EVENT SUMMARY: THIRD ANNUAL HOUSTON CONFERENCE ON OIL AND GAS INVESTMENT ARBITRATION

September 16, 2016
Hosted by the Environment, Energy and Natural Resources Center at the University of Houston Law Center

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EVENT SUMMARY

On September 16, 2016 the University of Houston Law Center, in collaboration with the Washburn University of Law and the International Law Institute (ILI), brought together leading legal experts from around the world to discuss hot topics regarding oil and gas investments in an evolving global market.[1] The panels covered subjects such as: the impact of the Trans-Pacific Partnership (TPP) on oil and gas investment arbitrations, how annulment standards applied in the oil and gas standard, applicable law in environmental counterclaims, and renewable energy and investment arbitration. The event's keynote speaker Dr. Diego García Carrión, the Attorney General of Ecuador, presented his book, *A Critical View of Investment Arbitration Based on Ecuadorian Experience*. The book illustrates the Ecuadorian perspective of the investment dispute settlement system by focusing on the main criticisms and observations made by Ecuador's legal defense, international practice, and academic works; using examples and references to cases that Ecuador has managed; and providing proposals to improve the investment dispute settlement system.

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1. A full video recording of the event may be found at https://washburnlaw.adobeconnect.com/_a996192762/p6hb0zmr29j/?launcher=false&fcsContent=true&pbMode=normal.

SPECIAL PRESENTATION: CONSIDERATIONS FOR NATURAL GAS INVESTMENTS IN AN EVOLVING GLOBAL MARKET

Speaker
Greg W. Hopper[2]

Summary Description: *An overview of the long-term outlook for natural gas and the commercial considerations that will shape future market transactions.*

The theme of Greg Hopper's discussion was that growing markets bring new commercial uncertainties and contractual challenges. First, Mr. Hopper noted that with the discovery of unconventional natural gas, the amount of North American gas had hit new levels. He added that this has created a new role for American companies because they are now exporting more, reversing their pipeline systems, and adding distribution systems to accommodate more exports and less imports. Mr. Hopper highlighted that North America sits on approximately 475 trillion cubic feet of natural gas below $3.30.[3]

Mr. Hopper then discussed how this growth in supply correlates with the growing global demand for natural gas. He emphasized the importance of the power market, and the usage of natural gas for electric generation in other countries. He noted that the price of natural gas in North America is now becoming a determining factor of the price of electricity in other markets around the globe.

While the United States has a growing market for gas, Mr. Hopper noted several problems that the United States could face. Mr. Hopper used the northeast pipelines delay in the Marcellus Shale as an example of the problems the United

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2. Vice President and Head of Americas Gas & Power Consulting, Wood Mackenzie.

3. For updated statistics, see Myra P. Saefong, *EIA Reports Decline of 243 Billion Cubic Feet in U.S. Natural-Gas Supplies*, MARKETWATCH (Jan. 19, 2017, 10:38 AM), http://www.marketwatch.com/story/eia-reports-decline-of-243-billion-cubic-feet-in-us-natural-gas-supplies-2017-01-19; *U.S. Natural Gas Jumps 3% to More Than 2-Week High*, INVESTING.COM (Mar. 6, 2017, 8:45 AM), https://www.investing.com/news/commodities-news/u.s.-natural-gas-jumps-3-to-more-than-2-week-high-464025 [http://perma.cc/DFV8-WA7F].

States could face. He also mentioned that the EPA's issuance of new methane regulations could affect prices in the contracts. Mr. Hopper further added that battles for new production will have a huge bearing on price.

Despite the potential issues in the United States, Mr. Hopper stressed that gas and renewables are the future for the world. He used the role of gas in the power generation market to exemplify how gas continues to take market share from coal even as renewables increase to penetrate the market. Given the novelty of renewables, however, it is still uncertain how both will coexist in the market.

To exemplify the growth, he mentioned that there is nearly 7.5 billion cubic feet per day being added across the border to facilitate U.S. imports.[4] However, he did note that there is a tremendous amount of uncertainty regarding the value of assets related to natural gas, and consequently, there is a tremendous amount of uncertainty for the stakeholders as well. Despite the uncertainty, Mr. Hopper highlighted the Mexican market as one of the promising markets for natural gas.

