News and Notes from

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11TH ITA-IEL-ICC JOINT CONFERENCE ON INTERNATIONAL ENERGY ARBITRATION IN HOUSTON

Conference Report by Andreina "Andie" Escobar (Vinson & Elkins, Houston)

I. ***"Ethics of Arbitrator Conduct and Challenges"*** (January 19, 2023)

Moderator: Elizabeth J. Dye (Pillsbury Winthrop Shaw Pitman, Houston)

Panelists: Rahul Donde (Lévy Kaufmann-Kohler, Geneva); Kabir Duggal (Arnold & Porter and Columbia Law School, New York); M. Imad Khan (Winston & Strawn, Houston); and Lucy Winnington-Ingram (Reed Smith, London).

Elizabeth J. Dye gave an introduction to the talk and introduced the panelists.

Dr. Kabir Duggal started the discussion by giving an overview of the IBA Guidelines on Conflicts of Interest. He then posed a rhetorical question to the room: "Can someone appoint an arbitrator based on how that person has decided in the past?" To explore this question, Dr. Duggal covered two case studies: 1) *CC/Devas (Mauritius) Ltd., v. Republic of India* and 2) *Urbaser v. Argentina*. Both cases explored the idea of disqualifying an arbitrator based on previously expressed opinions. In both cases, the judges dismissed the respective challenges, determining that an arbitrator's formerly expressed views do not warrant dismissal.

Lucy Winnington-Ingram continued the discussion by covering the duty to disclose. Ms. Winnington-Ingram explained that the duty to disclose arises out of the obligation to be impartial, and sometimes, arbitrators will have to disclose information that is not in the public domain. This, however, can often conflict with an arbitrator's duty of confidentiality.

M. Imad Khan then expanded on the IBA Guidelines on Conflicts of Interest. Mr. Khan first pointed out that both in investor-state and commercial arbitrations, arbitrators are often unsure about what to disclose. There is a constant tension between what is necessary and what is not. When in doubt, as the IBA Guidelines suggest, arbitrators should weigh in favor of disclosing.

Ms. Winnington-Ingram and Mr. Khan continued to share their thoughts on the draft code of conduct. Both went on to talk about *Eiser v. Spain* as an example of a case where not just impartiality, but *perceived* impartiality is important. There, the arbitrator failed to disclose that he was the hired-quantum expert for one of the law firms involved in the arbitration. The law firm hired the arbitrator in nine different arbitrations, one of which was contemporaneous with the arbitration in question. In this case, the challenge was upheld. The arbitrator failed to report this potential conflict, which not only was perceived as a bias, but also as a way of depriving Spain from the opportunity to object to the arbitrator.

The pair also covered *Douala Port Authority v. India*, in which an arbitrator, Thomas Clay, failed to report a close personal relationship with a party's counsel, Emmanuel Gaillard. Thomas Clay sat as an arbitrator for a case in which Mr. Gaillard represented a party. Mr. Clay, however, never disclosed this relationship. Dr. Duggal continued to explain that this relationship was only uncovered after Mr. Clay wrote a eulogy for Mr. Gaillard. In his eulogy, Mr. Clay detailed his close relationship with Mr. Gaillard including the fact that he had often listened to Mr. Gaillard's advice. And with this information, India challenged the award in French courts, claiming that Mr. Clay was not impartial. The Paris Court of Appeals agreed and decided not enforce the award.

Dr. Duggal continued to talk about the complex case presented in *Halliburton v. Chubb*. In short, the arbitrator in *Chubb* failed to disclose his involvement as an arbitrator in two other contemporaneous arbitrations, and Halliburton challenged the arbitrator. The U.K. Supreme Court, however, rejected the challenge since there was little legal overlap between the arbitrations, and the other two arbitrations would end shortly. Moreover, the failure to report did not violate the arbitrator's impartiality.

The roundtable ended with a lively discussion on how much should arbitrators disclose.

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II. "Evolving Doctrines of Excuse in Face of Global Disruption: Panel and Debate" (January 19, 2023)

Moderator: Christina G. Hioureas (Foley Hoag, New York).

Panelists: Naomi Briercliffe (Allen & Overy, London); Trevor Cox (Legal Counsel at SLB, Houston), Carla Ghariban (Jones Day, Los Angeles); and Andrea Orta Gonzalez Sicilia (Ruiz – Silva Abogados, Mexico City)

Meredith Craven gave a short introduction on the presentation, and Christina G. Hioureas introduced the panelists.

Ms. Hioureas began the conversation by asking Naomi Briercliffe about the nature of force majeure clauses in the United Kingdom. Ms. Briercliffe explained that in the United Kingdom, the force majeure clauses depend greatly on the contract, and a party may make such a claim only if the relevant contract explicitly provides for that. In her words, "the Contract is King." Ms. Briercliffe continued to explain that there are no particular circumstances in which a court is more likely to grant a force majeure. Rather, the contract will govern, and courts will follow the language of the contract.

Ms. Hioureas then asked Andrea Orta Gonzalez Sicilia about the nature of force majeure clauses in Mexico. Ms. Orta Gonzalez Sicilia explained that Mexican law takes a different approach; no one is forced to do the impossible and thus, Mexican courts take a less rigid approach. Additionally, under Mexican law, circumstances that could be foreseeable but unavoidable could also qualify as force majeures. Most importantly, courts care about equity, but they will also look at the costs associated with the claims and the causation of impossibility.

After discussing Mexico and the United Kingdom, Ms. Hioureas asked Carla Ghariban to speak on force majeures in the United States. Ms. Ghariban explained that the United Kingdom and the United States deal with force majeure clauses in similar ways. The arbitrator or judge will see the plain language of the contract and will consider there to be a force majeure only if necessary. Ms. Ghariban also discussed the different approach courts have taken to COVID-19 as a force majeure. At the beginning of the pandemic, Californian courts were more inclined to include the pandemic in the definition of a "natural disaster," meaning that the pandemic triggered force majeure. As time went by, the courts became less and less inclined to trigger force majeure as pandemic-related disruptions became foreseeable.

Ms. Hioureas moved on to ask Trevor Cox about what patterns he has seen regarding force majeure clauses throughout the world. He explained that from a client perspective, he has seen a mixed approach to interpreting the clauses. In the United States, courts strictly construe the clauses. In Mexico, courts vary in their way of interpreting clauses. And in the United Kingdom, courts construe clauses slightly broader than those in the United States do.

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Ms. Hioureas then asked the whole panel to share their respective country's approach to contractual excuse. Both Ms. Briercliffe and Ms. Ghariban explained that in their countries, the United Kingdom and the United States, respectively, contractual excuses face a high standard. Ms. Orta Gonzalez Sicilia explained that in Mexico, it depends on local law, and some states do recognize hardship.

