



The Geopolitics of UNCITRAL Group III: Representative Positions on Different Issues *

Summary

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

The session at Washington Arbitration Week, led by Jose Antonio Rivas and Marine Carlson, focused on the evolving landscape of investor-state arbitration, particularly in relation to UNCITRAL's Working Group III. The panel emphasized the increased participation and engagement in the discussions surrounding reforms, highlighting the importance of geopolitical dynamics in shaping state positions.

Key participants included Jason Lee, Margie List-Jaime, Josh Simmons, and Karen Kaiser, who brought extensive experience from various legal and governmental backgrounds. They discussed the progress made over the past five years, including the adoption of mediation guidelines and codes of conduct for arbitrators and judges, as well as ongoing discussions about the establishment of an appellate mechanism and an advisory center for international investment law.

The panelists noted that while there is a growing interest in creating an appellate mechanism to address issues of predictability and consistency in arbitration outcomes, there remains a lack of consensus on its structure and function. The advisory center aims to enhance the capacity of developing states to navigate investor-state disputes, although questions regarding its funding and operational scope remain unresolved.

The discussions also touched on procedural reforms, highlighting the need for clarity on issues such as damages, conditions for claims, and the right to regulate. The panel underscored the significance of state experiences in shaping the future of investor-state arbitration, emphasizing that the path forward will require flexibility and collaboration among member states.

In conclusion, the session provided a comprehensive overview of the current status and future directions of investor-state arbitration, with a focus on the complexities of reforming the system to better serve all stakeholders involved.



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Topics

Geopolitics, UNCITRAL, UNCITRAL Group III, ISDS Reform, Arbitrator Code of Conduct, Working Group III

Category

WAW

Full Transcript

00:00:02

So again, good morning everyone

00:00:04

and this is at Washington

00:00:07

arbitration week at my name

00:00:08

is Jose Antonio Rivas together

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with the young Laird from

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crawling Mooring one of the

00:00:16

co-founders of Washington arbitration week.

00:00:19

This is our fifth day

00:00:20

and last day and it

00:00:22



has been a marvelous experience

00:00:24

wait, we've had greater numbers

00:00:28

and than any year fully

00:00:30

in person and before starting

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I would like to give

00:00:34

my my my great appreciation

00:00:38

to Wiley hear a dc-based

00:00:41

firm. Thank you Josh for

00:00:44

for your hospitality at without

00:00:47

you and without all their

00:00:49

sponsors and host. It would

00:00:51

not be possible to do

00:00:53

a Washington arbitration week. We

00:00:56



would also like to thank

00:00:57

our advisory committee and to

00:01:01

my left is one. The

00:01:02

members of our advisory committee

00:01:04

with without a Marines and

00:01:07

help and also counseled on

00:01:10

some of the topics that

00:01:11

we choose for International Washington

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Appreciation Week. It would be

00:01:16

impossible to do it. I

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would also give that would

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like to give a shout

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out to our our team

00:01:22



vodka in an extra G

00:01:25

in Bogota here in DC

00:01:30

with me but also involved

00:01:31

my Lucia Kansas and and

00:01:35

the team also from Coral

00:01:36

that has been helping us

00:01:38

and especially Ian today's topic

00:01:42

is And and by the

00:01:44

way, I'm from a strategy

00:01:46

of those P which is

00:01:47

an investor State arbitration Law

00:01:48

Firm here in DC. Today's

00:01:52

topic is one that that

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we have been following for

00:01:55

now believe that more than

00:01:57

five years into the uncitral

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group 38. We called it

00:02:03

somehow differently this time but

00:02:06

because because we wanted to

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see to see if if

00:02:09

if that picks up to

00:02:10

see if there are any

00:02:11

Regional geopoliticus behind it and

00:02:14

they're always there always I

00:02:16

was a might be a

00:02:17

little bit altruistic as to

00:02:19



uncover. What is a GI

00:02:20

Joe politics behind it. I

00:02:22

don't know where they will

00:02:23

succeed. But by the very

00:02:24

least what we want to

00:02:26

hear would love to hear

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is is the status and

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under some of the the

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the the ongoing discussions and

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then perhaps the sticking points

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as of now, but but

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that is not my my

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place to go to develop

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anymore. I don't want to

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steal Marines or Marines Thunder.

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My job here is to

00:02:46

introduce marine marine Carlson recently

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left. Sidley Austin and she

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became an independent arbitrator. She

00:02:56

she's building on 25 years

00:02:58

of experience in Wester State

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and international commercial arbitration prior

00:03:03

to launching her arbitrator practice.

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She was a cult leader.

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As I said of Sealy

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Austin LLP is global arbitration

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trade and advocacy practice where

00:03:14

she was a partner specializing

00:03:16

in investment re arbitration and

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represented claimant investors and responding

00:03:22

States in roughly equal measure

00:03:23

and academic analysis of the

00:03:27

investment re arbitration committee Place

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Marine in the top 25.

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Most experienced isds Council in

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the world. Not a small

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thing among the core lawyers

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who dominate the caseload She's

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named as one of the

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top 250 woman in litigation

00:03:46

by Benchmark. And as one

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of Latin America's top 100

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female lawyers by Latin vax.

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Marine is also an Adjunct

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professor at George Washington University

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law school and the American

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University Washington College of Law

00:04:01

teaching investment treaty arbitration and

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member of the executive committee

00:04:05

of the foundation for international

00:04:07

arbitration. Advocacy recent vice president

00:04:11

of the American Society of

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international law and just complete

00:04:15

eight years of service on

00:04:17

the board of directors of

00:04:19

the Care Coalition at Washington

00:04:21

d.c. Legal service organization focused

00:04:24

on immigrants rights and and

00:04:26

I must emphasize that she

00:04:28

is one of the members

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of The Advisory Board of

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Washington arbitration week. That's that's

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the most important thing. So,

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thank you and welcome. Thank

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you so much Jose Antonio

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for the very comprehensive. But

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you definitely according to the

00:04:54

title of the panel the

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geopolitics of uncontrolled working group

00:04:58

tree and discussing represented positions

00:05:01

on different issues. I should

00:05:03

have warned Jose Antonio. However

00:05:05

that the panel is probably

00:05:07

going to go Rogue and

00:05:09

that's because in talking about

00:05:10

this topic we thought you

00:05:13

had the notion of geopolitics

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sort of conjures up visions

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of of realpolitik, which I

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guess is appropriate this week.

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When were thinking of Henry

00:05:21

Kissinger passing political blocs. North

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south east west Cold War

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terms Western democracies versus Communist

00:05:32

States developed versus developing states

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in the suggestion isn't there

00:05:37

some sort of predictable pattern

00:05:38

there as to who allies

00:05:40

with who and takes what?

00:05:42

What issues and as we

00:05:44

were discussing that in the

00:05:45



context of working groups free

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it seemed to us that

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that actually isn't really the

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case in a lot of

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the issues that are before

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working group 3, you don't

00:05:54

see those sort of realpolitik

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patterns of alliances and send

00:06:01

the patterns in which states

00:06:02

take positions on different issues

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changes from issue to issue

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as well. So so so

00:06:09

so we decided to abandon

00:06:11



the title of the panel

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at least not the topic

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but the panel's going to

00:06:17

to brief us on what's

00:06:18

happening on what the main

00:06:20

themes and common threads are

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of discussion on some of

00:06:23

the Hot Topics at working

00:06:25

group 3, but maybe not

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from the lens of geopolitics

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as such introduce our panelists

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who are going to help

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us with that discussion. I

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will start with a traditional

00:06:35

what should be assumed that

00:06:37

every panel but they traditional

00:06:39

caveat that of course none

00:06:41

of our panelists. Speaking in

00:06:42

an official capacity or presenting

00:06:44

the views of the representative

00:06:45

respective governments employers Etc. But

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they they come to us

00:06:51

with a wealth of experience.

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So we're joined online from

00:06:55

Vienna by Jason Lee who's

00:06:58

the senior legal officer in

00:07:00



the international trade law division

00:07:01
of the UN office of

00:07:02
legal Affairs, otherwise known as

00:07:04
the the secretary at front

00:07:06
and he has been with

00:07:10
the United Nations since 2007

00:07:11
previously having served in the

00:07:13
Korean Ministry of Foreign Affairs.

00:07:14
His other projects with Ed

00:07:18
on Central have included the

00:07:19
Singapore convention on mediation and

00:07:21
Service as secretary to work

00:07:23
in groups 6 on security

00:07:24



interest, but of course, he's

00:07:25

here today because he's serving

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as the working group of

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three secretary and therefore so

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deeply involved in the in

00:07:34

the entire project from until

00:07:35

Charles institutional perspective were also

00:07:39

joined by Margie list, Jaime

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who wear Number of hats

00:07:42

one of which is professor

00:07:44

at the University of Panama,

00:07:45

but for this purpose, she's

00:07:47

a legal adviser at Panama's

00:07:49



Ministry of economy and finance

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advising on treaty-based investment arbitration.

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And of course serving as

00:07:57

Panama's representative to working group

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three, and she was also

00:08:02

a former trade negotiator for

00:08:03

the Panamanian government as well.

00:08:04

Then the next down the

00:08:07

table is Josh Simmons his

00:08:09

partner here at our hosts

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Wiley Ryan and the global

00:08:11

disputes practice also an adjunct

00:08:13

professor at University law at

00:08:16



University of Virginia law school

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and came to Wylie having

00:08:21

with previous service in post

00:08:23

as a senior advisor and

00:08:25

earlier attorney adviser at the

00:08:26

department of state advising the

00:08:28

United States and international disputes

00:08:30

and treaty negotiations. International Investment

00:08:33

disputes in particular and then

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at the end of the

00:08:37

table, we have Karen Kaiser

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who's attorney adviser in the

00:08:40

office of private international law

00:08:42



and the office of legal

00:08:43

adviser at the state department.

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She joined the state department

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in 2006. She represents the

00:08:49

United States at on Central

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including working group three as

00:08:52

well as at the Hague

00:08:53

conference on private international law

00:08:54

and Yuna drug previously. In

00:08:58

other roles at the state

00:08:59

department was involved in B,

00:09:00

negotiations and implementation and in

00:09:03

the litigation of is DS

00:09:04



cases at the office of

00:09:05

claims and investment disputes. So

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as you see we've got

00:09:08

a very actively involved panel,

00:09:11

who knows. Well all of

00:09:13

these issues and can bring

00:09:15

us up to speed on

00:09:15

them are order of proceedings

00:09:18

is going to start with

00:09:20

asking Jay to give us

00:09:22

sort of an overview of

00:09:23

how we've gotten here in

00:09:24

the approximately 5 plus years

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that working group 3 has

00:09:28

been underway and its project

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to look at it is

00:09:31

DS reform. Going to talk

00:09:33

about what's been accomplished so

00:09:34

far and then we're going

00:09:35

to turn to some of

00:09:36

the specific topics that are

00:09:37

currently on the working group

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3 agenda, Margie. Lisa's going

00:09:41

to talk about the Appellate

00:09:42

mechanism. Discussions. Josh is going

00:09:44

to take out the advisory

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Center and then Karen's going

00:09:47
to to launch S into

00:09:49
the the current hot topics

00:09:51
of procedural reform and quote

00:09:52
on quote cross-cutting issues. And

00:09:55
for each of those will

00:09:56
tell tell us what's on

00:09:57
the table. What are some

00:09:58
of the key stakeholder of

00:09:59
used and what's the process

00:10:01
going forward? What's next? So

00:10:03
with that as our introduction,

00:10:05
I will turn it over

00:10:06



to Jay to tell us

00:10:08

how we got here. Thank

00:10:10

you very much. I still

00:10:12

to this day. I was

00:10:13

just introduced tell you about

00:10:16

where we are and how

00:10:17

we got here. I think

00:10:18

that's what I want to

00:10:19

do. So just going to

00:10:22

where we are in July

00:10:23

of this year in the

00:10:24

summer as we know it

00:10:26

finalized. The first of the

00:10:28



reform elements in is just

00:10:30

before So this included to

00:10:32

text on mediation in Destin

00:10:34

mediation guideline on you dishion

00:10:36

and a model Provisions for

00:10:38

states to adopt from and

00:10:40

two codes of conduct when

00:10:42

was adopted and the other

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was adopted in principle. The

00:10:44

code of conduct for arbitrators

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was adopted and the code

00:10:47

of conduct for judges was

00:10:48

adopted in principle because we

00:10:51



have not stopped finished the

00:10:53

work on the court. But

00:10:55

as you mentioned we went

00:10:56

back six years it was

00:10:58

at that time in 2017

00:11:00

that the commission interested working

00:11:02

with you with a very

00:11:02

broad mandate to conduct is

00:11:05

this response to identify the

00:11:06

concern considering the result of

00:11:09

desirability of Reform and to

00:11:11

develop 11 Solutions, and that's

00:11:13

what we're doing. Now. We're

00:11:14



at the third state were

00:11:15

reaction to the Terrapin Solutions,

00:11:17

but you went back a

00:11:19

little bit longer. I should

00:11:22

have been up in your

00:11:22

back 15 years because I

00:11:24

think we need to work

00:11:26

on your phone when it

00:11:27

is started to look into

00:11:28

transparency as it was revised.

00:11:31

Going to chop chicken rolls

00:11:32

when she came into your

00:11:34

shoe and they said that

00:11:36



the commission said that there

00:11:37

should be a ghost that

00:11:38

are developed to ensure transparency

00:11:41

and I say proceedings which

00:11:43

resulted in the transparency rules

00:11:45

and the Mauritius conventions that

00:11:47

follow so after that this

00:11:49

was a kind of isps

00:11:51

came into the picture of

00:11:52

us at all. And in

00:11:54

2017. We got a mandate

00:11:56

starting in November 2017 with

00:11:58

the first working group and

00:12:00



since then we've had 14

00:12:03

sessions are 10 sessions in

00:12:05

Vienna and processions in New

00:12:06

York. So that's where we

00:12:08

are. I know that there

00:12:12

has been some experts preparing

00:12:14

this but it's actually the

00:12:15

governor is coming together to

00:12:17

actually in negotiate these reform

00:12:19

element testing based on consensus

00:12:22

and transparent manner. We've had

00:12:25

a number of efforts to

00:12:26

contain tryptophan International organizations for

00:12:29



sample of the dress that

00:12:30

the code of conduct where

00:12:32

I drafted a tablet and

00:12:40

a number of different matters

00:12:42

now in a number of

00:12:52

matters the number of the

00:12:53

allegations that are participating corporations

00:12:55

with the multiplayer ideas The

00:12:58

increased use of income. A

00:13:03

hybrid meeting we also have

00:13:05

the intersection of meetings, which

00:13:06

is beginning to be a

00:13:07

lot about something that people

00:13:09



wants to host and are

00:13:11

we have a sinus procedures

00:13:13

without the report and additional

00:13:16

Resources by the general assembly

00:13:17

to hold one more session

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of the working groups during

00:13:20

the year. So I just

00:13:23

wanted to give you a

00:13:23

view of where we are.

00:13:25

So after the commission what

00:13:28

happened was that there was

00:13:29

an international meeting in Singapore

00:13:31

who stood by the government

00:13:32



of Singapore where we discuss

00:13:34

the elements of a standing

00:13:36

my cousin. So we looked

00:13:39

into kind of the rational

00:13:41

and implications for the sending

00:13:42

my cousin. What are the

00:13:43

possible model scope Governor's how

00:13:46

it can exist within the

00:13:47

existing mechanisms or whether it

00:13:49

has to be separate and

00:13:51

this was kind of thought

00:13:53

in what in dabs and

00:13:54

the idea is that this

00:13:56



before my element would be

00:13:57

presented to the working group

00:13:58

in April of next year.

00:14:00

I guess I text you.

00:14:03

So that's the that's the

00:14:04

plan and then in the

00:14:06

October for most action, which

00:14:08

is the 46th action. The

00:14:10

working would consider to other

00:14:12

topics to main topics one

00:14:14

was the advice Centre entire

00:14:15

International Investment. We're by the

00:14:18

working group agree that the

00:14:19



Centre should be established as

00:14:21

an independent inter governmental body

00:14:24

are composed of states and

00:14:27

are used that it would

00:14:29

work to prepare a job

00:14:30

statute of the Battery Center,

00:14:32

which is Gomer protocol to

00:14:34

the malted Arrangement that the

00:14:35

working group is working on

00:14:36

and there was support for

00:14:39

providing legal assistance on proceedings

00:14:42

representation Services. There were some

00:14:44

questions about that also discussions

00:14:47



also involves about whether the

00:14:49

Diamond Center should splices from

00:14:51

state-to-state dispute settlement and so

00:14:53

on. Most of the discussions

00:14:56

focused on the service is

00:14:57

2/3 / the center to

00:15:00

the beneficiaries would be and

00:15:02

what the priority should be

00:15:03

because it's probably with the

00:15:05

limited resources that cuz I

00:15:06

just said they would have

00:15:07

it wasn't clear that all

00:15:09

of the member states would

00:15:10



be able to access the

00:15:12

center. And of course I

00:15:14

said mention representation Services was

00:15:16

also a she treated with

00:15:18

some pirate ship to be

00:15:19

given to a disease and

00:15:21

developing countries. If their request

00:15:23

is to be made the

00:15:24

final thing, which is an

00:15:26

issue that we're looking into

00:15:27

on how to finance the

00:15:28

weather center. It was generally

00:15:30

agreed that the contributions from

00:15:32



the member states and fees

00:15:34

to be charged to the

00:15:35

states would be the main

00:15:36

sources of the financing and

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also but open to other

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voluntary contributions that may come

00:15:42

into the picture another topic

00:15:44

that was discussed is what

00:15:46

Karen or touch upon which

00:15:47

is the job positions and

00:15:49

procedural and cross-cutting issues are

00:15:59

kind of piling up for

00:16:01

the second year to prepare

00:16:02



and we tried to compel

00:16:04
them into a set of

00:16:05
Provisions for consideration by the

00:16:07
working group taking a look

00:16:08
at some of the conditions

00:16:09
that have been mentioned for

00:16:11
raising a claim some of

00:16:12
the conductor. The proceedings that

00:16:14
would undertake that would relate

00:16:18
to the efficiency of the

00:16:19
proceedings and finally a provisions

00:16:22
on the awards with the

00:16:23
decision to be made by

00:16:24



the mechanism. One thing that

00:16:26

I wanted to mention there.

00:16:27

Just when cases that. We

00:16:29

have not dealt into what

00:16:31

the procedure was for the

00:16:32

standing like a little bit

00:16:34

and we also kind of

00:16:35

thought that these procedures to

00:16:37

working with each other. It's

00:16:39

about to agree on should

00:16:40

also apply to the stand

00:16:42

in my cousin and that

00:16:43

was the basis of our

00:16:44



discussions. So where we go

00:16:47

from now, the working group

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is expected to present the

00:16:50

results of the work on

00:16:52

the Battery Center and the

00:16:54

guidance document on the ice

00:16:55

cream truck crashing in the

00:16:57

street to send invitation to

00:16:58

the commission. Next July. It

00:17:01

is planned at the working

00:17:02

group three issues would be

00:17:03

discussed in the earlier. We

00:17:06

served right and left because

00:17:11



I think the current work

00:17:12

when I asked yesterday for

00:17:13

me and tell us a

00:17:14

lot of complexities, especially because

00:17:16

states are to be given

00:17:18

flexibility in undertaking and. That's

00:17:24

a little bit of flavor

00:17:25

of what kind of Providence

00:17:26

we can prepare and present

00:17:28

to the working group. And

00:17:30

if we have to I

00:17:32

can go session is that

00:17:33

we steal the commission that

00:17:36



we are meeting in January

00:17:37

and Jenna and April in

00:17:39

New York and in between

00:17:41

there will be an intersection

00:17:43

in Belgium Brussels. To look

00:17:46

at the access to justice

00:17:48

issues of a number of

00:17:49

the elements. So that's where

00:17:51

we are. Thank you. Thanks

00:17:55

so much for including for

00:17:58

previewing some of the things

00:17:59

that some of our other

00:18:00

panels are going to go

00:18:00



into a little more depth

00:18:01

about time for you to

00:18:04

to pick up one of

00:18:05

those issues, which is the

00:18:06

mechanism permanent mechanism permanent investment

00:18:09

Court, whatever whatever we're calling

00:18:11

it these days. Thank you

00:18:20

so much. And thank you

00:18:21

for the organizer is Jose

00:18:23

Antonio and it's a real

00:18:25

pleasure to hear at a

00:18:27

Washington to discuss about about

00:18:30

these issues. So Deep Ellum

00:18:32



weekend, he's not he's not

00:18:33

something that is is new.

00:18:34

Right? We have been talking

00:18:36

about that for the past

00:18:37

20 years. So it have

00:18:40

been included in some of

00:18:41

our treaties and actually do

00:18:43

you want it between Panama

00:18:44

and the US have the

00:18:45

possibility of implementing an appellate

00:18:48

mechanism and more recently 20

00:18:50

miles to negotiate a treaty

00:18:51

with free trade agreement with

00:18:53



Korea. But also that Post

00:18:56
lady so so it's not

00:18:59
it's not nothing you and

00:19:01
the XX Secretariat as we

00:19:04
know in 2004 police are

00:19:06
also discussing about this possibility

00:19:10
of implementing an appeal facility

00:19:13
within accepted at that time.

00:19:16
It was said that it

00:19:16
was too premature but now

00:19:19
20 years later. We still

00:19:21
discussing about these issues. It

00:19:23
wasn't included in the we

00:19:25



know it in the recent

00:19:27

reforms of the exit rules,

00:19:30

but we know that probably

00:19:33

want to be researched is

00:19:35

because it's on their discussions

00:19:37

in a day working groups

00:19:38

312. So why talking about

00:19:45

an appeal make a reason?

