

Tax Measures and Investment Arbitration *

Summary

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

The Washington Arbitration Update (WAU) featured a panel discussion focusing on the intersection of taxation and investment arbitration, highlighting its significance in contemporary legal practice. The session was moderated by Sebastian Wushka, a partner at Luther in Hamburg, who introduced key panelists, including Trisha Mitra, Roberta, Wendy Miles KC, and Robin Rylanda, each bringing expertise in international arbitration, tax law, and investment disputes.

Trisha Mitra opened with an overview of recent developments in investment arbitration related to taxation, emphasizing the growing relevance of tax measures in investment disputes, which account for approximately 15% of cases. She discussed the implications of the OECD's global minimum tax initiative, highlighting how it may influence foreign direct investment (FDI) flows and investor nationality issues. Trisha noted that states might face investment treaty claims if they change tax regimes, particularly those with stabilization clauses.

The panelists engaged in a robust dialogue about the complexities of tax carve-outs in investment treaties, with Robin Rylanda explaining the challenges associated with tax gross-up claims in arbitration. He outlined scenarios where investors might be undercompensated due to taxation on awards, emphasizing the need for clarity and consistency in legal reasoning regarding damages.

Wendy Miles KC contributed insights on carbon pricing mechanisms and their implications for investment treaties, stressing the importance of coordinated approaches between tax and investment law to facilitate sustainable investment in a transitioning economy.

Overall, the session underscored the necessity for greater interaction and dialogue between international tax and investment law communities, particularly in light of evolving global standards and the urgent need for effective dispute resolution mechanisms in the context of taxation and investment arbitration. The discussion concluded with a call for ongoing collaboration to address these complex issues in future panels and networking sessions.



Authors

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Topics

investment arbitration, tax, tax measures

Category

WAU

Full Transcript

00:00:02

Hello, everyone. This is a

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world arbitration update. And today

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we have our third we're

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now having our third panel

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of the day in Europe

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day and we have an

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incredible panel to speak on.

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Facts and investment arbitration I

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would like to thank all

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of our panelists and I

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would like to to before

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moving into the panel. I

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would like to thank our

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sponsors which have made it

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possible to make the world

00:00:37

arbitration update a sustainable Forum.

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This is our second edition

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of wow, and That I

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would I would stress that

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that the tool two of

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the main missions of the

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world opportunity update. Wow, R1

00:00:56

to the centralize international arbitration

00:01:00

and and and by this

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we mean to really reaching

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out to places in the

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world that do International arbitration

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beyond the the normal centers

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including the New York or

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paris's or even Washington and

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reach out to places even

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in Europe that may not

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be the main centers or

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in Asia or in Africa

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or in Latin America or

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or in in Asia. So

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that's one of the objectives

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on the other objective is

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to update on issues of

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international commercial right investment arbitration

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as well as public international

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law within this objective one

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of the topics that we

00:01:48

had not addressed before in

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any of the world arbitration

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panels in the first year

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or in its sister event

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the Washington arbitration week. Also

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wow is the are the

00:02:05

Is on Taxation and investment

00:02:08

nutrition so lo and behold

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last year. We had a

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conversation with Sebastian wushka, who

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is the moderator and the

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mind behind this this panel

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to put together a an

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incredible set of panelists who

00:02:26

would address issues of investment

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arbitration and Taxation. And and

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this is a reality now,

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I would like to thank

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Sebastian because you know, he

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he looked into into the

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main issues that that should

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be discussed that are both

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issues that will be addressed

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to give a baseline for

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everyone and then to go

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deeper into topics that are

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novel and and that that

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must be discussed in taxation

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and investment arbitration, but before

00:03:01

even the floor to Sebastian

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and and In the speakers,

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I would like to emphasize

00:03:09

that Sebastian is a partner

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at Luther and he is

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in Hamburg and assists domestic

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and foreign clients in relation

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to complex complex litigation and

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arbitration proceedings with a strong

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focus on public international law

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matters, including public international law

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advisory work and in the

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area of International Investment law,

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he assists both corporate investors

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and and state owned Enterprises

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with their investment disputes and

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is particularly experience in infra

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intra EU investment matters. He's

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expertise covers questions of public

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international law more broadly including

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for example, human rights and

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humanitarian law. He has appeared

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before various tribunals under the

00:04:01

ICC rules amongst others. I

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would like to emphasize that

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he has been listed as

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a lawyers to watch in

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2023 and he has been

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recommended as a future leader

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in arbitration both in 2022

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and 2021 with that I

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would like to hand the

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Floor to Sebastian Sebastian the

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floor is yours. Thank you

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very much Christian Antonio. And

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thank you also to the

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entire world arbitration update team

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for the invitation to moderate

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this panel for the openness

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to host a session here

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on the interaction of international

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Taxation and International Investment law.

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I'm not going to spend

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many introductory rewards about Taxation

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and investment law here since

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we actually have one panelist

00:05:01

given an opening presentation on

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the topic. Let me just

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say that I'm glad to

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see so many colleagues joining

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the session. I see some

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are still joining in text

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matters and interaction with investment

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law standards is if you

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don't already considered a very

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interesting issue, it is definitely

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an issue that you cannot

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avoid practicing in international arbitration.

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It will rise in all

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investment cases. If only in

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relation to the taxation of

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awards, which we will also

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be addressing in this session.

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And especially Antonio already indicated.

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We have a great panel

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to discuss these topics. First

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we will have an introductory

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presentation the update so to

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say by Trisha Mitra. Trisha

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focuses a practice on investment

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and Commercial arbitration as well

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as publishing international law matters.

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She's an associate with the

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lead in London and previously

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was a an associate with

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the arbitration group at Sherman

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and Sterling in Paris for

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many years, but prior to

00:06:01

that. She also spent time

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with the arbitration practice at

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Wilma held in London as

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well as as an assistant

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to persevere in Switzerland in

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his arbitration practice and as

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a litigation associate in India.

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Joining Trisha in the discussion

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will be Professor, Roberta. No.

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Robert is a professor of

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Swiss and international tax law

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at University of lausanne where

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you had the text policy

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Senator as well as a

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research platform on text disputes

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and International Investment and Commercial

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arbitration to which I am

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fortunate to also contribute. next

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this probe as also the

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chairman of the permanent scientific

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Committee of the International Business

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Association and he practices Swiss

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and international tax law as

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an independent expert with over

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20 years of experience and

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as part of that is

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regularly involved as an expert

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in international arbitrations. Next we

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have Wendy miles KC who

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is a specialist in international

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arbitration and dispute resolution with

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over 25 years of experience

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at 20 Essex in London.

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Since 2005 she has developed

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a busy arbitration practice as

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an arbitrator and the most

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arbitral institutions including an investment

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cases. And when he has

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been appointed by the UK

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to the exact panel of

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arbitrators and also the panel

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of conciliators in 2020. amongst

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numerous further appointments importantly for

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present purposes when they also

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code shares the ICC working

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group on carbon pricing mechanisms.

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We're also tax comes into

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play as we will see

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during today's session. Finally, we

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are joined by Robin rylanda

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who is a partner at

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monheimer's modeling and Stockholm Sweden

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where he specializes in dispute

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resolution with a particular emphasis

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on arbitration matters. Robin has

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considerable experience as Council and

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investment disputes under bilateral investment

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treaties the energy data treaty

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and the exit convention and

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he also regularly represents clients

00:07:55

in arbitration related matters before

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the Swedish courts. And as

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I can say from personal

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experience Robin is in particular

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and expert on Damages aspects

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and investment cases, and they

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are also on taxation questions.

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Now we will try to

00:08:09

make the session as interactive

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as possible. But of course

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we will have certain input

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presentations starting first with Twitter

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introductory presentation and then moving

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to different topics between these

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topics. We will open up

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the floor for the panelists

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to join the debate and

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exchange, but we would also

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like the audience to participate

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by raising questions. So in

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case you have questions, please

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send them to the chat

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and I will try to

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integrate them into the discussion

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as we go. Otherwise, we

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will hopefully have some time

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left at the end for

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that purpose and can then

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address questions at a Q&A

00:08:46

session in the end. Now

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without further Ado, I would

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like to invite trisham to

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start with her opening remarks

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enter update. Thank you very

00:09:00

much Sebastian. And thank you

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again to the organizers of

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the world arbitrating update for

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the invitation. When one things

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of the type of police

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powers of a state that

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could give rise to an

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investment arbitration. The first categories

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that perhaps come to mind

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are physical exploration regulatory measures

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treatment by domestic courts. But

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taxation measures are equally and

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exercise of police power and

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according to latest statistics the

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cause of 15% of all

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ists cases registered so far.

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So therefore this is a

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significant ratio of ists cases

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and what makes this topic

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chosen by the organizers very

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relevant for practitioners as Sebastian

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mentioned I will give an

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overview of interesting developments in

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the space in the last

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few years. I plan to

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cover taxation board from sort

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of policy perspective as well

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as developments in the isds

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phase. I plan to begin

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by by discussing. the global

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minimum tax and their implications

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on FDI and ists To

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understand Global minimum tax we

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need to go back to

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2013. When the oecd and

00:10:24
the G20 launched the base

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erosion and profit shifting project

00:10:28
or what is called the

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bets. The aim of peps

00:10:33
was to address tax planning

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strategies used by multinational companies

00:10:37
to avoid paying taxes. Not

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to be clear. The companies

00:10:42
were not evading taxes. They

00:10:44
were instead tax planning in

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a way to exploit loopholes

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and mismatches between national tax

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laws of different jurisdictions. And

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countries particularly developing countries started

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complaining that while these multinationals

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were conducting economic activities in

00:11:01

their territories. The companies were

00:11:04

able to avoid paying taxes

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by structuring themselves through say

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a low tax jurisdiction. This

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kind of tax competition or

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race to the bottom. the

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countries have complained frustrate Revenue

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collection Revenue efforts add to

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this The increased digitization of

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businesses when tax Frameworks were

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originally designed for perhaps more

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brick and mortar kind of

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businesses. the work of the

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oecd up is in two

00:11:37

is a two pillar approach.

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Below one aims to reallocate

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some profits based on the

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market jurisdiction where the businesses

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are generating value from say

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for example through interaction with

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consumers or users in that

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jurisdiction where they might not

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have a physical Nexus. but

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are conducting economic activities in

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so in case you're wondering

00:12:03

what the tax teams of

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Google Facebook and Netflix will

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be thinking about for the

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next few years. It's pillow

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on. now pillar 2 proposes

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the global minimum tax Which

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is intended to address the

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incentives to shift profits based

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solely on tax outcomes. Now

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these rules at the moment

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are meant to apply to

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companies with more than 750

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million in revenues. So the

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big multinationals But it is

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quite significant because it could

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make companies revisit their current

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tax re-structuring which in turn

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has the potential to affect

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FDI flows. Across the world

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and potentially the most in

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in low tax jurisdictions. It's

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a company's might move away

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from the use of offshore

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Vehicles often used in tax

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planning. And establish more direct

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connections with recipe and countries

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and from an ists perspective.

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This could be quite interesting

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because it might impact questions

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of nationality of investors. Global

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minimum data tax Could have

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many potential impacts on both

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FDI and isds. For example

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where countries have entered into

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stabilization Clauses are agreed to

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provide preferential tax treatment to

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foreign investors. Adjusting the tax

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could potentially lead to isds

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claims. now the current IIA

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framework or at least the

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majority of the current II's

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Do not include explicit obligations

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that the tax regime of

00:13:45

a country will not change.

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those states often argue that

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changing a tax regime is

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an exercise of the softentiy

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and therefore cannot be impugned

00:13:57

or should not be impuned

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through an ISS claim. Investors

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on the other hand have

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relied on expropriation and tfps

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and umbrella Clauses to argue

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that the change in the

00:14:09

tax framework has adversely impacted

00:14:11

their investment. Going forward and

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especially once pillow 2 comes

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into Force. It'll be interesting

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to see how iin negotiators

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react to this if at

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all they do. Would they

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incorporate perhaps more clarification language

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in the IIs? States have

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in the recent discussions for

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IIA reform had The safeguarding

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of their regulatory space probably

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at the highest up at

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the top of their priority

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list. So as pillar to

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comes into effect on his

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ratified by countries states will

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also likely be thinking about

00:15:01

how to minimize the risk

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of isd's claims. The first

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answer that will probably come

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to everyone's mindless tax covers.

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Indeed the Indian model vit

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curves our tax disputes completely.

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Some would say other reaction

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to the Vodafone and the

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candidates. But if states do

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not agree to completely carve

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our tax disputes there could

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be other reform options such

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as redefining investment. Tweaking the

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language of the standards of

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protection in the vit or

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indeed having another look at

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the public policy exceptions clause.

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The new Dutch model vit

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has an interesting Clause preserving

00:15:42
the right of parties to

00:15:43
implement taxes and here I

00:15:45
coach aimed at preventing the

00:15:47
avoidance or evasion of taxes

00:15:49
personal into its tax laws

00:15:52
or it's agreements for the

00:15:53
avoidance of double taxation. So

00:15:57
clearly treating negotiators are already

00:15:59
thinking about this. Now I'll

00:16:04
move away from developments in

00:16:07
in the tax policy space.

00:16:09
And talk a little bit

00:16:10

about the recent developments in

00:16:13

tax related isds disputes. Now

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over the years many of

00:16:18

the tax cases that we

00:16:19

have seen have Arisen from

00:16:21

taxes or levies aimed at

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specific Industries. The Vodafone and

00:16:27

can disputes whose Awards of

00:16:29

her issued in 2020. We're

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one of the first few

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cases where the application of

00:16:35

the central tax statute of

00:16:37

a country was challenged in

00:16:38

an ists case. Now the

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those cases as many of

00:16:43

you might already know a

00:16:45

rose from the retroactive Amendment

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of the capital gains provision

00:16:49

in India's Income Tax Act.

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And the subsequent in position

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of attacks of what billions

00:16:56

of dollars on on can

00:16:58

and work? Now I'll summarize

00:17:02

the main findings of the

00:17:03

tribunal in can. Not just because I

00:17:06

was part of that team

00:17:07

but because the Vodafone award

00:17:09
is not public. in the

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can dispute India raised several

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jurisdictional objections It argued that

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vit that the b.i.t the

00:17:22
UK and WB it excluded

00:17:23
tax disputes. The tribunal however

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rejected this seeing that the

00:17:30
vit expressly carved our tax

00:17:33
disputes only from the national

00:17:35
treatment and the MFM Clauses

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in the vit. And you

00:17:41
also argued that tax disputes

00:17:43
are not arbitrable. The tribunal

00:17:46

however held that there is

00:17:47

a distinction between tax disputes

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and a dispute relating to

00:17:51

tax measures. And can what

00:17:54

and and how that can

00:17:55

was disputing the manner in

00:17:57

which the tax was imposed

00:17:58

and not necessarily seeking to.

00:18:04

Seeking to resolve attacks dispute

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against India before the Tribunal.

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The tribunal also did not

00:18:11

find any public policy that

00:18:12

prevented it from accepting jurisdiction

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over the dispute. In that

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case India also failed to

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convince the tribunal that tax

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disputes were excluded from the

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vit because India and UK

00:18:24

had a had a double

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taxation treaty. The tribunal clarify

00:18:28

that that a vit and

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a double taxation treaty have

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different schools. On the merits

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the tribunal found that India

00:18:37

had reached the equity standard.

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Finding that the amendment had

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substantively altered the Indian tax

00:18:44

framework and confirm that legal

00:18:47

certainty and stability were general

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principles of rule of law.

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The tribunal also rejected India's

00:18:55

arguments that cans corporate structuring

00:18:57

was tax avoidant making a

00:19:00

distinction between legitimate tax planning

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and import impermissible tax avoidance.

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I must know that the

00:19:09

can tribunal noted that there

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was a doubt of jurisdiction

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Jewish Prudence in relation to

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matters of retroactivity and retroactive

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Taxation and particular and I

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want to know whether the

00:19:21

can award will be that

00:19:22

very jurisprudence for future cases

00:19:24

and retroactive taxes seeing that

00:19:28

just in March last year

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a Canadian mining company called

00:19:32

false Majestic as initiated the

00:19:34

case against Mexico over retroactive

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tax liabilities. Then there are

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the well-known slew of cases

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known as the renewable energy

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cases over the modification of

00:19:45

a state subsidy regime for

00:19:47

renewable energy. Spain Italy and

00:19:49

the Czech Republic have steadily

00:19:52

climbed the untag list of

00:19:53

more student more student respondent

00:19:55

States as a result of

00:19:57

those cases. The list of

00:20:00

decisions is perhaps too long

00:20:02

to summarize in in the

00:20:04

course of my introduction. But

00:20:06

in the majority of the

00:20:07

Spanish solar cases, for example,

00:20:08

Spain was found liable for

00:20:11

reaching the protection standards in

00:20:12

the ecd for the manner

00:20:14

in which subsidy regime was

00:20:15

reformed. Last year also saw

00:20:19

two new cases against Ukraine

00:20:21

resulting from reforms to their

00:20:23

wind and solar tariff regimes.

00:20:25

Interestingly France and Japan are

00:20:27

now reportedly facing their first

00:20:29

treaty cases again as a

00:20:30

result of changes to the

00:20:32

solar subsidy regimes. Now it

00:20:35

is reported that the Japanese

00:20:36

government is very of facing

00:20:39

multiple claims as a result

00:20:41

of of these changes. Now

00:20:44

all these are more concerns

00:20:45

leading me back to my

00:20:47

earlier point. It is an

00:20:48

interesting time for tax policy

00:20:50

makers and investment of an

00:20:53

investment treaty negotiators whose future

00:20:55

mandates will likely reflect these

00:20:57

developments. I would stop you

00:21:00

for now. Sebastian back to

00:21:02

you Thank you very much

00:21:05

Tricia for this this overview

00:21:06

of both the text policy

00:21:08

space and the same time

00:21:10

then also current developments in

00:21:12

relation to investment arbitration relating

00:21:15

to taxation measures tax related

00:21:17

investment disputes as the the

00:21:19

Canon travel called it. I'm

00:21:21

looking through the the panel

00:21:22

to see whether I immediate

00:21:24

directions to to Trisha's opening

00:21:26

remarks. Would anybody like to

00:21:28

comment in particular cases a

00:21:30

particular aspects from that? Well,

00:21:32

if you allow me perhaps

00:21:34

just a few words on

00:21:36

global minimum tax. I will

00:21:38

say my other remarks for

00:21:40

my inputs because they relate

00:21:41

more to the the cases

00:21:43

but on global minimum tax,

00:21:44

I think it's very nice

00:21:45

that Trisha brought up the

00:21:46

the issue. It is a

00:21:49

very interesting example of recent

00:21:52

way of making laws at

00:21:54

the international tax level just

00:21:57

to highlight two points. So

00:21:59

the global minimum tax is

00:22:01

not a multilateral treaty. It's

00:22:03

about transposing domestic agreed laws

00:22:07

into domestic laws model rules.

00:22:10

So this is quite interesting

00:22:10

because countries would you know

00:22:13

replicate directly into their domestic

00:22:15

tax legislations rules, that would

00:22:19

have been agreed upon at

00:22:20

the multinational level, but it's

00:22:21

not a treaty that's a

00:22:23

very different important difference with

00:22:25

with pillar one actually. So

00:22:27

Global minimum tax is just

00:22:29

domestic law now the fact

00:22:31

that There is a problem

00:22:32

of interaction with the investment

00:22:34

treaty regime on the scores

00:22:37

the need for a more

00:22:38

coordinated approach between the two

00:22:40

Fields. That's that's quite clear.

00:22:41

It's also a question of

00:22:45

what happens. If for example

00:22:47

a country has incentives and

00:22:50

then decides to remove these

00:22:51

incentives to actually implement the

00:22:53

global minimum tax and that's

00:22:55

where they say the sensitive

00:22:57

Point does arise but I

00:22:59

think one should not also

00:23:01

Forget that the global minimum

00:23:04

tax is is a global

00:23:06

architecture. So just to give

00:23:07

you an example if a

00:23:09

country where to still maintain

00:23:12

an incentive and not to

00:23:13

implement the the global minimum

00:23:17

tax the income would be

00:23:18

taxed elsewhere. So if you

00:23:21

have a multinational group if

00:23:22

the income if there is

00:23:24

an incentive in the whole

00:23:25

state and that incentive is

00:23:27

maintained you still have a

00:23:28

Top-Up tax at the parent

00:23:30

company level or elsewhere. So

00:23:32

it should also be taken

00:23:34

into that consideration, but I

00:23:36

think the point made by

00:23:37

Trisha really on the scores

00:23:38

that there's got to be

00:23:40

a more coordinated approach between

00:23:42

the two Fields going forwards.