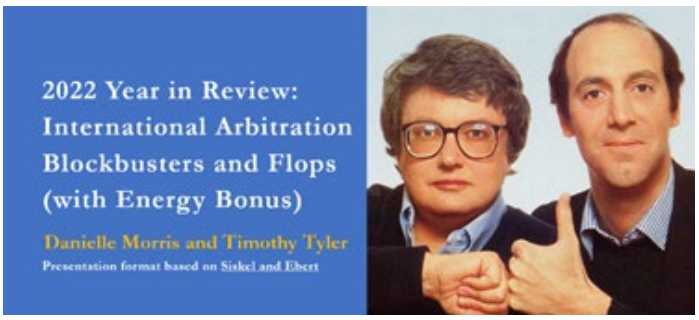
The panel ended with an analysis of the pros and cons of broad versus narrow interpretations of contractual excuse. They disclaimed that the following did not represent their personal opinions. Ms. Ghariban and Ms. Briercliffe explained that a broad interpretation protects the contract and keeps the contract's actual intent. This makes the contract a living document that adapts to unexpected changes. On the other hand, Ms. Cox and Ms. Orta Gonzalez Sicilia explained that a narrow interpretation protects the true intent of the parties. There had to be a meeting of the minds for the contract to be created, and a broad interpretation interrupts this meeting of the minds. If a change would have been anticipated, it should have been added to the contract.

Ultimately, the panel reached the conclusion that parties should start paying more attention to force majeure clauses. If the pandemic taught us one thing, it is that parties should draft and negotiate good force majeure clauses.

III. "2022 Year in Review: International Arbitration Blockbusters and Flops (with Energy Bonus)" (January 20, 2023)

Speakers: Danielle Morris (WilmerHale, Washington D.C.) and Timothy J. Tyler (Vinson & Elkins LLP, Houston)

Teresa Garcia-Reyes gave an introduction to the presentation, explaining that the presentation would review six cases in the style of the show, *Siskel and Ebert at the Movies*. Ms. Garcia-Reyes also made a disclaimer saying that this presentation was not based on Mr. Tyler's or Ms. Morris's personal opinions.



Timothy Tyler started the presentation by reviewing *Rockhopper v. Italy*. This case, as Mr. Tyler characterized it, was the rebirth of direct expropriation through the Energy Charter Treaty ("ECT"). Mr. Tyler introduced, at a high level, the facts of this case. In the most general sense, Italy denied Rockhopper (the claimant) a production concession to drill twelve miles off the coast of Abruzzi in the Adriatic Sea. Because Italy denied the permit after approving Rockhopper's environmental assessment, Rockhopper filed an arbitration claim against Italy for expropriation and fair and equitable treatment. The tribunal agreed and decided for Rockhopper. Mr. Tyler gave Rockhopper a thumbs up to the majority opinion and the concurrence. Ms. Morris gave a thumbs up to the majority and a thumbs down to the concurrence.

Mr. Tyler then moved on to *Kruck v. Spain*. This case, as he explained, is one of the many cases in the saga of Spanish solar panel cases. The facts in this case are very similar to the other ones. In 2007, Spain passed a law to promote foreign investment in solar panels. Then in 2010, 2013, and 2014, Spain passed a series of laws that eroded the regulations put in place by the 2007 laws. As a result, the investors sued Spain for the multiple changes made to the 2007 laws, and the tribunal found that Spain violated the investors' legitimate expectations. After giving an overview of the case, Mr. Tyler discussed Zachary Douglas's dissent. In the dissent, Douglas wrote from a contractual lens and explained that finding Spain's behavior was a violation of legitimate expectations only created a strict liability regime. Mr. Tyler said this alternate universe Douglas proposed was thought provoking. Ms. Morris, however, characterized the dissent as a law review article, and that Douglas was just saying that if the majority did not take his view, they were just making it up. Ultimately, Mr. Tyler gave a solid thumbs up to the majority and the dissent opinions.

Ms. Morris introduced another case that made waves in 2022: *ZF Automotive US, Inc. v. Luxshare* at the U.S. Supreme Court. Ms. Morris began the conversation by applauding Justice Amy Coney Barrett for her debut in international arbitration. For Ms. Morris, this was Justice Barrett's "breakout role." It was a short, concise opinion with cleanly laid out factors and most importantly, a correct decision. Justice Barrett reached the decision that 28 U.S.C. §1782 discovery is not available for international arbitration, but did not address whether this is the same standard considered in ICSID arbitrations. Both Ms. Morris and Mr. Tyler gave *ZF Automotives* a thumbs up.

Continuing on the same topic, Ms. Morris discussed *In re Alpene* and *In Re WeBuild S.p.A. and Sacyr S.A.*, both of which discuss 28 U.S.C. §1782 discovery in the context of ICSID arbitrations. Both cases, unsurprisingly, concluded that §1782 discovery does not extend to ICSID cases either.

Ms. Morris closed the presentation with what she described as the Titanic, the ECT. Ms. Morris covered the multiple events in the last year, including the many countries that declared their intent to withdraw from the ECT. These include France, Spain, the Netherlands, Poland, Slovenia, and Luxemburg. Additionally, the member states planned to vote on the modernization of the ECT in November 2022, but this vote was postponed to April 2023.

IV. "Lessons Learned from the Field: Navigating the Challenges of Enforcement Against State-Owned Entities" (January 20, 2023)

Moderator: Alex Yanos (Alston & Bird, New York)

Panelists: Isabel Fernandez de la Cuesta (King & Spalding LLP, New York), Christopher P. Moore (Clearly Gottlieb, London), and Andrew Stafford KC (Kobre & Kim, London).

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The panel began with a short introduction on sovereign immunity in the United States. Until 1952, the United States granted sovereign immunity to other States based on the principle of comity. In 1952, however, things changed. The United States began adopting a more restricted approach to sovereign immunity and delineated ways countries could waive said immunity through the Foreign Sovereign Immunities Act.

In reality, sovereign immunity poses two problems: 1) immunity from suit and 2) immunity from execution. Immunity from suit can be waived through the arbitration exception which is provided in 28 U.S.C. §1605(a). Immunity from execution can pose a bigger problem. Under "immunity from execution," a sovereign's assets are presumed immune unless the asset is used for commercial purposes. It is important to note, however, that some assets even if used for commercial purposes are always immune from attachment: such as central-bank assets and military assets. A special problem arises with assets of State-Owned Enterprises ("SOE"). If a party is attempting to attach a SOE's assets, the U.S. Court must have personal jurisdiction over the SOE through the minimum contacts test, which is a requirement to attach a State's assets. Additionally, a party may not just attach a SOE's assets in an attempt to collect from a state. The party must first successfully argue the doctrine of alter ego to attach successfully the SOE's assets.

Next, the panel discussed sovereign immunity in the United Kingdom. Overall, the United Kingdom's approach overlaps considerably with that of the Unites States. In the United Kingdom, there is a general inclination towards upholding immunity. Additionally, it is harder to attach a SOE's assets in an attempt to collect from the state. In the United Kingdom, courts apply the alter-ego doctrine very rigorously, and it is a very high standard to meet. This is partly due to the fact in the United Kingdom, the doctrine derives from corporate law rather than international law. Additionally, fraud (which is one of the arguments that may be used to support alter ego) has an extremely high standard in the United Kingdom. As the panel explained, claimants are expected to have their fraud claims ready the moment attachment requests are filed. Thus, U.K. claimants are not granted the opportunity to flesh out their arguments post discovery as U.S. claimants usually are.

The panel moved on to discuss the role of politics in enforcement efforts. The panel pointed out that once an enforcement is in the sphere of sanctions, the parties are at the hands of the government. This has been the case with cases implicating the Russian and Venezuelan sanctions. While the Russian sanctions have brought a lot of uncertainty to investors, they have also revealed the existence of previously unknown assets. These assets are owned by oligarchs and indirectly, by the Russian Government. The problem is that because these assets are frozen and are not recognized as the Russian Government's assets, investors may not attach them. Investors have attempted to push U.S. legislative recognition of these assets as being owned by the Russian Government in order to attach them. But even if this happens, there might be other hurdles investors must surpass; for example, President Joe Biden has expressed that these assets must be used for reparations for Ukrainian citizens.