00:19:46

Why is there so many

00:19:48

countries that are you no

00:19:49

interest in perhaps implementing this

00:19:53

deception as we know this

00:19:56

is one of the two

00:19:58



systems reform of just the

00:20:00

other one was already mentioned

00:20:01

by Mary that is be

00:20:03

standing by the well, I'm

00:20:07

Elsa of course why ye

00:20:09

so What we need to

00:20:12

be freshest. So with the

00:20:14

current system that it was

00:20:16

actually made basically for a

00:20:19

contractual relationships at that time

00:20:22

in 1965 when it when

00:20:24

it was a Salvation course,

00:20:26

there were not that many

00:20:27



treaties but now we know

00:20:29

that over 60% of the

00:20:32

cases are based on bilateral

00:20:34

investment treaties want your damned

00:20:36

are from a generation of

00:20:40

three days before 2010. So

00:20:43

did the idea of having

00:20:45

an a peer-review is to

00:20:47

being able to have that

00:20:49

correctness of the substance to

00:20:51

modify or to reverse the

00:20:55

league of find these of

00:20:56

the first season tribunal so

00:20:58



that is the key feature.

00:20:59

And then of course the

00:21:01

annulment president is always it's

00:21:04

only focusing on the legitimacy

00:21:06

of the process so it

00:21:09

could only voice the awards

00:21:10

and then If you want

00:21:12

to continue, then you have

00:21:13

to start all over again

00:21:14

with a new a new

00:21:17

tread, you know, so I

00:21:19

would like to focus in

00:21:21

four different aspect that are

00:21:22



under the car is not

00:21:24

everything that is on the

00:21:26

paper. The last paper that

00:21:28

we will be discussing in

00:21:29

April 2024. But it's at

00:21:34

least it gives you a

00:21:36

flavor or what we are

00:21:37

discussing at working working group

00:21:41

3. So the first one

00:21:42

is Disco. So what type

00:21:45

of decisions are we going

00:21:47

to put it on subject?

00:21:50

It would be subject to

00:21:51



an appeal. So not all

00:21:53

the time for sample. No

00:21:54

procedure or there's nothing that

00:21:57

is related to knowledge of

00:22:00

an arbitrator but more substantive.

00:22:02

So there's a whole discussion

00:22:04

or whether you're only final

00:22:06

decision should be subject to

00:22:08

a banana peel as is

00:22:10

his currently at exit. With

00:22:12

the unknown if the city

00:22:12

so if we go and

00:22:16

I have to say it

00:22:17



is everything that I'm going

00:22:18
to call me in right

00:22:19
now is under discussion. So

00:22:20
it's not like and there's

00:22:22
nothing you know the final

00:22:25
price because it is still

00:22:28
on their discussions of the

00:22:30
sower jurisdictional issues. So what

00:22:40
happened if a jurisdictional decision

00:22:44
that Daddy decided to hold

00:22:47
the proceedings goes to an

00:22:50
appeal. So in that case

00:22:51
there's a risk of further

00:22:53



proceeding of course, so then

00:22:56

we're discussing whether so it

00:22:58

does should be an automatic

00:22:59

suspension or not of the

00:23:04

proscenium. So that's I think

00:23:06

I want one of these

00:23:06

interesting, please also whether or

00:23:09

not information should be so

00:23:11

To an appeal. So this

00:23:14

is part of their scope

00:23:15

start. We're discussing then a

00:23:17

second point. We have the

00:23:19

grounds of appeal of course

00:23:21



and there's two elements that

00:23:24

are different for an annulment

00:23:26

errors in the interpretation and

00:23:30

application of the law. And

00:23:31

the second one is a

00:23:33

manifest errors in the abbreviation

00:23:35

of the facts which could

00:23:37

include appreciation of the domestic

00:23:40

law and Elsa, of course,

00:23:45

the damage has ever seen

00:23:47

the assessment. So. I think

00:23:51

that is part of the

00:23:53

main discussions because he will

00:23:55



make a difference with the

00:23:56

normal procedure that we have

00:23:58

now is not having a

00:24:00

case of like CMS versus

00:24:02

Argentina with a tribunal tell

00:24:05

you you you know, there

00:24:06

have been so many errors,

00:24:08

but we cannot announce for

00:24:10

excess of power. Because we

00:24:12

cannot substitute a decision to

00:24:15

our own find it so

00:24:17

you would our own find

00:24:19

you. So I think it

00:24:21



will be part of the

00:24:24

discussion. Also, there will be

00:24:26

other G included taken taken

00:24:29

from the exit articles 62

00:24:31

and some Elsa from our

00:24:37

conversation, but here also in

00:24:39

discussions of whether some of

00:24:41

these grounds that are in

00:24:44

the New York convention are

00:24:45

not fit to your highest

00:24:47

voice case Elementary want to

00:24:52

briefly discuss with you is

00:24:56

so the type of decision

00:24:58



that will be subject to

00:25:00

the appeal tribunal. So the

00:25:03

lady has betrayed me and

00:25:04

I'll cover up holes modify

00:25:07

or reverse decisions in most

00:25:10

of the cases. But also

00:25:12

we know that they might

00:25:14

be cases. What is Easter

00:25:16

Sunday to remind the D

00:25:19

case to the first five,

00:25:20

you know, so they will

00:25:21

be instances where it could

00:25:24

be difficult because the tribunal

00:25:27



is no longer available or

00:25:29

there's a Subway in a

00:25:31

case of conflict of interest

00:25:34

or corruption. It will be

00:25:36

hard then or impossible to

00:25:38

get it into the into

00:25:40

that frighten us. So there's

00:25:44

also a discussion on why

00:25:47

he needs to be included

00:25:49

in that decision for sampled

00:25:50

a recent by the Appellate

00:25:54

tribunal. So in that case,

00:25:56

it will need to specify

00:25:59



how the decision would be

00:26:01

modified and and or reverse

00:26:05

and why Of course, there's

00:26:09

a need to also warranty

00:26:11

the finality of the decision

00:26:13

because idea of having an

00:26:14

appointment that it's not it's

00:26:15

not that then it will

00:26:17

go again to an appeal

00:26:18

or to an annulment. So

00:26:20

it should be fine for

00:26:23

my last point. I would

00:26:25

like just briefly addressed the

00:26:28



issue of the enforcement and

00:26:30

recognition recognition and enforcement of

00:26:33

the hours. So we asked

00:26:36

it is in the exit

00:26:37

system now, so that decision

00:26:40

could be enforced as a

00:26:41

lookout for the sea shanty

00:26:43

in any of these statement

00:26:47

bars. But what happened with

00:26:49

the Thursday's to the states

00:26:51

that are not part of

00:26:52

the instruments that approved the

00:26:54

appeal make it there is

00:26:56



an issue there as well

00:26:57

that need to be discussed.

00:26:58

And of course in that

00:27:01

case, they might be a

00:27:03

receipt receipt will roll of

00:27:05

the New York convention. What

00:27:07

does it state that are

00:27:08

not part of the instrument

00:27:10

that creates the account? So

00:27:12

I think I will win

00:27:14

this overview. I will stop

00:27:15

here and so we can

00:27:17

discuss all the way more

00:27:18



and if you have questions

00:27:19

on particular issues regarding the

00:27:21

CFL him, thanks very much.

00:27:27

My advisor Center. Absolutely. Thanks

00:27:33

friend. And first of all,

00:27:34

welcome, we're glad to have

00:27:35

you all at Wylie this

00:27:36

morning and for everyone dialing

00:27:38

in as well. I think

00:27:40

Jay gave a good preview

00:27:42

of The Advisory Center, but

00:27:44

I just want to unpack

00:27:44

a few more details first.

00:27:46



What is it? Where did

00:27:48

it come from? And then

00:27:49

three of the open questions

00:27:51

that are being debated right

00:27:52

now? So what is the

00:27:54

advisory Center that's being discussed

00:27:56

by the working group David.

00:27:58

The full name is the

00:27:59

advisory Center on International Investment

00:28:02

law. The abbreviation is a

00:28:04

c i l The current

00:28:07

acronym and it's not an

00:28:09

unprecedented idea and I think

00:28:11



that's an important thing to

00:28:12

do to that bit. There

00:28:14

is a precedent to follow

00:28:15

from the WTO. So there's

00:28:18

an advisory Center on w

00:28:21

t o law that was

00:28:23

established in 2001 and that's

00:28:25

Center. I think many commentators

00:28:27

are greedy has been fairly

00:28:28

successful. And what's what's the

00:28:30

goal of the Centre of

00:28:32

the goal is to increase

00:28:34

the technical capacity of countries

00:28:37



that are involved in these

00:28:38

disputes. In a sense a

00:28:41

right of representation so that

00:28:43

they have out of a

00:28:44

council because many of the

00:28:45

least developed countries might not

00:28:47

have the in-house government experience.

00:28:49

For example to present their

00:28:52

case. Well in a WTO

00:28:53

dispute and in the context

00:28:56

of some of the criticisms

00:28:57

that have Arisen in investor-state

00:28:59

arbitration a similar idea has

00:29:02



come to the fore with

00:29:03

respect to this advisory Center

00:29:06

has been discussing it for

00:29:08

a number of years and

00:29:10

it's it's come together much

00:29:13

more clearly and recent months.

00:29:15

In fact, you can even

00:29:16

find it online hot off

00:29:18

the presses November 27th 2023.

00:29:22

There's a draft statute of

00:29:25

an advisory Center. So this

00:29:26

follows on discussions this past

00:29:28

October and will be continued

00:29:30



to be discussed in January

00:29:32

next year. And I understand

00:29:35

that a goal is to

00:29:35

have these this draft statute

00:29:38

largely completed by next July.

00:29:40

So in a way you

00:29:42

can see now this advisory

00:29:44

Center which is conceptual following

00:29:47

a precedent now taking some

00:29:48

shape and there's bracketed text.

00:29:51

Of course in the draft

00:29:52

statute on some of the

00:29:53

questions that are opened. I

00:29:54



want a flag. Just three

00:29:55

of those although there are

00:29:56

a number that will require

00:29:57

some more detailed discussion in

00:29:59

the coming months. The first

00:30:01

is what is the scope

00:30:02

of the advisory Center. So

00:30:05

as the name suggests it

00:30:07

relates to International Investment law.

00:30:10

But International Investment law disputes

00:30:12

can take different forms. There's

00:30:14

they're different players involved. There's

00:30:16

the investor there's the state

00:30:18



and as many of you

00:30:19

know, most investment treaties also

00:30:21

have a mechanism for state-to-state

00:30:22

disputes that could be for

00:30:25

example diplomatic protection espousal claims

00:30:28

to be a submissions on

00:30:30

interpretation of the relevant treaty

00:30:32

and so a big question

00:30:35

that the participants in a

00:30:36

working group have been debating

00:30:37

is in the center advise

00:30:42

on state to state disputes

00:30:44

can the center advise investors

00:30:47



or is the center going

00:30:49

to be limited to states

00:30:52

that are defending against claims

00:30:55

or potential claims by investors

00:30:57

my sense and I will

00:30:59

welcome the input of those

00:31:00

who have been in the

00:31:01

room, but my sense is

00:31:02

that there seems to be

00:31:04

some emerging consensus around focusing

00:31:08

on Representation in advising of

00:31:12

states that are defending against

00:31:14

claims by investors and you

00:31:16



can see this in the

00:31:18

terms of this draft statute.

00:31:21

So what what's the objective

00:31:23

of the advisory Center Article

00:31:25

2 of the drafts as

00:31:27

it aims to provide training

00:31:28

support and assistance with regard

00:31:31

to International Investment law or

00:31:33

some form Dara. I'm it

00:31:36

wants to enhance the capacity

00:31:37

of states and Regional economic

00:31:41

integration organizations in handling International

00:31:43

Investment disputes. So that's the

00:31:46



scope it's still being debated

00:31:48

but it does seem that

00:31:49

at least at a minimum

00:31:52

of the Central Primary objective

00:31:54

would be to facilitate representation

00:31:57

of states in investor-state arbitration

00:31:59

defending against investor claims. The

00:32:03

second question is what will

00:32:04

that representation look like the

00:32:07

center is going to have

00:32:08

its contemplated that it will

00:32:10

have a staff. This will

00:32:11

be as will be a

00:32:12



working organization that has qualified

00:32:15

lawyers who can provide this

00:32:17

advice and articles 6 and

00:32:21

7 of the draft statute

00:32:22

bles this out. So one

00:32:24

form of advice might be

00:32:26

before a dispute arises. So

00:32:28

for example, if a developing

00:32:30

country is considering passing a

00:32:32

certain law a measure that

00:32:34

they might go to the

00:32:35

center and say these are

00:32:37

our obligations under this investment

00:32:40



treaty. Could you advise us

00:32:42

as to whether there might

00:32:43

be explained or what that

00:32:45

clean might look like and

00:32:47

I think that's what that

00:32:48

could be a useful to

00:32:50

fill a Tatian by The

00:32:51

Advisory Center because it will

00:32:52

be gathering best practices of

00:32:55

states around the world and

00:32:56

facilitating a change of information

00:32:58

the second and I think

00:33:00

this is the one that's

00:33:01



going to be more challenging

00:33:02

to implement and where I

00:33:04

think Jay hinted at the

00:33:06

at the resource question is

00:33:08

the actual representation of the

00:33:10

state in the arbitration. So

00:33:13

article 7 as it's currently

00:33:17

drafted includes that the advisory

00:33:20

Center may represent. The member

00:33:24

that is the state who

00:33:25

is a member of The

00:33:26

Advisory Center represent the members

00:33:29

in the preceding including in

00:33:31



a hearing possibly in conjunction

00:33:33

with a team of that

00:33:34

number. So that's a question

00:33:38

of resources as anyone who's

00:33:40

been involved and investment arbitration

00:33:43

knows these can be large

00:33:44

complex disputes the require substantial

00:33:47

resources go to bring the

00:33:49

claim and to defend against

00:33:50

the claim and many governments

00:33:53

from the developing world do

00:33:56

not have robust in-house capacity

00:33:59

to do this. So there

00:34:01



could be that there seems

00:34:02

to be a suggestion that

00:34:03

there would be a team

00:34:04

building capacity enhancing function of

00:34:08

the advisory Center. So you

00:34:10

can imagine a team of

00:34:11

experts at defending State investor-state

00:34:14

arbitration at The Advisory Center

00:34:16

working together with the lawyers

00:34:18

of the government involved in

00:34:20

the dispute to The Advocate.

00:34:23

But how many team members

00:34:26

will there be at the

00:34:27



advisory Center? How much will

00:34:30

they be paid how how

00:34:31

many cases can they handle?

00:34:33

I'm sure. What is the

00:34:36

following Washington arbitration week or

00:34:38

this field knows that the

00:34:39

number of investor State arbitration

00:34:41

cases are rising and a

00:34:43

team, for example of 15

00:34:45

at an advisory Center could

00:34:47

not possibly represent all developing

00:34:49

countries in investor-state arbitration that

00:34:51

we need to be more

00:34:52



or before some sort of

00:34:53

compromise. And how do you

00:34:55

rank which states who are

00:34:58

members of The Advisory temperature

00:34:59

get in terms of representation.

00:35:02

These are some of the

00:35:03

rubber meets the road tough

00:35:05

questions being a go. She

00:35:07

ate it now. The last

00:35:09

question and I understand this

00:35:10

has not been intensely discussed

00:35:12

yet at the working group,

00:35:14

but I think it's a

00:35:14



relatively fun one to think

00:35:16

about is where will the

00:35:17

advisory Center be located? And

00:35:20

you know, I'm going to

00:35:21

give my informal pitch with

00:35:22

no Authority while we're here

00:35:23

at Washington arbitration way to

00:35:25

Washington DC is a great

00:35:26

spot, but I'm sure that

00:35:28

will be hotly debated and

00:35:29

the coming session. So that

00:35:31

is the advisory Center and

00:35:32

I look forward to discussing

00:35:33



it further with any questions.

00:35:34

Thanks for the kitchen sink

00:35:45

it which is how I've

00:35:47

been thinking about the procedural

00:35:48

and cross-cutting issues that have

00:35:49

been under discussion including at

00:35:51

the most recent session. So

00:35:53

where it where is this

00:35:54

all coming from and where

00:35:55

is it going to get?

00:35:56

Thank you, Martin. One more

00:35:59

thing I want to do

00:35:59

is unpack a little bit.

00:36:00



So you can understand why

00:36:01

we have a kitchen sink

00:36:02

or are as I think

00:36:03

they referred to them a

00:36:05

pile of issues for the

00:36:06

Secretariat. I think we can

00:36:08

perhaps put that up a

00:36:10

bit more delicately, but I'm

00:36:12

before I go to my

00:36:13

remarks. I want to Echo

00:36:14

the comments of Margie &

00:36:16

Josh First Bank the organisers

00:36:19

the Washington Appreciation Week for

00:36:21



inviting me and I've had

00:36:24

an opportunity to speak before

00:36:25

and I've attended in the

00:36:26

past and the programs are

00:36:27

just excellent. So I feel

00:36:28

very honored to be able

00:36:29

to participate and then I'm

00:36:31

also going to underscore that

00:36:32

I'm speaking in my personal

00:36:33

capacity. So what I say

00:36:35

here doesn't represent my office

00:36:37

the state department the legal

00:36:39

advisors office or the US

00:36:40



government that said I'm not

00:36:41

trying to say anything super

00:36:43

exciting but just so that

00:36:44

if something does it take

00:36:46

to cure curiosity, it's my

00:36:48

personal few. So I'll go

00:36:50

to the procedural and cross-cutting

00:36:52

issues because of course that

00:36:53

is a bit of a

00:36:53

clunky title, but we don't

00:36:55

really have A better way

00:36:56

to refer to them and

00:36:58

I think I'd like to

00:36:58



kind of go back to

00:37:00

how we got to these

00:37:01

issues early in the working

00:37:04

group's process delegations were encouraged

00:37:08

to submit papers on what

00:37:10

types of Reform should be

00:37:11

put before the working group

00:37:13

in Atlanta how it should

00:37:13

organize itself. And one of

00:37:15

the early papers was actually

00:37:17

one that was put put

00:37:18

forward by Thailand and Thailand

00:37:20

proposed a so-called building blocks

00:37:23



of proteins where they wanted

00:37:24

to make discreet changes that

00:37:26

countries could then start of

00:37:27

put together. I like to

00:37:28

think of it does the

00:37:29

Lego approach, you know, where

00:37:30

you can mix and match

00:37:32

what you what you may

00:37:34

want to do in terms

00:37:35

of Reform assuming that you

00:37:36

could have some kind of

00:37:37

matching and one of the

00:37:38

things that was included in

00:37:40



that proposal was I'm updating

00:37:41

me on to trial arbitration

00:37:43

rules to include proposals on

00:37:45

procedural Innovations such as early

00:37:47

dismissal claims security for costs

00:37:49

and regulating third-party funding later.