PANEL 1: THE TRANS-PACIFIC PARTNERSHIP – IMPACT ON INVESTMENT ARBITRATIONS IN THE OIL AND GAS SECTOR

Panelists
Tracy Hester[5]
Teddy Baldwin[6]

Moderator
Lorena Perez-McGill[7]

Summary Description: *The panelists addressed the ongoing debates about the Trans-Pacific Partnership and how it impacts oil and gas investments in the Pacific region, particularly focusing on the implications of the TPP investment in ongoing oil and gas investments in the region as well as future prospects.*

4. John Krohn et al., *Growth in Domestic Natural Gas Production Leads to Development of LNG Export Terminals*, U.S. ENERGY INFO. ADMIN., (Mar. 4, 2016), https://www.eia.gov/todayinenergy/detail.php?id=25232 [http://perma.cc/A34Q-PNAZ].

5. Professor, University of Houston Law Center.

6. Edward G. "Teddy" Baldwin, Partner, Baker & Mackenzie.

7. Professor, University of Houston Law Center.

Professor Tracy Hester's discussion was about the connection between oil and gas investor-state arbitration, NAFTA and the TPP. In his view, the most salient comment regarding the TPP was from the U.S. Trade Representative's office stating it was a "renegotiation of NAFTA" and "an opportunity to address NAFTA's shortcomings."[8] He discussed NAFTA and how side agreements became necessary because many felt that NAFTA lacked the strength to protect labor and the environment.

Professor Hester mentioned that the enforcement of environmental laws is an issue that colors oil and gas arbitration. With this he segued into the discussion of the enforcement of environmental laws under the North American Agreement on Environmental Cooperation (NAAEC), a side treaty of NAFTA that deals with the environment. The NAAEC has mechanisms to hold nations belonging to NAFTA accountable for not following their own environmental laws. He described the Submittal of Environmental Matters Process, which allows any citizen of any of the three nations of NAFTA to submit a claim to the Commission of Environmental Cooperation (CEC) alleging that one of the nations has failed to enforce its own laws. According to Professor Hester, this makes the NAAEC a unique treaty in that it empowers private citizens to bring a claim and "shine the light of truth" on a nation's improper conduct. Professor Hester argued that the TPP is weaker than the NAAEC because there is no factual record or submittal processes to hold a party accountable for a violation of their environmental law. He observed that the TPP's domestic transparent process is weak because it does not lay out the process for managing or enforcing the claims. He then tied it back to oil and gas investment by highlighting that the TPP lacked any mention of climate change. He concluded that in the event the TPP is ratified, it is imperative to ensure there is harmonization between the TPP and the NAAEC.

Teddy Baldwin elaborated on how the TPP could affect oil

8. OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2017 TRADE POLICY AGENDA AND 2016 ANNUAL REPORT 1, 96 (2017), https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/AnnualReport2017.pdf [http://perma.cc/D5JV-3BU7].

and gas investments subject to either NAFTA or bilateral investment treaties (BITs). In the event a party is not protected by a BIT, Mr. Baldwin noted that the TPP would cover the investment. Mr. Baldwin stated that there are three ways the TPP could affect oil and gas investments. First, one must have an investment in order to bring an investment claim. The definition of "investment" is set out in the treaty. Second, the TPP allows states to determine what rights oil and gas producers have. The parties' law dictates, in large part or completely, what is an investment and therefore what rights are applicable to oil and gas producers. Third, investor expectations will also be affected by the TPP. Investors expect fair and equitable treatment for their investments. That is what is established in agreements such as NAFTA and CAFTA; however, the TPP diminishes the right to be treated fairly because it removes the expectation factor of fair and equitable treatment. According to Mr. Baldwin, a consequence of this is that there could be an increase in expropriations.

PANEL 2: ANNULMENT IN THE OIL AND GAS SECTOR

Panelists
Freddy Sourgens[9]
Alvaro Galindo[10]

Moderator
Silvia Marchili[11]

Summary Description: *The panelists addressed how the annulment standards of the International Centre for the Settlement of Investment Disputes (ICSID) are applied in the oil and gas sector. They provided insight in how to apply the manifest excess of power annulment standard to questions typically faced by investment arbitrations, namely whether typical oil development project structures are at odds with legal rules constraining tribunal jurisdiction and questions of applicable law in the oil and gas sector.*

9. Associate Professor of Law, Washburn University School of Law; Associate Director of the Washburn Law Oil and Gas Law Center.

