



Keynote Speaker: Meg Kinnear & History, Present and Future of ICSID: Where It Came From, and Where it Might Go? *

Summary

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

The third day of Washington Arbitration Week on November 30, 2022, commenced with a warm welcome from the organizers, acknowledging the efforts of the team behind the event, including strategy LLP and Dr. Jose Antonio Rivas. The session highlighted the significance of Washington as a hub for international arbitration and introduced the keynote speaker, Secretary-General Meg Kinnard of the International Centre for Settlement of Investment Disputes (ICSID), who discussed the history, present, and future of ICSID.

Kinnard emphasized the importance of ICSID's design features, such as its focus on procedural rules rather than substantive obligations, and its unique enforcement mechanisms. She noted the organization's growth over the past 55 years, highlighting that it currently has 158 member states and has handled over 70% of known investor-state cases. The session also addressed the impact of the COVID-19 pandemic on arbitration practices, with a shift towards remote and hybrid hearings.

A panel discussion followed, featuring experts such as Marin Carlson, Susan Franck, John McRae, and Antonio Parra, who provided insights into strategic decisions in the design of the ICSID system, the current state of predictability in case outcomes, and the challenges of time and costs in investor-state dispute settlements. They discussed the evolving nature of international investment law, the need for transparency, and the potential for mediation as an alternative dispute resolution method.

The panelists reflected on the mixed trends in state participation in investor-state arbitration, with some countries withdrawing while others continue to engage with the system, suggesting that these decisions are often driven by specific events rather than a broader trend. The discussion concluded with considerations for the future, including the potential for an appellate body and the ongoing modernization of ICSID's rules to enhance efficiency and transparency. The session wrapped up with a call for continued dialogue and collaboration within the arbitration community.



Authors

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Topics

ICSID

Category

WAW

Full Transcript

00:00:03

Welcome everyone to day, 3

00:00:06

of Washington, arbitration week is

00:00:08

November 30th of 2022 and

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we're here at the exit

00:00:14

in Washington DC and we

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have a couple of items

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on the agenda today, which

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will get to. But that

00:00:21

I first wanted to, thank

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it, said before hosting this

00:00:25

event today, it's always great

00:00:28

to be here. It's been

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a long time since we've

00:00:31

been able to get together

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and it's really great seeing

00:00:34

so many faces that I

00:00:35

haven't seen in a long

00:00:37

time. So welcome great to

00:00:39

see you also wanted to

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mention Mike the coat organizers

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of this event strategy, LLP

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and Hosea, dr. Jose Antonio

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Rivas and his team, Anna

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Maria, Anna and Maria Luchia

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and and the whole strategy

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group. They're the ones who've

00:01:01

been sending out all the

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emails and keeping Track of

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us all and making the

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trains run on time. So

00:01:07

just wanted to mention that

00:01:08

has been a huge effort

00:01:10

to coordinate. I think are

00:01:13

20 some odd panels This

00:01:14

Week. 56 Law Firm have

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been hosting. We just had

00:01:20
a great up swell of

00:01:22
support this year and this

00:01:24
is the third edition. And

00:01:26
I just want to mention

00:01:27
that, you know, how this

00:01:27
sort of the roots of

00:01:29
actually Washington arbitration week has

00:01:32
been in the covid pandemic.

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It was really kind of

00:01:35
seen as a solution to,

00:01:37
you know, get trying to

00:01:38
get people back together and

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trying to bring together the

00:01:41

Washington arbitration community. And if

00:01:44

it's really amazing how people

00:01:45

have come together works and

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put together so many great

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panels like the one we're

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going to see today really

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Washington is fantastic Center for

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international arbitration for commercial arbitration,

00:02:00

of course the great courts.

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Here we have great City

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Holidays. And, of course, exit

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is the jewel in the

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arbitration crown of Washington, and

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we're very happy to be

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here, and then talking about

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all things exit. So, before

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we, we have a panel

00:02:18

on an exit Anna, which

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is coming up in about

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20 minutes or half hour,

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but before that, we have

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our honored keynote speaker for

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Washington arbitration week. We would

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like to at least, you

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know, after 3 editions I

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don't think we have that

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much of a tradition but

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what of our Traditions is

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we're trying to do a

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kind of a midweek keynote

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speaker and we have the

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great pleasure today, having the

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secretary-general evicted making the air

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speak to us on. I'm

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sure something related to fix

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it but we'll see. Always

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always a surprise. But you

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know, I've known Meg for

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I don't know, some 25

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years now. I haven't worked

00:03:01

together on opposite sides and

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some of the earliest Master

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cases, which some of you

00:03:06

may know, from at least

00:03:08

two students from your llm

00:03:09

classes. It's now seemingly history.

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But, you know, the one,

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the one great thing about,

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the international arbitration world, we

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work opposite each other. We

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work hard on her case

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has to win or lose,

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but we're all colleagues together

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and it's great working with

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you, Megan certainly with everyone

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here who I work with

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and opposite the same sentiment

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applies. But, you know, Maggie

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has had a fantastic career.

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She was the director general

00:03:38

of the trade law division,

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Canada's Foreign Affairs Department working

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on wtlk, Aces not. The

00:03:44

case is as I said

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and then she made the

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big move to Washington here

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and has done a fantastic

00:03:49

job that it said and

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we want to I think

00:03:53

all indicate our our gratitude

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and thanks for for her

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efforts over the many years

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and in developing it said

00:04:01

into the greatest Sushi. What

00:04:02

it is? On that note

00:04:05

I want to introduce and

00:04:07

ask him to come up

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here and I'll give some

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Keno remarks. Thanks babe. Thank

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you very much. I have

00:04:15

mixed feelings about being called

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part of History. I have

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to pay Still working with

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that one. But what I

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want to talk about today

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is a little bit of

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exit history. A lot about

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exit present in a little

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bit about the future, but

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we have an amazing panel

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in particular that's going to

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delve into the future. So

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I welcome you to the

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center and to our beautiful

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facilities. I think we moved

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in here about eight months

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before the pandemic or something,

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well, times like that. So

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some of you may not

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have seen them. So please

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after the session, feel free

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to grab an extra staff

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member and have them for

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you around. We are very

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proud of our facilities and

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they are wonderful places to

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have hearings and conferences like

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this. So we welcome you

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today the topic we have

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of exit past present and

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future, I'll be asleep is

00:05:01

especially relevant as we come

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to your end and we

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think about the Milestones that

00:05:05

we've achieved in the last

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year. But also, as we

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start thinking about what's next

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and what are we going

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to be doing in 2023?

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I think the success of

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excited and its growth in

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the past, 55 years is

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rooted in particular, in some

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of the design features of

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the exit convention and the

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more. I look at this,

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the more I find things

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that were very prescient features

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to think instead of 1960

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566 drafting this document and

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thinking of things like conciliation

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and enforcement. And all of

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the things that we find

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grounded in the exact convention

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is actually a real tribute

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to those who were the

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drafters of it. I see

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to design features that I

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think are, especially important and

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have really been relevant to

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keep the organization on a

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steady ground. The first one

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is obviously that the drafters

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decided to create a facility

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and a set of rules

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for dispute resolution. But they

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did not Veer into the

00:06:03

substance of substantive obligation and

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this obviously was a very

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smart design Choice, especially when

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you put it in the

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context of the treaties that

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have come up with particular

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since the 19th. The mid-1990s

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and the desire, we seen

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four states to actually be

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the Masters in the defining,

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the substantive obligations in their

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treaties. So I think it

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was a stroke of Brilliance

00:06:25

to basically offer Rick's it

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as the facility for dispute

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resolution. Would not get into

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that involving debate about what

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is expropriation or natural National

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treatment or any of those

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issues stated clearly want. Autonomy

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in that respect the second

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key design feature, that I

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would look at is the

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inclusion of the simplified enforcement

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mechanism and that of course,

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is unique to exit and

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distinguishes it from every other

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option for investors State dispute

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settlement. And we know that

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facility user, see this as

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a simplified enforcement mechanism has

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absolutely vital and rightly so

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because an unfulfilled award obviously

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does very little to resolve

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an individual dispute or two

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and a half ounce of

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confidence in the investment, climate

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of any country or in

00:07:12
its rule of law, So

00:07:15
those were to me the

00:07:16
to cheat design features that

00:07:19
really defined exit and brought

00:07:22
us to a very strong

00:07:24
place to start from and

00:07:26
helped us move to the

00:07:26
last 55 years, and also

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wanted to pay tribute to

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the foresight of the leadership

00:07:34
exit has had in the

00:07:36
past. We all know when

00:07:38
is especially important to note

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the work of the first

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Secretary General, Aaron braccus, who

00:07:43
steered the convention through the

00:07:45
negotiation process who developed the

00:07:47
first set of rules and

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really led the center in

00:07:50
its formative days. If you

00:07:53
look at the history of

00:07:54
the exit convention, you will

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see the kinds of discussions

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that were held in some

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really ingenious ways that he

00:08:00

was able to find consensus

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and to move the whole

00:08:03

project forward. It's also important

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to note, the third Secretary

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General mr. Ibrahim she had

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her, who was in office

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from 1983 to 2009. Still

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remember my first days at

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Exit where I would say,

00:08:16

well why do we do

00:08:17



it this way? And I

00:08:18

would not infrequently, get because

00:08:20

mr. She hasn't told us

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to mr. She hasn't started

00:08:23

that and I sometimes felt

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like the ghost of mr.

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She had over in the

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halls and I had huge

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shoes to fill literally and

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figuratively. But he was an

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incredible sort of formative influence

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on the exit convention and

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on the center. He also

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had some very important roles

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for example, sharing the task

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force that led to the

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very famous World Bank group

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guidelines, on the treatment of

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foreign direct investment and he

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increased its membership to 132

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States. So all of his

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work is still very much

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evident today. I'd also like

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to know if the debt

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of gratitude we have to

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Antonio para who were very

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lucky to have joining us

00:09:01

today. Antonio was clearly the

00:09:04

heart of except for over

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15 years and he successfully

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steered the organization through some

00:09:09

of the very challenging years,

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including knows where there were

00:09:12

a number of cases with

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respect to Argentine Financial measures.

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Some of the first NAFTA

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cases were coming up and

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most notably steering the 2004.

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What ultimately became the 2006

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amendments. So I think if

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it has been extremely lucky

00:09:27

to have some really dedicated

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and very, very capable leaders.

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And that's been a lot

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of the key to its

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success to go to the

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present. We are today 158

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members strong with another seven

00:09:41

states, who have signed, but

00:09:43

not yet ratified. And I

00:09:45

look back in the last

00:09:46

about 14 years. We've had

00:09:48



on average about 1 New

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State, join Puryear, which I

00:09:51

think is amazing. Statistic we

00:09:53

hear so much about States

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running from investor State. The

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facts are once again that

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there is growth every year

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steady growth and commitment to

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this system. Over the years,

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we have become the premier

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investment facility and we have

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done over 70% of all

00:10:10

known investor-state cases. So there

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is a real Center of

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expertise here. We offer I

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think talk much service and

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we offered that everywhere in

00:10:20

the world. So you see

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we have our hearing room

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here in Washington. We have

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hearing rooms in Paris currently

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under a little bit of

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construction, but they will be

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back. We have facilities cooperation

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with over 30 institutions and

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if we need to, we

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can hold hearings or session

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in more than 120 World

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Bank offices around the world.

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So I really am confident

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that there is no single

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place in the world where

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it said, it could not

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hold a hearing if the

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parties requested a hearing in

00:10:48

that location. In addition, as

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we all know the pandemic

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has forced us in a

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way that's perhaps has a

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silver lining of the pandemic,

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but it is forced us

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to Pivot to remote hearings

00:11:00

and we offer parties. Unrivaled

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service. Through electronic means we've

00:11:05

done more than 500 remote

00:11:07

sessions over the last two

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and a half years and

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you get really good what

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you do. That five hundred

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or more times. What we

00:11:15

are seeing is that parties

00:11:16

are actually more frequently requesting.

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Now, what we're calling hybrid

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hearing, the idea that you

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will have a core group

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of your Council team and

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your arbitrators in one location

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physically. But then also be

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able to broadcast to a

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larger part of the group

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that is working on the

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case. And I suspect that

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that will be a growing

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Trend in the future. And

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again is one that we

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are more than happy to

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accommodate. We have also increased

00:11:47

in terms of cases and

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I think everybody is doing

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our wonderful. If the statistics

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in the charts, but it

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again is remarkable. When you

00:11:55

put it in context by

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the early 1990s, exit administered,

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an average of 2 cases

00:12:00

per year. And that's not

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really that long ago. We

00:12:04

are now administering and receiving

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roughly 55 new cases every

00:12:08

year and at any one

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time, we are managing 375

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to 380 pending cases. So

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this continues to be an

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increasingly busy Place. We've also

00:12:21

grown from a staff of

00:12:22

very few Council. Who originally

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we're actually shared with the

00:12:25

legal group of the World

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Bank, to a Secretariat of

00:12:29

72 people who are solely

00:12:31

dedicated to the exit Rule,

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and I see a number

00:12:34
of our call each year.

00:12:35
And for those of you

00:12:36
who work with them, you

00:12:37
will know that they are

00:12:38
not only dedicated but also

00:12:40
an expert group We have

00:12:43
modernize our administrative systems and

00:12:46
I think, you know, these

00:12:46
are some of the things

00:12:47
that you don't necessarily see

00:12:48
first off but they're important

00:12:50
to the overall quality of

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the undertaking. So we have

00:12:53

modernize our administrative systems, we've

00:12:56

got fully remote filing by

00:12:58

parties so no more Banker's

00:13:00

boxes. Thank goodness, we have

00:13:03

case management technology, that's very

00:13:05

useful and we're all using

00:13:07

that in host and for

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each case and we have

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fully digitalize our financial systems.

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So that really helps to

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ensure the service is well-managed

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and transparent. Does 2017. And

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this again is something perhaps

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that most people don't recognize

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but since 2017, it's it

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has been financially self-sustaining and

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we are very proud that

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we have been able to

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do that. While maintaining our

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administrative fees at an extremely,

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reasonable level and also without

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asking for contributions from member

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states. So there's been a

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lot going on and I

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started underneath basically at the

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same time as the things

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that you see, when you

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open up the website. First

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and foremost, we have also

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taken on a large role

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in technical assistance and I

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think you will know that

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there's probably an endless need

00:13:57

for technical assistance and the

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more you can do the

00:14:01

better it is. So we've

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contributed quite a lot to

00:14:03

technical assistance in the last

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roughly ten years. We've done

00:14:08

that in part to Publications.

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And in particular, we've got

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the exit review which now

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is issued three times a

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year by Oxford publication. But

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we've also added what to

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think in the bank. Which

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product basically we have a

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number of documents. For example,

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the background paper on annulment,

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we have the respondents guide

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to case management and we

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have our exit statistics that

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get updated every 6 months.

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All of this I think

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is helpful in terms of

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technical assistance and what to

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expect. But also very important

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in that if there is

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going to be a dialogue

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on investment arbitration and investment

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treaties which they're evidently is

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it is really important just

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started with an empirical basis.