The Venezuelan sanctions have also brought a lot of uncertainty and hurdles for investors. In *Crystallex v. Venezuela*, claimant obtained an award of over $1 billion but has yet to successfully collect on it. Crystallex most recently attempted to collect by taking over some shares of Petróleos de Venezuela ("PDVSA"), the government's national oil company. Although Crystallex succeeded in attaching the shares, it has been unable to earn any monetary compensation for them since Venezuela is sanctioned by the United States, and the sale of the shares need to be approved by the U.S. Government. The U.S. Government has refused to do so, leaving Crystallex with worthless shares that it cannot even sell. With that said, the panel noted that Venezuela is going through political changes that may allow investors like Crystallex to finally collect their awards. Recently, the Venezuelan national assembly terminated the role of Interim President Juan Guaidó, which could help relax U.S. sanctions. Additionally, Venezuela has recently allowed Chevron to start selling oil out of Venezuela, an uncharacteristic move for the Venezuelan government.

The panel then discussed the importance of award enforcement. The panel highlighted that practitioners should be fully aware of their client's probability and practicality of collecting at the beginning of the arbitration. Often times, even when collecting is possible, it could strain the relationship between the investor and the state, and it could even pose a security threat to the employees in the state. The panel noted that, ultimately, if collection would be impossible or impractical, then the client should consider selling its investment.

As a final aside, the panel emphasized the importance of addressing "footnote arguments" that are added in an arbitration's last stages. This is often a tactic parties use to set up the award to be challenged. To avoid giving these arguments traction, counsel should almost always address them. In this manner, the party may not claim that it was not impartially heard. The panel, however, noted that counsel should not devote too much time to these arguments as these also could unnecessarily delay the arbitration. Overall, it is hard to strike a balance between giving the argument enough attention and not giving it attention at all. The panel concluded with a positive note: with patience, your client will always recover. At some point, a new government will come in, and someone will have to pay.

V. "The Implications of Changing Energy Policy in Energy Disputes" (January 20, 2023)

Moderator: Analia Gonzalez (BakerHostetler, Washington D.C.)

Panelists: Alberton Fortún (Cuatrecasas, Madrid); Dr. Antonio Ortiz-Mena (Dentons Global Advisors and Georgetown University, Washington D.C.); Lindsey D. Schmindt (Gibson Dunn, New York)

Cecelia Azar introduced the panel, giving a short introduction on each the panelists.

Soon after, Analia Gonzalez, the moderator, opened up the conversation and introduced the topic: the implications of changing energy policy in energy disputes.

Ms. Gonzalez began by asking Lindsey Schmidt what the implications of the energy policy changes happening in Latin America would be. Was it liberalizing or closing? Ms. Schmidt said that in recent years, we have seen an increase of foreign investment drawn to Latin America, particularly in renewables. She also acknowledged that despite the fact that Latin America has been going through political swings (as it historically has), investment will continue to increase. With this mix of investment and new governments, we are set to see disputes. Ms. Gonzalez also asked Ms. Schmidt about the Mexican energy sector, which has opened up since 2013. Ms. Schmidt shared that there is still significant uncertainty as to the Mexican energy market. Indeed, many of the laws passed in 2013 have been challenged and continue to face uncertainty.

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Ms. Gonzalez moved on to discuss the Texas-Gulf Pipeline with Dr. Antonio Ortiz-Mena. Dr. Ortiz-Mena first gave a quick overview of both the Texas-Gulf Pipeline, an oil pipeline that travels from Texas to Tuxpan, Mexico, and the difficulties investors in the pipeline have been facing with the Mexican government. Dr. Ortiz-Mena explained that through these disputes, he has learned the importance of truly knowing how the respondent government functions. In one dispute, his team had to learn the nuances involved with dealing with the Mexican government. He explained, for example, that covert pressure worked much better than overt pressure when dealing with the Mexican government and that PowerPoints were a great tool to communicate with the Mexican government. Dr. Ortiz-Mena emphasized that it is truly necessary to understand the nuances of each government during negotiations, meaning that a multi-disciplinary team is essential when negotiating with heads of states.

Ms. Gonzalez then asked Alberto Fortin about the situation in Europe and its ever-changing regulatory framework. Mr. Fortin explained that he finds it paradoxical that the European countries continue to introduce regulation that affects renewable-energy investors but keep pushing for the withdrawal of the ECT on climate change concerns. Mr. Fortin then continued to explain the history of regulatory changes in Europe, which he split into three phases. The first one, from 1992-2001, fostered renewable energy. The second one, from 2007-2008, attracted foreign investment. And the third one, from 2013-2023, changed policies and dismantled renewable energy. This could only be described as a "roller coaster."

The panel then discussed some important points of which investors should be aware. First, the panel recommended that all companies notify the government of their intent to file for arbitration before actually doing it. No government will be pleased to learn for the first time about the dispute through a letter of intent, and irritating the host state in that way may not be ideal. Second, the panel said that investors should embrace change and protect their investments accordingly. Third, investors may need to consider restructuring their investments to ensure they have good BIT protections. Fourth, the panel also recommended investors to negotiate stabilization and arbitration clauses. Lastly, the panel highlighted the importance of making sure the state has waived its sovereign immunity either by treaty or by contract.

VI. "Natural Gas: What's Next!?" (January 20, 2023)

Moderator: Gisèle Stephens-Chu (Stephens Chu, Paris)

Panelists: Christian Nitsch (Pavilion Energy, Madrid); Michael Polkinghorn (White & Case LLP, Paris); and Mark R. Robeck (Golden Pass LNG, Houston).

Gisèle Stephens-Chu introduced the panel and gave a short introduction about the topic. She explained that gas has been incredibly political in recent years, and the world in general has been facing considerable problems with gas supply.

Mark Robeck then started the discussion by speaking about Ukraine. He explained that when he worked with Ukraine and Poland, both countries faced considerable problems with gas transportation, and the problems have not ameliorated since. Currently, Ukraine is looking to increase gas storage to Eastern European countries, and the war has been a challenge. Mr. Robeck explained that as of today, there is a Russian pipeline in Ukraine that is only working at 30%-40% of its full capacity.

Ms. Stephens-Chu then asked Michael Polkinghorn to discuss Liquid Natural Gas ("LNG") supply side. Polkinghorn expressed that LNG supply side has also faced multiple issues. For example, Europe's delivery market of LNG has faced significant challenges. In Europe, it is customary to pay liquidated damages when the seller fails to deliver, but most recently, sellers and buyers have been paying the price difference between the current price and the original price. On top of that, there are usually caps and carve outs. Since mid-2021, we have seen an increase of price in LNG, and since then, buyers of LNG have become much more aggressive with caps because they want deliverers to pay even more. The LNG scene in the United States is quite different from that of Europe. Before the Ukrainian war, there were a number of LNG ports that were not used to capacity, but since the war, new capacity is increasing. That said the most important thing beyond port capacity is pipeline capacity.