00:23:45

Right. Thank you very much

00:23:47
for this this I think

00:23:49
very helpful input also from

00:23:50
the textile for all arbitration

00:23:52
investment lawyers here in the

00:23:54
audience when the AC that

00:23:56
you are unmuted. So I

00:23:57
assume that you have a

00:23:58
comment also as well. Just

00:23:59
thank you Sebastian just to

00:24:01
make sure that everybody understands

00:24:03
the the audience the enlarged

00:24:07
approach as Trisha alluded to

00:24:10
and as you alluded to

00:24:11

investment arbitration may be pursuant

00:24:14

to an investment treaty. It

00:24:16

may also be pursuant to

00:24:17

an investment agreement or a

00:24:19

contract. So it's between an

00:24:21

investor foreign investor on the

00:24:22

one hand and estate party.

00:24:24

Usually the host State on

00:24:25

the other hand under a

00:24:27

contract and Trisha touched on

00:24:28

the text stabilization Provisions, which

00:24:30

come into contracts rather than

00:24:32

treaties so that that the

00:24:34

conversation relates to that as

00:24:36

everybody as much as a

00:24:38

treatise. Right. Thank you very

00:24:41

much, Robin. Yeah purpose just

00:24:44

picking up on what Tricia

00:24:46

said about what this might

00:24:48

mean for negotiations for investment

00:24:51

protection treaties going forward perhaps

00:24:56

as you said there will

00:24:57

be an inclination to include,

00:25:00

you know tax carve outs.

00:25:02

I just I'm just hoping

00:25:03

that they perhaps won't necessarily

00:25:06

be complete tax car lots,

00:25:08

but that you rather review

00:25:10

every time what is the

00:25:12

real need here for the

00:25:14

core about both when it

00:25:15

comes to what type of

00:25:16

measures you want to exclude.

00:25:18

I mean again the distinction

00:25:19

between tax dispute tax related

00:25:23

measures anything related to tax

00:25:25

but also on the other

00:25:26

end when it comes to

00:25:27

what types of protection standards

00:25:30

that you want to exclude

00:25:31

because of course there's a

00:25:32

big difference between excluding for

00:25:35

instance tax from umbrella Clauses.

00:25:37

If you have a contract

00:25:39

with a government or from

00:25:41

perhaps the ACT standard, so

00:25:44

Just a wish from my

00:25:47

side going forward. Right, and

00:25:50

I think this also underscores

00:25:52

the need that Robert already

00:25:54

emphasized for an more intensified

00:25:56

dialogue between text and politics

00:25:58

and investment policy makers because

00:26:00

the the usual setting that

00:26:02

you have is that the

00:26:02

text treating negotiators negotiate the

00:26:05

treaty and then they might

00:26:06

not know sufficiently about text

00:26:09

issues and like car from

00:26:10

our completely just because the

00:26:11

unknown should remain out of

00:26:12

the system. So that might

00:26:15

might be something that should

00:26:17

be rethought from from that

00:26:18

perspective as well. And I

00:26:20

think for that purpose, it's

00:26:21

also great white would beneficial

00:26:24

be beneficial for all of

00:26:25

us to look a bit

00:26:25

into the text here more

00:26:28

in more detail and for

00:26:29

that purpose, I would ask

00:26:30

about to take the floor

00:26:32

in relation to how Text

00:26:36

dispute settlement is somewhat different

00:26:37

from investment disputable and taking

00:26:39

more comparative approach to the

00:26:41

two systems as such. Yes,

00:26:44

thank you very much Sebastian.

00:26:46

Well. Tax disputes dispute settlements

00:26:50
on their International tax law

00:26:52
is is in the state

00:26:53
of Crisis. Currently, I must

00:26:55
say and the reason for

00:26:57
that it is because it

00:26:58
has not actually evolved as

00:27:01
quickly as the international tax

00:27:02
system has evolved. What do

00:27:03
I mean by that? Well,

00:27:05
very bluntly dispute settlements on

00:27:08
their International tax law is

00:27:10
rooted in diplomatic protection. The

00:27:12
taxpayer has a right to

00:27:13

initiate the procedure but has

00:27:14

no standing at the international

00:27:16

level. I was reading again

00:27:18

the report published in 2022

00:27:20

by the World Bank where

00:27:22

there is a description of

00:27:23

dispute settlement on the tax

00:27:25

treaties and I was interested

00:27:27

to see that it's called

00:27:28

the best efforts approach. Well

00:27:31

that doesn't really do justice

00:27:32

to the recent work of

00:27:34

the oecd because although we

00:27:36

are stuck with this diplomatic

00:27:38
protection framework. The idea is

00:27:40
still that the corporate authorities

00:27:43
would do their best and

00:27:45
it's interesting to see that

00:27:46
the material refers. To handling

00:27:49
the mutual agreement procedure in

00:27:51
unfair and Equitable manner to

00:27:54
actually reach a result. So

00:27:55
there is actually clearly pressure

00:27:57
on computer authorities to actually

00:28:01
resolve tax disputes. So it's

00:28:03
it would be wrong to

00:28:04
say that just they lose

00:28:06

best effort. But still the

00:28:08

taxpayer has no standing. So

00:28:10

that's I would say one

00:28:11

element which has over the

00:28:14

years stimulated the appetite for

00:28:17

investment State arbitration where of

00:28:20

course the position of the

00:28:21

investor taxpayer, it's different. Then

00:28:24

there is another element if

00:28:25

you look at tax treaty

00:28:27

disputes settlements, it will only

00:28:30

help you to deal with

00:28:32

disputes that are rooted in

00:28:34

a tax treaty application. So

00:28:37

typically cases of double double

00:28:41

taxation. It's offers no remedy

00:28:44

and it does not cover

00:28:45

cases the purely rooted for.

00:28:48

Example in a miss or

00:28:50

arbitrary application of domestic law

00:28:52

which can apply in a

00:28:54

cross-border situation. So simply the

00:28:57

scope of the mutual agreement

00:28:58

procedure is actually confined to

00:29:03

tax treaty application. and then

00:29:06

of course and I think

00:29:07

that also gives a nice

00:29:09

perhaps explanation to the reluctance

00:29:13

of states or to their

00:29:15

desire to include more and

00:29:16

more carve out for sovereignty

00:29:17

concerns. This is also a

00:29:19

tendency which we have been

00:29:21

facing in the tax field

00:29:23

because since a couple of

00:29:25

years we attempted to introduce

00:29:30

or to complement the mutual

00:29:32

agreement procedure, which what is

00:29:34

called tax arbitration. Well, it's

00:29:36

actually not it's not really

00:29:38

arbitration but it's called tax

00:29:41

arbitration and a lot of

00:29:44

States although it is not

00:29:46

tax arbitration in the way

00:29:47

you understand arbitration. A lot

00:29:49

of state are still opposing

00:29:51

tax treaty arbitration for sovereignty

00:29:55

concerns. So that's why basically

00:29:57

there is pressure on the

00:30:00

system to deliver effective disputes

00:30:03

settlement mechanism, and that's why

00:30:04

there is a natural interest

00:30:07

to go for Are State

00:30:09

dispute settlement bearing in mind

00:30:11

that most of the bilateral

00:30:13

investment treaties do not include

00:30:15

carve outs today? Then there

00:30:18

is probably a more fundamental

00:30:20

question which arises and that

00:30:25

is the sovereignty arguments. If

00:30:27

you look at the making

00:30:28

of international tax law today,

00:30:30

whether it concerns the domestic

00:30:33

tax rules or whether it

00:30:35

can concerns tax treaties. These

00:30:38

rules are increasingly shaped by

00:30:40

commonly agreed standards that are

00:30:43

often. In fact subject to

00:30:45

peer reviews at the international

00:30:48

level. I mean, I was

00:30:50

just alluding to the extreme

00:30:51

example being the global minimum

00:30:53

tax where you have an

00:30:54

entire set of rules and

00:30:56

a commentary is which are

00:30:57

simply included in the domestic

00:30:59

law and approved and agreed

00:31:00

by the relevant States. But

00:31:04

this also happens in many

00:31:05

other areas. So the question

00:31:07

is with this unique way

00:31:10

of making international tax law.

00:31:13

Could you really say that

00:31:15

there's a sovereignty problem in

00:31:17

engaging in arbitration given the

00:31:20

fact that the agreement has

00:31:21

already been taken has already

00:31:23

taken place. I mean we're

00:31:25

looking at rules that are

00:31:26

being accepted by more than

00:31:28

140 countries. So the point

00:31:30

is is the sovereignty arguments

00:31:33

still a valid one. This

00:31:35

is an argument. I've been

00:31:36

making recently at the public

00:31:38

consultation at the oecd on

00:31:40

global minimum tax. I mean,

00:31:41

if you have an agreement

00:31:42

at the global level, can

00:31:44

you really come up with

00:31:45

the sovereignty argument? That's I

00:31:47

would say A question mark

00:31:50

from my side and secondly,

00:31:52

I mean on the the

00:31:54

carve outs. I'm I have

00:31:57

difficulties to understand why the

00:32:00

taxation should be carved out

00:32:02

from the scope of of

00:32:04

investment treaties why this particular

00:32:08

State conduct should be carved

00:32:10

out as a general rule

00:32:11

as a general why arbitrary

00:32:13

arbitrary treatments should be carved

00:32:16

out when it comes to

00:32:16

tax there. I would have

00:32:17

a difficulty on the other

00:32:19

hand. I can understand a

00:32:21

more new also approach more

00:32:23

neurons type of car valves

00:32:25

which are more designed to

00:32:26

ensure a proper functioning or

00:32:29

articulation between the two system

00:32:31

that I can understand but

00:32:33

simply carving tax all together

00:32:35

that I have difficulties to

00:32:37

to understand especially because what

00:32:42

will be carved out of

00:32:43

an investment treaty will not

00:32:44

necessarily fall into a mutual

00:32:46

agreement procedure. So it basically

00:32:48

and nowhere Right. Thank you.

00:32:54

Thank you very much for

00:32:55

bear. I think this very

00:32:57

well highlighted how when we

00:32:58

talk about interaction investing investment

00:33:01

law and tax law how

00:33:02

we have a big picture

00:33:03

elements at play. Let's say

00:33:05

sovereignty concerns all of these

00:33:07

and then we have extremely

00:33:08

technical elements as well that

00:33:10

we need to consider. So

00:33:11

also after repairs input I

00:33:14

would like to open it

00:33:15

up to to the panel

00:33:16

to share some thoughts on

00:33:17

this and I see that

00:33:18

when he's already getting started.

00:33:21

Today hopefully, okay, right just

00:33:24

me waving at somebody charging

00:33:25

into my room the so

00:33:29

I think big picture is

00:33:32

something that we should really

00:33:33

spend a moment on because

00:33:34

we're not talking about two

00:33:36

things and two separate silos

00:33:38

texts on the one hand

00:33:39

and investment protection / arbitration

00:33:41

on the other hand. What

00:33:43

we're talking about is an

00:33:45
international economic law framework, which

00:33:48
is if you like the

00:33:49
visible glove on the Invisible

00:33:52
Hand of the international Economic

00:33:57
framework not not my metaphor

00:33:59
and you know, if we

00:34:01
if we come back so

00:34:03
just let me sort of

00:34:04
big picture both in terms

00:34:05
of history. And in terms

00:34:07
of the system we're looking

00:34:08
at quickly on the history

00:34:10
if we come right back

00:34:12

to one of the sort

00:34:14

of earlier iterations of what

00:34:15

ultimately became the exit can

00:34:17

convention the abstruse craft convention

00:34:21

and what that did was

00:34:23

try to deal with the

00:34:25

situation where of decolonization where

00:34:27

the sort of imperialists protection

00:34:30

of net exporters of Capital

00:34:32

Property interests was replaced by

00:34:36

a notion of international protection

00:34:39

of property rights. And that

00:34:42

protection of international property rights

00:34:45

which weighed in favor of

00:34:46

the net exporters of capital

00:34:48

in every instance tip towards

00:34:50

the investor and public interest.

00:34:53

for any expropriation including through

00:34:56

taxation if you like allowed

00:34:59

investors to come to the

00:35:00

international courts and by Creating

00:35:04

this property protection as covering

00:35:08

direct and indirect expropriation this

00:35:11

principle that underscores many of

00:35:14

the investment treaties and later

00:35:19

includes regulatory expropriation. It's it's

00:35:23

as one sort of critic

00:35:25

noted it's difficult to determine

00:35:26

where indirect deprivation of property

00:35:29

ends and for instance taxation

00:35:32

planning legislation or property law

00:35:35

reform begins, and I'd add

00:35:37

that environmental law reform or

00:35:40

climate change related reform begins.

00:35:42

So we have historically laid

00:35:46

out in the first quarter

00:35:48

of the 20th century and

00:35:50

to the mid 20th century.

00:35:52

An international economic law framework

00:35:54

that protects property rights for

00:35:56

the property right holder wherever

00:35:59

it is in the world

00:36:00

and and that has trumped

00:36:02

the ability of of the

00:36:05

state to to be able

00:36:06

to introduce regulatory change that

00:36:10

that runs contrary to those

00:36:11

property interests. Now that's investment

00:36:14

protection but investment protection sits

00:36:17

within a whole series of

00:36:21

elements of the legal framework

00:36:24

and I try I like

00:36:25

to think of that legal

00:36:26

framework as having. Three broad

00:36:30
different legal systems that overlap

00:36:33
and interconnect. The first is

00:36:34
the public international law system.

00:36:36
And I think what Rover

00:36:38
is saying about International taxation

00:36:40
treaties, which are usually double

00:36:42
taxation type instruments. They're part

00:36:45
of that public international law

00:36:47
framework. So are our investment

00:36:48
treaties. So is our exit

00:36:50
convention and so as our

00:36:51
New York convention, they all

00:36:53
sit in that public international

00:36:54

law system. They are in

00:36:56

many ways the nervous system

00:36:58

that communicates to the rest

00:37:00

of the legal system how

00:37:01

it should react or act.

00:37:05

But the the real action

00:37:07

happens in the domestic law,

00:37:09

so whether it comes from

00:37:10

legislation from regulation or from

00:37:12

National Court decisions from jurisprudence,

00:37:15

that's where we have the

00:37:16

muscles of the international economic

00:37:19

law. They really sit in

00:37:20

that regulatory system. But how

00:37:21

do you reconcile the two

00:37:23

and then we have this

00:37:24

third system that really into

00:37:26

relates as well which is

00:37:27

private international law and I

00:37:29

mentioned earlier that the International

00:37:31

Investment agreements being so critical

00:37:33

those International Investment agreements carry

00:37:37

with them internationalization mechanisms, like

00:37:41

choice of governing or like

00:37:43

choice of arbitration outside the

00:37:44

host state of the investment

00:37:45

that remove those contractual protections

00:37:49

of the property again from

00:37:51

the sovereignty of the state

00:37:52

where that we're the investment

00:37:53

is is regulated. So those

00:37:55

three systems all interact and

00:37:58

I think what's really fascinating

00:38:00

about this discussion is tax

00:38:03

law very much like in

00:38:05

and protection Has elements of

00:38:10

public international law elements of

00:38:13

national law of course domestic

00:38:16

law but also it has

00:38:19

elements in that private international

00:38:21

law system because we contract

00:38:23

to stabilize text to stabilize

00:38:26

investment not just to protect

00:38:28

the investor, but often for

00:38:30

the host state to incentivize

00:38:32

the investment to come and

00:38:33

in the first place particularly

00:38:34

in an extractive and industries,

00:38:36

which require heavy upfront investment.

00:38:39

So when you look at

00:38:40

how you want to solve

00:38:42

for something at one end

00:38:43

of that system you need

00:38:45

to think about how pulling

00:38:47

that thread impacts something out

00:38:50

in the system and we'll

00:38:51

come to it in a

00:38:52

minute, but I think all

00:38:53

of it becomes critically important

00:38:54

when we think about transition,

00:38:57

To a low carbon future

00:38:59

which scientists tell us is

00:39:01

non-negotiable and when we transition

00:39:04

that how do all of

00:39:05

those elements play together and

00:39:07

I think texts and investment

00:39:08

protection is a critical conflict

00:39:10

point. Right. Thank you very

00:39:14

much. I'm just looking whether

00:39:16

they're other comments by Robin

00:39:18

or Trisha on on this

00:39:19

particular aspect. I mean just

00:39:22

just a quick reaction to

00:39:24

the sovereignty point. Rusty Parks

00:39:29

back in 2009. I mean

00:39:30

Rusty Parks always thinks about

00:39:31

things way before he's almost

00:39:34

he is like you look

00:39:36

and look into a crystal

00:39:37

ball back in 2009. He

00:39:40

was already saying that of

00:39:42

course collecting taxes is a

00:39:44

core activity of of a

00:39:47

state but so so is

00:39:49

Environmental Protection and so as

00:39:50

administrative of Justice, which is

00:39:52

regularly challenged before I see

00:39:56

yes, so while collection of

00:39:58

taxes, of course an exercise

00:40:01

of a sovereign function I

00:40:05

believe what is often challenged

00:40:07

in isd's cases is is

00:40:09

a violation of the state's

00:40:13

International obligations and the manner

00:40:15
in which that tax is

00:40:16
imposed and not necessarily the

00:40:17
right to impose that tax.

00:40:23
Thank you very much. In

00:40:25
the interest of time and

00:40:26
and when you already alluded

00:40:27
to this, I suggest we

00:40:29
move to this particular point

00:40:30
that you're already addressed or

00:40:32
alluded to the point of

00:40:34
text carvots, but also your

00:40:37
work on carbon pricing mechanisms.

00:40:39
Maybe you can share some

00:40:40
thoughts also in relation to

00:40:42
how this relates really to

00:40:43
text. And thanks Sebastian. So

00:40:47
I just wanted to add

00:40:48
Tricia and Robert have already

00:40:52
touched on and Robin the

00:40:54
the tax carve out. So

00:40:56
I just want to come

00:40:56
back to the energy Charter

00:40:58
treaty in particular because I

00:41:00
want to address carve outs

00:41:02
and carbon pricing mechanisms in

00:41:04
the context of transition. to

00:41:07

meet the Paris agreement climate

00:41:08

change mitigation adaptation goals And

00:41:11

I think the energy chartered

00:41:13

treaty is a really useful

00:41:14

instrument to focus on when

00:41:16

you're thinking about transition because

00:41:18

it really is the only

00:41:19

energy transition investment agreement in

00:41:22

existence. It was designed for

00:41:24

a different transition at a

00:41:26

different time. But that said

00:41:28

it has the UNF Triple

00:41:30

C the framework agreement of

00:41:31

the Paris agreement in its

00:41:32

recitals. It has carve outs

00:41:34

for environment. It has references

00:41:36

to many of the sustainability

00:41:38

protections. It also has a

00:41:39

taxation carbon so as cool

00:41:42

21 of the energy chartreuse

00:41:44

is a very clear taxation

00:41:46

carve out. So it's interesting

00:41:47

when Trisha's talking about the

00:41:49

renewable cases with Spain in

00:41:52

the context of investment treaty

00:41:55

and tax because the the

00:41:57

text related elements the retroactive

00:42:00

texts measure by Spain has

00:42:05

pretty much universally been found

00:42:08

not to be within the

00:42:10

scope of the energy. attitude

00:42:11

because of the taxation carve

00:42:13

out and the same apply.

00:42:16

I mean there were other

00:42:17

claims obviously, but that measure

00:42:20

The same related to the

00:42:21

so-called Robin Hood tax on

00:42:24

the renewable windfalls in Italy

00:42:27

again. The tribunal's pretty much

00:42:31

universally. I think someone will

00:42:32

create me if I'm wrong

00:42:33

found those to be within

00:42:35

the cover interestingly enough that

00:42:37

you cost cases and there's

00:42:39

four of those the ucos

00:42:40

cases. I really doubt with.