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What are the fox in

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to launch the discussion from

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there? So these kinds of

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products are really important to

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that kind of basis for

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a discussion. Our technical assistance

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has also taken the form

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of multiple training courses and

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reference materials both for government

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officials and for private sector

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Council. So you may well

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have seen for example some

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of our presentations on how

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to mediate and investor-state dispute

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how to prevent abuse in

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the first place, how to

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manage a dispute if it

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actually starts. And some of

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you may also have you

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been into our, what we

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used to call exit 101

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course, which was actually a

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great course. We haven't done

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it in a little while

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but it was a great

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force to start people from

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day one, the request for

00:15:37



arbitration and work all the

00:15:39

way through to compliance and

00:15:41

enforcement. So that's the kind

00:15:43

of commitment was made to

00:15:44

technical assistance. We have also

00:15:47

made huge strides in terms

00:15:48

of the diversity of tribunal

00:15:50

members and ad hoc members

00:15:52

and that's been done through

00:15:54

a number of effort. First

00:15:57

of all, we have spoken

00:15:58

to Our member states, to

00:16:00

encourage that, they keep their

00:16:01



panel list up-to-date and have

00:16:04

explained to them. The kinds

00:16:05

of criteria, you would look

00:16:06

for in someone who is

00:16:08

on the list of arbitrators,

00:16:10

or the list of conciliators.

00:16:11

And I think if you

00:16:12

see how many destinations have

00:16:14

been made in the last

00:16:15

few years, you will see

00:16:16

that the states are rising

00:16:18

to that challenge. So, we

00:16:19

now have a list that

00:16:20



has more than 700 people

00:16:22

and it is more diverse

00:16:24

than ever before. In house,

00:16:27

we have also been offering

00:16:28

parties various techniques for selecting

00:16:31

arbitrators. There is if parties

00:16:33

want the usual, I think

00:16:35

strike and rank list which

00:16:36

we all know. But we

00:16:38

have also come up with

00:16:40

an offered something that we

00:16:41

call about which essentially is

00:16:43

giving parties, perhaps, 579 options

00:16:47



and allowing them to say.

00:16:49

Whether they would accept that

00:16:50

person and allowing them, if

00:16:52

they both agree, just to

00:16:53

let that person. And all

00:16:55

of these really go to

00:16:57

trying to compliment the ability

00:16:59

of the parties to select

00:17:01

their tribunal. We recognize that

00:17:03

that is an extremely valued

00:17:04

feature of arbitration. And so,

00:17:06

our efforts are to the

00:17:07

extent possible for parties to

00:17:10



be able to come to

00:17:11

that selection between themselves. This

00:17:14

kind of rank and strike.

00:17:15

And Ballard also has a

00:17:17

secondary purpose in that it

00:17:19

complements the efforts to bring

00:17:20

new people into this New

00:17:22

Year again. Recent statistics will

00:17:25

bear this out in about

00:17:27

2009. We saw how many

00:17:30

people how many females were

00:17:32

arbitrators? And the number was

00:17:34

under 9%, and I think

00:17:37



most of them were Gabrielle,

00:17:39

Kelvin colder and Brigitte Stern.

00:17:41

So, it was a very,

00:17:44

very small number, we've made

00:17:46

a huge effort to address

00:17:47

this. And so for example,

00:17:49

and just leave your 21,

00:17:50

we have 31% female arbitrators,

00:17:53

and fiscal, year twenty-two, we

00:17:56

had 24% female arbitrators and

00:17:59

I'm proud to say that

00:18:00

of those appointed by a

00:18:01

45% or female arbitrators. So

00:18:05



the world has really been

00:18:06

changing in this way and

00:18:08

continues to change and we

00:18:09

continue to support that. We

00:18:12

are also trying as week

00:18:13

Consider trying to get the

00:18:15

million more diverse in terms

00:18:16

of gender. Also, looking at

00:18:18

other things, a key one

00:18:20

is regional origin and diversifying,

00:18:22

the pool of arbitrators by

00:18:24

Regional origin. And the other

00:18:26

one was you may not

00:18:27



think of is often, is

00:18:28

something you might call a

00:18:29

first-time flyer. In other words,

00:18:31

replenishment of the arbitral pool,

00:18:33

new people coming into the

00:18:35

field and being able to

00:18:37

do this. So, for example,

00:18:39

last year, 11% of the

00:18:41

appointments involve individuals appointed for

00:18:44

the very first time and

00:18:46

of those, 45% were women

00:18:48

and 25% involved Nationals of

00:18:51

low or middle-income economies. So

00:18:54



we have very much dedicated

00:18:56

ourselves to trying to address

00:18:57

diversity and I know that

00:18:59

private sector and party State

00:19:02

parties involved in this have

00:19:04

also become very much aware

00:19:05

of the importance of diversifying.

00:19:07

The arbitral group, I think,

00:19:11

perhaps the most important Legacy

00:19:13

of exit to date has

00:19:14

been its leadership role in

00:19:15

modernizing investment disputes settlement at

00:19:18

large. And in this respect,

00:19:20



of course, I think about

00:19:21

the Amendments of 2006, which

00:19:24

truly were pioneering be staked

00:19:27

out. Transparency of proceedings for

00:19:29

the very first time and

00:19:31

brought into the mainstream things

00:19:33

like non disputing parties admission.

00:19:35

Open hearings publicly-available Wards and

00:19:38

excerpts of those Awards. The

00:19:41

2006 amendments also brought the

00:19:43

Manifest lack of legal, Merit

00:19:45

motion. Basically something that you

00:19:47

might think of it as

00:19:48



an early strike out Motion

00:19:49

in domestic procedure. And these

00:19:51

have now become not only

00:19:53

a widely accepted in extra

00:19:54

practice, but widely emulated in

00:19:57

other sets of rules that

00:19:58

address investor-state. So, it has

00:20:01

now become how we operate

00:20:02

in this discipline. In 2006,

00:20:06

you made me remember there

00:20:07

was also a proposal for

00:20:09

an appellate body to be

00:20:10

hosted by exit and we

00:20:12



do know that it was

00:20:13

not accepted by member states

00:20:15

at the time, but there

00:20:16

is a wonderful paper still

00:20:18

on the exit website. And

00:20:20

I think in many respects

00:20:21

Antonio Perez also did and

00:20:23

did a wonderful job but

00:20:25

it clearly would preserve the

00:20:26

advantages of the exit system

00:20:28

worst states to go to

00:20:30

an appellate body mechanism. And

00:20:32

we know states are considering

00:20:33



this at working group three

00:20:34

and I mention it because

00:20:36

I think it is still

00:20:37

a very useful reference in

00:20:39

respect of that kind of

00:20:41

a Direction. In the past

00:20:44

year we got to the

00:20:47

exit what we're calling it

00:20:49

said 2022 basically the second

00:20:51

set of amendments and these

00:20:53

ended up being the most

00:20:54

comprehensive amendments we had ever

00:20:57

done and I think it

00:20:58



was done for the most

00:20:59

transparent process we have ever

00:21:01

had and very proud to

00:21:03

say first of all that

00:21:04

it is done, if it

00:21:05

was adopted but more importantly,

00:21:07

it was adopted by an

00:21:09

85% approval rate of members

00:21:12

and not a single rejection.

00:21:14

And I take that as

00:21:15

an important statistic, not just

00:21:17

because it exceeded what we

00:21:19

required to adopt these new

00:21:21



rules. But I see it

00:21:22

as a very strong endorsement

00:21:23

of the new rules and

00:21:25

further evidence that they have

00:21:26

addressed. The procedural concerns that

00:21:29

we had heard in all

00:21:30

the various debate leading up

00:21:32

to these. If the 2020

00:21:33

rules 2022 rules, they have

00:21:36

set the future direction for

00:21:38

investor-state, and I think not

00:21:39

just for exit in particular.

00:21:43

Where is an increased quite

00:21:44



large, increasing transparency that I

00:21:46

thinking of a very concrete

00:21:47

impact. As case has come

00:21:49

under, the new rules is

00:21:51

the potential for expedited arbitration

00:21:53

and a number of techniques

00:21:55

to deal with the ever-present

00:21:57

concern about time and cost,

00:21:59

there is updated conciliation. There

00:22:03

is significantly expanded jurisdiction under

00:22:05

the additional facility, which I

00:22:07

think it's something that a

00:22:08

lot of people haven't noted

00:22:09



perhaps, because, rightfully you're exhausted

00:22:12

after you read the first

00:22:12

drawer on the convention at

00:22:15

the additional facility is a

00:22:16

lot more available now under

00:22:18

the exit 2022 rules. And

00:22:20

most importantly, I said of

00:22:22

stand-alone mediation rules and we

00:22:24

know there's a lot of

00:22:25

enthusiasm among claimants and responded

00:22:29

to be able to mediate

00:22:31

disputes and they now have

00:22:33

this the framework to do

00:22:34



so under the exit system.

00:22:36

So, I think these are

00:22:39

definitely going to strengthen investment

00:22:41

dispute. Resolution The big question

00:22:44

obviously and I'm going to

00:22:45

in particular probably leave that

00:22:47

to my learned colleagues. But

00:22:49

the big question is, what

00:22:51

can we expect for the

00:22:52

future? We all know that

00:22:55

some commentators have urged states

00:22:57

to walk away from investment,

00:22:58

arbitration and investment agreement and

00:23:01



we know some have but

00:23:03

I think it's important to

00:23:04

remember that most have not

00:23:06

and I certainly feel that

00:23:08

the prevalent mood is not

00:23:09

to abandon this discipline and

00:23:12

that Most states and investors

00:23:13

are interested in strengthening it

00:23:15

in frankli getting on with

00:23:17

business. What States citizens realize

00:23:20

is that the cost of

00:23:22

unresolved grievances is absolutely a

00:23:25

mint resulting in losses of

00:23:27



billions of dollars a year.

00:23:28

And of course, nobody likes

00:23:31

a dispute, but there is

00:23:32

something worse and that is

00:23:34

an unresolved dispute. And in

00:23:36

the investment context, the unresolved

00:23:38

dispute leads to Investments abandoned

00:23:41

or Investments never even met.

00:23:43

In the first place. So

00:23:45

we're going to continue our

00:23:46

work with our stakeholders to

00:23:47

make this the most effective

00:23:49

and efficient, dispute resolution system

00:23:52



that we will continue to

00:23:53

leverage technology. Obviously, we're going

00:23:56

to have continued to encourage

00:23:57

dispute, prevention, and Hands-On management

00:24:00

of dispute. We're going to

00:24:02

continue to offer a variety

00:24:03

of dispute resolution techniques. And

00:24:06

are number one job. Right

00:24:08

now, we are going to

00:24:09

be implementing these new rules

00:24:10

which I think you will

00:24:11

see lead to some very

00:24:12

concrete changes. So we're pretty

00:24:15



excited about the future of

00:24:17

exit. I would like to

00:24:20

move into our panel and

00:24:22

we have a number of

00:24:23

questions for them is of

00:24:26

tremendous panel that we've pulled

00:24:28

together today. And let me

00:24:29

first introduce our panel members,

00:24:31

we have first of all,

00:24:32

Marin Carlson who is a

00:24:35

co-leader of the global arbitration

00:24:37

trade and advocacy practice at

00:24:39

Sibley's here in Washington DC

00:24:41



and a very experienced counsel.

00:24:43

Investor-state dispute matters, we have

00:24:46

Susan, Frank at the far.

00:24:48

End was a professor at

00:24:50

Washington College of Law at

00:24:51

American University. You will know,

00:24:53

Susan, who's published various articles

00:24:55

and books on international law,

00:24:57

and dispute resolution. And she

00:24:59

is one of the foremost

00:25:00

experts in using data and

00:25:02

statistics to settle a dispute

00:25:04

resolution. We have as well

00:25:07



here in person until Jose

00:25:09

Antonio to you. It was

00:25:11

a founding partner of xstrata

00:25:12

g a well-known Council in

00:25:15

investment and Commercial matters and

00:25:17

is Ian said one of

00:25:19

the co-founders of Washington arbitration

00:25:21

week which is a tremendous

00:25:22

thing. So we congratulate you.

00:25:24

This has been a great

00:25:25

addition to the Washington arbitration

00:25:27

scene. We are also joined

00:25:30

today by John McCrae who

00:25:33



is an Emeritus Professor from

00:25:35

University of Ottawa. Faculty of

00:25:36

law, an expert in public

00:25:39

international law is that numerous

00:25:41

times and I'm hoping we've

00:25:44

got done, there we go.

00:25:45

Hide on an expert in

00:25:47

public. International law, John, is

00:25:49

that numerous times as an

00:25:51

investor State dispute settlement arbitrator,

00:25:53

and as a panelist in

00:25:55

free trade agreements and at

00:25:56

the WTO. So he has

00:25:58



very broad International public International

00:26:02

experience and I guess for

00:26:04

any of us to wear

00:26:05

Canadian. I think there's a

00:26:07

one of us who hasn't

00:26:08

been educated by John and

00:26:10

we thank him hugely for

00:26:11

that. We also have Antonio

00:26:14

para with us and as

00:26:16

I said earlier, Antonia was

00:26:18

a former legal counsel and

00:26:19

DSG at Exit. He was

00:26:21

here from 1984 to 2005

00:26:24



and has been a huge

00:26:26

source of inspiration and great

00:26:29

advice ever since and has

00:26:32

done a number of contribution

00:26:33

to the discipline but in

00:26:35

particular two editions of the

00:26:37

history of exit. So Antonio

00:26:39

is a font of knowledge

00:26:40

about exit and we're so

00:26:42

delighted that he is joining

00:26:43

us today. So what I

00:26:45

would like to do if

00:26:46

I may is move to

00:26:47



our question-and-answer part And what

00:26:51

we have is a number

00:26:52

of questions and we thought

00:26:54

that we would have our

00:26:55

panelists address these questions in

00:26:58

pairs and we are happy

00:27:00

to have any kind of

00:27:01

questions from the audience as

00:27:03

we go along and we'll

00:27:05

try and look to a

00:27:07

lot of the issues that

00:27:08

are arising now. So that

00:27:10

is a broad range of

00:27:11



items that we thought we'd

00:27:12

covered in this Q&A session

00:27:14

with our panelists. So, I

00:27:17

want to start keeping with

00:27:18

our past present and future

00:27:19

theme start with something about

00:27:22

the past. And the question

00:27:24

here is what were the

00:27:26

most important strategic decisions made

00:27:29

in designing, the exit system,

00:27:31

and drafting the convention? And

00:27:34

I think there's no better

00:27:35

person to start us off

00:27:36



here than Antonio Antonio, I

00:27:39

will pass the microphone to

00:27:41

you. Sorry about that. Can

00:27:58

you hear me now we

00:28:00

can? It's perfect. We hear

00:28:01

you and see you. Sorry.

00:28:05

And thanks to Jose, Antonio

00:28:09

for organizing this event engine,

00:28:13

to make for moderating the

00:28:16

panel and of course for

00:28:19

her introductory remarks. In answer

00:28:26

to the question that Meg

00:28:27

is just supposed. I would

00:28:29



start by saying that different

00:28:33

people have it different times

00:28:35

at different ideas as to

00:28:38

what were the most important,

00:28:40

strategic decisions in designing, the

00:28:45

exit system, and drafting the

00:28:47

exit convention. For example, Erin

00:28:52

Brockovich. Brought his signatures on

00:28:54

it in 1972 amid Rising

00:28:58

instances of agreements, between governments

00:29:01

and foreign investors bag. Containing.

