

State-owned Companies as Investors and Claimants in Investment Arbitration *

Summary

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

The session at the Washington Arbitration Update, led by co-founder Jose Antonio Rivas, focused on the role of state-owned enterprises (SOEs) as investors in investment arbitration, particularly in the context of outbound investments from China. The panel featured prominent experts, including Professor Mark Feldman from Peking University and Dr. Wang Liu from the University of New South Wales, who highlighted the complexities surrounding the treatment of SOEs under international investment law.

Key topics discussed included the extent of protection for SOE investments under investment treaties and the Energy Charter Treaty (ECT). The panel addressed whether an SOE's relationship with its home state should influence jurisdictional determinations in arbitration cases. Dr. Wang noted that SOEs often face challenges in qualifying as investors due to their state ownership, which complicates their standing in arbitration. He emphasized the need for clear definitions and the interpretation of investment treaties to accommodate SOEs.

The discussion also touched on the increasing significance of Chinese SOEs in global markets, particularly through initiatives like the Belt and Road Initiative (BRI). Panelists expressed concerns about the potential for geopolitical tensions to affect the arbitration landscape, especially in countries with less robust legal frameworks.

Hugh and Vivien Lee shared insights on the practical realities faced by Chinese SOEs in international construction projects, emphasizing the importance of contract management and proper documentation to navigate disputes effectively. The session concluded with reflections on the evolving nature of investment arbitration and the necessity for reforms to address the unique challenges posed by SOEs in this context.

Authors

Mark Feldman, WANG Lu, Ian A. Laird, Hew Kian Heong, Vivienne Li, CAO Lijun, WANG Xuehua



Topics

State-owned Companies, Investors, Claimants, Investment Arbitration, Arbitration, State Companies, International Arbitration

Category

WAU

Full Transcript

00:00:00

This is a world of

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arbitration update at my name

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is Jose Antonio Rivas. I'm

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one of the co-founders of

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World Arbitration Update which was

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co-founded four years ago. This

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is our fourth edition and

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we are very lucky and

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honored to be here in

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Beijing with the incredible Council

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of arbitrators and in general

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the arbitration Community off of

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China and as a matter

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of teaching as an arbitrator

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and and I'm doing this

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to arbitration and because of

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those interests, it was a

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lot of fun actually to

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put together this panel. This

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panel is is I believe

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one of that that's going

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to be one of the

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Milestones of world arbitration out

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there. Do we have never

00:00:57

done this topic before neither?

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Washington arbitration with which we

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also co-founded 5 years ago

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at norene World arbitration update

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and I I say this

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without any any shyness. I

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really think that this panel

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has the best of the

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best that that that not

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only in China but in

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terms of offworld noted so

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luckily the proceedings will be

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recorded and then people will

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be able to see it

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not only here but beyond

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and with that I don't

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want to steal our moderators

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Thunder because he will be

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presenting each one of the

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panelists but let me share

00:01:42

with you that we're also

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very lucky to have Professor

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Mark Feldman a professor. Feldman

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is a professor of law

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at Peking University School of

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transactional Law and he joined

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the law school as an

00:02:00

assistant professor in 2011. He

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has taught more than a

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thousand and served as these

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advisor for more than 100.

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Students are in the university

00:02:13

in night in 2019. He

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served as JT faculty representative

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of the law school 10th

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anniversary alumni weekend and since

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2016. He has served on

00:02:26

the academic community of the

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University graduate school and I

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could go on and on

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no referring to know he's

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actually it's in that also

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his presence in the 80

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and a so conferences and

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so on and so forth,

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but I think that were

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really lucky because this panel

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has been working inside among

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themselves to bring today's Final

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to you. So Professor Feldman

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welcome and thank you for

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being here with us. Thank

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you. Thank you Jose into

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World arbitration update enter the

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Beijing arbitration commission for the

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opportunity and Jose. I have

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to say in terms of

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this panel. This is this

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is a busy time for

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me personally. It was not

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easy for me to make

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it to Beijing when I

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saw who was on this

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panel. I booked the flight.

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I made it to Beijing.

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So thank you for really

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putting together an incredible panel

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and I can just briefly

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introduce the topic and briefly

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introduce our panelists or today

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for the for the topic.

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We will be discussing state-owned

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companies as investors and claimants

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in investment arbitration the protection

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of outbound soe investment under

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investment treaties and the exit

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invention. There are significant amounts

00:03:51

of foreign investment by a

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Zoe's and a key question

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becomes to what extent should

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that outbound investment by a

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so, he's be protected under

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investment treaties and be protected

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under the exit convention. And

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I think there were a

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few key questions will be

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addressing today. One beam should

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an SOS relationship with its

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home state matter for purposes

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of determining jurisdiction under an

00:04:14

investment treaty or jurisdiction under

00:04:16

the exit Venture. And if

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so, why should an SOS

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relationship with its home state

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matter and continuing the point.

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If so, how should an

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SOS relationship with its home

00:04:30

state matter for purposes of

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determining jurisdiction. So that will

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be the topic today. Our

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presenter today is dr. Wang

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Liu based at the China

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international business and economic loss

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center in Sydney at the

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University of New South Wales.

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Dr. Wong recently served as

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scholar-in-residence at exit only the

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third scholar to hold that

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position at Aksarben. Dr. Wang

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previously worked with excited as

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a CO guest editor for

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an exit review special issue

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on SOL investment. Dr. Wang

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holds two phds one from

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the University of Liverpool in

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the UK and the other

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from Xi'an. Jiaotong University in

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China. And Laird partner and

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chair of the international dispute

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resolution group at Crowell &

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morning Warren based in Washington

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DC and has more than

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25 years of experience representing

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clients in investment treaty arbitration

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with a particular focus on

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the energy and natural resources

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sector in holds a ba

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from the Gill and lob

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from the University of Windsor

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and an MBA from the

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University of Cambridge. You can

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honk head of international arbitration

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construction and projects at Rodger

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and 10 in Singapore currently

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based in Shanghai who has

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more than 30 years of

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experience advising Chinese and international

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clients on major infrastructure projects

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and construction disputes in many

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parts of the world since

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2018. She has been recognized

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as an eminent practitioner in

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the field of construction by

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Chambers greater China region who

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holds an job from the

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National University of Singapore Singapore.

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Miss Lee has nearly 10

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years of experience in the

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Consulting industry specializing in construction

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disputes holding an llm in

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comparative and international dispute resolution

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from Queen Mary University of

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London and a bachelor's in

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Material Science and Engineering from

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the National University of Singapore

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deputy director. Foreign related Department

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in Beijing Equity partner at

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Lagoon in Beijing Salvage run

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has represented clients in over

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200 arbitration cases, including investment

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treaty arbitration quite notably Salvage.

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When was a key member

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of the successful defense of

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China in an important case

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when holes in lob from

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you I B E Law

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School here in Beijing. And

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then lol. I'm from UC

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Berkeley doctor in Beijing at

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Hong Kong and partners with

00:07:20

a PhD in law from

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you i e u i

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v e in Beijing previously

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served as associate dean of

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Law School in Beijing also

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has served as director of

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the committee of international and

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WTO legal Affairs of The

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all-china Lawyers Association. So with

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those introductions, we will begin

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with our present. Dr. Wong

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Thank you, Mark for your

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very kind introduction and how

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they everyone is at older

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and privilege to participate in

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the world in 2024 China

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inside in Beijing. And I

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appreciate the opportunity to presents

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Allstate on Enterprises as investors

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and the client's investment arbitration

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before a panel of distinguished

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experts International arbitration. So States

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Enterprises is one of the

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most significant and complex challenges

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in International Investment law and

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arbitration and I will discuss

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this issue in Straight Talk

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contact the problem and the

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challenges and Prospect. So the

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contacts off the soe issues

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despite some of that kids

00:08:46

off dead reform and privatization

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as always remains an important

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economic force in the world

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economy. According to the ank

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hats as teammates. There are

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approximately with operating world wild

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controlling trillions of dollars in

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foreign assets over half of

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a so, he's off from

00:09:15

developing economies such as China

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Melissa South Africa and Russia

00:09:21

are in the European Union

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in response to the covid-19

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governments have implemented virus to

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support businesses. So that potentially

00:09:35

increased the number of SOS,

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especially in Europe and he

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turns off. Sex hurt for

00:09:41

saxophone has a Zoe's a

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particularly active in strategic sectors

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such as energy and natural

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resources infrastructure transportation and out

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of communication for investment by

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state-owned Enterprises is not a

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new phenomenon their significance Global

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expansion, especially from countries. Like

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China has raised wystrach All-Stars

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in Costa say regarding the

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National Security and Auntie competition

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for merrilees down from the

00:10:16

state ownership and the exercise

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all governmental functions issues in

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recent Years also highlights a

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clash between different models of

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Economic Development as well as

00:10:37

the impact of geopolitical and

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economic. So what's the problem

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give us the prominence of

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a Zoe's inferring that as

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always have been lied on

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investment arbitration to resolve their

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dispute with the hostess days

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are about to receive a

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settlement the SDS not providing

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for investors against his procedure

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and substantive rights that can

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be directly enforced against how's

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the states and their entities

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under International play? To clarify

00:11:26

investment arbitration is not exclusively

00:11:30

based on investment trees that

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can also based on the

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investment contracts or domestic law

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called the hostess days. In

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fact as ambassadors from both

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developing and developed countries have

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her to arbitration against the

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hostess days based on investment

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contracts or the Apple boy

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message vidi the primary and

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fundamental problem in investment arbitration

00:11:56

involving a Zoe s climate

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is 1Weather app, so he's

00:12:02

qualified investors and to whether

00:12:06

as a standing before they

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so the first question relates

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to the definition of us

00:12:13

under the investment treaties. Generally

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ambassadors is Defiance probably including

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both natural persons and leave

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a person and the majority

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of investment treaties did not

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distinguish between letters on the

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base is all the ownership

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this situation is involving with

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investment treaties come to address

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as though he's more explicitly

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and frequently by making a

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reference to Enterprises that our

00:12:43

governments of the old or

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controlled in the definition Claus

00:12:47

some investment treaties even go

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further up to explicitly cover

00:12:52

States as investors. By contrast

00:12:56

explicit excuse Explorer of as

00:12:59

always as qualified investors is

00:13:02

rare in lesbian 3-day practice.

00:13:04

The rationale for Ike's Place.

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It is cordoned off as

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always any the definition of

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a master's maybe they'll reinstate

00:13:11

obviously, it will clarify the

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status off at least as

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protected investors and for some

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states. It is also ensure

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that as always I'm not

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used to such events International

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obligations as an arbitration tribunals

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and respond as days have

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not really a draft of

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the status off at so

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he's suggesting that's our investors

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assumed to be covered by

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the broad definition of investment

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provided by most investment treaties

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view of the unique characteristics

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of a Zoe's whether as

00:13:48
a result of protecting investors

00:13:49
can be problematic for example

00:13:52
in the head on down

00:13:53
case. We've seen that the

00:13:57
issues being discussed by the

00:14:01
tribunal and in that case

00:14:03
there was found in States

00:14:04
argue that the Chinese are

00:14:06
so we did not qualify

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as a vast her under

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the China not accept this

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argument and found no basis

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in the investment treaty to

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impose restrictions on you bastards

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based on their organization business

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ownership or control before the

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tribunal the state ownership was

00:14:30

not relevant for the purpose

00:14:31

of the status of a

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so, he's as economic entities

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Under The Apple Tree and

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there's no evidence that the

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Chinese as a least active

00:14:42

at 12 a.m. Instrumental instrumental

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tea of Chinese government under

00:14:48

its Express instruction. Similarly in

00:14:51

cat naps versus Ukraine case

00:14:54

and Central tribunal determined that

00:14:57

the soe in question was

00:14:58

not controlled by the Russian

00:15:00

government according to the structure

00:15:02

and function of past while

00:15:04

the tribunal found its necessary.

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It's unnecessary to decide what

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is a public entity illegible

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to make claims under the

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investment Treaty of Paris court

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of appeal ruled that the

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cits contacts a test does

00:15:22

not mandate that investors be

00:15:25

private. And so the more

00:15:28

the courts how that's the

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SOS connections to the government.

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Did not deprive the company

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office structural organic. And is

00:15:38

there an eternity? So they

00:15:42

ask they have cases review

00:15:45

that's many vitamins have you

00:15:46

knows except as always as

00:15:49

protecting investors on their investment

00:15:51

treated but was pretty top-notch

00:15:55

clarify the status of a

00:15:57

Zoe's at protecting vouchers tribunals

00:16:01

will need to interpret in

00:16:02

the issue and their disappearance

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remains uncertain as a depends

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on the structural and functional

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tests fly to the specific

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case. So far example in

00:16:12

a case against the Mexico

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the majority of the tribunal

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held at being State on

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alter the commercial nurture off

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the as always activities and

00:16:23

the private nature of the

00:16:25

relevant Investments and the brt

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did not exclude as a

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baby from its scope. However,

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the wall of the arbitrator's

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how bad is a claim

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that outside the scope of

00:16:38

the tribunal Street Station because

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that's all we at As

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a agents off the stage.

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The next question is whether

00:16:45

as police has standing before

00:16:47

he passed her State arbitration

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and this question is linked

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to but not a difference

00:16:52

from a police as protecting

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Busters on their investment rate

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is the standing of has

00:16:58

always particularly complicated in the

00:17:00

complex off exit arbitration as

00:17:03

reflected in the jurisdiction of

00:17:07

the AC tribunals is confined

00:17:09

to this is between a

00:17:11

Contracting State and National of

00:17:14

another contact him stay so

00:17:17

in other words exit. Have

00:17:20

no jurisdiction to arbitrate disputes

00:17:22

between Tuesdays or between two

00:17:25

private entities according to article

00:17:29

25 paragraph to be a

00:17:32

national of another contacting States

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is defined to include any

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person. So it appears that

00:17:41

the state-owned Enterprises can be

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considered as a national off

00:17:46

another contract Tuesdays, but some

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argue that the size is

00:17:56

a promotion of private International

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Investment and private International capsules.

00:18:02

So efficient is exclusively to

00:18:06

private event and that means

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that as always even if

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I was protecting bastards, I'm

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not able to access to

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exceed arbitration. However, as of

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today no exit Tribune Fictions

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to athlete as climate is

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a landmark case as it

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appears as if worst case

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where the tribunal have adopted

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at the flights that have

00:18:32

applied by exit Chief Architect

00:18:35

her Aaron Rodgers to be

00:18:38

specific according to the rock

00:18:41

is tasked a mixed economy

00:18:44
company or governmental Corporation should

00:18:49
not be disqualified as a

00:18:52
natural now of another contract

00:18:54
Tuesday's unless it is acting

00:18:56
as an agent for the

00:18:57
government or is discharging and

00:19:00
essentially governmental functions. In this

00:19:03
case, you know how that

00:19:06
in determining whether as all

00:19:07
we need is charged or

00:19:09
exercised a governmental functions. The

00:19:12
focus must be on the

00:19:13
nature of days activities rather

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than their peppers. The tribunal

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concluded that the activities of

00:19:19
the SOB where is usually

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commercial in nature of the

00:19:25
soe was promoting the government

00:19:28
of all, this is what

00:19:30
purpose of this days. Impeaching

00:19:34
Urban Construction Group vs. Yemen

00:19:36
application of the past that

00:19:42
you complain that the Chinese

00:19:46
as a wee participation in

00:19:48
an airport project was commercial

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and in particular the Chinese

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government's role as the ultimate

00:19:57

decision-maker was in the word

00:20:01

of the words of the

00:20:03

tribunal that's too remote from

00:20:05

the facts of airport project

00:20:07

to be relevant similarly in

00:20:10

the master versus tank has

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deprived. You know. It's a

00:20:14

Sobe reasoning and rejected the

00:20:16

argument that the dispute was

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between Tuesday's finding that bass.

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No, we did not exercise

00:20:22

a public function or the

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government exercise that control over

00:20:26

the climate and its investment

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decision. Although the project at

00:20:32

is described as probably the

00:20:34

best guy in deciding as

00:20:37

a as a climate zone

00:20:39

the exit arbitration. Actually the

00:20:42

cat does not resolve the

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problem but leave cuz they're

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all because serious in its

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application and and the Tribune

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O's the cereal indicate that

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standing under the exit to

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measure is determined not by

00:20:56

power but by its function

00:20:58

and assessing the function to

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tribunal should focus on the

00:21:01

nature rather than the purpose

00:21:04

of the activities of the

00:21:05

distinguishing between the nature and

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purpose of all fit activity

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is not always clear. And

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given the difficulty International tribunal

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is the true purpose often

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activity conducted by performing baths

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her a more reliable assessment.

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My instead rely on these

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facts about the activity and

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to hear the definition of

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bosmans could play a role.

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Well, it is uncertain whether

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future probably knows World staff

00:21:35

and apply the product is

00:21:37

test. It is evidence that

00:21:39

the number of dispute fish

00:21:41

react. So he's as climate

00:21:43

has increased dramatically over the

00:21:45

past that is understanding of

00:21:47

a Zoe's is expected to

00:21:50

face closer. That's what reviews

00:21:55

at IC Atlanta landscape. It

00:21:58

becomes apparent that we are

00:22:00

experiencing The Winds of Change

00:22:02

reform efforts have been discussed

00:22:05

and debated before the official

00:22:06

working group 3 and the

00:22:08

exist as a leading institution

00:22:10

in the ICS conducted its

00:22:12

most expensive moderation modernization and

00:22:17

released its new rules and

00:22:19

regulations in 2022. And in

00:22:22

parallel with the rise of

00:22:24

a Zoe's as investors and

00:22:26

climates, then you go to

00:22:28

a shop some treat his

00:22:29

offered a new Avenue to

00:22:31

adopt an evasive as a

00:22:32

weedy safe place and the

00:22:34

typical examples include this a

00:22:37

t t t t s

00:22:37

o e chapter which is

00:22:39

arguably the most ambitious attempt

00:22:41

to regulate a Zoe's at

00:22:43

the international level and we

00:22:45

know China has formally submitted

00:22:47

a request to rejoin cptpp.

00:22:49

All those all come is

00:22:51

far from of shorts Tidus.