10. International Counsel, Dechert LLP.

11. Partner, King & Spalding.

Alvaro Galindo provided the Ecuadorian perspective of annulment by talking about the case of *Occidental v. Ecuador* (*Oxy II*).[12] He used this case to illustrate how the manifest excess of power annulment standard can be applied. This was a case that arose out of a 1999 participation contract between Occidental (Oxy) and Petroecuador for exploration and exploitation of hydrocarbons. The arbitration award found Ecuador could terminate the participation contract because Oxy had transferred rights to a third party without government approval and Oxy had violated terms of the Participation Contract and the Ecuadorian Hydrocarbons Law. He proceeded to explain how the arbitrator found a breach of fair and equitable treatment under the U.S.-Ecuador bilateral treaty and Oxy was awarded the largest amount awarded by the ICSID at that time. Ecuador applied for annulment on several grounds, however the committee only accepted the manifest excess of power standard in assuming jurisdiction under Article 52(1) of the ICSID Convention.[13] He quoted the Committee in saying that, "[b]y compensating a protected investor for an investment which is beneficially owned by a non-protected investor, the Tribunal has illicitly expanded the scope of its jurisdiction and has acted with an excess of powers."[14] He further highlighted that the Committee stated the excess of powers was manifested when the Tribunal assumed jurisdiction over an investment, which at the time was not part of the OEPC treaty.

Professor Freddy Sourgens began his presentation by highlighting the difference between investor-state arbitration and commercial arbitration, emphasizing that investor-state arbitration originated from public international law based on treaties that would provide the bedrock of due process and fundamental rights for the parties involved. In contemplating the value of investor-state arbitration and the measures needed to protect the process, Professor Sourgens addressed the issue of

12. Occidental Petroleum Corp. v. Republic of Ecuador, ICSID Case No. ARB/06/11, Decision on Annulment of the Award (Oct. 5, 2012) [hereinafter *Oxy II*].

13. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 52(1), Oct. 14, 1966, 575 U.N.T.S. 159.

14. *Oxy II*, Decision on Annulment, ¶ 266.

setting aside an award by discussing the recent *Yukos* award[15] set aside in the Dutch courts. In this case, the key issue was whether or not Article 26, the dispute resolution clause, of the Energy Charter Treaty (ECT) applied to Russia since Russia had signed the treaty but had not ratified it.[16] The arbitration tribunal, seated at the Hague, ruled that nothing in the Russian Constitution, Code, or Regulations prohibited the tribunal from applying Article 45, the provisional application provision. Therefore, the tribunal concluded that the ECT provided it with proper jurisdiction over the claim.[17] The tribunal awarded $65 billion to the claimant, which was reduced by 25 percent to $50 billion as a consequence of the contributory fault of Yukos in violating Russian tax law.[18] The Russian Federation approached the Dutch courts to set aside this award, one of the largest in international arbitration history. The Dutch courts applied the Dutch Arbitration Act to justify their jurisdiction over the set aside proceedings.[19] The Hague District Court found that the ECT applied provisionally to a signatory state only in regard to the provisions that do not violate the laws of the signatory state. Because Russia had never ratified the ECT, the Dutch court ruled that Article 45 did not comply with Russian law and neither did Article 26. Professor Sourgens emphasized that the Dutch ruling tossed aside the opinions of the leading international law experts and supported its reasoning using definitions included in the Oxford dictionary to interpret the words in Article 45. As a consequence, the Dutch courts reversed the largest award in international arbitration history.[20] Professor Sourgens concluded by pondering whether the manifest excess of power annulment standard fulfilled its

15. Yukos Universal Ltd. (Isle of Man) v. Russian Federation, PCA Case No. 2005-04/AA227, Final Award (July 18, 2014).

16. Annex 1 to the Final Act of the European Energy Charter Conference art. 26, Dec. 17, 1994, 1998 O.J. (L 69) 26 (EC) [hereinafter Energy Charter Treaty].

17. *Yukos*, PCA Case No. 2005-04/AA227, Interim Award on Jurisdiction and Admissibility, ¶ 301 (Nov. 30, 2009).

18. *Yukos*, Final Award, at annex C.

19. Dutch Arbitration Act, Arts. 4:1020-76, RV.

20. Rb. Rechtbank Den Haag, 20 april 2016, RvdW 2016, C/09/477160 (Russian Federation/Yukos Universal Ltd.), http://jure.nl/ECLI:NL:RBDHA:2016:4230 [http://perma.cc/8USX-MT4K].

purpose by protecting the integrity of the investor-state arbitration process. He connected this thought to the *Yukos* case: Was the value and integrity of the investor-state arbitration process maintained when a Dutch court, through its understanding of Russian Constitutional law and usage of the Oxford Dictionary, interpreted the Energy Charter Treaty in a way that resulted in the set aside of a $50 billion award given by an arbitral tribunal who applied the reasoning and opinions of world-renown international law experts such as Judge Stephen Schwebel and Michael Reisman?