00:29:04

Arbitration clauses being frustrated, as

00:29:08

result of unilateral action, by

00:29:11



the government termination vehicle, including

00:29:15

its arbitration clause. Rockets refer

00:29:20

to this experience. When in

00:29:22

his leg lectures, he turned

00:29:24

his quote, probably the most

00:29:26

important provision in quote of

00:29:29

the exit convention. It's stipulation

00:29:32

in article, 25 that wants

00:29:35

both parties have given their

00:29:37

consent to the jurisdiction of

00:29:39

exit. Neither May withdraw, its

00:29:41

consent unilaterally for braccus, the

00:29:47

provision had the effect of

00:29:49



quote elevating to the level

00:29:51

of an international legal obligation

00:29:54

and quotes exit consent, Claus

00:29:57

concluded by the park. Abraham's.

00:30:02

She hunted to take another

00:30:04

example published its well-known article

00:30:06

on the roads evicted Amiga

00:30:09

and the duplication of investment

00:30:12

disputes in 1986. In the

00:30:15

first issue of the accepted

00:30:16

View. The article originally composed

00:30:20

for Latin American audience was

00:30:23

written against the backdrop of

00:30:25



a prolonged at crisis in

00:30:27

Latin America. She had his

00:30:31

conclusion in the article with

00:30:33

the exit in Meagher represented

00:30:36

what he called. Modern responses

00:30:38

enabling developing countries to attract

00:30:41

more foreign direct investment in

00:30:45

place of loans from commercial

00:30:46

Banks. Oh well, avoiding the

00:30:50

politicization of investment disputes and

00:30:54

the espousal by Foreign states

00:30:56

of plans of their Nationals.

00:31:01

In the section of the

00:31:02



article Lennox and she had

00:31:04

to emphasize his key. To

00:31:07

be to be achieving, if

00:31:10

what he says quote, it's

00:31:13

a fundamental objective to deplet

00:31:15

size, the resolution of investment

00:31:18

disputes and quote, the provision

00:31:22

of article. 27 of the

00:31:24

exhibit convention. Prohibiting attract, Contracting

00:31:28

States from giving diplomatic protection

00:31:30

or bringing an international claim

00:31:33

in respect of a dispute

00:31:35

that one of its nest

00:31:37



and another contraction state had

00:31:40

consented to submit to exit.

00:31:45

Given today's events and still

00:31:48

growing network of International Investment.

00:31:52

Agreements are my own candidate

00:31:56

for a provision of the

00:31:57

exit. Convention reflecting a most

00:32:00

important strategic decision and its

00:32:03

design, and drafting would be

00:32:06

the provision of article 25

00:32:08

as to form of the

00:32:11

consent of the parties to

00:32:13

the jurisdiction of eccentric. Under

00:32:16



article 25. This need only

00:32:19

be expressed in writing and

00:32:22

need not in particular, be

00:32:24

recorded in a single instrument.

00:32:28

as we all know the

00:32:29

resulting flexibility has allowed to

00:32:31

exceed jurisdiction to be founded

00:32:33

by investors accepting offers of

00:32:36

consent in the investor-state, dispute

00:32:39

settlement, provisions of many, of

00:32:42

the approximately 2,500 now in

00:32:46

existence, according to the most

00:32:50

recent edition of the exit,

00:32:53



a slew of Statistics, almost

00:32:56

80% of all excited cases

00:32:58

are cases of this kind,

00:33:02

Some see, this is anomalous

00:33:04

arguing that the exit convention

00:33:07

was intended, only to cover

00:33:09

contract dispute. I cannot however

00:33:13

find much or indeed any

00:33:16

support for this in the

00:33:18

drafting history of the exit

00:33:20

convention. at the earliest of

00:33:24

the meetings of the executive

00:33:26

directors of the World Bank,

00:33:29



Who had formal responsibility for

00:33:32

drafting Dixon convention at the

00:33:35

earliest of their meetings on

00:33:38

the convention. It was predicted

00:33:41

that it said predicted by

00:33:43

one of the participants and

00:33:46

Alternate executive director from it

00:33:49

run so happens. He predicted

00:33:52

in this discussion but it

00:33:54

said, quote, Writing Practice have

00:33:57

a great deal of business

00:33:58

and quote, in in part

00:34:02

because quote many governments might

00:34:04



insert exit Clauses in their

00:34:07

commercial treaties and quote The

00:34:12

earliest II is concluded from

00:34:15

the late 1950s to the

00:34:16

late 1960s had provisions on

00:34:20

the settlement of disputes. These

00:34:24

Provisions, excuse me. Only address

00:34:29

disputes between the states parties

00:34:32

to the treaties. Aaron broken

00:34:36

noted, this in his address

00:34:40

as secretary-general evicted to the

00:34:43

first annual meeting of the

00:34:45

administrative Council, evicted in 1967.

00:34:52



A little less than a

00:34:53

year after the exit convention

00:34:56

came into Force. In his

00:34:59

remarks broadcast, said that now

00:35:02

that the exceed convention procedures

00:35:04

were available, it might be

00:35:07

advisable. quote, to substitute these

00:35:12

procedures for those provided in

00:35:16

the treaties and quote, 2

00:35:21

years later in 1969. Excedrin

00:35:25

should a set of model

00:35:26

exit. Closes for investment treaties.

00:35:31

Same year. 1969, saw the

00:35:34



conclusion of the first IIA

00:35:37

incorporating such consent, Provisions. Now,

00:35:42

commonplace course in the CIA

00:35:46

such as proliferation, in subsequent

00:35:48

years, thanks a lot. Thanks,

00:35:53

Antonio. Susan. What would you

00:35:55

point to, as a strategic

00:35:57

decision that set the direction

00:35:59

for exit because we live

00:36:05

in a modern reality work.

00:36:07

Tik-Tok Twitter, tries to tell

00:36:09

us how to live. And

00:36:10

remember, the information about how

00:36:12



to think critically about the

00:36:14

state and future of investment

00:36:15

disputes settlement. I'd like to

00:36:17

kind of have a dial

00:36:18

back a bit from that

00:36:20

kind of cognitive fast thinking,

00:36:21

and instead, make sure that

00:36:23

we're reframing where we actually

00:36:25

have been. And I actually

00:36:26

think Antonio is so wonderful

00:36:29

to be here, and I

00:36:30

was obsessed with your book.

00:36:31

This summer course, and did

00:36:34



a deep dive into the

00:36:35

trouble myself, and there was

00:36:36

so much that. I both

00:36:38

relearned and also learned for

00:36:40

the first time. So I

00:36:41

would flag Meg Zone, ABS

00:36:43

observation of what was the

00:36:45

words you used not to

00:36:47

Deer into the substance of

00:36:48

International Investment law, but instead

00:36:50

to create procedural Mecca, That

00:36:54

are ex ante agreed you.

00:36:55

So the better angels of

00:36:57



our nature can help us

00:36:58

resolve conflict in a meaningful

00:37:00

way rather than having to

00:37:02

worry about the substance that

00:37:04

can and should. And must

00:37:05

be the prerogative of sovereign

00:37:08

states that having been said

00:37:10

in terms of learning from

00:37:13

our past so that we

00:37:14

can understand our future, I

00:37:16

very much think he was

00:37:17

again, put his finger on

00:37:19

the number of things. If

00:37:21



you look at the draft

00:37:22

in history, developing states were

00:37:24

very active and had strong

00:37:26

voices. It's not just the

00:37:27

air ranian delicate, it work

00:37:29

was people from India. It

00:37:31

was people from China that

00:37:33

were making absolutely. I would

00:37:35

take almost narky comments but

00:37:37

it just came time to

00:37:38

lightful. There were so many

00:37:40

things that we're on the

00:37:41

record that I wish. I

00:37:42



personally could have been a

00:37:43

fly on the wall to

00:37:45

watch. How broken manage these

00:37:47

political situation to get people

00:37:50

to focus on procedure rather

00:37:52

than Subs? Do for my

00:37:54

money. Although article 25 is

00:37:56

a very important design choice

00:37:57

and was, of course, the

00:37:58

focus of much, much, much

00:38:00

to be from my money.

00:38:02

It's actually article 42, which

00:38:04

is where all the money,

00:38:05



mainly be applicable law. Provision,

00:38:08

that tells you, what is

00:38:09

the substance that governs the

00:38:11

dispute, which is not within

00:38:12

the hands against it at

00:38:14

all. And it did not

00:38:15

drop in history is quite

00:38:16

good with broken saying, hey,

00:38:18

States, if you don't want

00:38:19

to be bound by this

00:38:20

international law, don't include it.

00:38:22

Do something else. If you

00:38:24

wanted to be the treaty

00:38:26



treaty law, go for it.

00:38:28

X be happy, I'm paraphrasing

00:38:30

here, but at the same

00:38:32

time, he also said, if

00:38:33

you wished excluded and pick

00:38:35

a state law on a

00:38:36

state contract launch a state

00:38:38

law on foreign investment, you

00:38:40

have the capacity and the

00:38:41

freedom to do. He was

00:38:44

very much inviting states to

00:38:45

exercise sovereignty especially because so

00:38:48

many of the developing State,

00:38:49



we're coming out of colonialism

00:38:51

experimenting with. Own ideas of

00:38:54

what international law should be

00:38:56

in, minimum standards are treatments

00:38:58

for foreigners and there's just

00:38:59

lovely language that is in

00:39:02

the record. Kind of points

00:39:03

that out. And I do

00:39:05

have actually an article that's

00:39:06

going to be coming out

00:39:07

next year in the Michigan

00:39:08

Journal of international law where

00:39:10

I kind of do my

00:39:11



Frank Deep dive into the

00:39:13

trouble, so you can get

00:39:14

my take on history that

00:39:15

is based on data. But

00:39:17

I wanted to give you

00:39:18

one last bit of data.

00:39:19

Before I see the flooring

00:39:20

shut namely remember the exit

00:39:24

convention was enforcing ratified in

00:39:26

1966. So there is wonderful

00:39:29

publication by Unk, Chad, that

00:39:31

talks about all the bilateral

00:39:32

investment treaties in effect before

00:39:34



2000 when I have done

00:39:36
it kind of a deep

00:39:37
calling of that and I

00:39:39
found a couple of things.

00:39:39
Number one in 1969, like

00:39:42
three years after ratification over

00:39:45
130 countries and territories had

00:39:48
no bilateral or multilateral investment

00:39:50
treaty in effect, right to

00:39:52
think, I thought if there's

00:39:53
like a hundred and ninety

00:39:54
plus countries and territories in

00:39:56
the world we had a

00:39:57



hundred and third more than

00:39:58

130. That said no like

00:40:01

no soup for you, that

00:40:02

was not what they were

00:40:03

up to. However however and

00:40:06

this was a good 1969.

00:40:08

This when I looked at

00:40:09

it there were less than

00:40:09

60 trees in force and

00:40:13

effect, put that into your

00:40:15

brain and let it Steep.

00:40:17

And in terms of a

00:40:18

substantially law that could be

00:40:20



the legitimate province of a

00:40:22

dispute at exit and this

00:40:24

explains. Why Brokers went on

00:40:26

the record, not just because

00:40:27

of the observations of the

00:40:29

uranium delegate which Antonia was

00:40:30

quite right to point to.

00:40:32

He said, I predict 90

00:40:34

to 95% and he doubled

00:40:36

down on 95% again that

00:40:39

these cases will be resolved

00:40:40

by domestic national law that

00:40:43

states control rather than treaties.

00:40:46



And I think we have

00:40:48

to remember that. In terms

00:40:50

of the flip that has

00:40:51

happened, we need to Remember

00:40:53

that history which he cuz

00:40:54

he said, 95%. 100, right?

00:40:58

It means treaties could have

00:41:00

a role. We can't forget

00:41:01

that but it was not

00:41:02

the original Genesis. So let's

00:41:04

remember our history. And that

00:41:06

history is actually quite rich.

00:41:08

Thank you, Susan. I wanted

00:41:11



to move on to the

00:41:12

present and some of the

00:41:13

things that we here and

00:41:15

one of the big things

00:41:16

we've heard and discussion has

00:41:17

been that there is a

00:41:18

lack of predictability or coherence

00:41:21

of case outcomes. And the

00:41:24

question I have is whether

00:41:25

this critique is is one

00:41:27

that actually has been outstripped

00:41:29

by what has happened in

00:41:31

particular. We have a lot

00:41:33



of new treaties that prescribe

00:41:36

with the lawyers we have

00:41:37

new rule and most importantly

00:41:39

we have a body of

00:41:41

case law that has really

00:41:42

provided a lot more predictability

00:41:44

as it involves overtime. So

00:41:47

the question I want to

00:41:48

put first to Professor McRae

00:41:50

and then to Jose is

00:41:53

Do you think this man-child

00:41:54

lack of predictability or lack

00:41:56

of coherence? Is still really

00:41:58



a valid one or has

00:41:59

the world evolved beyond that

00:42:01

critique and maybe we'll start

00:42:03

with Professor McRae. Thank you

00:42:08

very much, Meg. Can you

00:42:12

hear me? I can see

00:42:21

myself on the screen but

00:42:22

I'm not sure that helps.

00:42:28

Is that the find? Can

00:42:29

I proceed? And I think

00:42:40

in the undead working group

00:42:41

sessions on isds perform. You

00:42:44

found a variety of you.

00:42:46



Some sort of predictability and

00:42:47

coherence in terms of arguments

00:42:49

being made before tribunals. Even

00:42:51

though, those against being rejected

00:42:53

by other tribunals others saw

00:42:56

it as a problem of

00:42:57

government, not knowing what to

00:42:59

treat. Herpes will be interpreted

00:43:02

since I'm spoke of predictability

00:43:04

as a tenant problem and

00:43:07

other. So, the problem is

00:43:08

really not about the system,

00:43:09

but a rose out of

00:43:10



who were appointed as arbitrators.

00:43:12

And others said that, protecting

00:43:13

barely coherent went really desirable

00:43:15

in a single instance, treaties

00:43:18

and differences in treaty interpretation

00:43:21

can reflect differences in the

00:43:22

previous themselves and they're all

00:43:24

the contacts, which they concluded.

00:43:25

And others said that. That

00:43:28

consistency in treating pepper taste

00:43:30

is not the same as

00:43:30

accuracy entry. The interpretation, I

00:43:33

think, when considering what states

00:43:36



are saying about that, you

00:43:38

have to consider a couple

00:43:40

of background factors and expectations

00:43:44

and I think the expectations

00:43:46

of investors in the expectation

00:43:48

of states and respected what

00:43:50

investment agreements provide haven't always

00:43:53

been the same. I think

00:43:55

that investors probably so I

00:43:56

asked the Assets Protection for

00:43:58

the investment would operate like

00:44:00

a domestic court system insurance

00:44:03

against the actions of governments

00:44:05



to my thumb and I

00:44:06

think states are the other

00:44:08

had intended to see investor

00:44:09

protections is guarding against something

00:44:11

more narrow, reprehensible treatment of

00:44:14

Investments appropriation other outrageous behavior

00:44:16

in the treatment of Investments.

