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TABLE OF CONTENTS

ITA LEADERSHIP

ITA CHAIR'S VALEDICTORY REMARKS	<i>Joseph E. Neuhaus</i>	1
CAIL'S AND ITA'S NEW LEADERS		5
THE HON. CHARLES N. BROWER'S LIFETIME ACHIEVEMENT AWARD. ACCEPTANCE SPEECH.	<i>The Hon. Charles N. Brower</i>	7

ARTICLES

ISSUES OF JURISDICTION AND ADMISSIBILITY IN THE 'CRIMEAN' ARBITRAL PROCEEDINGS	<i>Martina Ercolanese</i>	9
THE COMPLIANCE WITH CLIMATE CHANGE STANDARDS AS A JUSTIFICATION TO VIOLATIONS OF INTERNATIONAL INVESTMENT TREATY OBLIGATIONS—AN ANALYSIS	<i>Marcus Liew</i>	43

BOOK REVIEWS

INTERNATIONAL ARBITRATION IN LATIN AMERICA: ENERGY AND NATURAL RESOURCES DISPUTES EDITED BY GLORIA M. ALVAREZ, MÉLANIE RIOFRIO PICHÉ, FELIPE V. SPERANDIO	<i>Julián de Cárdenas García</i>	79
THE UNRULY NOTION OF ABUSE OF RIGHTS BY JAN PAULSSON	<i>Sylvia Tordova</i>	85

ITA CONFERENCE PRESENTATIONS

9TH ITA-IEL-ICC JOINT CONFERENCE ON INTERNATIONAL ENERGY ARBITRATION

KEYNOTE REMARKS: HOW A BIDEN ADMINISTRATION WILL IMPACT THE ENERGY MARKETS	<i>Kenneth B. Medlock III</i>	90
A REPORT ON THE "YEAR IN REVIEW—THE MAGNIFICENT SEVEN" PRESENTATION BY LAURENCE SHORE	<i>Munia El Harti Alonso</i>	104
A REPORT ON THE "ENERGY DISPUTES: AN UPDATE FROM THE ARBITRATORS" PANEL	<i>Lorena Guzmán-Díaz</i>	110

A REPORT ON THE “IN-HOUSE PERSPECTIVES: THE ENERGY INDUSTRY IN TRANSITION” PANEL	<i>Patrick Aana</i>	120
--	---------------------	-----

18TH ITA-ASIL CONFERENCE

A REPORT ON PROFESSOR ALVAREZ’S OPENING REMARKS “ISDS REFORM: THE LONG VIEW”	<i>Fabian Zetina</i>	126
--	----------------------	-----

A REPORT ON THE “TALKING TO INSTITUTIONS LEADERS: WHAT DOES REFORM LOOK LIKE?” PANEL	<i>Fransua Estrada</i>	131
--	------------------------	-----

YOUNG ITA

YOUNG ITA CHAIR’S REPORT, FALL/WINTER 2020 AND SPRING 2021	<i>Robert Reyes Landicho</i>	133
--	------------------------------	-----

YOUNG ITA LEADERSHIP ANNOUNCEMENT		139
-----------------------------------	--	-----

REPORT: #YOUNGITATALKS AND CIARB YMG JOINT EVENT: THE ARBITRAL PROCESS FROM START TO FINISH—TIPS FOR A SUCCESSFUL ARBITRATION	<i>Elisabeth Zoe Everson</i>	156
--	------------------------------	-----

REPORT: YOUNG ITA MENTORSHIP GROUPS IN ASIA HOST FIRESIDE CHAT WITH MS. LUCY REED	<i>Yvonne Mak Ishita Soni</i>	160
--	-----------------------------------	-----



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KEYNOTE REMARKS:

HOW THE BIDEN ADMINISTRATION WILL IMPACT THE ENERGY MARKETS

by Kenneth B. Medlock III

Keynote address delivered at the 9th ITA-IEL-ICC Joint Conference on International Energy Arbitration on January 20, 2021.

I. INTRODUCTION

Today we discuss what the Biden administration can do to the energy market domestically and what it will mean internationally. It is important to highlight this world because the US is a major player on both the supply and demand fronts. This is where the Biden administration holds some strong and bold ambitions. I believe you will see several measures implemented on the foreign policy front that will set the stage for the US to capture a leadership role in climate conversations across the world.