00:42:46

Expropriation by taxation and expropriation

00:42:51

does is an exception to

00:42:53

the tax cover? So an

00:42:55

exception to the exception if

00:42:56

you like and and the

00:43:00

the tribunal found there there's

00:43:02

some that the text measures

00:43:04

in new costs were not

00:43:05

beneficial. They were discriminatory and

00:43:07

they were directed against that

00:43:09

specific investor and also falling

00:43:13

potentially within indirect tax say

00:43:16

expropriation as a result, but

00:43:19

I think it's interesting anyone

00:43:21

who's looking at this or

00:43:22

thinking about this. I think

00:43:23

it's really interesting to spend

00:43:24

a bit of time in

00:43:26

those publicly available. Energy charge

00:43:29

treaty cases. I think I've

00:43:30

got the statistics somewhere, but

00:43:32
of the Sort of 65

00:43:39
odd Awards 68 Awards 36

00:43:43
refer to article 21 and

00:43:46
of those 32 are the

00:43:48
renewable energy cases and the

00:43:50
remaining for the ucost cases.

00:43:52
So the vast majority do

00:43:54
touch on 21, but most

00:43:56
some fail on 21. So

00:43:58
that's a text carve out

00:44:00
sort of holding up and

00:44:01
it'd be interesting to hear

00:44:03
from Robert and whether or

00:44:04

not he thinks that has

00:44:05

been useful because those investors

00:44:09

had other remedies for the

00:44:11

state measures that won't taxation

00:44:15

weren't required didn't require a

00:44:18

recovery through a taxation. um

00:44:22

argument now carbon pricing mechanisms.

00:44:30

I wanted to bring into

00:44:31

the conversation because it's a

00:44:34

great big bucket. In fact,

00:44:36

it's a semi truck tanker.

00:44:39

Full of potential taxation measures

00:44:41

so not all carbon pricing

00:44:44

mechanisms will be taxed but

00:44:46

many of them will be

00:44:47

so a carbon pricing mechanism

00:44:49

for example is a fuel

00:44:51

text a direct fuel text

00:44:52

on your pump. That's that's

00:44:54

obviously a text ETS system

00:44:57

is there to text or

00:44:58

not? Probably not although some

00:45:01

design features and some ETS

00:45:03

systems may form a type

00:45:07

of indirect tax so as

00:45:10

States introduce and Implement carbon

00:45:15

pricing mechanisms in order to

00:45:18

bring about the market correction

00:45:20

that's required in order for

00:45:23

us to transition to a

00:45:24

low carbon future. And 68

00:45:28

States or subnational states have

00:45:30

already introduced mechanisms and there's

00:45:32

a whole lot more in

00:45:33

the drafting in the coming.

00:45:35

As those mechanisms continue to

00:45:38

increase there's no one size

00:45:40

fits all there's lots of

00:45:42

different mechanisms of lots of

00:45:43

different design features. Every single

00:45:46

time one comes into play.

00:45:49

Even if there is a

00:45:50

taxation carve out there will

00:45:53

be the type of discussion.

00:45:54

We saw in those 32

00:45:55

energy Charter trees on is

00:45:57

it tax isn't it tax?

00:45:59

So if a state is

00:46:01

trying to design a carbon

00:46:02

pricing mechanism that is not

00:46:04

going to run it into

00:46:07

investment treaty claims. It might

00:46:08

be very mindful to to

00:46:10

design it around something that's

00:46:12

quite clearly text. But that

00:46:13

may not be the best

00:46:14

mechanism for achieving the carbon

00:46:17

reduction in that particular place.

00:46:19

So the reason I spent

00:46:20

a bit of a moment

00:46:21

earlier on systems is because

00:46:25

Energy transition infrastructure transition transport

00:46:29

industrial and land use transition

00:46:31

to Net Zero. requires systemic

00:46:34

change and this whole plethora

00:46:39

of international economic law it

00:46:43

needs to adapt to a

00:46:46

very different goal than what

00:46:48

underscored it when it was

00:46:50

created and Taxation plays a

00:46:53

tremendously important role in that

00:46:55

investment protection plays an incredibly

00:46:57

important role in that because

00:46:59

we need the investment to

00:47:00

go into transition and particularly

00:47:03

cross-border investment. But across both

00:47:06

we need to find mechanisms

00:47:09

to ensure that the underlying

00:47:12

objectives of the Paris agreement

00:47:13

and I think there's some

00:47:14

really interesting. Arguments to be

00:47:17

had about conflict of public

00:47:20

International Norms. We may see

00:47:22

some arguments under some of

00:47:23

those tax guidance principles and

00:47:26

pillar one pillar too, but

00:47:28

more likely between Paris agreement

00:47:30

and investment treaty protections or

00:47:34

even the New York convention

00:47:35

on you know, which Norm

00:47:37

prevails because the most recent

00:47:39

is of course the Paris

00:47:41

agreement. Thank you very much

00:47:46

Wendy. Um immediate directions from

00:47:48

the from the panelists. To

00:47:52

these points probably I see

00:47:54

we have a comment. No,

00:47:56

I mean I just got

00:47:57

off my no, absolutely I

00:48:00

just wanted to emphasize. What

00:48:01

what Wendy says did. I

00:48:04

mean this whole problem needs

00:48:08

to be tackled in a

00:48:10

coordinated fashion. So of course,

00:48:11

there's got to be a

00:48:13

coordination and for one very

00:48:16

basic reason also the predictability

00:48:19

for for the the investor

00:48:21

and this is typically perhaps

00:48:26

an area where I can

00:48:27

make a parallel with Summit

00:48:29

experience that we've we've had

00:48:31

actually in the international tax

00:48:33

field we had cases in

00:48:35

which For policy reasons we

00:48:38

decided to carve out certain

00:48:40

certain aspects from from a

00:48:42

relevant tax treaty for example,

00:48:43

in order to build a

00:48:45

consistent policy. So I would

00:48:50

I would fully support this

00:48:51

but I come back to

00:48:54

to my remark that I

00:48:56

made at the at the

00:48:57

beginning. I still feel that

00:48:59

that going forward because of

00:49:02

course the trend as we

00:49:03

have seen now, it seems

00:49:04

that it's yes or no

00:49:06

in the sense that you

00:49:07

have bilateral investment treaties with

00:49:09

no carve out and then

00:49:11

the tendency to say well,

00:49:11

let's have a full carve

00:49:13

out. At least that's that's

00:49:14

a risk. I would be

00:49:18

a bit cautious with that.

00:49:19

I think that there is

00:49:21

no reason to exclude completely

00:49:23

taxation measures from the scope

00:49:27

of review of investment treaty

00:49:29

arbitration simply because it is

00:49:31

tax on the other hand

00:49:32

when it comes to building

00:49:34

a consistent. Policy that is

00:49:37

neutral in the sense that

00:49:39

you don't basically go for

00:49:40
a tax because it is

00:49:41
a tax because it is

00:49:42
convenient. You you go for

00:49:43
a neutral consistent policy. Then

00:49:45
that coordination is absolutely necessary.

00:49:52
Thank you very much. And

00:49:54
I think I mean we

00:49:56
may have some members here

00:49:57
in the audience who have

00:49:58
not yet looked into taxation

00:50:00
articles in my lateral investment

00:50:01
treaties are generally in the

00:50:02
energy Charter treaty. So I

00:50:04

think for that purpose if

00:50:05

this is something that's new

00:50:07

to you. I think a

00:50:08

look into article 21 or

00:50:09

of the ECT or similar

00:50:11

Provisions will be very helpful

00:50:12

there because you see it's

00:50:14

on one hand. It's a

00:50:15

car Lodge and cops certain

00:50:16

elements of the treaty back

00:50:18

in and then it's by

00:50:19

the detail provision that that

00:50:22

is very elaborate and and

00:50:24

interesting too to look at

00:50:25

or start and from there

00:50:27

to to investigate this this

00:50:29

area further. I see when

00:50:31

you do have a another

00:50:32

comment on Broadway, please go

00:50:34

ahead on us. Just looking

00:50:35

at Dr. Dear's question. I

00:50:37

was if now as an

00:50:38

appropriate time to answer that.

00:50:40

I think I think the

00:50:43

two lessons that can be

00:50:44

drawn. The first lesson is

00:50:47

genuine. taxation policies can successfully

00:50:58

be carved out and that

00:51:01

carve out will be respected.

00:51:04

pretty uniformly in investment treaty

00:51:09

arbitration. So I think and

00:51:12

you know, what when you

00:51:13

think about it, it's interesting

00:51:14

that an energy transition treaty.

00:51:19

Halved out text this is

00:51:21

1992. This was drafted text

00:51:23

carve outs were not big

00:51:24

then Tricia might correct me

00:51:25

on that, but I don't

00:51:26

think text Carvel's for that

00:51:27

common, then they're still not

00:51:28

today. So clearly people were

00:51:32

thinking that energy systems and

00:51:34

transition of energy systems is

00:51:36

going to intersect with Taxation

00:51:39

and so took taxation out

00:51:42

of the the investment protections

00:51:44

or yeah, so so I

00:51:50

think the first thing is

00:51:50

taxation carve outs do work

00:51:52

can work. equally and investor

00:51:56

should be aware of those

00:51:57

right? So if you're looking

00:51:58

for an additional if you

00:52:00

want some form of text

00:52:02

stabilization, you need to negotiate

00:52:04

it into your contract. The

00:52:08

second thing big lesson that

00:52:09

I think can be drawn

00:52:10

out of the ucoc cases

00:52:12

and particular but also how

00:52:13

they were argued subsequently and

00:52:15

isolux and other cases. is

00:52:17

that States can't hide behind

00:52:22

taxation as a fig leaf

00:52:25

for expropriation. And Robert mentioned

00:52:30

the bips guidance from oecd.

00:52:32

I was involved in a

00:52:34

lengthy. natural resources arbitration as

00:52:40

Council in an African state

00:52:44

we're pretty much the government

00:52:45

had worked through every single

00:52:48

step in the baps guidance

00:52:50

and redrafted and recast its

00:52:54

law to cut off the

00:52:55

the incentive that that that's

00:53:00

the best guidance was sort

00:53:01

of arguing against but it

00:53:04

did so in the face

00:53:05

of long-standing investment agreements and

00:53:07

that was a contractual dispute

00:53:09

and it really was expropriate

00:53:12

systemic expropriation by text and

00:53:15

it even invoked Potentially an

00:53:18

interesting double taxation treaty point

00:53:21

where the offshore country where

00:53:24

the holding company to the

00:53:26

local operating company was held

00:53:28

the offshore country had a

00:53:30

double taxation treaty and the

00:53:31

state tried to claim capital

00:53:34

gains tax on the dividends

00:53:36

paid to the parent company.

00:53:37

So so it even had

00:53:39

there and we ran into

00:53:40

precisely the issue that Robert

00:53:42

identifies. Where do you go

00:53:45

to resolve that dispute? We

00:53:47

thought can we bring it

00:53:47

into arbitration? No, it was

00:53:49

between the two states so

00:53:50

didn't belong in our arbitration

00:53:52

and and that Lacuna and

00:53:55

I agree. I think it

00:53:56

is a Latina is potentially

00:53:58

a problem. Thank you very

00:54:02

much. I think we can

00:54:03

also use Dr. Davis question

00:54:05

here to to move to

00:54:06

the last segment of our

00:54:09

discussion that we had prepared

00:54:10

here. He basically asks what

00:54:12

lessons can be drawn from

00:54:13

ECT cases involving Spain and

00:54:15

one element that I believe

00:54:17

arises in many of these

00:54:19

cases, but also generally investment

00:54:21

disputes is the the question

00:54:22

of text grows up claims

00:54:24

and for that purpose, I

00:54:26

would invite Robin or to

00:54:28

to share Sports on this

00:54:29

and explain a bit what

00:54:31

the what the items the

00:54:34

issues are there when you

00:54:35

when you discuss tax cross

00:54:37

and investment of information Yeah,

00:54:39

thanks Sebastian. And yeah, this

00:54:42

is a bit of a

00:54:42

transition from the topic we've

00:54:44

had so far. I mean

00:54:45

we're moving away from where

00:54:47

tax is part of through

00:54:49

the issue in substance into

00:54:52

where tax is part of

00:54:53

the consequences or the remedies

00:54:56

or damages perhaps more specifically

00:54:59

in this case and I

00:55:01

will discuss mostly tax grows

00:55:04

up, which is basically where

00:55:05

you grow up damages to

00:55:06

account for taxes that may

00:55:08

be applied on it. But

00:55:09

also a few words on

00:55:11

on similar remedies which might

00:55:15

or might not achieve the

00:55:17

same goal. And just to

00:55:20

make sure that we're all

00:55:21

on the same page. I

00:55:24

will start from scratch. So

00:55:25

to speak. I mean the

00:55:27

situation we're in now we

00:55:29

have a scenario where a

00:55:30

breach of an investment collection

00:55:32

treaty has been established so

00:55:35

we know that the state

00:55:36

is then liable for the

00:55:37

consequences of that breach. We

00:55:42

know that the investor is

00:55:44

entitled to full compensation. I

00:55:47

mean, it goes all the

00:55:48

way back to choresoft and

00:55:49

we're supposed to put the

00:55:52

investor. In the same place

00:55:54

as if the breach didn't

00:55:55

take place. So far so

00:55:59

good. Now how how do

00:56:02

we do that? How is

00:56:03

the calculated? And as you

00:56:06

mentioned Sebastian damages are bit

00:56:10

of an interest for me

00:56:11

personally, but I'm not gonna

00:56:12

despite that go into any

00:56:14

any details here and and

00:56:16

how to calculate them just

00:56:18

of course depends from case

00:56:19

to case. But generally, of

00:56:22

course you you would value

00:56:24

the investment in question. The

00:56:27

one that's been affected by

00:56:27

the state's measure you would

00:56:30

value it in in a

00:56:31

butt for scenario hypothetical scenario

00:56:33

where the state measure is

00:56:35

not in place and you

00:56:37

compare that value to the

00:56:38

value in in real life,

00:56:40

which often or at least

00:56:43

in some cases would be

00:56:44

zero because the investment has

00:56:45

been destroyed. and then if

00:56:51

that tax treatment in the

00:56:54

butforce scenario is the same

00:56:57

as the tax treatment on

00:56:59

Damages. Once it it's paid

00:57:01

by the state then we

00:57:03

have we have no problem.

00:57:04

Right all good the problem

00:57:07

arises where there might be.

00:57:09

Tax on the award when

00:57:11

it's paid out by the

00:57:12

state would not have Arisen

00:57:14

in the bath for scenario

00:57:16

on the profits or the

00:57:18

positive cash flow. That would

00:57:20

have been in the bath

00:57:21

for scenario. and just to

00:57:23

give one example, I think

00:57:25

this relates to several of

00:57:26

the Spanish Renewables cases at

00:57:28

least and it will be

00:57:29

that would be the same

00:57:30

for Cases where the investors

00:57:34

is from Sweden where you

00:57:37

have an investment that has

00:57:39

been made through a local

00:57:41

investment vehicle and and that

00:57:44

and the investment is affected.

00:57:47

Then in the bud for

00:57:49

scenario, generally you would value

00:57:51

that investment. And you would

00:57:54

look at the positive cash

00:57:54

flows the profits that would

00:57:55

have been made. And then

00:57:58

in the buttforce scenario those

00:58:00

profits could then be channeled

00:58:02

to the foreign investor the

00:58:05

Swedish investor or whatever it

00:58:06

may be and it would

00:58:07

be tax exempt by the

00:58:09

participation exemption. So you whatever

00:58:15

value as a recent in

00:58:17

in the whole state could

00:58:19

then be taken back to

00:58:20

the the foreign investor without

00:58:22

any tax being imposed? But

00:58:25

then if you have a

00:58:26

scenario where if damages are

00:58:29

paid out by the whole

00:58:31

state to the foreign investor,

00:58:32
and that is taxed. It

00:58:34
might be then that the

00:58:35
foreign investor does not put

00:58:36
in the same in the

00:58:37
same position as it would

00:58:39
have been but for the

00:58:41
breach. Just exemplify if the

00:58:45
value is is a hundred

00:58:46
in the butt for scenario.

00:58:47
The investor could take that

00:58:50
home. Whereas perhaps in if

00:58:52
damages are paid by just

00:58:54
a hundred and that is

00:58:55

taxed you would end up

00:58:57

with say perhaps around 80.

00:58:59

And arguably then the investors

00:59:02

under compensated. States will of

00:59:06

course say those states that

00:59:07

it's not their problem. And

00:59:09

this is where I think

00:59:11

the tension is on this

00:59:12

issue. So that's one of

00:59:16

the scenarios the other of

00:59:17

course might be if you

00:59:18

have calculated the damages arising

00:59:22

in the local investment vehicle

00:59:24

after tax taking into account

00:59:27

all taxes that arise. Well,

00:59:29

then if damages is paid

00:59:30

to that entity and it's

00:59:32

taxed again, you will be

00:59:34

put in that entity will

00:59:35

be put in a worse

00:59:36

position than it would have

00:59:38

been but for the breach.

00:59:41

So those are the typical

00:59:42

situations that might arise so

00:59:45

to speak the problems. So

00:59:46

what are these Solutions then

00:59:48

well in the in the

00:59:51
first scenario the investor could

00:59:55
bring a tax growth of

00:59:56
claim saying that well. Yeah,

00:59:58
the value was 100 now

01:00:00
the value is zero, but

01:00:01
you shouldn't give me a

01:00:02
hundred because they will only

01:00:03
end up with 80. We

01:00:05
need to grow up my

01:00:05
claim to 125 to make

01:00:09
sure that after tax they

01:00:10
have a hundred she would

01:00:11
bring a tax tax clean.

01:00:13

In the other scenario that

01:00:15

I mentioned where you risk

01:00:18

having, you know, local tax

01:00:20

being applied twice so to

01:00:22

speak. You could ask the

01:00:24

tribunal to award the amount

01:00:27

in question net of taxes.

01:00:29

You would order the whole

01:00:31

state to pay that that

01:00:32

of taxes or one way

01:00:33

or another make sure that

01:00:35

it's not taxed. So different

01:00:37

solutions depending on basically depending

01:00:40

on whether the tax in

01:00:41
question is would arise in

01:00:44
the host state or in

01:00:45
the state of the of

01:00:46
the foreign investor. Then to

01:00:50
the the big question then

01:00:51
how our Petro Tribune is

01:00:52
looking at this and I

01:00:55
don't know if I can

01:00:56
get much of an update

01:00:57
in this respect. There aren't

01:01:01
many revolutionary developments in either

01:01:04
of these questions. Really there

01:01:06
is you know, some jurisprudence

01:01:09

coming out of the Spanish

01:01:10

cases, but it's mostly confirming

01:01:13

what might have already been

01:01:15

in the sort of law

01:01:18

the land before that. So

01:01:20

what is it starting with?

01:01:24

The sort of second scenario

01:01:25

that I mentioned where you

01:01:26

have the risk of double

01:01:28

so to speak double taxation

01:01:30

in the whole state. And

01:01:32

you request the award to

01:01:34

being made net of any

01:01:36

taxes and that is you

01:01:39

know tribunals you can say

01:01:40

that there's there's split but

01:01:42

I would say more more

01:01:44

often than not it is

01:01:46

granted assuming of course that

01:01:48

the investor proves that you

01:01:50

know, how everything has been

01:01:52

calculated proves that damages or

01:01:54

attacks would arise and so

01:01:56

on but on the legal

01:01:58

question of whether this is

01:01:59

something that tribunal scan and

01:02:01

want to do there's pretty

01:02:03
good precedent that tribunals are

01:02:05
doing this and are feeling

01:02:07
that they're entitled to do

01:02:09
it. You might end up

01:02:10
with an award just one

01:02:14
example. I need to look

01:02:15
at my notes. In one

01:02:19
of what the the tribunal

01:02:21
stated in the operative part

01:02:22
that quote the award is

01:02:24
made Nets of all taxes.