00:44:18

And I think we saw

00:44:19

this played out in the

00:44:20

earlier cases, where governments don't

00:44:22

have a much more restrictive

00:44:23

interpretation play. Some matter such

00:44:25

as fair and Equitable treatment,

00:44:27



And I think that the

00:44:28

variation was this that developed

00:44:31

countries are capital exploding countries.

00:44:33

Didn't really see investment treaties

00:44:36

has Bradley applying to the

00:44:37

Run Behavior, their so-called Advanced

00:44:39

legal system would already have

00:44:40

the protections that were provided

00:44:42

for under the investment agreements.

00:44:45

And I think I'm done

00:44:47

after turned out this way

00:44:48

through, it wasn't just Mexico.

00:44:50

That was worshiped investor claims.

00:44:52



Let me see the same

00:44:53

sort of reaction. We can

00:44:55

you are to some extent.

00:44:56

You take me in the

00:44:58

context of the energy chart

00:45:00

reading. The other point, I

00:45:02

think we have to consider

00:45:03

his background is that at

00:45:05

the outset, decision-makers on investment

00:45:07

tribunals will largely arbitrators golden

00:45:11

commercial arbitration. And that's where

00:45:13

the world a suspect, where

00:45:15

was the substantial body of

00:45:16



expertise, in conducting arbitration, dealing

00:45:19

with procedural question. And the

00:45:21

complex claim for damages As

00:45:23

far as substantive law, all

00:45:25

the best pieces concerned, it

00:45:27

generally involves pretty interpretation and

00:45:30

sometimes the articulation of custom

00:45:32

international law and I think

00:45:34

these with things compared to

00:45:36

be nude for commercial applicators.

00:45:37

I think we see evidence

00:45:39

of this in young polson's

00:45:41

groundbreaking article arbitration without privity

00:45:43



which is an attempt to

00:45:45

answer the question. What is

00:45:46

this new thing? Where do

00:45:47

you like this? Investment arbitration.

00:45:50

I think we also said,

00:45:51

the other cases are betrayed

00:45:53

is attempting to give content

00:45:55

and apply the Vienna Convention

00:45:56

of the world treaties. What

00:45:58

we had was those trained

00:45:59

in one discipline so to

00:46:00

speak learning the language and

00:46:02

practices of another discipline. And

00:46:05



we see this in the

00:46:05

debates. Over the nfn clothes,

00:46:07

we see it in the

00:46:08

jurisprudence of treats, the power

00:46:09

to recommend provisional measures of

00:46:11

the power to order. Buy

00:46:12

new provisional, measures debates that

00:46:14

are about the scope and

00:46:15

Ambit of interpretive process in

00:46:18

dealing with a treaty raging

00:46:19

and these differences of interpretation

00:46:22

have contributed to the view.

00:46:24

That is DS, Laura's not

00:46:26



predicted a coherent But I

00:46:29

think you have to look

00:46:29

more. Broadly is a variety

00:46:31

of factors that affect predictability

00:46:32

and co-parents. The fact that

00:46:35

decisions are made by ad

00:46:36

hoc tribunals with different compositions,

00:46:38

will it ever be made

00:46:39

the fuse and interpretation and

00:46:40

predictability will be harder to

00:46:43

achieve inherent in the nature

00:46:45

of the system. But in

00:46:48

general terms, I would say

00:46:50



that investment before you know

00:46:59

when we'll find documents to

00:47:01

follow a similar pattern cases

00:47:03

cited would have been a

00:47:04

year since Emily directions and

00:47:08

then decisions of tribunals analyze

00:47:11

the Lord. This is not

00:47:14

to suggest that Robin representing

00:47:24

a fundamental difference in law

00:47:25

to say that they will

00:47:28

not be decisions. That will

00:47:30

generally be guided by subsequent

00:47:31

tribunal States is fundamentally misconceived,

00:47:34



but that happens any system

00:47:36

of adjudication and, of course,

00:47:38

investment arbitration is no ready.

00:47:40

Way to repair this. The

00:47:43

closest government redraft their investment

00:47:45

treaties to limit or expand

00:47:47

them. According to their interest,

00:47:48

the scope of arbitral decision-making.

00:47:51

May be narrowed or curtailed

00:47:53

unclear. Provisions, may become clear

00:47:55

and as excited revised its

00:47:58

rules and they could put

00:47:59

it down to accommodate change

00:48:00



and improve them again. Are

00:48:02

his contention of being clarified,

00:48:04

but in all cases, interpretation

00:48:07

is still required as we

00:48:09

further opportunities. Interpretation put this

00:48:11

agreement Is a final word.

00:48:14

I would like to say

00:48:16

that. I think that the

00:48:16

major controversies about isds have

00:48:20

nothing so much about predictability.

00:48:21

Okay, parents are about whether

00:48:23

isda. I should be there

00:48:24

at all. The Argentina, Argentina

00:48:27



debt crisis current concerns with

00:48:30

energy litigation in Europe, a

00:48:32

lot about the parents of

00:48:33

the system. True can one

00:48:35

can disagree with different tribunals

00:48:37

and how broadly there are

00:48:38

techniques and positions. In this

00:48:39

debate continues for example, best

00:48:46

reflect the fact that states

00:48:48

are finding that the extent

00:48:49

of the discipline of these

00:48:50

treaties go further than they

00:48:52

had, appreciate it. And that's

00:48:53



something that can only be

00:48:54
resolved through 20 revision. Not

00:48:57
by saying that investment decision-making

00:48:58
can be made more predictable

00:49:00
or the system fax. Thank

00:49:03
you. Thank you. Don Jose.

00:49:10
Thank you. Make concerning predictability.

00:49:14
I would say I would

00:49:15
start simply by asking whether

00:49:18
this is this is really

00:49:20
a, a desired characteristic which

00:49:23
simply a characteristic that we

00:49:27
may not see out of

00:49:28



the ICS system, when when

00:49:32

we have has will no

00:49:34

more than 3,300 investment treaties

00:49:37

to Aspire to a system

00:49:41

at where one issue will

00:49:46

be treated by a different

00:49:48

tribunal under a different treaty

00:49:50

in the same manner is

00:49:52

is, is is very inspirational

00:49:55

and I am not entirely

00:49:58

sure that that it is

00:50:00

the right aspiration. That being

00:50:04

said, predictability. Yes. Perhaps that

00:50:06



under the four corners of

00:50:07

the applicable treaty that we

00:50:10

can aspire to. There are

00:50:12

many aspects that make the

00:50:14

aspiration of predictability props up

00:50:20

a run one within within

00:50:22

the system or one that

00:50:24

we might not be able

00:50:25

to to grasp. And I

00:50:27

say it is because this

00:50:28

isn't connection to some of

00:50:30

the discussions. At the Armstrong

00:50:32

group, three at where The

00:50:36



the notion of war or

00:50:38

the promised land is being

00:50:40

set too. High of a

00:50:42

bar by by thinking that

00:50:44

there must be consistency. Again,

00:50:47

we're we're not under the

00:50:49

WTO law where there's a

00:50:51

set of, of, of trees

00:50:54

for all members that we

00:50:55

are in a different system.

00:50:59

Plus-plus as as things are

00:51:03

going with C everyday, more

00:51:05

new generations of treaties. We

00:51:09



now we're seeing the possibility

00:51:11
of at least 20 or

00:51:15
fragmented dispute resolution system on

00:51:19
the one hand, existing arbitration

00:51:21
system. And on the other

00:51:23
hand, a multilateral investment court

00:51:25
system and that that might

00:51:29
get the aspiration way too

00:51:32
high. That being said, I

00:51:35
am an optimist that being

00:51:37
said, I do believe that

00:51:39
that the system has matured

00:51:41
in an incredible minor and

00:51:43



and they are some areas

00:51:45

in which because the system

00:51:47

is now more than 50

00:51:49

years old. What we can

00:51:51

see is areas in which

00:51:54

there have been a significant

00:51:56

progress, and I would even

00:51:58

dare saying that there is

00:51:59

In some areas majority or

00:52:02

or some type of flu

00:52:04

is really spoiled us going

00:52:05

to stunt where you could

00:52:07

see each shoes that have

00:52:09



been resolved that within the

00:52:11

existing system had not been

00:52:12

resolved in in the first

00:52:14

year. So to be to

00:52:17

be very specific. Let's think

00:52:19

in terms of coup de

00:52:20

Provence act in breach of

00:52:23

investment treaty that. Of course,

00:52:29

for those who have served

00:52:32

the public international law DNA

00:52:35

is, is a, is an

00:52:37

obvious question. You look into

00:52:38

Article, 4 of the articles

00:52:41



on steak responsibly. Can you

00:52:43

say, yes, of course, but

00:52:45

the ICS system itself had

00:52:50

to deal with that issue

00:52:50

in some of the early

00:52:52

Argentinian cases. And then nowadays,

00:52:55

I would say That nobody

00:52:58

would ask that question. It

00:53:00

is already out of there,

00:53:02

saying she was going to

00:53:03

start if it's a Canadian

00:53:05

province or I'm struggling state

00:53:08

or Argentinian province in breach

00:53:12



of international that that is

00:53:14

attributable to the state and

00:53:16

there other their other areas.

00:53:18

Like this is another example

00:53:19

that it that we could,

00:53:20

we could give the early

00:53:23

days at Exit. We had

00:53:24

a discussion on whether in

00:53:28

direct Investments could be a

00:53:30

subject of claims by minority

00:53:33

investors. That issue is also

00:53:36

one that I would say.

00:53:37

Unless there is Clarity to

00:53:39



the country within the treaty

00:53:41

would be part of juice,

00:53:43

but also start. So, so

00:53:44

my messages. Yes, it takes,

00:53:48

it takes a long time

00:53:49

for for a 50 years

00:53:54

old. Is, is the age

00:53:57

of or a little bit

00:53:58

more than 50 years old.

00:53:59

He's at the age of

00:54:00

the exit system. It is

00:54:01

predictable to the extent or

00:54:06

or the Isley assistant, to

00:54:07



the extent that you can

00:54:08

expect. A legal system to

00:54:12

be predictable within fifty years

00:54:13

and I'm in comparison, think

00:54:15

about the Roman law system.

00:54:17

So I will stop at

00:54:18

that. I can't help but

00:54:21

jump in because you're giving

00:54:22

me flashbacks. The very first

00:54:23

breath that I wrote as

00:54:25

an associate and investment treaty

00:54:26

case. I spent about 45

00:54:28

pages explaining why to sent

00:54:32



did not have to be

00:54:33

in the same document and

00:54:35

it was okay, that it

00:54:36

was in the treaty on

00:54:37

the one hand and a

00:54:38

request for arbitration in the

00:54:40

other and nobody would even

00:54:41

put science. Exactly. Agree that,

00:54:45

that that the predictability of

00:54:48

coherence question would look very

00:54:50

different. If you were asking

00:54:51

that question in 1988 1998

00:54:53

or even 2005 than it

00:54:57



does in 2022. Is exactly

00:55:00

it. Wanted to start with

00:55:02

you on the perennial question

00:55:05

of time and cost and

00:55:07

investor-state dispute settlement, are we

00:55:10

going to be able to

00:55:11

cure this or at least

00:55:12

make it a lot better?

00:55:13

And how can councils, and

00:55:15

tribunal and the institution try

00:55:18

to attack this problem and

00:55:19

succeed? Thanks, Michael. I mean,

00:55:22

I think it's the first

00:55:23



thing that we have to

00:55:24

recognize and look forward to

00:55:26

our the innovations that are

00:55:29

that are in the 2022

00:55:30

rules and a lot of

00:55:31

time and effort in the

00:55:33

development of the rule amendments

00:55:35

was dedicated to this question

00:55:37

of, how are we going

00:55:38

to improve efficiency and how

00:55:43

are we going to be

00:55:43

cost-sensitive in the process? And

00:55:45

then that's not set aside

00:55:47



the the simple innovation of

00:55:49

the hybrid hearing, the zoom

00:55:50

hearing, the fact that we

00:55:52

do our first sessions by

00:55:53

phone or by zoom and

00:55:56

e-file everything and we don't

00:55:57

kill the trees. Claudia for

00:56:00

just Peterson was here and

00:56:01

I was thinking about one

00:56:02

of the first filings I

00:56:02

did where we were literally

00:56:03

like handing over large boxes

00:56:06

but stacks of them like

00:56:08



15 boxes, trying to settle

00:56:10

those across Washington in calves

00:56:12

and it was terrible. So

00:56:13

thank God bless all done.

00:56:21

Biggest innovation of all I

00:56:22

think is the is the

00:56:23

set of expedited arbitration rules

00:56:25

that they can be selected

00:56:26

and applied. So the entirety

00:56:29

of chapter 7 is is

00:56:31

in the in the rules

00:56:33

and in the. There is

00:56:34

actually to potentially reduce the

00:56:35



time of the arbitration by

00:56:37
as much as 50% to

00:56:39
default to sole arbitrator so

00:56:40
that we can you afford

00:56:41
for the appropriate proceeding move

00:56:43
these things jump forward faster

00:56:45
and in a more streamlined

00:56:46
fashion so that is not

00:56:47
only the mega just use

00:56:49
that can be resolved in

00:56:50
the system. Then we look

00:56:53
at things like mandatory case

00:56:54
management conference. It's not just

00:56:56



the first session where we

00:56:57

all set the aspirational rules

00:56:58

that are going to govern

00:56:59

us for the next two

00:57:00

or three or four years

00:57:01

but actually case management conferences,

00:57:04

in which the tribunal is

00:57:05

encouraged, and, and reassured that

00:57:07

it's fine to narrow down

00:57:08

The rules, go down the

00:57:10

issues to, to identify uncontested

00:57:13

facts to, to shape, the

00:57:15

proceedings in a way that

00:57:16



will make them more efficient.

00:57:17

And I look forward to

00:57:19

that happening, particularly in connection

00:57:21

with document. We can only

00:57:23

hope, then we got the

00:57:26

throughout the throughout the 2020

00:57:28

rules time limits were time

00:57:30

limits, did not exist before

00:57:31

both time limits on the

00:57:33

parties to get them to

00:57:34

act quickly and also time

00:57:37

limits or or aspirations for

00:57:38

the tribunal to set expectations

00:57:40



about how quickly the

00:57:41

tribunal may act and whether

00:57:44

that's the the range runs

00:57:47

from Jessica applications to disqualify,

00:57:49

arbitrators to the issuance of

00:57:52

procedural order. Number 12 applications

00:57:54

for bifurcation and then one

00:57:57

on the far end decision-making,

00:57:59

how quickly will get decisions

00:58:01

in a manifest, lack of

00:58:02

legal, Merit proceeding, or on

00:58:05

an award or Anna rectification

00:58:07

are in an ailment context

00:58:09



Also clarifications about bifurcation requests

00:58:12

and about the Manifest legal

00:58:14

Merit, men's has lack of

00:58:16

legal Merit process. So the

00:58:18

party's understand how those can

00:58:20

have those will operate. And

00:58:22

expect that their expectations, accordingly

00:58:24

more, more Direction, more power,

00:58:32

for the tribunal, when it

00:58:33

comes to the allocation of

00:58:34

costs, including interim, cost of

00:58:36

where it cost allocations. And,

00:58:38

and publicity about cost, there

00:58:43



may be moments during the

00:58:44

arbitration where it's hard to

00:58:45

think, ahead to the day,

00:58:46

when someday, somebody's going to

00:58:47

see how much we spent

00:58:48

on X, but maybe that's

00:58:50

that's a discipline in its

00:58:52

own, right. And I think

00:58:59

the overarching importance of this

00:59:01

issue is illustrated in the

00:59:02

fact that right there up

00:59:03

front in row 30 at

00:59:04

the very beginning of the

00:59:05



general duty of the evolved

00:59:08

the parties to the preceding.

