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Global Geopolitics and International Energy Arbitration: a Report from the 4th Annual ITA-IEL-ICC Joint Conference

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The 4th Annual Joint Conference on International Energy Arbitration, co-hosted by the Institute for Transnational Arbitration (ITA), the Institute for Energy Law (IEL), and the International Court of Arbitration of the International Chamber of Commerce (ICC), took place on January 12-13, 2017, in Houston, Texas. Under the guidance of conference co-chairs Suzana Blades (ConocoPhillips, Houston), Juliet Blanch (independent arbitrator, London) and Jim Tancula (Mayer Brown, Chicago), panelists analyzed the many challenges and opportunities at the intersection of global geopolitics and international energy arbitration. The conference provided a unique platform for senior arbitrators and leading practitioners from energy companies, law firms, and arbitral institutions to debate a wide range of topics, including the fate of international trade treaties like the Trans-Pacific Partnership (TPP), alternative and renewable sources of energy, the call for specialized procedures for energy arbitration, and global geopolitics.

Energy Disputes in a Depressed Price Environment

A major theme permeating the conference was the impact of the low oil price environment on international energy disputes. A panel of corporate general counsel, moderated by Suzana Blades and comprising Hewitt Pate (Chevron Corporation, San Ramon), Marcia E. Backus (Occidental Petroleum, Houston), Janet Langford Carrig (ConocoPhillips, Houston), and Alan Crain (recently retired from Baker Hughes, Houston), shared their experiences addressing the challenges of a low price environment, including heightened cost sensitivities and an increasing number of disputes. Panelists highlighted the cascading effects of a material reduction in corporate legal department budgets which necessitated the adoption of cost-reducing measures (like modern e-discovery technologies to more efficiently identify and classify documents) as well as the cooperation by external counsel in reducing rates. In the panelists' view, while there was a material increase in litigation and arbitration in the current price environment, no one type of dispute pre-dominated.

Panelists agreed that one issue requiring increased persistence and innovation in the depressed price environment is enforcement of arbitral awards. Marcia Backus, Mark Lowes (KBR, Houston), and Michael Kim (Kobre & Kim, New York/Seoul/London) shared 'war stories' on enforcement of major international arbitral awards and judgments. Backus gave an overview of efforts to obtain payment by Ecuador on an approximately US$ 1.1 billion award in favor of Occidental Petroleum. She highlighted the value of creative post-award settlement structuring, including exchanging discounts on the award amount for prompt cash payment and waiver of

potential state immunities and other claims against Oxy in Ecuador. Lowes, for his part, focused on KBR's long-running efforts to enforce an ICC award against Pemex. Despite annulment of the award by the courts at the seat of arbitration (Mexico), the U.S. federal appeals court for the Second Circuit recently upheld a lower court's decision to recognize and enforce that annulled award in the U.S. Kim, whose practice includes a focus on enforcement, shared his game plan and strategy for obtaining payment. Where sophisticated commercial parties have hidden assets, Kim recommended identifying "points of consumption" (e.g., an award debtor's home) which can then open avenues of investigation into hard-to-find networks of shell structures supporting that consumption (e.g., offshore companies paying for the home). He also counseled award creditors to educate themselves on alternatives to judicial freezing of assets, including freezing by police in certain jurisdictions. In certain jurisdictions, these alternatives may be instant or, in any event, significantly faster.

Enhancing Efficiency and Reducing Costs in Energy Disputes

Continuing with the theme of assessing the implications of the low price environment, conference participants and attendees also evaluated whether specialized arbitrators, forums, and procedures in energy arbitration could enhance efficiency and reduce costs. A panel moderated by Tomas Vail (White & Case, London) and including Professor Peter Cameron (University of Dundee), Ginny Castelan (King & Spalding, Houston), Lauren Friedman (Kirkland & Ellis, New York), and Aaron Rofkahr (Chevron Upstream, San Ramon) considered the use of specialized fora for energy disputes, lists identifying experienced energy arbitrators, and bespoke procedural rules, like time limits on rendering awards. The majority of panelists and audience members expressed skepticism about the utility of specialized institutions and rules, voicing concern that such mechanisms might not be suitable for the diverse range of disputes arising in the energy sector. To the extent that energy arbitration users desired reform – for instance, time limits on rendering arbitral awards or restrictions on document production – the panelists cautioned that such measures should build in flexibility to allow users and arbitrators to take account of the breadth and potential complexity of energy disputes.