01:02:27
and or withholdings by the

01:02:29
whole state and this example

01:02:33

and Spain is ordered to

01:02:34

identify identify claimants for any

01:02:36

tax liability or withholding that

01:02:38

may be imposed. So it's

01:02:40

you know doing it two

01:02:42

ways thing. It should be

01:02:43

not one way or the

01:02:45

other. And I think it's

01:02:48

we're turning to the tax

01:02:50

grows up where the the

01:02:51

issue is a bit more

01:02:53

complicated. But before doing that,

01:02:55

I think it's interesting to

01:02:56

look at you know, what

01:02:57

has been the basis for

01:02:58

the orbital tribunals granting disorder

01:03:01

relief. And of course is

01:03:03

of course a varies from

01:03:04

case to case but but

01:03:06

it comes down to in

01:03:07

many instances the principle of

01:03:10

all compensation. So the tribunals

01:03:12

are saying if we don't

01:03:13

Grant this sort of relief

01:03:15

there is a risk that

01:03:16

the investor is not fully

01:03:17

compensated. Because tax will be

01:03:20

imposed and you will end

01:03:21

up with a net amount

01:03:22

that is smaller than you

01:03:24

would end up with in

01:03:26

the buff for scenario. So

01:03:32

that's interesting because you could

01:03:34

think then if you apply

01:03:35

that to a tax growth

01:03:37

subclaim. Well, that should be

01:03:38

granted as well. Right because

01:03:40

it's it's seeking to achieve

01:03:41

the same purpose but it's

01:03:45

not that easy because when

01:03:48

it comes to the tax

01:03:49

growth of claims where you're

01:03:51

not seeking a you know

01:03:52

declaration or or you want

01:03:54

the tribunal just to make

01:03:56

sure that they what should

01:03:57

should be not of taxes

01:03:58

but actually want the amount

01:03:59

to be higher. Well there

01:04:03

the Jewish prunes is pretty

01:04:05

clear. There are no published

01:04:08

cases where that has been

01:04:09

been granted. I I personally

01:04:13

know at least one unpublished

01:04:14

decision where such a tax

01:04:16

grows up has been awarded

01:04:18

for tax in the investors

01:04:20

home state can't say much

01:04:23

more about that. Unfortunately, but

01:04:24

but even that being said

01:04:26

the Jewish prunes here is

01:04:28

pretty clear. There are a

01:04:30

lot of cases where that's

01:04:31

sort of claim is simply

01:04:33

being denied. Well, if that

01:04:38

is the case then you're

01:04:38

of course curious. What are

01:04:41

why why isn't this being

01:04:43

granted and Or perhaps it

01:04:48

so let's let's look at

01:04:50

the reasoning in this cases

01:04:51

and it could have been

01:04:52

interesting to see how tribunals

01:04:54

are are approaching this issue.

01:04:56

But unfortunately in most cases

01:04:58

the the reasons are basically

01:05:01

more or less in existent

01:05:03

or Not very long, at

01:05:07

least they usually do not

01:05:08

explain or engage in the

01:05:10

principle legal issue of whether

01:05:13

this is something that arbitribunal

01:05:15

can grant. Can just speculate

01:05:20

as to why I think

01:05:22

many many lawyers think tax

01:05:24

is scary. I don't know

01:05:29

if you would agree. I

01:05:30

mean it is this specialized

01:05:32

area of law. At least.

01:05:33

I know a lot of

01:05:34

people are scared just about

01:05:36

you know, engaging in economics

01:05:38

or financial issues. And I

01:05:40

mean tax is sort of

01:05:41

Next Level. It might be

01:05:43

that either way. I think

01:05:45

it's it's unfortunate. It's this

01:05:49

type of issue a tax

01:05:50

growth of claim is being

01:05:51

raised in many cases, but

01:05:54

still many published cases and

01:05:56

stay away. We don't have

01:05:57

I would say well developed

01:05:59

area of law with where

01:06:01

we have an analysis of

01:06:03

the actual legal standard to

01:06:04

be applied. I think that's

01:06:07

too bad. But what we

01:06:09

do have if we look

01:06:09

at these cases, I mean

01:06:11

in most instances it's actually

01:06:12

being denied with reference to

01:06:15

a lack of evidence really

01:06:17

that the investor hasn't proven.

01:06:20

You know that there would

01:06:21

be additional tax in its

01:06:25

home state. You know what

01:06:26

the tax rate would have

01:06:27

been and so on if

01:06:30

if it's an easy way

01:06:31

out or if it's investors

01:06:33

not taking the time to

01:06:35

actually provide sufficient evidence. We

01:06:38

can debate that but that's

01:06:39

most often the case. The

01:06:43

thing that's perhaps what one

01:06:44

takeaway here. You hear if

01:06:46

you're interested in these sort

01:06:47

of issues. You hear that?

01:06:48

Well tax girls have claims

01:06:49

that you you're not you're

01:06:50

never going to get it

01:06:51

and they're never granted. But

01:06:53

in most cases, it's simply

01:06:54

because the investor hasn't perhaps

01:06:56

done done. Its homework and

01:06:59

present it sufficient evidence. but

01:07:03

but in some cases it's

01:07:05

actually being denied for legal

01:07:07

reasons and I think that

01:07:10

will be the last part

01:07:11

of what I want to

01:07:13

say initially and if we

01:07:15

look at those legal reasons.

01:07:18

Or the so-called legal reasons

01:07:21

perhaps because in many instances

01:07:23

it's it's very brief. There

01:07:26

are a few cases where

01:07:27

the tribunals It more or

01:07:30

less the conclusion is the

01:07:32

reasoning, you know, I think

01:07:35

in one case, it's the

01:07:37

Tribune just concludes that no

01:07:39

taxation in the home States.

01:07:40

That's quote claimants, exclusive burden.

01:07:44

And that you know that

01:07:46

can could be a finding

01:07:47

but it would be interesting

01:07:48

to hear. Why should that

01:07:50

burden be be on the

01:07:51

claimants and not on the

01:07:53

state which is in breach

01:07:55

of the treaty. and another

01:07:59

case the tribunal noted that

01:08:01

the quote the ultimate tax

01:08:04

treatment of an award must

01:08:06

be addressed by the fiscal

01:08:07

authorities in the respective countries.

01:08:10

And that is well, of

01:08:12

course true as such but

01:08:15

it would have been interesting

01:08:16

to hear a little bit

01:08:16

more about. How that should

01:08:19

be weighed against, you know

01:08:20
a principle of a full

01:08:21
compensation. the the legal reasoning

01:08:30
that we do have Comes

01:08:34
down to tribunal saying that

01:08:36
well, this is this doesn't

01:08:38
qualify as consequential loss. That's

01:08:41
usually I say usually they're

01:08:45
just a handful of cases.

01:08:46
But what tribunals refer to

01:08:48
when denying this sort of

01:08:50
on the principle legal basis?

01:08:55
I think much can be

01:08:56
said about the reasoning or

01:08:58

lack of reasoning in these

01:08:59

in these Awards and I

01:09:00

be happy to come back

01:09:01

on it in the further

01:09:03

discussion. I think I'll and

01:09:06

in particular Perhaps whether there's

01:09:09

a legal basis for the

01:09:11

distinction that I think is

01:09:13

being made between on the

01:09:15

one hand orbital tribunal being

01:09:18

prepared to. Grant the type

01:09:22

of non-monetary relief for taxes

01:09:26

imposed by the host State

01:09:28

and on the other hand

01:09:29

tribunal is being very reluctant

01:09:31

to Grant tax cross-ups for

01:09:35

taxes that are might be

01:09:37

imposed by the investors home

01:09:39

state and if there's a

01:09:41

legal base for that distinction,

01:09:42

but I'll be happy to

01:09:43

come back on that in

01:09:44

the first discussion if we

01:09:47

have time. Thanks. Thank you

01:09:52

very much Robin for this

01:09:53

I think excellent overview of

01:09:54

a very technical problem that

01:09:57

I think is easy to

01:10:00

understand listening to you and

01:10:01

setting it out like this

01:10:02

one aspect to this. I

01:10:05

mean looking at this scarcity

01:10:07

of legal reasoning might also

01:10:08

relate to the fact that

01:10:10

essentially all principles relating to

01:10:13

damages in investors State arbitration

01:10:15

somewhat. Go back to the

01:10:17

cause of factory case and

01:10:18

pay lots of Victory case,

01:10:19

of course didn't concern any

01:10:21

texts Matters by any other

01:10:23

state already given that it

01:10:25

was simply a state-to-state dispute

01:10:27

at that time. So this

01:10:28

this issue didn't come up

01:10:29

and then was not further

01:10:30

developed in the Going forward

01:10:32

so it's it's definitely important.

01:10:34

I've also believe that that

01:10:35

principles will be developed or

01:10:37

further development that respect but

01:10:38

I would be curious to

01:10:39

see whether the other panelists

01:10:41

see on the panel have

01:10:41

have reactions to to this

01:10:43

presentation and the points raised

01:10:45

here. Let me just check

01:10:49

into two points. One of

01:10:51

the carbon pricing mechanisms is

01:10:53

of course the carbon border

01:10:54

adjustment mechanism. So even if

01:10:57

you avoid a taxation under

01:11:01

favorable investment text conditions in

01:11:05

your host state which are

01:11:06

then changed during the investment

01:11:08

and you are entitled to

01:11:11

damages. For the protection within

01:11:14

that host state that may

01:11:16

play out potentially in a

01:11:20

gross-up type situation through sea

01:11:22

bam you may end up

01:11:23

paying the tax on the

01:11:24

goods that you were producing

01:11:26

or extracting and then transporting

01:11:28

to another state and I

01:11:31

think it would defeat the

01:11:32

purpose of carbon pricing mechanisms

01:11:35

to reduce carbon to be

01:11:38

able to escape that the

01:11:40

second point that I make

01:11:41
calls our Factory is you

01:11:45
know, when you go back

01:11:45
and read the case on

01:11:48
that put back in the

01:11:48
position. It's it's it, you

01:11:51
know, we have done a

01:11:52
mighty mighty job as an

01:11:54
international arbitration community of enlarging

01:11:57
that while beyond what the

01:11:59
tribunal actually said in that

01:12:01
case and I think again

01:12:03
the You know, it doesn't

01:12:06
entitle you to a discounted

01:12:08

cash flow. Assuming all conditions

01:12:10

are absolutely unchanged going forward

01:12:13

and for the tax, if

01:12:15

a tax carve out is

01:12:17

effective then shouldn't the taxation

01:12:21

that is carved out. At

01:12:25

least be implemented in the

01:12:27

discounted cash flow. So if

01:12:29

the state is entitled the

01:12:31

state has three or four

01:12:32

measures against you in respect

01:12:35

to your investment. One of

01:12:35

them's text that's a text

01:12:37

carve out at minimum that

01:12:39

text should apply to just

01:12:41

kind of cash flow if

01:12:42

you're seeking damages on an

01:12:44

income basis for example, but

01:12:47

also, you know all of

01:12:48

the other. Different carbon pricing

01:12:51

mechanisms that we're seeing we

01:12:52

should be seeing those in

01:12:54

those discounted cash flows the

01:12:57

valuation of the coal fire

01:12:58

power plants in in the

01:13:00

Netherlands. They should be we've

01:13:02

only got one left now,

01:13:03

but they should be reflecting

01:13:04

those measures unless they are

01:13:07

separately protected and they're not

01:13:09

under the energy house treaty.

01:13:10

So I'm not sure Robin

01:13:14

did say it but I'll

01:13:15

say it for him. I

01:13:16

don't think we are acting

01:13:17

in as sophisticated. Amen as

01:13:20

we ought to be in

01:13:22

the international arbitration community in

01:13:25

respect of Damages already when

01:13:28

you bring text related damages

01:13:31
and economic impact on Damages

01:13:33
into that. We have got

01:13:36
a long long way to

01:13:37
go. So I say bring

01:13:39
on more Robins bring more

01:13:40
bears into arbitration more frequently

01:13:44
and let's get it right.

01:13:48
Thank you Wendy. I see

01:13:49
Robin. You unmuted you have

01:13:50
an immediate direction to this

01:13:52
point. Not really just of

01:13:56
course agree on when it's

01:13:58
of course on the last

01:14:00

point no objections there but

01:14:04

also on the point before

01:14:06

that about of course, you

01:14:07

need to be implementing in

01:14:09

the but for for the

01:14:11

bus for cash flows any

01:14:12

taxes that been carved out

01:14:14

certainly yeah. Thank you very

01:14:17

much. I think when these

01:14:19

words in the end also

01:14:21

somewhat encapsulated what I think

01:14:23

we have shown with this

01:14:24

panel. We need a much

01:14:26

stronger discussion on various sites

01:14:29

between the international tax and

01:14:30

the International Investment law and

01:14:32

arbitration Community. We have seen

01:14:34

that both in relation to

01:14:35

what we call in the

01:14:36

beginning the big picture the

01:14:37

international aluminum text questions and

01:14:41

International Investment arbitration in that

01:14:43

respect, but we have also

01:14:44

seen it now in relation

01:14:45

to Robin's presentation here in

01:14:48

relation to really detailed question

01:14:50

of Damages delegations and compensation.

01:14:53

So there's on all fronts

01:14:55

one good same there's all

01:14:57

from an all-frons room for

01:14:59

discussion and room for interaction

01:15:00

between International Investment and tax

01:15:03

lawyers, which I hope we

01:15:04

will see going forward and

01:15:06

I acknowledge that we have

01:15:07

reached some of the end

01:15:09

of our allocated time here.

01:15:10

So I see that there's

01:15:12

one interesting question in the

01:15:13

chat and that I would

01:15:14

suggest we take with us

01:15:15

to the networking. questions, which

01:15:17

is whether there's actually also

01:15:19

the possibility for an inverse

01:15:21

scenario of what Robin described

01:15:22

the scenario that you could

01:15:23

have situation where it damages

01:15:26

of what is Tax exempt

01:15:29

and hence, there might be

01:15:30

a situation where the investor

01:15:31

would be overcompensated in given

01:15:34

that the investor does not

01:15:35

need to pay tax in

01:15:36

the home jurisdiction, probably or

01:15:38
another jurisdiction. So that is

01:15:40
maybe something to to start

01:15:41
the networking session with Robin.

01:15:43
However would like to yes,

01:15:45
I can just force for

01:15:46
those discussions. I can just

01:15:48
tell you look at csob

01:15:51
versus Slovakia. It's not exactly

01:15:54
that situation but it is

01:15:55
a situation where among other

01:15:57
issues the host State argued

01:15:59
that the tax situation would

01:16:01
be better for the investor

01:16:03
in the sort of action

01:16:04
scenario where damages are paid

01:16:06
out. And perhaps it's a

01:16:09
cliffhanger. I won't tell you

01:16:10
what the outcome was. Right.

01:16:13
Thank you very much. And

01:16:14
thank you for this this

01:16:15
Cliffhanger. It also remains not

01:16:18
for me to thank everyone

01:16:19
for the excellent discussion the

01:16:20
excellent presentations. That was really

01:16:23
a pleasure to moderate this

01:16:24
panel and hand back over

01:16:25

to a person Antonio for

01:16:27

his closing words and also

01:16:28

for the initiation of the

01:16:29

networking session. Thank you very

01:16:31

much. Thank you. Thank you

01:16:37

Sebastian. And in the order

01:16:39

that I see you on

01:16:40

my screen Robin. Thank you

01:16:42

very much Tricia who we

01:16:45

are and and when the

01:16:46

thank you very much for

01:16:47

what was indeed an incredible

01:16:50

panel. I I I had

01:16:55

at some stage in an

01:16:58

earlier life the the honor

01:17:02

and and responsibility to negotiate

01:17:05

investment treaties and one one

01:17:07

of the one of the

01:17:09

classes that that I I

01:17:11

was always wonder how it

01:17:14

would work out because at

01:17:15

the time there wasn't that

01:17:16

that much you know. Quote

01:17:20

unquote jurisprudence was was the

01:17:22

the special consultations that tax

01:17:27

authorities are supposed to do

01:17:29

among themselves before as actually

01:17:32

a requirement before before the

01:17:34

investor is is entitled to

01:17:37

submit a request for arbitration

01:17:39

and I've seen that in

01:17:41

some investors arbitration cases. There

01:17:44

have been complaints by the

01:17:45

whole state that that has

01:17:48

been that has been simply

01:17:49

another kind of performa set

01:17:54

of consultations. And and I

01:17:56

I wanted to take that

01:17:57

that this opportunity to see

01:18:00

what what your thoughts are

01:18:01

because he's also my experience

01:18:03

also from from working at

01:18:06

the time of the World

01:18:07

Bank, but also as a

01:18:08

governmental official that that Tax

01:18:14

authorities are very mindful of

01:18:17

their level of expertise and

01:18:20

and my sense is that

01:18:22

that those type of Provisions

01:18:24

are are sort of included

01:18:26

there because there's a recognition

01:18:27

of the level of specialty

01:18:29

that that tax mattress have

01:18:30

and all so in the

01:18:32

hope that at the very

01:18:33

least tax authorities would be

01:18:34

able to speak among themselves,

01:18:36

but I don't know whether

01:18:37

this is something that that

01:18:40

either any of you would

01:18:41

like to comment on in

01:18:43

terms of how that has

01:18:44

has played out whether it

01:18:47

really is a performer kind

01:18:50

of flag at that is

01:18:52

hailed and and and simply

01:18:55

seen so that the the

01:18:57

show can go on to

01:18:59

the request for arbitration. Prepare

01:19:09

your mate. You're referring to

01:19:12

the tax filter mechanism. Yes.

01:19:16

So basically the the difficulty

01:19:19

the conceptual difficulty I have

01:19:21

with this is basically you're

01:19:23

asking the compete on taxator

01:19:25

is to give consent to

01:19:27

move to investor State disputes.

01:19:29

So basically you're asking them

01:19:31

to apply on something that

01:19:33

goes beyond their expertise because

01:19:36

the competent tax authorities for

01:19:38

example can can you know

01:19:40

discuss double taxation, but you

01:19:43

know, if you move into

01:19:44

issues that are relevant to

01:19:46

investment State dispute like expropriation.

01:19:49

Would there be really the

01:19:50

the right the right authorities

01:19:53

to engage into that that

01:19:54

discussion discussion? So this is

01:19:55

I think a conceptual difficulty

01:19:57

that I have with this

01:19:58

mechanism Yeah, well, there's of

01:20:02

course lots of room for

01:20:04
profession and we we need

01:20:06
more of that. But with

01:20:07
that thank you there for

01:20:08
for giving your your thoughts

01:20:11
on on that with that

01:20:13
I would thank you and

01:20:16
and lets us move to

01:20:19
the breakout rooms. I think

01:20:21
that we have perhaps sufficient

01:20:24
people for for two or

01:20:27
so and that is a

01:20:29
safe space that we stop

01:20:31
reporting now and nobody has

01:20:35

to talk about tax but

01:20:36

you can or damages but

01:20:40

of course we can and

01:20:41

I could not say thank

01:20:43

you enough because we have

01:20:45

we've had a really good

01:20:46

numbers for for this this

01:20:48

panel and and I believe

01:20:50

that that people are very

01:20:52

thirsty to understand complex issues

01:20:56

and and get it right

01:20:58

as this panel has A

01:21:00

as message to the whole

01:21:02

of the arbitration community. So

01:21:04

thank you and we'll look

01:21:06

into other panels that we

01:21:07

can put together on Taxation

01:21:09

and international arbitration. So, thank

01:21:12

you. Hello, everyone. This is

00:00:03

a world arbitration update. And

00:00:06

today we have our third

00:00:10

we're now having our third

00:00:12

panel of the day in

00:00:14

Europe day and we have

00:00:16

an incredible panel to speak

00:00:20

on. Facts and investment arbitration

00:00:25

I would like to thank

00:00:26

all of our panelists and

00:00:29

I would like to to

00:00:30

before moving into the panel.

00:00:32

I would like to thank

00:00:33

our sponsors which have made

00:00:35

it possible to make the

00:00:36

world arbitration update a sustainable

00:00:39

Forum. This is our second

00:00:42

edition of wow, and That

00:00:47

I would I would stress

00:00:48

that that the tool two

00:00:51

of the main missions of

00:00:52

the world opportunity update. Wow,

00:00:55

R1 to the centralize international

00:00:59

arbitration and and and by

00:01:02

this we mean to really

00:01:03

reaching out to places in

00:01:07

the world that do International

00:01:10

arbitration beyond the the normal

00:01:12

centers including the New York

00:01:14

or paris's or even Washington

00:01:17

and reach out to places

00:01:19

even in Europe that may

00:01:22

not be the main centers

00:01:23

or in Asia or in

00:01:25

Africa or in Latin America

00:01:27

or or in in Asia.

00:01:30

So that's one of the

00:01:33

objectives on the other objective

00:01:34

is to update on issues

00:01:37

of international commercial right investment

00:01:40

arbitration as well as public

00:01:43

international law within this objective

00:01:46

one of the topics that

00:01:48

we had not addressed before

00:01:52

in any of the world

00:01:54

arbitration panels in the first

00:01:57

year or in its sister

00:01:59

event the Washington arbitration week.