The next slide offers us an understanding of how to frame a conversation about the energy market. This slide is a classic Earth at night photograph, a composite of the earth on a clear night around the world. When we put this composite together, we can identify where we consume the most energy because that is where the lights are on. This image was originally made famous by National Geographic in the mid-1990s. It was on the cover of one of its magazines. In fact, there are many iterations of this image that display different things; however, this one, in particular, shows you where the lights are on.

Now, I would like to draw your attention to a few regions first to highlight how difficult the task ahead will be. As you can see in the picture, in North America, the lights are very bright, particularly in the eastern part that is densely populated. From this image, you can also see Western Europe, which is incredibly well-lit. You can also see Japan and South Korea, where people live, and Australia, New Zealand, and Latin America.

I am going to pause there for a reason. Collectively, these countries are known as the Organizations of Economic Cooperation and Development (“OECD”). These



countries and regions are the brightest or the well-lit regions in the world. This matters when you have a conversation about energy and how energy policy in any one area might impact developments in the rest of the world.

II. THE GROWING DISPARITY IN GLOBAL ENERGY CONSUMPTION

In this part, we will examine how this domestic work can exert a major influence on the international energy market. This will hopefully culminate in suggestions about what can be done domestically to improve the inequality experienced within the global international market. To better illustrate the existing inequality, I should point out that the most well-lit places on the planet represent roughly 1.2 billion people. There are about 7.7 billion people on the planet, so the well-lit regions of the earth are home to a relatively small fraction of the population.

Interestingly, the OECD is not just home to the wealthiest nations in the world who also have the biggest energy footprints on a *per capita* basis; these are nations in which industrialization has long since been the norm. In addition, these countries have driven most of the political and geopolitical discourse about international commerce as well as the framing of international law. Effectively, these countries have set the stage for the rest of the world. That said, we should bear in mind that these countries are only home to 1.2 billion people.

Next, I want to draw your attention to India, Southeast Asia (or the ASEAN region), and China. Here you can see that the lights are on, but they are not quite as bright. However, if you do a time-lapse on this, you will see that those regions of the world are growing brighter. In fact, their growth has become the hallmark of what has been happening in the energy market for the last couple of decades. How can that be? Geographically, these regions are not quite as large and are still not quite as bright, but there is a very important point to bring to the fore here. Collectively, India, China, and the ASEAN region account for about 3.4 billion people. That is almost three times the number of what we have in the OECD in relatively smaller regions. This is remarkable. The population growth in these regions is still positive, as opposed to OECD nations, in which the population growth is relatively flat and is projected to remain so for the next 30 years. In fact, in a lot of OECD nations, you see aging



population. This has interesting implications for the socio-economic trends in these countries. However, in developing Asian economies, this is not the case.

A. *The Increased Influence of Asia in the Energy Landscape.*

When you look at what is likely to come over the next thirty years and what has transpired in the last 30 years, you will see that the world of energy has shifted to one that is driven by what is happening in Asia. China, of course, dramatically emerged onto the global energy scene in the mid-1990s with its massive rate of economic growth that has remained constant through the last two decades. As a result, it has forever transformed the way we think about energy production, energy demand, energy trade, and even conversations on the environment. In particular, the supply chain for some of the greener technologies is being proposed for distribution in OECD nations. We can certainly revisit this topic, if desired, however, it will suffice to say that, over the last twenty years, Asia, in general, and China, in particular, have had a transformative effect on the world of energy. They will likely continue to do so.

Now, it is important to note that I have not even commented on the remaining three billion people on the planet. They live in the Middle East, Central Asia, Latin America, and sub-Saharan Africa. This is where things get really interesting because if you look at sub-Saharan Africa at night, you see a continent that is relatively dark. Thus, it begs a very simple question: is it dark at night because there are no people in these regions? Of course, not. In fact, there are just over a billion people in this part of the world who lack access to modern energy services, a condition that is typically referred to as energy poverty. It is also a region that has launched an initiative to improve energy access conditions. The initiative is called “Energy Access for all by 2030”. This initiative is regarded as ambitious as the “Net Zero” energy initiative which we hear about in OECD countries. These significant chunks of the global population without access to modern energy services account for nearly three billion people. This is not acceptable. Therefore, this invokes an urgent need to expand energy access by investing in energy infrastructure and developing new resources. However, what those resources are, remains to be seen. Generally, when countries begin to develop, they use local (*i.e.*, domestic) resources. This is called



leveraging their own competitive advantage. It allows them to support economic growth and development.