The panel then discussed price review and indexation. This, for the panel, was in a state of chaos. Currently, Title Transfer Facility ("TTF") is problematic, and with the closing of Groningen gas field, there is too much uncertainty. This, however, will get increasingly interesting (albeit complicated) as Europe is getting more and more fuel from the United States, and the United States has a different pricing model.

Christian Nitsch then started to discuss downstream contracts and their effects on clients. Mr. Nitsch explained that clients with downstream contracts using TTF have been hurt, and due to this increase in prices, buyers are beginning to launch actions to renegotiate contracts, and suppliers themselves are considering reopening the contracts. Mr. Nitsch explained that renegotiation has happened in the nuclear industry, and there is huge uncertainty related to this. As Mr. Nitsch pointed out, how do you anticipate what cannot be anticipated?

The panel concluded that the implications of these dynamics all depend on how the operative contracts are drafted, so it is important that parties draft and negotiate contracts carefully. Although no one can anticipate the future, it is almost certain that change will happen. This is especially true with long-term contracts. As such, it is important to draft good force majeure and hardship clauses.

VII. "Back to the Future or the New Normal" (January 20, 2023)

Moderator: Caroline Richard (Freshfields Bruckhaus Deringer LLP, Washington D.C.)

Panelists: J. Brian Casey (Bay Street Chambers, Toronto); Pedro José Izquierdo (Sullivan & Cromwell LLP, New York); and Ema Vidak Gijković (Independent Arbitrator, New York)

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Teresa Garcia-Reyes gave a short introduction to the presentation. In her introduction, she made clear that this was not a presentation on the "virtual world," but rather on case management. Ms. Garcia-Reyes noted that recently, parties and tribunals have gotten more creative. For example, around 30% of ICSID Rule 41(5) applications have happened in the past three years, and most recently, tribunals are starting to take up the question of bifurcation *sua sponte*. We have also seen tribunals starting to ask parties for a list of undisputed facts. These developments were uncommon pre-pandemic, but that is not the case anymore.

Ema Vidak Gijković contributed to the discussion of the changes we were seeing in international arbitration, citing to a study by Bloomberg Law, which surveyed about 384 law firms. The survey asked the law firms if they thought the legal industry was innovating. 72% of the law firms said no, and 28% of the law firms said yes. In Ms. Gijković's opinion, 28% is a very high number, especially in the non-flexible legal industry. Ms. Gijković then continued to say that before the pandemic, we thought we *had* to have a hearing in person, but with the pandemic, this mindset has shifted. Since then, there is now more discussion and more flexibility.

Caroline Richard then posed the question: "*have attitudes of tribunals towards bifurcation changed?*" The panel answered yes. At a very high level, the pandemic shifted people's thoughts and taught everyone to be more creative and receptive. At the same time, there have been more bifurcations because there has been an increase in issue complexity, in diversity of counsel participation, and in institutions' initiatives. On top of that, tribunals are becoming more sensitive to cost reduction efforts.

Ms. Richard then asked: "*does bifurcation always reduce costs?*" The panel responded that bifurcation does not always reduce costs and time. For that, it is important for tribunals to ask: 1) are the facts particularly so intertwined with the case that bifurcation does not make sense, and 2) will determination of that issue dispose of the case. Tribunals need to look at each question separately. Ultimately, the increase of bifurcation applications are here to stay.

Ms. Richard then asked about the tribunals' inclinations to borrow from litigators. In other words, are we starting to see motions for summary judgment? The panel first discussed ICSID Rule 41(5) applications, which were introduced in 2006. Although not completely analogous to motions for summary judgment, Rule 41(5) does share significant similarities. The problem with these applications is that the standard is extremely high (although not impossible). After the introduction of Rule 41(5), we have certainly seen other institutions like the ICC introduce similarly fashioned motions. The panel noted that there was a bigger problem: *is there a concern of deciding issues in a summary-judgment fashion could make the award vulnerable*? Mr. Casey answered affirmatively. Arbitrators are often concerned with the fact that the non-movant party may claim that they did not exercise their right to be heard right to be heard. Pedro Jose Izquierdo, however, disagreed. He considered that not all courts would find this as a negative as Anglo-Saxon courts often grant summary-judgment motions.

The panel closed with a discussion on other creative techniques. Ms. Gijković stated that it would be better if parties did not just follow the Procedural Order No.1 template and venture past it. Often times, tribunals do not have a preference, and parties just default to it. Mr. Casey stated that lawyers do not like innovation and sometimes new proposals are not positively taken up. Mr. Izquierdo concurred, finding that inviting parties to deviate from the template is just opening it up for a fight. Ms. Gijković disagreed and stated that this should not happen if the tribunal gives the parties enough structure. With good structure, the parties could easily agree on a different procedural order. The panel concluded with the panelist discussing the thin balance between the innovating arbitrator and giving the impression of bias.

VIII. "Queen Mary University of London/ Pinset Masons Survey on the Future of International Energy Arbitration – Final Results" (January 20, 2023)

Speakers: Prof. Loukas Mistelis (Queen Mary University of London and Clyde & Co LLP, London); Jason Hambury (Pinsent Masons LLP, London); and Kathryn Barnes (Chevron, San Ramon).

Cecelia Azar gave a short introduction to the presentation, explaining that it would provide an overview of a Queen Mary University of London and Pinsent Masons Survey on the Future of International Energy Arbitration.

Prof. Loukas Mistelis began the presentation by giving an overview of the survey's results. The survey involved over 900 responders and 50 personalized interviews. This time, the surveyors truly wanted to represent a diverse set of professionals, and to ensure that, they surveyed professionals from different geographical areas and levels of experience. Prof. Mistelis pointed out that the group was composed as following: 33.3% from Asia, 33.3% from Europe, 9% from the Middle East, 14% from the Americas, and 7% from Africa. Additionally, the team made sure to cover experiences from both civil and common-law jurisdictions.

The team found that the top three drivers of disputes will be: 1) oil and gas price volatility, 2) energy infrastructure, and 3) government policy changes. Additionally, Europe is expected to face the largest increase in disputes, and this could be attributed to the war in Ukraine. Jason Hambury then explained that the survey also found that the transition to cleaner energy will begin to emerge as a cause of disputes. Additionally, security of supply will be the most pressing short-to-medium term challenge. The survey also predicts an acceleration in nuclear projects and singles out the cost of nuclear projects as the factor that will lead to disputes.

Katheryn Barnes then talked about the international arbitration servicing needs of the sector. According to the survey, international arbitration continues to play a primary role in the resolution of international energy disputes. For clients, confidentiality in disputes is an essential part of why arbitration continues to pay a role in dispute resolution. Ms. Barnes explained that the surveyors thought that it was necessary to have better case management at the initial stages of an arbitration. The participants also said that they would like to see a greater use of technology in arbitration and have more virtual hearings and online platforms.

The presentation culminated with a short discussion of the future of investor-state dispute settlement. According to the survey, it is clear that the oil and gas sector will dominate the character of disputes. Moreover, despite the ECT modernization process, the survey still sees more intra-EU and BIT cases taking place. Additionally, with the sunset clauses, ECT member states are unlikely to be able to dispense of all investment claims in the near future.

LEGAL IMPLICATIONS RELATED TO THE JOINDER OF A NON-CONSENTING THIRD PARTY IN INTERNATIONAL ARBITRATION

Article by Judge Mohamed Gomaa (The Egyptian State Council Court of Appeal, Cairo)

Arbitration has long been considered a creature of contract. As international transactions become more complex, certain procedural problems arising out of contractual principles are becoming more common. One of the most vexing of these issues concerns the joinder of non-consenting third parties into an existing arbitration.