00:37:53

I'm in the process of

00:37:54

five. is chili is real

00:37:57

Japan Mexico and Peru submitted

00:38:00

a similar paper that kind

00:38:01

of built on that concept,

00:38:02

but they refer to their

00:38:03

approach as the sweet approach

00:38:05



and what the goal of

00:38:06

that paper was just to

00:38:07

illustrate that they were actually

00:38:08

a lot of common approaches

00:38:10

and existing agreements such as

00:38:13

Mexico was the example because

00:38:16

Mexico I had an agreement

00:38:17

with the European Union that

00:38:19

agreements with the United States

00:38:20

and Canada and they were

00:38:22

also part of the comprehensive

00:38:23

and Progressive Trans-Pacific Partnership

00:38:26

or CPTPP and what you

00:38:28



could see is that many

00:38:30

of the procedural issues in

00:38:31

those three agreements were actually

00:38:33

fairly similar the one proposal

00:38:35

there was 22 not so

00:38:36

much amend existing agreements that

00:38:39

already have those types of

00:38:40

Provisions, but to take those

00:38:42

and retrofit earlier first generation

00:38:45

of bilateral investment treaties and

00:38:47

agreements to bring them up

00:38:48

to code so to speak,

00:38:50

because of course, those are

00:38:51



the agreements where we've seen

00:38:52

many of the disputes and

00:38:54

they were the source of

00:38:54

many of the concerns that

00:38:56

Had prompted on Central to

00:38:59

to take this workout. Now

00:39:02

those that stream of procedural

00:39:04

work was supplemented by on

00:39:07

proposals initially put forward by

00:39:09

the then South African deli

00:39:10

get to work in group

00:39:11

three, but then supported by

00:39:13

others that went into what

00:39:14



are now considered the cross-cutting

00:39:16

issues. And these issues picked

00:39:18

up on topics like damages

00:39:20

which were of concern in

00:39:21

terms of the way in

00:39:22

which awards are perceived to

00:39:24

be being issued on Damages

00:39:28

concerns about ensuring that the

00:39:30

right to regulate was clarified

00:39:32

and other other questions about

00:39:36

access to to STS in

00:39:40

particular was the role of

00:39:42

local local remedy for these

00:39:45



friends came together last September

00:39:48

2022 and the working group's

00:39:51

43rd session and that's when

00:39:53

the Secretariat have been originally

00:39:55

tasked with a bathing. The

00:39:56

initial procedural rules that have

00:39:58

been looking at and then

00:40:00

as Jace said the list

00:40:02

began to accumulate every countries

00:40:05

begin to say well if

00:40:05

you're going to update this

00:40:06

look at this, but said

00:40:07

that and that process is

00:40:09



what led us to the

00:40:10

paper that we were looking

00:40:12

at this past fall. Now,

00:40:15

the other thing that had

00:40:16

happened in the interim was

00:40:18

that exit had completed its

00:40:19

rules amendment process and so

00:40:22

aware there had been a

00:40:24

concern perhaps for years ago

00:40:26

about treaties not our or

00:40:29

rules not sufficiently being structured

00:40:34

so that they addressed procedural

00:40:36

concerns. We now have the

00:40:39



extra drills worship adopted many

00:40:40

of the types of procedural

00:40:42

reforms that are being considered

00:40:44

an answer, in particular a

00:40:45

clarifying that early dismissal claims

00:40:48

addressing security for costs regulating

00:40:51

third-party funding and what have

00:40:52

you so so that's why

00:40:54

we got there now and

00:40:55

in the way The paper

00:40:56

was presented there was a

00:40:57

group of three categories and

00:40:59

she mentioned these but I

00:41:00



think the three categories are

00:41:02

not equal in terms of

00:41:03

I think the controversy and

00:41:06

attention that they that they

00:41:08

may get the first category

00:41:10

was as they mentioned conditions

00:41:14

on claims and that category

00:41:16

included some of what we

00:41:18

might think of as traditional

00:41:20

gateways to claim such as

00:41:22

a statute of limitations potentially

00:41:26

some kind of a waiver

00:41:27

requirement. But also some other

00:41:29



ones that we don't typically

00:41:30

see in that space which

00:41:32

would be denial of benefits

00:41:33

exhaustion of local remedies and

00:41:37

Provisions on the right to

00:41:38

regulate the working group has

00:41:40

not discussed. Most of those

00:41:42

there was some brief discussion

00:41:44

of some of the the

00:41:46

relationship of waiver and other

00:41:49

conditions, but that's been postponed

00:41:51

and that will pick back

00:41:52

up in January the second

00:41:54



category wasn't Got it all

00:41:57

and that's it. Primarily the

00:41:58

procedural issues. And that's where

00:42:00

we see the type of

00:42:01

overlap with the reforms that

00:42:04

have been achieved a Texan

00:42:06

as well as other common

00:42:09

some of the common proposals

00:42:10

that were flagged in the

00:42:11

paper. That was done by

00:42:12

a chili is real Japan

00:42:14

Mexico and Peru. And in

00:42:16

that context those are probably

00:42:19



the furthest along because we

00:42:21

had because the working group

00:42:22

had already been looking at

00:42:23

questions of early dismissal security

00:42:25

for costs their party funding

00:42:27

but there's still a lot

00:42:28

to be done in the

00:42:29

in that space and one

00:42:31

question are is how much

00:42:33

of those Provisions need to

00:42:36

be treated language and how

00:42:37

much of them might actually

00:42:38

be more appropriately an addendum

00:42:41



or special chapter of the

00:42:43

uncitral rules that would apply

00:42:44

to investor-state dispute cases similar

00:42:48

to the transparency rules. And

00:42:49

so that is something that

00:42:50

the working group is also

00:42:51

going to be taking a

00:42:52

look at now. The one

00:42:54

topic that we did spend

00:42:55

quite a Time on and

00:42:57

the paper just developed presented

00:43:01

created quite a lively debate

00:43:02

was the topic of Damages

00:43:05



and I think that topic

00:43:06

is a good illustration of

00:43:07

some of the tensions that

00:43:08

are going on with these

00:43:09

topics because one issue there

00:43:11

is the word the scope

00:43:14

of the working group's mandate.

00:43:16

There are some delegations who

00:43:18

see the working group's mandate

00:43:20

as very clearly focused on

00:43:23

procedural aspects of isds. So

00:43:26

one of the shorthand ways

00:43:28

that you can think about

00:43:29



it as if you're familiar

00:43:30

with say us agreements, there's

00:43:33

a section A and A

00:43:34

section B section B topics

00:43:37

are the type of thing

00:43:37

that with it working group

00:43:38

3 could do maybe some

00:43:40

categories maybe not but but

00:43:42

generally such an a off

00:43:45

the outside the Mandate there

00:43:47

are others though who interpret

00:43:48

the language and see that

00:43:49

the that the working group

00:43:51



has been given a broad

00:43:52

mandate and that it's not

00:43:54

necessarily limited to Central issues

00:43:57

and the way that the

00:43:58

chair of the working group

00:43:59

has sort of tried to

00:44:00

to square that circle is

00:44:02

to say we can have

00:44:04

procedural approaches to resolve some

00:44:07

of these substances concerns what

00:44:09

that actually means we'll have

00:44:10

to see but that's alright.

00:44:11

That's our mantra for it

00:44:12



for over how we how

00:44:13

we go forward and I

00:44:16

just want to find very

00:44:17

briefly on the damages issue

00:44:18

that that was one where

00:44:19

there was a fairly clear

00:44:21

divide in the working group

00:44:22

that there were delegations that

00:44:24

did not believe that it

00:44:25

was an appropriate topic to

00:44:28

consider and others who thought

00:44:31

it was essential to consider

00:44:32

and I know we've talked

00:44:34



about the geopolitical aspect and

00:44:37

how are not going to

00:44:37

talk about it, but I

00:44:39

think damages is actually an

00:44:40

interesting topic because I think

00:44:42

there is There there was

00:44:44

an apparent divide. I would

00:44:47

say in terms of developing

00:44:51

and developed countries, but it

00:44:52

was also very mixed in

00:44:53

terms of how what what

00:44:55

countries experience was with is

00:44:57

dies. And I think that's

00:44:58



probably the more distinguishing factor

00:45:01
and I think that's a

00:45:02
key factor in as a

00:45:03
trial is although there are

00:45:06
certain Regional groupings. It's really

00:45:08
the experience that countries are

00:45:10
bringing a delegations are bringing

00:45:11
to the table on this.

00:45:13
So I'm the damages the

00:45:15
way forward was not to

00:45:17
bash heads necessarily but to

00:45:20
agree to have a conversation

00:45:21
and see what could happen

00:45:23



out of that and I

00:45:24

think that probably helps move

00:45:27

the working group forward, but

00:45:29

it doesn't necessarily mean that

00:45:31

any particular approach to dama

00:45:33

Justice on the table right

00:45:34

now or even that anything

00:45:36

can be done on Damages

00:45:38

because of this is a

00:45:38

complicated topic and we'll have

00:45:40

to find a way forward

00:45:41

that Not get into the

00:45:46

substance of aspects in terms

00:45:47



of the actual compensation standard

00:45:51

and are there procedural techniques

00:45:53

or procedural Provisions that weekend

00:45:55

approaches that week that the

00:45:56

working group can consider that

00:45:58

can help coordinate that Gordon

00:46:00

damage is often some of

00:46:01

that may be better guidance

00:46:03

on how to calculate damages.

00:46:05

But again, these are topics

00:46:07

that still need to be

00:46:08

decided. Thank you. Thanks very

00:46:11

much Karen. I think I'd

00:46:13



like to just start off

00:46:14

our discussion by posing a

00:46:15

couple of follow-up questions about

00:46:17

some of these individual topics

00:46:19

and then we'll also throw

00:46:20

it out to the to

00:46:21

the floor for questions as

00:46:23

well because I think there's

00:46:24

a lot to discuss here.

00:46:25

I had one question for

00:46:27

March release on the mechanism.

00:46:30

My understanding is the currently

00:46:32

the discussion is sort of

00:46:33



separating kind of function questions

00:46:36

from the Forum questions right

00:46:37

now will will think later

00:46:39

about what this is how

00:46:40

it's going to operationalize. Let's

00:46:42

talk about what My question

00:46:45

is does that mean that

00:46:46

we've essentially set aside entirely

00:46:48

the discussion of whether this

00:46:50

will come into existence at

00:46:51

all. Is it is that

00:46:52

now just a done deal

00:46:53

and that we're going to

00:46:54



have something or is there

00:46:56

still a weather discussion happening

00:46:58

at all? Well, thank you.

00:47:00

So first of all, there's

00:47:02

no decision taken on if

00:47:04

we're going to have an

00:47:06

appointment so that it that

00:47:09

it happened being decided. So

00:47:11

if the same for the

00:47:12

multilateral investment course, so and

00:47:15

will address the issues under

00:47:19

discussion that is pretty much

00:47:20

how it will function and

00:47:22



what will be the scope

00:47:24

but then of course there's

00:47:25

the other question on on

00:47:27

the form that there have

00:47:30

been some discussions on. But

00:47:32

there's no decision either on

00:47:35

whether that did the best

00:47:37

way will be to have

00:47:38

an outstanding appellate body or

00:47:42

if A roaster could work

00:47:44

for 4 put in place

00:47:46

an appeal mechanism. And of

00:47:48

course, there's a huge difference

00:47:49



whether we're going to happen

00:47:51

because we will need a

00:47:53

secretary will need the info.

00:47:55

Who is confirmed that money

00:47:58

and then even if we

00:48:03

could say that perhaps that

00:48:05

wouldn't be relieved we put

00:48:11

in a shift that coherent

00:48:14

stink buy completed because they

00:48:16

will be different members of

00:48:19

the tribunal then there's some

00:48:23

that are you and I

00:48:24

was saying, I mean, there's

00:48:25



no position to get here

00:48:26

more easily to the current

00:48:31

system because it could be

00:48:32

administered by the current institutions

00:48:35

such as it stays or

00:48:36

the PCA or others. It

00:48:41

does seem like follow the

00:48:42

money is always an interesting

00:48:43

question because because you can

00:48:45

think ideally about how you

00:48:47

design an appellate mechanism or

00:48:49

you can think about how

00:48:49

am I going to pay

00:48:50



for it? And that might

00:48:50

lead you into I think

00:48:53

there's a question. Just a

00:49:06

repeat for the benefit of

00:49:07

those who aren't in the

00:49:08

room. The question was what's

00:49:10

the discussion in terms of

00:49:12

the The Binding nature of

00:49:13

the decisions for her future

00:49:16

cases, then I don't recall.

00:49:18

I don't know if Karen

00:49:21

will recall if there had

00:49:23

been a discussion on that

00:49:24



but I would say that

00:49:25

part of the advantage of

00:49:26

having and a pair of

00:49:29

Brittany. You will be that's.

00:49:31

I will be as a

00:49:35

president or for the other

00:49:37

cases, so but I don't

00:49:38

know just If I can

00:49:41

just jump in real quick,

00:49:42

I'm there hasn't been a

00:49:44

final decision on president, but

00:49:46

that's an excellent question because

00:49:48

it begs because it begs

00:49:49



a separate question. Why have

00:49:50

an appellate if it doesn't

00:49:51

have president but that said

00:49:55

president brings with it some

00:49:56

some potential risks and and

00:49:58

and downsize and one of

00:50:00

the things that I think

00:50:02

the working group has not

00:50:03

really grabbed a whip and

00:50:05

a sort of trying to

00:50:06

I think put his head

00:50:07

in the sand on are

00:50:09

these potential spillover effects because

00:50:11



you'll have a couple scenarios

00:50:14

one is State and State

00:50:16

be our parties to the

00:50:17

Appellate body and they agree

00:50:19

that they will abide by

00:50:20

the by an appellate review

00:50:22

mechanisms decision great if it's

00:50:24

consistent with what they agreed

00:50:26

but what if it's not

00:50:27

or what if it's different

00:50:28

than what one of them

00:50:29

has been saying for a

00:50:30

long time. Now the other

00:50:32



thing that we're also very

00:50:33

familiar with and in the

00:50:35

investment contact is many treaties

00:50:38

now have identical language that

00:50:40

they have picked up from

00:50:42

other treaties. Now if your

00:50:44

state C and you're not

00:50:45

part of the Appellate review

00:50:47

body, but your language has

00:50:49

been interpreted. What does that

00:50:51

say? What does that mean

00:50:52

about the interpretation of your

00:50:54

treaty some some reactions have

00:50:57



just been well, just enjoy

00:50:58

nor do I figure out

00:51:00

figure it out on your

00:51:01

own but it but it's

00:51:02

really not that simple because

00:51:03

I'm appellate review mechanism will

00:51:07

be expected to have some

00:51:08

greater Authority than stay another

00:51:12

arbitration tribunal or the US

00:51:13

are on claims Tribunal. And

00:51:15

even the icj which by

00:51:17

its statute says the decision

00:51:19

is only binding on the

00:51:21



parties with respect to the

00:51:22

particular dispute. So we do

00:51:24

have to think about what

00:51:26

possible guardrails are out there

00:51:28

if we're going to go

00:51:29

forward on this and I

00:51:30

think this is one of

00:51:31

the issues that could be

00:51:32

a sticking point in the

00:51:35

discussion as we as we've

00:51:38

done thoroughly Margie did a

00:51:39

great job officers laying out

00:51:40

how this will operate but

00:51:42



but there is still this

00:51:43

larger question of how does

00:51:44

it operate in the context

00:51:46

of what we have now.

00:51:49

If I'm at one commented

00:51:52

that I question the comments

00:51:53

is one of the most

00:51:54

common questions from those who

00:51:56

are not familiar with arbitration

00:51:58

is is their repeal and

00:52:00

the answer has always been

00:52:01

fairly easy. No, but in

00:52:03

some cases there's there's these

00:52:04



other mechanisms and one of

00:52:06

those in exit cases of

00:52:07

norment and you mentioned Margie

00:52:09

the the the interplay they're

00:52:11

obviously there has been increasing

00:52:12

enrollment temps in recent years

00:52:15

to what extent do you

00:52:16

think dissatisfaction with exit annulment

00:52:19

is driving the conversation for

00:52:22

the Appellate mechanism. That is

00:52:26

the key issue because actually

00:52:28

ever and I mention it

00:52:30

ever seen the interpretation so

00:52:32



the lack of career and

00:52:33

his lack of predictability of

00:52:36

those decisions are the ones

00:52:38

that are actually drive in

00:52:40

all these discussions and I

00:52:42

think that's why many of

00:52:44

the countries that are participating

00:52:46

armoire opened on the idea.

00:52:49

Javier Aquino and even if

00:52:53

it's not then I'll review

00:52:55

I said because daddy also

00:52:57

have implications on the cost

00:52:59

and leader direction of the

00:53:05



One question on maybe picking

00:53:08

up on this on this

00:53:09

Earth the interplay with exid.

00:53:10

Can you looted to the

00:53:12

fact that of course the

00:53:13

discussion on the procedural and

00:53:14

cross-cutting issues is coming on

00:53:16

the heels of exits on

00:53:18

reform of its rules and

00:53:20

I noted that the discussion

00:53:21

paper said it was taking

00:53:22

into account the recently amended

00:53:24

exit. Rules. What do we

00:53:27



see? Is that interplay going

00:53:28

forward? I mean I've suggested

00:53:29

that maybe some of the

00:53:30

discuss some of the issues

00:53:31

that were being discussed my

00:53:32

move off the table or

00:53:34

or move into a different

00:53:35

space. Are there other ways

00:53:37

in which the exit rules

00:53:39

are coming into play in

00:53:40

the discount in the discussion.

00:53:41

Margie may have a different

00:53:44

view but I mean, I

00:53:45



think it's primarily in the

00:53:46

in the Control process are

00:53:48

the installation rules on

00:53:50

the question now is how

00:53:51

do you would it make

00:53:53

sense to have treaty Provisions

00:53:55

that could would override or

00:53:58

duplicate or what-have-you? Do the

00:54:00

exit rules or might it

00:54:01

be better to have the

00:54:03

uncontrolled rules being And the

00:54:06

same sort of parallel or

00:54:08

provide the same types of

00:54:09



protections so that you don't

00:54:10
have I don't have a

00:54:11
forum shopping. But I mean

00:54:12
that the states are confident

00:54:15
that they are saying the

00:54:16
same process in the two

00:54:17
major rules that are that

00:54:18
are being that are used

00:54:21
in these cases, but I

00:54:22
think that's the primary way.

00:54:24
There may also be discussions.

00:54:27
There may be some delegations

00:54:28
who thought they fixed the

00:54:30



girls went too far. It

00:54:32

didn't go far enough and

00:54:33

one question will be is

00:54:35

that a space for treaty

00:54:36

language versus arbitration rules, but

00:54:39

we're really still at a

00:54:40

fairly preliminary stage on that

00:54:42

aspect. So I think it's

00:54:44

the watch the space. I

00:54:46

know if I'm a jumping

00:54:48

so I know that the

00:54:51

audience we have to make

00:54:53

dinner and Martina perfect. So

00:54:55



if they want to jump

00:54:55
in after me, so I

00:54:59
know I I agree we

00:55:01
do currants so we need

00:55:03
to differentiate and it was

00:55:04
raised in the last meeting

00:55:06
that there was a risk

00:55:07
using into the language for

00:55:11
those rules that are procedural

00:55:12
rules is a Westie party

00:55:14
because then you if you

00:55:16
apply it to all and

00:55:18
a BLT three languages to

00:55:20



apply it to Old 3DS

00:55:22
as well. So it's not

00:55:23
to deter future 3 days,

00:55:25
but also to the stock

00:55:27
of tree is that you

00:55:28
are so so in that

00:55:32
case that can be accomplished

00:55:33
with the new exit rules

00:55:35
because you have you know,

00:55:37
the tree is the Dallas

00:55:39
Provisions that made complete in

00:55:41
cases where it says it

00:55:42
will fly so A personal

00:55:46



opinion too Daddy. I will

00:55:47

be with those type of

00:55:48

rose to put it in

00:55:50

an honest. It's all rules

00:55:53

like an Annex to the

00:55:55

arbitration rules that would apply

00:55:57

if an investor shoes d

00:56:01

a y rules for the

00:56:03

proceedings. So in that case

00:56:04

they will also be behind

00:56:08

by that Onyx that will

00:56:09

apply to all yes. Yes,

00:56:10

and then you have all

00:56:11



these beautiful rules that were

00:56:13

working on. So I'm happy

00:56:20

to open up the floor

00:56:21

to questions. If we have

00:56:23

any weed. We have one

00:56:24

question in the chat comments

00:56:26

asking on the subject of

00:56:28

the Appellate mechanism. If there's

00:56:30

a conflict with the fundamental

00:56:32

concept of party autonomy in

00:56:33

arbitration one aspect of which

00:56:35

is arbitrator selection. I am

00:56:40

so pretty particular with the

00:56:53



multilateral investment court because we

00:56:55
are so you go to

00:57:02
shoes, you know, the arbitrator's

00:57:05
but you tell me what

00:57:07
you have in your normal

00:57:08
procedure is nobody really choose

00:57:11
their the arbitrator speakers in

00:57:14
excess so it would be

00:57:15
so the sensor that was

00:57:17
appointed and then you know

00:57:20
when you have it all

00:57:22
and then it will be

00:57:23
a tribunal of the local

00:57:25



course. So actually you don't

00:57:27

have the right to choose

00:57:28

the second. They are interviewing

00:57:31

also acknowledge that that already

00:57:37

exist. My apologies day because

00:57:43

I I didn't see your

00:57:44

your hand raised and so

00:57:45

there are probably a number

00:57:46

of these issues. But you

00:57:47

want to jump in on

00:57:47

you should have just interrupted

00:57:48

us, please don't hesitate. Just

00:57:52

wanted to touch up on

00:57:53



the last question about this

00:57:55

selection of the arbitrator's decision

00:57:57

makers that we are facing

00:57:58

we're currently preparing the next

00:58:00

papers for the standing my

00:58:01

cousin and you and one

00:58:04

of the issues that we

00:58:05

face is actually the jurisdiction

00:58:06

of the standing that cuz

00:58:08

I would especially if it's

00:58:10

established as a standing appointment

00:58:12

to share cases coming from

00:58:15

arbitral tribunals are the parties

00:58:21



need to consent to the

00:58:22

abuse mechanism. So this consent

00:58:26

to appear is just one

00:58:27

issue and the idea is

00:58:28

that this I think three

00:58:31

levels of consent consent to

00:58:33

arbitrations in Biaggi's in a

00:58:35

case where an industrious have

00:58:37

a clean. So the states

00:58:39

have already expressed their concern

00:58:40

to Desmet measures. And then

00:58:43

when we create a standing

00:58:45

there has to be a

00:58:46



consent by the state to

00:58:48

find themselves to the jurisdiction

00:58:50

of the tribunal or the

00:58:51

standing like to hear those

00:58:53

cases and there I think

00:58:55

there has to be some

00:58:56

sort of a mechanism to

00:58:57

capture the consent of the

00:58:58

investors when they come in

00:59:00

if there isn't a pen

00:59:01

so not only about the

00:59:04

selection of Europe Cheddar's but

00:59:05

there's a consent issue about

00:59:07



how these will be binding

00:59:09

on your on the investors

00:59:11

is another issue that we

00:59:12

are faced and this is

00:59:13

something that we don't have

00:59:14

a real clear solution to

00:59:16

at this stage. And that's

00:59:18

just one thing. Just going

00:59:20

back to the geopolitics, I

00:59:21

think. Ancient the experience of

00:59:26

the member states are different

00:59:27

with regard to us. Yes,

00:59:28

and I think that's kind

00:59:30



of the dividing back to

00:59:31

her rather than in developed

00:59:32

or developing countries now in

00:59:35

Jeep repairs and I just

00:59:36

sent the paper we've been

00:59:38

asked to categorize different states

00:59:40

depending on developing LDC. Is

00:59:44

it difficult to see whether

00:59:47

the developing countries in the

00:59:48

developed countries have different perspectives?

00:59:50

I think they have kind

00:59:51

of did it really dependent

00:59:53

on Case by case? And

00:59:55



one of the other aspects

00:59:57

is what kind of Reform

00:59:58

they see as the best

00:59:59

solution for the response is

01:00:01

also behind their engines of

01:00:04

what the priority of the

01:00:06

reform should be. So I

01:00:07

don't think it's the geopolitics

01:00:08

but there's a lot of

01:00:10

different interests in the back

01:00:11

that is, to defy the

01:00:13

groups and States into different

01:00:15

groups as one of the

01:00:17



reform Elementary. I would just

01:00:24

add on that. Last note.