B. *The Contrasting Landscape of OECD Countries vis-à-vis non-OECD Countries*

So, when we look at the world and we talk about energy, what is evident is that it is the world of haves and have nots. The OECD is certainly the world of “haves” yet this world does not even comprise half of the world’s population. The fact is there are more people lacking access to modern energy services in any reliable way to promote economic growth, development, and well-fair improvement.

As we move forward, this set of data will be a very important motivator for international discourse. It is also equally important to recognize that, by UN population projections, if we project out to 2050, we will be looking at 9.6 billion people. By that time, OECD is projected to be roughly the same size, just south of 1.4 billion. This means that most of the population growth that is being projected will occur outside the developed world. To make things clearer, a massive fraction of that growth is expected to come from the world’s most impoverished nations, from places like sub-Saharan Africa.

So, when we think about the energy transition problem, it is important to recognize that transitions essentially mean multiple things depending on where you are in the world. This picture is illuminating in many ways because you can begin to see that a transition in North America might mean moving from one resource to another, as new technologies are integrated into legacy infrastructures and grids get expanded. It is largely the story of moving from one fuel to another. Nevertheless, when you go to places like sub-Saharan Africa, it is less about fuel displacement and more about increasing energy demands. The question then becomes: how do we meet that challenge? It is a significant challenge, one that needs to be understood in the context of transitioning from energy poverty to energy access. Therefore, it is a very different kind of discussion.

The next slide presents a set of data that supports what I just laid out. The slide compares data from OECD and non-OECD countries. It also contains energy use from 1970 all the way through 2019. 2020 data is not yet completed. Once it is



completed, it will be added. We should expect a drop in demand, given the global shut down that we experienced. I will discuss this later in further detail, as it has significant bearing on the conversation concerning what we see in 2020.

III. THE ROLE OF LEGACY INFRASTRUCTURE IN SHAPING ENERGY MARKET

In the OECD spectrum, you can see primary energy use by fuel type. It contains oil, natural gas, and coal, which are still the dominant forms of energy use. In the non-OECD spectrum, the story is similar, except that there is even greater fossil dependence. When you see the non-OECD data the difference is quite striking. This is due to a significant growth in natural gas demand, as well as noticeable decline in coal consumption. These trends most definitely are going to continue, as they are directly connected with the age of infrastructure that is in place to use coal. Specifically, these trends pertain to the legacy conversation. I will explain this term in a minute. By contrast, when you look at the non-OECD trends, what stands out the most is the growing use of coal over the course of last twenty years. This signifies a striking difference from the OECD countries' trends. What that reveals is the popularity of legacy infrastructure that is in place in non-OECD countries. This infrastructure continues to be expanded due to the massive amount of coal-fired generation capacities which are still under construction in developing countries in Asia. Looking at these trends makes one thing clear; coal is going to be around for a while in these countries. This revelation gives rise to a vexing question about how these countries can manage to grapple with CO2 emissions and climate change.

In the US, the last major build-out of coal-fired generation was between 1978 - 1982. Most of that capacity was built with the design life of roughly forty years. A lot of it was supported by the policy. During 1980-1990, there were significant concerns in relation to energy security, the reliance on imports of oil, and the increased risk of running out of natural gas in the US. These factors drove movements towards domestic fuels. That is partly why the coal, in terms of resources endowment, has remained a dominant fuel. Although it is not a key fuel that is being consumed predominantly, the US is still home to 20% of the world recoverable coal, making it a massive resource base.



A. *The Shifting Paradigm of the Coal Production and Consumption in OECD Countries*

When fast forward to just a last few years, it can be seen that the production of coal experienced a noticeable drop in the OECD countries, as well as the US. In fact, coal has actually been in decline since 2007. It is partly due to being out-competed by other resources. Additionally, the decline of the coal consumption can be largely attributed to the rapid approach to 40th birthday of the significant percentage of coal-fired generation capacity in the US. This leaves developers with the option of either retire or replace the existing infrastructure or upgrade them. With natural gas being so cheap, coupled with renewables getting cheaper by the day, it is a fairly easy, straightforward decision. The only sensible option would be to retire and replace. That is what prompted the energy transition landscape in the US, similar story is unfolding in Europe as well.