00:22:53

Vacation clearly indicates that I

00:22:55

tried us is prepared to

00:22:57

embrace. That's a b c

00:22:59

d p s o u

00:23:00

vowels and another example is

00:23:02

a China comprehensive assessment while

00:23:06

China has formally grades for

00:23:08

the first time to incorporate

00:23:10

they as a weed is

00:23:11

in Flames. Although he is

00:23:15

currently pending as implications for

00:23:17

us. We regulations and investment

00:23:19

treaty making you should not

00:23:21

be underestimated as a significant

00:23:31

regulatory challenges for Hostess dates

00:23:34

and required tribunals to interpret

00:23:36

the application of investment treaty

00:23:38

provisions and AC Collision in

00:23:42

practice the central question focuses

00:23:45

on whether a Zoe's are

00:23:48

qualified investors and has standing

00:23:50

investors date arbitration. However, A

00:23:54

more profound problem caused by

00:23:56

its beliefs as investors is

00:23:59

the Blurred boundaries between public

00:24:02

and private attributable to the

00:24:05

unique features of a Zoe's

00:24:07

including State ownership and operation

00:24:10

in non-commercial capacities. So in

00:24:13

this contacts are revisits of

00:24:15

investment 3D necessary and desirable

00:24:19

as they need to consider

00:24:23

whether they are prepared to

00:24:25

face challenges from the forehead.

00:24:27

So he's wearing they only

00:24:29

Buster's International arbitration or if

00:24:32

they would prefer to exclude

00:24:34

us from Eva protections to

00:24:37

avoid potential as they have

00:24:39

claimed as for the latter

00:24:41

option. It is also important

00:24:42

to be aware of the

00:24:44

potential negative impacts of this

00:24:46

could have on Westmont by

00:24:48

for real so nice. although

00:24:52

training based Ambassador say Darby

00:24:56

Creek a promising for SOS

00:24:59

as climates according to the

00:25:01

existing jurisprudence contact face arbitration

00:25:04

should not be overlooked and

00:25:06

the compactor treaty-based arbitration. Does

00:25:09

Daniel pastoli's tends to be

00:25:11

last contested in contact face

00:25:13
arbitration, although another issue may

00:25:15
arise as to whether the

00:25:17
disputes is purely a contractual

00:25:19
claim. I think I should

00:25:21
stop here and thank you

00:25:23
again for your attention, and

00:25:25
I look forward to this

00:25:27
discussion. Thank you. Thank you

00:25:33
want to do for that

00:25:34
very effective overview of the

00:25:36
current legal landscape. And so

00:25:37
we can see what some

00:25:39
of the fundamental questions are

00:25:40
in terms of to what

00:25:41
extent should SOS be subject

00:25:43
to different treatment to special

00:25:44
rules. And we see that

00:25:46
there are certain issues arising

00:25:47
generally under investment treaties and

00:25:50
then a few issues that

00:25:51
are particular to the exit

00:25:52
invention. We're going to transition

00:25:54
a bit from the legal

00:25:56
landscape to to Morven on

00:25:58
the ground. Look at the

00:25:59
factual reality of soe investors

00:26:02

and in our next two

00:26:03

presenters will be focusing on

00:26:05

more of that on the

00:26:06

ground factual reality. I we

00:26:08

can start with with Hugh

00:26:10

who will be discussing some

00:26:11

of his experience are particularly

00:26:13

in in with construction and

00:26:15

with soe investors and after

00:26:17

Hugh Vivien Leigh again, who

00:26:19

is joining virtually Vivian can

00:26:21

share some of her experiences

00:26:22

as well in the construction.

00:26:24

A sector so Q please.

00:26:29

Thank you, Mom. I'll just

00:26:32

pick up from what you

00:26:34

said in her speech in

00:26:38

the presentation and I think

00:26:40

she started off with the

00:26:42

increasingly important role of the

00:26:45

isosceles or Chinese at Zoe's

00:26:46

in the international market and

00:26:51

I think many of you

00:26:53

agrees that the most high-profile

00:26:56

and obvious example of the

00:26:58

Chinese SOS flexing their muscle

00:27:01

in the international market is

00:27:04

the belt and Road initiative.

00:27:06

Developed and grown in the

00:27:08

shade too. I think everyone

00:27:11

knows it's a Chinese state-driven

00:27:14

initiated and so unsurprisingly the

00:27:18

the pot the company's all

00:27:21

the Chinese investors leading that

00:27:23

charge Chinese SOS. The investments

00:27:29

into the Bri countries over

00:27:34

number of countries. They are

00:27:35

made in a number of

00:27:36

countries and these countries I

00:27:40

think many will agree that

00:27:42

are some of them are

00:27:43

not well-known for upholding the

00:27:46

rule of law, which I

00:27:48

think then brings into Eminence

00:27:51

the importance of a treaty

00:27:54

protection and invariably the possibility

00:27:58

of a treaty arbitrations is

00:28:01

these Chinese Investments going into

00:28:04

the Bri countries should be

00:28:06

compromised or a by gunmen

00:28:10

action some form of government

00:28:12

action. And so so on

00:28:15

that note I stopped on

00:28:16

that note that it was

00:28:19

the increase of Chinese investment

00:28:21

by Chinese I so he's

00:28:23

into the Bri countries. It

00:28:25

is foreseeable that increasingly that

00:28:29

would be I will be

00:28:30

treating arbitration is coming out

00:28:32

of the investments into the

00:28:34

Bri countries. the next issue

00:28:37

I like to touch on

00:28:38

it would be whether it

00:28:41

is possible that the Chinese

00:28:45

are so he's would not

00:28:48

would be deprived of protection

00:28:51

because Treaty protection because they

00:28:57

are Chinese SOS personally. I

00:29:00

think that would be unlikely

00:29:04

that down in cases where

00:29:09

a treaty protection is is

00:29:12

deprived because a company or

00:29:16

claiming seeking protection treaty protection.

00:29:19

It's an soe I would

00:29:21

be surprised that that would

00:29:23

be different for investments into

00:29:26

the Bri, especially if applying

00:29:30

the Roches test. I don't

00:29:32

think the SOS participating in

00:29:35

the Bri actually acting as

00:29:38

agents of the Chinese state

00:29:40

or discharging governmental functionality India

00:29:46

investments into the Bri. But

00:29:49

I don't think it would

00:29:51

be unsociable that a clever

00:29:53

lawyer when faced with a

00:29:57

plane would actually come up

00:30:00

with an argument that the

00:30:02

Bri is a directive of

00:30:05

the Chinese State and Chinese

00:30:07

a Zoe's a participating in

00:30:10

the VR. I actually acting

00:30:12

as agents of the Chinese

00:30:13
state or discharging a governmental

00:30:17
functionality. But again, I think

00:30:22
that's where the Roches test

00:30:24
becomes quite quite important. I

00:30:27
mean personal leave. I think

00:30:28
if you apply it correctly.

00:30:30
That shouldn't be a correct

00:30:32
argument. But but then but

00:30:35
often as we all know.

00:30:40
Encouragement with incentives by the

00:30:43
Chinese government trying to distinguish

00:30:46
that from the directive the

00:30:48
lines can sometimes be blood

00:30:51

like similar to conversations, which

00:30:55

I have with my wife.

00:30:57

I don't know whether she's

00:30:58

encouraging me to do something

00:30:59

or directing me to do

00:31:01

something self. So moving on.

00:31:07

Into my area of specialty.

00:31:10

I'm not an expert in

00:31:12

investment arbitration. I I must

00:31:14

confess first. So I do

00:31:16

a lot with construction disputes

00:31:17

and I do a lot

00:31:18

with construction companies and funnily

00:31:22

enough of that Bri projects

00:31:25

actually construction projects. They're not

00:31:28

really investment projects in the

00:31:30

majority of investments in both

00:31:32

his fraction projects Chinese companies

00:31:35

going to the Bri countries

00:31:37

building all sorts of into

00:31:39

structure for the host countries

00:31:42

and all these projects will

00:31:44

be will be premised on

00:31:46

contracts and very detailed contracts

00:31:49

are signed. So the question

00:31:51

will be how many of

00:31:53

these projects call me of

00:31:55
the disputes claims will actually

00:31:58
end up in treaty arbitrations.

00:32:00
My suspicion is most of

00:32:03
the disputes or claims would

00:32:06
go the country. Contract application

00:32:08
Root rather than the treaty

00:32:11
arbitration route. I think that

00:32:17
will be the case. I

00:32:18
I won't be building a

00:32:19
practice based on observation because

00:32:21
I will be baby able

00:32:22
to pay the rent. So

00:32:23
it's more likely that a

00:32:25

lot of the disputes coming

00:32:26

out or I would be

00:32:28

contract-based arbitration cases rather than

00:32:32

investment Treaty of cases, but

00:32:35

it is possible. It is

00:32:38

possible that we will see

00:32:41

a few I don't think

00:32:43

they'll be many coming out

00:32:45

to Bri despite the scale

00:32:47

of the be. Alright, and

00:32:49

and I would Hazard a

00:32:52

few guess as to why

00:32:55

this might be the case.

00:32:57

I think at least from

00:33:00

what I've seen in many

00:33:02

of these projects is that

00:33:04

was any thinking that The

00:33:08

arbitration law should be should

00:33:11

be employed. I think one

00:33:13

reason would be the plains

00:33:15

or the losses that the

00:33:17

claimant on the Chinese as

00:33:18

we playing at once to

00:33:20

bring Falls outside the scope

00:33:22

of the underlined contracts. So

00:33:25

I quite often and where

00:33:29

there might be an imbalance

00:33:31

in the bargaining positions and

00:33:33

in the contract some of

00:33:35

the soe plans may have

00:33:38

signed away sitting right where

00:33:40

they are unable to clean

00:33:41

sudden losses. This happens quite

00:33:43

a lot in construction contracts

00:33:46

where you agree to limit

00:33:48

your claims to certain types

00:33:50

of losses, but not other

00:33:52

types of losses. So that's

00:33:55

one possibility. You can go

00:33:59

down the tree arbitration route

00:34:01
to in order to claim

00:34:02
losses that I'm not possible

00:34:05
under the under the underlying

00:34:07
contract. The other possibility we're

00:34:11
sitting planes are actually divided

00:34:13
under that underline contracts sew-in

00:34:16
in construction contracts by Austin

00:34:19
you have very strict claims

00:34:21
Provisions, which which imposes time

00:34:24
boss is the notices are

00:34:26
not put on putting on

00:34:27
time and also you may

00:34:30
have cases and I've seen

00:34:32

cases where translate lie dormant

00:34:35
for a long time and

00:34:36
shoes of limitation. Periods at

00:34:43
the end and the claims

00:34:45
underline underline contracts are unable

00:34:48
to be prosecuted under the

00:34:50
contraction sells the sudd. I

00:34:55
reason I which I think

00:34:56
is possibly quite likely to

00:35:01
be the reason real reason

00:35:03
why she job positions have

00:35:04
to be resulted to is

00:35:05
in the underlying contract. The

00:35:09
Chinese soe has signed up

00:35:11
to a dispute resolution Clause

00:35:13
that is not very friendly

00:35:14
to them. For example of

00:35:17
the species are to be

00:35:18
referred for resolution by the

00:35:22
local courts. And when you

00:35:24
are actually dealing with a

00:35:27
government entity of the government,

00:35:29
I don't think any Chinese

00:35:30
s o u l e

00:35:32
rate is chances of succeeding

00:35:34
on this plane in the

00:35:35
in the in the local

00:35:37

court. And therefore you have

00:35:38

to jump out of the

00:35:40

framework off of the car.

00:35:41

And that will result to

00:35:43

the protection of treaty arbitration

00:35:45

rather than the contract based

00:35:47

off of traction. I think

00:35:50

that concludes my observations and

00:35:53

comments and I think the

00:35:54

opportunity for being able to

00:35:56

participate in this event and

00:35:58

also to be set with

00:36:00

such prominent members of the

00:36:02

of the industry. Thank you.

00:36:07

Thank you so much you

00:36:10

for raising really interesting issues

00:36:12

about the role of Bri

00:36:13

how might Bri affect the

00:36:15

analysis on my Bri complicate

00:36:18

the analysis. I'm teaching an

00:36:20

investment for a divorce right

00:36:21

now. It is one issue

00:36:22

that we discuss is thinking

00:36:24

about the u s e

00:36:25

u in China with respect

00:36:27

to investment treaty arbitration right

00:36:28

now the EU obviously wants

00:36:30

to move to a court

00:36:31

the us at the moment

00:36:32

at best is ambivalent at

00:36:33

best two of the three.

00:36:35

I think China probably looks

00:36:36

like that the strongest supporter

00:36:38

of investor-state arbitration and Bri

00:36:40

obviously is playing a role

00:36:42

with that support. But then

00:36:43

you raise the question does

00:36:44

the existence of the Ry

00:36:45

possibly complicate the analysis of

00:36:47

the availability of treaty protection

00:36:50

do continuing our discussion of

00:36:52

realities on the ground. We're

00:36:54

going to turn to Vivien

00:36:54

Leigh who I understand is

00:36:56

joining us virtually. Thank you,

00:37:00

Mark. Thank you everyone. I

00:37:02

think you misheard Lou and

00:37:04

Hugh for the extremely insightful

00:37:05

presentation. I also want to

00:37:07

thank waumba see you for

00:37:10

having me. Unfortunately. I cannot

00:37:13

join you in person this

00:37:14

time, but I'm a grateful

00:37:15

for the opportunity to connect

00:37:17

virtually and I hope you

00:37:19

can hear me clearly. Ask

00:37:22

mrs. You mention Chinese are

00:37:24

so he's a big players

00:37:26

in Global Construction market and

00:37:28

they have a strong presence

00:37:29

overseas. I'll be going to

00:37:30

lay in the developing regions.

00:37:32

So today I will share

00:37:34

my experience working with the

00:37:35

Chinese are so he's doing

00:37:37

construction projects overseas some of

00:37:41

the challenges they face in

00:37:42
arbitration proceedings and I will

00:37:45
also take some trying to

00:37:47
say is that I've also

00:37:48
which may be implemented by

00:37:50
the Chinese as always construction

00:37:54
project cost of lead generate

00:37:55
one of the largest percentages

00:37:57
of commercial disputes in terms

00:38:00
of investment arbitration. What's the

00:38:02
number of construction case that

00:38:04
says lower they still constitute

00:38:06
a big portion. They made

00:38:08
up around 10% of the

00:38:09

total number of investment arbitration

00:38:12

registered and the exit and

00:38:14

by May 2023 Chinese soe

00:38:17

has acted as a claimant

00:38:19

in about 22 investor-state arbitration

00:38:21

of which about one-third arise

00:38:25

out of construction and Manufacturing.

00:38:28

The reason so many construction

00:38:30

projects ended up in international

00:38:32

arbitration is because they are

00:38:34

cross-border in nature. Is it

00:38:37

a technical complexity David lie

00:38:40

on the expertise of contractors

00:38:42

and subcontractors from around the

00:38:44

world their sheer size of

00:38:46

this project also requires found

00:38:49

from a range of domestic

00:38:50

and international investors. He's also

00:38:55

require heavy operating cost and

00:38:57

a round for a long.

00:38:59

Of time during which they

00:39:01

will be exposed to many

00:39:02

risks such as political instability

00:39:04

geopolitical tension and supply chain

00:39:08

disruptions. Especially during the cobra.

00:39:13

How dis risks are managed

00:39:15

very from one S3 to

00:39:16

another? All that you want

00:39:19

Chinese SOS who have Decades

00:39:21

of overseas experience. There's usually

00:39:25

a very diverse 49ers team

00:39:27

on the ground which plays

00:39:30

a crucial role in collaborating

00:39:32

with the local regulatory bodies

00:39:34

subcontractors and suppliers for that

00:39:38

reason. He's as though he's

00:39:40

an extremely sophisticated in almost

00:39:43

every phase of a construction

00:39:44

project lifecycle from Project drafting

00:39:47

project management and dispute resolution.

00:39:51

In dozens, I do not

00:39:53

see a huge difference from

00:39:55

this Chinese are so East

00:39:56

and any other top International

00:39:58

construction companies. I think the

00:40:02

one who can just go

00:40:03

get a little bit. Midsize

00:40:05

Constructors contractors will have limited

00:40:10

exposure has overseas. One important

00:40:13

reason I will say is

00:40:15

that there has not been

00:40:16

enough emphasis on contract management.

00:40:18

Well, it goes without saying

00:40:20

that a good understanding of

00:40:22

contract is crucial. But often

00:40:25

times we see parties do

00:40:26

not fully understand the risks

00:40:28

of location. Even when the

00:40:30

contractors you review the contract,

00:40:32

they also tend to focus

00:40:34

on those costs relative clauses

00:40:36

where time related Clauses take

00:40:39

a back seat. As someone

00:40:42

who often deals with project

00:40:43

delays and disruptions. I really

00:40:46

recommend the contractors and the

00:40:48

legal advisers to pay more

00:40:50

attention to and also to

00:40:52

comply with those contract contractual

00:40:55

procedures related to Fry's on

00:40:57

how the time required for

00:40:59

serving notices the duration required

00:41:01

to update the programs and

00:41:05

Records East could process can

00:41:09

go a long way to

00:41:10

was recovering General loss and

00:41:12

damages as well as Foundation

00:41:14

cost. The second and the

00:41:18

probably the most important practice

00:41:20

for all contractors including a

00:41:23

Zoe's is to maintain project

00:41:25

records. I cannot answer something

00:41:28

enough the importance of document

00:41:30

control anything in international arbitration

00:41:32

because it has a very

00:41:35

high threshold for parties to

00:41:37

prove their case documentary evidence.

00:41:40

It is an essential to

00:41:43

keep a fool and a

00:41:44

sedate record. This record should

00:41:46

be stored in a centralized

00:41:49

platform. I should contain all

00:41:52

relevant details to allow the

00:41:54

issues to be understood by

00:41:55

others including others within the

00:41:58

organization as well as external

00:42:01

advisors and consultants in England.

00:42:06

the king of external advisers

00:42:09

I think a lot of

00:42:11

the Chinese contractors are a

00:42:12

bit hesitant to engage one

00:42:14

unless it's absolutely necessary. And

00:42:18

I think this might have

00:42:19

to do with the traditional

00:42:21

approach in the domestic litigation

00:42:23

and arbitration where parties try

00:42:26

their best to use their

00:42:28

in-house team to do as

00:42:29

much as I could. However,

00:42:32

I open CDs approach not

00:42:35

being to work very well

00:42:36

in the international arbitration because

00:42:39

tribunal and the legal team

00:42:41

are sophisticated if it is

00:42:44

biased and one-sided play the

00:42:46

other side. Can you please

00:42:47

leave them in there? And

00:42:49

the tribunal will not believe

00:42:50

it and therefore you're not

00:42:52

standing on Solid Ground anymore.

00:42:55

However, as parties are also

00:42:57

becoming sophisticated. It has been

00:43:00

increasingly common these days to

00:43:02

see Chinese contractors engage external

00:43:05

legal counsels and even before

00:43:08

the start of arbitration you

00:43:11

allow them to do a

00:43:12

sense check. I think most

00:43:15

most a contractor find it

00:43:16

helpful to have such an

00:43:18

unbiased assessment of their potential

00:43:21

entitlement and explosion at a

00:43:24

early stage. Christian assistance in

00:43:28

determining whether or not we

00:43:30

should go for a patrician

00:43:31

and even if they decide

00:43:33

not to go this piece

00:43:35

out of this piece of

00:43:36

advice is still in the

00:43:39

process of settling discussion. That's

00:43:42

why based on my experience.