KEYNOTE: A CRITICAL VIEW OF INVESTMENT ARBITRATION BASED ON ECUADORIAN EXPERIENCE: AN ANALYSIS OF THE INVESTOR-STATE DISPUTE SETTLEMENT, ITS FLAWS, CONTRACTIONS AND PROPOSALS FOR A CHANGE

Keynote Speaker
Dr. Diego García Carrión[21]

Summary Description: *Dr. Diego García Carrión discussed his new book,* A Critical View of Investment Arbitration Based on Ecuadorian Experience. *He highlighted several seminole arbitration cases that illustrate the Ecuadorian frustration with the investor-state dispute settlement system. He then proposed solutions for these issues.*

Dr. Diego García Carrión presented his new book published in Quito, Ecuador in August 2016.[22] He followed the layout of his book as an outline to his presentation.

Dr. García Carrión began his presentation by exploring the problems he sees in the investor-state dispute resolution process. He noted some issues such as: broad and vague formulation of investment and investor protection standards; nonexistence of clear rules regarding frivolous claims; inconsistent tribunal decisions regarding similar factual and legal points; inequality of the regime as it protects investment

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21. Attorney General of the Republic of Ecuador.

22. DR. DIEGO GARCÍA CARRIÓN, A CRITICAL VIEW OF INVESTMENT ARBITRATION BASED ON ECUADORIAN EXPERIENCE (2016).

above and beyond State interests; imbalance between State obligations and investor rights; and short lists from which to select arbitrators. To shed light on these issues, Dr. García Carrión used Ecuador's experience regarding treaty interpretation, definitions of investment and investor, fair and equitable treatment, expropriation, and national treatment.

First, Dr. García Carrión elaborated on Ecuador's experience with treaty interpretation by discussing the *Perenco* case, which dealt with participation agreements with hydrocarbon exploitation.[23] The *Perenco* case originates from a Production Sharing Agreement between Burlington and Perenco. In determining the issues of jurisdiction and liability, the tribunal ruled that the claimant was correct in asserting that the ordinary meaning of the term "controlled" encompasses direct and indirect control. Ecuador was of the opinion that a company could only benefit from protection under the BIT if the control was direct. It reasoned that in the past when one of the parties decided to extend the benefits of the BIT to indirect control, they did so expressly, which meant that the parties saw a clear distinction between direct and indirect control. Ecuador, in turn, felt that they were liable to a claimant that did not fall under the protection of the control requirements of the BIT. However, the tribunal sided with Perenco's plain meaning interpretation of control to encompass both indirect and direct forms of control.[24]

He then segued into Ecuador's experience with the definition of investment, stating that it is usually broad and open-ended. Arbitration tribunals have great discretion and ability to consider specific circumstances of a case when determining if a transaction at issue is protected as an investment. Neither doctrine nor arbitration decisions have been able to set forth even minimal criteria to use in order to define "investment." Dr. García Carrión did mention the "*Salini* test"[25] set forth in *Salini*

23. Perenco Ecuador Ltd. v. Republic of Ecuador, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability (Sept. 12, 2014).

24. *Id.* ¶ 510.

25. The *Salini* test contains five requirements for an investment to exist: (1) a substantive commitment (capital contributions); (2) a certain duration of performance of the contract; (3) regular revenues and profits; (4) participation in transaction risks; (5)

v. Morrocco that gives some guidance to the definition of "investment." However, the problem remains unresolved. To elaborate on the Ecuadorian perspective, Dr. García Carrión used two cases: *M.C.I. v. Ecuador*[26] and *Chevron II*.[27] In both of these cases, the tribunal noted that the requirements that were taken into account in certain arbitration precedents for purposes of determining the existence of an investment protected by a treaty must be considered as mere examples and not necessarily as elements required for an investment to exist under the BIT.

Dr. García Carrión also mentioned that the investment regime developed through BITs is based on the premise that protection is applicable only to natural or legal persons (investors), who are nationals of a contracting State that performs investments in another contracting State. In the case of natural persons, BITs usually establish the nationality of an individual pursuant to the laws of citizenship and immigration of contracting States. The determination of a legal person is more complex. To tie this into the Ecuadorian experience he reviewed *Murphy III*, a case that discusses the definition of an investor for the purposes of determining whether he or she is a beneficiary of the U.S.-Ecuador BIT's protection. This arbitration was based on the BIT between Ecuador and the United States, where the jurisdiction of an arbitration tribunal is limited to "investment disputes." According to Article (1) of the U.S.-Ecuador BIT, a "company" qualifies as an "investment" if it is incorporated under Ecuador's laws and regulations.[28] Murphy Ecuador was not lawfully an investment in Ecuadorian territory. Therefore it could not be considered an investment in Ecuadorian territory, and its parent company could not file a claim under the U.S.-Ecuador BIT. The arbitral tribunal still

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significant contribution to the Host State's development. Salini Costruttori S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 31, 2001), 42 ILM 609 (2003).