However, when you get outside of the more developed economy of the world that is not the case. The landscape there is incredibly different and that has significant bearing on how the energy transition will unfold in different parts of the world. With respect to energy demand, one thing that I wanted to highlight is that, in 2006, the Non-OECD demand exceeded OECD demand for the very first time. It has continued to grow ever since. Currently, we are at the point in which Asia collectively represents more energy use than the EU and North America combined. Thus, the things that are happening in Europe and North America, on the energy fronts, still matter. However, it is important to recognize that what is unfolding in Asia is really indicative of emerging new reality in the world of energy.

B. *The Implications of Co2 Emissions*

The next slides carry an implication for Co2 emissions. This is important because, at the end of the day, a lot of international climate negotiations are really aimed at reducing Co2 emissions. The efforts to reduce Co2 emissions has not really garnered any concrete momentum in recent history. The table shows a slight decline in Co2 emissions in 2009, which was largely due to the global financial crisis. It is expected to see a significant decline of Co2 emissions in 2020, which is clearly due to a significant calamity that effectively resulted in the shutdown of the world's



economies. But I raised this point that in 2020, we effectively shut down two third of the world. Yet, we look at what happened in global oil demand, on an annual basis, it is projected to fall out by between ten to twenty billion barrels per day. That is roughly ten percent of the global demand. When you look at Co2 emissions that is fallen substantially, but not nearly as much as what most people would have anticipated, especially if they were told that the economic activities would have collapsed the way it did as a result of a pandemic in 2020.

So, this really does highlight the fact that legacy infrastructure will continue to play a major role in facilitating what we see in terms of carbon emissions and fuel use. This means that de-carbonization is going to require significant action, but it is not going to be a one-size-fits-all sort of story, nor will it be a silver bullet. In other words, many different things will shape the future energy landscape. It is important that we expand the way we think about de-carbonization; we must recognize that we are not just talking about replacing hydrate carbon. In fact, there are three very important words that you must incorporate into any conversation about energy transitions. Those words are legacy, scale, and technology. If you cannot reconcile these three words with the events that are unfolding, you should be wary of being sold a bill of goods. These three words are integral to any discourse concerning the integration of new energy resources into the existing energy architecture.

One thing from this slide that I would like to highlight—a thing that speaks volumes about the immense challenge that global Co emissions represent—is the division between OECD and non-OECD. Since 2000, OECD emissions have not increased, nor have they remained constant—they have decreased. The growth of global C02 emissions has occurred outside of the OECD and is largely driven by a developing Asia. In fact, the growth has been so dramatic that if you took OECD emissions all the way down to zero tomorrow, global emissions would still be at 1995 levels. This is a remarkable fact. It speaks volumes about what must happen and where.

C. *The Effects of Coordination Failure on the Future of Energy Market*

There are a few things on this slide that I would like to point out. The energy system has always been in transition. The world of energy today is very different from



what it looked back in 1990. The world of energy in 1990 was very different from what it looked in 1960. In a similar vein, the world of energy in 1960 looked very different from what it did in 1930. By all accounts, the world of energy in 2050 will look significantly different from what it looks like today. So, it is important to recognize that the energy system constantly evolves. It is always subject to transition. New technologies are always being introduced, therefore, their integration with the existing eco-energy system gives rise to an important question. Oftentimes, there comes about a particular technology that makes something so much cheaper, but it never gets picked, never gets integrated. Why is this the case?

We have seen this story play out with electric vehicles multiple times. It is largely due to the theory called “coordination.” This theory says that if I were to do something green that does not necessarily leverage the existing infrastructure, I would have to not only develop new technologies, but also the support technologies that is necessary for its operation. If one thing in that chain breaks down, you have what is called a “coordination failure” which results in the new technologies not being picked up for mass production.

So, for example, when you think about wind and solar, they have been relatively easy to integrate into developed economies’ power grids because there is an existing grid. Also, there are legacy resources that can provide back-up generation capacity. They are referred to as de facto storage. For instance, natural gases have done a tremendous job in places such as the State of Texas regarding wind power. Therefore, wind and solar energy must leverage existing legacy infrastructures as they continue to evolve.

In contrast, technologies that cannot leverage existing infrastructures might prove to be problematic. This is where policies and regulations will play an incredibly important role. It is also where coordination failure can occur. Said failure is known to be one of several elements that contributes to what is known as the “valley of death.” For those of you unfamiliar with this idea regarding new technologies, the “valley of death” describes a situation in which a promising new technology emerges every now and then and falls into the “valley of death,” that is, it never gets adopted.