00:43:43

I try to her benefit

00:43:45

tremendously from carrying out a

00:43:48

neutral Ruiz assessment at the

00:43:49

early stage rather than adopting

00:43:52

a wait-and-see approach towards the

00:43:54

end. Unconscious at the time,

00:43:57

so I'll probably talk to

00:43:58

you back to you mark.

00:44:01

Thank you Vivian for a

00:44:03

really interesting points there on

00:44:05

the role that the construction

00:44:06

sector plays in and how

00:44:08

so much soe investment is

00:44:09

in the construction Center sector

00:44:11

and in one thought that

00:44:12

came to mind was as

00:44:14

as we think about protecting

00:44:16

classic f t i physical

00:44:19

projects. It's interesting to think

00:44:20

about that so much of

00:44:21

this SOB investment is what

00:44:23

we think of his kind

00:44:24

of classic F. Yeah, I

00:44:26

did absolutely should be protected

00:44:28

by investment treaties what we're

00:44:30

not getting into intellectual property.

00:44:32

We're not getting into financial

00:44:33

instruments. These are more of

00:44:34

the classic old-school kind of

00:44:36

investment is being made by

00:44:38

a so, he's landscape and

00:44:42

is going to share views

00:44:43

on the legal landscape in

00:44:44

particular treaty practice in please.

00:44:49

Thanks very much. Mark really

00:44:52

happy to be here on

00:44:54

this town with you. And

00:44:55

with our other panelists. This

00:44:58

is Antonio is Introduction to

00:45:02

critical topic and is certainly

00:45:06

generating more discussion. Just sort

00:45:10

of going back to some

00:45:11

of the comments that the

00:45:12

professor and I want to

00:45:17

touch on a couple of

00:45:18

points. I think I actually

00:45:22

mentioned the idea that I

00:45:24

stayed Enterprise would be involved

00:45:27

in exit arbitration Princeton 65

00:45:33

texted was in its original

00:45:36

state as a mechanism for

00:45:39

contract disputes bilateral investment treaties

00:45:43

and free trade agreements were

00:45:45

far and few in between

00:45:46

it and it really wasn't

00:45:48

thinking of the drafters that

00:45:50

they would be coming as

00:45:52

mechanism which would facilitate International

00:45:55

arbitration today. So contracts were

00:46:01

very much talk of mine

00:46:03

and Aaron Broncos to their

00:46:06

wiring was mentioning a who

00:46:08

was the first Secretary-general and

00:46:10

one of the key Rafters

00:46:11

of the exit convention taking

00:46:13

that into context. He understood

00:46:15

that the key role for

00:46:22

the Andersons in 1960 60

00:46:25

years ago in a big

00:46:26

construction projects were the meat

00:46:29

and potatoes of exit arbitration

00:46:32

in those old days. So

00:46:33

contact hasn't really changed and

00:46:36

the concerns about how you

00:46:41

would apply has asking around

00:46:46

for 60 years. So that

00:46:47

this this is a long

00:46:49

discussion and part of the

00:46:51

context of this discussion, of

00:46:52

course is released to a

00:46:55

tribution issues in general. We

00:46:59

have the international law commission

00:47:01

drafted and spent many years

00:47:03

working on the articles on

00:47:06

state responsibility. Which address Some

00:47:09

of these concepts with as

00:47:11

well and you know talking

00:47:12

about teaching your eye if

00:47:13

that's class. So we have

00:47:16

a similar class on attribution

00:47:19

and it really goes to

00:47:20

the question of what is

00:47:21

government and the ioc articles

00:47:26

that that out, you know,

00:47:27

we usually think of government

00:47:29

departments and the executive but

00:47:35

it clearly there are entities.

00:47:38

Sometimes they don't do that

00:47:42

carry out our governmental function.

00:47:43

That's the key phrase that

00:47:46

both braccus has used as

00:47:49

well as the ilc Articles

00:47:51

and we see that the

00:47:53

tribunals have mentioned. It did

00:48:00

really grappled with this issue

00:48:01

of understanding the nature of

00:48:03

the investor and similarly the

00:48:07

nature of the invest. And

00:48:09

what what really comes out

00:48:11

and all these cases is

00:48:12

that the investment is commercial

00:48:14

they're involved in commercial projects

00:48:16

and rode very well construction

00:48:23

projects for the most part

00:48:25

and those are commercial. Those

00:48:27

are not deemed. Where is

00:48:31

you know, what is a

00:48:33

governmental function as I think

00:48:37

I fairly lost kind of

00:48:39

its specific meaning and I

00:48:42

think this is where some

00:48:42

of the tension, you know

00:48:46

what that would entail and

00:48:48

we've seen a solution to

00:48:50

this rather than sort of

00:48:52

relying on a test or

00:48:57

the Broncos test. We see

00:48:59

the tree drafters have very

00:49:01

specifically address this issue and

00:49:04

let you know. I'm looking

00:49:05

at the China Canada foreign

00:49:08

investment. Protection agreement from 2012

00:49:11

and an article to sub

00:49:13

to the parties agreed as

00:49:16

to what that governmental Authority

00:49:17

governmental function would be and

00:49:19

they gave examples such as

00:49:21

the power to expropriate Ranch

00:49:23

license to prove commercial transactions

00:49:25
are imposing quotas these charges

00:49:28
and so forth and end

00:49:29
the key part of that

00:49:30
Clause that this has delegated.

00:49:32
So if you are looking

00:49:34
at a situation where there

00:49:36
is a delegation and delegations

00:49:38
are usually have kind of

00:49:39
illegal character and her formal

00:49:41
and involve those types of

00:49:42
powers, then that's the kind

00:49:44
of thing. Just those three

00:49:46
parties Canada and China identified

00:49:49

as as part of that

00:49:50

government to function and I

00:49:52

think the treaty drafters have

00:49:54

actually done a service here

00:49:56

and make some of that

00:49:57

in a cutie but again

00:49:59

looking at the history of

00:50:00

this and and pressure washing

00:50:01

mention the Sea tttt The

00:50:04

trans-pacific partnership agreement. That kind

00:50:09

of language in it as

00:50:10

well as finding the scope

00:50:12

of what would make a

00:50:14

staid Enterprise governmental of governmental

00:50:17
function. And if I was

00:50:19
actually some of the history

00:50:21
of it and if you

00:50:23
go back to the NAFTA

00:50:24
the North American Free Trade

00:50:25
Agreement from 1993. The party

00:50:29
is actually devoted a chapter

00:50:31
chapter 15 and fries and

00:50:34
they provided is simpler definition.

00:50:35
So, you know just to

00:50:38
be a little country. I

00:50:46
think there are mechanisms that

00:50:47
exist in in the treaty

00:50:49

rafting that can provide some

00:50:52

some more certain and I'll

00:50:55

finish on this point heart

00:50:57

of the nature of international

00:50:59

law and treaties is there

00:51:01

is some measure of uncertainty

00:51:02

and we saw Professor professor's

00:51:04

on yesterday start her discussion

00:51:07

mentioning that the Concept of

00:51:09

constructive ambiguity entry draft which

00:51:13

you know, like in any

00:51:15

contract or any kind of

00:51:17

negotiation. There are certain terms

00:51:19

and Concepts that sometimes don't

00:51:20

get the level of detail.

00:51:21

That would be what exists

00:51:24

in a perfect world or

00:51:25

that a perfect set of

00:51:26

lawyers are our or negotiating

00:51:30

parties would like and part

00:51:32

of that is what drives

00:51:33

the some of these cases

00:51:35

is the definition of investor

00:51:36

and the scope of what

00:51:38

an investor could be in

00:51:40

the not in the US

00:51:42

but not fully Define and

00:51:44

I think this is one

00:51:45

of those issues that treaty

00:51:47

drafting like to see Fifi

00:51:50

Fifi and like the China

00:51:52

Canada FIFA address much of

00:51:56

that issue so I could

00:51:59

just sit on an unrelated

00:52:00

point. I think they're there

00:52:03

are other tensions as well

00:52:05

and is dies at the

00:52:07

end. Talked about the reforms

00:52:10

that are going on at

00:52:12

excited and a bunch of

00:52:13

troll and there is no

00:52:16

doubt that I submitting these

00:52:18

types of treaty Clauses to

00:52:20

a form of dispute resolution.

00:52:23

Create substantial for uncertainty because

00:52:24

every treaty has some differences

00:52:27

the parties are different the

00:52:30

state-owned Enterprises are not uniform

00:52:32

buy any so that requires

00:52:35

looking at the specific facts

00:52:36

of each case and and

00:52:38

examining them in a Judicial

00:52:40

function. And that's sometimes they

00:52:42

do not as easy as

00:52:44

it sounds that's why we

00:52:45

have a little bit of

00:52:50

uncertainty final point and I'm

00:52:58

actually quoting Professor when he

00:53:00

or she said there are

00:53:00

no big suitcases have denied

00:53:02

jurisdiction to SOS who have

00:53:05

acted as investors claimants. And

00:53:09

I think that is a

00:53:10

reflection that tribunals have being

00:53:12

cautious. They they haven't gone

00:53:14

out. They extended the terms.

00:53:19

They seen in the treaties

00:53:20
has been viewed a very

00:53:22
conservative approach Anton in maintaining

00:53:24
of you that unless you

00:53:27
can demonstrate again on the

00:53:28
facts and in the circumstances

00:53:30
of that case that there

00:53:31
is a specific delegation of

00:53:34
some function governmental function, then

00:53:36
they're not going to step

00:53:39
outside their bounds and say

00:53:40
somehow that the state-owned Enterprises

00:53:43
acting and I think that

00:53:46
that's a really important point

00:53:47

there. There is a measure

00:53:50

as much as possible of

00:53:52

consistency in the perfect family.

00:54:02

No lawyer would ever do

00:54:03

that, but the law has

00:54:06

been relatively consistent. So I'll

00:54:10

stop there but the very

00:54:11

interesting presentation. Thanks so much

00:54:19

deeper look at at the

00:54:23

legal landscape. And as you

00:54:25

mentioned that when there are

00:54:26

situations where we need to

00:54:27

determine when an actor is

00:54:29

acting as a government, we

00:54:31

have very well establish rules,

00:54:32

right? We have well-established attribution

00:54:34

rules. The ilc Articles, you

00:54:36

mentioned the Broncos factors in

00:54:38

my you and I think

00:54:39

the view of many others

00:54:39

the Broncos Packers basically track

00:54:41

two of those aisles the

00:54:42

Articles. So so we have

00:54:44

very well establish rules for

00:54:45

determining when an actor is

00:54:47

acting as a government it

00:54:48

and I think in terms

00:54:49

of treaty practice if parties

00:54:50

to a treaty wanted to

00:54:51

part from those customary rules,

00:54:53

they're free to do when

00:54:54

they're free to take a

00:54:55

different policy in their treaty

00:54:57

elect specialis and then depart

00:54:58

from the underlined customary international

00:55:00

law principal. So thank you

00:55:02

again for that discussion. We're

00:55:04

not going to turn in

00:55:05

particular to the topic Chinese

00:55:06

are so he's at South

00:55:07

Region is going to be

00:55:08

leading that discussion at Allegiant,

00:55:11

please. Thank you, Mark. Good

00:55:14

morning. Everyone. It's a pleasure

00:55:15

to be here participating in

00:55:18

this important event that will

00:55:24

buy my college professor and

00:55:29

the marks himself as a

00:55:33

legal issues in your relationship

00:55:35

SOS master and the international

00:55:42

US Open two documents as

00:55:46

well as it's a standing

00:55:48

for the Cure in the

00:55:49

context of a exit Navigation

00:55:51

exit to mention as well

00:55:54

as the broke his test

00:55:57

and the issue of attribution

00:55:59

for the Chinese practitioner when

00:56:01

we talked about this issue

00:56:03

of a standing we are

00:56:05

always only focus on really

00:56:09

two cases of why is

00:56:11

that Mongolia and the other

00:56:14

is a picture of a

00:56:15

big construction company vs. Yemen

00:56:17

that those cases a profitable

00:56:20

already mentioned discussion. I have

00:56:27

actually learned a lot from

00:56:28

all three of them, you

00:56:30

know, the other cases and

00:56:33

the recorded IQ Fusion issue.

00:56:37

I also will control you

00:56:41

suck you and I think

00:56:43

it's a weaving from Secretariat.

00:56:44

The user of the reasons

00:56:46

are particularly accuser of the

00:56:48

reason that sometimes you might

00:56:52

ask her because the contract

00:56:57

clause is known as he's

00:56:58

really friendly to the Chinese

00:57:01

are so he's so they

00:57:02

may need to look at

00:57:04

the contract on the six

00:57:07

other remedies. They are the

00:57:08

rules for remedies. I think

00:57:11

folks Ado prefers. I just

00:57:14

gave to offer my office

00:57:16

operations because you in recent

00:57:18

years. We have loved being

00:57:20

frequently. I inquired by Chinese

00:57:23

companies many of whom SOS

00:57:26

in relation to their outbound

00:57:29

device Monopoly card again. Bri

00:57:32

countries. From those contacts I

00:57:38

noted that are there are

00:57:40

two Tendencies. Why is the

00:57:43

Chinese companies are Chinese investors?

00:57:45

Are you still tend to

00:57:48

be reluctant when it comes

00:57:51

to a concentration of filing

00:57:54

a treaty of attrition if

00:57:59

we talked about this topic

00:58:00

15 years ago most of

00:58:03

the soe is there your

00:58:05

house, so we are not

00:58:06

aware of her. The option

00:58:08

for filing I asked you

00:58:10

is because of events like

00:58:13

this are they have received

00:58:15

legal education over the 15-year

00:58:17

time. So now it is

00:58:19

if you have any conversation

00:58:22

with the Council of the

00:58:25

soe switch I engage in

00:58:26

open us when the most

00:58:28

of them aware of this

00:58:30

option contract remedies they missed

00:58:34

you. 3D remedies under the

00:58:36

investment treaty or no treaty

00:58:40

agreement between China and wherever

00:58:43

they are you watching the

00:58:47

reluctance to exist. I think

00:58:51

one of the main reasons

00:58:53

he has to do with

00:58:54

a Chinese couch in Chinese

00:58:57

person's legal percent residual person

00:59:01

C10 to try to avoid

00:59:04

any dispute with the government.

00:59:06

So there is no tradition

00:59:09

of a taking all the

00:59:11

man. I need form of

00:59:13

legal action and that also

00:59:15

happens when it comes to

00:59:18

you know, what legal actions

00:59:19

against the sovereign states or

00:59:22

China, right? The other reason

00:59:26

I think I slept because

00:59:28

of a more or less

00:59:30

to send it to you

00:59:31

to the Diplomatic. Relationship between

00:59:36

China and the particular holster

00:59:40

state that where they are

00:59:41

you asking. But I think

00:59:45

this is a or rate

00:59:47

if it's not necessary consideration.

00:59:54

Because not every investment outside

00:59:57

China not every dispute may

00:59:58

have an impact on the

01:00:00

palace roof relationship. They may

01:00:03

have an impact only if

01:00:05

it's really, you know, shoot

01:00:08

you my best friend and

01:00:10

a huge losses are at

01:00:12

stake. However, I can practice

01:00:16

you know, some of the

01:00:17

s.o.s. Band. When are you

01:00:18

come to us. They always

01:00:21

ask questions like they say,

01:00:23

do you have a any

01:00:25

channel of a conversation of

01:00:29

communication with some Ministry of

01:00:31

Foreign Affairs or mystery of

01:00:34

a Commerce because when they

01:00:37

probably was encouraged by the

01:00:41

government may be sent to

01:00:43

you last and maybe says

01:00:46

ask me some time is

01:00:48

maybe and Yar see, you

01:00:50

know, there is dispute those

01:00:53

organizations and agencies may not

01:00:56

be the right combination see

01:00:58

to communicate two ways are

01:01:00

you know any communication with

01:01:02

his ministry of Commerce Minister

01:01:03

of Foreign Affairs? That's not

01:01:05

require any Chinese or any

01:01:08

Chinese new regulations before? Election

01:01:16

office location the other is

01:01:21

accountability Chinese are so he's

01:01:28

a lot of the time

01:01:30

they how to sync legal

01:01:32

remedies because they are required

01:01:33

to do so when there

01:01:36

are quite a number of

01:01:37

a regulation important regulation is

01:01:41

this what is called the

01:01:48

mayor's on managing the legal

01:01:52

dispute cases of central SOS

01:01:55

this why was issues by

01:01:57

ASAC in 2023. If you

01:02:02

look at the premiere on

01:02:03

ABC glass tile for cases

01:02:04

involving 50 many RMB equivalency

01:02:09

in foreign currency is not

01:02:10

very high value DSL. We

01:02:13

involved need to report to

01:02:15

SAC under the report shall

01:02:18

cover details of the case

01:02:19

that legal analysis of the

01:02:21

dispute a prediction of the

01:02:23

likely outcome as well as

01:02:26

the plan for next steps.

01:02:29

I also says after complexion

01:02:31

with a case, the legal

01:02:32

document needs to be reported

01:02:34

to assess act within 10

01:02:36

days max needs of a

01:02:40

full monitoring in pork in

01:02:41

the Casey's on management of

01:02:50

the cases will be held

01:02:52

accountable. I will be subject

01:02:54

to penalties as a preamble.

01:03:01

A few articles that are

01:03:04

trying to prepare some of

01:03:05

these Provisions is to prevent

01:03:07

losses to CSS. Hear of

01:03:12

me being a professor one

01:03:14

can tell that it's also

01:03:16

the people are really there

01:03:17

between you know, sorry I

01:03:21

said, you know, that's an

01:03:24

authorized by the states by

01:03:26

tax Independence Day operated by

01:03:29

the s.o.s. Decided solely for

01:03:37

is d i c h

01:03:40

i s d s remember

01:03:41

when I mentioned that 50

01:03:43

million euros equivalent to in

01:03:46

foreign currency. So apparently it

01:03:47

covers of the volume Westman

01:03:50

a dispute arising from Alpine,

01:03:52

Westmont. So because of because

01:03:57

of those regulations also use

01:04:00

when faced with a potential

01:04:02

dispute against a host of

01:04:03

State the management, they will

01:04:06

be under pressure to pursue

01:04:09

legal at remedies including pursuing

01:04:12

legal remedies through University application.