01:00:26

Thanks Jay. I think that's

01:00:27

that's quite right and you

01:00:29

could think even in terms

01:00:30

of again Washington. What is

01:00:33

the politics of investor-state arbitration

01:00:34

in the United States are

01:00:37

quite interesting and unsettled. It's

01:00:40

a space where it in

01:00:41

some ways the opposite ends

01:00:43

of the political Spectrum have

01:00:45

both expressed views contrary to

01:00:47



investor-state arbitration for different reasons

01:00:49

one side saying it's potentially

01:00:52

infringing on sovereignty and other

01:00:54

side saying it potentially infringing

01:00:55

on the ability to regulate

01:00:56

environmental in labor issues. So

01:00:59

even within a developed country

01:01:01

here in the United States,

01:01:02

if not clear how the

01:01:04

politics fit on all these

01:01:06

issues and I think therefore

01:01:08

as Jay said trying to

01:01:10

categorize broadly developing present developed

01:01:13



countries is not that clean

01:01:15

benefit and probably has Karen

01:01:17

said the better way to

01:01:18

think about it, although it's

01:01:19

the idiosyncratic is what is

01:01:21

the particular experience of those?

01:01:23

Investor-state arbitration because it's should

01:01:26

not be a coincidence that

01:01:27

when states have faced very

01:01:29

significant claims, but based on

01:01:31

their own governmental measures. They

01:01:34

sometimes then have a little

01:01:36

bit of a resistance. You

01:01:37



can see this with Australian

01:01:38

Philip Morris case. I bought

01:01:40

fall in Germany and others

01:01:41

and so it's better to

01:01:43

focus individually on those circumstances

01:01:45

and it's hard to think.

01:01:46

He's brought categorizations. Some questions

01:01:52

here in the room. I'll

01:01:53

take the one in the

01:01:54

middle. What station? That's a

01:02:31

great question. So the question

01:02:32

just for those online is

01:02:34

how will the Battery Center

01:02:36



be cost-effective by enabling these

01:02:38

potential teams of representation for

01:02:40

developing States and probably the

01:02:43

best way to think about

01:02:44

the answers to think about

01:02:45

the alternative. So if a

01:02:48

developing country faces a significant

01:02:50

investor State arbitration claim what

01:02:51

it what are the options

01:02:52

right now right. Now the

01:02:54

options are try to put

01:02:57

together the right team of

01:02:58

government lawyers to defend the

01:02:59



country and or retain outside

01:03:02

counsel and although and in

01:03:04

some cases that the rates

01:03:06

are not the same as

01:03:07

they would be in other

01:03:07

circumstances that can be expensive

01:03:09

and throwing away. The alternative

01:03:11

is the advisory Center might

01:03:12

be able to provide a

01:03:14

more cost-effective. You know, it

01:03:17

would naturally think about it

01:03:18

as pro bono become a

01:03:19

public defender type role in

01:03:22



representing States in a more

01:03:24

cost-effective way now, it's going

01:03:26

to be complicated because where

01:03:27

does it what is a

01:03:28

financing for the center in

01:03:30

the Lee's there come from

01:03:32

part of the idea is

01:03:34

that it comes from the

01:03:35

members who join the sector

01:03:36

paying a fee so there

01:03:38

need to be some calibration

01:03:40

of of how that funding

01:03:41

is going to work. But

01:03:41



I do think the premises

01:03:42

it's cheaper than the alternative

01:03:45

is the idea right now.

01:03:47

If I could just jump

01:03:48

into I mean the question

01:03:50

that you asked is really

01:03:51

kind of at the heart

01:03:52

of some of the discussions

01:03:52

on the advisory Center because

01:03:54

there is a sunset on

01:03:56

the one hand there is

01:03:57

probably a high demand for

01:03:58

legal representation. But that is

01:04:01



the most resource-intensive and therefore

01:04:03

probably the least likely to

01:04:04

provide the broadest type of

01:04:07

assistance. So a couple things

01:04:09

are being considered in the

01:04:10

context of the of the

01:04:11

other services that the advisory

01:04:13

said it would provide would

01:04:14

be capacity-building people tend to

01:04:16

think of their loss of

01:04:17

capacity-building content. Does this does

01:04:19

this but there are there

01:04:20

other types of capacity-building that

01:04:22



that might be maybe more

01:04:24

more carefully harnessed in an

01:04:26

advisory Center and one of

01:04:27

them is to sort of

01:04:28

replicate a forum where States

01:04:30

could come say, they'll be

01:04:32

state-led state-driven State participants. And

01:04:35

you know as we were

01:04:35

alluding to their some states

01:04:37

to have quite a bit

01:04:38

of experience with is dies

01:04:39

and it's the gamut, you

01:04:40

know from the US and

01:04:42



Canada to Panama Margie. Margie

01:04:45
is more of an expert

01:04:46
on it that I am

01:04:47
sir. Hit the stage, but

01:04:50
you know that they can

01:04:51
share their experiences on the

01:04:54
types of nuts and bolts

01:04:55
things that go to what

01:04:56
what Josh was was mentioning.

01:04:58
How do you set up

01:04:58
a team? How do you

01:05:00
manage outside counsel? How do

01:05:02
you you know, what sort

01:05:03



of work on these types

01:05:04

of things that that wouldn't

01:05:05

want to State his first

01:05:06

face by face of the

01:05:08

case can be quite daunting

01:05:09

but might be very efficiently

01:05:12

information might be professionally relayed

01:05:15

to the state in this

01:05:16

type of contact. So there's

01:05:17

nothing outside the box a

01:05:19

little bit in terms of

01:05:20

how we might approach this.

01:05:22

And one other comment on

01:05:23



that is that developing countries

01:05:25

that have recent experience defending

01:05:28

against the best first aid

01:05:29

arbitration are already doing this

01:05:30

to good effect. They're looking

01:05:32

for outside counsel to help

01:05:33

them build their own capacity

01:05:35

so that they are better

01:05:35

equipped to defend themselves in

01:05:37

future cases, which is certainly

01:05:39

a prudent in a good

01:05:40

approach and this is meant

01:05:42

to compliment that in the

01:05:43



one final piece, which I

01:05:44
think is an is an

01:05:46
easy thing. That's a visor

01:05:48
Central would do for all

01:05:49
countries is a center for

01:05:51
information sharing of best practices.

01:05:54
And I think that that's

01:05:55
certainly is going to enable

01:05:56
synergies and make these defenses

01:05:59
more cost-effective. Jose Antonio the

01:06:06
advisor Center perhaps Margie and

01:06:10
uncaring could further comment. How

01:06:12
much of the discussion is

01:06:15



being centered on the knowledge

01:06:18

that that has been gained

01:06:20

already by by state representatives

01:06:24

and I say this because

01:06:26

one of the things that

01:06:28

that that I finally in

01:06:29

our in our practices that

01:06:31

it is very private counsel

01:06:35

driven and and the Indy

01:06:38

advisory Center discussions will do

01:06:40

I have not being there

01:06:41

during this trial this car

01:06:43

since I was there before

01:06:44



many years when when when

01:06:47

the discussions were not in

01:06:49

on Central between what one

01:06:52

of the elements that I

01:06:53

find of of great importance

01:06:55

is the experience of States

01:06:57

and how much input or

01:07:00

our state's Additives and those

01:07:03

that have managed dispute even

01:07:05

being a council to to

01:07:07

the district will be able

01:07:09

to to input into the

01:07:10

sexual. That's that's question. Number

01:07:12



12 is is there any

01:07:17
sense and I say this

01:07:19
knowing that that might be

01:07:22
difficult question or or in

01:07:23
this context. Is there a

01:07:25
is there any sense of

01:07:26
whether there's greater support for

01:07:28
the Appellate mechanism than for

01:07:32
the stunning court or the

01:07:33
other way around and and

01:07:37
and and the last one

01:07:38
is you have a there

01:07:46
are there any questions as

01:07:50



to the legitimacy of of

01:07:53

creating a but either know

01:07:56

or especially standing court? Are

01:07:59

there any legitimacy issues considering

01:08:02

the fact that there are

01:08:05

currently of various investor-state arbitration

01:08:10

awards that European states are

01:08:13

refusing to enforce and that

01:08:15

are now part of international

01:08:18

law. How many are there

01:08:20

any questions in terms of

01:08:21

well, you're proposing a standing

01:08:24

court and and yet you're

01:08:26



not abiding with the rule

01:08:27

of law with international law

01:08:29

and in a feel for

01:08:31

you not to answer the

01:08:31

last two questions. I know

01:08:33

that you're not that is

01:08:34

7 1/2. I don't think

01:08:36

I see everybody back in

01:08:41

the way from the microphone.

01:08:43

So I'm that b r

01:08:45

e Center so we have

01:08:46

to understand that it is

01:08:48

built on to Eller. So

01:08:49



one pillar is the capacity

01:08:52

building the training before room

01:08:54

that I was referring to

01:08:56

so the whole idea of

01:08:58

that exchange of experience and

01:09:00

I think that it is

01:09:01

what you are referring. So

01:09:03

those days that have more

01:09:04

experience and ideas cases so

01:09:06

they could change with others

01:09:07

that are still starting with

01:09:11

the first cases and they're

01:09:13

not that experienced in the

01:09:15



process. So and then the

01:09:17

second pillar is the legal

01:09:19

representation. There's been a lot

01:09:22

of discussion on what members

01:09:24

have the right to what

01:09:26

so because there will be

01:09:28

different kind of levels of

01:09:30

members and I need to

01:09:33

have him be mentioned here.

01:09:34

But also there have been

01:09:36

discussions on whether it's a

01:09:39

nice cool getting to a

01:09:42

lazy first. Capacity building and

01:09:46



the exchange and that that

01:09:47

is really how do you

01:09:54

say how do you categorize

01:09:57

that discussion is very unlikely,

01:10:01

but yes. That will be

01:10:09

your name. Only two people

01:10:11

are so for the appellant

01:10:12

versus investment chords. Of course,

01:10:16

we can I mean countries

01:10:18

have not decided on any

01:10:20

of those but you can

01:10:21

tell that a list of

01:10:24

what time this is also

01:10:26



my personal opinion that there's

01:10:28

more openness for the ptolemaic

01:10:31

and I kind of been

01:10:33

having a whole investment court

01:10:35

that would change everything because

01:10:37

then that we will definitely

01:10:39

will have a different A

01:10:44

different system. Yeah, thanks for

01:10:48

the question. I don't I'm

01:10:49

going to need to add

01:10:50

on the advisory Center. I

01:10:51

think I agree with what

01:10:52

would Margie said? And again,

01:10:54



I think the Forum and

01:10:56

and other types of capacity-building

01:10:57

and and also ensuring that

01:10:59

when we were talking about

01:11:00

the legal representation that it's

01:11:02

very clear that the state

01:11:03

should be driving the case

01:11:05

and not having the advisory

01:11:07

Center telling the state what

01:11:09

to do or should have

01:11:09

stepping into the shoes because

01:11:11

of course ultimately it's the

01:11:12

state that is in charge

01:11:13



of the the interpretation of

01:11:15

its agreements and in charge

01:11:17

of a b defense and

01:11:19

so that part of it

01:11:20

is building that capacity to

01:11:21

be able to to execute

01:11:22

that regardless of whether it's

01:11:24

a private Law Firm that

01:11:25

you were supervising or the

01:11:26

advisory Center on the two

01:11:28

questions that you asked. I'm

01:11:29

not I'm going to use

01:11:30

them to Pivot to a

01:11:31



different point, which I think

01:11:32

they're they're useful to highlight

01:11:34

and that's that you the

01:11:36

working group was successful in

01:11:39

bringing the codes of conduct

01:11:40

to conclusion, but the issues

01:11:43

that face Will will raise

01:11:45

some of the types of

01:11:46

questions that you are that

01:11:47

they've been asked you about

01:11:48

legitimacy. What have you and

01:11:50

and we're going to start

01:11:51

to see I think it

01:11:53



may be harder for delegations

01:11:55

to agree and the question

01:11:57

then going forward will be

01:11:58

how willing our delegations going

01:12:01

to be to be flexible

01:12:03

to find new Solutions or

01:12:05

think about these problems in

01:12:06

a different way. They do

01:12:07

in terms of the issues

01:12:10

that motivate that you on

01:12:12

the court are they flexible

01:12:13

on achieving those objectives in

01:12:15

a different way or is

01:12:16



it the court and that's

01:12:18

it because the ability the

01:12:20

flexibility will probably determine ultimate

01:12:23

success uncitral is usually successful

01:12:26

when it focuses on the

01:12:29

solving problems through the objectives

01:12:31

and not so much on

01:12:32

trying to adopt a particular

01:12:33

approach and whether this project

01:12:36

going forward can following that

01:12:38

is going to be an

01:12:39

open question. I think the

01:12:40

types of questions is your

01:12:41



flag in there are ones

01:12:42

that are going to be

01:12:43

tricky ones for the for

01:12:45

the delegations to address another

01:12:49

thought on that is that

01:12:51

rib pain away regardless or

01:12:53

if it doesn't succeed in

01:12:55

the working group, there is

01:12:57

still the EU and recent

01:12:59

investment treaties having investment courts,

01:13:01

and it's going to be

01:13:01

interesting to see that experience

01:13:04

and I think it'll be

01:13:06



an interesting day when investor-state

01:13:08

arbitration tribunal sites to a

01:13:10

decision of an EU investment

01:13:12

court and you know, I'm

01:13:14

not going to be binding

01:13:14

precedent but there will be

01:13:16

an analogous case. And so

01:13:17

I think in some ways

01:13:19

we're seeing this fragmentation, it's

01:13:22

not necessarily something to be

01:13:24

concerned about its it it's

01:13:26

a it's an experiment to

01:13:28

see what is the most

01:13:29



appropriate way to resolve these

01:13:31

disputes and it's going to

01:13:34

be hard to find agreement

01:13:35

on one hole claw solution

01:13:36

and we might have to

01:13:37

live in this era of

01:13:39

fragmentation to see which one

01:13:42

prevails Oh, maybe I'll take

01:13:48

the program. So to bounce

01:13:49

off of that pose a

01:13:51

final question, which is given

01:13:55

the point they make sure

01:13:56

and then some of the

01:13:58



issues to come or is

01:13:59

it going to be harder

01:14:00

to agree on and then

01:14:01

then the issues that have

01:14:02

already been tackled which is

01:14:03

a standard approach to these

01:14:05

kind of things yesterday described

01:14:11

the working group three processes

01:14:14

you five years and no

01:14:15

end in sight. When will

01:14:17

we know when this is

01:14:18

done? 2026? No, I didn't

01:14:24

need to jump on your

01:14:25



question. But I think the

01:14:27

working group now has has

01:14:29

a plan that shows the

01:14:31

where we end has additional

01:14:33

resources that address is 22026.

01:14:36

I think after that it's

01:14:40

hard to say will it

01:14:41

be success or failure you

01:14:42

on the one hand those

01:14:43

who are familiar with negotiations

01:14:45

know that you need? Deadline

01:14:46

to move forward and then

01:14:47

the deadline passes and you

01:14:48



keep going whether or not

01:14:50

though on Central the commission

01:14:53

would decide to do that.

01:14:54

I think we'll really have

01:14:55

to have to see I

01:14:57

think that is entirely open

01:14:59

question and to put one

01:15:00

of my former colleagues anyone

01:15:02

who tells you they know

01:15:02

the answer doesn't know what

01:15:03

they're talking about. So anyone

01:15:07

else want offer any protections

01:15:08

question that thing is that

01:15:15



there's different type of solutions.

01:15:16

So because I mean it

01:15:19

was finished and it could

01:15:21

be implemented because it could

01:15:23

be implemented through its Junior

01:15:25

3DS, even if we don't

01:15:27

end with a with the

01:15:28

lateral instrument adopting the code,

01:15:32

I mean Dakota repair itself,

01:15:34

so and there's others solutions

01:15:37

that are going to both.

01:15:39

See how idea to also

01:15:41

have it to all these.

01:15:43



You know, I'm from now

01:15:45

to 2026 so we'll see

01:15:47

I mean, but at least

01:15:48

I think there will be

01:15:49

some products that we can

01:15:50

say at least we have

01:15:51

that he we don't answer.

01:15:52

You know, what I would

01:15:54

do is rinse am I

01:15:56

see the J wanted to

01:15:57

join in on this phone.

01:15:58

So just to come to

01:16:02

you to the working group,

01:16:03



I think what to do

01:16:04

when you think that's kind

01:16:04

of remaining is demoted arrangement.

01:16:07

And then that kind of

01:16:08

puts a picture and then

01:16:09

of course training 2020 to

01:16:11

2026 is an ideal go

01:16:13

for the course. We have

01:16:14

a little bit of time

01:16:15

to implement that further. I

01:16:17

think one of the other

01:16:18

questions is whether it was

01:16:20

a child is the right

01:16:20



forum for discussing all of

01:16:22

the implantation issues. And of

01:16:23

course if there are Samba

01:16:25

formula that's been discussed by

01:16:26

the working group presented to

01:16:28

the commission and it might

01:16:29

be that some of the

01:16:30

member states might be wishing

01:16:32

to do that further if

01:16:33

among those member states that

01:16:35

wish to actually put those

01:16:36

reforms but I think that's

01:16:37

what Josh was kind of

01:16:38



in the sense that it

01:16:40

doesn't have to be before.

01:16:43

I just wanted to go

01:16:45

back to one of the

01:16:46

issues that can I think

01:16:48

the procedural element of the

01:16:50

procedure is something that the

01:16:52

working group is able to

01:16:54

real know. It's probably likely

01:16:57

that the government would be

01:16:58

able to be on some

01:16:59

of the solutions. They're not

01:17:01

putting that into the other

01:17:02



truck. We love to but

01:17:05

the problem there is This

01:17:08

agreement by the were working

01:17:09

with the government said that

01:17:10

they didn't go sit in

01:17:12

his report is enacted into

01:17:14

the rules, which is then

01:17:15

up to the choice of

01:17:16

investors. So it kind of

01:17:19

loses the effect that reforms

01:17:23

that the working group has

01:17:24

kind of put together. By

01:17:28

putting it in the divorce

01:17:29



and I think that's why

01:17:30

one of the proposal from

01:17:32

the secretary is that it

01:17:33

may be better placed in

01:17:35

the 3D language better than

01:17:36

in those chopped Asian road,

01:17:37

which is an optional. That's

01:17:41

80% about to install rules

01:17:43

about 20% So the applicability

01:17:45

of those might not have

01:17:47

the impact that we wish

01:17:49

woodworking Google sister. Thank you,

01:17:54

Jay. And thank you for

01:17:55



kind of Life promise to

01:17:56

to give the floor back

01:17:57

to Jose Antonio for an

01:17:59

announcement before we wrap up.

01:18:00

But even before he makes

01:18:03

his announcement, I just want

01:18:04

to say thank you very

01:18:04

much to all four of

01:18:06

our panelists for real a

01:18:07

fascinating discussion. Thank you Maureen

01:18:15

and thank you for for

01:18:16

indulging me and also indulging

01:18:19

the Washington arbitration week. I

01:18:22



I just just as a

01:18:24

as a concluding statement. I

01:18:27

I think that I'll struggle

01:18:29

pay has has done an

01:18:31

incredible job in terms of

01:18:33

negotiations. It is so complex

01:18:36

to have so many so

01:18:37

many allegations in the room

01:18:39

and as as as as

01:18:40

many of you were saying

01:18:41

they are all ready products

01:18:43

in terms of the code

01:18:45

of conduct and so on

01:18:46



and so forth, of course,

01:18:47

there's so many issues and

01:18:48

and and many of them

01:18:50

challenging in any event the

01:18:52

announcement that that that we

01:18:54

would like to make today,

01:18:55

you know given that we're

01:18:56

being seen here and online

01:18:59

is that the world arbitration

01:19:02

update which is the sister

01:19:04

event of Washington arbitration week

01:19:05

is is launching its dates

01:19:08

for 2020 for and and

01:19:12



for those of you that

01:19:14

my Not know what it

01:19:15

is. The world of attrition

01:19:16

update is a similar form

01:19:19

to the Washington arbitration week,

01:19:21

but the happened but that

01:19:22

happens every year in May

01:19:25

and I need similar to

01:19:28

to this one in the

01:19:30

sense that it's a 66725

01:19:34

day event full of arbitration

01:19:37

panel's International commercial arbitration investor-state

01:19:42

arbitration and public international law

01:19:45



panels with two missions. One

01:19:47

is to update the International

01:19:50

Community with the on topics

01:19:53

of investment arbitration International commercial

01:19:55

arbitration and public international law

01:19:57

update. Why because the in

01:19:59

today's world it is impossible

01:20:00

to read 180 decisions in

01:20:04

one year and I are

01:20:05

more similar ICC and etcetera.

01:20:09

So we try to do

01:20:11

a little bit of over

01:20:13

a format. That will allow

01:20:15



people to to update themselves.

01:20:17

And the other mission is

01:20:18

to decentralize International arbitration because

01:20:21

there are many many sites

01:20:23

and places where International arbitration

01:20:25

is happening in Latin America

01:20:27

and Africa in the US

01:20:29

that might not be the

01:20:30

washing killer or the other

01:20:32

New York or the parish

01:20:33

for the London. So that's

01:20:34

another mission that we have

01:20:35

and this year. We're going

01:20:37



to start on May 15th

01:20:38

through 24 and I were

01:20:41

going to start in China

01:20:42

and we have we know

01:20:43

that there's a there's a

01:20:44

delegation and many people from

01:20:48

from many countries coming to

01:20:50

Washington Jason week including China.