00:02:01

Also wow is the are

00:02:05
the Is on Taxation and

00:02:07
investment nutrition so lo and

00:02:10
behold last year. We had

00:02:12
a conversation with Sebastian wushka,

00:02:16
who is the moderator and

00:02:18
the mind behind this this

00:02:20
panel to put together a

00:02:22
an incredible set of panelists

00:02:25
who would address issues of

00:02:28
investment arbitration and Taxation. And

00:02:32
and this is a reality

00:02:34
now, I would like to

00:02:35
thank Sebastian because you know,

00:02:37

he he looked into into

00:02:39

the main issues that that

00:02:41

should be discussed that are

00:02:44

both issues that will be

00:02:46

addressed to give a baseline

00:02:50

for everyone and then to

00:02:52

go deeper into topics that

00:02:54

are novel and and that

00:02:56

that must be discussed in

00:02:58

taxation and investment arbitration, but

00:03:00

before even the floor to

00:03:02

Sebastian and and In the

00:03:06

speakers, I would like to

00:03:08

emphasize that Sebastian is a

00:03:11

partner at Luther and he

00:03:14

is in Hamburg and assists

00:03:17

domestic and foreign clients in

00:03:19

relation to complex complex litigation

00:03:21

and arbitration proceedings with a

00:03:24

strong focus on public international

00:03:26

law matters, including public international

00:03:29

law advisory work and in

00:03:31

the area of International Investment

00:03:33

law, he assists both corporate

00:03:35

investors and and state owned

00:03:38

Enterprises with their investment disputes

00:03:41

and is particularly experience in

00:03:43

infra intra EU investment matters.

00:03:47

He's expertise covers questions of

00:03:49

public international law more broadly

00:03:51

including for example, human rights

00:03:55

and humanitarian law. He has

00:03:57

appeared before various tribunals under

00:04:01

the ICC rules amongst others.

00:04:04

I would like to emphasize

00:04:07

that he has been listed

00:04:08

as a lawyers to watch

00:04:11

in 2023 and he has

00:04:14

been recommended as a future

00:04:16

leader in arbitration both in

00:04:19

2022 and 2021 with that

00:04:24

I would like to hand

00:04:26

the Floor to Sebastian Sebastian

00:04:31

the floor is yours. Thank

00:04:36

you very much Christian Antonio.

00:04:37

And thank you also to

00:04:39

the entire world arbitration update

00:04:42

team for the invitation to

00:04:43

moderate this panel for the

00:04:45

openness to host a session

00:04:46

here on the interaction of

00:04:48

international Taxation and International Investment

00:04:51

law. I'm not going to

00:04:53

spend many introductory rewards about

00:04:56

Taxation and investment law here

00:04:59

since we actually have one

00:05:00

panelist given an opening presentation

00:05:03

on the topic. Let me

00:05:05

just say that I'm glad

00:05:06

to see so many colleagues

00:05:07

joining the session. I see

00:05:08

some are still joining in

00:05:09

text matters and interaction with

00:05:13

investment law standards is if

00:05:15

you don't already considered a

00:05:17

very interesting issue, it is

00:05:19

definitely an issue that you

00:05:20
cannot avoid practicing in international

00:05:22
arbitration. It will rise in

00:05:24
all investment cases. If only

00:05:27
in relation to the taxation

00:05:28
of awards, which we will

00:05:30
also be addressing in this

00:05:32
session. And especially Antonio already

00:05:34
indicated. We have a great

00:05:36
panel to discuss these topics.

00:05:38
First we will have an

00:05:40
introductory presentation the update so

00:05:42
to say by Trisha Mitra.

00:05:45
Trisha focuses a practice on

00:05:47
investment and Commercial arbitration as

00:05:49
well as publishing international law

00:05:51
matters. She's an associate with

00:05:53
the lead in London and

00:05:54
previously was a an associate

00:05:57
with the arbitration group at

00:05:58
Sherman and Sterling in Paris

00:05:59
for many years, but prior

00:06:01
to that. She also spent

00:06:02
time with the arbitration practice

00:06:03
at Wilma held in London

00:06:04
as well as as an

00:06:06
assistant to persevere in Switzerland

00:06:09

in his arbitration practice and

00:06:10

as a litigation associate in

00:06:13

India. Joining Trisha in the

00:06:15

discussion will be Professor, Roberta.

00:06:17

No. Robert is a professor

00:06:19

of Swiss and international tax

00:06:20

law at University of lausanne

00:06:22

where you had the text

00:06:24

policy Senator as well as

00:06:25

a research platform on text

00:06:27

disputes and International Investment and

00:06:29

Commercial arbitration to which I

00:06:31

am fortunate to also contribute.

00:06:34

next this probe as also

00:06:36

the chairman of the permanent

00:06:37

scientific Committee of the International

00:06:38

Business Association and he practices

00:06:41

Swiss and international tax law

00:06:42

as an independent expert with

00:06:45

over 20 years of experience

00:06:46

and as part of that

00:06:47

is regularly involved as an

00:06:49

expert in international arbitrations. Next

00:06:52

we have Wendy miles KC

00:06:54

who is a specialist in

00:06:56

international arbitration and dispute resolution

00:06:57

with over 25 years of

00:06:59

experience at 20 Essex in

00:07:01

London. Since 2005 she has

00:07:04

developed a busy arbitration practice

00:07:05

as an arbitrator and the

00:07:07

most arbitral institutions including an

00:07:09

investment cases. And when he

00:07:11

has been appointed by the

00:07:12

UK to the exact panel

00:07:13

of arbitrators and also the

00:07:14

panel of conciliators in 2020.

00:07:18

amongst numerous further appointments importantly

00:07:21

for present purposes when they

00:07:23

also code shares the ICC

00:07:25

working group on carbon pricing

00:07:27

mechanisms. We're also tax comes

00:07:29

into play as we will

00:07:30

see during today's session. Finally,

00:07:33

we are joined by Robin

00:07:34

rylanda who is a partner

00:07:36

at monheimer's modeling and Stockholm

00:07:37

Sweden where he specializes in

00:07:39

dispute resolution with a particular

00:07:41

emphasis on arbitration matters. Robin

00:07:44

has considerable experience as Council

00:07:46

and investment disputes under bilateral

00:07:48

investment treaties the energy data

00:07:50

treaty and the exit convention

00:07:52

and he also regularly represents

00:07:54

clients in arbitration related matters

00:07:57

before the Swedish courts. And

00:07:59

as I can say from

00:08:00

personal experience Robin is in

00:08:02

particular and expert on Damages

00:08:03

aspects and investment cases, and

00:08:05

they are also on taxation

00:08:06

questions. Now we will try

00:08:09

to make the session as

00:08:10

interactive as possible. But of

00:08:12

course we will have certain

00:08:14

input presentations starting first with

00:08:17

Twitter introductory presentation and then

00:08:19

moving to different topics between

00:08:22

these topics. We will open

00:08:24

up the floor for the

00:08:25

panelists to join the debate

00:08:26

and exchange, but we would

00:08:28

also like the audience to

00:08:30

participate by raising questions. So

00:08:32

in case you have questions,

00:08:33

please send them to the

00:08:35

chat and I will try

00:08:36

to integrate them into the

00:08:38

discussion as we go. Otherwise,

00:08:41

we will hopefully have some

00:08:42
time left at the end

00:08:43
for that purpose and can

00:08:44
then address questions at a

00:08:46
Q&A session in the end.

00:08:48
Now without further Ado, I

00:08:50
would like to invite trisham

00:08:52
to start with her opening

00:08:54
remarks enter update. Thank you

00:09:00
very much Sebastian. And thank

00:09:02
you again to the organizers

00:09:03
of the world arbitrating update

00:09:05
for the invitation. When one

00:09:09
things of the type of

00:09:10

police powers of a state

00:09:12

that could give rise to

00:09:13

an investment arbitration. The first

00:09:16

categories that perhaps come to

00:09:18

mind are physical exploration regulatory

00:09:21

measures treatment by domestic courts.

00:09:24

But taxation measures are equally

00:09:27

and exercise of police power

00:09:28

and according to latest statistics

00:09:31

the cause of 15% of

00:09:33

all its cases registered so

00:09:36

far. So therefore this is

00:09:38

a significant ratio of its

00:09:41

cases and what makes this

00:09:42

topic chosen by the organizers

00:09:46

very relevant for practitioners as

00:09:50

Sebastian mentioned I will give

00:09:51

an overview of interesting developments

00:09:55

in the space in the

00:09:55

last few years. I plan

00:09:57

to cover taxation board from

00:10:00

sort of policy perspective as

00:10:02

well as developments in the

00:10:04

isds phase. I plan to

00:10:09

begin by by discussing. the

00:10:11

global minimum tax and their

00:10:14

implications on FDI and ists

00:10:18

To understand Global minimum tax

00:10:19

we need to go back

00:10:21

to 2013. When the oecd

00:10:24

and the G20 launched the

00:10:25

base erosion and profit shifting

00:10:28

project or what is called

00:10:29

the bets. The aim of

00:10:32

peps was to address tax

00:10:34

planning strategies used by multinational

00:10:36

companies to avoid paying taxes.

00:10:40

Not to be clear. The

00:10:41

companies were not evading taxes.

00:10:44

They were instead tax planning

00:10:46
in a way to exploit

00:10:47
loopholes and mismatches between national

00:10:50
tax laws of different jurisdictions.

00:10:52
And countries particularly developing countries

00:10:56
started complaining that while these

00:10:58
multinationals were conducting economic activities

00:11:01
in their territories. The companies

00:11:04
were able to avoid paying

00:11:06
taxes by structuring themselves through

00:11:08
say a low tax jurisdiction.

00:11:12
This kind of tax competition

00:11:13
or race to the bottom.

00:11:15
the countries have complained frustrate

00:11:17

Revenue collection Revenue efforts add

00:11:21

to this The increased digitization

00:11:23

of businesses when tax Frameworks

00:11:26

were originally designed for perhaps

00:11:28

more brick and mortar kind

00:11:29

of businesses. the work of

00:11:33

the oecd up is in

00:11:36

two is a two pillar

00:11:38

approach. Below one aims to

00:11:42

reallocate some profits based on

00:11:45

the market jurisdiction where the

00:11:48

businesses are generating value from

00:11:50

say for example through interaction

00:11:52

with consumers or users in

00:11:54

that jurisdiction where they might

00:11:57

not have a physical Nexus.

00:11:59

but are conducting economic activities

00:12:00

in so in case you're

00:12:02

wondering what the tax teams

00:12:04

of Google Facebook and Netflix

00:12:06

will be thinking about for

00:12:07

the next few years. It's

00:12:08

pillow on. now pillar 2

00:12:11

proposes the global minimum tax

00:12:15

Which is intended to address

00:12:16

the incentives to shift profits

00:12:18

based solely on tax outcomes.

00:12:22

Now these rules at the

00:12:23

moment are meant to apply

00:12:25

to companies with more than

00:12:26

750 million in revenues. So

00:12:29

the big multinationals But it

00:12:32

is quite significant because it

00:12:34

could make companies revisit their

00:12:36

current tax re-structuring which in

00:12:38

turn has the potential to

00:12:40

affect FDI flows. Across the

00:12:43

world and potentially the most

00:12:46

in in low tax jurisdictions.

00:12:49

It's a company's might move

00:12:50

away from the use of

00:12:51

offshore Vehicles often used in

00:12:53

tax planning. And establish more

00:12:56

direct connections with recipe and

00:12:58

countries and from an ists

00:13:00

perspective. This could be quite

00:13:02

interesting because it might impact

00:13:04

questions of nationality of investors.

00:13:11

Global minimum data tax Could

00:13:14

have many potential impacts on

00:13:15

both FDI and isds. For

00:13:19

example where countries have entered

00:13:22

into stabilization Clauses are agreed

00:13:25

to provide preferential tax treatment

00:13:27

to foreign investors. Adjusting the

00:13:30

tax could potentially lead to

00:13:32

isds claims. now the current

00:13:36

IIA framework or at least

00:13:38

the majority of the current

00:13:40

II's Do not include explicit

00:13:43

obligations that the tax regime

00:13:45

of a country will not

00:13:46

change. those states often argue

00:13:50

that changing a tax regime

00:13:52

is an exercise of the

00:13:53

softenity and therefore cannot be

00:13:56

impugned or should not be

00:13:58

impuned through an ISS claim.

00:14:02

Investors on the other hand

00:14:03

have relied on expropriation and

00:14:05

tfps and umbrella Clauses to

00:14:08

argue that the change in

00:14:09

the tax framework has adversely

00:14:11

impacted their investment. Going forward

00:14:15

and especially once pillow 2

00:14:18

comes into Force. It'll be

00:14:20

interesting to see how iin

00:14:22

negotiators react to this if

00:14:24

at all they do. Would

00:14:26

they incorporate perhaps more clarification

00:14:29

language in the IIs? States

00:14:36

have in the recent discussions

00:14:40

for IIA reform had The

00:14:45

safeguarding of their regulatory space

00:14:47

probably at the highest up

00:14:50

at the top of their

00:14:52

priority list. So as pillar

00:14:56

to comes into effect on

00:14:58

his ratified by countries states

00:15:00

will also likely be thinking

00:15:01

about how to minimize the

00:15:02

risk of isd's claims. The

00:15:05

first answer that will probably

00:15:07

come to everyone's mindless tax

00:15:08

covers. Indeed the Indian model

00:15:11

vit curves our tax disputes

00:15:13

completely. Some would say other

00:15:16

reaction to the Vodafone and

00:15:17

the candidates. But if states

00:15:21

do not agree to completely

00:15:23

carve our tax disputes there

00:15:25

could be other reform options

00:15:26

such as redefining investment. Tweaking

00:15:30

the language of the standards

00:15:31

of protection in the vit

00:15:33

or indeed having another look

00:15:35

at the public policy exceptions

00:15:37

clause. The new Dutch model

00:15:40

vit has an interesting Clause

00:15:42

preserving the right of parties

00:15:43

to implement taxes and here

00:15:45

I coach aimed at preventing

00:15:47

the avoidance or evasion of

00:15:49

taxes personal into its tax

00:15:51

laws or it's agreements for

00:15:53

the avoidance of double taxation.

00:15:56

So clearly treating negotiators are

00:15:59

already thinking about this. Now

00:16:04

I'll move away from developments

00:16:06

in in the tax policy

00:16:08

space. And talk a little

00:16:10

bit about the recent developments

00:16:13

in tax related isds disputes.

00:16:16

Now over the years many

00:16:18

of the tax cases that

00:16:19

we have seen have Arisen

00:16:21

from taxes or levies aimed

00:16:23

at specific Industries. The Vodafone

00:16:26

and can disputes whose Awards

00:16:29

of her issued in 2020.

00:16:31

We're one of the first

00:16:32

few cases where the application

00:16:34

of the central tax statute

00:16:37

of a country was challenged

00:16:38

in an ists case. Now

00:16:41

the those cases as many

00:16:43

of you might already know

00:16:44

a rose from the retroactive

00:16:46

Amendment of the capital gains

00:16:48

provision in India's Income Tax

00:16:51

Act. And the subsequent in

00:16:54

position of attacks of what

00:16:56

billions of dollars on on

00:16:58

can and work? Now I'll

00:17:01

summarize the main findings of

00:17:03

the tribunalin can. Not just because

00:17:05

I was part of that

00:17:06
team but because the Vodafone

00:17:09
award is not public. in

00:17:14
the can dispute India raised

00:17:16
several jurisdictional objections It argued

00:17:20
that vit that the b.i.t

00:17:22
the UK and WB it

00:17:23
excluded tax disputes. The tribunal

00:17:27
however rejected this seeing that

00:17:29
the vit expressly carved our

00:17:33
tax disputes only from the

00:17:34
national treatment and the MFN

00:17:37
Clauses in the vit. And

00:17:41
you also argued that tax

00:17:43

disputes are not arbitrable. The

00:17:46

tribunal however held that there

00:17:47

is a distinction between tax

00:17:49

disputes and a dispute relating

00:17:51

to tax measures. And can

00:17:53

what and and how that

00:17:55

can was disputing the manner

00:17:57

in which the tax was

00:17:58

imposed and not necessarily seeking

00:18:00

to. Seeking to resolve attacks

00:18:05

dispute against India before the

00:18:07

Tribunal. The tribunal also did

00:18:11

not find any public policy

00:18:12

that prevented it from accepting

00:18:13

jurisdiction over the dispute. In

00:18:18

that case India also failed

00:18:19

to convince the tribunal that

00:18:21

tax disputes were excluded from

00:18:22

the vit because India and

00:18:24

UK had a had a

00:18:25

double taxation treaty. The tribunal

00:18:28

clarify that that a vit

00:18:30

and a double taxation treaty

00:18:31

have different schools. On the

00:18:34

merits the tribunal found that

00:18:37

India had reached the equity

00:18:38

standard. Finding that the amendment

00:18:41

had substantively altered the Indian

00:18:44

tax framework and confirm that

00:18:46

legal certainty and stability were

00:18:49

general principles of rule of

00:18:51

law. The tribunal also rejected

00:18:54

India's arguments that cans corporate

00:18:57

structuring was tax avoidant making

00:18:59

a distinction between legitimate tax

00:19:02

planning and import impermissible tax

00:19:05

avoidance. I must know that

00:19:09

the can tribunal noted that

00:19:11

there was a doubt of

00:19:12

jurisdiction Jewish Prudence in relation

00:19:15
to matters of retroactivity and

00:19:17
retroactive Taxation and particular and

00:19:20
I want to know whether

00:19:21
the can award will be

00:19:22
that very jurisprudence for future

00:19:24
cases and retroactive taxes seeing

00:19:28
that just in March last

00:19:30
year a Canadian mining company

00:19:31
called false Majestic as initiated

00:19:34
the case against Mexico over

00:19:35
retroactive tax liabilities. Then there

00:19:40
are the well-known slew of

00:19:41
cases known as the renewable

00:19:42

energy cases over the modification

00:19:45

of a state subsidy regime

00:19:47

for renewable energy. Spain Italy

00:19:49

and the Czech Republic have

00:19:51

steadily climbed the untag list

00:19:53

of more student more student

00:19:55

respondent States as a result

00:19:57

of those cases. The list

00:20:00

of decisions is perhaps too

00:20:02

long to summarize in in

00:20:03

the course of my introduction.

00:20:06

But in the majority of

00:20:07

the Spanish solar cases, for

00:20:08

example, Spain was found liable

00:20:10
for reaching the protection standards

00:20:12
in the ecd for the

00:20:13
manner in which subsidy regime

00:20:15
was reformed. Last year also

00:20:19
saw two new cases against

00:20:20
Ukraine resulting from reforms to

00:20:23
their wind and solar tariff

00:20:24
regimes. Interestingly France and Japan

00:20:27
are now reportedly facing their

00:20:29
first treaty cases again as

00:20:30
a result of changes to

00:20:32
the solar subsidy regimes. Now

00:20:35
it is reported that the

00:20:36

Japanese government is very of

00:20:38

facing multiple claims as a

00:20:41

result of of these changes.

00:20:44

Now all these are more

00:20:45

concerns leading me back to

00:20:46

my earlier point. It is

00:20:48

an interesting time for tax

00:20:50

policy makers and investment of

00:20:52

an investment treaty negotiators whose

00:20:55

future mandates will likely reflect

00:20:57

these developments. I would stop

00:21:00

you for now. Sebastian back

00:21:02

to you Thank you very

00:21:04

much Tricia for this this

00:21:06

overview of both the text

00:21:08

policy space and the same

00:21:09

time then also current developments

00:21:12

in relation to investment arbitration

00:21:14

relating to taxation measures tax

00:21:16

related investment disputes as the

00:21:18

the Canon travel called it.

00:21:20

I'm looking through the the

00:21:22

panel to see whether I

00:21:24

immediate directions to to Trisha's

00:21:26

opening remarks. Would anybody like

00:21:28

to comment in particular cases

00:21:29

a particular aspects from that?

00:21:31

Well, if you allow me

00:21:33

perhaps just a few words

00:21:35

on global minimum tax. I

00:21:38

will say my other remarks

00:21:40

for my inputs because they

00:21:41

relate more to the the

00:21:43

cases but on global minimum

00:21:44

tax, I think it's very

00:21:45

nice that Trisha brought up

00:21:46

the the issue. It is

00:21:49

a very interesting example of

00:21:51

recent way of making laws

00:21:54

at the international tax level

00:21:55

just to highlight two points.