26. M.C.I. Power Grp., L.C. v. Republic of Ecuador, ICSID Case No. ARB/03/06, Award (July 31, 2007).

27. Chevron Corp. v. Republic of Ecuador (II), PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility (Feb 27, 2012) [hereinafter *Chevron II*].

28. Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Ecuador, Aug. 27, 1993, S. TREATY DOC. NO. 103-15.

upheld jurisdiction over the claim and forced Ecuador to continue with the arbitration. Dr. García Carrión noted that it is still to be seen whether or not the award annulment mechanism is sufficient to reverse the decision of a Tribunal without proper jurisdiction of a BIT.

He then touched on the obligations that states have to investors and investments through BITs and International Investment Agreements (IIAs). The most invoked protection standard in investor-state disputes is the fair and equitable treatment standard. In *Oxy II*, the tribunal arrived at the conclusion that this standard requires a framework of legal and business stability. The tribunal concluded that there is an obligation not to alter the legal and business environment in which the investment has been made. Dr. García Carrión noted that since the conclusion is objective, it does not analyze the state environment or the motivations that led the State to act in the manner it did. He further mentioned that several tribunals have included proportionality when discussing fair and equitable treatment. He used *Oxy II* as an example in which Ecuador was penalized for its violation of the fair and equitable treatment standard because the declaration of *caducidad* used to terminate the contract with Oxy was "not a proportionate response in the particular circumstances."[29] In *Chevron II*, the tribunal found that Ecuador had violated the effective means standard set out in Article II(7) of the U.S.-Ecuador BIT.[30] Dr. García Carrión criticized this decision asserting that it gave the arbitral tribunal the power to review, revise, and reverse domestic judgments.

His discussion then turned on the topic of expropriation. There are protections laid out for foreign property and foreign investment. An expropriation implies the State's forcible appropriation of tangible or intangible property that belongs to private parties through administrative or legislative acts. To illustrate the Ecuadorian perspective he commented on the *Oxy II*,[31] *Perenco*,[32] and *Burlington*[33] cases. Dr. García Carrión

29. *Oxy II*, ICSID Case No. ARB/06/11, Award, ¶ 456 (Oct. 5, 2012).

30. *Chevron II*, PCA Case No. 2009-23, Partial Award on the Merits, ¶ 251 (Mar. 20, 2010).

31. *Oxy II*, Award.

disagreed with the tribunal's conclusion in *Oxy II* that Ecuador's termination of the oil company's contracts amounted to an expropriation. He reasoned that the *caducidad* provision, a provision that was accepted by both parties, was a punishment contemplated by the law for an investor's unlawful conduct.

To address national treatment—the objective of clauses to ensure that the host government treats the foreign investors equally with respect to local competitors—Dr. García Carrión turned to the *Oxy I* case. The *Oxy I* tribunal rejected the State's argument that the relevant basis for comparison to determine whether less favorable treatment existed toward the investors was based on the local oil producers and the actors in the oil industry.[34] The tribunal concluded that Ecuador violated the obligation of national treatment related to the application of Value-Added Tax (VAT) to Occidental's oil exports. Dr. García Carrión used *Oxy I* to exemplify that the basis for comparing activities between local and foreign investors is a matter that continues to be controversial.

He concluded his presentation with his criticisms of and proposals for the investor-state dispute resolution system. His first criticism was that there is an inconsistency among decisions issued by arbitral tribunals. In order to resolve this, he proposed the creation of an appellate mechanism by creating a Permanent Court of Investment Arbitration. His second criticism was that the current investor-state arbitration mechanism is limited. In the appointment of arbitrators, the parties assess sympathy or antipathy to cases, parties, and even the lawyers; furthermore, it is inevitable that arbitrators have an interest to be appointed again in future cases, given that there is a close link between law firms and arbitrators. All these factors limit the number of actors who can play a role in investor-state arbitration. His solution to this is to regulate multiple functions and perhaps incorporate restrictions to the

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32. Perenco Ecuador Ltd. v. Republic of Ecuador, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability (Sept. 12, 2014).