01:20:52

So we're related by the

01:20:54

fact that the that Washington

01:20:57

arbitration. Wicca is yes for

01:20:59

the International Community of Washington,

01:21:02

but also for the whole

01:21:03



world. Thank you, and that

01:21:05

will hope that you can

01:21:06

join us also in the

01:21:07

world over tration update. Thank

01:21:08

you. Wow to thanks. So

00:00:03

again, good morning everyone and

00:00:05

this is at Washington arbitration

00:00:07

week at my name is

00:00:09

Jose Antonio Rivas together with

00:00:12

the young Laird from crawling

00:00:14

Mooring one of the co-founders

00:00:16

of Washington arbitration week. This

00:00:19

is our fifth day and

00:00:20



last day and it has

00:00:23

been a marvelous experience wait,

00:00:26

we've had greater numbers and

00:00:29

than any year fully in

00:00:30

person and before starting I

00:00:33

would like to give my

00:00:35

my my great appreciation to

00:00:38

Wiley hear a dc-based firm.

00:00:43

Thank you Josh for for

00:00:45

your hospitality at without you

00:00:47

and without all their sponsors

00:00:50

and host. It would not

00:00:52

be possible to do a

00:00:53



Washington arbitration week. We would

00:00:56

also like to thank our

00:00:58

advisory committee and to my

00:01:01

left is one. The members

00:01:03

of our advisory committee with

00:01:05

without a Marines and help

00:01:07

and also counseled on some

00:01:10

of the topics that we

00:01:11

choose for International Washington Appreciation

00:01:15

Week. It would be impossible

00:01:18

to do it. I would

00:01:18

also give that would like

00:01:20

to give a shout out

00:01:21



to our our team vodka

00:01:23

in an extra G in

00:01:25

Bogota here in DC with

00:01:30

me but also involved my

00:01:33

Lucia Kansas and and the

00:01:35

team also from Coral that

00:01:36

has been helping us and

00:01:39

especially Ian today's topic is

00:01:43

And and by the way,

00:01:45

I'm from a strategy of

00:01:46

those P which is an

00:01:47

investor State arbitration Law Firm

00:01:49

here in DC. Today's topic

00:01:52



is one that that we

00:01:54

have been following for now

00:01:56

believe that more than five

00:01:57

years into the uncitral group

00:02:01

38. We called it somehow

00:02:04

differently this time but because

00:02:06

because we wanted to see

00:02:08

to see if if if

00:02:09

that picks up to see

00:02:10

if there are any Regional

00:02:11

geopoliticus behind it and they're

00:02:14

always there always I was

00:02:17

a might be a little

00:02:18



bit altruistic as to uncover.

00:02:20

What is a GI Joe

00:02:21

politics behind it. I don't

00:02:22

know where they will succeed.

00:02:23

But by the very least

00:02:25

what we want to hear

00:02:26

would love to hear is

00:02:28

is the status and under

00:02:30

some of the the the

00:02:31

the ongoing discussions and then

00:02:34

perhaps the sticking points as

00:02:36

of now, but but that

00:02:38

is not my my place

00:02:39



to go to develop anymore.

00:02:40

I don't want to steal

00:02:41

Marines or Marines Thunder. My

00:02:46

job here is to introduce

00:02:47

marine marine Carlson recently left.

00:02:52

Sidley Austin and she became

00:02:53

an independent arbitrator. She she's

00:02:56

building on 25 years of

00:02:58

experience in Wester State and

00:03:00

international commercial arbitration prior to

00:03:03

launching her arbitrator practice. She

00:03:06

was a cult leader. As

00:03:08

I said of Sealy Austin

00:03:10



LLP is global arbitration trade

00:03:12

and advocacy practice where she

00:03:14

was a partner specializing in

00:03:16

investment re arbitration and represented

00:03:19

claimant investors and responding States

00:03:22

in roughly equal measure and

00:03:25

academic analysis of the investment

00:03:27

re arbitration committee Place Marine

00:03:29

in the top 25. Most

00:03:31

experienced isds Council in the

00:03:34

world. Not a small thing

00:03:35

among the core lawyers who

00:03:38

dominate the caseload She's named

00:03:43



as one of the top

00:03:43

250 woman in litigation by

00:03:46

Benchmark. And as one of

00:03:48

Latin America's top 100 female

00:03:51

lawyers by Latin vax. Marine

00:03:54

is also an Adjunct professor

00:03:55

at George Washington University law

00:03:58

school and the American University

00:03:59

Washington College of Law teaching

00:04:02

investment treaty arbitration and member

00:04:04

of the executive committee of

00:04:05

the foundation for international arbitration.

00:04:07

Advocacy recent vice president of

00:04:11



the American Society of international

00:04:13

law and just complete eight

00:04:16

years of service on the

00:04:17

board of directors of the

00:04:19

Care Coalition at Washington d.c.

00:04:21

Legal service organization focused on

00:04:24

immigrants rights and and I

00:04:26

must emphasize that she is

00:04:28

one of the members of

00:04:31

The Advisory Board of Washington

00:04:32

arbitration week. That's that's the

00:04:35

most important thing. So, thank

00:04:39

you and welcome. Thank you

00:04:42



so much Jose Antonio for

00:04:43

the very comprehensive. But you

00:04:46

definitely according to the title

00:04:55

of the panel the geopolitics

00:04:56

of uncontrolled working group tree

00:04:58

and discussing represented positions on

00:05:01

different issues. I should have

00:05:03

warned Jose Antonio. However that

00:05:06

the panel is probably going

00:05:07

to go Rogue and that's

00:05:09

because in talking about this

00:05:11

topic we thought you had

00:05:13

the notion of geopolitics sort

00:05:15



of conjures up visions of

00:05:17

of realpolitik, which I guess

00:05:19

is appropriate this week. When

00:05:21

were thinking of Henry Kissinger

00:05:22

passing political blocs. North south

00:05:26

east west Cold War terms

00:05:29

Western democracies versus Communist States

00:05:32

developed versus developing states in

00:05:36

the suggestion isn't there some

00:05:37

sort of predictable pattern there

00:05:39

as to who allies with

00:05:40

who and takes what? What

00:05:42

issues and as we were

00:05:44



discussing that in the context

00:05:46

of working groups free it

00:05:47

seemed to us that that

00:05:48

actually isn't really the case

00:05:50

in a lot of the

00:05:51

issues that are before working

00:05:53

group 3, you don't see

00:05:54

those sort of realpolitik patterns

00:05:57

of alliances and send the

00:06:01

patterns in which states take

00:06:03

positions on different issues changes

00:06:05

from issue to issue as

00:06:06

well. So so so so

00:06:09



we decided to abandon the

00:06:11
title of the panel at

00:06:14
least not the topic but

00:06:16
the panel's going to to

00:06:17
brief us on what's happening

00:06:18
on what the main themes

00:06:20
and common threads are of

00:06:22
discussion on some of the

00:06:23
Hot Topics at working group

00:06:25
3, but maybe not from

00:06:26
the lens of geopolitics as

00:06:28
such introduce our panelists who

00:06:32
are going to help us

00:06:33



with that discussion. I will

00:06:35

start with a traditional what

00:06:36

should be assumed that every

00:06:37

panel but they traditional caveat

00:06:39

that of course none of

00:06:41

our panelists. Speaking in an

00:06:42

official capacity or presenting the

00:06:44

views of the representative respective

00:06:46

governments employers Etc. But they

00:06:50

they come to us with

00:06:51

a wealth of experience. So

00:06:53

we're joined online from Vienna

00:06:55

by Jason Lee who's the

00:06:58



senior legal officer in the

00:07:00

international trade law division of

00:07:01

the UN office of legal

00:07:02

Affairs, otherwise known as the

00:07:04

the secretary at front and

00:07:09

he has been with the

00:07:10

United Nations since 2007 previously

00:07:12

having served in the Korean

00:07:13

Ministry of Foreign Affairs. His

00:07:16

other projects with Ed on

00:07:18

Central have included the Singapore

00:07:19

convention on mediation and Service

00:07:22

as secretary to work in

00:07:23



groups 6 on security interest,

00:07:24

but of course, he's here

00:07:26

today because he's serving as

00:07:28

the working group of three

00:07:29

secretary and therefore so deeply

00:07:31

involved in the in the

00:07:34

entire project from until Charles

00:07:35

institutional perspective were also joined

00:07:39

by Margie list, Jaime who

00:07:41

wear Number of hats one

00:07:43

of which is professor at

00:07:44

the University of Panama, but

00:07:46

for this purpose, she's a

00:07:47



legal adviser at Panama's Ministry

00:07:49

of economy and finance advising

00:07:52

on treaty-based investment arbitration. And

00:07:56

of course serving as Panama's

00:07:58

representative to working group three,

00:08:00

and she was also a

00:08:02

former trade negotiator for the

00:08:03

Panamanian government as well. Then

00:08:06

the next down the table

00:08:07

is Josh Simmons his partner

00:08:09

here at our hosts Wiley

00:08:11

Ryan and the global disputes

00:08:12

practice also an adjunct professor

00:08:14



at University law at University

00:08:16

of Virginia law school and

00:08:18

came to Wylie having with

00:08:21

previous service in post as

00:08:23

a senior advisor and earlier

00:08:25

attorney adviser at the department

00:08:27

of state advising the United

00:08:29

States and international disputes and

00:08:30

treaty negotiations. International Investment disputes

00:08:34

in particular and then at

00:08:37

the end of the table,

00:08:37

we have Karen Kaiser who's

00:08:39

attorney adviser in the office

00:08:41



of private international law and

00:08:42

the office of legal adviser

00:08:43

at the state department. She

00:08:45

joined the state department in

00:08:46

2006. She represents the United

00:08:49

States at on Central including

00:08:51

working group three as well

00:08:52

as at the Hague conference

00:08:53

on private international law and

00:08:55

Yuna drug previously. In other

00:08:58

roles at the state department

00:08:59

was involved in B, negotiations

00:09:01

and implementation and in the

00:09:03



litigation of is DS cases

00:09:04

at the office of claims

00:09:06

and investment disputes. So as

00:09:08

you see we've got a

00:09:09

very actively involved panel, who

00:09:11

knows. Well all of these

00:09:13

issues and can bring us

00:09:15

up to speed on them

00:09:16

are order of proceedings is

00:09:19

going to start with asking

00:09:21

Jay to give us sort

00:09:22

of an overview of how

00:09:23

we've gotten here in the

00:09:24



approximately 5 plus years that

00:09:27

working group 3 has been

00:09:28

underway and its project to

00:09:30

look at it is DS

00:09:31

reform. Going to talk about

00:09:33

what's been accomplished so far

00:09:34

and then we're going to

00:09:35

turn to some of the

00:09:36

specific topics that are currently

00:09:38

on the working group 3

00:09:39

agenda, Margie. Lisa's going to

00:09:41

talk about the Appellate mechanism.

00:09:42

Discussions. Josh is going to

00:09:44



take out the advisory Center

00:09:45

and then Karen's going to

00:09:47

to launch S into the

00:09:49

the current hot topics of

00:09:51

procedural reform and quote on

00:09:52

quote cross-cutting issues. And for

00:09:55

each of those will tell

00:09:57

tell us what's on the

00:09:57

table. What are some of

00:09:58

the key stakeholder of used

00:10:00

and what's the process going

00:10:01

forward? What's next? So with

00:10:04

that as our introduction, I

00:10:05



will turn it over to

00:10:06

Jay to tell us how

00:10:08

we got here. Thank you

00:10:10

very much. I still to

00:10:12

this day. I was just

00:10:13

introduced tell you about where

00:10:16

we are and how we

00:10:17

got here. I think that's

00:10:18

what I want to do.

00:10:19

So just going to where

00:10:22

we are in July of

00:10:23

this year in the summer

00:10:24

as we know it finalized.

00:10:28



The first of the reform

00:10:29

elements in is just before

00:10:31

So this included to text

00:10:33

on mediation in Destin mediation

00:10:35

guideline on you dishion and

00:10:37

a model Provisions for states

00:10:39

to adopt from and two

00:10:40

codes of conduct when was

00:10:42

adopted and the other was

00:10:43

adopted in principle. The code

00:10:44

of conduct for arbitrators was

00:10:46

adopted and the code of

00:10:47

conduct for judges was adopted

00:10:49



in principle because we have

00:10:51

not stopped finished the work

00:10:53

on the court. But as

00:10:55

you mentioned we went back

00:10:57

six years it was at

00:10:59

that time in 2017 that

00:11:00

the commission interested working with

00:11:02

you with a very broad

00:11:03

mandate to conduct is this

00:11:05

response to identify the concern

00:11:07

considering the result of desirability

00:11:09

of Reform and to develop

00:11:11

11 Solutions, and that's what

00:11:13



we're doing. Now. We're at

00:11:14

the third state were reaction

00:11:16

to the Terrapin Solutions, but

00:11:18

you went back a little

00:11:20

bit longer. I should have

00:11:22

been up in your back

00:11:23

15 years because I think

00:11:24

we need to work on

00:11:26

your phone when it is

00:11:28

started to look into transparency

00:11:29

as it was revised. Going

00:11:31

to chop chicken rolls when

00:11:34

she came into your shoe

00:11:35



and they said that the

00:11:36

commission said that there should

00:11:38

be a ghost that are

00:11:39

developed to ensure transparency and

00:11:41

I say proceedings which resulted

00:11:43

in the transparency rules and

00:11:45

the Mauritius conventions that follow

00:11:47

so after that this was

00:11:50

a kind of isps came

00:11:51

into the picture of us

00:11:52

at all. And in 2017.

00:11:55

We got a mandate starting

00:11:57

in November 2017 with the

00:11:58



first working group and since

00:12:00

then we've had 14 sessions

00:12:03

are 10 sessions in Vienna

00:12:05

and processions in New York.

00:12:07

So that's where we are.

00:12:08

I know that there has

00:12:12

been some experts preparing this

00:12:14

but it's actually the governor

00:12:15

is coming together to actually

00:12:17

in negotiate these reform element

00:12:20

testing based on consensus and

00:12:22

transparent manner. We've had a

00:12:25

number of efforts to contain

00:12:26



tryptophan International organizations for sample

00:12:29

of the dress that the

00:12:30

code of conduct where I

00:12:32

drafted a tablet and a

00:12:40

number of different matters now

00:12:43

in a number of matters

00:12:52

the number of the allegations

00:12:53

that are participating corporations with

00:12:56

the multiplayer ideas The increased

00:12:59

use of income. A hybrid

00:13:03

meeting we also have the

00:13:05

intersection of meetings, which is

00:13:06

beginning to be a lot

00:13:08



about something that people wants

00:13:09

to host and are we

00:13:11

have a sinus procedures without

00:13:13

the report and additional Resources

00:13:16

by the general assembly to

00:13:18

hold one more session of

00:13:19

the working groups during the

00:13:20

year. So I just wanted

00:13:23

to give you a view

00:13:24

of where we are. So

00:13:26

after the commission what happened

00:13:28

was that there was an

00:13:29

international meeting in Singapore who

00:13:31



stood by the government of

00:13:32

Singapore where we discuss the

00:13:34

elements of a standing my

00:13:36

cousin. So we looked into

00:13:39

kind of the rational and

00:13:41

implications for the sending my

00:13:42

cousin. What are the possible

00:13:44

model scope Governor's how it

00:13:46

can exist within the existing

00:13:48

mechanisms or whether it has

00:13:49

to be separate and this

00:13:51

was kind of thought in

00:13:53

what in dabs and the

00:13:54



idea is that this before

00:13:56

my element would be presented

00:13:57

to the working group in

00:13:59

April of next year. I

00:14:01

guess I text you. So

00:14:03

that's the that's the plan

00:14:04

and then in the October

00:14:07

for most action, which is

00:14:09

the 46th action. The working

00:14:11

would consider to other topics

00:14:12

to main topics one was

00:14:14

the advice Centre entire International

00:14:16

Investment. We're by the working

00:14:18



group agree that the Centre

00:14:20

should be established as an

00:14:21

independent inter governmental body are

00:14:25

composed of states and are

00:14:27

used that it would work

00:14:30

to prepare a job statute

00:14:31

of the Battery Center, which

00:14:32

is Gomer protocol to the

00:14:34

malformed Arrangement that the working

00:14:36

group is working on and

00:14:38

there was support for providing

00:14:40

legal assistance on proceedings representation

00:14:42

Services. There were some questions

00:14:44



about that also discussions also

00:14:47

involves about whether the Diamond

00:14:50

Center should spices from state-to-state

00:14:51

dispute settlement and so on.

00:14:54

Most of the discussions focused

00:14:56

on the service is 2/3

00:14:58

/ the center to the

00:15:00

beneficiaries would be and what

00:15:02

the priority should be because

00:15:04

it's probably with the limited

00:15:05

resources that cuz I just

00:15:07

said they would have it

00:15:08

wasn't clear that all of

00:15:09



the member states would be

00:15:11

able to access the center.

00:15:13

And of course I said

00:15:14

mention representation Services was also

00:15:17

a she treated with some

00:15:18

pirate ship to be given

00:15:20

to a disease and developing

00:15:21

countries. If their request is

00:15:23

to be made the final

00:15:25

thing, which is an issue

00:15:26

that we're looking into on

00:15:27

how to finance the weather

00:15:29

center. It was generally agreed

00:15:31



that the contributions from the

00:15:32

member states and fees to

00:15:34

be charged to the states

00:15:35

would be the main sources

00:15:36

of the financing and also

00:15:38

but open to other voluntary

00:15:40

contributions that may come into

00:15:42

the picture another topic that

00:15:44

was discussed is what Karen

00:15:46

or touch upon which is

00:15:48

the job positions and procedural

00:15:49

and cross-cutting issues are kind

00:15:59

of piling up for the

00:16:01



second year to prepare and

00:16:02

we tried to compel them

00:16:04

into a set of Provisions

00:16:05

for consideration by the working

00:16:07

group taking a look at

00:16:09

some of the conditions that

00:16:10

have been mentioned for raising

00:16:11

a claim some of the

00:16:13

conductor. The proceedings that would

00:16:14

undertake that would relate to

00:16:18

the efficiency of the proceedings

00:16:20

and finally a provisions on

00:16:22

the awards with the decision

00:16:23



to be made by the

00:16:24

mechanism. One thing that I

00:16:26

wanted to mention there. Just

00:16:27

when cases that. We have

00:16:30

not dealt into what the

00:16:31

procedure was for the standing

00:16:33

like a little bit and

00:16:34

we also kind of thought

00:16:36

that these procedures to working

00:16:38

with each other. It's about

00:16:39

to agree on should also

00:16:41

apply to the stand in

00:16:42

my cousin and that was

00:16:43



the basis of our discussions.

00:16:45

So where we go from

00:16:47

now, the working group is

00:16:49

expected to present the results

00:16:50

of the work on the

00:16:52

Battery Center and the guidance

00:16:55

document on the ice cream

00:16:55

truck crashing in the street

00:16:57

to send invitation to the

00:16:59

commission. Next July. It is

00:17:01

planned at the working group

00:17:02

three issues would be discussed

00:17:04

in the earlier. We served

00:17:07



right and left because I

00:17:11

think the current work when

00:17:12

I asked yesterday for me

00:17:13

and tell us a lot

00:17:14

of complexities, especially because states

00:17:18

are to be given flexibility

00:17:19

in undertaking and. That's a

00:17:24

little bit of flavor of

00:17:25

what kind of Providence we

00:17:26

can prepare and present to

00:17:29

the working group. And if

00:17:30

we have to I can

00:17:32

go session is that we

00:17:33



steal the commission that we

00:17:36

are meeting in January and

00:17:37

Jenna and April in New

00:17:40

York and in between there

00:17:42

will be an intersection in

00:17:44

Belgium Brussels. To look at

00:17:46

the access to justice issues

00:17:48

of a number of the

00:17:50

elements. So that's where we

00:17:52

are. Thank you. Thanks so

00:17:55

much for including for previewing

00:17:58

some of the things that

00:17:59

some of our other panels

00:18:00



are going to go into

00:18:01

a little more depth about

00:18:01

time for you to to

00:18:04

pick up one of those

00:18:05

issues, which is the mechanism

00:18:07

permanent mechanism permanent investment Court,

00:18:10

whatever whatever we're calling it

00:18:11

these days. Thank you so

00:18:20

much. And thank you for

00:18:22

the organizer is Jose Antonio

00:18:23

and it's a real pleasure

00:18:26

to hear at a Washington

00:18:28

to discuss about about these

00:18:30



issues. So Deep Ellum weekend,

00:18:33

he's not he's not something

00:18:34

that is is new. Right?

00:18:35

We have been talking about

00:18:36

that for the past 20

00:18:37

years. So it have been

00:18:40

included in some of our

00:18:41

treaties and actually do you

00:18:43

want it between Panama and

00:18:44

the US have the possibility

00:18:45

of implementing an appellate mechanism

00:18:49

and more recently 20 miles

00:18:50

to negotiate a treaty with

00:18:51



free trade agreement with Korea.

00:18:55

But also that Post lady

00:18:56

so so it's not it's

00:18:59

not nothing you and the

00:19:02

XX Secretariat as we know

00:19:04

in 2004 police are also

00:19:07

discussing about this possibility of

00:19:11

implementing an appeal facility within

00:19:14

accepted at that time. It

00:19:16

was said that it was

00:19:16

too premature but now 20

00:19:20

years later. We still discussing

00:19:22

about these issues. It wasn't

00:19:23



included in the we know

00:19:25

it in the recent reforms

00:19:28

of the exit rules, but

00:19:31

we know that probably want

00:19:34

to be researched is because

00:19:36

it's on their discussions in

00:19:37

a day working groups 312.