One of the main reasons that technologies fail to catch on is that they lack the necessary (and expensive) support infrastructure.

That is why it is important to recognize the importance of legacy. All these factors are important, however, the level of importance of any one factor can vary by region, country, etc. When we think about the principle of comparative advantage, that is really what everything is point to: the fact that energy transition(s) will look different everywhere. In certain regions, you have certain comparative advantages that do not exist in other regions. Therefore, these regions should leverage their advantages toward a movement (within the energy system) that can lead to a more sustainable future. However, because this movement will be specific to these regions, it cannot be used as model for the rest of the world. A prime example is Northwest Europe, throughout which massive wind resources exist, especially off the coast of Denmark and the Netherlands. Granted, it is still intermittent, but it is robust and being leveraged.

That gives rise to another important question: how do you deal with intermittency? One of the ways these countries are addressing this issue is through the development of transmission infrastructure. This helps them arbitrage periods when there is a lot of wind blowing and when there is not. One of the interesting things that I was privy to learn about is that, in Norway, there have been significant discussions about expanding long-distance transmissions between Norway, Denmark and the continent. Why is this significant? Norway enjoys massive hydro resources and hydro is the world's best battery. It can be used as a balancing item for a system with more renewables. This is beautiful because we are effectively talking about a system that could evolve to a zero-emission system in a relatively easy manner by developing a little bit of infrastructure. But again, we cannot superimpose this reality on other regions. This gives rise to the question: how will other regions evolve? They will evolve with a similar approach but with different means. The key here is: what is the end goal? Environmental sustainability. Of course, last year sent a shockwave through the system. This has many people wondering about Covid-19's impact on energy and other facets of society. I would argue that the effects of Covid-19 are not



yet fully understood. Nevertheless, these effects will be with us for a long time to come.

IV. THE IMPACT OF COVID-19 AND BIDEN'S ELECTION ON THE US ENERGY MARKET

The short-term impacts of the pandemic on the energy market as well as consumer preferences have been significant. There certainly has been a shift in consumer behavior; for example, shopping behavior has significantly shifted (*i.e.*, has significantly decreased, changed from in-store shopping to online shopping, etc.). However, it is likely that we will see a return to the way things were once the vaccine is widely distributed and Covid is behind us. Nevertheless, some industries (*e.g.*, the aircraft industry) have been decimated and it may be a while before they show signs of recovery. In the energy field, folks have been talking about the pandemic's impact on oil prices and the oil market in general.

The interesting thing about it is that you see a significant drop in reduction and demand and there was a force shut-in of capacity. However, if you compare this to other industries—airline, hotel, or restaurants businesses—you will see that, in the energy field, things are on a more significant scale. So, a lot of shaking out has to happen. Public transportation was the area that, both, local and federal governments, were grappling with for a while. Rider shifts dropped dramatically. This put a strain on cities, forcing them to support public transport infrastructure. So, it will be interesting to see how these areas shape up as we go forward. In essence, it is really an issue of consumer behavior and habit. For example, in a lot of places in the world, people have avoided using public transportation. Instead, they've chosen to use their own vehicle or simply decided to not go anywhere. How this situation unfolds in the next ten to twenty years is an open question, however, its implications for energy transition are quite important.

Recent vehicle sale statistics noted that, on a global scale, SUVs have accounted for just over 42% of all new car sales last year. This is remarkable. However, we ought to focus on whole data and not individual parts because electric vehicles are being sold too, however, they make up a relatively small fraction of total annual sales. So, this begs the question: how is this going to unfold as we go forward? What will new



efficiency and new regulations mean for these sales?

This data that you see here is known to many people, however, there a couple of points I want to focus on. The outcome of Georgia gave Democrats a narrow majority in the Senate. They also maintained their narrow majority in the House. The key word in both these statements is *narrow*. Basically, this means that we will see a real opportunity for good old-fashioned negotiations. It also means that we will see a strong use of executive orders. In today's America, the robust use of executive orders is, in many ways, the prime emblem of its political system. Nevertheless, one of the biggest criticisms of their use is that they cannot affect lasting change because they are not legislative actions. Also, they can effectively be undone by the next president.