33. Burlington Res. Inc. v. Republic of Ecuador, ICSID Case No ARB/08/5, Decision on Jurisdiction (June 2, 2010).

34. Occidental Expl. & Prod. Co. v. Republic of Ecuador, LCIA Case No. UN3467, Final Award (July 1, 2004) [hereinafter *Oxy I*].

parallel exercise of professionals as arbitrators, attorneys, or expert witnesses in Center regulations, IIAs, or through a Global Convention. He also criticized the vague grounds for recusal, citing UNCITRAL and ICSID Convention regulations.[35] He proposed establishing parameters for an arbitrator to publicly refer to a case, its attorneys, or the parties along with rules to regulate the frequent appointment of the same law firm. He proposed a regulation of costs for attorneys' fees and costs in IIAs, a statute of limitations from the events that would give rise to the claim, and providing a detailed description in the IIA of the conducts that imply its violation.

PANEL 3: APPLICABLE LAW IN ENVIRONMENTAL COUNTERCLAIMS

Panelists
David Weiss[36]
Jamie Miller[37]
Julian Cardenas-Garcia[38]

Moderator
Ricardo Colmenter[39]

Summary Description: *The panel addressed the question of applicable law in the context of environmental counterclaims. They touched on potential applicable choices of law rules in the context of investment treaty arbitration counterclaims. It further explored the potential emergence of a transnational law on environmental liability in the investor-state arbitration context and its relationship to traditional international law sources.*

Jamie Miller began the panel discussion by using a chart from Professor Jorge E. Viñuales's book, *Foreign Investment and the Environment in International Law*,[40] to show that the amount of investment awards with an environmental component have increased from one prior to 1990 to twenty-four from the

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35. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *supra* note 13, art. 57.

36. Counsel, King & Spalding.

37. Senior Associate, King & Spalding.

38. Professor, University of Houston Law Center.

39. Director, Entra Consulting.

40. JORGE E. VIÑUALES, FOREIGN INVESTMENT AND THE ENVIRONMENT IN INTERNATIONAL LAW (2012).

years 2000 to 2011,[41] indicating a trend towards including environmental components to the awards. Ms. Miller mentioned two reasons for this. First, the environment is becoming more important to States as is manifested in the regulations and how the States have changed them. Second, there are more environmental references in BITs. She mentions several BITs including the China-Singapore BIT (1986), the U.S.-Honduras BIT (2001), and the Canada-Chile Free Trade Agreement to underline the fact that States have to regulate their environment in a way that is consistent with the BITs. However, one issue she highlighted is that the language does not operate to expand jurisdiction over counterclaims. The treaties do not provide language that would expand the jurisdiction and enable a state to bring environmental counterclaims to arbitration. Hence, not many counterclaims are asserted because there is a definite defense to jurisdiction. Here, Ms. Miller mentioned *Paushok v. Mongolia* as an example for an unsuccessful environmental counterclaim.[42] In this case, a mining claimant brought a claim under the Russian-Mongolian BIT. Mongolia counterclaimed, alleging that the mining company had violated Mongolian environmental law. The tribunal dismissed those claims on lack of jurisdiction, stating that these claims were outside the scope of investment arbitration.[43]

With the mention of lack of jurisdiction and the Mongolia case, David Weiss segued into his discussion. Mr. Weiss mentioned some concerns in applicable law in environmental counterclaims brought under BITs. First, in the absence of express consent from the claimant to have an environmental claim be arbitrated, the respondent will find it difficult to bring it to arbitration because there is no jurisdiction. He used the Peru-U.S. trade promotion agreement to exemplify the narrow scope of arbitration. He then mentioned some concerns regarding environmental counterclaims like finality, complex evidentiary issues, and remedies. With finality, certain issues arise, such as the ability of non-governmental organizations (NGOs) to bring environmental claims, and the ability of the

41. *Id.* at 17-22.
42. Paushok v. Gov't of Mong., Award on Jurisdiction and Liability (Apr. 28, 2011).
43. *Id.* ¶ 696.

host country to bring a parallel claim in domestic courts. The remedies concern raises issues such as what would be a remedy for the impacts, how to address risk of inadequate or excessive relief, and double recovery/inconsistent results. Mr. Weiss supported the position that means other than monetary compensation should be used to remedy these communities.