The main idea behind the joinder of third parties to an arbitral proceeding is twofold: to increase the procedural efficiency and to ensure the consistency of arbitration by avoiding multiple arbitrations concerning the same parties and set of facts. While the extension of the arbitration to non-parties is justified by multiple legal theories under international law, such as the principle of *non bis in dem,* the procedural mechanics of a joinder are regulated by the applicable arbitral institution's rules. A tribunal will preside over the joinder process, while national courts provide the judicial review on the joinder in award recognition or annulment proceedings.

Based on the consensual nature of international arbitration, the joinder of a third party to an arbitral proceeding generally occurs with the unanimous consent of all parties involved in the proceedings. However, in some cases, a third party may be forced by a tribunal to join an arbitration proceeding despite its objection based on a conflict of interest or some other reason.

When a third party objects to its joinder, this gives rise to legal implications concerning the absence of consent to arbitrate, the third party's due process rights related to equal participation, and other public policy concerns. These issues can impact the finality and enforceability of an award. Moreover, the lack of a coherent approach by tribunals concerning the application of non-consenting third party joinders complicates our understanding of the issue.

The most concerning legal implication of the joinder of a non-consenting third party is rooted in fundamental principles of international arbitration: party autonomy and consent to arbitrate. When a third party is joined after arbitral proceedings have commenced, such third party's rights as to equal participation in the constitution of the tribunal, and in the decisions concerning the procedural rules and confidentiality of the proceedings, are all threatened. This could present possible adverse consequences for the final award, which may suffer enforceability issues based on the aforementioned due process concerns experienced by the third party forced to joinder.

Article V(2)(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides grounds for the refusal to recognize and enforce an arbitral award based on public policy concerns. The UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards states that in the application of the Article V(2)(b) of the New York Convention, courts should take into account both the substantive outcome of the awards, as well as the procedure leading to the award. The due process rights and equal rights to participation of a third party forcibly joined to proceedings would squarely fall within these considerations. In response to this growing concern, in the last few years, international arbitral institutions have amended their rules to further clarify the provisions on the joinder of a third party.

This article analyzes the legal basis for joinder of the non-consenting third party and how institutional rules address the issues of consent and the equal participation rights of the third party, as well as the possible adverse effects of the joinder on the enforcement and recognition of an arbitral award. It ultimately argues that the institutional rules should have explicit provisions ensuring the equal participation right of the non-consenting third party to prevent the risk of annulment of the award during judicial review by national courts. It also observes that the arbitral tribunals and national courts should avoid joinder of the non-consenting third party if there is no fundamental ground or facts proving the close ties between the third party and the dispute. This reaffirms the fundamentally consensual nature of arbitration.

Public Policy Concerns Regarding the Joinder of a Non-consenting Party as Grounds for the Annulment of an Award

The joinder of a third party despite its objection may raise concerns related to the absence of consent to arbitrate, a key public policy concern.

National courts determine the existence of the consent to arbitrate on a case-by-case basis following the New York Convention and UNCITRAL Model Law. Article 2 of the New York Convention and Article 7 of UNCITRAL Model Law on International Commercial Arbitration both consider an arbitration agreement as an agreement between parties to resolve disputes arising out of a defined contractual or non-contractual legal relationship. The definition relies on the legal principles of party autonomy and the doctrine of privity of contracts, which are both rooted in the consent of the parties. Against this backdrop, arbitral tribunals may order joinder of a non-consenting third party, thereby implicating the third party's due process rights to equal participation and the right to present a defense.

Although equal participation is not an absolute right, infringement of the right of a third party to participate equally in the constitution of arbitral tribunal may be a ground to challenge the arbitral award under Article V(2)(b) of the New York Convention. This public policy concern as a basis for the refusal of the recognition and enforcement of award is also set out under Article 32(2)(b)(ii) of the UNCITRAL Model Law.

National courts that analyze whether arbitral tribunals ensured due process and equal treatment of the parties while ordering joinder of the third party have also relied on domestic laws that provide comprehensive explanations of the procedural violations that can amount to public policy violations.

In French law, Article 1510 of the Code de la Commande Publique (CCP) requires the arbitral tribunal to ensure equal treatment of the parties and uphold due process. Article 1520.4 CCP expressly indicates the violation of due process as grounds for setting aside an award. Furthermore, the requirement to guarantee equal treatment is covered under Article 1520.5 CCP, which considers the violation of this rule a breach of international public policy.

A similar framework exists in the Netherlands. Article 1065(1) of the Dutch Code of Civil Procedure sets out the scope of the public policy concerns that may constitute grounds for setting aside a final award rendered by arbitral tribunal. According to the Dutch Supreme Court, a violation of the fundamental principles of the procedural law, including the rights to be heard and to equal treatment, can amount to a violation of public policy.

The Swiss regime is slightly more rigid. The Private International Law Act addresses public policy concerns as grounds for the annulment of an award under Article 190(2)(e). According to this provision, domestic public policy and mandatory procedural rules differ from international public policy concerns, and a violation of public policy will only be found if the decision violates the fundamental and recognized procedural principles of domestic Swiss law in an "intolerable manner."

*(See **NON-CONSENTING THIRD PARTY JOINDER IN INTERNATIONAL ARBITRATION** page 8)*

*(Cont'd from **NON-CONSENTING THIRD PARTY JOINDER IN INTERNATIONAL ARBITRATION** page 7)*

Courts in common law jurisdictions apply a more cautious approach to consider public policy concerns as ground for setting aside an arbitral award. For instance, Section 103 of the English Arbitration Act favors the enforcement of the award and puts the burden of proof "firmly" on the party challenging the enforcement of award. English courts have set a high threshold for finding a procedural violation justifying the rejection of the enforcement of the final award.

A similarly restrictive approach is observed under the U.S. Federal Arbitration Act, which allows the award to be set aside by a court on limited grounds. U.S. courts only recognize a public policy violation if there is an explicit violation of "the basic notions of morality and justice" or "some [other] explicit public policy that is well defined and dominant." Hence court decisions rejecting enforcement of an arbitral award due to public policy violations related to the joinder of non-consenting parties are rare.

Judicial Review of Arbitral Awards Due to the Joinder of a Non- Consenting Third Party

There is ample case law addressing a lack of consent of a third party joinder as a basis for annulling an award. The case law considers the issue from a theoretical standpoint related to issues of consent of the parties as well as the procedural issues associated with the joinder of the third party. Although the focus of this article is the consent of the non-signatory third party, the decisions on the requirement of the consent of the original parties can also provide a better understanding of the approach of national courts on the consensual nature of arbitration.

In this regard, it is worth mentioning the *PT First Media* case where the Court of Appeals of Singapore interpreted the importance of the consent for the joinder of a third party. In the arbitral proceeding, claimants filed an application to join a third party, PT First Media. The third party served as a guarantor in the joint venture giving rise to the dispute and as a member of the conglomerate Lippo Group that was an original party to the proceeding. In the original proceedings, SIAC ordered joinder despite an objection from Lippo Group. The court reviewed the award based on the Lippo Group's lack of consent. In its decision, the court analyzed the importance of consent of the original parties when ordering joinder of a third party. It noted that consent can be provided in any form, either under a bespoke arbitration agreement or through an agreement to arbitrate under specific institutional rules. If the latter, the institutional rule should have explicit provisions that allow "unambiguously" forced joinder. In this case, the allegation of the original party on the absence of the consent to arbitrate with the joinder party was not a ground for annulment of the award.