01:04:18

So I know there is

01:04:21

also why I inspection from

01:04:23

the organization also will include

01:04:28

the inspection within the party

01:04:31

itself. So That's why you

01:04:37

know, the man who brings

01:04:37

a lot of the time

01:04:38

they have a to go

01:04:40

through this pretty happy Tuesday

01:04:42

matinee tomorrow in and sees

01:04:48

one of which is that

01:04:50

the measurement hands to you

01:04:54

know, avoid settlement settlements are

01:04:57

also leased to the accountability

01:05:00

issue. So we'll easily compromised

01:05:04

most of the situations. Although

01:05:07

I see there is a

01:05:09

possibility of settlement in some

01:05:12

cases of example is the

01:05:13

hottest state and you know

01:05:15

a previously I revoke my

01:05:17

license about it through the

01:05:19

arbitration they are willing to

01:05:21

restore the investor. I'll give

01:05:24

them a new license then

01:05:26

probably there's no reason for

01:05:29

the management to see no

01:05:30

other management to do not

01:05:32

think they will be held

01:05:33

accountable for what I've heard

01:05:34

is here and help me.

01:05:35

Then there's a possibility for

01:05:37

set reminder. Buy any compromise

01:05:42

is to be will say

01:05:44

no they will just say,

01:05:46

you know make the decision.

01:05:50

I will just a reporter

01:05:52

of time to myself and

01:05:54

the other possible tendency is

01:05:59

I didn't know this from

01:06:01

a practice but I think

01:06:02

that's how it's all going

01:06:04

to be true. The minor

01:06:06

pain management of the also

01:06:08

want to avoid Zapata family

01:06:11

because I ate a sub

01:06:14

body found in that means

01:06:16

a percentage of the all-time

01:06:17

what time are they receive

01:06:19

from? The award has he

01:06:21

won the case will be

01:06:23

allocated to the South how

01:06:26

you found us. Those may

01:06:28

be categorized as status as

01:06:30

I know measurements achievement. Kind

01:06:32

of father, you know. You

01:06:35

look pretty size unit future

01:06:36

by you not making use

01:06:39

of improper founding and at

01:06:43

the same time I'm losing

01:06:45

status as the best sub

01:06:48

basically my over the weekend.

01:06:49

Thank you. Thank you. It's

01:06:55

a large 14 really interesting

01:06:56

points from the inside and

01:06:58

tons of Chinese SOS and

01:07:00

you would mention the increasing

01:07:02

awareness of In-House counsel of

01:07:03
protections under investment treaties and

01:07:06
with respect to outside counsel

01:07:07
firms in China. I think

01:07:09
what's happening right now in

01:07:10
China with investment arbitration. It

01:07:12
reminds me of what was

01:07:13
happening in the US and

01:07:15
Europe in the 2000 was

01:07:17
within a certain DC in

01:07:18
the 2008 that time you

01:07:20
had a lot of big

01:07:21
firms with big commercial arbitration

01:07:23
practices slowly migrating over into

01:07:26

investment treaty work and I

01:07:28

think that in China, that's

01:07:29

exactly what's happening right now

01:07:30

the large firms with with

01:07:32

large commercial arbitration practices getting

01:07:34

up to speed on investment

01:07:36

arbitration. They have the clients.

01:07:37

They're getting ready to go

01:07:38

to have a larger and

01:07:39

larger Rolla and obviously jungle

01:07:41

and has played a key

01:07:42

role is in that process.

01:07:43

Okay. We're now going to

01:07:45

turn to eye doctor once

01:07:47

wake Wahoo. I was going

01:07:48

to be joining virtually is

01:07:50

that Go to work. Don't

01:07:57

you miss my grandson? You

01:07:59

hear me? Yeah. Okay, so

01:08:06

dededede stand today's lucky What's

01:08:25

the implementation got to Bri

01:08:29

Chinese state-owned Enterprises have been

01:08:32

consistently actors and playing a

01:08:35

n d e f e

01:08:39

r r y Investments? The

01:08:42

actress just has long been

01:08:46

a complicated issue in International

01:08:48

Investment operation. So just not

01:08:53

prefer the one who has

01:08:55

made a very sorrow complete

01:08:57

and instructive letter on a

01:09:00

list main topic. So I

01:09:02

would just like to do

01:09:04

at several points in football

01:09:08

regarding the qualified investor definition.

01:09:16

I think we can conclude

01:09:18

from article 25 of exit

01:09:21

connection that it's it's a

01:09:25

forum of investor-state dispute settlement

01:09:29

SPS. And 2nd and National

01:09:33

another Contracting state may include

01:09:37

a Judicial person which in

01:09:39

principle include asle. That's the

01:09:43

best way to go from

01:09:47

Hartford to make any distinction

01:09:56

between a Zoe's and privately

01:09:59

owned and the prices. So

01:10:02

Zack and rice to some

01:10:04

some dogs or Sound and

01:10:07

Security of the definition of

01:10:09

investment. You gentlemen have also

01:10:21

something about the broadcast test

01:10:23

test that's very important in

01:10:27

understanding the history and improved

01:10:30

through my two meaning of

01:10:32

of the article 25 of

01:10:35

exclamation and what else practice

01:10:46

test just out to mirror

01:10:49

the customary international law of

01:10:51

a abusive of 58. Drop

01:11:01

top goes on responsibilities of

01:11:03

states for internationally wrongful acts.

01:11:07

That's one point. I would

01:11:09

like to to make the

01:11:13

best practice in this field.

01:11:16

I fully agree with Professor

01:11:18

download that no tribunal has

01:11:22
denied any jurisdiction over the

01:11:25
least concerning the two X

01:11:31
cases. And one thing is

01:11:35
what what medicine is b

01:11:37
u c g. How do

01:11:45
you know? found that Chinese

01:11:50
place in walkmans in key

01:11:52
decision-making a v u z

01:11:54
g To the purpose of

01:11:59
determining whether he was discharging

01:12:01
governmental functions in specific instances.

01:12:06
This is a very important

01:12:08
principle, corporate framework for China

01:12:14

says freeze and this case

01:12:16

may be seen as such

01:12:18

importance Press International and Chinese

01:12:32

States involvement in key decision-making

01:12:35

at at least weatherbell qualified

01:12:44

investor or not. The important

01:12:47

thing is you have to

01:12:49

look at the time counters

01:12:50

characteristics of Investments itself. And

01:13:04

I'm still point. I would

01:13:05

like to make I cut

01:13:07

to make a very simple

01:13:08

summary of the state's position

01:13:12

and fabulous methods of analysis

01:13:14

in determining the qualification was

01:13:18

standing. whole states 2016 love

01:13:25

Jackson Our office has to

01:13:29

be right on G relating

01:13:32

to inherent characteristic such as

01:13:35

such as the operation and

01:13:40

management of soe is controlled

01:13:42

by the state National Park.

01:13:52

2 States with to some

01:13:54

extent with the ultimate beneficiary

01:13:56

as a resource investment as

01:13:58

Metra. And the tribunals methods

01:14:07

of an analysis if if

01:14:10

I could make summary. Is

01:14:12

that tribunal prefer to focus

01:14:15

on the nature of his

01:14:17

specific investment of SOS inherent

01:14:21

characteristic? as long as the

01:14:24

apartments, Four Seasons twice the

01:14:27

minimum requirements of a national

01:14:35

Proof s in post on

01:14:39

Stick party wants to respond

01:14:41

to the First Investors are

01:14:44

agents of the government Investments

01:14:46

is actually a government sponsors.

01:14:49

It was bad the unfavorable,

01:14:51

but that's the summary I

01:14:58

would like to make and

01:14:59

last I I would like

01:15:02

to thank Chinese SOS. That's

01:15:09

only the commercial and private

01:15:11

activities to protect will advise

01:15:21

to operate independently and act

01:15:24

in Conformity with the loss

01:15:26

of Home Country as well

01:15:28

as the customary international law

01:15:29

and local or in the

01:15:31

house. That's all I would

01:15:35

like to make some some

01:15:37

points. So thank you for

01:15:39

having me here. Thank you

01:15:40

very much. Thank you very

01:15:47

much. That one spy Squad

01:15:49

really interesting legal points there

01:15:51

the BCG case obviously it

01:15:52

is a key case in

01:15:54

this area. And also you

01:15:55

raised the issue of burden

01:15:56

and it is interesting to

01:15:57

think about burden that that

01:15:58

right. Normally the claim it

01:16:00

would have the burden of

01:16:00

establishing that it's an investor

01:16:02
or a national of a

01:16:03
contract in state, but with

01:16:05
respect to a jurisdictional objection,

01:16:06
the respondent raising the jurisdictional

01:16:09
objection normally would have the

01:16:10
burden to to establish whatever

01:16:12
objection it is. They're raising

01:16:14
including the fact that they'd

01:16:15
perhaps because of a relationship

01:16:17
with the government party should

01:16:19
not qualify as an investor.

01:16:21
We have a few minutes

01:16:22
remaining we've heard a lot.

01:16:23

We've covered a lot both

01:16:24

on the legal side. And

01:16:26

in terms of on the

01:16:27

ground facts, like I can

01:16:28

open things up for our

01:16:29

panel any reactions any comments

01:16:31

on anything that we've heard

01:16:33

so far. But I was

01:16:39

very upset to hear the

01:16:40

comments of the probably about

01:16:43

kind of the concerns of

01:16:44

State Enterprises it in terms

01:16:47

of regime. I think that's

01:16:53

the kind of concerned the

01:16:54

frankly not just us so

01:16:56

we'd have but certainly is

01:17:02

always that diplomatic element because

01:17:05

the the investor is foreign

01:17:08

that there has to be

01:17:10

no interaction at the Diplomatic

01:17:13

level in some of these

01:17:14

big dispute so that that's

01:17:16

very similar the idea of

01:17:19

seeking to avoid suing a

01:17:21

state that's definitely the motivation

01:17:23

of my commercial clients as

01:17:26

well. They they really don't

01:17:28

want to do that. That's

01:17:29

that's something that grinds against

01:17:32

their better judgment for the

01:17:34

most part and coming to

01:17:36

that conclusion. Really. Is predicated

01:17:39

just as as as we

01:17:41

said earlier on situations in

01:17:44

which frankly the company situation

01:17:51

in which the the losses

01:17:52

are just so significant to

01:17:55

the bottom line that just

01:17:58

frankly from responsibilities. And I

01:18:04

think that that's a very

01:18:05

difficult kind of situation for

01:18:08

for all investors faced with

01:18:11

similar challenges. So I don't

01:18:13

think it's just unique that

01:18:14

so he's although I do

01:18:15

understand there are certain Regulatory

01:18:17

and other responsibilities, which will

01:18:20

make it even more important

01:18:22

that they get if it's

01:18:23

a decision, right? But in

01:18:26

those in a significant loss

01:18:29

situation, it is definitely an

01:18:32

option really When government measures

01:18:34

are at issue in the

01:18:35

foreign jurisdiction going to be

01:18:38

on as a contract and

01:18:40

you know, that's something that

01:18:42

it's always worthwhile to look

01:18:44

at as a remedy. Thank

01:18:47

you can other reactions from

01:18:50

the panel. Thanks. I think

01:18:56

we've spoken a lot about

01:18:58

the Sol. You should have

01:19:00

should have the investment protected

01:19:02

protected investigating molluscum. But I

01:19:08

think we would go back

01:19:09

to what you started with

01:19:11
the relationship with the home

01:19:16
state of matter. And I

01:19:19
think it still doesn't matter

01:19:20
even if you're protected investor,

01:19:22
and how should it matter.

01:19:24
I think we haven't actually

01:19:26
dealt with those questions because

01:19:29
you might be an soe

01:19:32
and you do enjoy protection.

01:19:34
But what is the protection

01:19:37
that you enjoy other differences

01:19:38
in treatment that are in

01:19:41
the protection that a private

01:19:43

investor should enjoy in that

01:19:46

in the country between a

01:19:49

strip should a private investor?

01:19:51

Enjoy a different reason or

01:19:53

the same treatment and that

01:19:55

may come into play when

01:19:56

we look at National treatment

01:19:59

most-favored-nation treatment and there are

01:20:01

some cases on that I

01:20:03

can UPS in Canada is

01:20:06

a case on the other

01:20:08

issue might be a bit

01:20:09

more which is probably all

01:20:15

of the investor investment treaties

01:20:18

that will be exceptions and

01:20:20

National Security is one of

01:20:23

them and when you talk

01:20:25

about the exception applies the

01:20:30

National Security exception applies, I

01:20:32

think it is fairly obvious

01:20:34

to see that there might

01:20:36

be a difference in treatment

01:20:37

where you are Chinese private

01:20:41

investor or a soe and

01:20:45

so I think those would

01:20:47

be issues which unfortunately we

01:20:49

didn't have time together. Thank

01:20:52

you for raising those points

01:20:54

other for the comments also

01:21:03

have a photo myself understand

01:21:07

you because most of our

01:21:08

potential clients they are at

01:21:11

least so I think those

01:21:13

are the typical as a

01:21:14

set amount that I mentioned

01:21:17

a t ya mentioned that.

01:21:21

Probably companies they may have

01:21:28

a similar way, to bring

01:21:33

up a arbitration allows you

01:21:36

to against the sovereign states

01:21:37

my taxi, so maybe yeah

01:21:42

your clients. So I basically

01:21:44

a large clients which has

01:21:47

may be listed companies with

01:21:49

d have a similar issue.

01:21:51

Come across as more of

01:21:52

a Chinese private companies. Why

01:21:54

you messing in Central Asia

01:21:56

need to have a much

01:21:58

less concern in this regard

01:22:00

is a Ministry levels. How

01:22:04

is the embassy in terms

01:22:07

of accountability their teammates, but

01:22:10

it's not listed company for

01:22:12

sure. If it's Alyssa company,

01:22:15

issues. They want to make

01:22:20

you suffer. So how you

01:22:22

found you? Thank you. Did

01:22:28

you want? Thank you very

01:22:33

much for all the comments.

01:22:35

How is the Lord's laws

01:22:38

from today's discussions and the

01:22:41

only thing I found is

01:22:42

very interesting and I will

01:22:44

have enough time to cover

01:22:45

actually in session today is

01:22:48

you know, these states have

01:22:50

taking increase increase the security

01:23:00

reviews and also, you know

01:23:03

about National Security and another

01:23:13

issues. It's quite interesting at

01:23:17

the firing is discussed about

01:23:23

this Daniel. And there's the

01:23:37

issue of interpretation by the

01:23:39

occupy the you knows when

01:23:41

their vehicle ticket Investments. The

01:23:49

it's it's one of the

01:23:51

thing that's important is to

01:23:53

see what's actually open the

01:23:56

process for the future investment

01:23:58

strategy reforms is ICS system

01:24:02

reforms that what stick do

01:24:04

to address their concerns and

01:24:06

to achieve and I think

01:24:09

that's a great thing for

01:24:12

myself. And thank you. Thank

01:24:14

you we have about one

01:24:16

minute left. Dr. Juan Cuevas

01:24:18

Vivien Leigh any final Thoughts

01:24:20

with the minute we have

01:24:21

remaining Yes, please. Yeah, I

01:24:27

like to Circle back to

01:24:28

you. He said Crilley brim

01:24:30

phenomenon, mr. Chow chow mentioned

01:24:33

just now and investment arbitration.

01:24:36

I think despite a strong

01:24:39

presence of Chinese contractors and

01:24:41

Global construction industry so far.

01:24:43

They still have been very

01:24:45

few cases where Chinese a

01:24:48

Zoe's claimant. I think that

01:24:51

has something to do with

01:24:53

this bifurcated approach China has

01:24:56

taken to was International arbitration

01:24:58

and investment arbitration in principle.

01:25:01

I think on the 110

01:25:03

China has embraced the International

01:25:05

Education to Sotto investment disputes.

01:25:07

However, on the other hand,

01:25:10

it's still somewhat was the

01:25:15

core issues such as issues

01:25:17

of sovereignty and territorial issues

01:25:20

when this issue is that

01:25:21

a state I think a

01:25:23

question of how much Chinese

01:25:25

soe stand Chinese government to

01:25:29

resolve to arbitration is still

01:25:31

a question mark I think

01:25:34

that sort of attitude is

01:25:35

someone thinking process and also

01:25:39
they had to do it

01:25:39
to where is investment arbitration

01:25:41
a resulting in some degree

01:25:43
of resistance when they're contemplating

01:25:46
about initiating any form of

01:25:48
dispute resolution process against the

01:25:50
whole states. So I think

01:25:52
it's an interesting question to

01:25:53
think whether we should maintain

01:25:55
this bifurcated approach or at

01:25:58
one point on this should

01:26:00
be a more unique approach

01:26:02
and whether that will help

01:26:03

Chinese are so easy in

01:26:05

participating in more options. Thank

01:26:15

you for being late. Dr.

01:26:16

Wong shui for any final

01:26:17

thought. No, thank you. Thank

01:26:20

you. Okay. Well, thank you.

01:26:25

Everyone has been a terrific

01:26:26

discussion. Thank you. Again to

01:26:28

Jose Antonio to World arbitration

01:26:30

update to Beijing arbitration commission

01:26:32

to Ian Laird has been

01:26:34

a terrific session. I really

01:26:36

am glad I made the

01:26:36

trip to Beijing. Thank you

01:26:38

everyone. This is a world

00:00:02

of attrition update at my

00:00:04

name is Jose Antonio Rivas.

00:00:06

I'm one of the co-founders

00:00:07

of world arbitration update which

00:00:10

was co-founded four years ago.

00:00:12

This is our fourth edition

00:00:13

and we are very lucky

00:00:16

and honored to be here

00:00:18

in Beijing with the incredible

00:00:20

Council arbitrators and and in

00:00:23

general the arbitration Community off

00:00:25

of China and as a

00:00:31

matter of teaching as an

00:00:36

arbitrator and and I'm doing

00:00:37

this to arbitration and because

00:00:39

of those interests, it was

00:00:41

a lot of fun actually

00:00:44

to put together this panel.

00:00:46

This panel is is I

00:00:48

believe one of that that's

00:00:50

going to be one of

00:00:51

the Milestones of world arbitration

00:00:55

out there. Do we have

00:00:56

never done this topic before

00:00:59

neither? Washington arbitration with which

00:01:02

we also co-founded 5 years

00:01:03

ago at norene World arbitration

00:01:06

update and I I say

00:01:11

this without any any shyness.

00:01:13

I really think that this

00:01:16

panel has the best of

00:01:18

the best that that that

00:01:19

not only in China but

00:01:21

in terms of offworld noted

00:01:23

so luckily the proceedings will

00:01:28

be recorded and then people

00:01:31

will be able to see

00:01:32

it not only here but

00:01:33

beyond and with that I

00:01:35

don't want to steal our

00:01:37

moderators Thunder because he will

00:01:40

be presenting each one of

00:01:41

the panelists but let me

00:01:42

share with you that we're

00:01:44

also very lucky to have

00:01:45

Professor Mark Feldman a professor.