00:19:41

So why talking about an

00:19:45

appeal make a reason? Why

00:19:47

is there so many countries

00:19:48

that are you no interest

00:19:50

in perhaps implementing this deception

00:19:55

as we know this is

00:19:57



one of the two systems

00:19:58

reform of just the other

00:20:00

one was already mentioned by

00:20:02

Mary that is be standing

00:20:06

by the well, I'm Elsa

00:20:08

of course why ye so

00:20:11

What we need to be

00:20:13

freshest. So with the current

00:20:15

system that it was actually

00:20:16

made basically for a contractual

00:20:20

relationships at that time in

00:20:22

1965 when it when it

00:20:24

was a Salvation course, there

00:20:26



were not that many treaties

00:20:28

but now we know that

00:20:30

over 60% of the cases

00:20:33

are based on bilateral investment

00:20:34

treaties want your damned are

00:20:36

from a generation of three

00:20:40

days before 2010. So did

00:20:43

the idea of having an

00:20:45

a peer-review is to being

00:20:48

able to have that correctness

00:20:50

of the substance to modify

00:20:53

or to reverse the league

00:20:55

of find these of the

00:20:56



first season tribunal so that

00:20:58

is the key feature. And

00:21:00

then of course the annulment

00:21:02

president is always it's only

00:21:04

focusing on the legitimacy of

00:21:07

the process so it could

00:21:09

only voice the awards and

00:21:11

then If you want to

00:21:12

continue, then you have to

00:21:13

start all over again with

00:21:15

a new a new tread,

00:21:18

you know, so I would

00:21:20

like to focus in four

00:21:21



different aspect that are under

00:21:23

the car is not everything

00:21:24

that is on the paper.

00:21:26

The last paper that we

00:21:28

will be discussing in April

00:21:31

2024. But it's at least

00:21:35

it gives you a flavor

00:21:36

or what we are discussing

00:21:38

at working working group 3.

00:21:41

So the first one is

00:21:43

Disco. So what type of

00:21:45

decisions are we going to

00:21:48

put it on subject? It

00:21:50



would be subject to an

00:21:52

appeal. So not all the

00:21:53

time for sample. No procedure

00:21:55

or there's nothing that is

00:21:57

related to knowledge of an

00:22:00

arbitrator but more substantive. So

00:22:03

there's a whole discussion or

00:22:04

whether you're only final decision

00:22:07

should be subject to a

00:22:08

banana peel as is his

00:22:10

currently at exit. With the

00:22:12

unknown if the city so

00:22:13

if we go and I

00:22:16



have to say it is

00:22:17

everything that I'm going to

00:22:18

call me in right now

00:22:19

is under discussion. So it's

00:22:21

not like and there's nothing

00:22:23

you know the final price

00:22:26

because it is still on

00:22:28

their discussions of the sower

00:22:37

jurisdictional issues. So what happened

00:22:40

if a jurisdictional decision that

00:22:45

Daddy decided to hold the

00:22:48

proceedings goes to an appeal.

00:22:50

So in that case there's

00:22:52



a risk of further proceeding

00:22:54

of course, so then we're

00:22:56

discussing whether so it does

00:22:58

should be an automatic suspension

00:23:02

or not of the proscenium.

00:23:04

So that's I think I

00:23:06

want one of these interesting,

00:23:07

please also whether or not

00:23:09

information should be so To

00:23:12

an appeal. So this is

00:23:14

part of their scope start.

00:23:15

We're discussing then a second

00:23:18

point. We have the grounds

00:23:20



of appeal of course and

00:23:22

there's two elements that are

00:23:24

different for an annulment errors

00:23:28

in the interpretation and application

00:23:30

of the law. And the

00:23:32

second one is a manifest

00:23:33

errors in the abbreviation of

00:23:35

the facts which could include

00:23:37

appreciation of the domestic law

00:23:41

and Elsa, of course, the

00:23:45

damage has ever seen the

00:23:47

assessment. So. I think that

00:23:51

is part of the main

00:23:53



discussions because he will make

00:23:55

a difference with the normal

00:23:57

procedure that we have now

00:23:58

is not having a case

00:24:00

of like CMS versus Argentina

00:24:03

with a tribunal tell you

00:24:05

you you know, there have

00:24:06

been so many errors, but

00:24:08

we cannot announce for excess

00:24:11

of power. Because we cannot

00:24:12

substitute a decision to our

00:24:15

own find it so you

00:24:18

would our own find you.

00:24:19



So I think it will

00:24:22

be part of the discussion.

00:24:24

Also, there will be other

00:24:26

G included taken taken from

00:24:29

the exit articles 62 and

00:24:31

some Elsa from our conversation,

00:24:38

but here also in discussions

00:24:40

of whether some of these

00:24:42

grounds that are in the

00:24:44

New York convention are not

00:24:46

fit to your highest voice

00:24:48

case Elementary want to briefly

00:24:52

discuss with you is so

00:24:57



the type of decision that

00:24:59

will be subject to the

00:25:01

appeal tribunal. So the lady

00:25:04

has betrayed me and I'll

00:25:04

cover up holes modify or

00:25:07

reverse decisions in most of

00:25:11

the cases. But also we

00:25:13

know that they might be

00:25:14

cases. What is Easter Sunday

00:25:16

to remind the D case

00:25:19

to the first five, you

00:25:20

know, so they will be

00:25:21

instances where it could be

00:25:24



difficult because the tribunal is

00:25:27

no longer available or there's

00:25:29

a Subway in a case

00:25:32

of conflict of interest or

00:25:34

corruption. It will be hard

00:25:36

then or impossible to get

00:25:38

it into the into that

00:25:40

frighten us. So there's also

00:25:45

a discussion on why he

00:25:47

needs to be included in

00:25:49

that decision for sampled a

00:25:51

recent by the Appellate tribunal.

00:25:55

So in that case, it

00:25:57



will need to specify how

00:26:00

the decision would be modified

00:26:02

and and or reverse and

00:26:05

why Of course, there's a

00:26:09

need to also warranty the

00:26:11

finality of the decision because

00:26:13

idea of having an appointment

00:26:14

that it's not it's not

00:26:15

that then it will go

00:26:17

again to an appeal or

00:26:18

to an annulment. So it

00:26:20

should be fine for my

00:26:23

last point. I would like

00:26:25



just briefly addressed the issue

00:26:29

of the enforcement and recognition

00:26:31

recognition and enforcement of the

00:26:33

hours. So we asked it

00:26:36

is in the exit system

00:26:38

now, so that decision could

00:26:40

be enforced as a lookout

00:26:42

for the sea shanty in

00:26:43

any of these statement bars.

00:26:48

But what happened with the

00:26:49

Thursday's to the states that

00:26:51

are not part of the

00:26:52

instruments that approved the appeal

00:26:55



make it there is an

00:26:56

issue there as well that

00:26:58

need to be discussed. And

00:26:59

of course in that case,

00:27:02

they might be a receipt

00:27:04

receipt will roll of the

00:27:05

New York convention. What does

00:27:07

it state that are not

00:27:08

part of the instrument that

00:27:10

creates the account? So I

00:27:13

think I will win this

00:27:14

overview. I will stop here

00:27:16

and so we can discuss

00:27:17



all the way more and

00:27:18

if you have questions on

00:27:19

particular issues regarding the CFL

00:27:22

him, thanks very much. My

00:27:27

advisor Center. Absolutely. Thanks friend.

00:27:33

And first of all, welcome,

00:27:35

we're glad to have you

00:27:35

all at Wylie this morning

00:27:37

and for everyone dialing in

00:27:39

as well. I think Jay

00:27:41

gave a good preview of

00:27:42

The Advisory Center, but I

00:27:44

just want to unpack a

00:27:45



few more details first. What

00:27:47

is it? Where did it

00:27:48

come from? And then three

00:27:49

of the open questions that

00:27:51

are being debated right now?

00:27:52

So what is the advisory

00:27:55

Center that's being discussed by

00:27:56

the working group David. The

00:27:58

full name is the advisory

00:28:00

Center on International Investment law.

00:28:02

The abbreviation is a c

00:28:05

il The current acronym

00:28:08

and it's not an unprecedented

00:28:10



idea and I think that's

00:28:11

an important thing to do

00:28:12

to that bit. There is

00:28:14

a precedent to follow from

00:28:16

the WTO. So there's an

00:28:18

advisory Center on w t

00:28:21

o law that was established

00:28:23

in 2001 and that's Center.

00:28:26

I think many commentators are

00:28:27

greedy has been fairly successful.

00:28:29

And what's what's the goal

00:28:31

of the Centre of the

00:28:32

goal is to increase the

00:28:35



technical capacity of countries that

00:28:37

are involved in these disputes.

00:28:40

In a sense a right

00:28:42

of representation so that they

00:28:43

have out of a council

00:28:44

because many of the least

00:28:46

developed countries might not have

00:28:47

the in-house government experience. For

00:28:50

example to present their case.

00:28:52

Well in a WTO dispute

00:28:53

and in the context of

00:28:56

some of the criticisms that

00:28:58

have Arisen in investor-state arbitration

00:28:59



a similar idea has come

00:29:03

to the fore with respect

00:29:04

to this advisory Center has

00:29:07

been discussing it for a

00:29:08

number of years and it's

00:29:11

it's come together much more

00:29:13

clearly and recent months. In

00:29:15

fact, you can even find

00:29:17

it online hot off the

00:29:18

presses November 27th 2023. There's

00:29:23

a draft statute of an

00:29:25

advisory Center. So this follows

00:29:26

on discussions this past October

00:29:28



and will be continued to

00:29:30

be discussed in January next

00:29:32

year. And I understand that

00:29:35

a goal is to have

00:29:36

these this draft statute largely

00:29:38

completed by next July. So

00:29:41

in a way you can

00:29:42

see now this advisory Center

00:29:45

which is conceptual following a

00:29:47

precedent now taking some shape

00:29:49

and there's bracketed text. Of

00:29:51

course in the draft statute

00:29:52

on some of the questions

00:29:53



that are opened. I want

00:29:54
a flag. Just three of

00:29:55
those although there are a

00:29:56
number that will require some

00:29:58
more detailed discussion in the

00:29:59
coming months. The first is

00:30:01
what is the scope of

00:30:03
the advisory Center. So as

00:30:05
the name suggests it relates

00:30:07
to International Investment law. But

00:30:10
International Investment law disputes can

00:30:12
take different forms. There's they're

00:30:15
different players involved. There's the

00:30:16



investor there's the state and

00:30:18

as many of you know,

00:30:19

most investment treaties also have

00:30:21

a mechanism for state-to-state disputes

00:30:23

that could be for example

00:30:26

diplomatic protection espousal claims to

00:30:29

be a submissions on interpretation

00:30:31

of the relevant treaty and

00:30:33

so a big question that

00:30:35

the participants in a working

00:30:36

group have been debating is

00:30:39

in the center advise on

00:30:42

state to state disputes can

00:30:45



the center advise investors or

00:30:49

is the center going to

00:30:50

be limited to states that

00:30:53

are defending against claims or

00:30:55

potential claims by investors my

00:30:58

sense and I will welcome

00:31:00

the input of those who

00:31:00

have been in the room,

00:31:01

but my sense is that

00:31:02

there seems to be some

00:31:05

emerging consensus around focusing on

00:31:10

Representation in advising of states

00:31:13

that are defending against claims

00:31:14



by investors and you can

00:31:16

see this in the terms

00:31:20

of this draft statute. So

00:31:21

what what's the objective of

00:31:23

the advisory Center Article 2

00:31:26

of the drafts as it

00:31:27

aims to provide training support

00:31:29

and assistance with regard to

00:31:31

International Investment law or some

00:31:34

form Dara. I'm it wants

00:31:36

to enhance the capacity of

00:31:38

states and Regional economic integration

00:31:41

organizations in handling International Investment

00:31:45



disputes. So that's the scope

00:31:47

it's still being debated but

00:31:49

it does seem that at

00:31:51

least at a minimum of

00:31:52

the Central Primary objective would

00:31:54

be to facilitate representation of

00:31:57

states in investor-state arbitration defending

00:32:00

against investor claims. The second

00:32:03

question is what will that

00:32:05

representation look like the center

00:32:07

is going to have its

00:32:08

contemplated that it will have

00:32:10

a staff. This will be

00:32:11



as will be a working

00:32:12

organization that has qualified lawyers

00:32:16

who can provide this advice

00:32:18

and articles 6 and 7

00:32:21

of the draft statute bless

00:32:22

this out. So one form

00:32:25

of advice might be before

00:32:27

a dispute arises. So for

00:32:28

example, if a developing country

00:32:30

is considering passing a certain

00:32:32

law a measure that they

00:32:35

might go to the center

00:32:36

and say these are our

00:32:37



obligations under this investment treaty.

00:32:41

Could you advise us as

00:32:42

to whether there might be

00:32:44

explained or what that clean

00:32:45

might look like and I

00:32:47

think that's what that could

00:32:49

be a useful to fill

00:32:50

a Tatian by The Advisory

00:32:51

Center because it will be

00:32:52

gathering best practices of states

00:32:55

around the world and facilitating

00:32:57

a change of information the

00:33:00

second and I think this

00:33:00



is the one that's going

00:33:01

to be more challenging to

00:33:03

implement and where I think

00:33:04

Jay hinted at the at

00:33:06

the resource question is the

00:33:08

actual representation of the state

00:33:11

in the arbitration. So article

00:33:15

7 as it's currently drafted

00:33:18

includes that the advisory Center

00:33:21

may represent. The member that

00:33:24

is the state who is

00:33:25

a member of The Advisory

00:33:27

Center represent the members in

00:33:30



the preceding including in a

00:33:31

hearing possibly in conjunction with

00:33:34

a team of that number.

00:33:36

So that's a question of

00:33:38

resources as anyone who's been

00:33:40

involved and investment arbitration knows

00:33:43

these can be large complex

00:33:45

disputes the require substantial resources

00:33:47

go to bring the claim

00:33:50

and to defend against the

00:33:51

claim and many governments from

00:33:55

the developing world do not

00:33:56

have robust in-house capacity to

00:33:59



do this. So there could

00:34:01

be that there seems to

00:34:02

be a suggestion that there

00:34:03

would be a team building

00:34:04

capacity enhancing function of the

00:34:08

advisory Center. So you can

00:34:10

imagine a team of experts

00:34:11

at defending State investor-state arbitration

00:34:14

at The Advisory Center working

00:34:17

together with the lawyers of

00:34:18

the government involved in the

00:34:21

dispute to The Advocate. But

00:34:24

how many team members will

00:34:26



there be at the advisory

00:34:28

Center? How much will they

00:34:30

be paid how how many

00:34:32

cases can they handle? I'm

00:34:34

sure. What is the following

00:34:37

Washington arbitration week or this

00:34:38

field knows that the number

00:34:40

of investor State arbitration cases

00:34:41

are rising and a team,

00:34:44

for example of 15 at

00:34:45

an advisory Center could not

00:34:47

possibly represent all developing countries

00:34:50

in investor-state arbitration that we

00:34:51



need to be more or

00:34:52

before some sort of compromise.

00:34:54

And how do you rank

00:34:56

which states who are members

00:34:58

of The Advisory temperature get

00:35:00

in terms of representation. These

00:35:02

are some of the rubber

00:35:04

meets the road tough questions

00:35:06

being a go. She ate

00:35:07

it now. The last question

00:35:09

and I understand this has

00:35:11

not been intensely discussed yet

00:35:13

at the working group, but

00:35:14



I think it's a relatively

00:35:15

fun one to think about

00:35:16

is where will the advisory

00:35:18

Center be located? And you

00:35:20

know, I'm going to give

00:35:21

my informal pitch with no

00:35:22

Authority while we're here at

00:35:24

Washington arbitration way to Washington

00:35:25

DC is a great spot,

00:35:26

but I'm sure that will

00:35:28

be hotly debated and the

00:35:29

coming session. So that is

00:35:31

the advisory Center and I

00:35:32



look forward to discussing it

00:35:33

further with any questions. Thanks

00:35:37

for the kitchen sink it

00:35:46

which is how I've been

00:35:47

thinking about the procedural and

00:35:48

cross-cutting issues that have been

00:35:49

under discussion including at the

00:35:51

most recent session. So where

00:35:53

it where is this all

00:35:54

coming from and where is

00:35:55

it going to get? Thank

00:35:57

you, Martin. One more thing

00:35:59

I want to do is

00:35:59



unpack a little bit. So

00:36:00

you can understand why we

00:36:01

have a kitchen sink or

00:36:03

are as I think they

00:36:04

referred to them a pile

00:36:05

of issues for the Secretariat.

00:36:07

I think we can perhaps

00:36:09

put that up a bit

00:36:10

more delicately, but I'm before

00:36:12

I go to my remarks.

00:36:13

I want to Echo the

00:36:14

comments of Margie & Josh

00:36:17

First Bank the organisers the

00:36:19



Washington Appreciation Week for inviting

00:36:22
me and I've had an

00:36:24
opportunity to speak before and

00:36:25
I've attended in the past

00:36:26
and the programs are just

00:36:27
excellent. So I feel very

00:36:28
honored to be able to

00:36:29
participate and then I'm also

00:36:31
going to underscore that I'm

00:36:32
speaking in my personal capacity.

00:36:34
So what I say here

00:36:35
doesn't represent my office the

00:36:37
state department the legal advisors

00:36:39



office or the US government

00:36:41

that said I'm not trying

00:36:42

to say anything super exciting

00:36:43

but just so that if

00:36:44

something does it take to

00:36:46

cure curiosity, it's my personal

00:36:48

few. So I'll go to

00:36:50

the procedural and cross-cutting issues

00:36:52

because of course that is

00:36:53

a bit of a clunky

00:36:54

title, but we don't really

00:36:56

have A better way to

00:36:57

refer to them and I

00:36:58



think I'd like to kind

00:36:59
of go back to how

00:37:00
we got to these issues

00:37:01
early in the working group's

00:37:04
process delegations were encouraged to

00:37:08
submit papers on what types

00:37:10
of Reform should be put

00:37:11
before the working group in

00:37:13
Atlanta how it should organize

00:37:14
itself. And one of the

00:37:16
early papers was actually one

00:37:17
that was put put forward

00:37:18
by Thailand and Thailand proposed

00:37:21



a so-called building blocks of

00:37:23

proteins where they wanted to

00:37:24

make discreet changes that countries

00:37:26

could then start of put

00:37:27

together. I like to think

00:37:28

of it does the Lego

00:37:29

approach, you know, where you

00:37:30

can mix and match what

00:37:32

you what you may want

00:37:34

to do in terms of

00:37:35

Reform assuming that you could

00:37:36

have some kind of matching

00:37:37

and one of the things

00:37:38



that was included in that

00:37:40

proposal was I'm updating me

00:37:42

on to trial arbitration rules

00:37:43

to include proposals on procedural

00:37:46

Innovations such as early dismissal

00:37:48

claims security for costs and

00:37:50

regulating third-party funding later. I'm

00:37:53

in the process of five.

00:37:56

is chili is real Japan

00:37:58

Mexico and Peru submitted a

00:38:00

similar paper that kind of

00:38:01

built on that concept, but

00:38:02

they refer to their approach

00:38:04



as the sweet approach and

00:38:05

what the goal of that

00:38:06

paper was just to illustrate

00:38:07

that they were actually a

00:38:08

lot of common approaches and

00:38:11

existing agreements such as Mexico

00:38:14

was the example because Mexico

00:38:16

I had an agreement with

00:38:17

the European Union that agreements

00:38:19

with the United States and

00:38:20

Canada and they were also

00:38:22

part of the comprehensive and

00:38:23

Progressive Trans-Pacific Partnership or

00:38:26



cptpp and what you could

00:38:28

see is that many of

00:38:30

the procedural issues in those

00:38:32

three agreements were actually fairly

00:38:33

similar the one proposal there

00:38:35

was 22 not so much

00:38:36

amend existing agreements that already

00:38:39

have those types of Provisions,

00:38:41

but to take those and

00:38:42

retrofit earlier first generation of

00:38:46

bilateral investment treaties and agreements

00:38:47

to bring them up to

00:38:49

code so to speak, because

00:38:50



of course, those are the

00:38:51

agreements where we've seen many

00:38:53

of the disputes and they

00:38:54

were the source of many

00:38:55

of the concerns that Had

00:38:57

prompted on Central to to

00:38:59

take this workout. Now those

00:39:03

that stream of procedural work

00:39:05

was supplemented by on proposals

00:39:07

initially put forward by the

00:39:09

then South African deli get

00:39:11

to work in group three,

00:39:12

but then supported by others

00:39:13



that went into what are

00:39:14

now considered the cross-cutting issues.

00:39:16

And these issues picked up

00:39:18

on topics like damages which

00:39:20

were of concern in terms

00:39:21

of the way in which

00:39:22

awards are perceived to be

00:39:24

being issued on Damages concerns

00:39:29

about ensuring that the right

00:39:31

to regulate was clarified and

00:39:33

other other questions about access

00:39:37

to to STS in particular

00:39:41

was the role of local

00:39:42



local remedy for these friends

00:39:45

came together last September 2022

00:39:49

and the working group's 43rd

00:39:52

session and that's when the

00:39:54

Secretariat have been originally tasked

00:39:55

with a bathing. The initial

00:39:57

procedural rules that have been

00:39:58

looking at and then as

00:40:00

Jace said the list began

00:40:03

to accumulate every countries begin

00:40:05

to say well if you're

00:40:06

going to update this look

00:40:07

at this, but said that

00:40:07



and that process is what

00:40:10

led us to the paper

00:40:11

that we were looking at

00:40:13

this past fall. Now, the

00:40:15

other thing that had happened

00:40:16

in the interim was that

00:40:18

exit had completed its rules

00:40:20

amendment process and so aware

00:40:23

there had been a concern

00:40:24

perhaps for years ago about

00:40:27

treaties not our or rules

00:40:29

not sufficiently being structured so

00:40:35

that they addressed procedural concerns.