00:59:09

Of course, to act in

00:59:10

good faith as we always

00:59:11

expect, but to act with

00:59:13

an eye to efficiency and

00:59:15

cost-effectiveness. And, and there, that's

00:59:18

where I think the rules.

00:59:21

The rules can only take

00:59:22

us so far, and I

00:59:24

think when it comes to

00:59:25

time, and when it comes

00:59:26

to cost, we have to

00:59:28



acknowledge that we have seen

00:59:30

the enemy and they are

00:59:31

us. Write the rules, can't

00:59:34

fix everything for us. We

00:59:36

have to be better disciplined

00:59:38

ourselves. Whether we're sitting in

00:59:40

the council chair, where they

00:59:41

were sitting in the tribunals

00:59:42

chair for Council Heaven, forfend,

00:59:45

we should perhaps talk about

00:59:47

page limits because nobody can

00:59:51

halfway through a proceeding say

00:59:52

oh I'm going to confine

00:59:53



myself to this many pages

00:59:55

have that discussion ahead of

00:59:59

time. We could actually do

01:00:01

better at narrowing down the

01:00:02

issues and focusing, our attention

01:00:03

on what really matters instead

01:00:05

of being worried that if

01:00:06

we don't talk about every

01:00:07

single thing, That someday someone

01:00:09

will fault us for that.

01:00:10

And then when it comes

01:00:11

to the tribunal, that same,

01:00:12

that same motivation, right? That's

01:00:14



that same concerned. If I

01:00:15

have to talk about everything

01:00:16

so that nobody can say

01:00:17

that I didn't talk about

01:00:18

that has already. Alluded to

01:00:23

document production should document production,

01:00:25

really be a multimillion-dollar exercise

01:00:29

in these cases how much

01:00:31

actually comes out of document

01:00:32

production did actually changes the

01:00:35

face of the proceedings that

01:00:37

actually potential changes, the outcome

01:00:38

of the case, as counsel

01:00:40



for more than 20 years.

01:00:41

Now, I can really think

01:00:43

of very, very few instances,

01:00:45

where at where the first

01:00:46

never seen, The Smoking Gun.

01:00:48

Sure. Wish it would show

01:00:50

up Sunday but even the

01:00:52

things I can literally put

01:00:54

on one hand. The number

01:00:55

of times that I've seen

01:00:56

the document come out of

01:00:57

document production that have a

01:00:58

meaningful impact on The Chase.

01:01:00



And so we need to

01:01:03

constrain ourselves. Now that's always

01:01:06

easy to say in advance,

01:01:08

Dairy hard to stay in

01:01:09

the thick of in the

01:01:10

thick of the adversarial process.

01:01:11

But we can't expect the

01:01:13

rules to do everything for

01:01:14

us. And so we're going

01:01:16

to have to be better

01:01:16

behaved as well. Thank you,

01:01:19

that's great. Susan, what are

01:01:20

your thoughts as well? So

01:01:26



in Antonio's book, he's got

01:01:28

wonderful pictures of the draft

01:01:30

in history of the exit

01:01:31

convention. There's actually only two

01:01:33

women, pictured in the entire

01:01:34

book, believe it or not,

01:01:35

what is Meg? And one

01:01:37

is a stenographer busy taking

01:01:39

notes and I believe it's

01:01:40

on page, 93 of the

01:01:42

second edition. If you want

01:01:43

to have a look at

01:01:43

that. But the reason I

01:01:45



bring this up in connection

01:01:46

with cost is there were

01:01:47

actually two women participating in

01:01:49

the conversations. One was a

01:01:50

Miss Braun representing certain Nordic

01:01:53

countries who I never figured

01:01:54

those work but miss billica

01:01:57

Ratner from Austria actually had

01:01:59

a major role in the

01:02:00

debate and discussion of the

01:02:02

evolution of how costs are

01:02:04

treated in the exit convention.

01:02:05

So it's one of those

01:02:06



places that you can point

01:02:07

you a conversation between her.

01:02:09

And actually, the Brazilian delegate

01:02:12

that made a difference in

01:02:14

terms of what we actually

01:02:15

do today. Now, mind you

01:02:16

the convention punted Now we

01:02:19

have thank you, Meg. Finally,

01:02:21

some rules that actually provide

01:02:23

much more information about cost-shifting.

01:02:26

So I'm very grateful to

01:02:28

the founding mothers of exit,

01:02:30

who decided to take the

01:02:33



issues of cost, seriously, if

01:02:35

I want a ground that

01:02:35

conversation first in terms of

01:02:38

time and cost as some

01:02:40

of you may know I

01:02:41

have a small obsession with

01:02:42

this is she okay? And

01:02:43

wrote literally the book on

01:02:45

it in 2019. But I

01:02:48

think what's important to remember

01:02:49

from that book is the

01:02:51

single most important variable, that

01:02:54

was linked to any type

01:02:55



of cost claim. It cost

01:02:57

of lawyers respond. It possibly

01:02:59

with always time the number

01:03:02

of months it took to

01:03:03

have a case and I

01:03:04

want to remind people of

01:03:06

the really quite excellent work

01:03:07

that exit did in connection

01:03:09

with the rule drafting. I

01:03:10

think you guys to the

01:03:11

only good study I ever

01:03:12

saw on bifurcation and impact

01:03:15

on time and case management.

01:03:18



That is brilliant, and it's

01:03:19

a Hidden Gem within the

01:03:21

record. So please do feel

01:03:22

free to look at that

01:03:23

if you're thinking about how

01:03:24

do I worry about Cost

01:03:25

Containment. So I'm very much

01:03:28

appreciate what Marin said with

01:03:30

the case management conferences and

01:03:32

I actually am. So please

01:03:34

make that you went from

01:03:35

having a permissive CMC to

01:03:37

a mandatory case management conference.

01:03:39



Because this is about judging

01:03:41

Behavior to prevent due process

01:03:44

paranoia from creeping into the

01:03:46

proceedings. Such that we are

01:03:48

so worried about process that

01:03:49

we forget what we're actually

01:03:51

trying to achieve. Here is

01:03:52

international rule of law. So

01:03:54

I think that Dad isn't

01:03:55

going to be very useful

01:03:56

Innovation and I think that

01:03:58

is exactly the time to

01:03:59

talk about page limits but

01:04:01



the scope of what might

01:04:02

be happening with experts because

01:04:04

those are the things that

01:04:05

can contain costs and minimize

01:04:06

the amount of time, and

01:04:08

let's just be blunt about

01:04:09

it. The number of bodies

01:04:10

in a room who need

01:04:12

to be able to manage

01:04:12

their Diaries over the next

01:04:14

three to four years. So

01:04:15

I think that is a

01:04:16

wonderful innovation in terms of

01:04:18



time, But I also want

01:04:20

to try to flag a

01:04:21

couple of things that I

01:04:22

think are interesting and part

01:04:24

of this comes from a

01:04:25

book chapter that I got

01:04:27

coming out with Bailey, Road

01:04:28

huson associate at aurland Porter

01:04:30

and a happy crowd Washington

01:04:33

College of Law alone. About

01:04:37

the exit rules in particular

01:04:39

and the cost and time

01:04:41

element. One thing that I

01:04:43



think is actually quite useful

01:04:45

and this goes back to

01:04:46

part of Marines comment. So

01:04:48

often there already was a

01:04:50

legal opportunity to do things

01:04:53

with cost Management. In from

01:04:55

class award earlier, there was

01:04:57

always that doctrinal and theoretical

01:04:59

possibility, for whatever reason cognitively,

01:05:02

we let it slip to

01:05:03

the side. So what the

01:05:05

accepted rules are doing actually,

01:05:06

is it, they're creating a

01:05:08



nut. This is a Cass.

01:05:09

Sunstein nudge moment where it's

01:05:12

an opportunity to force us

01:05:13

to think about things. We

01:05:15

had it done before. So

01:05:16

in terms of the factors

01:05:17

that it's Now requires tribunals

01:05:20

to consider when thinking about

01:05:22

cost-shifting, I keep in mind,

01:05:24

like I think we all

01:05:25

know that we are talking

01:05:26

around 10 to 15 million

01:05:28

dollars worth of. This is

01:05:30



not a small amount and

01:05:32

argue be larger than some

01:05:34

stuffed into flames. If they're

01:05:36

doing that, we need to

01:05:37

have some rule of law

01:05:38

factors and it's a very

01:05:39

helpfully codified. A series of

01:05:42

factors that are actually the

01:05:43

most typically used by tribunal

01:05:46

and the book. I actually

01:05:47

had had to content analysis

01:05:49

on that so you can

01:05:50

actually go and see us

01:05:52



do to do what do

01:05:54

what do the date of

01:05:55

show? And there's actually a

01:05:56

really nice Matt, but I

01:05:58

want to also suggest that

01:05:59

there was a trick that

01:06:01

was missed. So and Meg,

01:06:03

you know, this is my

01:06:04

long-standing Richie. One of the

01:06:06

things that did not get,

01:06:07

put in, as a factor

01:06:09

to consider a connection with

01:06:10

Tasha playing with party settlement

01:06:12



efforts, and efforts to negotiate

01:06:14

or and or mediate a

01:06:16

dispute over the course of

01:06:17

a lifetime of Dispute some

01:06:20

of the early cases did

01:06:21

talk about that but it's

01:06:22

not something that made its

01:06:23

way into the rules. So

01:06:25

to the extent for ELCA

01:06:27

is here, one of our

01:06:28

leaders of the mediation efforts

01:06:30

and I know Don McRae.

01:06:32

Who's on, the screen is

01:06:32



also interested in mediation. The

01:06:34

fact that we're not buying

01:06:36

those together in the car

01:06:38

shipping expressly means we lost

01:06:39

an opportunity to nudge that

01:06:42

behavior, still still have. The

01:06:44

capacity is, it's an other

01:06:46

factors that could potentially be

01:06:49

considered that the whole idea

01:06:50

is nudge, nudge nudge, because

01:06:53

when people get to the

01:06:54

cost side, at the end

01:06:56

of the dispute, everybody's exhausted

01:06:58



cognitively depleted, and we can't

01:07:01

forget those things while we're

01:07:03

managing earlier parts of the

01:07:04

dispute. Accident. Those things might

01:07:08

be considered and conduct of

01:07:10

the party, so we'll see

01:07:11

what tribunals do. We all

01:07:19

know that the Marissa's convention

01:07:21

was very ambitious in terms

01:07:22

of transparency, but today. Only

01:07:24

nine states have ratified the

01:07:26

convention. We have, now some

01:07:28

very ambitious transparency goals in

01:07:31



our new rules. And the

01:07:33

question is, can the exit

01:07:34

2022 rules have a more

01:07:36

concrete and immediate effect on

01:07:39

transparency? What's a maybe? You

01:07:41

can start us off? Thank

01:07:43

you. Ma'am. Absolutely. There's just

01:07:47

one component to transparency. And

01:07:49

and then of course the

01:07:50

question is, you know, whether

01:07:52

the dikshit rules may have

01:07:56

your not only within the

01:07:58

exit system, but Beyond 8

01:08:01



a.m. a spillover effect before

01:08:07

referring to the it to

01:08:09

the technical question. I'd like

01:08:11

to say that transparency goes

01:08:14

hand-in-hand at least in my

01:08:15

view, with the issue of

01:08:17

legitimacy. And there's many modifications,

01:08:22

I always refer to the

01:08:24

exit rules and you could

01:08:25

rules modifications articles 62 to

01:08:28

68 + 0. + the,

01:08:30

the requirement of disclosure for

01:08:33

arbitrators under-19 out. But, but

01:08:37



one of the reasons why

01:08:41

There's a there's a strong

01:08:44

predictability of saying yes to

01:08:48

to the question is is

01:08:49

one. We are referring to

01:08:52

fix it as an end

01:08:54

many, how many perhaps most

01:08:57

of you know, but I

01:08:58

think it's worth noting that

01:08:59

he still does not least

01:09:02

and perhaps More than 70%

01:09:04

of the investor-state arbitration cases.

01:09:06

So it's a very straightforward

01:09:08



question. If you have... Portofolio

01:09:11

cases, yes, transparency requirements will

01:09:15

will be implemented a but

01:09:17

beyond that, there's also the

01:09:20

issue of legitimacy and I

01:09:22

think I would like to

01:09:23

to to follow the words

01:09:25

that you shared during the

01:09:26

keynote speech in terms of

01:09:29

85% of the states were

01:09:33

in favor of the rules,

01:09:34

there was no position and

01:09:36

that that leads to a

01:09:39



conversation of Yes. Application of

01:09:42

the rules because they're legitimate

01:09:45

and legitimacy issue doing a

01:09:49

little bit of research. That

01:09:51

is available to everyone. 67

01:09:54

countries, providing comments, and many

01:09:58

of them provided comments. In

01:10:00

each one of the rounds

01:10:02

of working papers. Some of

01:10:06

them for five times. It

01:10:10

is a very, very rich

01:10:13

and participatory process since in

01:10:17

some conferences, I can think

01:10:21



for instance that candy about

01:10:24
1 + and I don't

01:10:28
want to know segregated in

01:10:30
your any other area of

01:10:32
international. I don't think that

01:10:33
in other areas of the

01:10:35
international, you would see that

01:10:37
participatory process, Were you could

01:10:41
see countries of each continent,

01:10:44
providing comments. And I in

01:10:46
addition to that, I know

01:10:47
that there were there was

01:10:50
a, a very significant processing

01:10:52



terms of capacity building because

01:10:54

it's not only about providing

01:10:56

comments, but also understanding what

01:10:59

others are saying. And during

01:11:00

the 45-year process that the

01:11:02

rules amendments, took I understand

01:11:06

that there was a lot

01:11:06

of knowledge sharing and that

01:11:09

makes the possibility of implementing

01:11:11

the rules including the transparency

01:11:13

rules much higher. Now, going

01:11:16

into into what those rules

01:11:17

are, I will simply say

01:11:18



that there are there key

01:11:21

of factors, including the possibility

01:11:25

of, of, of now, publishing

01:11:28

the awards unless, unless the

01:11:32

parties either party to the

01:11:35

dispute expresses, it's, it's a,

01:11:37

it's a descent. Specific time.