One of the more interesting things about this year's elections is that 86 of the 99 chambers in state legislators held elections. If one looks carefully, one can see a shift away from Democrats (*i.e.*, republication). At present, it is a relatively minor shift, but it is still a shift. Why does that matter? There is a process occurring that is known as re-districting. This means that if you have republication controls in state legislators, it is likely that Democratic districts will learn towards the Rs. It should go without saying that this matters to Democrats because it will affect how they vote on various issues, *i.e.*, they will be less willing to vote for something that will harm their constituency. At best, they might push everything back towards the middle. This is where good old-fashioned negotiation will come into play. In any case, the age of uncertainty is upon us. Personally, I think it is going to be fun to see what the next four years have in store.

The last slide summarizes our discussion today. It is important to note that energy will not be at the top of the list, at least not from a legislative perspective. Nevertheless, it may still be affected through executive order. From a legislative perspective, there is going to be a lot more emphasis on getting through the pandemic, health care, and economic recovery. These are big ticket items which are not simple to address. However, no matter what is said, it is all going to be about one thing: recovery. This is where I believe a lot of negotiation will take place. Ultimately, these negotiations will lead to more moderate discussions on energy transition. Of



course, this does not mean that discussions will not be contentious—of course they will be—we are talking about people who have very strong feelings about this stuff. That said, there will be areas in which bipartisanship will prevail. Therefore, we should expect to see fast movement in these areas. As far as de-carbonization, we must think deeper about things in a broader perspective. This means that we need to consider things from portfolio perspective, which means looking at nature-based solutions.

There is a bill called the “Growing Climate Solution Act”. The bill was debated last June and has considerable support across the political spectrum. This is the type of thing I would expect to move forward without a hitch. Also, I think we are going to see a strong emphasis on carbon capture technologies and support for their deployment. This could reel in several republication, oil- and gas-producing states. In addition, it could garner support from Democrats, which is where their thin majority comes into play.

Over the last two weeks, I have read a multitude of articles about how an infrastructure package might be introduced in the next wave of the US government’s two trillion-dollar investment opportunity. In fact, there is a myriad of examples there. I think that one of the most common issues these packages have is their particular focus on transmission structure. This is needed regardless of the energy technologies win out, so there are certain things that are inevitable, and certain things that are not. What this means is that we get pushed into things that are easier to make progress with at the expense of the more contentious issues which, ultimately, get tabled. This, in essence, opens a door for Biden to use foreign policy as a very strong and powerful tool. In rejoining the Paris Accord, the US assumed its leadership role in global climate discourse. Of course, leadership can be assumed without concrete actions from within. Nevertheless, I think we will see said actions, either through making or through various cabinet appointments. These actions will effectively establish the US as a country that is taking real action to address climate change.



V. CONCLUSION

I believe lots of interesting events will occur that will send strong signals internationally that the US is determined about climate action, in particular with respect to rule making action from within the executive branch. However, such robust desire to take serious actions to address climate change is not reflected as strongly from legislative perspectives. There have been discussions about banning fracking and what can be done on that front. There is an interesting juxtaposition that I would like present to you to leave you something to think about.

I did a briefing for the Ministry of Foreign Affairs in Korea a few weeks ago. An important issue that surfaced in that discussion was the concerns amongst people in the Ministry about what the administration might do to natural gas production and the prospect for it, as well as energy exports. They are quite concerned. Korea remains steadfast ally in the Asian Pacific, therefore, their views are important. Why are they worried? Because currently their power generation mix comprises roughly 40 % of coal. They have very strong and solid goals to drive coal out of their energy mix, but they also do not have a lot of renewable resources, which forces them to rely on gas. From the energy security perspective, one thing that they need to consider is whether the gas would be a viable alternative for them. That is where the US really can play a significant role. The US energy de-risks the gas market in the Pacific base. That is something the Korean government seeks to capitalize on. Therefore, if you envision the world where the LNG exports in the US are diminished because the gas production is compromised, it still carries significant implications for the carbon footprint of some of our allies in a developing Asian economy as well. So, this factor ultimately will shape this conversation, which is why, natural gas will likely remain an important fuel for any energy transition's discussion, largely due to what it means in other parts of the world.



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INSTITUTE FOR TRANSNATIONAL ARBITRATION OF THE CENTER FOR AMERICAN AND INTERNATIONAL LAW

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B. *Why Become a Member?*

Membership dues are more than compensated both financially and professionally by the benefits of membership. Depending on the level of membership, ITA members may designate multiple representatives on the Institute's Advisory Board, each of whom is invited to attend, without charge, either the annual ITA Workshop in Dallas or the annual Americas Workshop held in a different Latin American city each year. Both events begin with the Workshop and are followed by a Dinner Meeting later that evening and the ITA Forum the following morning—an informal, invitation-only roundtable discussion on current issues in the field. Advisory Board Members also receive a substantial tuition discount at all other ITA programs.