00:21:58

So the global minimum tax

00:22:00

is not a multilateral treaty.

00:22:03

It's about transposing domestic agreed

00:22:07

laws into domestic laws model

00:22:09

rules. So this is quite

00:22:10

interesting because countries would you

00:22:13

know replicate directly into their

00:22:15

domestic tax legislations rules, that

00:22:18

would have been agreed upon

00:22:20

at the multinational level, but

00:22:21

it's not a treaty that's

00:22:23

a very different important difference

00:22:25

with with pillow one actually.

00:22:27

So Global minimum tax is

00:22:29

just domestic law now the

00:22:30

fact that There is a

00:22:32

problem of interaction with the

00:22:34

investment treaty regime on the

00:22:36

scores the need for a

00:22:38

more coordinated approach between the

00:22:40

two Fields. That's that's quite

00:22:41

clear. It's also a question

00:22:45

of what happens. If for

00:22:46

example a country has incentives

00:22:49

and then decides to remove

00:22:51

these incentives to actually implement

00:22:53

the global minimum tax and

00:22:54

that's where they say the

00:22:56

sensitive Point does arise but

00:22:59

I think one should not

00:23:00

also Forget that the global

00:23:03

minimum tax is is a

00:23:05

global architecture. So just to

00:23:07

give you an example if

00:23:08

a country where to still

00:23:11

maintain an incentive and not

00:23:13

to implement the the global

00:23:16

minimum tax the income would

00:23:18

be taxed elsewhere. So if

00:23:21

you have a multinational group

00:23:22

if the income if there

00:23:24

is an incentive in the

00:23:25

whole state and that incentive

00:23:26

is maintained you still have

00:23:28

a Top-Up tax at the

00:23:29

parent company level or elsewhere.

00:23:32

So it should also be

00:23:34

taken into that consideration, but

00:23:36

I think the point made

00:23:37

by Trisha really on the

00:23:38

scores that there's got to

00:23:40

be a more coordinated approach

00:23:42

between the two Fields going

00:23:43

forwards. Right. Thank you very

00:23:47

much for this this I

00:23:49

think very helpful input also

00:23:50

from the textile for all

00:23:51

arbitration investment lawyers here in

00:23:54

the audience when the AC

00:23:56

that you are unmuted. So

00:23:57

I assume that you have

00:23:57

a comment also as well.

00:23:58

Just thank you Sebastian just

00:24:00

to make sure that everybody

00:24:03

understands the the audience the

00:24:06

enlarged approach as Trisha alluded

00:24:10

to and as you alluded

00:24:11

to investment arbitration may be

00:24:14

pursuant to an investment treaty.

00:24:16

It may also be pursuant

00:24:17

to an investment agreement or

00:24:19

a contract. So it's between

00:24:20

an investor foreign investor on

00:24:22

the one hand and estate

00:24:23

party. Usually the host State

00:24:25

on the other hand under

00:24:26

a contract and Trisha touched

00:24:28

on the text stabilization Provisions,

00:24:30

which come into contracts rather

00:24:32

than treaties so that that

00:24:34

the conversation relates to that

00:24:36

as everybody as much as

00:24:37

a treatise. Right. Thank you

00:24:41

very much, Robin. Yeah purpose

00:24:44

just picking up on what

00:24:45

Tricia said about what this

00:24:47

might mean for negotiations for

00:24:50

investment protection treaties going forward

00:24:52

perhaps as you said there

00:24:56

will be an inclination to

00:24:59

include, you know tax carve

00:25:01

outs. I just I'm just

00:25:03

hoping that they perhaps won't

00:25:05

necessarily be complete tax car

00:25:07

lots, but that you rather

00:25:09

review every time what is

00:25:12

the real need here for

00:25:14

the core about both when

00:25:15

it comes to what type

00:25:16

of measures you want to

00:25:18

exclude. I mean again the

00:25:19

distinction between tax dispute tax

00:25:22

related measures anything related to

00:25:25

tax but also on the

00:25:26

other end when it comes

00:25:27

to what types of protection

00:25:30

standards that you want to

00:25:31

exclude because of course there's

00:25:32

a big difference between excluding

00:25:34

for instance tax from umbrella

00:25:37

Clauses. If you have a

00:25:38

contract with a government or

00:25:40

from perhaps the ACT standard,

00:25:42

so Just a wish from

00:25:46

my side going forward. Right,

00:25:50

and I think this also

00:25:51

underscores the need that Robert

00:25:53

already emphasized for an more

00:25:56

intensified dialogue between text and

00:25:58

politics and investment policy makers

00:26:00

because the the usual setting

00:26:01

that you have is that

00:26:02

the text treating negotiators negotiate

00:26:05

the treaty and then they

00:26:06

might not know sufficiently about

00:26:09

text issues and like car

00:26:10

from our completely just because

00:26:11

the unknown should remain out

00:26:12

of the system. So that

00:26:15

might might be something that

00:26:17

should be rethought from from

00:26:18

that perspective as well. And

00:26:19

I think for that purpose,

00:26:20

it's also great white would

00:26:23

beneficial be beneficial for all

00:26:25

of us to look a

00:26:25

bit into the text here

00:26:27

more in more detail and

00:26:29

for that purpose, I would

00:26:30

ask about to take the

00:26:32

floor in relation to how

00:26:35

Text dispute settlement is somewhat

00:26:37

different from investment disputable and

00:26:39

taking more comparative approach to

00:26:41

the two systems as such.

00:26:43

Yes, thank you very much

00:26:45

Sebastian. Well. Tax disputes dispute

00:26:50

settlements on their International tax

00:26:52

law is is in the

00:26:53

state of Crisis. Currently. I

00:26:55

must say and the reason

00:26:57

for that it is because

00:26:58

it has not actually evolved

00:27:00

as quickly as the international

00:27:02

tax system has evolved. What

00:27:03

do I mean by that?

00:27:04

Well, very bluntly dispute settlements

00:27:08

on their International tax law

00:27:10

is rooted in diplomatic protection.

00:27:11

The taxpayer has a right

00:27:13

to initiate the procedure but

00:27:14

has no standing at the

00:27:15

international level. I was reading

00:27:17

again the report published in

00:27:20

2022 by the World Bank

00:27:21

where there is a description

00:27:23

of dispute settlement on the

00:27:25

tax treaties and I was

00:27:26

interested to see that it's

00:27:28

called the best efforts approach.

00:27:30

Well that doesn't really do

00:27:32

justice to the recent work

00:27:34

of the oecd because although

00:27:36

we are stuck with this

00:27:37

diplomatic protection framework. The idea

00:27:40

is still that the corporate

00:27:42

authorities would do their best

00:27:45

and it's interesting to see

00:27:46

that the material refers. To

00:27:48

handling the mutual agreement procedure

00:27:50

in unfair and Equitable manner

00:27:52

to actually reach a result.

00:27:55

So there is actually clearly

00:27:57

pressure on computer authorities to

00:28:01

actually resolve tax disputes. So

00:28:03

it's it would be wrong

00:28:04

to say that just they

00:28:05

lose best effort. But still

00:28:08

the taxpayer has no standing.

00:28:10

So that's I would say

00:28:11

one element which has over

00:28:14

the years stimulated the appetite

00:28:16

for investment State arbitration where

00:28:20

of course the position of

00:28:21

the investor taxpayer, it's different.

00:28:23

Then there is another element

00:28:25

if you look at tax

00:28:26

treaty disputes settlements, it will

00:28:30

only help you to deal

00:28:32

with disputes that are rooted

00:28:34

in a tax treaty application.

00:28:36

So typically cases of double

00:28:40

double taxation. It's offers no

00:28:44

remedy and it does not

00:28:45

cover cases the purely rooted

00:28:47

for. Example in a miss

00:28:49

or arbitrary application of domestic

00:28:52

law which can apply in

00:28:53

a cross-border situation. So simply

00:28:55

the scope of the mutual

00:28:58

agreement procedure is actually confined

00:29:03

to tax treaty application. and

00:29:06

then of course and I

00:29:07

think that also gives a

00:29:09

nice perhaps explanation to the

00:29:12

reluctance of states or to

00:29:14

their desire to include more

00:29:16

and more carve out for

00:29:17

sovereignty concerns. This is also

00:29:19

a tendency which we have

00:29:20

been facing in the tax

00:29:23

field because since a couple

00:29:25

of years we attempted to

00:29:29

introduce or to complement the

00:29:32

mutual agreement procedure, which what

00:29:34

is called tax arbitration. Well,

00:29:36

it's actually not it's not

00:29:38

really arbitration but it's called

00:29:40

tax arbitration and a lot

00:29:43

of States although it is

00:29:46

not tax arbitration in the

00:29:47

way you understand arbitration. A

00:29:49

lot of state are still

00:29:50

opposing tax treaty arbitration for

00:29:54

sovereignty concerns. So that's why

00:29:56

basically there is pressure on

00:29:59

the system to deliver effective

00:30:02

disputes settlement mechanism, and that's

00:30:04

why there is a natural

00:30:05

interest to go for Are

00:30:09

State dispute settlement bearing in

00:30:10

mind that most of the

00:30:11

bilateral investment treaties do not

00:30:14

include carve outs today? Then

00:30:17

there is probably a more

00:30:19

fundamental question which arises and

00:30:24

that is the sovereignty arguments.

00:30:26

If you look at the

00:30:27

making of international tax law

00:30:29

today, whether it concerns the

00:30:32

domestic tax rules or whether

00:30:34

it can concerns tax treaties.

00:30:37

These rules are increasingly shaped

00:30:40

by commonly agreed standards that

00:30:43

are often. In fact subject

00:30:45

to peer reviews at the

00:30:48

international level. I mean, I

00:30:49

was just alluding to the

00:30:51

extreme example being the global

00:30:52

minimum tax where you have

00:30:54

an entire set of rules

00:30:55

and a commentary is which

00:30:57

are simply included in the

00:30:58

domestic law and approved and

00:31:00

agreed by the relevant States.

00:31:03

But this also happens in

00:31:05

many other areas. So the

00:31:07

question is with this unique

00:31:09

way of making international tax

00:31:12

law. Could you really say

00:31:14

that there's a sovereignty problem

00:31:16

in engaging in arbitration given

00:31:19

the fact that the agreement

00:31:21

has already been taken has

00:31:23

already taken place. I mean

00:31:25

we're looking at rules that

00:31:26

are being accepted by more

00:31:28

than 140 countries. So the

00:31:30

point is is the sovereignty

00:31:32

arguments still a valid one.

00:31:35

This is an argument. I've

00:31:36

been making recently at the

00:31:37

public consultation at the oecd

00:31:39

on global minimum tax. I

00:31:41

mean, if you have an

00:31:42

agreement at the global level,

00:31:43

can you really come up

00:31:45

with the sovereignty argument? That's

00:31:47

I would say A question

00:31:49

mark from my side and

00:31:51

secondly, I mean on the

00:31:53

the carve outs. I'm I

00:31:57

have difficulties to understand why

00:31:59

the taxation should be carved

00:32:02

out from the scope of

00:32:03

of investment treaties why this

00:32:08

particular State conduct should be

00:32:09

carved out as a general

00:32:11

rule as a general why

00:32:13

arbitrary arbitrary treatments should be

00:32:15

carved out when it comes

00:32:16

to tax there. I would

00:32:17

have a difficulty on the

00:32:19

other hand. I can understand

00:32:20

a more new also approach

00:32:22

more neurons type of car

00:32:24

valves which are more designed

00:32:26

to ensure a proper functioning

00:32:29

or articulation between the two

00:32:31

system that I can understand

00:32:32

but simply carving tax all

00:32:35

together that I have difficulties

00:32:37

to to understand especially because

00:32:40

what will be carved out

00:32:43

of an investment treaty will

00:32:44

not necessarily fall into a

00:32:46

mutual agreement procedure. So it

00:32:48

basically and nowhere Right. Thank

00:32:54

you. Thank you very much

00:32:54

for bear. I think this

00:32:56

very well highlighted how when

00:32:58

we talk about interaction investing

00:33:00

investment law and tax law

00:33:01

how we have a big

00:33:03

picture elements at play. Let's

00:33:05

say sovereignty concerns all of

00:33:07

these and then we have

00:33:08

extremely technical elements as well

00:33:09

that we need to consider.

00:33:11

So also after repairs input

00:33:14

I would like to open

00:33:14

it up to to the

00:33:16

panel to share some thoughts

00:33:17
on this and I see

00:33:18
that when he's already getting

00:33:20
started. Today hopefully, okay, right

00:33:23
just me waving at somebody

00:33:25
charging into my room the

00:33:27
so I think big picture

00:33:31
is something that we should

00:33:33
really spend a moment on

00:33:34
because we're not talking about

00:33:35
two things and two separate

00:33:37
silos texts on the one

00:33:39
hand and investment protection /

00:33:41
arbitration on the other hand.

00:33:42

What we're talking about is

00:33:44

an international economic law framework,

00:33:47

which is if you like

00:33:49

the visible glove on the

00:33:51

Invisible Hand of the international

00:33:56

Economic framework not not my

00:33:58

metaphor and you know, if

00:34:01

we if we come back

00:34:02

so just let me sort

00:34:04

of big picture both in

00:34:05

terms of history. And in

00:34:07

terms of the system we're

00:34:08

looking at quickly on the

00:34:09

history if we come right

00:34:11

back to one of the

00:34:13

sort of earlier iterations of

00:34:15

what ultimately became the exit

00:34:17

can convention the abstruse craft

00:34:20

convention and what that did

00:34:23

was try to deal with

00:34:24

the situation where of decolonization

00:34:27

where the sort of imperialists

00:34:30

protection of net exporters of

00:34:32

Capital Property interests was replaced

00:34:36

by a notion of international

00:34:39

protection of property rights. And

00:34:42

that protection of international property

00:34:44

rights which weighed in favor

00:34:46

of the net exporters of

00:34:47

capital in every instance tip

00:34:50

towards the investor and public

00:34:52

interest. for any expropriation including

00:34:56

through taxation if you like

00:34:58

allowed investors to come to

00:35:00

the international courts and by

00:35:03

Creating this property protection as

00:35:07

covering direct and indirect expropriation

00:35:10

this principle that underscores many

00:35:14

of the investment treaties and

00:35:19

later includes regulatory expropriation. It's

00:35:23

it's as one sort of

00:35:24

critic noted it's difficult to

00:35:26

determine where indirect deprivation of

00:35:29

property ends and for instance

00:35:31

taxation planning legislation or property

00:35:35

law reform begins, and I'd

00:35:37

add that environmental law reform

00:35:40

or climate change related reform

00:35:42

begins. So we have historically

00:35:45

laid out in the first

00:35:48

quarter of the 20th century

00:35:49

and to the mid 20th

00:35:51

century. An international economic law

00:35:54

framework that protects property rights

00:35:56

for the property right holder

00:35:58

wherever it is in the

00:35:59

world and and that has

00:36:01

trumped the ability of of

00:36:04

the state to to be

00:36:06

able to introduce regulatory change

00:36:09

that that runs contrary to

00:36:11

those property interests. Now that's

00:36:14

investment protection but investment protection

00:36:16

sits within a whole series

00:36:20

of elements of the legal

00:36:23

framework and I try I

00:36:25

like to think of that

00:36:26

legal framework as having. Three

00:36:29

broad different legal systems that

00:36:32

overlap and interconnect. The first

00:36:34

is the public international law

00:36:36

system. And I think what

00:36:37

Rover is saying about International

00:36:40

taxation treaties, which are usually

00:36:42

double taxation type instruments. They're

00:36:45

part of that public international

00:36:46

law framework. So are our

00:36:48

investment treaties. So is our

00:36:49

exit convention and so as

00:36:51

our New York convention, they

00:36:52

all sit in that public

00:36:54

international law system. They are

00:36:56

in many ways the nervous

00:36:58

system that communicates to the

00:36:59

rest of the legal system

00:37:01

how it should react or

00:37:03

act. But the the real

00:37:07

action happens in the domestic

00:37:08

law, so whether it comes

00:37:09

from legislation from regulation or

00:37:12

from National Court decisions from

00:37:14

jurisprudence, that's where we have

00:37:16

the muscles of the international

00:37:18
economic law. They really sit

00:37:20
in that regulatory system. But

00:37:21
how do you reconcile the

00:37:22
two and then we have

00:37:24
this third system that really

00:37:26
into relates as well which

00:37:27
is private international law and

00:37:29
I mentioned earlier that the

00:37:30
International Investment agreements being so

00:37:33
critical those International Investment agreements

00:37:36
carry with them internationalization mechanisms,

00:37:41
like choice of governing or

00:37:42
like choice of arbitration outside

00:37:44

the host state of the

00:37:45

investment that remove those contractual

00:37:48

protections of the property again

00:37:50

from the sovereignty of the

00:37:52

state where that we're the

00:37:53

investment is is regulated. So

00:37:55

those three systems all interact

00:37:57

and I think what's really

00:37:59

fascinating about this discussion is

00:38:02

tax law very much like

00:38:04

in and protection Has elements

00:38:09

of public international law elements

00:38:12

of national law of course

00:38:16

domestic law but also it

00:38:19

has elements in that private

00:38:21

international law system because we

00:38:22

contract to stabilize text to

00:38:26

stabilize investment not just to

00:38:28

protect the investor, but often

00:38:29

for the host state to

00:38:31

incentivize the investment to come

00:38:33

and in the first place

00:38:34

particularly in an extractive and

00:38:36

industries, which require heavy upfront

00:38:38

investment. So when you look

00:38:40

at how you want to

00:38:41

solve for something at one

00:38:43

end of that system you

00:38:45

need to think about how

00:38:46

pulling that thread impacts something

00:38:49

out in the system and

00:38:51

we'll come to it in

00:38:52

a minute, but I think

00:38:53

all of it becomes critically

00:38:54

important when we think about

00:38:55

transition, To a low carbon

00:38:58

future which scientists tell us

00:39:01

is non-negotiable and when we

00:39:04

transition that how do all

00:39:05

of those elements play together

00:39:07

and I think texts and

00:39:08

investment protection is a critical

00:39:09

conflict point. Right. Thank you

00:39:14

very much. I'm just looking

00:39:15

whether they're other comments by

00:39:18

Robin or Trisha on on

00:39:19

this particular aspect. I mean

00:39:22

just just a quick reaction

00:39:24

to the sovereignty point. Rusty

00:39:28

Parks back in 2009. I

00:39:30

mean Rusty Parks always thinks

00:39:31

about things way before he's

00:39:33

almost he is like you

00:39:36

look and look into a

00:39:37

crystal ball back in 2009.

00:39:40

He was already saying that

00:39:41

of course collecting taxes is

00:39:44

a core activity of of

00:39:46

a state but so so

00:39:48

is Environmental Protection and so

00:39:50

as administrative of Justice, which

00:39:52

is regularly challenged before I

00:39:55

see yes, so while collection

00:39:58

of taxes, of course an

00:40:01

exercise of a sovereign function

00:40:05

I believe what is often

00:40:07

challenged in isd's cases is

00:40:09
is a violation of the

00:40:12
state's International obligations and the

00:40:14
manner in which that tax

00:40:16
is imposed and not necessarily

00:40:17
the right to impose that

00:40:18
tax. Thank you very much.

00:40:25
In the interest of time

00:40:26
and and when you already

00:40:27
alluded to this, I suggest

00:40:29
we move to this particular

00:40:30
point that you're already addressed

00:40:32
or alluded to the point

00:40:34
of text carvots, but also

00:40:36

your work on carbon pricing

00:40:38
mechanisms. Maybe you can share

00:40:40
some thoughts also in relation

00:40:42
to how this relates really

00:40:43
to text. And thanks Sebastian.

00:40:47
So I just wanted to

00:40:47
add Tricia and Robert have

00:40:52
already touched on and Robin

00:40:54
the the tax carve out.

00:40:55
So I just want to

00:40:56
come back to the energy

00:40:57
Charter treaty in particular because

00:40:59
I want to address carve

00:41:02
outs and carbon pricing mechanisms

00:41:03

in the context of transition.