The issue of enhancing efficiency and reducing costs also arose before another panel on managing the arbitral tribunal and process, moderated by James Tancula and comprising of Rocío Digón (ICC International Court of Arbitration, SICANA, Inc., New York), Mark Kantor (independent arbitrator, Washington), Clyde W. Lea (Reed Smith, Houston), and Dietmar W. Prager (Debevoise & Plimpton, New York). These panelists also indicated a general preference against imposing procedural limitations in an arbitration clause (e.g., limiting document production or reliance on experts) so that counsel and arbitrators would have the discretion to implement appropriate procedures on a case-by-case basis. Rocío Digón also gave an overview of the ICC's upcoming Expedited Procedure Rules for cases under US$ 2 million, which aimed to give arbitrators and parties the tools necessary to reduce time and costs.

Taken together, the panelists and conference attendees' preferences for preserving arbitral tribunals' procedural flexibility suggest that the onus is on arbitrators and counsel to actively manage the arbitral process. This responsibility includes, where appropriate, considering and implementing cost- and time-saving procedural devices (such as those in the new ICC Expedited Procedure Rules) suitable to the dispute at hand.

International Trade Treaties 'In the Pipeline'

Conference participants also devoted extensive attention to the fate of a number of international trade treaties 'in the pipeline,' including the TPP and the Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada. Laurence Shore (Herbert Smith Freehills, New York) delivered the conference's "Year in Review" in which he analyzed the top 2016 developments in international energy arbitration. Shore identified the rulings and trends that will, in his view, have the most important influence on energy arbitration in 2017 and beyond. Shore contrasted the waning influence of the TPP, which was likely to be stymied by the incoming U.S. administration, with the CETA, which is going forward.

Some conference attendees viewed the push-back to the TPP, and to investor-state arbitration in treaties like the CETA, as part of a broader trend of states rejecting or seeking to circumscribe arbitration of foreign direct investment disputes. Countries like Ecuador and Bolivia have terminated a significant number of their bilateral investment treaties (BITs), and others—particularly in Latin America—have denounced the ICSID Convention. In a luncheon interview conducted by Professor Catherine A. Rogers (Penn State Law), Professor William (Rusty) W. Park (Boston University School of Law) opined that international arbitration was nevertheless in its "Golden Age," and was not on the wane despite often-vociferous opposition and criticism. He viewed the contemporary push-back to investor-state arbitration as a part of a cyclical trend, and saw its predecessor in the 19th century "Calvo Doctrine" whereby Latin American countries, in particular, eschewed arbitration of international investment disputes. Other conference attendees and participants shared his optimism that, despite mounting opposition to investor-state arbitration and, indeed, to international trade treaties like the NAFTA, there remained a meaningful role for arbitration—both in the resolution of international trade disputes and in enhancing the rule of law.

Renewable Energy: Incentives and Arbitration

Another important topic receiving extensive attention at the conference was renewable energy. Shore, in his "Year in Review," opined that 2016 was striking for the significant number of high-stakes energy disputes in that area, including a large number concerning nuclear and solar projects in Europe. Their outcomes will impact and define a state's right to regulate in a number of sensitive areas, including renewable energy and climate change. Shore focused on *Charanne and Construction Investments v. Spain*, the first decision on the merits in a stream of disputes by solar investors against Spain, Italy, and the Czech Republic. For Shore, the partial victory for the state could set an important precedent with respect to the scope of fair and equitable treatment (FET) obligations and, in particular, whether general legislation aimed at promoting solar investment could generate legitimate expectations of stability for foreign investors that would be enforceable under the FET standard.

More broadly, these solar and nuclear cases demonstrate how international arbitration is intimately intertwined with geopolitics and states' efforts to encourage renewable sources of energy. In the conference's keynote presentation, Sarah Ladislaw (Center for Strategic & International Studies, Washington) discussed oil price forecasts and the influence of the geopolitical environment on the energy industry, as well as the impact of alternative or renewable energy sources on the oil and gas industry in the short and long terms. Ladislaw's wide-ranging presentation also addressed the effect of the Paris Agreement on climate change. In her view, China and India—despite their extensive emissions—were nevertheless keen to play a leading role in developing renewable production technologies, like nuclear and solar energy, as well as in developing clean energy consumption methods, like electric cars. The large number of pending nuclear and solar

arbitrations testify to arbitration's continued role at the cutting edge of these efforts.

Conclusion

Issues at the forefront of international relations and domestic policy—openness to international trade, encouragement of renewable energy sources, cyber security—are all intertwined with the energy sector. As in years past, the conference tasked leading arbitration practitioners from a diverse range of professional backgrounds to debate technologies, doctrines, and techniques to address these and other challenges. Developments proposed for the energy sector and debated at the Houston conference can be expected to be at the cutting edge of the development of international dispute settlement.

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