01:11:43

In addition to that. There's

01:11:45

also the provisions that specify,

01:11:50

that they'll be publication of

01:11:53

all orders and decisions not

01:11:55

terminating terminating. I need Sitara

01:11:58

tration proceeding 63 Actual change.

01:12:09



I believe that these rules

01:12:12

make a huge difference in

01:12:15

terms of hearings as well

01:12:17

and and because now the

01:12:21

rule is not not to

01:12:22

ask for permission but actually

01:12:24

there must be the other

01:12:25

way around. There must be

01:12:28

an opposition to to having

01:12:30

the public hearing for publicity

01:12:33

and transparency. He's always in

01:12:36

intention with the issue of

01:12:38

confidentiality. But what's so interesting

01:12:41



about the roses that even

01:12:43
that tension is is, is

01:12:44
a is supplemented by a

01:12:46
framework as to how to

01:12:48
determine A result, of course,

01:12:53
by the tribunal between transparency

01:12:56
and and confidentiality. And, and

01:13:00
last but not least, and

01:13:02
this is a listing in

01:13:04
my understanding and influence of

01:13:07
NAFTA and similar with investment

01:13:13
chapters. There is now an

01:13:16
expansion within the rules to

01:13:18



the participation of non disputing

01:13:21

parties, which I believe is

01:13:23

is is is a something

01:13:26

that clearly creates more Comfort

01:13:29

to states. There might be

01:13:32

a second thoughts by by

01:13:34

investors themselves, or counsel for

01:13:36

investors in terms of, why

01:13:37

do we need this? But

01:13:39

the reality is that that

01:13:40

that this is, these are

01:13:42

rules that are named Lee

01:13:44

talked and discuss Bi-State sew-in

01:13:48



in general terms. I think

01:13:49

that Legitimacy. The actual power

01:13:54

of of, of the provider

01:13:57

exit, in this case and

01:13:58

an M3, the spillover effect,

01:14:01

we we have seen in

01:14:04

investment treaty arbitration, that some

01:14:08

doctrine, that start in the

01:14:09

ancient history, make it to

01:14:13

the sold under the Swedish

01:14:17

Chamber of Commerce. In one

01:14:21

example of that, is the

01:14:22

Cellini test and I'm not

01:14:24



saying that I'm in favor

01:14:25

of that practice or not.

01:14:26

I'm simply noting that that

01:14:28

happens. How Some of the

01:14:32

rules that are decided within

01:14:36

the rules. Here are the

01:14:37

amendments, but also in jurisprudential

01:14:40

and some of those have

01:14:42

a spillover effect in international

01:14:44

law, in United States. And

01:14:46

that I see as something

01:14:49

very easily happening at also

01:14:51

concerning the transparent transparency. Provisions

01:14:54



at weight weigh beyond the

01:14:56

Marissa's convention I really like

01:15:03

the transparency rules. I also

01:15:05

have to get lots of

01:15:05

credit to exit for essentially

01:15:07

going as far as you

01:15:08

can in publication within the

01:15:11

bounds of the convention, right?

01:15:12

The one place where I

01:15:13

absolutely stuck as of the

01:15:15

convention says, you can't publish

01:15:16

without the consent of hard-working

01:15:23

team of the transparency Provisions

01:15:26



in in the 2022 rules,

01:15:28

is that presumption of publication

01:15:30

that presumption of transparency in

01:15:31

all aspects of the proceedings.

01:15:33

And there may be, there

01:15:35

will be circumstances in which

01:15:36

the hearing is not going

01:15:38

to be open or when

01:15:39

it's going to be on

01:15:40

a limited basis that it'll

01:15:41

be open or there will

01:15:42

be redactions from the, from

01:15:44

the awards, or there will

01:15:46



be redactions for procedure. But

01:15:48

just to establish a presumption,

01:15:49

the procedural order should always

01:15:51

be published. That's that's an

01:15:53

innovation in and of itself,

01:15:54

right? It's in some of

01:15:55

the new treaties but it's

01:15:56

not necessarily. So, Instinctive reaction

01:16:01

of parties with your twenty

01:16:05

years of experience in investment,

01:16:06

treaty arbitration. So I do

01:16:08

think it will. This is

01:16:10

definitely not just nothing. I'm

01:16:17



thinking about the practicalities of

01:16:19
how this is going to

01:16:20
be implemented. I mean, I

01:16:21
hope that in one or

01:16:23
two years the process of

01:16:26
redacting decisions Awards orders and

01:16:29
everything else is going to

01:16:30
be as second nature to

01:16:31
us as counsel as the

01:16:33
process of making transcript, Corrections.

01:16:35
It's just going to be

01:16:36
the thing you do automatically

01:16:37
after you file. Walk through

01:16:39



your document, figure out what

01:16:41

needs to be. Redacted, have

01:16:42

a little bit of a

01:16:42

discussion about it with the

01:16:43

other party. And then move

01:16:45

on right now, it's still

01:16:47

sort of this, this kind

01:16:49

of Black Box. Who knows

01:16:51

what should be redacted and

01:16:52

what shouldn't and how much

01:16:53

will have to argue about

01:16:54

it? But I also really

01:16:55

like roll 66, which gives

01:16:57



us a nice list of

01:16:58

reasons to redact or not.

01:16:59

Confidential information. We'll see how

01:17:03

that gets played out in

01:17:04

practice. I think it will

01:17:04

take us a little trial

01:17:06

and error to get there,

01:17:07

but I'm hoping that that,

01:17:09

in essence, we will not

01:17:11

need to talk about transparency

01:17:12

about publication process. Is there

01:17:14

about redaction because it will

01:17:16

be second nature to us.

01:17:17



And I think a very

01:17:19

short. Of time, Tremendous at,

01:17:23

we're going to move to

01:17:24

mediation, which has been enthusiastically

01:17:27

received. I think every time

01:17:28

exit has done a presentation,

01:17:30

but the second question that

01:17:32

always comes up, is, we'll

01:17:33

parties. Really mediate when push

01:17:35

comes to shove. So, the

01:17:37

question I wanted to pose

01:17:38

in particular, to Susan, and

01:17:40

to Dawn is, Will governments

01:17:43



in particular want to mediate,

01:17:44
and how do we go

01:17:45
from a set of rules

01:17:47
to mediation and practice? Thanks

01:17:50
man. Because it's like a

01:17:56
process that you'd are necessarily

01:17:57
participating in and out in

01:17:59
that moment. And if Meg

01:18:00
knows I've been working on

01:18:02
these issues since 2007. So

01:18:04
again, this is me and

01:18:06
comment about becoming part of

01:18:08
history is perhaps why I

01:18:09



am particularly interested at the

01:18:11

moment. But it's really been

01:18:13

a challenge to get people

01:18:14

to think, proactively and constructively

01:18:16

about conflict prevention and dispute

01:18:19

management more systematically. That having

01:18:22

been said, on the context

01:18:23

of mediation, some of my

01:18:24

own preliminary analyses that are

01:18:26

coming out of data collected

01:18:28

in Scotland in connection, with

01:18:30

Erica suggest that perhaps mediation

01:18:32

is happening already more than

01:18:34



we might think. So people

01:18:36
are identifying that they're acting

01:18:38
as mediators in cases, which

01:18:39
means there has to be

01:18:40
cases that are getting mediated.

01:18:42
So it's a bit like

01:18:43
as Gonzalo was kind enough

01:18:45
to remind me the Encanto

01:18:47
Musical and the song. We

01:18:51
don't talk about Bruno no

01:18:53
no, no. So it's happening

01:18:55
but we're not talking about

01:18:56
it. I apologize for singing

01:18:57



at the World Bank but

01:18:58

I think that the bigger

01:18:59

point is it's there and

01:19:01

what we need to do

01:19:02

is raise it up to

01:19:03

the surface and create an

01:19:04

opportunity for people to understand

01:19:06

the success stories of what's

01:19:08

going on. So I can

01:19:10

to provide a bit of

01:19:10

a frame back in 20.

01:19:12

I think it was 2013

01:19:13

at the American Society of

01:19:15



international law, you can go

01:19:16

look at the proceedings to

01:19:17

find this honest open, Brett

01:19:19

and I put together a

01:19:20

mediation mop and presented that

01:19:23

to the group and plenty

01:19:25

of people said. Now I

01:19:26

can see what is possible.

01:19:27

We actually had a Mina

01:19:30

arbitrator, not mean an arbitrator

01:19:32

but a diplomat from Amina

01:19:33

State come up to us

01:19:35

and say yes we have

01:19:37



been trying to mediate but

01:19:38

we didn't have any tool

01:19:39

kit to work with. So

01:19:41

to the extent that for

01:19:42

example, there is now the

01:19:44

IBA rules on mediation for

01:19:46

investor-state dispute. There are a

01:19:48

whole bunch of mediation training,

01:19:49

protocols, Broca is helping to

01:19:52

create and make sure comes

01:19:53

to fruition. There are also

01:19:55

opportunities for it takes its

01:19:58

rules to now be in

01:20:00



effect. I mean this in

01:20:00

a way, it's a creation

01:20:02

of a brand new facility,

01:20:04

but I think Meg is

01:20:05

quite right to say, people

01:20:07

aren't focusing enough on what

01:20:09

the additional facility now. Offers,

01:20:12

it's not just the kind

01:20:13

of almost open door policy

01:20:14

for all investment disputes that's

01:20:16

there. That's really stunning. I

01:20:19

kind of wonder what Brokers

01:20:20

would think about. All of

01:20:21



this baby. You be very

01:20:22

excited. You also go like,

01:20:23

how did she manage that

01:20:24

one. But then there's this

01:20:26

addition and a much-needed addition

01:20:29

of mediation because conciliation in

01:20:31

the exit sense is basically

01:20:33

non-binding arbitration. Why would you

01:20:35

spend 12 million dollars on

01:20:37

something? That's not enforceable. I

01:20:40

couldn't justify that. As an

01:20:41

investor, I couldn't justify that

01:20:43

at the state, I could

01:20:44



only justify that as someone

01:20:46

who wanted to me to

01:20:48

have a billing partner. Athena

01:20:51

Law Firm. You know, this

01:20:52

is the part of the

01:20:52

problem could be us and

01:20:54

I'm to understand that having

01:20:56

worked in the private sector

01:20:57

but I want to help

01:20:58

us think constructively about how

01:21:01

can we use alternative methodologies

01:21:04

like mediation, which are in

01:21:07

a way Megan. The rules

01:21:08



still are actually quite loose.

01:21:09

The mediation can be what

01:21:11

you want it to be.

01:21:12

I'm in there different types

01:21:14

of mediation. There's our value

01:21:17

to mediation. There are large

01:21:20

issue. Mediations, there are small

01:21:22

issue mediation. So to the

01:21:24

extent State, what to use,

01:21:25

sovereignty control the outcomes of

01:21:28

cases, and not necessarily be

01:21:30

stuck, paying a bill, there

01:21:32

are opportunities and this is

01:21:33



part of that we need

01:21:34

to give them the success

01:21:35

stories and start to sing

01:21:37

about what is a possible.

01:21:39

We need to let people

01:21:41

know you could decide to

01:21:42

carve out a small part

01:21:43

of this dispute and maybe

01:21:45

resolve something and get some

01:21:46

good political process for yourself.

01:21:47

That's not out of bounds.

01:21:50

And in fact, you can

01:21:51

get creative options. That don't

01:21:56



involve monetary damages, even this

01:21:59

pain solar cases are interesting

01:22:01

and similar things were happening

01:22:02

in Argentina. People were right,

01:22:04

we're creating regulatory regime. Change

01:22:07

is part of the negotiation

01:22:07

process to make sure domestic

01:22:10

political priorities were at here

01:22:11

to while still managing the

01:22:13

underlying dispute to say nothing

01:22:15

of one of my personal

01:22:16

and Antonio and I have

01:22:17

talked about this case but

01:22:19



it is kind of a

01:22:19

very funny case. The looking

01:22:21

mirror versus Ukraine case, the

01:22:23

very first one got resulted

01:22:25

in a settlement agreement and

01:22:27

disagreement there had nothing to

01:22:29

do with money per se.

01:22:31

He wanted the opportunity to

01:22:33

open up a new Oksana

01:22:34

Baiul hairdressing shop, right? So

01:22:37

this was a kind of

01:22:38

a very unusual remedy that

01:22:40

an investor who been seeking

01:22:41



money was able to say,

01:22:43

no, I want something else

01:22:45

that's about my business opportunities,

01:22:47

those kind of stories about

01:22:50

how can you use the

01:22:51

process to give you what

01:22:53

you need? Imagine that it

01:22:56

is possible. The more we

01:22:58

have a success stories, the

01:22:59

more I think will create

01:23:01

the capacity to make it

01:23:02

happen. But we've also got

01:23:03

to have the checklists and

01:23:05



the capacity we over-promise and

01:23:08

under-deliver. So I think that's

01:23:10

really where the challenge is

01:23:11

going to be having the

01:23:13

mediator to understand the unique

01:23:14

and very different skills that

01:23:17

were quite. Fermented judikay, Shinto,

01:23:20

a mediation. That is not

01:23:21

insubstantial and likewise the mediators

01:23:24

with those skills need understand

01:23:26

public, international law, and business.

01:23:28

If it has to be

01:23:30

both of those working hand-in-hand

01:23:33



and then hopefully, we can

01:23:34

trade all the lawyers, understand

01:23:36

all the revenue you can

01:23:38

generate from mediation advocacy because

01:23:40

I think it's going to

01:23:42

be a huge part of

01:23:43

the future and the past

01:23:45

is gone done. We're not

01:23:46

requiring you to sing but

01:23:48

we would be glad for

01:23:50

your thoughts on mediation and

01:23:52

will it be adopted in

01:23:53

practice? Well, I certainly wasn't

01:23:56



planning to to sing a

01:23:58

little late. I did admire

01:23:59

Susan's singing. I was actually

01:24:03

become of this by looking

01:24:04

at an example of a

01:24:07

conciliation, which in some senses

01:24:11

that maybe sometimes I seen

01:24:12

as different sometimes, it seems

01:24:14

indistinguishable example of a mediation

01:24:17

that occur that I was

01:24:18

involved in. That may help

01:24:21

as Susan says, tell how

01:24:23

this can happen and why

01:24:24



it might be useful at

01:24:26

a conciliation like mediations had

01:24:28

a long and venerable history,

01:24:29

being included in dispute settlement

01:24:31

visions and treaties and a

01:24:32

long but less than herbal

01:24:33

history of practically. No use

01:24:35

of consideration, getting silly 8

01:24:38

and also the leading work

01:24:40

on its National conciliation. Don't

01:24:42

get caught. He he he

01:24:43

once wrote that states include

01:24:45

conciliation not because they plan

01:24:48



to use it because they

01:24:49

want to show that they

01:24:50

committed to dispute settlement without

01:24:51

ever planning to use it.

01:24:53

But this example of a

01:24:55

recent example, under compulsory conciliation

01:24:58

Provisions in the law of

01:24:59

the sea treaty between T-Mobile

01:25:01

St. And Australia, I think

01:25:04

it's instructive about the use

01:25:06

of conciliation all the process.