00:41:07

to meet the Paris agreement

00:41:08

climate change mitigation adaptation goals

00:41:11

And I think the energy

00:41:12

chartered treaty is a really

00:41:14

useful instrument to focus on

00:41:15

when you're thinking about transition

00:41:17

because it really is the

00:41:19

only energy transition investment agreement

00:41:21

in existence. It was designed

00:41:24

for a different transition at

00:41:26

a different time. But that

00:41:27

said it has the UNF

00:41:29

Triple C the framework agreement

00:41:31

of the Paris agreement in

00:41:32

its recitals. It has carve

00:41:34

outs for environment. It has

00:41:35

references to many of the

00:41:37

sustainability protections. It also has

00:41:39

a taxation carbon so as

00:41:42

cool 21 of the energy

00:41:44

chartreuse is a very clear

00:41:45

taxation carve out. So it's

00:41:47

interesting when Trisha's talking about

00:41:49

the renewable cases with Spain

00:41:51

in the context of investment

00:41:54

treaty and tax because the

00:41:56

the text related elements the

00:41:59

retroactive texts measure by Spain

00:42:05

has pretty much universally been

00:42:07

found not to be within

00:42:09

the scope of the energy.

00:42:11

attitude because of the taxation

00:42:13

carve out and the same

00:42:15

apply. I mean there were

00:42:17

other claims obviously, but that

00:42:19

measure The same related to

00:42:21

the so-called Robin Hood tax

00:42:24

on the renewable windfalls in

00:42:27

Italy again. The tribunal's pretty

00:42:31
much universally. I think someone

00:42:32
will create me if I'm

00:42:33
wrong found those to be

00:42:35
within the cover interestingly enough

00:42:37
that you cost cases and

00:42:38
there's four of those the

00:42:40
ucos cases. I really doubt

00:42:44
with. Expropriation by taxation and

00:42:50
expropriation does is an exception

00:42:53
to the tax cover? So

00:42:55
an exception to the exception

00:42:56
if you like and and

00:42:59
the the tribunal found there

00:43:02

there's some that the text

00:43:03

measures in new costs were

00:43:05

not beneficial. They were discriminatory

00:43:07

and they were directed against

00:43:09

that specific investor and also

00:43:12

falling potentially within indirect tax

00:43:16

say expropriation as a result,

00:43:18

but I think it's interesting

00:43:20

anyone who's looking at this

00:43:21

or thinking about this. I

00:43:23

think it's really interesting to

00:43:24

spend a bit of time

00:43:25

in those publicly available. Energy

00:43:28

charge treaty cases. I think

00:43:30

I've got the statistics somewhere,

00:43:32

but of the Sort of

00:43:37

65 odd Awards 68 Awards

00:43:42

36 refer to article 21

00:43:45

and of those 32 are

00:43:48

the renewable energy cases and

00:43:50

the remaining for the ucost

00:43:52

cases. So the vast majority

00:43:53

do touch on 21, but

00:43:56

most some fail on 21.

00:43:57

So that's a text carve

00:44:00

out sort of holding up

00:44:01

and it'd be interesting to

00:44:02

hear from Robert and whether

00:44:03

or not he thinks that

00:44:05

has been useful because those

00:44:08

investors had other remedies for

00:44:11

the state measures that won't

00:44:14

taxation weren't required didn't require

00:44:18

a recovery through a taxation.

00:44:22

um argument now carbon pricing

00:44:29

mechanisms. I wanted to bring

00:44:31

into the conversation because it's

00:44:33

a great big bucket. In

00:44:36

fact, it's a semi truck

00:44:37

tanker. Full of potential taxation

00:44:41

measures so not all carbon

00:44:43

pricing mechanisms will be taxed

00:44:46

but many of them will

00:44:47

be so a carbon pricing

00:44:49

mechanism for example is a

00:44:51

fuel text a direct fuel

00:44:52

text on your pump. That's

00:44:53

that's obviously a text ETS

00:44:56

system is there to text

00:44:58

or not? Probably not although

00:45:01

some design features and some

00:45:03

ETS systems may form a

00:45:06

type of indirect tax so

00:45:08

as States introduce and Implement

00:45:13

carbon pricing mechanisms in order

00:45:18

to bring about the market

00:45:20

correction that's required in order

00:45:23

for us to transition to

00:45:24

a low carbon future. And

00:45:27

68 States or subnational states

00:45:29

have already introduced mechanisms and

00:45:32

there's a whole lot more

00:45:33

in the drafting in the

00:45:34

coming. As those mechanisms continue

00:45:38

to increase there's no one

00:45:40

size fits all there's lots

00:45:42

of different mechanisms of lots

00:45:43
of different design features. Every

00:45:46
single time one comes into

00:45:47
play. Even if there is

00:45:50
a taxation carve out there

00:45:52
will be the type of

00:45:53
discussion. We saw in those

00:45:55
32 energy Charter trees on

00:45:57
is it tax isn't it

00:45:58
tax? So if a state

00:46:00
is trying to design a

00:46:02
carbon pricing mechanism that is

00:46:04
not going to run it

00:46:07
into investment treaty claims. It

00:46:08

might be very mindful to

00:46:09

to design it around something

00:46:11

that's quite clearly text. But

00:46:13

that may not be the

00:46:14

best mechanism for achieving the

00:46:17

carbon reduction in that particular

00:46:18

place. So the reason I

00:46:20

spent a bit of a

00:46:21

moment earlier on systems is

00:46:23

because Energy transition infrastructure transition

00:46:28

transport industrial and land use

00:46:30

transition to Net Zero. requires

00:46:34

systemic change and this whole

00:46:38

plethora of international economic law

00:46:42

it needs to adapt to

00:46:45

a very different goal than

00:46:48

what underscored it when it

00:46:50

was created and Taxation plays

00:46:53

a tremendously important role in

00:46:54

that investment protection plays an

00:46:57

incredibly important role in that

00:46:58

because we need the investment

00:47:00

to go into transition and

00:47:03

particularly cross-border investment. But across

00:47:06

both we need to find

00:47:08

mechanisms to ensure that the

00:47:11

underlying objectives of the Paris

00:47:13

agreement and I think there's

00:47:14

some really interesting. Arguments to

00:47:17

be had about conflict of

00:47:19

public International Norms. We may

00:47:22

see some arguments under some

00:47:23

of those tax guidance principles

00:47:26

and pillar one pillar too,

00:47:28

but more likely between Paris

00:47:29

agreement and investment treaty protections

00:47:33

or even the New York

00:47:35

convention on you know, which

00:47:37

Norm prevails because the most

00:47:39

recent is of course the

00:47:40

Paris agreement. Thank you very

00:47:46

much Wendy. Um immediate directions

00:47:48

from the from the panelists.

00:47:52

To these points probably I

00:47:54

see we have a comment.

00:47:56

No, I mean I just

00:47:57

got off my no, absolutely

00:48:00

I just wanted to emphasize.

00:48:01

What what Wendy says did.

00:48:04

I mean this whole problem

00:48:08

needs to be tackled in

00:48:10

a coordinated fashion. So of

00:48:11

course, there's got to be

00:48:12

a coordination and for one

00:48:16

very basic reason also the

00:48:18

predictability for for the the

00:48:21

investor and this is typically

00:48:23

perhaps an area where I

00:48:27

can make a parallel with

00:48:28

Summit experience that we've we've

00:48:31

had actually in the international

00:48:32

tax field we had cases

00:48:34

in which For policy reasons

00:48:37

we decided to carve out

00:48:39

certain certain aspects from from

00:48:41

a relevant tax treaty for

00:48:43

example, in order to build

00:48:45

a consistent policy. So I

00:48:50

would I would fully support

00:48:51

this but I come back

00:48:54

to to my remark that

00:48:56

I made at the at

00:48:57

the beginning. I still feel

00:48:59

that that going forward because

00:49:01

of course the trend as

00:49:03

we have seen now, it

00:49:04

seems that it's yes or

00:49:06

no in the sense that

00:49:07

you have bilateral investment treaties

00:49:09

with no carve out and

00:49:10

then the tendency to say

00:49:11

well, let's have a full

00:49:12

carve out. At least that's

00:49:14

that's a risk. I would

00:49:18

be a bit cautious with

00:49:19

that. I think that there

00:49:21

is no reason to exclude

00:49:23

completely taxation measures from the

00:49:27

scope of review of investment

00:49:29

treaty arbitration simply because it

00:49:31

is tax on the other

00:49:32

hand when it comes to

00:49:34

building a consistent. Policy that

00:49:37

is neutral in the sense

00:49:39

that you don't basically go

00:49:40

for a tax because it

00:49:41

is a tax because it

00:49:42

is convenient. You you go

00:49:43

for a neutral consistent policy.

00:49:45

Then that coordination is absolutely

00:49:48

necessary. Thank you very much.

00:49:54

And I think I mean

00:49:56

we may have some members

00:49:57

here in the audience who

00:49:58

have not yet looked into

00:49:59

taxation articles in my lateral

00:50:01

investment treaties are generally in

00:50:02
the energy Charter treaty. So

00:50:04
I think for that purpose

00:50:05
if this is something that's

00:50:07
new to you. I think

00:50:08
a look into article 21

00:50:09
or of the ECT or

00:50:11
similar Provisions will be very

00:50:12
helpful there because you see

00:50:13
it's on one hand. It's

00:50:15
a car Lodge and cops

00:50:16
certain elements of the treaty

00:50:17
back in and then it's

00:50:18
by the detail provision that

00:50:20

that is very elaborate and

00:50:23

and interesting too to look

00:50:25

at or start and from

00:50:26

there to to investigate this

00:50:29

this area further. I see

00:50:30

when you do have a

00:50:31

another comment on Broadway, please

00:50:33

go ahead on us. Just

00:50:35

looking at Dr. Dear's question.

00:50:37

I was if now as

00:50:38

an appropriate time to answer

00:50:40

that. I think I think

00:50:42

the two lessons that can

00:50:44

be drawn. The first lesson

00:50:47

is genuine. taxation policies can

00:50:56

successfully be carved out and

00:51:01

that carve out will be

00:51:02

respected. pretty uniformly In investment

00:51:08

treaty arbitration. So I think

00:51:11

and you know, what when

00:51:13

you think about it, it's

00:51:14

interesting that an energy transition

00:51:17

treaty. Halved out text this

00:51:20

is 1992. This was drafted

00:51:22

text carve outs were not

00:51:24

big then Tricia might correct

00:51:25

me on that, but I

00:51:26

don't think text Carvel's for

00:51:27

that common, then they're still

00:51:28

not today. So clearly people

00:51:32

were thinking that energy systems

00:51:34

and transition of energy systems

00:51:35

is going to intersect with

00:51:38

Taxation and so took taxation

00:51:41

out of the the investment

00:51:44

protections or yeah, so so

00:51:49

I think the first thing

00:51:50

is taxation carve outs do

00:51:52

work can work. equally and

00:51:55

investor should be aware of

00:51:56

those right? So if you're

00:51:58

looking for an additional if

00:52:00

you want some form of

00:52:02

text stabilization, you need to

00:52:03

negotiate it into your contract.

00:52:07

The second thing big lesson

00:52:09

that I think can be

00:52:10

drawn out of the ucos

00:52:11

cases and particular but also

00:52:13

how they were argued subsequently

00:52:14

and isoluxe and other cases.

00:52:17

is that States can't hide

00:52:21

behind taxation as a fig

00:52:24

leaf for expropriation. And Robert

00:52:29

mentioned the bips guidance from

00:52:31

oecd. I was involved in

00:52:34

a lengthy. natural resources arbitration

00:52:39

as Council in an African

00:52:43

state we're pretty much the

00:52:45

government had worked through every

00:52:48

single step in the baps

00:52:49

guidance and redrafted and recast

00:52:53

its law to cut off

00:52:55

the the incentive that that

00:52:59

that's the best guidance was

00:53:01

sort of arguing against but

00:53:04

it did so in the

00:53:04
face of long-standing investment agreements

00:53:07
and that was a contractual

00:53:08
dispute and it really was

00:53:11
expropriate systemic expropriation by text

00:53:15
and it even invoked Potentially

00:53:18
an interesting double taxation treaty

00:53:21
point where the offshore country

00:53:24
where the holding company to

00:53:26
the local operating company was

00:53:27
held the offshore country had

00:53:30
a double taxation treaty and

00:53:31
the state tried to claim

00:53:33
capital gains tax on the

00:53:35

dividends paid to the parent

00:53:36

company. So so it even

00:53:39

had there and we ran

00:53:40

into precisely the issue that

00:53:42

Robert identifies. Where do you

00:53:45

go to resolve that dispute?

00:53:46

We thought can we bring

00:53:47

it into arbitration? No, it

00:53:49

was between the two states

00:53:50

so didn't belong in our

00:53:52

arbitration and and that Lacuna

00:53:55

and I agree. I think

00:53:56

it is a Latina is

00:53:58

potentially a problem. Thank you

00:54:02

very much. I think we

00:54:03

can also use Dr. Davis

00:54:05

question here to to move

00:54:06

to the last segment of

00:54:09

our discussion that we had

00:54:10

prepared here. He basically asks

00:54:12

what lessons can be drawn

00:54:13

from ECT cases involving Spain

00:54:15

and one element that I

00:54:17

believe arises in many of

00:54:19

these cases, but also generally

00:54:20

investment disputes is the the

00:54:22

question of text grows up

00:54:24

claims and for that purpose,

00:54:25

I would invite Robin or

00:54:28

to to share Sports on

00:54:29

this and explain a bit

00:54:30

what the what the items

00:54:33

the issues are there when

00:54:35

you when you discuss tax

00:54:36

cross and investment of information

00:54:39

Yeah, thanks Sebastian. And yeah,

00:54:41

this is a bit of

00:54:42

a transition from the topic

00:54:44

we've had so far. I

00:54:45

mean we're moving away from

00:54:46

where tax is part of

00:54:48

through the issue in substance

00:54:51

into where tax is part

00:54:53

of the consequences or the

00:54:55

remedies or damages perhaps more

00:54:59

specifically in this case and

00:55:01

I will discuss mostly tax

00:55:03

grows up, which is basically

00:55:05

where you grow up damages

00:55:06

to account for taxes that

00:55:08

may be applied on it.

00:55:09

But also a few words

00:55:11

on on similar remedies which

00:55:14

might or might not achieve

00:55:16

the same goal. And just

00:55:20

to make sure that we're

00:55:21

all on the same page.

00:55:22

I will start from scratch.

00:55:25

So to speak. I mean

00:55:27

the situation we're in now

00:55:28

we have a scenario where

00:55:30

a breach of an investment

00:55:32

collection treaty has been established

00:55:34

so we know that the

00:55:35

state is then liable for

00:55:37

the consequences of that breach.

00:55:41

We know that the investor

00:55:44
is entitled to full compensation.

00:55:46
I mean, it goes all

00:55:48
the way back to choresoft

00:55:49
and we're supposed to put

00:55:51
the investor. In the same

00:55:54
place as if the breach

00:55:55
didn't take place. So far

00:55:59
so good. Now how how

00:56:01
do we do that? How

00:56:03
is the calculated? And as

00:56:05
you mentioned Sebastian damages are

00:56:09
bit of an interest for

00:56:11
me personally, but I'm not

00:56:12

gonna despite that go into

00:56:14

any any details here and

00:56:16

and how to calculate them

00:56:17

just of course depends from

00:56:19

case to case. But generally,

00:56:21

of course you you would

00:56:23

value the investment in question.

00:56:26

The one that's been affected

00:56:27

by the state's measure you

00:56:29

would value it in in

00:56:31

a butt for scenario hypothetical

00:56:33

scenario where the state measure

00:56:35

is not in place and

00:56:37

you compare that value to

00:56:38
the value in in real

00:56:40
life, which often or at

00:56:43
least in some cases would

00:56:44
be zero because the investment

00:56:45
has been destroyed. and then

00:56:49
if that tax treatment in

00:56:54
the buttforce scenario is the

00:56:56
same as the tax treatment

00:56:59
on Damages. Once it it's

00:57:01
paid by the state then

00:57:02
we have we have no

00:57:03
problem. Right all good the

00:57:06
problem arises where there might

00:57:08

be. Tax on the award

00:57:11

when it's paid out by

00:57:12

the state would not have

00:57:13

Arisen in the bath for

00:57:15

scenario on the profits or

00:57:18

the positive cash flow. That

00:57:20

would have been in the

00:57:20

bath for scenario. and just

00:57:23

to give one example, I

00:57:25

think this relates to several

00:57:26

of the Spanish Renewables cases

00:57:28

at least and it will

00:57:29

be that would be the

00:57:30

same for Cases where the

00:57:34

investors is from Sweden where

00:57:37

you have an investment that

00:57:39

has been made through a

00:57:40

local investment vehicle and and

00:57:44

that and the investment is

00:57:46

affected. Then in the bud

00:57:49

for scenario, generally you would

00:57:50

value that investment. And you

00:57:54

would look at the positive

00:57:54

cash flows the profits that

00:57:55

would have been made. And

00:57:58

then in the buttforce scenario

00:57:59

those profits could then be

00:58:01

channeled to the foreign investor

00:58:04

the Swedish investor or whatever

00:58:05

it may be and it

00:58:07

would be tax exempt by

00:58:09

the participation exemption. So you

00:58:13

whatever value as a recent

00:58:17

in in the whole state

00:58:18

could then be taken back

00:58:20

to the the foreign investor

00:58:21

without any tax being imposed?

00:58:25

But then if you have

00:58:26

a scenario where if damages

00:58:29

are paid out by the

00:58:30

whole state to the foreign

00:58:32

investor, and that is taxed.

00:58:33

It might be then that

00:58:34

the foreign investor does not

00:58:36

put in the same in

00:58:37

the same position as it

00:58:39

would have been but for

00:58:41

the breach. Just exemplify if

00:58:44

the value is is a

00:58:46

hundred in the butt for

00:58:47

scenario. The investor could take

00:58:50

that home. Whereas perhaps in

00:58:52

if damages are paid by

00:58:54

just a hundred and that

00:58:55

is taxed you would end

00:58:57

up with say perhaps around

00:58:58

80. And arguably then the

00:59:02

investors under compensated. States will

00:59:06

of course say those states

00:59:07

that it's not their problem.

00:59:09

And this is where I

00:59:11

think the tension is on

00:59:12

this issue. So that's one

00:59:16

of the scenarios the other

00:59:17

of course might be if

00:59:18

you have calculated the damages

00:59:20

arising in the local investment

00:59:24

vehicle after tax taking into

00:59:27

account all taxes that arise.

00:59:28

Well, then if damages is

00:59:30

paid to that entity and

00:59:31

it's taxed again, you will

00:59:34

be put in that entity

00:59:35

will be put in a

00:59:36

worse position than it would

00:59:38

have been but for the

00:59:39

breach. So those are the

00:59:42

typical situations that might arise

00:59:44

so to speak the problems.

00:59:46

So what are these Solutions

00:59:48
then well in the in

00:59:51
the first scenario the investor

00:59:54
could bring a tax growth

00:59:56
of claim saying that well.

00:59:57
Yeah, the value was 100

00:59:59
now the value is zero,

01:00:01
but you shouldn't give me

01:00:02
a hundred because they will

01:00:03
only end up with 80.

01:00:04
We need to grow up

01:00:05
my claim to 125 to

01:00:08
make sure that after tax

01:00:09
they have a hundred she

01:00:11

would bring a tax tax

01:00:11

clean. In the other scenario

01:00:15

that I mentioned where you

01:00:17

risk having, you know, local

01:00:20

tax being applied twice so

01:00:22

to speak. You could ask

01:00:24

the tribunal to award the

01:00:27

amount in question net of

01:00:29

taxes. You would order the

01:00:30

whole state to pay that

01:00:31

that of taxes or one

01:00:33

way or another make sure

01:00:34

that it's not taxed. So

01:00:37

different solutions depending on basically

01:00:40

depending on whether the tax

01:00:41

in question is would arise

01:00:44

in the host state or

01:00:45

in the state of the

01:00:46

of the foreign investor. Then

01:00:49

to the the big question

01:00:50

then how our Petro Tribune

01:00:52

is looking at this and

01:00:54

I don't know if I

01:00:56

can get much of an

01:00:56

update in this respect. There

01:01:00

aren't many revolutionary developments in

01:01:04

either of these questions. Really

01:01:05

there is you know, some

01:01:08

jurisprudence coming out of the

01:01:09

Spanish cases, but it's mostly

01:01:12

confirming what might have already

01:01:15

been in the sort of

01:01:17

law the land before that.

01:01:20

So what is it starting

01:01:21

with? The sort of second

01:01:25

scenario that I mentioned where

01:01:26

you have the risk of

01:01:27

double so to speak double

01:01:29

taxation in the whole state.