Advisory Board members also have the opportunity to participate in the work of the Institute's practice committees and a variety of other free professional and social membership activities throughout the year. Advisory Board Members also receive a free subscription to ITA's quarterly law journal, *World Arbitration and Mediation Review*, a free subscription to ITA's quarterly newsletter, *News and Notes*, and substantial discounts on all ITA educational online, DVD and print publications. Your membership and participation support the activities of one of the world's leading forums on international arbitration today.

C. *The Advisory Board.*

The work of the Institute is done primarily through its Advisory Board, and its committees. The current practice committees of the ITA are the Americas Initiative Committee (comprised of Advisory Board members practicing or interested in Latin America) and the Young Arbitrators Initiative Committee (comprised of Advisory Board members under 40 years old). The ITA Advisory Board and its committees meet for business and social activities each June in connection with the annual ITA Workshop. Other committee activities occur in connection with the annual ITA Americas Workshop and throughout the year.

D. *Programs.*

The primary public program of the Institute is its annual ITA Workshop, presented each year in June in Dallas in connection with the annual membership meetings. Other annual programs include the ITA Americas Workshop held at different venues in Latin America, the ITA-ASIL Spring Conference, held in Washington, D.C., and the ITA-IEL-ICC Joint Conference on International Energy Arbitration. ITA conferences customarily include a Roundtable for young practitioners and an ITA Forum for candid discussion among peers of current issues and concerns in the field. For a complete calendar of ITA programs, please visit our website at www.cailaw.org/ita.

E. *Publications.*

The Institute for Transnational Arbitration publishes its acclaimed Scoreboard of Adherence to Transnational Arbitration Treaties, a comprehensive, regularly-updated report on the status of every country's adherence to the primary



international arbitration treaties, in ITA's quarterly newsletter, News and Notes. All ITA members also receive a free subscription to ITA's World Arbitration and Mediation Review, a law journal edited by ITA's Board of Editors and published in four issues per year. ITA's educational videos and books are produced through its Academic Council to aid professors, students and practitioners of international arbitration. Since 2002, ITA has co-sponsored KluwerArbitration.com, the most comprehensive, up-to-date portal for international arbitration resources on the Internet. The ITA Arbitration Report, a free email subscription service available at KluwerArbitration.com and prepared by the ITA Board of Reporters, delivers timely reports on awards, cases, legislation and other current developments from over 60 countries, organized by country, together with reports on new treaty ratifications, new publications and upcoming events around the globe. ITAFOR (the ITA Latin American Arbitration Forum) A listserv launched in 2014 has quickly become the leading online forum on arbitration in Latin America.

Please join us. For more information, visit ITA online at www.cailaw.org/ita.



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ITA IN REVIEW

Table of Contents

ARTICLES

ISSUES OF JURISDICTION AND ADMISSIBILITY IN THE
'CRIMEAN' ARBITRAL PROCEEDINGS

Martina Ercolanese

THE COMPLIANCE WITH CLIMATE CHANGE STANDARDS
AS A JUSTIFICATION TO VIOLATIONS OF INTERNATIONAL
INVESTMENT TREATY OBLIGATIONS—AN ANALYSIS

Marcus Liew

BOOK REVIEWS

INTERNATIONAL ARBITRATION IN LATIN AMERICA:
ENERGY AND NATURAL RESOURCES DISPUTES
EDITED BY GLORIA M. ALVAREZ, ET AL.

Julián de Cardenas García

THE UNRULY NOTION OF ABUSE OF RIGHTS
BY JAN PAULSSON

Sylvia Tordova

ITA CONFERENCE PRESENTATIONS

KEYNOTE REMARKS:
HOW A BIDEN ADMINISTRATION WILL IMPACT THE ENERGY MARKETS

Kenneth B. Medlock III

A REPORT ON PROFESSOR ALVAREZ'S OPENING REMARKS
"ISDS REFORM: THE LONG VIEW"

Fabian Zetina

Young ITA

YOUNG ITA CHAIR'S REPORT

Robert Reyes Landicho

YOUNG ITA MENTORSHIP GROUPS IN ASIA
HOST FIRESIDE CHAT WITH MS. LUCY REED

Yvonne Mak
Ishita Soni

AND MORE.

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