Professor Julian Cardenas-Garcia brought another perspective to the panel. While Ms. Miller and Mr. Weiss discussed environmental counterclaims solely based on BITs, Professor Cardenas expanded on environmental counterclaims that could be brought under investment contracts, such as oil production sharing agreements, where the claims can be within the scope of the tribunal's jurisdiction. Oil contracts tend to include a standard obligation that the contractor or the operator shall carry out operations following "oil and gas industry practices." Abiding to industry practices is an issue of applicable law, particularly in the cases of accident that may cause pollution or damage to the environment. Therefore, in the event the host country desires to bring an environmental counterclaim, it can bring it under one of these provisions in the contracts. Professor Cardenas used the example of the case *Niko Resources (Bangladesh) Ltd. v. People's Republic of Bangladesh*.[44] There were two blowouts in gas fields operated by Niko in Bangladesh. The Bangladeshi government claimed that *Niko Resources* did not comply with the clause that obliged Niko to respect the "generally accepted standards of international Petroleum industry."[45] Professor Cardenas also mentioned the cases of *Burlington v. Ecuador*[46] and *Perenco v. Ecuador*[47] to expand on this perspective.

44. Niko Res. (Bangladesh) Ltd. v. People's Republic of Bangl., ICSID Case No. ARB/10/11 and ARB/10/18, Decision on Jurisdiction (Aug. 19, 2013).

45. *Id.* ¶ 502.

46. Burlington Res. Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Jurisdiction (June 2, 2010).

47. Perenco Ecuador Ltd. v. Republic of Ecuador, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability (Sept. 12, 2014).

PANEL 4: RENEWABLE ENERGY AND INVESTMENT ARBITRATION

Panelists
Kabir Duggal[48]
Janet Whittaker[49]
Tomasz Hara[50]

Moderator
Ian Laird[51]

Summary Description: *The panel discussed the emergence of the renewable energy industry onto the global scene. They touched on regulatory responses to the renewable energy sector, using Spain and its wind farms as an example of how changes in the regulatory environment have led to significant investor-state arbitration claims.*

Ian Laird started the discussion by noting a shift in investment arbitration cases; while they still focus on energy, there has been a shift to renewable energy. As of September 2016, the amount of power and energy arbitration cases has increased from 17 percent to 35 percent, while the amount of oil and gas mining arbitration cases has decreased from 26 percent to 20 percent. Spain plays a major role with cases involving renewable energy. From January 2011 to September 2016, there have been a total of thirty-two Spanish renewable energy cases: four in 2016, sixteen in 2015, five in 2014, five in 2013, one in 2012, and one in 2011.[52] There are other European cases, for example, in the Czech Republic[53] and Italy.[54] However, the panelists primarily focused on Spain.

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48. Senior Associate, Baker & McKenzie.

49. Partner, Clifford Chance.

50. Associate, Allen & Overy.

51. Partner, Crowell & Moring.

52. For a list of arbitration cases against Spain involving renewable energy, see CARMEN OTERO GARCÍA CASTRILLÓN, CTR. FOR INT'L GOVERNANCE INNOVATION, SPAIN AND INVESTMENT ARBITRATION: THE RENEWABLE ENERGY EXPLOSION 11-14 (2016), https://www.cigionline.org/sites/default/files/documents/ISA%20Paper%20No.17.pdf [http://perma.cc/4UZA-PTBX].

53. *E.g.*, Solar v. Czech, PCA Case No. 2014-01; Natland Inv. Grp. NV v. Czech (registered Aug. 8, 2013).

54. *E.g.*, Belenergia S.A. v. It., ICSID Case No. ARB/15/40; Eskosol S.p.A. v. It., ICSID Case No. Arb 15/50.

Janet Whittaker explained the history of these claims. Beginning in the late 20th century, there has been a growing acceptance of the causal connection between greenhouse gas emissions and climate change/global warming. States entered into commitments to lower this. They determined that renewable energy was the answer to this, although renewables were more expensive than traditional. In light of this and the fact that investors were skeptical to invest because it would not yield a profit, countries started to offer incentives to solve this dilemma regarding renewable energy. She then discussed Spain's special regime where there was a preferential price for electricity that was fed in by plants. She discussed how the government implemented feed-in tariff regime, which basically would set feed-in tariffs at a very high rate for the first 25 years of the plant's production. Afterwards the rate would decrease, but still be beneficial for the lifetime of the project. These two things (25 years and lifetime) sparked a boom in investment in the renewable energy sector. But in 2008, with the dawn of the financial crisis, the government limited the incentives that would be paid to generators, and then limited incentives to all producers, not just new ones. Furthermore, it imposed a cap on the number of installations that could feed into the grid. In 2012, all the preferential tariffs were abolished and a 7 percent tax was implemented.[55] In 2014, the Spanish government made another modification, which replaced the feed-in tariff regime and resulted in a significant decrease in the rate of return for these investors.