In *Bay Hotel & Resort Ltd and Zurich Indemnity Company of Canada v. Cavalier Construction Co. Ltd*, the respondent filed an application for the joinder of Cavalier CTI as a third party. Cavalier CTI had carried out the contract in dispute and was formed and entirely financed by the respondent. The institution ordered joinder despite the objection of the claimant. The court held that the arbitral tribunal lacked jurisdiction to order a joinder in circumstances where a non-consenting party rejects to arbitrate with the non- signatory.

A recent case on the arbitral proceeding administered under the London Court of International Arbitration (LCIA) 2020 Rules provides further insight into the nature of judicial review of a forced third-party joinder. According to the tribunal's decision, that the third party was a signatory to an arbitration agreement did not evince the implied consent to a specific arbitration between the other two parties that arose out of the underlying arbitration agreement. In the dispute between CJE (claimant) and CJD (respondent), the latter filed an application to join CJE's parent company, CJF, to the arbitration proceeding under Article 22.1(viii) of the LCIA Rules. However, as the provision requires the party's written consent to be joined, which the respondent did not provide, the arbitral tribunal rejected the application.

The High Court of Singapore upheld the decision of the arbitral tribunal in its review of the award. The Court stated that forced joinder is not about the joinder of the third party despite its objection, but joinder of the third party based on its own consent despite the objection of one of the *original* parties to arbitration proceeding. Moreover, the Court restated the doctrine of "double separability" noting that being a signatory to an arbitration agreement does not preclude a party from consenting to participate in an arbitral proceeding initiated under a separate agreement between the original parties.

Lastly, one of the key cases on the right of the joined third party to equal participation is the *Dutco* case. The decision of the French Court of Cassation in *Dutco* has had far-reaching implications on the role of third party joinders, specifically concerning their right to appoint arbitrators. The arbitration involved one claimant and two respondents, whereby the latter had to make a joint appointment of an arbitrator under protest. The interim award was set aside by the Court holding that the tribunal was irregularly constituted. The Court rejected claimant's argument that the parties' agreement to arbitrate under the specific rules should be considered as a waiver of their right to nominate the arbitrators. On the contrary, the Court held that the right to nominate an arbitrator is a matter of public policy and can be waived only after the dispute has arisen. The decision led to two conclusions with regards to the equal participation of the parties in the multi-party arbitrations. First, the decision confirmed that the appointment of arbitrators as a right to equal participation is a public policy concern that if violated merits the annulment of an award. Second, this right cannot be waived before the dispute has arisen.

Conclusion

In conclusion, this analysis demonstrates that the third party's consent to joinder is crucial for safeguarding the finality of an arbitral award. As international arbitration becomes more complex and predominantly involves multiple parties, arbitration agreements cannot foresee all possible future disputes, and implicated parties, and thus cannot be the only basis for the provision of the specific consent of the original parties to include particular third parties to the arbitral proceeding. The modern day complexity of international trade and transactions requires arbitration institutions to embrace broad provisions on joinder. However, these broad provisions, especially provisions relying on the *prima facie* tests, need to be balanced with the guarantees of the third party's right to equal participation in the appointment of arbitrators. Unless the third party openly waives its right to participation in the appointment of the arbitrators, the joinder of the non-consenting third party may jeopardize the finality of the rendered award. In this context, special attention may be given to the attempts of the institutional rules to avoid the risk of the annulment of the rendered award by including safeguarding provisions, such as requiring the party to expressly waive the right to appoint an arbitrator.

INSTITUTE FOR TRANSNATIONAL ARBITRATION EXPERTS...IN THE NEWS UPDATES

Supporting Member **Borden Ladner Gervais LLP** has designated **Glenn Gibson** as an Advisory Board representative under 40.

Sustaining Member **WilmerHale** has designated **Jonathan Lim** as an Advisory Board representative under 40.

Supporting Member **CMS Legal Services EEIG** has designated **Dr. Zsolt Okányi** as a member of the Advisory Board.

Supporting Member **CMS Legal Services EEIG** has designated **Dr. Nicolas Wiegand** as a member of the Advisory Board.

Eric J. Cassidy of **Curtis, Mallet-Prevost, Colt & Mosle, LLP** has joined ITA as an Associate Member.

Supporting Member **Borden Ladner Gervais LLP** has designated **Philippe Boisvert** as an Advisory Board representative under 40.

Supporting Member **Borden Ladner Gervais LLP** has designated **Paige Burnham** as an Advisory Board representative under 40.

Past ITA Chair, **Professor Jeswald W. Salacuse** recently published an article entitled "*The International Lawyer",* published in the Spring issue of *Negotiation Journal,* which seeks to demystify international arbitration by examining the *Aguas Argentinas* case from start to finish.

Arbitral Institution Member **Conciliation and Arbitration Center of the Chamber of Commerce of Costa Rica** has designated Executive Director **María José Yglesias** as a member on the Advisory Board.

*(See **EXPERTS...IN THE NEWS UPDATES** page 10)*

Institute for TRANSNATIONAL ARBITRATION

THE CENTER FOR AMERICAN AND INTERNATIONAL LAW 75th Anniversary

CAIL LAW • JUSTICE • WORLDWIDE

*(Cont'd from **EXPERTS...IN THE NEWS UPDATES** page 9)*

James Castello (King & Spalding, Paris) has been appointed the next Deputy Chairman of the LCIA Board of Directors having served as a member of the board since 2015. James fills the role vacated by Chairman Christopher Style KC, following his appointment on January 1, 2023. For more than 20 of his 35 years in legal practice, James has lived and worked in Europe, focusing exclusively on international arbitration (both commercial and investor-state) as both counsel and arbitrator. Since 2001, he has served as a U.S. delegate to the UNCITRAL Arbitration Working Group, participating in the preparation of UNCITRAL's signature arbitration instruments, including the Model Law (2006), the Arbitration Rules (2010), the new Transparency Rules for Investor-State Arbitration (2013), and the related Mauritius Convention on Transparency (2014) as well as the Expedited Arbitration Rules (2021). James welcomes the chance to serve as Deputy Chair and has long admired the LCIA's transparency – publishing both arbitrator challenge decisions as well as detailed data on cost and duration of cases, dedicated case management staff, and its famed Tylney Hall format for ensuring interactive conferences.

David E. Sharp FCIArb (Houston, TX) has been elected Chair of the North America Branch of the Chartered Institute of Arbitrators. He may be reached at dsharp@sharplawhouston.com.

Professor Charles H. Brower II (Wayne State Law School, Detroit, MI) recently published two articles entitled *Against Imperial Arbitrators: The Brilliance of Canada's New Model Investment Treaty*, 17 FIU L. Rev. 1 (2022) and *Putin vs. Zelensky: Reflections on Leadership, Global Order, and the Rule of Law*, 45 U. Ark. Little Rock L. Rev. 47 (2022). Brower was also named to Who's Who Legal: Arbitration for the ninth straight year, and will be listed in Marquis Who's Who in America (2023).