00:40:37



We now have the extra

00:40:39

drills worship adopted many of

00:40:40

the types of procedural reforms

00:40:43

that are being considered an

00:40:44

answer, in particular a clarifying

00:40:47

that early dismissal claims addressing

00:40:49

security for costs regulating third-party

00:40:51

funding and what have you

00:40:52

so so that's why we

00:40:54

got there now and in

00:40:55

the way The paper was

00:40:57

presented there was a group

00:40:57

of three categories and she

00:40:59



mentioned these but I think

00:41:00

the three categories are not

00:41:03

equal in terms of I

00:41:04

think the controversy and attention

00:41:07

that they that they may

00:41:08

get the first category was

00:41:12

as they mentioned conditions on

00:41:14

claims and that category included

00:41:17

some of what we might

00:41:18

think of as traditional gateways

00:41:21

to claim such as a

00:41:23

statue of limitations potentially some

00:41:26

kind of a waiver requirement.

00:41:28



But also some other ones

00:41:30

that we don't typically see

00:41:31

in that space which would

00:41:32

be denial of benefits exhaustion

00:41:34

of local remedies and Provisions

00:41:38

on the right to regulate

00:41:38

the working group has not

00:41:41

discussed. Most of those there

00:41:42

was some brief discussion of

00:41:44

some of the the relationship

00:41:47

of waiver and other conditions,

00:41:49

but that's been postponed and

00:41:51

that will pick back up

00:41:52



in January the second category

00:41:55

wasn't Got it all and

00:41:57

that's it. Primarily the procedural

00:41:58

issues. And that's where we

00:42:00

see the type of overlap

00:42:02

with the reforms that have

00:42:04

been achieved a Texan as

00:42:07

well as other common some

00:42:09

of the common proposals that

00:42:10

were flagged in the paper.

00:42:11

That was done by a

00:42:12

chili is real Japan Mexico

00:42:15

and Peru. And in that

00:42:16



context those are probably the

00:42:19

furthest along because we had

00:42:21

because the working group had

00:42:22

already been looking at questions

00:42:24

of early dismissal security for

00:42:26

costs their party funding but

00:42:28

there's still a lot to

00:42:29

be done in the in

00:42:30

that space and one question

00:42:32

are is how much of

00:42:34

those Provisions need to be

00:42:36

treated language and how much

00:42:37

of them might actually be

00:42:38



more appropriately an addendum or

00:42:41

special chapter of the uncitral

00:42:43

rules that would apply to

00:42:44

investor-state dispute cases similar to

00:42:48

the transparency rules. And so

00:42:49

that is something that the

00:42:50

working group is also going

00:42:51

to be taking a look

00:42:53

at now. The one topic

00:42:54

that we did spend quite

00:42:55

a Time on and the

00:42:58

paper just developed presented created

00:43:01

quite a lively debate was

00:43:04



the topic of Damages and

00:43:05

I think that topic is

00:43:06

a good illustration of some

00:43:07

of the tensions that are

00:43:08

going on with these topics

00:43:10

because one issue there is

00:43:12

the word the scope of

00:43:14

the working group's mandate. There

00:43:16

are some delegations who see

00:43:19

the working group's mandate as

00:43:21

very clearly focused on procedural

00:43:24

aspects of isds. So one

00:43:27

of the shorthand ways that

00:43:28



you can think about it

00:43:29

as if you're familiar with

00:43:31

say us agreements, there's a

00:43:33

section A and A section

00:43:35

B section B topics are

00:43:37

the type of thing that

00:43:37

with it working group 3

00:43:39

could do maybe some categories

00:43:40

maybe not but but generally

00:43:43

such an a off the

00:43:45

outside the Mandate there are

00:43:47

others though who interpret the

00:43:48

language and see that the

00:43:49



that the working group has

00:43:51

been given a broad mandate

00:43:52

and that it's not necessarily

00:43:54

limited to Central issues and

00:43:57

the way that the chair

00:43:58

of the working group has

00:43:59

sort of tried to to

00:44:01

square that circle is to

00:44:03

say we can have procedural

00:44:05

approaches to resolve some of

00:44:07

these substances concerns what that

00:44:09

actually means we'll have to

00:44:10

see but that's alright. That's

00:44:11



our mantra for it for

00:44:13

over how we how we

00:44:14

go forward and I just

00:44:16

want to find very briefly

00:44:17

on the damages issue that

00:44:18

that was one where there

00:44:20

was a fairly clear divide

00:44:21

in the working group that

00:44:22

there were delegations that did

00:44:24

not believe that it was

00:44:26

an appropriate topic to consider

00:44:30

and others who thought it

00:44:31

was essential to consider and

00:44:33



I know we've talked about

00:44:34

the geopolitical aspect and how

00:44:37

are not going to talk

00:44:38

about it, but I think

00:44:39

damages is actually an interesting

00:44:40

topic because I think there

00:44:42

is There there was an

00:44:45

apparent divide. I would say

00:44:47

in terms of developing and

00:44:51

developed countries, but it was

00:44:52

also very mixed in terms

00:44:53

of how what what countries

00:44:55

experience was with is dies.

00:44:57



And I think that's probably

00:44:58

the more distinguishing factor and

00:45:02

I think that's a key

00:45:02

factor in as a trial

00:45:04

is although there are certain

00:45:06

Regional groupings. It's really the

00:45:08

experience that countries are bringing

00:45:10

a delegations are bringing to

00:45:12

the table on this. So

00:45:14

I'm the damages the way

00:45:15

forward was not to bash

00:45:18

heads necessarily but to agree

00:45:20

to have a conversation and

00:45:22



see what could happen out

00:45:23
of that and I think

00:45:24
that probably helps move the

00:45:28
working group forward, but it

00:45:29
doesn't necessarily mean that any

00:45:31
particular approach to dama Justice

00:45:33
on the table right now

00:45:34
or even that anything can

00:45:36
be done on Damages because

00:45:38
of this is a complicated

00:45:39
topic and we'll have to

00:45:40
find a way forward that

00:45:43
Not get into the substance

00:45:46



of aspects in terms of

00:45:47

the actual compensation standard and

00:45:51

are there procedural techniques or

00:45:53

procedural Provisions that weekend approaches

00:45:56

that week that the working

00:45:56

group can consider that can

00:45:58

help coordinate that Gordon damage

00:46:00

is often some of that

00:46:01

may be better guidance on

00:46:03

how to calculate damages. But

00:46:06

again, these are topics that

00:46:07

still need to be decided.

00:46:08

Thank you. Thanks very much

00:46:11



Karen. I think I'd like

00:46:13
to just start off our

00:46:15
discussion by posing a couple

00:46:16
of follow-up questions about some

00:46:17
of these individual topics and

00:46:19
then we'll also throw it

00:46:20
out to the to the

00:46:22
floor for questions as well

00:46:23
because I think there's a

00:46:24
lot to discuss here. I

00:46:26
had one question for March

00:46:28
release on the mechanism. My

00:46:30
understanding is the currently the

00:46:32



discussion is sort of separating

00:46:34

kind of function questions from

00:46:36

the Forum questions right now

00:46:37

will will think later about

00:46:39

what this is how it's

00:46:40

going to operationalize. Let's talk

00:46:42

about what My question is

00:46:45

does that mean that we've

00:46:46

essentially set aside entirely the

00:46:48

discussion of whether this will

00:46:50

come into existence at all.

00:46:51

Is it is that now

00:46:52

just a done deal and

00:46:53



that we're going to have

00:46:54

something or is there still

00:46:56

a weather discussion happening at

00:46:58

all? Well, thank you. So

00:47:00

first of all, there's no

00:47:02

decision taken on if we're

00:47:05

going to have an appointment

00:47:06

so that it that it

00:47:09

happened being decided. So if

00:47:11

the same for the multilateral

00:47:12

investment course, so and will

00:47:16

address the issues under discussion

00:47:19

that is pretty much how

00:47:21



it will function and what

00:47:23

will be the scope but

00:47:24

then of course there's the

00:47:25

other question on on the

00:47:27

form that there have been

00:47:30

some discussions on. But there's

00:47:32

no decision either on whether

00:47:36

that did the best way

00:47:38

will be to have an

00:47:39

outstanding appellate body or if

00:47:43

A roaster could work for

00:47:45

4 put in place an

00:47:46

appeal mechanism. And of course,

00:47:48



there's a huge difference whether

00:47:50

we're going to happen because

00:47:52

we will need a secretary

00:47:53

will need the info. Who

00:47:56

is confirmed that money and

00:47:59

then even if we could

00:48:04

say that perhaps that wouldn't

00:48:05

be relieved we put in

00:48:11

a shift that coherent stink

00:48:14

buy completed because they will

00:48:16

be different members of the

00:48:20

tribunal then there's some that

00:48:23

are you and I was

00:48:24



saying, I mean, there's no

00:48:25

position to get here more

00:48:29

easily to the current system

00:48:31

because it could be administrated

00:48:32

by the current institutions such

00:48:35

as it stays or the

00:48:37

PCA or others. It does

00:48:41

seem like follow the money

00:48:42

is always an interesting question

00:48:43

because because you can think

00:48:46

ideally about how you design

00:48:47

an appellate mechanism or you

00:48:49

can think about how am

00:48:49



I going to pay for

00:48:50

it? And that might lead

00:48:51

you into I think there's

00:48:53

a question. Just a repeat

00:49:06

for the benefit of those

00:49:07

who aren't in the room.

00:49:08

The question was what's the

00:49:11

discussion in terms of the

00:49:12

The Binding nature of the

00:49:13

decisions for her future cases,

00:49:16

then I don't recall. I

00:49:18

don't know if Karen will

00:49:21

recall if there had been

00:49:23



a discussion on that but

00:49:24

I would say that part

00:49:25

of the advantage of having

00:49:26

and a pair of Brittany.

00:49:30

You will be that's. I

00:49:31

will be as a president

00:49:35

or for the other cases,

00:49:37

so but I don't know

00:49:38

just If I can just

00:49:41

jump in real quick, I'm

00:49:42

there hasn't been a final

00:49:44

decision on president, but that's

00:49:46

an excellent question because it

00:49:48



begs because it begs a

00:49:49

separate question. Why have an

00:49:51

appellate if it doesn't have

00:49:52

president but that said president

00:49:55

brings with it some some

00:49:57

potential risks and and and

00:49:58

downsize and one of the

00:50:00

things that I think the

00:50:02

working group has not really

00:50:04

grabbed a whip and a

00:50:05

sort of trying to I

00:50:06

think put his head in

00:50:07

the sand on are these

00:50:09



potential spillover effects because you'll

00:50:13

have a couple scenarios one

00:50:14

is State and State be

00:50:16

our parties to the Appellate

00:50:18

body and they agree that

00:50:19

they will abide by the

00:50:21

by an appellate review mechanisms

00:50:22

decision great if it's consistent

00:50:25

with what they agreed but

00:50:27

what if it's not or

00:50:28

what if it's different than

00:50:28

what one of them has

00:50:30

been saying for a long

00:50:31



time. Now the other thing

00:50:32

that we're also very familiar

00:50:34

with and in the investment

00:50:36

contact is many treaties now

00:50:38

have identical language that they

00:50:40

have picked up from other

00:50:42

treaties. Now if your state

00:50:44

C and you're not part

00:50:46

of the Appellate review body,

00:50:47

but your language has been

00:50:49

interpreted. What does that say?

00:50:51

What does that mean about

00:50:53

the interpretation of your treaty

00:50:54



some some reactions have just

00:50:57

been well, just enjoy nor

00:50:59

do I figure out figure

00:51:00

it out on your own

00:51:01

but it but it's really

00:51:03

not that simple because I'm

00:51:04

appellate review mechanism will be

00:51:07

expected to have some greater

00:51:09

Authority than stay another arbitration

00:51:12

tribunal or the US are

00:51:14

on claims Tribunal. And even

00:51:16

the icj which by its

00:51:18

statute says the decision is

00:51:19



only binding on the parties

00:51:21

with respect to the particular

00:51:23

dispute. So we do have

00:51:24

to think about what possible

00:51:27

guardrails are out there if

00:51:29

we're going to go forward

00:51:30

on this and I think

00:51:30

this is one of the

00:51:31

issues that could be a

00:51:34

sticking point in the discussion

00:51:36

as we as we've done

00:51:38

thoroughly Margie did a great

00:51:39

job officers laying out how

00:51:41



this will operate but but

00:51:42

there is still this larger

00:51:43

question of how does it

00:51:44

operate in the context of

00:51:46

what we have now. If

00:51:50

I'm at one commented that

00:51:52

I question the comments is

00:51:53

one of the most common

00:51:54

questions from those who are

00:51:56

not familiar with arbitration is

00:51:58

is their repeal and the

00:52:00

answer has always been fairly

00:52:01

easy. No, but in some

00:52:03



cases there's there's these other

00:52:05

mechanisms and one of those

00:52:06

in exit cases of norment

00:52:08

and you mentioned Margie the

00:52:09

the the interplay they're obviously

00:52:11

there has been increasing enrollment

00:52:13

temps in recent years to

00:52:16

what extent do you think

00:52:17

dissatisfaction with exit annulment is

00:52:20

driving the conversation for the

00:52:22

Appellate mechanism. That is the

00:52:26

key issue because actually ever

00:52:29

and I mention it ever

00:52:31



seen the interpretation so the

00:52:32

lack of career and his

00:52:33

lack of predictability of those

00:52:37

decisions are the ones that

00:52:38

are actually drive in all

00:52:40

these discussions and I think

00:52:42

that's why many of the

00:52:44

countries that are participating armoire

00:52:47

opened on the idea. Javier

00:52:50

Aquino and even if it's

00:52:53

not then I'll review I

00:52:55

said because daddy also have

00:52:57

implications on the cost and

00:52:59



leader direction of the One

00:53:06

question on maybe picking up

00:53:08

on this on this Earth

00:53:09

the interplay with exid. Can

00:53:11

you looted to the fact

00:53:12

that of course the discussion

00:53:13

on the procedural and cross-cutting

00:53:14

issues is coming on the

00:53:17

heels of exits on reform

00:53:18

of its rules and I

00:53:20

noted that the discussion paper

00:53:21

said it was taking into

00:53:23

account the recently amended exit.

00:53:24



Rules. What do we see?

00:53:27

Is that interplay going forward?

00:53:28

I mean I've suggested that

00:53:30

maybe some of the discuss

00:53:30

some of the issues that

00:53:31

were being discussed my move

00:53:33

off the table or or

00:53:35

move into a different space.

00:53:36

Are there other ways in

00:53:38

which the exit rules are

00:53:39

coming into play in the

00:53:40

discount in the discussion. Margie

00:53:43

may have a different view

00:53:44



but I mean, I think

00:53:45

it's primarily in the in

00:53:47

the Control process are the

00:53:48

installation rules on the

00:53:50

question now is how do

00:53:52

you would it make sense

00:53:53

to have treaty Provisions that

00:53:56

could would override or duplicate

00:53:58

or what-have-you? Do the exit

00:54:00

rules or might it be

00:54:01

better to have the uncontrolled

00:54:04

rules being And the same

00:54:06

sort of parallel or provide

00:54:08



the same types of protections

00:54:09

so that you don't have

00:54:10

I don't have a forum

00:54:11

shopping. But I mean that

00:54:13

the states are confident that

00:54:15

they are saying the same

00:54:16

process in the two major

00:54:17

rules that are that are

00:54:18

being that are used in

00:54:21

these cases, but I think

00:54:22

that's the primary way. There

00:54:25

may also be discussions. There

00:54:27

may be some delegations who

00:54:28



thought they fixed the girls

00:54:30

went too far. It didn't

00:54:32

go far enough and one

00:54:33

question will be is that

00:54:35

a space for treaty language

00:54:37

versus arbitration rules, but we're

00:54:39

really still at a fairly

00:54:40

preliminary stage on that aspect.

00:54:42

So I think it's the

00:54:44

watch the space. I know

00:54:46

if I'm a jumping so

00:54:48

I know that the audience

00:54:51

we have to make dinner

00:54:53



and Martina perfect. So if

00:54:55

they want to jump in

00:54:56

after me, so I know

00:55:01

I I agree we do

00:55:02

currants so we need to

00:55:03

differentiate and it was raised

00:55:05

in the last meeting that

00:55:06

there was a risk using

00:55:09

into the language for those

00:55:11

rules that are procedural rules

00:55:13

is a Westie party because

00:55:15

then you if you apply

00:55:17

it to all and a

00:55:18



BLT three languages to apply

00:55:20
it to Old 3DS as

00:55:22
well. So it's not to

00:55:23
deter future 3 days, but

00:55:25
also to the stock of

00:55:27
tree is that you are

00:55:28
so so in that case

00:55:32
that can be accomplished with

00:55:34
the new exit rules because

00:55:36
you have you know, the

00:55:38
tree is the Dallas Provisions

00:55:40
that made complete in cases

00:55:42
where it says it will

00:55:43



fly so A personal opinion

00:55:46
too Daddy. I will be

00:55:48
with those type of rose

00:55:49
to put it in an

00:55:50
honest. It's all rules like

00:55:53
an Annex to the arbitration

00:55:56
rules that would apply if

00:55:58
an investor shoes d a

00:56:01
y rules for the proceedings.

00:56:03
So in that case they

00:56:05
will also be behind by

00:56:08
that Onyx that will apply

00:56:09
to all yes. Yes, and

00:56:11



then you have all these

00:56:12

beautiful rules that were working

00:56:13

on. So I'm happy to

00:56:20

open up the floor to

00:56:22

questions. If we have any

00:56:23

weed. We have one question

00:56:24

in the chat comments asking

00:56:27

on the subject of the

00:56:28

Appellate mechanism. If there's a

00:56:30

conflict with the fundamental concept

00:56:32

of party autonomy in arbitration

00:56:34

one aspect of which is

00:56:36

arbitrator selection. I am so

00:56:47



pretty particular with the multilateral

00:56:53

investment court because we are

00:56:58

so you go to shoes,

00:57:02

you know, the arbitrator's but

00:57:06

you tell me what you

00:57:07

have in your normal procedure

00:57:08

is nobody really choose their

00:57:11

the arbitrator speakers in excess

00:57:14

so it would be so

00:57:16

the sensor that was appointed

00:57:18

and then you know when

00:57:20

you have it all and

00:57:22

then it will be a

00:57:24



tribunal of the local course.

00:57:26

So actually you don't have

00:57:27

the right to choose the

00:57:30

second. They are interviewing also

00:57:32

acknowledge that that already exist.

00:57:39

My apologies day because I

00:57:43

I didn't see your your

00:57:44

hand raised and so there

00:57:45

are probably a number of

00:57:46

these issues. But you want

00:57:47

to jump in on you

00:57:47

should have just interrupted us,

00:57:48

please don't hesitate. Just wanted

00:57:52



to touch up on the

00:57:53

last question about this selection

00:57:56

of the arbitrator's decision makers

00:57:58

that we are facing we're

00:57:59

currently preparing the next papers

00:58:01

for the standing my cousin

00:58:02

and you and one of

00:58:04

the issues that we face

00:58:05

is actually the jurisdiction of

00:58:07

the standing that cuz I

00:58:08

would especially if it's established

00:58:10

as a standing appointment to

00:58:13

share cases coming from arbitral

00:58:16



tribunals are the parties need

00:58:21

to consent to the abuse

00:58:23

mechanism. So this consent to

00:58:26

appear is just one issue

00:58:27

and the idea is that

00:58:29

this I think three levels

00:58:31

of consent consent to arbitrations

00:58:34

in Biaggi's in a case

00:58:35

where an industrious have a

00:58:37

clean. So the states have

00:58:39

already expressed their concern to

00:58:41

Desmet measures. And then when

00:58:43

we create a standing there

00:58:45



has to be a consent

00:58:47

by the state to find

00:58:48

themselves to the jurisdiction of

00:58:50

the tribunal or the standing

00:58:52

like to hear those cases

00:58:53

and there I think there

00:58:55

has to be some sort

00:58:56

of a mechanism to capture

00:58:58

the consent of the investors

00:58:59

when they come in if

00:59:00

there isn't a pen so

00:59:02

not only about the selection

00:59:04

of Europe Cheddar's but there's

00:59:05



a consent issue about how

00:59:08

these will be binding on

00:59:09

your on the investors is

00:59:11

another issue that we are

00:59:12

faced and this is something

00:59:13

that we don't have a

00:59:14

real clear solution to at

00:59:16

this stage. And that's just

00:59:18

one thing. Just going back

00:59:20

to the geopolitics, I think.