00:01:48

Feldman is a professor of

00:01:52

law at Peking University School

00:01:55

of transactional Law and he

00:01:57

joined the law school as

00:02:00

an assistant professor in 2011.

00:02:03

He has taught more than

00:02:04

a thousand and served as

00:02:07

these advisor for more than

00:02:08

100. Students are in the

00:02:12

university in night in 2019.

00:02:15

He served as JT faculty

00:02:17

representative of the law school

00:02:20

10th anniversary alumni weekend and

00:02:23

since 2016. He has served

00:02:26

on the academic community of

00:02:27

the University graduate school and

00:02:36

I could go on and

00:02:37

on no referring to know

00:02:40

he's actually it's in that

00:02:45

also his presence in the

00:02:48

80 and a so conferences

00:02:50

and so on and so

00:02:50

forth, but I think that

00:02:52

were really lucky because this

00:02:53

panel has been working inside

00:02:55

among themselves to bring today's

00:02:58

Final to you. So Professor

00:03:00

Feldman welcome and thank you

00:03:01

for being here with us.

00:03:03

Thank you. Thank you Jose

00:03:08

into World arbitration update enter

00:03:10

the Beijing arbitration commission for

00:03:13

the opportunity and Jose. I

00:03:14

have to say in terms

00:03:15

of this panel. This is

00:03:17

this is a busy time

00:03:18

for me personally. It was

00:03:19

not easy for me to

00:03:20

make it to Beijing when

00:03:23

I saw who was on

00:03:24

this panel. I booked the

00:03:25

flight. I made it to

00:03:27

Beijing. So thank you for

00:03:28

really putting together an incredible

00:03:29

panel and I can just

00:03:30

briefly introduce the topic and

00:03:32

briefly introduce our panelists or

00:03:34

today for the for the

00:03:35

topic. We will be discussing

00:03:37

state-owned companies as investors and

00:03:40

claimants in investment arbitration the

00:03:44

protection of outbound soe investment

00:03:46

under investment treaties and the

00:03:48

exit invention. There are significant

00:03:50

amounts of foreign investment by

00:03:52

a Zoe's and a key

00:03:53

question becomes to what extent

00:03:55

should that outbound investment by

00:03:56

a so, he's be protected

00:03:59

under investment treaties and be

00:04:00

protected under the exit convention.

00:04:03

And I think there were

00:04:03

a few key questions will

00:04:05

be addressing today. One beam

00:04:07

should an SOS relationship with

00:04:09

its home state matter for

00:04:12

purposes of determining jurisdiction under

00:04:14

an investment treaty or jurisdiction

00:04:16

under the exit Venture. And

00:04:19

if so, why should an

00:04:21

SOS relationship with its home

00:04:23

state matter and continuing the

00:04:25

point. If so, how should

00:04:28

an SOS relationship with its

00:04:30

home state matter for purposes

00:04:31

of determining jurisdiction. So that

00:04:33

will be the topic today.

00:04:34

Our presenter today is dr.

00:04:37

Wang Liu based at the

00:04:39

China international business and economic

00:04:41

loss center in Sydney at

00:04:43

the University of New South

00:04:44

Wales. Dr. Wong recently served

00:04:47

as scholar-in-residence at exit only

00:04:50

the third scholar to hold

00:04:53

that position at Aksarben. Dr.

00:04:55

Wang previously worked with excited

00:04:57

as a CO guest editor

00:04:59

for an exit review special

00:05:01

issue on SOL investment. Dr.

00:05:05

Wang holds two phds one

00:05:07

from the University of Liverpool

00:05:09

in the UK and the

00:05:10

other from Xi'an. Jiaotong University

00:05:12

in China. And Laird partner

00:05:16

and chair of the international

00:05:17

dispute resolution group at Crowell

00:05:19

& morning Warren based in

00:05:21

Washington DC and has more

00:05:23

than 25 years of experience

00:05:25

representing clients in investment treaty

00:05:27

arbitration with a particular focus

00:05:29

on the energy and natural

00:05:31

resources sector in holds a

00:05:34

ba from the Gill and

00:05:36

lob from the University of

00:05:37

Windsor and an MBA from

00:05:38

the University of Cambridge. You

00:05:42

can honk head of international

00:05:43

arbitration construction and projects at

00:05:46

Rodger and 10 in Singapore

00:05:48

currently based in Shanghai who

00:05:51

has more than 30 years

00:05:52

of experience advising Chinese and

00:05:54

international clients on major infrastructure

00:05:56

projects and construction disputes in

00:05:59

many parts of the world

00:06:01

since 2018. She has been

00:06:03

recognized as an eminent practitioner

00:06:05

in the field of construction

00:06:07

by Chambers greater China region

00:06:09

who holds an lob from

00:06:11

the National University of Singapore

00:06:13

Singapore. Miss Lee has nearly

00:06:20

10 years of experience in

00:06:21

the Consulting industry specializing in

00:06:24

construction disputes holding an llm

00:06:27

in comparative and international dispute

00:06:29

resolution from Queen Mary University

00:06:31

of London and a bachelor's

00:06:33

in Material Science and Engineering

00:06:35

from the National University of

00:06:37

Singapore deputy director. Foreign related

00:06:43

Department in Beijing Equity partner

00:06:46

at Lagoon in Beijing Salvage

00:06:50

run has represented clients in

00:06:52

over 200 arbitration cases, including

00:06:55

investment treaty arbitration quite notably

00:06:58

Salvage. When was a key

00:06:59

member of the successful defense

00:07:02

of China in an important

00:07:03

case when holes in lob

00:07:07

from you I B E

00:07:08

Law School here in Beijing.

00:07:10

And then lol. I'm from

00:07:11

UC Berkeley doctor in Beijing

00:07:18

at Hong Kong and partners

00:07:20

with a PhD in law

00:07:21

from you i e u

00:07:23

i v e in Beijing

00:07:24

previously served as associate dean

00:07:26

of Law School in Beijing

00:07:29

also has served as director

00:07:30

of the committee of international

00:07:32

and WTO legal Affairs of

00:07:35

The all-china Lawyers Association. So

00:07:38

with those introductions, we will

00:07:40

begin with our present. Dr.

00:07:42

Wong Thank you, Mark for

00:07:56

your very kind introduction and

00:07:58

how they everyone is at

00:08:00

older and privilege to participate

00:08:03

in the world in 2024

00:08:05

China inside in Beijing. And

00:08:08

I appreciate the opportunity to

00:08:10

presents Allstate on Enterprises as

00:08:13

investors and the client's investment

00:08:15

arbitration before a panel of

00:08:17

distinguished experts International arbitration. So

00:08:22

States Enterprises is one of

00:08:25

the most significant and complex

00:08:27

challenges in International Investment law

00:08:30

and arbitration and I will

00:08:32

discuss this issue in Straight

00:08:35

Talk contact the problem and

00:08:38

the challenges and Prospect. So

00:08:41

the contacts off the soe

00:08:43

issues despite some of that

00:08:45

kids off dead reform and

00:08:47

privatization as always remains an

00:08:51

important economic force in the

00:08:53

world economy. According to the

00:08:55

ankh hats as teammates. There

00:08:57

are approximately with operating world

00:09:06

wild controlling trillions of dollars

00:09:09

in foreign assets over half

00:09:14

of a so, he's off

00:09:15

from developing economies such as

00:09:17

China Melissa South Africa and

00:09:20

Russia are in the European

00:09:25

Union in response to the

00:09:27

covid-19 governments have implemented virus

00:09:31

to support businesses. So that

00:09:35

potentially increased the number of

00:09:37

SOS, especially in Europe and

00:09:40

he turns off. Sex hurt

00:09:41

for saxophone has a Zoe's

00:09:44

a particularly active in strategic

00:09:46

sectors such as energy and

00:09:49

natural resources infrastructure transportation and

00:09:52

out of communication for investment

00:09:57

by state-owned Enterprises is not

00:09:58

a new phenomenon their significance

00:10:01

Global expansion, especially from countries.

00:10:04

Like China has raised wystrach

00:10:06

All-Stars in Costa say regarding

00:10:10

the National Security and Auntie

00:10:12

competition for merrilees down from

00:10:16

the state ownership and the

00:10:18

exercise all governmental functions issues

00:10:29

in recent Years also highlights

00:10:31

a clash between different models

00:10:34

of Economic Development as well

00:10:36

as the impact of geopolitical

00:10:38

and economic. So what's the

00:10:43

problem give us the prominence

00:10:46

of a Zoe's inferring that

00:10:48

as always have been lied

00:10:56

on investment arbitration to resolve

00:10:59

their dispute with the hostess

00:11:01

days are about to receive

00:11:06

a settlement the SDS not

00:11:09

providing for investors against his

00:11:14

procedure and substantive rights that

00:11:16

can be directly enforced against

00:11:19

how's the states and their

00:11:20

entities under International play? To

00:11:26

clarify investment arbitration is not

00:11:29

exclusively based on investment treaties

00:11:32

that can also based on

00:11:34

the investment contracts or domestic

00:11:37

law called the hostess days.

00:11:38

In fact as ambassadors from

00:11:41

both developing and developed countries

00:11:43

have her to arbitration against

00:11:46

the hostess days based on

00:11:48

investment contracts or the Apple

00:11:50

boy message vidi the primary

00:11:53

and fundamental problem in investment

00:11:55

arbitration involving a Zoe s

00:11:58

climate is 1Weather app, so

00:12:02

he's qualified investors and to

00:12:06

whether as a standing before

00:12:08

they so the first question

00:12:11

relates to the definition of

00:12:12

us under the investment treaties.

00:12:16

Generally ambassadors is Defiance probably

00:12:19

including both natural persons and

00:12:22

leave a person and the

00:12:23

majority of investment treaties did

00:12:25

not distinguish between letters on

00:12:29

the base is all the

00:12:30

ownership this situation is involving

00:12:33

with investment treaties come to

00:12:35

address as though he's more

00:12:37

explicitly and frequently by making

00:12:40

a reference to Enterprises that

00:12:43

our governments of the old

00:12:44

or controlled in the definition

00:12:47

Claus some investment treaties even

00:12:50

go further up to explicitly

00:12:52

cover States as investors. By

00:12:55

contrast explicit excuse Explorer of

00:12:59

as always as qualified investors

00:13:01

is rare in lesbian 3-day

00:13:03

practice. The rationale for Ike's

00:13:06

Place. It is cordoned off

00:13:07

as always any the definition

00:13:09

of a master's maybe they'll

00:13:10

reinstate obviously, it will clarify

00:13:13

the status off at least

00:13:15

as protected investors and for

00:13:18

some states. It is also

00:13:19

ensure that as always I'm

00:13:21

not used to such events

00:13:22

International obligations as an arbitration

00:13:26

tribunals and respond as days

00:13:29

have not really a draft

00:13:31

of the status off at

00:13:32

so he's suggesting that's our

00:13:34

investors assumed to be covered

00:13:37

by the broad definition of

00:13:39

investment provided by most investment

00:13:41

treaties view of the unique

00:13:45

characteristics of a Zoe's whether

00:13:48

as a result of protecting

00:13:49

investors can be problematic for

00:13:51

example in the head on

00:13:52

down case. We've seen that

00:13:56

the issues being discussed by

00:14:01

the tribunal and in that

00:14:03

case there was found in

00:14:04

States argue that the Chinese

00:14:06

are so we did not

00:14:07

qualify as a vast her

00:14:09

under the China not accept

00:14:15

this argument and found no

00:14:17

basis in the investment treaty

00:14:19

to impose restrictions on you

00:14:22

bastards based on their organization

00:14:24

business ownership or control before

00:14:27

the tribunal the state ownership

00:14:29

was not relevant for the

00:14:31

purpose of the status of

00:14:32

a so, he's as economic

00:14:34

entities Under The Apple Tree

00:14:36

and there's no evidence that

00:14:40

the Chinese as a least

00:14:42

active at 12 a.m. Instrumental

00:14:45

instrumental tea of Chinese government

00:14:47

under its Express instruction. Similarly

00:14:51

in cat naps versus Ukraine

00:14:54

case and Central tribunal determined

00:14:57

that the soe in question

00:14:58

was not controlled by the

00:15:00

Russian government according to the

00:15:02

structure and function of past

00:15:04

while the tribunal found its

00:15:05

necessary. It's unnecessary to decide

00:15:08

what is a public entity

00:15:09

illegible to make claims under

00:15:11

the investment Treaty of Paris

00:15:14

court of appeal ruled that

00:15:19

the cits contacts a test

00:15:22

does not mandate that investors

00:15:24

be private. And so the

00:15:28

more the courts how that's

00:15:30

the SOS connections to the

00:15:32

government. Did not deprive the

00:15:35

company office structural organic. And

00:15:38

is there an eternity? So

00:15:41

they ask they have cases

00:15:43

review that's many vitamins have

00:15:46

you knows except as always

00:15:48

as protecting investors on their

00:15:50

investment treated but was pretty

00:15:54

top-notch clarify the status of

00:15:57

a Zoe's at protecting vouchers

00:16:00

tribunals will need to interpret

00:16:02

in the issue and their

00:16:03

disappearance remains uncertain as a

00:16:06

depends on the structural and

00:16:07

functional tests fly to the

00:16:09

specific case. So far example

00:16:12

in a case against the

00:16:13

Mexico the majority of the

00:16:16

tribunal held at being State

00:16:17

on alter the commercial nurture

00:16:20

off the as always activities

00:16:22

and the private nature of

00:16:25

the relevant Investments and the

00:16:27

brt did not exclude as

00:16:29

a baby from its scope.

00:16:30

However, the wall of the

00:16:34

arbitrator's how bad is a

00:16:36

claim that outside the scope

00:16:38

of the tribunal Street Station

00:16:40

because that's all we at

00:16:41

As a agents off the

00:16:43

stage. The next question is

00:16:45

whether as police has standing

00:16:47

before he passed her State

00:16:48

arbitration and this question is

00:16:50

linked to but not a

00:16:52

difference from a police as

00:16:53

protecting Busters on their investment

00:16:56

rate is the standing of

00:16:57

has always particularly complicated in

00:17:00

the complex off exit arbitration

00:17:02

as reflected in the jurisdiction

00:17:07

of the AC tribunals is

00:17:08

confined to this is between

00:17:10

a Contracting State and National

00:17:14

of another contact him stay

00:17:16

so in other words exit.

00:17:20

Have no jurisdiction to arbitrate

00:17:22

disputes between Tuesdays or between

00:17:25

two private entities according to

00:17:28

article 25 paragraph to be

00:17:30

a national of another contacting

00:17:34

States is defined to include

00:17:36

any person. So it appears

00:17:41

that the state-owned Enterprises can

00:17:43

be considered as a national

00:17:46

off another contract Tuesdays, but

00:17:48

some argue that the size

00:17:56

is a promotion of private

00:17:58

International Investment and private International

00:18:01

capsules. So efficient is exclusively

00:18:06

to private event and that

00:18:09

means that as always even

00:18:11

if I was protecting bastards,

00:18:13

I'm not able to access

00:18:14
to exceed arbitration. However, as

00:18:17
of today no exit Tribune

00:18:20
Fictions to athlete as climate

00:18:22
is a landmark case as

00:18:26
it appears as if worst

00:18:28
case where the tribunal have

00:18:30
adopted at the flights that

00:18:32
have applied by exit Chief

00:18:34
Architect her Aaron Rodgers to

00:18:38
be specific according to the

00:18:41
rock is tasked a mixed

00:18:43
economy company or governmental Corporation

00:18:48
should not be disqualified as

00:18:51

a natural now of another

00:18:53

contract Tuesday's unless it is

00:18:56

acting as an agent for

00:18:57

the government or is discharging

00:18:59

and essentially governmental functions. In

00:19:03

this case, you know how

00:19:05

that in determining whether as

00:19:07

all we need is charged

00:19:08

or exercised a governmental functions.

00:19:11

The focus must be on

00:19:12

the nature of days activities

00:19:14

rather than their peppers. The

00:19:17

tribunal concluded that the activities

00:19:19

of the SOB where is

00:19:21

usually commercial in nature of

00:19:24

the soe was promoting the

00:19:28

government of all, this is

00:19:29

what purpose of this days.

00:19:32

Impeaching Urban Construction Group vs.

00:19:36

Yemen application of the past

00:19:42

that you complain that the

00:19:46

Chinese as a wee participation

00:19:48

in an airport project was

00:19:50

commercial and in particular the

00:19:55

Chinese government's role as the

00:19:57

ultimate decision-maker was in the

00:20:01

word of the words of

00:20:03

the tribunal that's too remote

00:20:04

from the facts of airport

00:20:06

project to be relevant similarly

00:20:09

in the master versus tank

00:20:12

has deprived. You know. It's

00:20:13

a Sobe reasoning and rejected

00:20:16

the argument that the dispute

00:20:18

was between Tuesday's finding that

00:20:20

bass. No, we did not

00:20:21

exercise a public function or

00:20:24

the government exercise that control

00:20:25

over the climate and its

00:20:27

investment decision. Although the project

00:20:32

at is described as probably

00:20:34

the best guy in deciding

00:20:37

as a as a climate

00:20:38

zone the exit arbitration. Actually

00:20:41

the cat does not resolve

00:20:43

the problem but leave cuz

00:20:45

they're all because serious in

00:20:46

its application and and the

00:20:49

Tribune O's the cereal indicate

00:20:51

that standing under the exit

00:20:54

to measure is determined not

00:20:55

by power but by its

00:20:57

function and assessing the function

00:21:00

to tribunal should focus on

00:21:01

the nature rather than the

00:21:03

purpose of the activities of

00:21:05

the distinguishing between the nature

00:21:08

and purpose of all fit

00:21:09

activity is not always clear.

00:21:11

And given the difficulty International

00:21:14

tribunal is the true purpose

00:21:17

often activity conducted by performing

00:21:20

baths her a more reliable

00:21:22

assessment. My instead rely on

00:21:24

these facts about the activity

00:21:26

and to hear the definition

00:21:27

of bosmans could play a

00:21:30

role. Well, it is uncertain

00:21:33

whether future probably knows World

00:21:35

staff and apply the product

00:21:37

is test. It is evidence

00:21:39

that the number of dispute

00:21:41

fish react. So he's as

00:21:42

climate has increased dramatically over

00:21:45

the past that is understanding

00:21:47

of a Zoe's is expected

00:21:49

to face closer. That's what

00:21:54

reviews at IC Atlanta landscape.