Kabir Duggal continued the discussion by discussing how these changes really affected companies. The annual caps, for example, really hurt the investors. Mr. Duggal discussed the case *Charanne B.V. & Construction Investments S.A.R.L. v. the Kingdom of Spain*[56] and the tribunal's rulings on their points

55. For a survey of Spain's recent economic developments and policies, see ORG. FOR ECON. CO-OPERATION & DEV., OECD ECONOMIC SURVEYS: SPAIN 2012 (2012); *see also Europe Slashing Renewable Subsidies*, INST. FOR ENERGY RESOURCES (Apr. 9, 2014)· http://instituteforenergyresearch.org/analysis/europe-slashing-renewable-subsidies-2/ [http://perma.cc/9A9J-TWZQ] (discussing how multiple European governments are "reneging on the generous deals they initially provided" for renewable energy subsidies).

56. Charanne B.V. v. Kingdom of Spain, SCC Arb. No. 062/2012, Final Award (Jan 26, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7162.pdf

regarding whether or not these measures were considered indirect expropriation or a breach of fair and equitable treatment. Mr. Duggal touched on the expropriation point and simplified it by stating, "If you're making 100 bucks one year and the next you're making $5. It really sucks, but an arbitral tribunal is probably still going to tell you that you're making a profit so it's not an expropriation." He added that the tribunal acknowledged that the effect was very severe but not severe enough to be considered an expropriation. He then summarized why the majority in this case said that they did not believe there was a violation of the fair and equitable treatment standard: they wanted a specific promise, and the special regime was not a specific promise.

After Mr. Duggal's discussion of the *Charanne* case, Tomasz Hara discussed what will come about these decisions in the future and laid out three golden rules that states should follow when devising their incentive schemes for renewable investment. First, the State should not make changes that would retroactively reduce subsidies. Second, the State should ensure the budget is flexible to fit the market. Third, the State should ensure the perception of stability. He concluded his part of the panel by stating that renewable energy is intermittent and there is a need for another source of energy. Effectively, there will be a need for gas as well as renewables in the foreseeable future.

CONCLUSION

From the ancient times of the Code of Hammurabi until present day, the world of arbitration continues to evolve and confront systematic issues regarding fairness such as those addressed by Dr. Diego García Carrión in his keynote speech. The presentation of his book, *A Critical View of Investment Arbitration Based on Ecuadorian Experience* illustrates the current concerns of many States facing an increase in the practice of investment arbitration cases. Many support these concerns and criticisms of lack of consistency in the creation of investment arbitration case law are supported. However,

[http://perma.cc/3KUN-S3RD].

investment arbitration is a recent practice that is currently evolving and reshaping the practice of transnational dispute resolution between States and foreign investors. Despite the criticisms presented, it is undeniable that for the moment, arbitration is the preferred method of dispute resolution for long-term investment projects.

The panels provided information and analysis that showed the tug-of-war between States and foreign investors trying to rebalance the transnational legal regime of investment arbitration. The concerns around the TPP and the skepticism of its entry into force has been part of an international debate, led by the public opinion that this system can reduce the control of the States of their power to regulate. The concerns around the multi-billion dollar awards against States were also addressed in the cases of annulments under the ICSID and NY Conventions in the cases of *Occidental v. Ecuador* (*Oxy II*) and *Yukos v. Russia*. A partial annulment in *Oxy II* and a total annulment in *Yukos* have contributed raised alerts for investors and the hopes of States to challenge these decisions.

Additionally, the possibility of States presenting environmental counter-claims is very restricted in cases where jurisdiction is based only on an investment treaty (where there might be some chance for a case of contributory fault in environmental accidents caused by the claimant). However, this possibility can become a repeated practice in cases where jurisdiction is based not only on a treaty but also on an investment contract. As such, oil and gas operators should take into account the obligation to operate according to industry practices, since their violations can be used by the State to support their counter-claims.

Finally, the conference introduced the emerging practice of investment arbitration in the renewable energy sector, particularly, based on the arbitration wave that occurred in Spain after the changes in Spanish law that cut a number of incentives offered to foreign investors to develop renewable energy projects in the Iberian country.

The international arbitration community undergoes this evolution by observing the trends, like the shift in energy claims to more renewable energy claims mentioned in Panel 4. The

Houston Conference on Oil and Gas Investment Arbitration aspires to continue its tradition of hosting a dialogue, between the leading scholars and practitioners in the arbitration field, that focuses on the aforementioned trends, issues, and solutions.