Munkhnaran "Nara" Munkhtuvshin (Ph.D. Candidate, Nagoya University, Japan) started a new position as a lecturer of International Investment Arbitration at the University of Finance and Economics in Mongolia.

Stephan Wilske, ITA's Reporter for Turkey, was reappointed as the Vice President of the CAA International Arbitration Centre (CAAI) Court of Arbitration for another term ending December 31, 2024. Stephan Wilske was also appointed as a member to the VIAC's International Advisory Board for the term 2023 to 2025.

MarcAnthony Bonanno (McCarter & English, LLP) who volunteers with the nonprofit "Africa in the Moot" as a moot court coach for the University of Cape Town's Willem C. Vis International Commercial Arbitration Moot court team, organized a virtual pre-moot competition on February 4, 2023, between the University of Cape Town, Columbia Law School, Elisabeth Haub School of Law at Pace University, Charleston School of Law, and the Taras Shevchenko National University of Kyiv. The pre-moot aimed to help each team prepare for the annual Vis Moot competition held in Vienna each April. In organizing the virtual pre-moot, MarcAnthony secured the participation of 20 volunteer arbitrators from several countries, including Georgia, Ukraine, France, Italy, Kenya, Panama, and the United States.

Velislava Hristova and **Andrés E. Alvarado Garzón** are the recipients of the 2022 CPR Outstanding Professional Short Article Award for their article "International Arbitration and Cross-Border Insolvency - Friends or Foes? Revisiting the Role of Arbitration in Resolving Cross-border Insolvency-Related Disputes," published in the Journal of International Dispute Settlement, Volume 12, Issue 4, December 2021.

Institute for TRANSNATIONAL ARBITRATION

The Institute for Transnational Arbitration
A Division of THE CENTER FOR AMERICAN AND INTERNATIONAL LAW

SCOREBOARD
OF ADHERENCE TO TRANSNATIONAL ARBITRATION TREATIES
(as of April 5, 2023)

ABBREVIATIONS

NY United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly, 1958 New York Convention)
ICSID Convention on the Settlement of Investment Disputes (1965)
IA Inter-American Convention on International Commercial Arbitration (commonly, Panama Convention) (1975)
USBIT United States Bilateral Investment Treaty
TIP US Treaties with Investment Protection Provisions
ECT Energy Charter Treaty (1998)
MC United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (commonly, Mauritius Convention) (2017)

SYMBOLS

S Signed, but not ratified
R Ratified, acceded or succeeded
A Subscribed, but not signed, ratified or paid
(*) Capital-exporting country under MIGA
N/A Not applicable

CHANGES FROM PREVIOUS ISSUE

NY Timor Leste (R)
ICSID None.
IA None.
USBIT Updated.

ECT None.
MC None.

TIP None.

NATION	NY[1]	ICSID[2]	ECT[3]	IA	USBIT	TIP[4]	MC
Afghanistan	R	R	R			R	
Albania	R	R	R		R		
Algeria	R	R				S	
Andorra	R						
Angola	R	R				S	
Antigua and Barbuda	R					R[23]	
Argentina	R	R		R	R	R	
Armenia	R	R	R		R	S	
Australia	R	R	S			R / S[19]	R
Austria	R	R	R				
Azerbaijan	R	R	R		R		
Bahamas	R	R				R[23]	
Bahrain	R	R			R	R / S[24]	
Bangladesh	R	R			R		
Barbados	R	R				R[23]	
Belarus	R	R	S[20]		S		
Belgium	R	R	R				S
Belize	R	S				R[23]	R
Benin	R	R				S[22] / R[29]	R
Bhutan	R						
Bolivia[6]	R			R		S[31]	R
Bosnia and Herzegovina[7]	R	R	R				
Botswana	R	R				R[26]	
Brazil	R			R		R	
Brunei Darussalam	R	R				R / R[27]/S[19]	
Bulgaria	R	R	R		R		
Burkina Faso	R	R				S[22] / R[29]	
Burundi	R	R				R[25] / R[30]	
Cambodia	R	R				R / R[27]	
Cameroon	R	R			R		R
Canada	R	R				R[8] / S[19]/S[21]	R

Cape Verde	R	R				S[22]	
Central African Republic	R	R					
Chad		R					
Chile	R	R		R		R / S[19]	
China (People's Republic)[9]	R	R					
Colombia	R	R		R		R / S[31]	
Comoros	R	R				R[30]	
Congo	R	R			R		S
Congo (Democratic Republic of)	R	R			R	R[30]	
Cook Islands	R						
Costa Rica	R	R		R		R[10]	
Côte d'Ivoire	R	R				S[22] / R[29]	
Croatia[7]	R	R	R		R		
Cuba	R						
Cyprus	R	R	R				
Czech Republic	R	R	R		R		
Denmark[11]	R	R	R				
Djibouti	R	R				R[30]	
Dominica	R					R[23]	
Dominican Republic	R	S		R		R[10]	
Ecuador	R	R		R		S[31]	
Egypt	R	R			R	R / R[30]	
El Salvador	R	R		R	S	R[10]	
Equatorial Guinea							
Eritrea						R[30]	
Estonia	R	R	R		R		
Eswatini		R				R[26] / R[30]	
Ethiopia	R	S				R[30]	
Fiji	R	R					
Finland	R	R	R				S
France[12]	R	R	R				S
Gabon	R	R					S
Gambia		R				S[22]	R
Georgia	R	R	R		R	R	
Germany	R	R	R				S
Ghana	R	R				R / S[22]	
Greece	R	R	R				
Grenada		R			R	R[23]	
Guatemala	R	R		R		R[10]	
Guinea	R	R				S[22]	
Guinea-Bissau		S				S[22] / R[29]	
Guyana	R	R				R[23]	
Haiti	R	R			S	R[23]	
Holy See (Vatican City)	R						
Honduras	R	R		R	R	R[10]	
Hungary	R	R	R				
Iceland	R	R	R			S	
India	R						
Indonesia	R	R				R[27]	
Iran	R						
Iraq	A	R				S	R
Ireland	R	R	R				
Israel	R	R				R	
Italy	R	R					S
Jamaica	R	R			R	R[23]	
Japan	R	R	R			S[19]	
Jordan	R	R	R		R	R	
Kazakhstan	R	R	R		R	R[28]	
Kenya	R	R				R[25] / R[30]	