00:21:57

It becomes apparent that we

00:22:00

are experiencing The Winds of

00:22:02

Change reform efforts have been

00:22:04

discussed and debated before the

00:22:06

official working group 3 and

00:22:08

the exist as a leading

00:22:09

institution in the ICS conducted

00:22:12

its most expensive moderation modernization

00:22:16

and released its new rules

00:22:18

and regulations in 2022. And

00:22:22

in parallel with the rise

00:22:24

of a Zoe's as investors

00:22:26

and climates, then you go

00:22:27

to a shop some treat

00:22:29

his offered a new Avenue

00:22:30

to adopt an evasive as

00:22:32

a weedy safe place and

00:22:34

the typical examples include this

00:22:36

a t t t t

00:22:37

s o e chapter which

00:22:39

is arguably the most ambitious

00:22:41

attempt to regulate a Zoe's

00:22:43

at the international level and

00:22:45

we know China has formally

00:22:46

submitted a request to rejoin

00:22:48

cptpp. All those all come

00:22:50

is far from of shorts

00:22:53

Tidus. Vacation clearly indicates that

00:22:55

I tried us is prepared

00:22:56

to embrace. That's a b

00:22:59

c d p s o

00:23:00

u vowels and another example

00:23:02

is a China comprehensive assessment

00:23:06

while China has formally grades

00:23:08

for the first time to

00:23:09

incorporate they as a weed

00:23:11

is in Flames. Although he

00:23:15

is currently pending as implications

00:23:17

for us. We regulations and

00:23:19

investment treaty making you should

00:23:20

not be underestimated as a

00:23:27

significant regulatory challenges for Hostess

00:23:33

dates and required tribunals to

00:23:35

interpret the application of investment

00:23:38

treaty provisions and AC Collision

00:23:41

in practice the central question

00:23:45

focuses on whether a Zoe's

00:23:47

are qualified investors and has

00:23:49

standing investors date arbitration. However,

00:23:53

A more profound problem caused

00:23:56

by its beliefs as investors

00:23:58

is the Blurred boundaries between

00:24:01

public and private attributable to

00:24:05

the unique features of a

00:24:07

Zoe's including State ownership and

00:24:10

operation in non-commercial capacities. So

00:24:13

in this contacts are revisits

00:24:15

of investment 3D necessary and

00:24:19

desirable as they need to

00:24:22

consider whether they are prepared

00:24:25

to face challenges from the

00:24:27

forehead. So he's wearing they

00:24:29

only Buster's International arbitration or

00:24:32

if they would prefer to

00:24:33

exclude us from Eva protections

00:24:37

to avoid potential as they

00:24:39

have claimed as for the

00:24:40

latter option. It is also

00:24:42

important to be aware of

00:24:43

the potential negative impacts of

00:24:46

this could have on Westmont

00:24:47

by for real so nice.

00:24:51

although training based Ambassador say

00:24:56

Darby Creek a promising for

00:24:58

SOS as climates according to

00:25:01

the existing jurisprudence contact face

00:25:04

arbitration should not be overlooked

00:25:06

and the compactor treaty-based arbitration.

00:25:09

Does Daniel pastoli's tends to

00:25:11

be last contested in contact

00:25:13

face arbitration, although another issue

00:25:15

may arise as to whether

00:25:17

the disputes is purely a

00:25:18

contractual claim. I think I

00:25:21

should stop here and thank

00:25:23

you again for your attention,

00:25:25

and I look forward to

00:25:26

this discussion. Thank you. Thank

00:25:33

you want to do for

00:25:34

that very effective overview of

00:25:36

the current legal landscape. And

00:25:37

so we can see what

00:25:38

some of the fundamental questions

00:25:40

are in terms of to

00:25:41

what extent should SOS be

00:25:42

subject to different treatment to

00:25:44

special rules. And we see

00:25:46

that there are certain issues

00:25:47

arising generally under investment treaties

00:25:49

and then a few issues

00:25:50

that are particular to the

00:25:51

exit invention. We're going to

00:25:54

transition a bit from the

00:25:56

legal landscape to to Morven

00:25:58

on the ground. Look at

00:25:59

the factual reality of soe

00:26:01

investors and in our next

00:26:03

two presenters will be focusing

00:26:04

on more of that on

00:26:06

the ground factual reality. I

00:26:08

we can start with with

00:26:10

Hugh who will be discussing

00:26:11

some of his experience are

00:26:13

particularly in in with construction

00:26:15

and with soe investors and

00:26:17

after Hugh Vivien Leigh again,

00:26:19

who is joining virtually Vivian

00:26:20

can share some of her

00:26:21

experiences as well in the

00:26:23

construction. A sector so Q

00:26:26

please. Thank you, Mom. I'll

00:26:32

just pick up from what

00:26:34

you said in her speech

00:26:37

in the presentation and I

00:26:40

think she started off with

00:26:41

the increasingly important role of

00:26:44

the isosceles or Chinese at

00:26:46

Zoe's in the international market

00:26:49

and I think many of

00:26:52

you agrees that the most

00:26:55

high-profile and obvious example of

00:26:58

the Chinese SOS flexing their

00:27:01

muscle in the international market

00:27:03

is the belt and Road

00:27:04

initiative. Developed and grown in

00:27:08

the shade too. I think

00:27:11

everyone knows it's a Chinese

00:27:12

state-driven initiated and so unsurprisingly

00:27:17

the the pot the company's

00:27:21

all the Chinese investors leading

00:27:23

that charge Chinese SOS. The

00:27:28

investments into the Bri countries

00:27:32

over number of countries. They

00:27:35

are made in a number

00:27:36

of countries and these countries

00:27:39

I think many will agree

00:27:41

that are some of them

00:27:43

are not well-known for upholding

00:27:45

the rule of law, which

00:27:48

I think then brings into

00:27:50

Eminence the importance of a

00:27:54

treaty protection and invariably the

00:27:58

possibility of a treaty arbitrations

00:28:01

is these Chinese Investments going

00:28:03

into the Bri countries should

00:28:05

be compromised or a by

00:28:09

gunmen action some form of

00:28:11

government action. And so so

00:28:14

on that note I stopped

00:28:16

on that note that it

00:28:19

was the increase of Chinese

00:28:21

investment by Chinese I so

00:28:23

he's into the Bri countries.

00:28:25

It is foreseeable that increasingly

00:28:28

that would be I will

00:28:30

be treating arbitration is coming

00:28:32

out of the investments into

00:28:34

the Bri countries. the next

00:28:37

issue I like to touch

00:28:38

on it would be whether

00:28:40

it is possible that the

00:28:43

Chinese are so he's would

00:28:48

not would be deprived of

00:28:50

protection because Treaty protection because

00:28:56

they are Chinese SOS personally.

00:29:00

I think that would be

00:29:03

unlikely that down in cases

00:29:09

where a treaty protection is

00:29:12

is deprived because a company

00:29:15

or claiming seeking protection treaty

00:29:18

protection. It's an soe I

00:29:21

would be surprised that that

00:29:23

would be different for investments

00:29:26

into the Bri, especially if

00:29:29

applying the Roches test. I

00:29:31

don't think the SOS participating

00:29:35

in the Bri actually acting

00:29:37

as agents of the Chinese

00:29:40

state or discharging governmental functionality

00:29:45

India investments into the Bri.

00:29:48

But I don't think it

00:29:50

would be unsociable that a

00:29:53

clever lawyer when faced with

00:29:57

a plane would actually come

00:30:00

up with an argument that

00:30:02

the Bri is a directive

00:30:04

of the Chinese State and

00:30:07

Chinese a Zoe's a participating

00:30:09

in the VR. I actually

00:30:11

acting as agents of the

00:30:13

Chinese state or discharging a

00:30:16

governmental functionality. But again, I

00:30:22

think that's where the Roches

00:30:24

test becomes quite quite important.

00:30:26

I mean personal leave. I

00:30:28

think if you apply it

00:30:29

correctly. That shouldn't be a

00:30:31

correct argument. But but then

00:30:34

but often as we all

00:30:37

know. Encouragement with incentives by

00:30:43

the Chinese government trying to

00:30:45

distinguish that from the directive

00:30:47

the lines can sometimes be

00:30:50

blood like similar to conversations,

00:30:55

which I have with my

00:30:56

wife. I don't know whether

00:30:58

she's encouraging me to do

00:30:59

something or directing me to

00:31:00

do something self. So moving

00:31:06

on. Into my area of

00:31:10

specialty. I'm not an expert

00:31:12

in investment arbitration. I I

00:31:14

must confess first. So I

00:31:15

do a lot with construction

00:31:16

disputes and I do a

00:31:18

lot with construction companies and

00:31:21

funnily enough of that Bri

00:31:24

projects actually construction projects. They're

00:31:28

not really investment projects in

00:31:30
the majority of investments in

00:31:32
both his fraction projects Chinese

00:31:35
companies going to the Bri

00:31:36
countries building all sorts of

00:31:38
into structure for the host

00:31:41
countries and all these projects

00:31:44
will be will be premised

00:31:45
on contracts and very detailed

00:31:48
contracts are signed. So the

00:31:51
question will be how many

00:31:53
of these projects call me

00:31:55
of the disputes claims will

00:31:57
actually end up in treaty

00:31:59
arbitrations. My suspicion is most

00:32:03
of the disputes or claims

00:32:05
would go the country. Contract

00:32:08
application Root rather than the

00:32:11
treaty arbitration route. I think

00:32:17
that will be the case.

00:32:17
I I won't be building

00:32:19
a practice based on observation

00:32:21
because I will be baby

00:32:22
able to pay the rent.

00:32:23
So it's more likely that

00:32:24
a lot of the disputes

00:32:26
coming out or I would

00:32:28

be contract-based arbitration cases rather

00:32:32

than investment Treaty of cases,

00:32:34

but it is possible. It

00:32:38

is possible that we will

00:32:40

see a few I don't

00:32:43

think they'll be many coming

00:32:45

out to Bri despite the

00:32:47

scale of the be. Alright,

00:32:48

and and I would Hazard

00:32:51

a few guess as to

00:32:54

why this might be the

00:32:57

case. I think at least

00:32:59

from what I've seen in

00:33:02

many of these projects is

00:33:04

that was any thinking that

00:33:08

The arbitration law should be

00:33:09

should be employed. I think

00:33:12

one reason would be the

00:33:14

plaints or the losses that

00:33:17

the claimant on the Chinese

00:33:18

as we playing at once

00:33:19

to bring Falls outside the

00:33:22

scope of the underlined contracts.

00:33:24

So I quite often and

00:33:29

where there might be an

00:33:30

imbalance in the bargaining positions

00:33:32

and in the contract some

00:33:35
of the soe plans may

00:33:37
have signed away sitting right

00:33:39
where they are unable to

00:33:41
clean sudden losses. This happens

00:33:43
quite a lot in construction

00:33:45
contracts where you agree to

00:33:48
limit your claims to certain

00:33:50
types of losses, but not

00:33:52
other types of losses. So

00:33:55
that's one possibility. You can

00:33:59
go down the tree arbitration

00:34:00
route to in order to

00:34:02
claim losses that I'm not

00:34:04

possible under the under the

00:34:06

underlying contract. The other possibility

00:34:10

we're sitting planes are actually

00:34:13

divided under that underline contracts

00:34:16

sew-in in construction contracts by

00:34:18

Austin you have very strict

00:34:20

claims Provisions, which which imposes

00:34:23

time boss is the notices

00:34:25

are not put on putting

00:34:27

on time and also you

00:34:29

may have cases and I've

00:34:31

seen cases where translate lie

00:34:34

dormant for a long time

00:34:36

and shoes of limitation. Periods

00:34:42
at the end and the

00:34:44
claims underline underline contracts are

00:34:47
unable to be prosecuted under

00:34:50
the contraction sells the sudd.

00:34:54
I reason I which I

00:34:56
think is possibly quite likely

00:35:00
to be the reason real

00:35:02
reason why she job positions

00:35:04
have to be resulted to

00:35:05
is in the underlying contract.

00:35:08
The Chinese soe has signed

00:35:11
up to a dispute resolution

00:35:12
Clause that is not very

00:35:14
friendly to them. For example

00:35:16
of the species are to

00:35:18
be referred for resolution by

00:35:22
the local courts. And when

00:35:24
you are actually dealing with

00:35:26
a government entity of the

00:35:28
government, I don't think any

00:35:30
Chinese s o u l

00:35:32
e rate is chances of

00:35:34
succeeding on this plane in

00:35:35
the in the in the

00:35:36
local court. And therefore you

00:35:38
have to jump out of

00:35:39

the framework off of the

00:35:41

car. And that will result

00:35:43

to the protection of treaty

00:35:45

arbitration rather than the contract

00:35:46

based off of tration. I

00:35:49

think that concludes my observations

00:35:53

and comments and I think

00:35:54

the opportunity for being able

00:35:55

to participate in this event

00:35:57

and also to be set

00:36:00

with such prominent members of

00:36:02

the of the industry. Thank

00:36:04

you. Thank you so much

00:36:10

you for raising really interesting

00:36:12

issues about the role of

00:36:13

Bri how might Bri affect

00:36:15

the analysis on my Bri

00:36:17

complicate the analysis. I'm teaching

00:36:20

an investment for a divorce

00:36:21

right now. It is one

00:36:22

issue that we discuss is

00:36:23

thinking about the u s

00:36:25

e u in China with

00:36:26

respect to investment treaty arbitration

00:36:28

right now the EU obviously

00:36:29

wants to move to a

00:36:30

court the us at the

00:36:32

moment at best is ambivalent

00:36:33

at best two of the

00:36:35

three. I think China probably

00:36:36

looks like that the strongest

00:36:37

supporter of investor-state arbitration and

00:36:40

Bri obviously is playing a

00:36:41

role with that support. But

00:36:43

then you raise the question

00:36:44

does the existence of the

00:36:45

Ry possibly complicate the analysis

00:36:47

of the availability of treaty

00:36:49

protection do continuing our discussion

00:36:51

of realities on the ground.

00:36:53

We're going to turn to

00:36:54

Vivien Leigh who I understand

00:36:55

is joining us virtually. Thank

00:37:00

you, Mark. Thank you everyone.

00:37:01

I think you misheard Lou

00:37:03

and Hugh for the extremely

00:37:05

insightful presentation. I also want

00:37:07

to thank waumba see you

00:37:10

for having me. Unfortunately. I

00:37:12

cannot join you in person

00:37:14

this time, but I'm a

00:37:15

grateful for the opportunity to

00:37:16

connect virtually and I hope

00:37:19

you can hear me clearly.

00:37:21

Ask mrs. You mention Chinese

00:37:24

are so he's a big

00:37:25

players in Global Construction market

00:37:27

and they have a strong

00:37:29

presence overseas. I'll be going

00:37:30

to lay in the developing

00:37:31

regions. So today I will

00:37:34

share my experience working with

00:37:35

the Chinese are so he's

00:37:37

doing construction projects overseas some

00:37:41

of the challenges they face

00:37:42

in arbitration proceedings and I

00:37:45

will also take some trying

00:37:47

to say is that I've

00:37:47

also which may be implemented

00:37:50

by the Chinese as always

00:37:53

construction project cost of lead

00:37:55

generate one of the largest

00:37:56

percentages of commercial disputes in

00:38:00

terms of investment arbitration. What's

00:38:02

the number of construction case

00:38:04

that says lower they still

00:38:05

constitute a big portion. They

00:38:08

made up around 10% of

00:38:09

the total number of investment

00:38:11

arbitration registered and the exit

00:38:13

and by May 2023 Chinese

00:38:16
soe has acted as a

00:38:18
claimant in about 22 investor-state

00:38:21
arbitration of which about one-third

00:38:24
arise out of construction and

00:38:26
Manufacturing. The reason so many

00:38:29
construction projects ended up in

00:38:32
international arbitration is because they

00:38:34
are cross-border in nature. Is

00:38:37
it a technical complexity David

00:38:40
lie on the expertise of

00:38:41
contractors and subcontractors from around

00:38:44
the world their sheer size

00:38:46
of this project also requires

00:38:48

found from a range of

00:38:50

domestic and international investors. He's

00:38:54

also require heavy operating cost

00:38:57

and a round for a

00:38:58

long. Of time during which

00:39:00

they will be exposed to

00:39:01

many risks such as political

00:39:04

instability geopolitical tension and supply

00:39:08

chain disruptions. Especially during the

00:39:10

cobra. How dis risks are

00:39:14

managed very from one S3

00:39:16

to another? All that you

00:39:19

want Chinese SOS who have

00:39:21

Decades of overseas experience. There's

00:39:24

usually a very diverse 49ers

00:39:27

team on the ground which

00:39:29

plays a crucial role in

00:39:31

collaborating with the local regulatory

00:39:33

bodies subcontractors and suppliers for

00:39:38

that reason. He's as though

00:39:40

he's an extremely sophisticated in

00:39:42

almost every phase of a

00:39:44

construction project lifecycle from Project

00:39:47

drafting project management and dispute

00:39:50

resolution. In dozens, I do

00:39:53

not see a huge difference

00:39:54

from this Chinese are so

00:39:56

East and any other top

00:39:58

International construction companies. I think

00:40:02

the one who can just

00:40:03

go get a little bit.

00:40:05

Midsize Constructors contractors will have

00:40:09

limited exposure has overseas. One

00:40:13

important reason I will say

00:40:14

is that there has not

00:40:15

been enough emphasis on contract

00:40:18

management. Well, it goes without

00:40:20

saying that a good understanding

00:40:21

of contract is crucial. But

00:40:24

often times we see parties

00:40:26

do not fully understand the

00:40:27

risks of location. Even when

00:40:30

the contractors you review the

00:40:32

contract, they also tend to

00:40:34

focus on those costs relative

00:40:36

clauses where time related Clauses

00:40:39

take a back seat. As

00:40:41

someone who often deals with

00:40:43

project delays and disruptions. I

00:40:45

really recommend the contractors and

00:40:48

the legal advisers to pay

00:40:50

more attention to and also

00:40:52

to comply with those contract

00:40:54
contractual procedures related to Fry's

00:40:57
on how the time required

00:40:59
for serving notices the duration

00:41:01
required to update the programs

00:41:04
and Records East could process

00:41:08
can go a long way

00:41:09
to was recovering General loss

00:41:12
and damages as well as

00:41:14
Foundation cost. The second and

00:41:18
the probably the most important

00:41:19
practice for all contractors including

00:41:23
a Zoe's is to maintain

00:41:24
project records. I cannot answer

00:41:28

something enough the importance of

00:41:29

document control anything in international

00:41:32

arbitration because it has a

00:41:35

very high threshold for parties

00:41:37

to prove their case documentary

00:41:40

evidence. It is an essential

00:41:42

to keep a fool and

00:41:44

a sedate record. This record

00:41:46

should be stored in a

00:41:48

centralized platform. I should contain

00:41:51

all relevant details to allow

00:41:54

the issues to be understood

00:41:55

by others including others within

00:41:58

the organization as well as

00:42:00

external advisors and consultants in

00:42:03

England. the king of external

00:42:08

advisers I think a lot

00:42:10

of the Chinese contractors are

00:42:12

a bit hesitant to engage

00:42:14

one unless it's absolutely necessary.