01:25:07

What do you call a

01:25:08

conciliation? Cuz I might save

01:25:09



us more. I had to

01:25:11

move a character mediation. Timor-leste

01:25:15

invoke the conciliation provisions of

01:25:18

the treaty because they couldn't

01:25:22

get a straight into agree

01:25:24

on the delimitation of the

01:25:25

maritime boundary between the Timor

01:25:27

Sea. And I think there

01:25:28

is number of things you

01:25:29

could learn. From this, that

01:25:32

the process involved, allowing the

01:25:34

parties who be unable to

01:25:36

resolve their dispute and it

01:25:38



often developed and added more

01:25:40

developed, a hostile relationship to

01:25:43

talk to each other for

01:25:44

a third party. And for

01:25:46

most of the timor-leste conciliation

01:25:47

until we hear almost at

01:25:49

the grievant, we met with

01:25:50

the party separately. So they

01:25:51

could speak frankly about their

01:25:53

positions, their interests of where

01:25:54

they could see the possibility.

01:25:56

The solution they couldn't do

01:25:57

this in the presence of

01:25:58



each other and I was

01:26:00

also agreed at the outset

01:26:01

that it was agreed to

01:26:02

everything was agreed. Second load.

01:26:05

The issue was drawing a

01:26:07

maritime boundary table. Estes real

01:26:09

impressed with access to resources,

01:26:11

but your boundary line with

01:26:12

divided on this raid was

01:26:14

also interested in results as

01:26:15

but it wanted to preserve

01:26:16

have an agreement on the

01:26:17

continental shelf that is entered

01:26:19



into with Indonesia in 1972,

01:26:21

and adjacent areas that didn't

01:26:23

want to agree on a

01:26:24

boundary with T-Mobile St. It

01:26:26

would encourage Indonesia to abandon

01:26:28

the 1972 line. So the

01:26:32

issue could be broadened to

01:26:34

include related issues, that reflected

01:26:36

the real interests of the

01:26:37

of the parties and Susie's

01:26:39

example of the it turns

01:26:41

out that the investor really

01:26:42

wanted something else. The money

01:26:43



I think was a good

01:26:44
example of this provides. Another

01:26:48
example, related issues of which

01:26:53
there was litigation between the

01:26:55
parties and once the parties

01:26:57
became invested in the process,

01:26:59
they agreed to withdraw from

01:27:01
that litigation to create an

01:27:02
atmosphere that was conducive to

01:27:04
reach an agreement nose, get

01:27:05
rid of the side issues,

01:27:06
set up part of your

01:27:07
difficulty, with dealing with each

01:27:09



other, and we're impediment to

01:27:11

reaching in the spirit. Mnm

01:27:13

force. And this is where

01:27:15

I think conciliation is different

01:27:16

from what she described, the

01:27:21

legal position for parties were

01:27:23

important as background of a

01:27:26

dispute. And they have to

01:27:28

be understood by the conciliation

01:27:30

permission. But after that they're

01:27:33

off, the table are always

01:27:35

in the background. They weren't

01:27:37

subjected to pay. It wasn't

01:27:38



a a form of arbitration

01:27:40

under the name of conciliation,

01:27:41

Simply illegal possession of the

01:27:44

parties, was simply not going

01:27:45

to be too tentative of

01:27:46

the of the, of the

01:27:49

outcome. And finally, the two

01:27:52

countries after you had had

01:27:54

a long relationship which in

01:27:56

the past going back to

01:27:58

the second world war and

01:27:59

earlier was very close. It

01:28:02

was very fractious During the

01:28:04



period when people estimate seeking

01:28:07

to gain its independence from

01:28:09

Indonesia at that time because

01:28:11

got its independence from Portugal

01:28:14

and then immediately was invaded

01:28:16

by Indonesia and was a

01:28:18

guerrilla warfare. And during that.

01:28:21

Of time was fractions, I

01:28:22

don't think a malicious Australia

01:28:24

has been particularly helpful then.

01:28:26

After the, in the simulations

01:28:28

independence, it became close again.

01:28:29

And I think both parties

01:28:31



understood that they had a

01:28:33

long-term relationship and the getting

01:28:36

rid of this major irritant

01:28:37

was an important part of

01:28:40

being able to continue that

01:28:42

relationship but obviously it is

01:28:44

peculiar to them but the

01:28:46

fact they had this relationship

01:28:48

made it easier for them

01:28:49

to see That's a long

01:28:51

trip was more important than

01:28:53

the shorter term. Obviously not

01:28:56

all these considerations are relevant

01:28:57



to an investment dispute or

01:28:59

mediation or conciliation, but I

01:29:01

think that they give insight

01:29:03

into possibilities that can be

01:29:05

investigated by States and investors

01:29:07

who want to avoid a

01:29:10

lengthy process that took at

01:29:13

18 months 24. The conciliation

01:29:15

here, want to avoid the

01:29:17

finding of lengthy pleading. My

01:29:19

parties, the process was quite

01:29:22

informal. The one. No formal

01:29:24

submission was difficult. And as

01:29:26



I don't think she can

01:29:27

handle this. How do you

01:29:28

get lawyers? Whose life is

01:29:31

litigation to work in a

01:29:33

different system work in the

01:29:34

system with an unexpected, right

01:29:36

lengthy pleadings other than expected

01:29:37

to Simply reiterate and articulate

01:29:42

the position, one side, but

01:29:44

to try and work on

01:29:45

how to get a solution

01:29:46

between and in the end,

01:29:48

what a provided was a

01:29:49



solution. Both parties decided they

01:29:51

could live with and not

01:29:53

one where one party lost

01:29:54

in the other party one.

01:29:56

So I think that there

01:29:57

is an option, that's what

01:29:59

if he said the rhaetian,

01:30:00

and I think states are

01:30:02

not going to be automatically

01:30:03

willing to the to jump

01:30:05

to this, because they're not

01:30:06

used to it. But if

01:30:08

they look at it closely

01:30:09



than they see, their advantages

01:30:10

that are worth considering for

01:30:12

the longest time. It's done.

01:30:16

It's really useful. I wanted

01:30:18

to move now to the

01:30:21

environment and I guess we

01:30:23

all know before, sample Venezuela

01:30:25

Bolivia and Ecuador left exit

01:30:28

in the mid-2000s in 2021

01:30:30

Ecuador. Rejoined, exit, we seeing

01:30:33

the usmca where Canada and

01:30:36

United States excluded investor-state. And

01:30:39

we've recently heard a discussion

01:30:40



under the energy. Charter treaty

01:30:42

modernization where are number states,

01:30:44

are saying, they won't ratify

01:30:46

that treaty and in fact

01:30:47

are thinking about going back

01:30:48

and not continuing under the

01:30:51

existing treaty and addressing the

01:30:53

tail Provisions in that treaty.

01:30:55

So, we seen that direction.

01:30:56

At the same time, we

01:30:58

see a number of new

01:30:59

multilateral treaty set. Our sepsi

01:31:02

ptpp, we see a number

01:31:05



of model B, which are,

01:31:07

of course, the template for

01:31:08

negotiation didn't get last count.

01:31:10

More than 65 states have

01:31:11

model B and are negotiating

01:31:13

agreements. And I wanted to

01:31:16

ask him, first of all,

01:31:17

Marin and Antonio, how do

01:31:19

you rationalize those two? Very

01:31:21

different things, States leaving, but

01:31:24

States, actually endorsing and increasing

01:31:27

use of the system. How

01:31:28

do you rationalize the two

01:31:29



of those Trends in? Or

01:31:31

is there a unifying explanation

01:31:32

to start us off? Because

01:31:39

I'm not sure that there's

01:31:40

a trend, right? I think,

01:31:42

I think there is a

01:31:43

Temptation and maybe it's, it's

01:31:45

our current news 24 hour,

01:31:47

day news cycle or something

01:31:48

of the sort that has

01:31:49

us looking for news and

01:31:51

what's new, and what just

01:31:52

happened, and what might be

01:31:53



happening tomorrow? And then maybe

01:31:55

extrapolating Trends out of the

01:31:57

news. But that's not quite

01:32:00

the same as say, is,

01:32:01

is actually looking what states

01:32:02

are due, right? I think

01:32:04

it's more important to look

01:32:05

at how they vote with

01:32:08

their feet and to that

01:32:10

end. I think, when we

01:32:12

look at States who have

01:32:14

in the past, Store at

01:32:15

the moment are talking about

01:32:17



departing the system or departing

01:32:19

particular treaties. I think my

01:32:22

hypothesis is it it's more

01:32:23

often event-driven right over there.

01:32:25

Something specific about that situation

01:32:26

that is causing at that

01:32:28

moment. Those dates to make

01:32:30

the decisions that they make

01:32:31

as opposed to saying that

01:32:32

there's a broad swing in

01:32:33

One Direction or the swing

01:32:35

in the other direction and

01:32:36

try calling that a trend,

01:32:37



it's more fun to call

01:32:38

it. A supposed you can

01:32:39

do a blog post about

01:32:40

calling it a trend, but

01:32:43

I put up my hypothesis

01:32:44

is going to be that

01:32:45

we're talking more about event

01:32:46

driven activity here. And so,

01:32:50

I think the poster child

01:32:52

for that is the usmca.

01:32:54

I continue to believe the

01:32:56

the gist g. I s

01:32:58

d, s, provisions of USMC,

01:33:00



a r. A a one

01:33:02

time. I could be wrong.

01:33:05

We'll we'll see. But I

01:33:08

think, I think there were

01:33:09

a lot of political calculations

01:33:10

and I'm probably the more

01:33:12

significant political calculation is not

01:33:14

the United States. Deciding why

01:33:17

bother for her for our

01:33:19

relationship. But the fact that

01:33:21

the United States and Mexico

01:33:23

still have investor-state dispute settlement

01:33:25

in a peculiar form but

01:33:29



there wasn't there wasn't a

01:33:31

thought. The other the end

01:33:32

result was not. Let's abandon

01:33:34

this for all purposes. It

01:33:36

was less, Taylor make it

01:33:37

for our specific circumstances and

01:33:40

I'll I'll go out on

01:33:41

a limb and say that

01:33:42

with the energy Charter treaty,

01:33:43

I think that's much more

01:33:44

about the the entry Ubud

01:33:47

impulse than it is about

01:33:50

the, the system writ large.

01:33:51



And I think the best

01:33:54

evidence of some sort of

01:33:55

the voting with your feet

01:33:56

has, is the fact that

01:33:57

the treaty texts themselves and

01:34:00

all, but a handful of

01:34:02

states are still playing in

01:34:03

the system and still talking

01:34:04

about refining. It revising it,

01:34:06

reforming, it improving it. Very

01:34:09

few of actually decided to

01:34:10

set fire to it, so,

01:34:15

I don't want us to

01:34:16



get carried away, looking for

01:34:18

trends, when I think we

01:34:20

might be making Trends out

01:34:22

of news and one-off events.

01:34:24

So what are your thoughts?

01:34:32

I couldn't agree more with

01:34:34

what Marine says and she

01:34:38

says, it's in a much

01:34:40

more sophisticated and and helpful

01:34:45

way than, then I would

01:34:47

or could rather at but

01:34:52

For myself and that don't

01:34:54

want to sound complacent. I

01:34:56



don't think anybody is leaving

01:34:58

the system is by that,

01:35:02

we mean quitting altogether participation

01:35:06

in the SDS system of

01:35:09

the three countries that have

01:35:11

denounced you to the convention

01:35:12

exit, of course, is now

01:35:14

back and fix it so

01:35:15

cold. When it's the weather

01:35:17

in Bolivia seem to continue

01:35:19

to participate actively if not

01:35:22

addicted. Then another is diaspora.

01:35:25

Acute according to Aunt, sis

01:35:28



DS, Navigator 22 is DS.

01:35:32

Cases have been brought against

01:35:34

Venezuela since it announced the

01:35:36

exit convention about 2/3 as

01:35:39

many as before that time.

01:35:40

And as for Bolivia, Got

01:35:45

many more cases. 16 and

01:35:48

turtle have been initiated involving

01:35:51

it since the country denounced

01:35:53

the exit convention. When just

01:35:56

three cases have been brought

01:35:59

against Bolivia, I think it's

01:36:03

important in this discussion to

01:36:06



remember the consensual character of

01:36:09

the existing as emphasized by

01:36:12

the report of the World

01:36:15

Bank, executive directors on the

01:36:17

convention. No, country is obligated

01:36:20

to become or in my

01:36:21

ad remain a party to

01:36:25

the exit convention or being

01:36:27

party to make use of

01:36:29

the dispute settlement facilities of

01:36:31

the center. Nobody, I think

01:36:34

would characterize as having left

01:36:37

except the party, that decided

01:36:40



for whatever reasons against substitute

01:36:44

as submit investment disputes to

01:36:47

the center. If nothing else,

01:36:50

it's Nationals would would as

01:36:53

long as their state remains

01:36:55

a part, it took me,

01:36:57

it's a convention. Continue to

01:36:59

be eligible themselves to use

01:37:02

the procedures of the convention

01:37:04

for their disputes with other

01:37:07

parties to be excited convention.

01:37:09

So, now you have Participation

01:37:14

in the system letter at,

01:37:16



at least at the very

01:37:18

clothes removed, by, by the

01:37:21

country concerned. That once there

01:37:24

no more cases, brought by

01:37:27

EU claimants against EU respondent.

01:37:30

They should still remain a

01:37:32

large proportion of cases involving

01:37:37

at EU Nationals against non-eu

01:37:42

countries. I looking at the

01:37:46

exit at caseload database. I

01:37:55

mean, I may have gotten

01:37:56

my son's wrong but I

01:37:57

calculate from that, that 20%

01:38:02



of all at the convention

01:38:03

and additional facility, arbitrations involve

01:38:07

his claim and ceu Nationals

01:38:09

in this respondents non-eu States.

01:38:12

So, in this post acnes

01:38:15

scenario, you still have quite

01:38:17

heavy participation in the exhaust

01:38:19

system on the part of

01:38:21

the European. and similarly, again,

01:38:27

based on pending Chase levels.

01:38:32

It would seem if there's

01:38:34

a fish sting. Of course,

01:38:37

it would seem that about

01:38:39



10% of the cases would

01:38:41

continue to be brought by

01:38:44

a Canadian and US Nationals

01:38:46

outside of the USMC area.

01:38:50

Thank you. Thank you. I

01:38:54

recognized. We are low on

01:38:56

time but we just want

01:38:57

to go to two quick

01:38:58

questions on the future. The

01:39:00

first Antonia will stay with

01:39:02

you. Is it's it has

01:39:04

an amendment formula under the

01:39:05

convention, requiring 100% approval of

01:39:08



member states. Is that going

01:39:10

to be a barrier in

01:39:11

the future to continued modernization?

01:39:16

Well, in the spirit of

01:39:18

cutting short my the time

01:39:21

I spend in my remarks

01:39:22

and I would simply answer

01:39:26

that question by saying. I

01:39:29

know it's true, that amending

01:39:34

the convention requires rest station

01:39:38

by all it said, Contracting

01:39:42

states of the amendment. And

01:39:46

there are 150 age of

01:39:47



them. And keishin processes are

01:39:50

commonly very lengthy. So, so

01:39:54

are the minimum this word

01:39:55

up? Amending, the convention itself

01:39:57

would be problematic and ever,

01:40:03

and deed. I would think.