00:59:24

Ancient the experience of the

00:59:26

member states are different with

00:59:27

regard to us. Yes, and

00:59:29



I think that's kind of

00:59:30

the dividing back to her

00:59:31

rather than in developed or

00:59:32

developing countries now in Jeep

00:59:35

repairs and I just sent

00:59:36

the paper we've been asked

00:59:38

to categorize different states depending

00:59:41

on developing LDC. Is it

00:59:44

difficult to see whether the

00:59:47

developing countries in the developed

00:59:48

countries have different perspectives? I

00:59:50

think they have kind of

00:59:51

did it really dependent on

00:59:54



Case by case? And one

00:59:56

of the other aspects is

00:59:57

what kind of Reform they

00:59:58

see as the best solution

01:00:00

for the response is also

01:00:01

behind their engines of what

01:00:04

the priority of the reform

01:00:06

should be. So I don't

01:00:08

think it's the geopolitics but

01:00:09

there's a lot of different

01:00:10

interests in the back that

01:00:11

is, to defy the groups

01:00:14

and States into different groups

01:00:15



as one of the reform

01:00:17

Elementary. I would just add

01:00:25

on that. Last note. Thanks

01:00:26

Jay. I think that's that's

01:00:27

quite right and you could

01:00:29

think even in terms of

01:00:30

again Washington. What is the

01:00:33

politics of investor-state arbitration in

01:00:35

the United States are quite

01:00:37

interesting and unsettled. It's a

01:00:40

space where it in some

01:00:42

ways the opposite ends of

01:00:43

the political Spectrum have both

01:00:45



expressed views contrary to investor-state

01:00:47

arbitration for different reasons one

01:00:50

side saying it's potentially infringing

01:00:52

on sovereignty and other side

01:00:54

saying it potentially infringing on

01:00:55

the ability to regulate environmental

01:00:57

in labor issues. So even

01:00:59

within a developed country here

01:01:02

in the United States, if

01:01:03

not clear how the politics

01:01:05

fit on all these issues

01:01:07

and I think therefore as

01:01:09

Jay said trying to categorize

01:01:11



broadly developing present developed countries

01:01:13

is not that clean benefit

01:01:15

and probably has Karen said

01:01:17

the better way to think

01:01:18

about it, although it's the

01:01:20

idiosyncratic is what is the

01:01:21

particular experience of those? Investor-state

01:01:24

arbitration because it's should not

01:01:27

be a coincidence that when

01:01:28

states have faced very significant

01:01:30

claims, but based on their

01:01:32

own governmental measures. They sometimes

01:01:34

then have a little bit

01:01:36



of a resistance. You can

01:01:37

see this with Australian Philip

01:01:39

Morris case. I bought fall

01:01:40

in Germany and others and

01:01:42

so it's better to focus

01:01:43

individually on those circumstances and

01:01:45

it's hard to think. He's

01:01:47

brought categorizations. Some questions here

01:01:52

in the room. I'll take

01:01:53

the one in the middle.

01:02:20

What station? That's a great

01:02:31

question. So the question just

01:02:32

for those online is how

01:02:34



will the Battery Center be

01:02:36

cost-effective by enabling these potential

01:02:39

teams of representation for developing

01:02:41

States and probably the best

01:02:43

way to think about the

01:02:44

answers to think about the

01:02:46

alternative. So if a developing

01:02:48

country faces a significant investor

01:02:50

State arbitration claim what it

01:02:52

what are the options right

01:02:52

now right. Now the options

01:02:55

are try to put together

01:02:57

the right team of government

01:02:58



lawyers to defend the country

01:03:00

and or retain outside counsel

01:03:02

and although and in some

01:03:05

cases that the rates are

01:03:06

not the same as they

01:03:07

would be in other circumstances

01:03:08

that can be expensive and

01:03:10

throwing away. The alternative is

01:03:11

the advisory Center might be

01:03:13

able to provide a more

01:03:14

cost-effective. You know, it would

01:03:17

naturally think about it as

01:03:18

pro bono become a public

01:03:19



defender type role in representing

01:03:23

States in a more cost-effective

01:03:24

way now, it's going to

01:03:26

be complicated because where does

01:03:27

it what is a financing

01:03:28

for the center in the

01:03:30

Lee's there come from part

01:03:33

of the idea is that

01:03:34

it comes from the members

01:03:35

who join the sector paying

01:03:37

a fee so there need

01:03:39

to be some calibration of

01:03:40

of how that funding is

01:03:41



going to work. But I

01:03:41

do think the premises it's

01:03:43

cheaper than the alternative is

01:03:45

the idea right now. If

01:03:48

I could just jump into

01:03:49

I mean the question that

01:03:50

you asked is really kind

01:03:51

of at the heart of

01:03:52

some of the discussions on

01:03:53

the advisory Center because there

01:03:54

is a sunset on the

01:03:56

one hand there is probably

01:03:58

a high demand for legal

01:03:59



representation. But that is the

01:04:01

most resource-intensive and therefore probably

01:04:03

the least likely to provide

01:04:05

the broadest type of assistance.

01:04:08

So a couple things are

01:04:09

being considered in the context

01:04:10

of the of the other

01:04:11

services that the advisory said

01:04:13

it would provide would be

01:04:14

capacity-building people tend to think

01:04:16

of their loss of capacity-building

01:04:17

content. Does this does this

01:04:19

but there are there other

01:04:21



types of capacity-building that that

01:04:22

might be maybe more more

01:04:24

carefully harnessed in an advisory

01:04:26

Center and one of them

01:04:27

is to sort of replicate

01:04:29

a forum where States could

01:04:30

come say, they'll be state-led

01:04:32

state-driven State participants. And you

01:04:35

know as we were alluding

01:04:36

to their some states to

01:04:37

have quite a bit of

01:04:38

experience with is dies and

01:04:40

it's the gamut, you know

01:04:41



from the US and Canada

01:04:42

to Panama Margie. Margie is

01:04:45

more of an expert on

01:04:47

it that I am sir.

01:04:47

Hit the stage, but you

01:04:51

know that they can share

01:04:52

their experiences on the types

01:04:54

of nuts and bolts things

01:04:55

that go to what what

01:04:56

Josh was was mentioning. How

01:04:58

do you set up a

01:04:59

team? How do you manage

01:05:00

outside counsel? How do you

01:05:02



you know, what sort of

01:05:03

work on these types of

01:05:04

things that that wouldn't want

01:05:06

to State his first face

01:05:07

by face of the case

01:05:08

can be quite daunting but

01:05:10

might be very efficiently information

01:05:14

might be professionally relayed to

01:05:16

the state in this type

01:05:16

of contact. So there's nothing

01:05:18

outside the box a little

01:05:19

bit in terms of how

01:05:20

we might approach this. And

01:05:22



one other comment on that

01:05:23

is that developing countries that

01:05:26

have recent experience defending against

01:05:28

the best first aid arbitration

01:05:29

are already doing this to

01:05:31

good effect. They're looking for

01:05:32

outside counsel to help them

01:05:34

build their own capacity so

01:05:35

that they are better equipped

01:05:36

to defend themselves in future

01:05:38

cases, which is certainly a

01:05:39

prudent in a good approach

01:05:41

and this is meant to

01:05:42



compliment that in the one

01:05:43

final piece, which I think

01:05:45

is an is an easy

01:05:47

thing. That's a visor Central

01:05:48

would do for all countries

01:05:50

is a center for information

01:05:52

sharing of best practices. And

01:05:54

I think that that's certainly

01:05:56

is going to enable synergies

01:05:57

and make these defenses more

01:05:59

cost-effective. Jose Antonio the advisor

01:06:06

Center perhaps Margie and uncaring

01:06:10

could further comment. How much

01:06:13



of the discussion is being

01:06:15

centered on the knowledge that

01:06:19

that has been gained already

01:06:21

by by state representatives and

01:06:25

I say this because one

01:06:27

of the things that that

01:06:28

that I finally in our

01:06:29

in our practices that it

01:06:32

is very private counsel driven

01:06:35

and and the Indy advisory

01:06:38

Center discussions will do I

01:06:40

have not being there during

01:06:42

this trial this car since

01:06:44



I was there before many

01:06:47

years when when when the

01:06:48

discussions were not in on

01:06:49

Central between what one of

01:06:52

the elements that I find

01:06:53

of of great importance is

01:06:55

the experience of States and

01:06:58

how much input or our

01:07:01

state's Additives and those that

01:07:03

have managed dispute even being

01:07:05

a council to to the

01:07:07

district will be able to

01:07:09

to input into the sexual.

01:07:11



That's that's question. Number 12

01:07:13

is is there any sense

01:07:17

and I say this knowing

01:07:20

that that might be difficult

01:07:22

question or or in this

01:07:23

context. Is there a is

01:07:25

there any sense of whether

01:07:27

there's greater support for the

01:07:28

Appellate mechanism than for the

01:07:32

stunning court or the other

01:07:34

way around and and and

01:07:37

and the last one is

01:07:39

you have a there are

01:07:46



there any questions as to

01:07:50

the legitimacy of of creating

01:07:54

a but either know or

01:07:56

especially standing court? Are there

01:08:00

any legitimacy issues considering the

01:08:03

fact that there are currently

01:08:06

of various investor-state arbitration awards

01:08:11

that European states are refusing

01:08:14

to enforce and that are

01:08:15

now part of international law.

01:08:18

How many are there any

01:08:20

questions in terms of well,

01:08:22

you're proposing a standing court

01:08:25



and and yet you're not

01:08:26

abiding with the rule of

01:08:27

law with international law and

01:08:30

in a feel for you

01:08:31

not to answer the last

01:08:32

two questions. I know that

01:08:33

you're not that is 7

01:08:35

1/2. I don't think I

01:08:36

see everybody back in the

01:08:41

way from the microphone. So

01:08:44

I'm that b r e

01:08:45

Center so we have to

01:08:46

understand that it is built

01:08:48



on to Eller. So one

01:08:50

pillar is the capacity building

01:08:52

the training before room that

01:08:54

I was referring to so

01:08:57

the whole idea of that

01:08:58

exchange of experience and I

01:09:00

think that it is what

01:09:02

you are referring. So those

01:09:03

days that have more experience

01:09:04

and ideas cases so they

01:09:06

could change with others that

01:09:07

are still starting with the

01:09:11

first cases and they're not

01:09:13



that experienced in the process.

01:09:16

So and then the second

01:09:17

pillar is the legal representation.

01:09:20

There's been a lot of

01:09:22

discussion on what members have

01:09:24

the right to what so

01:09:27

because there will be different

01:09:28

kind of levels of members

01:09:31

and I need to have

01:09:33

him be mentioned here. But

01:09:35

also there have been discussions

01:09:37

on whether it's a nice

01:09:40

cool getting to a lazy

01:09:42



first. Capacity building and the

01:09:46

exchange and that that is

01:09:47

really how do you say

01:09:54

how do you categorize that

01:09:57

discussion is very unlikely, but

01:10:08

yes. That will be your

01:10:09

name. Only two people are

01:10:11

so for the appellant versus

01:10:13

investment chords. Of course, we

01:10:16

can I mean countries have

01:10:18

not decided on any of

01:10:20

those but you can tell

01:10:22

that a list of what

01:10:24



time this is also my

01:10:26

personal opinion that there's more

01:10:28

openness for the ptolemaic and

01:10:31

I kind of been having

01:10:33

a whole investment court that

01:10:35

would change everything because then

01:10:38

that we will definitely will

01:10:40

have a different A different

01:10:44

system. Yeah, thanks for the

01:10:48

question. I don't I'm going

01:10:50

to need to add on

01:10:50

the advisory Center. I think

01:10:51

I agree with what would

01:10:53



Margie said? And again, I

01:10:54

think the Forum and and

01:10:56

other types of capacity-building and

01:10:58

and also ensuring that when

01:10:59

we were talking about the

01:11:00

legal representation that it's very

01:11:02

clear that the state should

01:11:03

be driving the case and

01:11:05

not having the advisory Center

01:11:07

telling the state what to

01:11:09

do or should have stepping

01:11:10

into the shoes because of

01:11:11

course ultimately it's the state

01:11:13



that is in charge of

01:11:13

the the interpretation of its

01:11:15

agreements and in charge of

01:11:17

a b defense and so

01:11:19

that part of it is

01:11:20

building that capacity to be

01:11:21

able to to execute that

01:11:22

regardless of whether it's a

01:11:24

private Law Firm that you

01:11:25

were supervising or the advisory

01:11:27

Center on the two questions

01:11:28

that you asked. I'm not

01:11:30

I'm going to use them

01:11:30



to Pivot to a different

01:11:31

point, which I think they're

01:11:33

they're useful to highlight and

01:11:34

that's that you the working

01:11:37

group was successful in bringing

01:11:39

the codes of conduct to

01:11:41

conclusion, but the issues that

01:11:43

face Will will raise some

01:11:45

of the types of questions

01:11:46

that you are that they've

01:11:47

been asked you about legitimacy.

01:11:50

What have you and and

01:11:51

we're going to start to

01:11:52



see I think it may

01:11:53

be harder for delegations to

01:11:55

agree and the question then

01:11:57

going forward will be how

01:11:59

willing our delegations going to

01:12:02

be to be flexible to

01:12:03

find new Solutions or think

01:12:05

about these problems in a

01:12:06

different way. They do in

01:12:07

terms of the issues that

01:12:11

motivate that you on the

01:12:12

court are they flexible on

01:12:14

achieving those objectives in a

01:12:16



different way or is it

01:12:16

the court and that's it

01:12:18

because the ability the flexibility

01:12:21

will probably determine ultimate success

01:12:23

uncitral is usually successful when

01:12:27

it focuses on the solving

01:12:29

problems through the objectives and

01:12:31

not so much on trying

01:12:32

to adopt a particular approach

01:12:33

and whether this project going

01:12:37

forward can following that is

01:12:39

going to be an open

01:12:39

question. I think the types

01:12:41



of questions is your flag

01:12:42

in there are ones that

01:12:42

are going to be tricky

01:12:44

ones for the for the

01:12:45

delegations to address another thought

01:12:49

on that is that rib

01:12:52

pain away regardless or if

01:12:53

it doesn't succeed in the

01:12:55

working group, there is still

01:12:57

the EU and recent investment

01:12:59

treaties having investment courts, and

01:13:01

it's going to be interesting

01:13:01

to see that experience and

01:13:05



I think it'll be an

01:13:06

interesting day when investor-state arbitration

01:13:08

tribunal sites to a decision

01:13:10

of an EU investment court

01:13:12

and you know, I'm not

01:13:14

going to be binding precedent

01:13:15

but there will be an

01:13:16

analogous case. And so I

01:13:18

think in some ways we're

01:13:20

seeing this fragmentation, it's not

01:13:22

necessarily something to be concerned

01:13:24

about its it it's a

01:13:26

it's an experiment to see

01:13:28



what is the most appropriate

01:13:30

way to resolve these disputes

01:13:32

and it's going to be

01:13:34

hard to find agreement on

01:13:35

one hole claw solution and

01:13:37

we might have to live

01:13:38

in this era of fragmentation

01:13:40

to see which one prevails

01:13:46

Oh, maybe I'll take the

01:13:48

program. So to bounce off

01:13:49

of that pose a final

01:13:52

question, which is given the

01:13:56

point they make sure and

01:13:57



then some of the issues

01:13:58
to come or is it

01:13:59
going to be harder to

01:14:00
agree on and then then

01:14:01
the issues that have already

01:14:02
been tackled which is a

01:14:03
standard approach to these kind

01:14:05
of things yesterday described the

01:14:12
working group three processes you

01:14:14
five years and no end

01:14:15
in sight. When will we

01:14:17
know when this is done?

01:14:18
2026? No, I didn't need

01:14:24



to jump on your question.

01:14:26

But I think the working

01:14:27

group now has has a

01:14:29

plan that shows the where

01:14:31

we end has additional resources

01:14:34

that address is 22026. I

01:14:36

think after that it's hard

01:14:40

to say will it be

01:14:41

success or failure you on

01:14:42

the one hand those who

01:14:44

are familiar with negotiations know

01:14:45

that you need? Deadline to

01:14:46

move forward and then the

01:14:47



deadline passes and you keep

01:14:48

going whether or not though

01:14:50

on Central the commission would

01:14:53

decide to do that. I

01:14:55

think we'll really have to

01:14:56

have to see I think

01:14:57

that is entirely open question

01:14:59

and to put one of

01:15:00

my former colleagues anyone who

01:15:02

tells you they know the

01:15:02

answer doesn't know what they're

01:15:03

talking about. So anyone else

01:15:07

want offer any protections question

01:15:13



that thing is that there's

01:15:15
different type of solutions. So

01:15:17
because I mean it was

01:15:19
finished and it could be

01:15:21
implemented because it could be

01:15:23
implemented through its Junior 3DS,

01:15:26
even if we don't end

01:15:27
with a with the lateral

01:15:29
instrument adopting the code, I

01:15:32
mean Dakota repair itself, so

01:15:35
and there's others solutions that

01:15:37
are going to both. See

01:15:39
how idea to also have

01:15:41



it to all these. You

01:15:44

know, I'm from now to

01:15:45

2026 so we'll see I

01:15:47

mean, but at least I

01:15:48

think there will be some

01:15:49

products that we can say

01:15:50

at least we have that

01:15:51

he we don't answer. You

01:15:53

know, what I would do

01:15:54

is rinse am I see

01:15:56

the J wanted to join

01:15:57

in on this phone. So

01:16:00

just to come to you

01:16:02



to the working group, I

01:16:03

think what to do when

01:16:04

you think that's kind of

01:16:05

remaining is demoted arrangement. And

01:16:07

then that kind of puts

01:16:08

a picture and then of

01:16:09

course training 2020 to 2026

01:16:12

is an ideal go for

01:16:14

the course. We have a

01:16:14

little bit of time to

01:16:15

implement that further. I think

01:16:18

one of the other questions

01:16:19

is whether it was a

01:16:20



child is the right forum

01:16:21

for discussing all of the

01:16:22

implantation issues. And of course

01:16:24

if there are Samba formula

01:16:25

that's been discussed by the

01:16:26

working group presented to the

01:16:28

commission and it might be

01:16:30

that some of the member

01:16:30

states might be wishing to

01:16:32

do that further if among

01:16:34

those member states that wish

01:16:35

to actually put those reforms

01:16:36

but I think that's what

01:16:38



Josh was kind of in

01:16:39

the sense that it doesn't

01:16:40

have to be before. I

01:16:43

just wanted to go back

01:16:45

to one of the issues

01:16:46

that can I think the

01:16:48

procedural element of the procedure

01:16:50

is something that the working

01:16:53

group is able to real

01:16:54

know. It's probably likely that

01:16:57

the government would be able

01:16:58

to be on some of

01:16:59

the solutions. They're not putting

01:17:01



that into the other truck.

01:17:03

We love to but the

01:17:06

problem there is This agreement

01:17:08

by the were working with

01:17:09

the government said that they

01:17:11

didn't go sit in his

01:17:12

report is enacted into the

01:17:14

rules, which is then up

01:17:16

to the choice of investors.

01:17:18

So it kind of loses

01:17:20

the effect that reforms that

01:17:23

the working group has kind

01:17:25

of put together. By putting

01:17:29



it in the divorce and

01:17:29

I think that's why one

01:17:30

of the proposal from the

01:17:32

secretary is that it may

01:17:33

be better placed in the

01:17:35

3D language better than in

01:17:36

those chopped Asian road, which

01:17:38

is an optional. That's 80%

01:17:42

about to install rules about

01:17:43

20% So the applicability of

01:17:45

those might not have the

01:17:47

impact that we wish woodworking

01:17:49

Google sister. Thank you, Jay.

01:17:54



And thank you for kind

01:17:55

of Life promise to to

01:17:56

give the floor back to

01:17:57

Jose Antonio for an announcement

01:17:59

before we wrap up. But

01:18:02

even before he makes his

01:18:03

announcement, I just want to

01:18:04

say thank you very much

01:18:05

to all four of our

01:18:06

panelists for real a fascinating

01:18:08

discussion. Thank you Maureen and

01:18:15

thank you for for indulging

01:18:16

me and also indulging the

01:18:20



Washington arbitration week. I I

01:18:23
just just as a as

01:18:24
a concluding statement. I I

01:18:28
think that I'll struggle pay

01:18:29
has has done an incredible

01:18:31
job in terms of negotiations.

01:18:34
It is so complex to

01:18:36
have so many so many

01:18:37
allegations in the room and

01:18:39
as as as as many

01:18:40
of you were saying they

01:18:42
are all ready products in

01:18:43
terms of the code of

01:18:45



conduct and so on and

01:18:46

so forth, of course, there's

01:18:48

so many issues and and

01:18:49

and many of them challenging

01:18:50

in any event the announcement

01:18:53

that that that we would

01:18:54

like to make today, you

01:18:55

know given that we're being

01:18:57

seen here and online is

01:19:00

that the world arbitration update

01:19:02

which is the sister event

01:19:04

of Washington arbitration week is

01:19:06

is launching its dates for

01:19:09



2020 for and and for

01:19:13

those of you that my

01:19:14

Not know what it is.

01:19:15

The world of attrition update

01:19:17

is a similar form to

01:19:19

the Washington arbitration week, but

01:19:21

the happened but that happens

01:19:22

every year in May and

01:19:26

I need similar to to

01:19:29

this one in the sense

01:19:31

that it's a 66725 day

01:19:35

event full of arbitration panel's

01:19:38

International commercial arbitration investor-state arbitration

01:19:42



and public international law panels

01:19:46

with two missions. One is

01:19:48

to update the International Community

01:19:50

with the on topics of

01:19:53

investment arbitration International commercial arbitration

01:19:55

and public international law update.

01:19:58

Why because the in today's

01:19:59

world it is impossible to

01:20:01

read 180 decisions in one

01:20:04

year and I are more

01:20:05

similar ICC and etcetera. So

01:20:09

we try to do a

01:20:11

little bit of over a

01:20:13



format. That will allow people

01:20:15

to to update themselves. And

01:20:17

the other mission is to

01:20:18

decentralize International arbitration because there

01:20:21

are many many sites and

01:20:23

places where International arbitration is

01:20:25

happening in Latin America and

01:20:27

Africa in the US that

01:20:29

might not be the washing

01:20:30

killer or the other New

01:20:32

York or the parish for

01:20:33

the London. So that's another

01:20:34

mission that we have and

01:20:36



this year. We're going to

01:20:37

start on May 15th through

01:20:39

24 and I were going

01:20:41

to start in China and

01:20:42

we have we know that

01:20:44

there's a there's a delegation

01:20:46

and many people from from

01:20:48

many countries coming to Washington

01:20:50

Jason week including China. So

01:20:52

we're related by the fact

01:20:55

that the that Washington arbitration.

01:20:57

Wicca is yes for the

01:20:59

International Community of Washington, but

01:21:02



also for the whole world.

01:21:04

Thank you, and that will

01:21:05

hope that you can join

01:21:06

us also in the world

01:21:07

over traction update. Thank you.

01:21:08

Wow to thanks.