00:42:16

And I think this might

00:42:19

have to do with the

00:42:20

traditional approach in the domestic

00:42:22

litigation and arbitration where parties

00:42:26

try their best to use

00:42:28

their in-house team to do

00:42:29

as much as I could.

00:42:32

However, I open CDs approach

00:42:34

not being to work very

00:42:36

well in the international arbitration

00:42:37

because tribunal and the legal

00:42:41

team are sophisticated if it

00:42:43

is biased and one-sided play

00:42:46

the other side. Can you

00:42:47

please leave them in there?

00:42:48

And the tribunal will not

00:42:50

believe it and therefore you're

00:42:52

not standing on Solid Ground

00:42:53

anymore. However, as parties are

00:42:56

also becoming sophisticated. It has

00:42:59

been increasingly common these days

00:43:01

to see Chinese contractors engage

00:43:04

external legal counsels and even

00:43:08

before the start of arbitration

00:43:10

you allow them to do

00:43:12

a sense check. I think

00:43:14

most most a contractor find

00:43:16

it helpful to have such

00:43:18

an unbiased assessment of their

00:43:21

potential entitlement and explosion at

00:43:24

a early stage. Christian assistance

00:43:27

in determining whether or not

00:43:30

we should go for a

00:43:31

patrician and even if they

00:43:33

decide not to go this

00:43:34

piece out of this piece

00:43:36

of advice is still in

00:43:39

the process of settling discussion.

00:43:42

That's why based on my

00:43:43

experience. I try to her

00:43:45

benefit tremendously from carrying out

00:43:47

a neutral Ruiz assessment at

00:43:49

the early stage rather than

00:43:51

adopting a wait-and-see approach towards

00:43:53

the end. Unconscious at the

00:43:56

time, so I'll probably talk

00:43:58

to you back to you

00:44:00

mark. Thank you Vivian for

00:44:03

a really interesting points there

00:44:05

on the role that the

00:44:06

construction sector plays in and

00:44:08

how so much soe investment

00:44:09

is in the construction Center

00:44:10

sector and in one thought

00:44:12

that came to mind was

00:44:14

as as we think about

00:44:15

protecting classic f t i

00:44:18

physical projects. It's interesting to

00:44:20

think about that so much

00:44:21

of this SOB investment is

00:44:23

what we think of his

00:44:24

kind of classic F. Yeah,

00:44:26

I did absolutely should be

00:44:27

protected by investment treaties what

00:44:29

we're not getting into intellectual

00:44:31

property. We're not getting into

00:44:32

financial instruments. These are more

00:44:34

of the classic old-school kind

00:44:36

of investment is being made

00:44:37

by a so, he's landscape

00:44:41

and is going to share

00:44:43

views on the legal landscape

00:44:44

in particular treaty practice in

00:44:46

please. Thanks very much. Mark

00:44:51

really happy to be here

00:44:54

on this town with you.

00:44:55

And with our other panelists.

00:44:57

This is Antonio is Introduction

00:45:02

to critical topic and is

00:45:05

certainly generating more discussion. Just

00:45:09

sort of going back to

00:45:11

some of the comments that

00:45:12

the professor and I want

00:45:17

to touch on a couple

00:45:18

of points. I think I

00:45:21

actually mentioned the idea that

00:45:24

I stayed Enterprise would be

00:45:27

involved in exit arbitration Princeton

00:45:30

65 texted was in its

00:45:36

original state as a mechanism

00:45:38

for contract disputes bilateral investment

00:45:42

treaties and free trade agreements

00:45:44

were far and few in

00:45:46

between it and it really

00:45:48

wasn't thinking of the drafters

00:45:50

that they would be coming

00:45:52

as mechanism which would facilitate

00:45:54

International arbitration today. So contracts

00:46:01

were very much talk of

00:46:02

mine and Aaron Broncos to

00:46:05

their wiring was mentioning a

00:46:08

who was the first Secretary-general

00:46:09

and one of the key

00:46:10

Rafters of the exit convention

00:46:13

taking that into context. He

00:46:15

understood that the key role

00:46:17

for the Andersons in 1960

00:46:24

60 years ago in a

00:46:26

big construction projects were the

00:46:29

meat and potatoes of exit

00:46:31

arbitration in those old days.

00:46:32

So contact hasn't really changed

00:46:35

and the concerns about how

00:46:40

you would apply has asking

00:46:46

around for 60 years. So

00:46:47

that this this is a

00:46:48

long discussion and part of

00:46:51

the context of this discussion,

00:46:52

of course is released to

00:46:55

a tribution issues in general.

00:46:57

We have the international law

00:47:00

commission drafted and spent many

00:47:03

years working on the articles

00:47:05

on state responsibility. Which address

00:47:08

Some of these concepts with

00:47:10

as well and you know

00:47:12

talking about teaching your eye

00:47:13

if that's class. So we

00:47:15

have a similar class on

00:47:18

attribution and it really goes

00:47:20

to the question of what

00:47:21

is government and the ioc

00:47:25

articles that that out, you

00:47:27

know, we usually think of

00:47:28

government departments and the executive

00:47:34

but it clearly there are

00:47:37

entities. Sometimes they don't do

00:47:40

that carry out our governmental

00:47:43

function. That's the key phrase

00:47:45

that both braccus has used

00:47:49

as well as the ilc

00:47:50

Articles and we see that

00:47:53

the tribunals have mentioned. It

00:47:59

did really grappled with this

00:48:01

issue of understanding the nature

00:48:03

of the investor and similarly

00:48:07

the nature of the invest.

00:48:09

And what what really comes

00:48:11

out and all these cases

00:48:12

is that the investment is

00:48:14

commercial they're involved in commercial

00:48:16

projects and rode very well

00:48:23

construction projects for the most

00:48:25

part and those are commercial.

00:48:27

Those are not deemed. Where

00:48:31

is you know, what is

00:48:33

a governmental function as I

00:48:36

think I fairly lost kind

00:48:39

of its specific meaning and

00:48:42

I think this is where

00:48:42

some of the tension, you

00:48:46

know what that would entail

00:48:46

and we've seen a solution

00:48:50

to this rather than sort

00:48:52

of relying on a test

00:48:54

or the Broncos test. We

00:48:59

see the tree drafters have

00:49:01

very specifically address this issue

00:49:03

and let you know. I'm

00:49:05

looking at the China Canada

00:49:07

foreign investment. Protection agreement from

00:49:10

2012 and an article to

00:49:13

sub to the parties agreed

00:49:15

as to what that governmental

00:49:17

Authority governmental function would be

00:49:19

and they gave examples such

00:49:21

as the power to expropriate

00:49:22

Ranch license to prove commercial

00:49:24

transactions are imposing quotas these

00:49:27

charges and so forth and

00:49:29

end the key part of

00:49:30

that Clause that this has

00:49:31

delegated. So if you are

00:49:34

looking at a situation where

00:49:35

there is a delegation and

00:49:37

delegations are usually have kind

00:49:39

of illegal character and her

00:49:40

formal and involve those types

00:49:42

of powers, then that's the

00:49:44

kind of thing. Just those

00:49:46

three parties Canada and China

00:49:48

identified as as part of

00:49:50

that government to function and

00:49:52

I think the treaty drafters

00:49:54

have actually done a service

00:49:55

here and make some of

00:49:57

that in a cutie but

00:49:59

again looking at the history

00:50:00

of this and and pressure

00:50:01

washing mention the Sea tttt

00:50:04

The trans-pacific partnership agreement. That

00:50:09

kind of language in it

00:50:10

as well as finding the

00:50:12

scope of what would make

00:50:14

a staid Enterprise governmental of

00:50:16

governmental function. And if I

00:50:19

was actually some of the

00:50:21
history of it and if

00:50:23
you go back to the

00:50:23
NAFTA the North American Free

00:50:25
Trade Agreement from 1993. The

00:50:29
party is actually devoted a

00:50:30
chapter chapter 15 and fries

00:50:33
and they provided is simpler

00:50:35
definition. So, you know just

00:50:38
to be a little country.

00:50:39
I think there are mechanisms

00:50:46
that exist in in the

00:50:48
treaty rafting that can provide

00:50:51
some some more certain and

00:50:54

I'll finish on this point

00:50:56

heart of the nature of

00:50:58

international law and treaties is

00:51:01

there is some measure of

00:51:02

uncertainty and we saw Professor

00:51:03

professor's on yesterday start her

00:51:06

discussion mentioning that the Concept

00:51:09

of constructive ambiguity entry draft

00:51:12

which you know, like in

00:51:15

any contract or any kind

00:51:16

of negotiation. There are certain

00:51:18

terms and Concepts that sometimes

00:51:20

don't get the level of

00:51:21

detail. That would be what

00:51:24

exists in a perfect world

00:51:25

or that a perfect set

00:51:26

of lawyers are our or

00:51:28

negotiating parties would like and

00:51:32

part of that is what

00:51:33

drives the some of these

00:51:34

cases is the definition of

00:51:36

investor and the scope of

00:51:37

what an investor could be

00:51:39

in the not in the

00:51:42

US but not fully Define

00:51:44

and I think this is

00:51:45

one of those issues that

00:51:46

treaty drafting like to see

00:51:49

Fifi Fifi and like the

00:51:51

China Canada FIFA address much

00:51:56

of that issue so I

00:51:59

could just sit on an

00:52:00

unrelated point. I think they're

00:52:03

there are other tensions as

00:52:05

well and is dies at

00:52:07

the end. Talked about the

00:52:10

reforms that are going on

00:52:11

at excited and a bunch

00:52:13

of troll and there is

00:52:15

no doubt that I submitting

00:52:18

these types of treaty Clauses

00:52:20

to a form of dispute

00:52:21

resolution. Create substantial for uncertainty

00:52:24

because every treaty has some

00:52:26

differences the parties are different

00:52:30

the state-owned Enterprises are not

00:52:31

uniform buy any so that

00:52:34

requires looking at the specific

00:52:36

facts of each case and

00:52:38

and examining them in a

00:52:39

Judicial function. And that's sometimes

00:52:42

they do not as easy

00:52:44

as it sounds that's why

00:52:45

we have a little bit

00:52:50

of uncertainty final point and

00:52:58

I'm actually quoting Professor when

00:52:59

he or she said there

00:53:00

are no big suitcases have

00:53:02

denied jurisdiction to SOS who

00:53:05

have acted as investors claimants.

00:53:09

And I think that is

00:53:10

a reflection that tribunals have

00:53:12

being cautious. They they haven't

00:53:14

gone out. They extended the

00:53:17

terms. They seen in the

00:53:20

treaties has been viewed a

00:53:22

very conservative approach Anton in

00:53:24

maintaining of you that unless

00:53:26

you can demonstrate again on

00:53:28

the facts and in the

00:53:29

circumstances of that case that

00:53:31

there is a specific delegation

00:53:34

of some function governmental function,

00:53:36

then they're not going to

00:53:38

step outside their bounds and

00:53:40

say somehow that the state-owned

00:53:42

Enterprises acting and I think

00:53:46

that that's a really important

00:53:47

point there. There is a

00:53:48

measure as much as possible

00:53:51

of consistency in the perfect

00:53:59

family. No lawyer would ever

00:54:03

do that, but the law

00:54:06

has been relatively consistent. So

00:54:09

I'll stop there but the

00:54:11

very interesting presentation. Thanks so

00:54:19

much deeper look at at

00:54:23

the legal landscape. And as

00:54:25

you mentioned that when there

00:54:26

are situations where we need

00:54:27

to determine when an actor

00:54:29

is acting as a government,

00:54:30

we have very well establish

00:54:32

rules, right? We have well-established

00:54:33
attribution rules. The ilc Articles,

00:54:36
you mentioned the Broncos factors

00:54:37
in my you and I

00:54:38
think the view of many

00:54:39
others the Broncos Packers basically

00:54:40
track two of those aisles

00:54:42
the Articles. So so we

00:54:44
have very well establish rules

00:54:45
for determining when an actor

00:54:46
is acting as a government

00:54:47
it and I think in

00:54:49
terms of treaty practice if

00:54:50
parties to a treaty wanted

00:54:51

to part from those customary

00:54:53

rules, they're free to do

00:54:54

when they're free to take

00:54:55

a different policy in their

00:54:56

treaty elect specialis and then

00:54:58

depart from the underlined customary

00:55:00

international law principal. So thank

00:55:01

you again for that discussion.

00:55:03

We're not going to turn

00:55:04

in particular to the topic

00:55:06

Chinese are so he's at

00:55:07

South Region is going to

00:55:08

be leading that discussion at

00:55:10

Allegiant, please. Thank you, Mark.

00:55:13

Good morning. Everyone. It's a

00:55:15

pleasure to be here participating

00:55:17

in this important event that

00:55:21

will buy my college professor

00:55:27

and the marks himself as

00:55:32

a legal issues in your

00:55:34

relationship SOS master and the

00:55:40

international US Open two documents

00:55:45

as well as it's a

00:55:47

standing for the Cure in

00:55:49

the context of a exit

00:55:50

Navigation exit to mention as

00:55:54

well as the broke his

00:55:56
test and the issue of

00:55:58
attribution for the Chinese practitioner

00:56:01
when we talked about this

00:56:02
issue of a standing we

00:56:05
are always only focus on

00:56:08
really two cases of why

00:56:11
is that Mongolia and the

00:56:14
other is a picture of

00:56:15
a big construction company vs.

00:56:17
Yemen that those cases a

00:56:19
profitable already mentioned discussion. I

00:56:26
have actually learned a lot

00:56:28
from all three of them,

00:56:29

you know, the other cases

00:56:32

and the recorded IQ Fusion

00:56:35

issue. I also will control

00:56:40

you suck you and I

00:56:42

think it's a weaving from

00:56:44

Secretariat. The user of the

00:56:46

reasons are particularly accuser of

00:56:48

the reason that sometimes you

00:56:52

might ask her because the

00:56:55

contract clause is known as

00:56:57

he's really friendly to the

00:56:59

Chinese are so he's so

00:57:02

they may need to look

00:57:04

at the contract on the

00:57:06

six other remedies. They are

00:57:08

the rules for remedies. I

00:57:11

think folks Ado prefers. I

00:57:13

just gave to offer my

00:57:16

office operations because you in

00:57:18

recent years. We have loved

00:57:20

being frequently. I inquired by

00:57:22

Chinese companies many of whom

00:57:25

SOS in relation to their

00:57:28

outbound device Monopoly card again.

00:57:31

Bri countries. From those contacts

00:57:37

I noted that are there

00:57:40

are two Tendencies. Why is

00:57:42

the Chinese companies are Chinese

00:57:45

investors? Are you still tend

00:57:48

to be reluctant when it

00:57:50

comes to a concentration of

00:57:53

filing a treaty of attrition

00:57:56

if we talked about this

00:58:00

topic 15 years ago most

00:58:03

of the soe is there

00:58:04

your house, so we are

00:58:05

not aware of her. The

00:58:08

option for filing I asked

00:58:10

you is because of events

00:58:13

like this are they have

00:58:14
received legal education over the

00:58:16
15-year time. So now it

00:58:18
is if you have any

00:58:21
conversation with the Council of

00:58:24
the soe switch I engage

00:58:26
in open us when the

00:58:28
most of them aware of

00:58:30
this option contract remedies they

00:58:34
missed you. 3D remedies under

00:58:36
the investment treaty or no

00:58:39
treaty agreement between China and

00:58:42
wherever they are you watching

00:58:44
the reluctance to exist. I

00:58:51

think one of the main

00:58:53

reasons he has to do

00:58:54

with a Chinese couch in

00:58:56

Chinese person's legal percent residual

00:59:00

person C10 to try to

00:59:03

avoid any dispute with the

00:59:05

government. So there is no

00:59:09

tradition of a taking all

00:59:10

the man. I need form

00:59:13

of legal action and that

00:59:15

also happens when it comes

00:59:17

to you know, what legal

00:59:19

actions against the sovereign states

00:59:21

or China, right? The other

00:59:25

reason I think I slept

00:59:28

because of a more or

00:59:30

less to send it to

00:59:31

you to the Diplomatic. Relationship

00:59:35

between China and the particular

00:59:39

holster state that where they

00:59:41

are you asking. But I

00:59:44

think this is a or

00:59:47

rate if it's not necessary

00:59:50

consideration. Because not every investment

00:59:56

outside China not every dispute

00:59:58

may have an impact on

01:00:00

the palace roof relationship. They

01:00:03

may have an impact only

01:00:05

if it's really, you know,

01:00:08

shoot you my best friend

01:00:09

and a huge losses are

01:00:12

at stake. However, I can

01:00:16

practice you know, some of

01:00:17

the s.o.s. Band. When are

01:00:18

you come to us. They

01:00:21

always ask questions like they

01:00:23

say, do you have a

01:00:24

any channel of a conversation

01:00:29

of communication with some Ministry

01:00:31

of Foreign Affairs or mystery

01:00:34

of a Commerce because when

01:00:37

they probably was encouraged by

01:00:40

the government may be sent

01:00:43

to you last and maybe

01:00:46

says ask me some time

01:00:47

is maybe and Yar see,

01:00:49

you know, there is dispute

01:00:52

those organizations and agencies may

01:00:56

not be the right combination

01:00:58

see to communicate two ways

01:00:59

are you know any communication

01:01:02

with his ministry of Commerce

01:01:03

Minister of Foreign Affairs? That's

01:01:04

not require any Chinese or

01:01:07

any Chinese new regulations before?

01:01:15

Election office location the other

01:01:20

is accountability Chinese are so

01:01:28

he's a lot of the

01:01:30

time they how to sync

01:01:31

legal remedies because they are

01:01:33

required to do so when

01:01:35

there are quite a number

01:01:36

of a regulation important regulation

01:01:41

is this what is called

01:01:43

the mayor's on managing the

01:01:50

legal dispute cases of central

01:01:54

SOS this why was issues

01:01:57
by ASAC in 2023. If

01:02:01
you look at the premiere

01:02:02
on ABC glass tile for

01:02:04
cases involving 50 many RMB

01:02:07
equivalency in foreign currency is

01:02:10
not very high value DSL.