Kiribati							
Korea (Republic) (South)	R	R				R	
Kosovo		R					
Kuwait	R	R				S / S[24]	
Kyrgyzstan	R	R	R		R	R[28]	
Lao People's Democratic Republic	R					R / R[27]	
Latvia	R	R	R		R		
Lebanon	R	R				S	
Lesotho	R	R				R[26]	
Liberia	R	R				R/S[22]	
Libyan Arab Jamahiriya						S / R[30]	
Liechtenstein	R		R				
Lithuania	R	R	R		R		
Luxembourg	R	R	R				S
Madagascar	R	R				R[30]	S
Malawi	R	R				R[30]	
Malaysia	R	R				R / R[27] / S[19]	
Maldives	R					R	
Mali	R	R				S[22] / R[29]	
Malta	R	R	R				
Marshall Islands	R						
Mauritania	R	R					
Mauritius	R	R				R / R[30]	R
Mexico	R	R		R		R[8]/S[19]/S[21]	
Micronesia		R					
Moldova	R	R	R		R		
Monaco	R						
Mongolia	R	R	R		R	R	
Montenegro	R	R	R				
Morocco	R	R			R	R	
Mozambique	R	R			R	R	
Myanmar (Burma)	R					S / R[27]	
Namibia		S				R[26]	
Nauru		R					
Nepal	R	R					
Netherlands[13]	R	R	R				S
New Zealand[14]	R	R				R / S[19]	
Nicaragua	R	R		R	S	R[10]	
Niger	R	R				S[22] / R[29]	
Nigeria	R	R				R	
North Macedonia[7]	R	R	R				
Norway	R	R	S				
Oman	R	R				R / S[24]	
Pakistan	R	R					
Palau	R						
Panama	R	R		R	R	R	
Papua New Guinea	R	R					
Paraguay	R	R		R		S	
Peru	R	R		R		R / R[18]/S[19] / S[31]	
Philippines	R	R					
Poland	R		R		R	R[27]	
Portugal	R	R	R				
Qatar	R	R				S / S[24]	
Romania	R	R	R		R		
Russian Federation	R	S	S		S		
Rwanda	R	R			R	R / R[25]	
Saint Kitts and Nevis		R				R[23]	
Saint Lucia		R				R[23]	
St. Vincent and the Grenadines	R	R				R[23]	

Samoa		R					
San Marino	R	R					
Sao Tome and Principe	R	R					
Saudi Arabia	R	R				R / S[24]	
Senegal	R	R			R	S[22] / R[29]	
Serbia[7]	R	R					
Seychelles	R	R				R[30]	
Sierra Leone	R	R				S[22]	
Singapore	R	R				R / R[27]	
Slovakia	R	R	R		R		
Slovenia[7]	R	R	R				
Solomon Islands		R					
Somalia		R				R[30]	
South Africa	R					R / R[26]	
South Sudan		R				R[25]	
Spain	R	R	R				
Sri Lanka	R	R			R	R	
Sudan	R	R				R[30]	
Suriname	R					R[23]	
Sweden	R	R	R				S
Switzerland	R	R	R			R	R
Syrian Arab Republic	R	R					S
Taiwan							
Tajikistan	R		R			R[28]	
Tanzania	R	R				R[25]	
Thailand	R	S				R / R[27]	
Timor Leste	R	R					
Togo		R				S[22] / R[29]	
Tonga	R	R					
Trinidad and Tobago	R	R			R	R[23]	
Tunisia	R	R			R	R[30]	
Turkey	R	R	R		R	S	
Turkmenistan	R	R	R			R[28]	
Tuvalu							
Uganda	R	R				R[25] / R[30]	
Ukraine	R	R	R		R	S	
United Arab Emirates	R	R				S / S[24]	
United Kingdom[15]	R	R	R				S
United States of America[16]	R	R		R	N/A	N/A	S
Uruguay	R	R		R	R	R	
Uzbekistan	R	R	R		S	R[28]	
Vanuatu							
Venezuela	R			R			
Vietnam	R					R /S[19] / R[27]	
West Bank and Gaza[17]	R						
Yemen		R	R			R	
Zambia	R	R				R[30]	
Zimbabwe	R	R				R[30]	

Notes: (1) Extends to metropolitan and overseas constituent territorial subdivisions but not to overseas dependent territories. Consult UNCITRAL for definitive status, as well as for the reservations to the Convention. (2) Extends to metropolitan and overseas constituent territorial subdivisions and to overseas dependent territories unless specifically excluded. (3) 1991 European Energy Charter was signed by the US. European Union and EURATOM have ratified the ECT. (4) Treaties signed or ratified by the US with provisions on investments. (5) See also 2014 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. (6) ICSID Convention entered into force for Bolivia on July 23, 1995. On May 2, 2007, Bolivia denounced the ICSID Convention, with effect on November 3, 2007. The Government of Bolivia delivered notice to the United States on June 10, 2011, that it was terminating the "Treaty Between the Government of the United States of America and the Government of the Republic of Bolivia Concerning the Encouragement and Reciprocal Protection of Investment." As of June 10, 2012 (the date of termination), the treaty ceases to have effect, except that it continues to apply for another 10 years to covered investments existing at the time of termination. (7) As of 4 February 2003, The Federal Republic of Yugoslavia has changed its name to "Serbia and Montenegro." Montenegro declared itself independent from Serbia on June 3, 2006. Bosnia & Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, and Slovenia are separated successor states to parts of the former Yugoslavia and have succeeded to the NY. The Former Yugoslav Republic of Macedonia changed its name to the Republic of North Macedonia on 12 February 2019. (8) Included in the North American Free Trade Agreement among the United States, Canada and Mexico. (9) NY: includes Hong Kong Special Administrative Region. (10) Included in the Dominican Republic - Central America - United States Free Trade Agreement. (11) NY: includes Faeroe Islands and Greenland. (12) NY: includes, inter alia, French Guiana, French Polynesia, Guadeloupe, Martinique, Mayotte, New Caledonia, Réunion, and St. Pierre and Miquelon. (13) NY: includes Aruba and Netherlands Antilles. (14) ICSID Convention: excludes Cook Islands, Niue and Tokelau. (15) NY: includes Bermuda, Cayman Islands, Gibraltar, Guernsey, Isle of Man, and British Virgin Islands. ICSID Convention: excludes British Indian Ocean Territory, Pitcairn Islands, British Antarctic Territory and Sovereign Base Areas of Cyprus. ICSID Convention: continues to include Hong Kong Special Administrative Region. (16) NY: includes, inter alia, American Samoa, Guam, Northern Mariana Islands, Puerto Rico and US Virgin Islands. (17) West Bank and Gaza are not recognized as states by the United States. (18) United States - Peru Trade Promotion Agreement. (19) Trans-Pacific Partnership signed on February 4, 2016. (20) The State has signed the ECT and it applies it provisionally, under Art. 45 of the ECT. (21) USMCA signed on November 30, 2018. (22) Economic Community of West African States (ECOWAS) – US Trade and Investment Framework Agreement ('TIFA') signed on August 5, 2014. (23) Caribbean Community (CARICOM) – US TIFA, in force on May 28, 2013. (24) Gulf Cooperation Council – US Framework Agreement signed on September 25, 2012. (25) East African Community – US TIFA, entered into force on July 16, 2008. (26) Southern African Customs Union – US TIFA, entered into force on July 16, 2008. (27) Association of South-East Asian Nations (ASEAN) – US TIFA, entered into force on August 25, 2006. (28) Central Asia – US TIFA, entered into force on June 1, 2004. (29) West African Economic and Monetary Union (WAEMU) – US TIFA, entered into force on April 24, 2002. (30) Common Market for Eastern and Southern Africa (COMESA) - US TIFA, entered into force on October 29, 2001. (31) Andean Community (ANCOM) – US Trade and Investment Council signed on October 30, 1998.

SOURCES:

This issue was compiled by Co-Editors Crina Baltag and Monique Sasson of The Institute for Transnational Arbitration based on the following sources: United Nations; ICSID; UNCITRAL; Organization of American States; Energy Charter Secretariat; UNCTAD and the Office of the United States Trade Representative. The Scoreboard is designed to be a convenient reference and it is not intended to be relied on as legal advice. Please consult the sources directly to confirm the status of any particular ratifications, reservations, changes, special conditions or new developments.

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