01:01:32

And you request the award

01:01:34

to being made net of

01:01:36

any taxes and that is

01:01:38

you know tribunals you can

01:01:39

say that there's there's split

01:01:41

but I would say more

01:01:44

more often than not it

01:01:46

is granted assuming of course

01:01:47

that the investor proves that

01:01:50

you know, how everything has

01:01:51

been calculated proves that damages

01:01:53

or attacks would arise and

01:01:56

so on but on the

01:01:57

legal question of whether this

01:01:59

is something that tribunal scan

01:02:01

and want to do there's

01:02:03

pretty good precedent that tribunals

01:02:05

are doing this and are

01:02:06

feeling that they're entitled to

01:02:08

do it. You might end

01:02:10

up with an award just

01:02:14

one example. I need to

01:02:15

look at my notes. In

01:02:19

one of what the the

01:02:20

tribunal stated in the operative

01:02:22

part that quote the award

01:02:24

is made Nets of all

01:02:26

taxes. and or withholdings by

01:02:28

the whole state and this

01:02:31

example and Spain is ordered

01:02:34

to identify identify claimants for

01:02:36

any tax liability or withholding

01:02:38

that may be imposed. So

01:02:40

it's you know doing it

01:02:42

two ways thing. It should

01:02:43

be not one way or

01:02:45

the other. And I think

01:02:47

it's we're turning to the

01:02:50

tax grows up where the

01:02:51

the issue is a bit

01:02:52

more complicated. But before doing

01:02:54

that, I think it's interesting

01:02:56

to look at you know,

01:02:57

what has been the basis

01:02:58

for the arbitral tribunals granting

01:03:01

disorder relief. And of course

01:03:03

is of course a varies

01:03:04

from case to case but

01:03:06

but it comes down to

01:03:07

in many instances the principle

01:03:10

of all compensation. So the

01:03:12

tribunes are saying if we

01:03:13

don't Grant this sort of

01:03:14

relief there is a risk

01:03:16

that the investor is not

01:03:17

fully compensated. Because tax will

01:03:20

be imposed and you will

01:03:21

end up with a net

01:03:22

amount that is smaller than

01:03:24

you would end up with

01:03:25

in the buff for scenario.

01:03:32

So that's interesting because you

01:03:34

could think then if you

01:03:35

apply that to a tax

01:03:37

growth subclaim. Well, that should

01:03:38

be granted as well. Right

01:03:40

because it's it's seeking to

01:03:41

achieve the same purpose but

01:03:44

it's not that easy because

01:03:48

when it comes to the

01:03:49

tax growth of claims where

01:03:50

you're not seeking a you

01:03:52

know declaration or or you

01:03:54

want the tribunal just to

01:03:55

make sure that they what

01:03:57

should should be not of

01:03:58

taxes but actually want the

01:03:59

amount to be higher. Well

01:04:02

there the Jewish prunes is

01:04:05

pretty clear. There are no

01:04:06

published cases where that has

01:04:09

been been granted. I I

01:04:12

personally know at least one

01:04:14

unpublished decision where such a

01:04:16

tax grows up has been

01:04:17

awarded for tax in the

01:04:20

investors home state can't say

01:04:23

much more about that. Unfortunately,

01:04:24

but but even that being

01:04:26

said the Jewish prunes here

01:04:28

is pretty clear. There are

01:04:29

a lot of cases where

01:04:31

that's sort of claim is

01:04:32

simply being denied. Well, if

01:04:38

that is the case then

01:04:38

you're of course curious. What

01:04:40

are why why isn't this

01:04:43

being granted and Or perhaps

01:04:47

it so let's let's look

01:04:50

at the reasoning in this

01:04:50

cases and it could have

01:04:52

been interesting to see how

01:04:53

tribunals are are approaching this

01:04:56

issue. But unfortunately in most

01:04:58

cases the the reasons are

01:05:00

basically more or less in

01:05:03

existent or Not very long,

01:05:07

at least they usually do

01:05:08

not explain or engage in

01:05:10

the principle legal issue of

01:05:13

whether this is something that

01:05:14

arbitribunal can grant. Can just

01:05:20

speculate as to why I

01:05:22

think many many lawyers think

01:05:23

tax is scary. I don't

01:05:29

know if you would agree.

01:05:29

I mean it is this

01:05:31

specialized area of law. At

01:05:33

least. I know a lot

01:05:34

of people are scared just

01:05:35

about you know, engaging in

01:05:37
economics or financial issues. And

01:05:39
I mean tax is sort

01:05:41
of Next Level. It might

01:05:43
be that either way. I

01:05:45
think it's it's unfortunate. It's

01:05:48
this type of issue a

01:05:50
tax growth of claim is

01:05:51
being raised in many cases,

01:05:52
but still many published cases

01:05:56
and stay away. We don't

01:05:57
have I would say well

01:05:58
developed area of law with

01:06:00
where we have an analysis

01:06:03

of the actual legal standard

01:06:04

to be applied. I think

01:06:06

that's too bad. But what

01:06:09

we do have if we

01:06:09

look at these cases, I

01:06:11

mean in most instances it's

01:06:12

actually being denied with reference

01:06:15

to a lack of evidence

01:06:17

really that the investor hasn't

01:06:19

proven. You know that there

01:06:21

would be additional tax in

01:06:24

its home state. You know

01:06:26

what the tax rate would

01:06:27

have been and so on

01:06:28
if if it's an easy

01:06:30
way out or if it's

01:06:32
investors not taking the time

01:06:35
to actually provide sufficient evidence.

01:06:37
We can debate that but

01:06:39
that's most often the case.

01:06:42
The thing that's perhaps what

01:06:44
one takeaway here. You hear

01:06:45
if you're interested in these

01:06:47
sort of issues. You hear

01:06:48
that? Well tax girls have

01:06:49
claims that you you're not

01:06:50
you're never going to get

01:06:51

it and they're never granted.

01:06:52

But in most cases, it's

01:06:53

simply because the investor hasn't

01:06:56

perhaps done done. Its homework

01:06:59

and present it sufficient evidence.

01:07:02

but but in some cases

01:07:04

it's actually being denied for

01:07:06

legal reasons and I think

01:07:10

that will be the last

01:07:11

part of what I want

01:07:13

to say initially and if

01:07:15

we look at those legal

01:07:17

reasons. Or the so-called legal

01:07:21

reasons perhaps because in many

01:07:23

instances it's it's very brief.

01:07:24

There are a few cases

01:07:26

where the tribunals It more

01:07:30

or less the conclusion is

01:07:32

the reasoning, you know, I

01:07:35

think in one case, it's

01:07:36

the Tribune just concludes that

01:07:38

no taxation in the home

01:07:40

States. That's quote claimants, exclusive

01:07:43

burden. And that you know

01:07:45

that can could be a

01:07:47

finding but it would be

01:07:48

interesting to hear. Why should

01:07:50
that burden be on

01:07:51
the claimants and not on

01:07:53
the state which is in

01:07:55
breach of the treaty. and

01:07:58
another case the tribunal noted

01:08:01
that the quote the ultimate

01:08:04
tax treatment of an award

01:08:05
must be addressed by the

01:08:07
fiscal authorities in the respective

01:08:09
countries. And that is well,

01:08:12
of course true as such

01:08:14
but it would have been

01:08:15
interesting to hear a little

01:08:16

bit more about. How that

01:08:18

should be weighed against, you

01:08:20

know a principle of a

01:08:21

full compensation. the the legal

01:08:30

reasoning that we do have

01:08:33

Comes down to tribunal saying

01:08:36

that well, this is this

01:08:38

doesn't qualify as consequential loss.

01:08:40

That's usually I say usually

01:08:44

they're just a handful of

01:08:45

cases. But what tribunals refer

01:08:48

to when denying this sort

01:08:50

of on the principle legal

01:08:52

basis? I think much can

01:08:56

be said about the reasoning

01:08:57

or lack of reasoning in

01:08:58

these in these Awards and

01:09:00

I be happy to come

01:09:01

back on it in the

01:09:03

further discussion. I think I'll

01:09:06

and in particular Perhaps whether

01:09:09

there's a legal basis for

01:09:11

the distinction that I think

01:09:13

is being made between on

01:09:15

the one hand orbital tribunal

01:09:17

being prepared to. Grant the

01:09:22

type of non-monetary relief for

01:09:25

taxes imposed by the host

01:09:28

State and on the other

01:09:29

hand tribunal is being very

01:09:31

reluctant to Grant tax cross-ups

01:09:35

for taxes that are might

01:09:37

be imposed by the investors

01:09:38

home state and if there's

01:09:40

a legal base for that

01:09:41

distinction, but I'll be happy

01:09:43

to come back on that

01:09:44

in the first discussion if

01:09:47

we have time. Thanks. Thank

01:09:52

you very much Robin for

01:09:53

this I think excellent overview

01:09:54

of a very technical problem

01:09:55

that I think is easy

01:09:59

to understand listening to you

01:10:01

and setting it out like

01:10:02

this one aspect to this.

01:10:05

I mean looking at this

01:10:06

scarcity of legal reasoning might

01:10:08

also relate to the fact

01:10:10

that essentially all principles relating

01:10:13

to damages in investors State

01:10:15

arbitration somewhat. Go back to

01:10:17

the cause of factory case

01:10:18

and pay lots of Victory

01:10:19

case, of course didn't concern

01:10:21

any texts Matters by any

01:10:23

other state already given that

01:10:25

it was simply a state-to-state

01:10:27

dispute at that time. So

01:10:28

this this issue didn't come

01:10:29

up and then was not

01:10:30

further developed in the Going

01:10:32

forward so it's it's definitely

01:10:33

important. I've also believe that

01:10:35

that principles will be developed

01:10:37

or further development that respect

01:10:38

but I would be curious

01:10:39

to see whether the other

01:10:40

panelists see on the panel

01:10:41

have have reactions to to

01:10:43

this presentation and the points

01:10:44

raised here. Let me just

01:10:49

check into two points. One

01:10:50

of the carbon pricing mechanisms

01:10:52

is of course the carbon

01:10:54

border adjustment mechanism. So even

01:10:57

if you avoid a taxation

01:10:59

under favorable investment text conditions

01:11:04

in your host state which

01:11:06

are then changed during the

01:11:07

investment and you are entitled

01:11:11

to damages. For the protection

01:11:13

within that host state that

01:11:15

may play out potentially in

01:11:19

a gross-up type situation through

01:11:22

sea bam you may end

01:11:23

up paying the tax on

01:11:24

the goods that you were

01:11:25

producing or extracting and then

01:11:28

transporting to another state and

01:11:31

I think it would defeat

01:11:32

the purpose of carbon pricing

01:11:34

mechanisms to reduce carbon to

01:11:37

be able to escape that

01:11:39

the second point that I

01:11:41

make calls our Factory is

01:11:44

you know, when you go

01:11:45

back and read the case

01:11:46

on that put back in

01:11:48

the position. It's it's it,

01:11:50

you know, we have done

01:11:52

a mighty mighty job as

01:11:54

an international arbitration community of

01:11:56

enlarging that while beyond what

01:11:59

the tribunal actually said in

01:12:01

that case and I think

01:12:02

again the You know, it

01:12:05

doesn't entitle you to a

01:12:07

discounted cash flow. Assuming all

01:12:10

conditions are absolutely unchanged going

01:12:13

forward and for the tax,

01:12:14

if a tax carve out

01:12:16

is effective then shouldn't the

01:12:20

taxation that is carved out.

01:12:24

At least be implemented in

01:12:26

the discounted cash flow. So

01:12:29

if the state is entitled

01:12:31

the state has three or

01:12:32

four measures against you in

01:12:34

respect to your investment. One

01:12:35
of them's text that's a

01:12:37
text carve out at minimum

01:12:38
that text should apply to

01:12:40
just kind of cash flow

01:12:41
if you're seeking damages on

01:12:44
an income basis for example,

01:12:46
but also, you know all

01:12:48
of the other. Different carbon

01:12:50
pricing mechanisms that we're seeing

01:12:52
we should be seeing those

01:12:53
in those discounted cash flows

01:12:56
the valuation of the coal

01:12:58
fire power plants in in

01:13:00

the Netherlands. They should be

01:13:02

we've only got one left

01:13:03

now, but they should be

01:13:03

reflecting those measures unless they

01:13:07

are separately protected and they're

01:13:09

not under the energy house

01:13:10

treaty. So I'm not sure

01:13:13

Robin did say it but

01:13:14

I'll say it for him.

01:13:15

I don't think we are

01:13:17

acting in as sophisticated. Amen

01:13:20

as we ought to be

01:13:21

in the international arbitration community

01:13:24

in respect of Damages already

01:13:27

when you bring text related

01:13:30

damages and economic impact on

01:13:33

Damages into that. We have

01:13:35

got a long long way

01:13:37

to go. So I say

01:13:38

bring on more Robins bring

01:13:40

more bears into arbitration more

01:13:43

frequently and let's get it

01:13:45

right. Thank you Wendy. I

01:13:49

see Robin. You unmuted you

01:13:50

have an immediate direction to

01:13:51

this point. Not really just

01:13:54

of course agree on when

01:13:58

it's of course on the

01:14:00

last point no objections there

01:14:03

but also on the point

01:14:05

before that about of course,

01:14:07

you need to be implementing

01:14:09

in the but for for

01:14:11

the bus for cash flows

01:14:12

any taxes that been carved

01:14:13

out certainly yeah. Thank you

01:14:17

very much. I think when

01:14:19

these words in the end

01:14:20

also somewhat encapsulated what I

01:14:23

think we have shown with

01:14:24

this panel. We need a

01:14:26

much stronger discussion on various

01:14:28

sites between the international tax

01:14:30

and the International Investment law

01:14:32

and arbitration Community. We have

01:14:34

seen that both in relation

01:14:35

to what we call in

01:14:36

the beginning the big picture

01:14:37

the international aluminum text questions

01:14:41

and International Investment arbitration in

01:14:43

that respect, but we have

01:14:44

also seen it now in

01:14:45

relation to Robin's presentation here

01:14:47

in relation to really detailed

01:14:50
question of Damages delegations and

01:14:52
compensation. So there's on all

01:14:55
fronts one good same there's

01:14:57
all from an all-frons room

01:14:58
for discussion and room for

01:15:00
interaction between International Investment and

01:15:02
tax lawyers, which I hope

01:15:03
we will see going forward

01:15:05
and I acknowledge that we

01:15:07
have reached some of the

01:15:08
end of our allocated time

01:15:10
here. So I see that

01:15:12
there's one interesting question in

01:15:13
the chat and that I

01:15:14
would suggest we take with

01:15:15
us to the networking. questions,

01:15:16
which is whether there's actually

01:15:18
also the possibility for an

01:15:20
inverse scenario of what Robin

01:15:22
described the scenario that you

01:15:23
could have situation where it

01:15:26
damages of what is Tax

01:15:28
exempt and hence, there might

01:15:30
be a situation where the

01:15:31
investor would be overcompensated in

01:15:33
given that the investor does

01:15:35

not need to pay tax

01:15:36

in the home jurisdiction, probably

01:15:38

or another jurisdiction. So that

01:15:40

is maybe something to to

01:15:41

start the networking session with

01:15:42

Robin. However would like to

01:15:45

yes, I can just force

01:15:46

for those discussions. I can

01:15:48

just tell you look at

01:15:50

csob versus Slovakia. It's not

01:15:53

exactly that situation but it

01:15:55

is a situation where among

01:15:57

other issues the host State

01:15:58

argued that the tax situation

01:16:01
would be better for the

01:16:03
investor in the sort of

01:16:04
action scenario where damages are

01:16:05
paid out. And perhaps it's

01:16:09
a cliffhanger. I won't tell

01:16:10
you what the outcome was.

01:16:13
Right. Thank you very much.

01:16:14
And thank you for this

01:16:15
this Cliffhanger. It also remains

01:16:17
not for me to thank

01:16:18
everyone for the excellent discussion

01:16:20
the excellent presentations. That was

01:16:22
really a pleasure to moderate

01:16:24

this panel and hand back

01:16:25

over to a person Antonio

01:16:26

for his closing words and

01:16:28

also for the initiation of

01:16:29

the networking session. Thank you

01:16:31

very much. Thank you. Thank

01:16:37

you Sebastian. And in the

01:16:39

order that I see you

01:16:40

on my screen Robin. Thank

01:16:42

you very much Tricia who

01:16:44

we are and and when

01:16:45

the thank you very much

01:16:47

for what was indeed an

01:16:50

incredible panel. I I I

01:16:55

had at some stage in

01:16:57

an earlier life the the

01:17:02

honor and and responsibility to

01:17:04

negotiate investment treaties and one

01:17:07

one of the one of

01:17:09

the classes that that I

01:17:10

I was always wonder how

01:17:13

it would work out because

01:17:15

at the time there wasn't

01:17:16

that that much you know.

01:17:19

Quote unquote jurisprudence was was

01:17:22

the the special consultations that

01:17:27

tax authorities are supposed to

01:17:28

do among themselves before as

01:17:31

actually a requirement before before

01:17:34

the investor is is entitled

01:17:37

to submit a request for

01:17:39

arbitration and I've seen that

01:17:40

in some investors arbitration cases.

01:17:43

There have been complaints by

01:17:45

the whole state that that

01:17:46

has been that has been

01:17:49

simply another kind of performa

01:17:52

set of consultations. And and

01:17:55

I I wanted to take

01:17:57

that that this opportunity to

01:17:59

see what what your thoughts

01:18:01

are because he's also my

01:18:03

experience also from from working

01:18:05

at the time of the

01:18:07

World Bank, but also as

01:18:08

a governmental official that that

01:18:12

Tax authorities are very mindful

01:18:17

of their level of expertise

01:18:20

and and my sense is

01:18:22

that that those type of

01:18:23

Provisions are are sort of

01:18:25

included there because there's a

01:18:26

recognition of the level of

01:18:28

specialty that that tax mattress

01:18:30
have and all so in

01:18:31
the hope that at the

01:18:33
very least tax authorities would

01:18:34
be able to speak among

01:18:35
themselves, but I don't know

01:18:37
whether this is something that

01:18:39
that either any of you

01:18:41
would like to comment on

01:18:42
in terms of how that

01:18:44
has has played out whether

01:18:47
it really is a performer

01:18:49
kind of flag at that

01:18:52
is hailed and and and

01:18:54
simply seen so that the

01:18:56
the show can go on

01:18:58
to the request for arbitration.

01:19:08
Prepare your mate. You're referring

01:19:12
to the tax filter mechanism.

01:19:14
Yes. So basically the the

01:19:18
difficulty the conceptual difficulty I

01:19:21
have with this is basically

01:19:22
you're asking the compete on

01:19:24
taxator is to give consent

01:19:26
to move to investor State

01:19:28
disputes. So basically you're asking

01:19:31
them to apply on something

01:19:33

that goes beyond their expertise

01:19:36

because the competent tax authorities

01:19:38

for example can can you

01:19:40

know discuss double taxation, but

01:19:43

you know, if you move

01:19:44

into issues that are relevant

01:19:46

to investment State dispute like

01:19:48

expropriation. Would there be really

01:19:50

the the right the right

01:19:52

authorities to engage into that

01:19:54

that discussion discussion? So this

01:19:55

is I think a conceptual

01:19:57

difficulty that I have with

01:19:58

this mechanism Yeah, well, there's

01:20:02

of course lots of room

01:20:03

for profession and we we

01:20:05

need more of that. But

01:20:06

with that thank you there

01:20:08

for for giving your your

01:20:10

thoughts on on that with

01:20:13

that I would thank you

01:20:16

and and lets us move

01:20:19

to the breakout rooms. I

01:20:21

think that we have perhaps

01:20:23

sufficient people for for two

01:20:26

or so and that is

01:20:29

a safe space that we

01:20:31
stop reporting now and nobody

01:20:34
has to talk about tax

01:20:36
but you can or damages

01:20:39
but of course we can

01:20:41
and I could not say

01:20:43
thank you enough because we

01:20:45
have we've had a really

01:20:46
good numbers for for this

01:20:48
this panel and and I

01:20:50
believe that that people are

01:20:51
very thirsty to understand complex

01:20:56
issues and and get it

01:20:58
right as this panel has

01:21:00

A as message to the

01:21:02

whole of the arbitration community.

01:21:03

So thank you and we'll

01:21:05

look into other panels that

01:21:07

we can put together on

01:21:08

Taxation and international arbitration. So,

01:21:11

thank you.