01:02:13
We involved need to report

01:02:15
to SAC under the report

01:02:18
shall cover details of the

01:02:19
case that legal analysis of

01:02:21
the dispute a prediction of

01:02:23
the likely outcome as well

01:02:25
as the plan for next

01:02:28

steps. I also says after

01:02:31

complexion with a case, the

01:02:32

legal document needs to be

01:02:34

reported to assess act within

01:02:35

10 days max needs of

01:02:40

a full monitoring in pork

01:02:41

in the Casey's on management

01:02:50

of the cases will be

01:02:51

held accountable. I will be

01:02:54

subject to penalties as a

01:02:58

preamble. A few articles that

01:03:04

are trying to prepare some

01:03:05

of these Provisions is to

01:03:06

prevent losses to CSS. Hear

01:03:12

of me being a professor

01:03:13

one can tell that it's

01:03:14

also the people are really

01:03:16

there between you know, sorry

01:03:21

I said, you know, that's

01:03:23

an authorized by the states

01:03:25

by tax Independence Day operated

01:03:29

by the s.o.s. Decided solely

01:03:37

for is d i c

01:03:39

h i s d s

01:03:41

remember when I mentioned that

01:03:42

50 million euros equivalent to

01:03:45

in foreign currency. So apparently

01:03:47

it covers of the volume

01:03:50

Westman a dispute arising from

01:03:51

Alpine, Westmont. So because of

01:03:56

because of those regulations also

01:04:00

use when faced with a

01:04:01

potential dispute against a host

01:04:03

of State the management, they

01:04:06

will be under pressure to

01:04:08

pursue legal at remedies including

01:04:11

pursuing legal remedies through University

01:04:15

application. So I know there

01:04:21

is also why I inspection

01:04:23

from the organization also will

01:04:28

include the inspection within the

01:04:30

party itself. So That's why

01:04:36

you know, the man who

01:04:37

brings a lot of the

01:04:38

time they have a to

01:04:39

go through this pretty happy

01:04:41

Tuesday matinee tomorrow in and

01:04:47

sees one of which is

01:04:49

that the measurement hands to

01:04:52

you know, avoid settlement settlements

01:04:57

are also leased to the

01:04:59

accountability issue. So we'll easily

01:05:03

compromised most of the situations.

01:05:06

Although I see there is

01:05:09

a possibility of settlement in

01:05:11

some cases of example is

01:05:13

the hottest state and you

01:05:15

know a previously I revoke

01:05:17

my license about it through

01:05:19

the arbitration they are willing

01:05:20

to restore the investor. I'll

01:05:24

give them a new license

01:05:25

then probably there's no reason

01:05:28

for the management to see

01:05:29

no other management to do

01:05:31

not think they will be

01:05:32

held accountable for what I've

01:05:34

heard is here and help

01:05:35

me. Then there's a possibility

01:05:37

for set reminder. Buy any

01:05:41

compromise is to be will

01:05:44

say no they will just

01:05:46

say, you know make the

01:05:50

decision. I will just a

01:05:51

reporter of time to myself

01:05:53

and the other possible tendency

01:05:58

is I didn't know this

01:06:01

from a practice but I

01:06:02

think that's how it's all

01:06:04

going to be true. The

01:06:06

minor pain management of the

01:06:08

also want to avoid Zapata

01:06:11

family because I ate a

01:06:14

sub body found in that

01:06:15

means a percentage of the

01:06:17

all-time what time are they

01:06:18

receive from? The award has

01:06:21

he won the case will

01:06:23

be allocated to the South

01:06:25

how you found us. Those

01:06:27

may be categorized as status

01:06:30

as I know measurements achievement.

01:06:32

Kind of father, you know.

01:06:34

You look pretty size unit

01:06:36

future by you not making

01:06:39

use of improper founding and

01:06:43

at the same time I'm

01:06:44

losing status as the best

01:06:48

sub basically my over the

01:06:49

weekend. Thank you. Thank you.

01:06:54

It's a large 14 really

01:06:56

interesting points from the inside

01:06:58

and tons of Chinese SOS

01:07:00

and you would mention the

01:07:01

increasing awareness of In-House counsel

01:07:03

of protections under investment treaties

01:07:05

and with respect to outside

01:07:07

counsel firms in China. I

01:07:09

think what's happening right now

01:07:10

in China with investment arbitration.

01:07:12

It reminds me of what

01:07:13

was happening in the US

01:07:15

and Europe in the 2000

01:07:16

was within a certain DC

01:07:18

in the 2008 that time

01:07:20

you had a lot of

01:07:21

big firms with big commercial

01:07:23

arbitration practices slowly migrating over

01:07:26

into investment treaty work and

01:07:28

I think that in China,

01:07:28

that's exactly what's happening right

01:07:30

now the large firms with

01:07:31

with large commercial arbitration practices

01:07:34

getting up to speed on

01:07:35

investment arbitration. They have the

01:07:37

clients. They're getting ready to

01:07:38

go to have a larger

01:07:39

and larger Rolla and obviously

01:07:40

jungle and has played a

01:07:41

key role is in that

01:07:43

process. Okay. We're now going

01:07:45

to turn to eye doctor

01:07:46

once wake Wahoo. I was

01:07:48

going to be joining virtually

01:07:49
is that Go to work.

01:07:55
Don't you miss my grandson?

01:07:58
You hear me? Yeah. Okay,

01:08:03
so dededede stand today's lucky

01:08:24
What's the implementation got to

01:08:28
Bri Chinese state-owned Enterprises have

01:08:32
been consistently actors and playing

01:08:35
a n d e f

01:08:39
e r r y Investments?

01:08:42
The actress just has long

01:08:45
been a complicated issue in

01:08:48
International Investment operation. So just

01:08:53
not prefer the one who

01:08:54

has made a very sorrow

01:08:56

complete and instructive letter on

01:08:59

a list main topic. So

01:09:02

I would just like to

01:09:03

do at several points in

01:09:07

football regarding the qualified investor

01:09:12

definition. I think we can

01:09:18

conclude from article 25 of

01:09:20

exit connection that it's it's

01:09:24

a forum of investor-state dispute

01:09:28

settlement SPS. And 2nd and

01:09:33

National another Contracting state may

01:09:37

include a Judicial person which

01:09:39

in principle include asle. That's

01:09:43
the best way to go

01:09:46
from Hartford to make any

01:09:55
distinction between a Zoe's and

01:09:58
privately owned and the prices.

01:10:01
So Zack and rice to

01:10:04
some some dogs or Sound

01:10:07
and Security of the definition

01:10:09
of investment. You gentlemen have

01:10:20
also something about the broadcast

01:10:23
test test that's very important

01:10:26
in understanding the history and

01:10:30
improved through my two meaning

01:10:32
of of the article 25

01:10:35
of exclamation and what else

01:10:45
practice test just out to

01:10:48
mirror the customary international law

01:10:51
of a abusive of 58.

01:11:01
Drop top goes on responsibilities

01:11:03
of states for internationally wrongful

01:11:06
acts. That's one point. I

01:11:09
would like to to make

01:11:10
the best practice in this

01:11:15
field. I fully agree with

01:11:18
Professor download that no tribunal

01:11:21
has denied any jurisdiction over

01:11:25
the least concerning the two

01:11:30

X cases. And one thing

01:11:35

is what what medicine is

01:11:37

b u c g. How

01:11:45

do you know? found that

01:11:49

Chinese place in walkmans in

01:11:51

key decision-making a v u

01:11:54

z g To the purpose

01:11:58

of determining whether he was

01:12:01

discharging governmental functions in specific

01:12:04

instances. This is a very

01:12:07

important principle, corporate framework for

01:12:13

China says freeze and this

01:12:16

case may be seen as

01:12:18

such importance Press International and

01:12:24

Chinese States involvement in key

01:12:34

decision-making at at least weatherbell

01:12:43

qualified investor or not. The

01:12:46

important thing is you have

01:12:48

to look at the time

01:12:49

counters characteristics of Investments itself.

01:13:03

And I'm still point. I

01:13:05

would like to make I

01:13:06

cut to make a very

01:13:08

simple summary of the state's

01:13:12

position and fabulous methods of

01:13:14

analysis in determining the qualification

01:13:18

was standing. whole states 2016

01:13:25

love Jackson Our office has

01:13:29

to be right on G

01:13:31

relating to inherent characteristic such

01:13:35

as such as the operation

01:13:39

and management of soe is

01:13:42

controlled by the state National

01:13:50

Park. 2 States with to

01:13:53

some extent with the ultimate

01:13:55

beneficiary as a resource investment

01:13:58

as Metra. And the tribunals

01:14:07

methods of an analysis if

01:14:10

if I could make summary.

01:14:12

Is that tribunal prefer to

01:14:14

focus on the nature of

01:14:16

his specific investment of SOS

01:14:20

inherent characteristic? as long as

01:14:24

the apartments, Four Seasons twice

01:14:26

the minimum requirements of a

01:14:29

national Proofs in post

01:14:39

on Stick party wants to

01:14:41

respond to the First Investors

01:14:43

are agents of the government

01:14:45

Investments is actually a government

01:14:48

sponsors. It was bad the

01:14:51

unfavorable, but that's the summary

01:14:57

I would like to make

01:14:58

and last I I would

01:15:01

like to thank Chinese SOS.

01:15:08

That's only the commercial and

01:15:10

private activities to protect will

01:15:21

advise to operate independently and

01:15:24

act in Conformity with the

01:15:26

loss of Home Country as

01:15:27

well as the customary international

01:15:29

law and local or in

01:15:31

the house. That's all I

01:15:35

would like to make some

01:15:36

some points. So thank you

01:15:39

for having me here. Thank

01:15:40

you very much. Thank you

01:15:47

very much. That one spy

01:15:49

Squad really interesting legal points

01:15:50

there the BCG case obviously

01:15:52

it is a key case

01:15:54

in this area. And also

01:15:55

you raised the issue of

01:15:55

burden and it is interesting

01:15:57

to think about burden that

01:15:58

that right. Normally the claim

01:16:00

it would have the burden

01:16:00

of establishing that it's an

01:16:01

investor or a national of

01:16:03

a contract in state, but

01:16:04

with respect to a jurisdictional

01:16:06

objection, the respondent raising the

01:16:08

jurisdictional objection normally would have

01:16:10

the burden to to establish

01:16:12

whatever objection it is. They're

01:16:14

raising including the fact that

01:16:15

they'd perhaps because of a

01:16:17

relationship with the government party

01:16:19

should not qualify as an

01:16:20

investor. We have a few

01:16:22

minutes remaining we've heard a

01:16:23

lot. We've covered a lot

01:16:24

both on the legal side.

01:16:25

And in terms of on

01:16:27

the ground facts, like I

01:16:28

can open things up for

01:16:29

our panel any reactions any

01:16:31

comments on anything that we've

01:16:33

heard so far. But I

01:16:39

was very upset to hear

01:16:40

the comments of the probably

01:16:42

about kind of the concerns

01:16:44

of State Enterprises it in

01:16:47

terms of regime. I think

01:16:52

that's the kind of concerned

01:16:54

the frankly not just us

01:16:55

so we'd have but certainly

01:16:58

is always that diplomatic element

01:17:04

because the the investor is

01:17:07

foreign that there has to

01:17:10

be no interaction at the

01:17:12

Diplomatic level in some of

01:17:14

these big dispute so that

01:17:16

that's very similar the idea

01:17:19

of seeking to avoid suing

01:17:21

a state that's definitely the

01:17:23

motivation of my commercial clients

01:17:25

as well. They they really

01:17:27

don't want to do that.

01:17:29

That's that's something that grinds

01:17:31
against their better judgment for

01:17:34
the most part and coming

01:17:36
to that conclusion. Really. Is

01:17:38
predicated just as as as

01:17:41
we said earlier on situations

01:17:43
in which frankly the company

01:17:45
situation in which the the

01:17:51
losses are just so significant

01:17:55
to the bottom line that

01:17:56
just frankly from responsibilities. And

01:18:00
I think that that's a

01:18:05
very difficult kind of situation

01:18:07
for for all investors faced

01:18:11

with similar challenges. So I

01:18:13

don't think it's just unique

01:18:14

that so he's although I

01:18:15

do understand there are certain

01:18:17

Regulatory and other responsibilities, which

01:18:20

will make it even more

01:18:21

important that they get if

01:18:23

it's a decision, right? But

01:18:26

in those in a significant

01:18:28

loss situation, it is definitely

01:18:32

an option really When government

01:18:33

measures are at issue in

01:18:35

the foreign jurisdiction going to

01:18:38

be on as a contract

01:18:39
and you know, that's something

01:18:42
that it's always worthwhile to

01:18:43
look at as a remedy.

01:18:47
Thank you for other reactions

01:18:49
from the panel. Thanks. I

01:18:55
think we've spoken a lot

01:18:57
about the Sol. You should

01:18:59
have should have the investment

01:19:02
protected protected investigating molluscum. But

01:19:08
I think we would go

01:19:09
back to what you started

01:19:10
with the relationship with the

01:19:16
home state of matter. And

01:19:18

I think it still doesn't

01:19:20

matter even if you're protected

01:19:22

investor, and how should it

01:19:24

matter. I think we haven't

01:19:26

actually dealt with those questions

01:19:27

because you might be an

01:19:31

soe and you do enjoy

01:19:33

protection. But what is the

01:19:36

protection that you enjoy other

01:19:38

differences in treatment that are

01:19:41

in the protection that a

01:19:42

private investor should enjoy in

01:19:45

that in the country between

01:19:48

a strip should a private

01:19:50

investor? Enjoy a different reason

01:19:52

or the same treatment and

01:19:54

that may come into play

01:19:56

when we look at National

01:19:58

treatment most-favored-nation treatment and there

01:20:01

are some cases on that

01:20:03

I can UPS in Canada

01:20:05

is a case on the

01:20:07

other issue might be a

01:20:08

bit more which is probably

01:20:14

all of the investor investment

01:20:18

treaties that will be exceptions

01:20:20

and National Security is one

01:20:23

of them and when you

01:20:25

talk about the exception applies

01:20:30

the National Security exception applies,

01:20:31

I think it is fairly

01:20:34

obvious to see that there

01:20:36

might be a difference in

01:20:37

treatment where you are Chinese

01:20:40

private investor or a soe

01:20:44

and so I think those

01:20:46

would be issues which unfortunately

01:20:48

we didn't have time together.

01:20:51

Thank you for raising those

01:20:54

points other for the comments

01:20:56

also have a photo myself

01:21:05

understand you because most of

01:21:08

our potential clients they are

01:21:11

at least so I think

01:21:12

those are the typical as

01:21:14

a set amount that I

01:21:16

mentioned a t ya mentioned

01:21:21

that. Probably companies they may

01:21:28

have a similar way, to

01:21:32

bring up a arbitration allows

01:21:35

you to against the sovereign

01:21:37

states my taxi, so maybe

01:21:41

yeah your clients. So I

01:21:44

basically a large clients which

01:21:47

has may be listed companies

01:21:49

with d have a similar

01:21:50

issue. Come across as more

01:21:52

of a Chinese private companies.

01:21:54

Why you messing in Central

01:21:56

Asia need to have a

01:21:58

much less concern in this

01:21:59

regard is a Ministry levels.

01:22:04

How is the embassy in

01:22:07

terms of accountability their teammates,

01:22:10

but it's not listed company

01:22:11

for sure. If it's Alyssa

01:22:13

company, issues. They want to

01:22:20

make you suffer. So how

01:22:22

you found you? Thank you.

01:22:28

Did you want? Thank you

01:22:33

very much for all the

01:22:34

comments. How is the Lord's

01:22:37

laws from today's discussions and

01:22:40

the only thing I found

01:22:42

is very interesting and I

01:22:44

will have enough time to

01:22:44

cover actually in session today

01:22:48

is you know, these states

01:22:50

have taking increase increase the

01:23:00

security reviews and also, you

01:23:03

know about National Security and

01:23:11

another issues. It's quite interesting

01:23:16

at the firing is discussed

01:23:22

about this Daniel. And there's

01:23:37

the issue of interpretation by

01:23:39

the occupy the you knows

01:23:41

when their vehicle ticket Investments.

01:23:48

The it's it's one of

01:23:51

the thing that's important is

01:23:53

to see what's actually open

01:23:56

the process for the future

01:23:57

investment strategy reforms is ICS

01:24:01

system reforms that what stick

01:24:04

do to address their concerns

01:24:05

and to achieve and I

01:24:09

think that's a great thing

01:24:12

for myself. And thank you.

01:24:13

Thank you we have about

01:24:16

one minute left. Dr. Juan

01:24:18

Cuevas Vivien Leigh any final

01:24:20

Thoughts with the minute we

01:24:21

have remaining Yes, please. Yeah,

01:24:27

I like to Circle back

01:24:28

to you. He said Crilley

01:24:30

brim phenomenon, mr. Chow chow

01:24:32

mentioned just now and investment

01:24:35

arbitration. I think despite a

01:24:38

strong presence of Chinese contractors

01:24:40

and Global construction industry so

01:24:43

far. They still have been

01:24:45

very few cases where Chinese

01:24:47

a Zoe's claimant. I think

01:24:51

that has something to do

01:24:52

with this bifurcated approach China

01:24:55

has taken to was International

01:24:57

arbitration and investment arbitration in

01:25:01

principle. I think on the

01:25:02

110 China has embraced the

01:25:05

International Education to Sotto investment

01:25:07

disputes. However, on the other

01:25:09

hand, it's still somewhat was

01:25:14

the core issues such as

01:25:17

issues of sovereignty and territorial

01:25:19

issues when this issue is

01:25:21

that a state I think

01:25:23

a question of how much

01:25:25

Chinese soe stand Chinese government

01:25:27

to resolve to arbitration is

01:25:31

still a question mark I

01:25:33

think that sort of attitude

01:25:34

is someone thinking process and

01:25:38

also they had to do

01:25:39

it to where is investment

01:25:40

arbitration a resulting in some

01:25:43

degree of resistance when they're

01:25:45

contemplating about initiating any form

01:25:48

of dispute resolution process against

01:25:50

the whole states. So I

01:25:52

think it's an interesting question

01:25:53

to think whether we should

01:25:55

maintain this bifurcated approach or

01:25:58

at one point on this

01:26:00

should be a more unique

01:26:01

approach and whether that will

01:26:02

help Chinese are so easy

01:26:05

in participating in more options.

01:26:14

Thank you for being late.

01:26:15

Dr. Wong shui for any

01:26:17

final thought. No, thank you.

01:26:20

Thank you. Okay. Well, thank

01:26:25

you. Everyone has been a

01:26:26

terrific discussion. Thank you. Again

01:26:27

to Jose Antonio to World

01:26:29

arbitration update to Beijing arbitration

01:26:31

commission to Ian Laird has

01:26:34

been a terrific session. I

01:26:35

really am glad I made

01:26:36

the trip to Beijing. Thank

01:26:37

you everyone.