01:40:05

But on the other hand

01:40:08

demanding, the regulations and rules

01:40:11

of a people's convention, proceedings

01:40:14

is comparatively easy, requiring only

01:40:18

a two-thirds majority vote of

01:40:20

the members of the administrative

01:40:22

Council. So long, of course,

01:40:23



as the regulations, and rules

01:40:27

remain consistent with the most

01:40:31

affect flexible and brought provisions

01:40:34

of the exact convention. Main

01:40:37

Avenue for reform addicted to

01:40:40

have been Amendment of the

01:40:43

exceed regulations, and rules in

01:40:46

this has been demonstrated by

01:40:49

successive amendments of the regulations

01:40:53

and rules. Including most notably

01:40:58

the in several respects far-reaching

01:41:01

amendments. Recently adopted by the

01:41:06

administrative Council evicted in March

01:41:09



of this year. Among the

01:41:12

new amendments changes of the

01:41:14

exit arbitration rules regarding the

01:41:18

publication of Awards. In the

01:41:20

procedure, for deciding challenges are

01:41:23

particularly striking for me and

01:41:26

disrespect article for the age

01:41:28

of the exit convention. Forbids

01:41:30

exit from publishing an award

01:41:32

without the consent of the

01:41:33

parties, and in accordance with

01:41:36

article 58 of the convention.

01:41:38

And typical case of a

01:41:40



three-member arbitral, tribunal, the challenge

01:41:43

of one of the arbitrator's

01:41:45

is decided by the two

01:41:47

others, unless they're equally divided

01:41:51

in, which case, the challenge

01:41:52

is decided by the president

01:41:54

of the World Bank, in

01:41:55

his capacity as chairman of

01:41:57

the exhibit, administrative Council. As

01:42:01

for the publication of awards,

01:42:03

newly amended exit, arbitration 162

01:42:06

games, the parties to have

01:42:08

given their consent to the

01:42:10



publication of the award by

01:42:12

8. If neither Jack's within

01:42:16

a certain period after this

01:42:18

patch of the document. And

01:42:21

as such Marin noted not

01:42:24

too long ago, this really

01:42:27

excited shown its ability and

01:42:30

willingness to to push the

01:42:33

envelope as far as it

01:42:35

possibly could in this respect.

01:42:37

And I think very successfully

01:42:39

without of course entering into

01:42:43

an amendment of the exit

01:42:47



convention. And in regard to

01:42:50

the procedure of having the

01:42:51

possible disqualification of a member

01:42:53

of an hour. Normally determined

01:42:56

by his or her colleagues

01:42:58

on the Tribune has a

01:43:01

procedure termed as unsatisfactory incurred

01:43:06

by an ad hoc committee

01:43:07

chaired by Professor McRae and

01:43:12

tickseed case. And in respect

01:43:17

of this procedure, it's a

01:43:18

newly amended exit arbitration Route,

01:43:21

25A provide in the event

01:43:25



of the challenge of run

01:43:27

of PS3 are the features

01:43:31

that you have been unable

01:43:32

to decide to challenge for

01:43:34

any reason. They will be

01:43:37

deemed to be equally divided

01:43:39

with the result that the

01:43:41

challenge will be decided by

01:43:42

the chair of the administrative

01:43:45

Council and Biggs a show.

01:43:48

I think how much can

01:43:50

be achieved in the way

01:43:51

of constructive change by amendments

01:43:54



of the regulations and rules

01:43:56

evicted. While remaining within an

01:43:59

unchanging framework of the convention.

01:44:04

Looking ahead to bring up

01:44:07

a hobby horse of mine,

01:44:08

one might imagine a future

01:44:10

amendments of the exceed arbitration

01:44:12

rules modernizing, the standard for

01:44:15

disqualifying, arbitrators for lack of

01:44:19

impartiality, in and Independence, in

01:44:22

much the same way as

01:44:23

this is already been done.

01:44:25

In the newly amended additional

01:44:28



facility arbitration Perhaps the toughest

01:44:33

you to challenge group did

01:44:34

will be the creation of

01:44:36

an exit appeals facility is

01:44:39

Contracting State decide after 18

01:44:44

years and I might add

01:44:45

that they would now be

01:44:46

ready to entertain decide. Yeah.

01:44:51

In one sense in The

01:44:53

Limited sense of approving a

01:44:55

stash of an additional facility

01:44:57

rules like the Smoochy, it

01:45:00

by accident at 20th for

01:45:03



the test, may actually be

01:45:05

even easier than demanding the

01:45:09

exit regulations and rules because

01:45:11

under the convention adoption under

01:45:14

Section time, such an entirely

01:45:17

new set of rules would

01:45:19

require only a simple majority

01:45:21

vote of the administrative council

01:45:24

members. Putting in place, the

01:45:28

more substantive adjustments that would

01:45:30

underlines. That traditional facility rules

01:45:34

would be daunting to be

01:45:38

involved. Interesting, modifications of the

01:45:41



exit convention by interested Contracting

01:45:44

States as envisaged in article

01:45:47

41 of the Vienna convention

01:45:48

on the law of treaties.

01:45:50

And I hasten to add

01:45:53

that. Even this may not

01:45:57

be Beyond reach is such

01:46:02

a facility. Is desired by

01:46:04

significant numbers of Contracting States.

01:46:07

And we also shouldn't forget

01:46:09

another plea. I make sure,

01:46:13

but they often find that

01:46:15

say, it doesn't resonate with

01:46:17



many people. That and a

01:46:20

facility might more readily be

01:46:23

installed. If it were to

01:46:25

be made of Google search

01:46:26

provisional route to can find

01:46:28

the exit towards as, in

01:46:31

fact, it's done without a

01:46:35

lot of highlights in you,

01:46:36

but it just feels under

01:46:39

the investment court, system of

01:46:41

some of the EU investment

01:46:44

strategist at all. In all.

01:46:45

I'm, I'm very optimistic, as

01:46:48



usual. Thank you. Jose, if

01:46:51

we can have a quick

01:46:52

answer and we can finish

01:46:53

up on appellate body which

01:46:55

is already been raised. I

01:47:01

couldn't agree more with Antonio

01:47:05

Brown. I'll just make it

01:47:08

one remark which is where

01:47:12

do we come from? And

01:47:13

and I know what, when

01:47:16

I teach one of the

01:47:17

introductory remarks that that, that

01:47:19

I share with with students

01:47:21



is, is the exit system

01:47:23

is still Today, revolutionary and

01:47:27

and, and Brilliant. It's one

01:47:28

of the few in international

01:47:30

economic system that allows right

01:47:33

of recourse International. So that's,

01:47:36

that's the framework within that

01:47:37

framework. Yes, know there might

01:47:39

be difficulty in changing the

01:47:41

convention, almost impossible, but the

01:47:45

Amendments and the series of

01:47:46

amendments that we have seen

01:47:48

is insufficient proof that that

01:47:50



the Amendments can be done

01:47:53

the the Broncos on transparency.

01:47:56

Where were a few examples

01:47:59

that that were given. Another

01:48:01

example is, for instance, how

01:48:03

the, the new rule 41

01:48:06

clarifying, that that it's not

01:48:10

only related to manifestly lack

01:48:13

of legal married with Monica

01:48:15

slacker also involved jurisdiction. So,

01:48:20

when, when I see how

01:48:22

the exit, . But also

01:48:25

the the international investor State

01:48:29



arbitration community in tracks. 111

01:48:33

image came came about a

01:48:36

few weeks ago and made

01:48:38

me think a little bit

01:48:38

about the the notion of

01:48:40

progressive development and convocation entrusted

01:48:44

to the ioc of the

01:48:46

United Nations that is an

01:48:49

explicit function that that body

01:48:51

has. But in many respects

01:48:54

that idea of not throwing

01:48:57

everything to or setting everything

01:48:59

on fire. But I actually

01:49:00



calibrating reviewing qualifying. Some of

01:49:04

the rules that tribunals provide

01:49:06

is is part of what

01:49:08

we have seen. And that's

01:49:09

why I'm also very hopeful

01:49:10

and within within the system

01:49:15

that will make up the

01:49:17

system better not doing away

01:49:20

with it, Thank you. I'm

01:49:22

going to finish with one

01:49:24

question, which is been a

01:49:26

preface. Tear the whole question

01:49:27

of a multilateral investment cord

01:49:29



or a appellate body at

01:49:32

are there further adjustments to

01:49:34

the system that might better

01:49:35

address. The concerns that motivate

01:49:37

that and connected. For example,

01:49:39

play a role in such

01:49:41

a body Estates decide that

01:49:42

that's the direction they wanted

01:49:44

to go in and Don.

01:49:45

I wonder if you could

01:49:46

start us off on this,

01:49:47

thank you. I think I

01:49:52

think one has to be

01:49:53



cautious about thinking one could

01:49:54

move to an appellate process,

01:49:56

was just an adjustment to

01:49:58

the existing system. Another would

01:49:59

one might think of of

01:50:01

taking the annulment process and

01:50:03

adding expanding the jurisdiction. But

01:50:06

I think that if you

01:50:07

have, you have to, if

01:50:08

you're going to have an

01:50:09

appellate process, is going to

01:50:10

provide consistency and predictability by

01:50:13

giving common interpretations to Provisions

01:50:17



that are common throughout Drive

01:50:19

investment treaties. Don't think an

01:50:22

ad-hoc process like that is

01:50:24

really going to work and

01:50:26

I think the experience of

01:50:27

a WTO is useful here.

01:50:30

Do you have a stablished

01:50:31

an appellate body and what

01:50:33

do they do? They gave

01:50:34

them for years with one

01:50:35

from you. About the first

01:50:38

appellate, body was composed of

01:50:40

people with expertise and international

01:50:43



trade, law expertise and public

01:50:45

international law expertise in dispute

01:50:48

settlement. What had happened? And

01:50:51

they had credibility. I think

01:50:52

all those states that necessary.

01:50:54

Like every decision they made,

01:50:56

they had credibility because I

01:50:58

had the authority of the

01:51:00

knowledge in the way they

01:51:01

work their opinions. What has

01:51:03

happened over time, is that

01:51:05

the expertise in trade law

01:51:08

while some have it is

01:51:10



not. So widespread the expertise

01:51:13

and public international law is

01:51:14

not. So, and background in

01:51:18

dispute settlement is not calm.

01:51:19

And so, what you have

01:51:21

Add was as the diminishing

01:51:24

Authority, the Appellate body progressed

01:51:27

the Secretariat played more more

01:51:29

major role. So that became

01:51:33

is if essentially the decision

01:51:36

making was becoming rigid and

01:51:38

was perceived that the Secretariat

01:51:40

was heavily involved in decision-making

01:51:42



and develop, our team members

01:51:44

know what we learned from

01:51:46

that we learn. I think

01:51:47

first that in order to

01:51:49

have a body that will

01:51:51

be credible in interpreting the

01:51:53

treaties, you could have individuals

01:51:56

who have expertise to go

01:51:57

to. People have individuals with

01:51:59

expertise and investment law, individuals

01:52:02

with experience in treating interpretation

01:52:04

an individual who experience than

01:52:06

running operations. If you don't

01:52:08



have those people on that

01:52:10

body, then you going to

01:52:12

have the same problem emerging.

01:52:15

This happens. Every shield with

01:52:16

Reliance on a secretary and

01:52:18

that means you have to

01:52:19

have a lot of people

01:52:20

with much long. Become so

01:52:22

not short for a year

01:52:23

and you look better people

01:52:24

where they can create sufficient

01:52:26

credibility of overtime and and

01:52:31

the confidence of the parties

01:52:35



in letting the system operate

01:52:37

for that period of time

01:52:37

rather than changing the four

01:52:39

years. If I don't like

01:52:42

individual members of the Appellate

01:52:46

body, not renewing. Its onslaught

01:52:47

of accepting a second types

01:52:49

of four-year term is not

01:52:50

really consistent with the long-term

01:52:52

credibility of an appellate body.

01:52:55

Finally, I say that a

01:52:58

body with experience and expertise

01:53:00

and longer terms will provide

01:53:04



that I will have the

01:53:05

necessary authority to manage of

01:53:07

Secretariat. And when the Secretariat

01:53:10

has greater expertise and the

01:53:11

individuals who are deciding the

01:53:13

cases, you can see what

01:53:15

is likely to her too,

01:53:16

and that something would have

01:53:18

to be avoided in the

01:53:19

fella protest. He has Nixon

01:53:22

could manage an appellate process

01:53:24

with Independence, the Secretariat, but

01:53:26

it would have to be

01:53:27



people with long-term much longer-term.

01:53:29

A much greater expertise than

01:53:31

simply talking to people to,

01:53:35

to take on this role

01:53:37

because they be politically acceptable,

01:53:38

rather than looking at the

01:53:40

real expertise that you need.

01:53:42

Thank you, thank you, close

01:53:45

out the session. I think

01:53:47

that I am happy to

01:53:48

do that. And part of

01:53:49

the reason I would like

01:53:50

to is Antonio's been working

01:53:51



on these issues since 2004.

01:53:54

And I remember when I

01:53:55

was a young associate dealing

01:53:58

with the tool Otter cases

01:54:00

and thinking back in 2001

01:54:02

to 2002, what do we

01:54:04

do with some of the

01:54:06

challenges and the creation of

01:54:07

consistency? If we if we

01:54:10

need it but Antonia was

01:54:12

one of the people who

01:54:12

led the charge. And as

01:54:14

you said Meg there's that

01:54:15



paper from 2006 that still

01:54:17

is available. It was also

01:54:19

a time. When the US

01:54:21

State was working to create

01:54:23

opportunities for people, to consider

01:54:25

appellate bodies, and I am

01:54:27

now in the vein of

01:54:29

History. Once again, old enough

01:54:32

to remember when European governments

01:54:34

told me that I was

01:54:35

ridiculous for purporting to suggest

01:54:37

an appellate body. Might be

01:54:38

useful, just keep that in

01:54:40



mind. 20 years ago, they

01:54:42

laughed at me and I

01:54:43

was taken aside and conferences

01:54:45

and strongly encouraged to do

01:54:46

more useful scholarship. Now. Haven't

01:54:49

been said, part of what

01:54:50

I want to make sure

01:54:51

people here is the political

01:54:53

winds shift, and for my

01:54:55

money. The only thing that

01:54:58

makes the most sense to

01:54:59

me is exit must be

01:55:01

involved in any conversation related

01:55:03



to an appellate body, less

01:55:05

International rule of law work

01:55:08

at cross-purposes rather than in

01:55:10

harmony. Thank you. That's a

01:55:13

tremendous. And I want to

01:55:14

thank all of our panelists

01:55:16

bought a lot of expertise

01:55:19

and really good thoughts to

01:55:21

a diverse range of topics.

01:55:23

And I want to thank

01:55:24

all of you who are

01:55:25

here looking person and remotely

01:55:27

and wish you a very

01:55:29



good rest of your Washington

01:55:31

arbitration week. So this will

01:55:33

close the proceedings for today.

01:55:34

Thank you.