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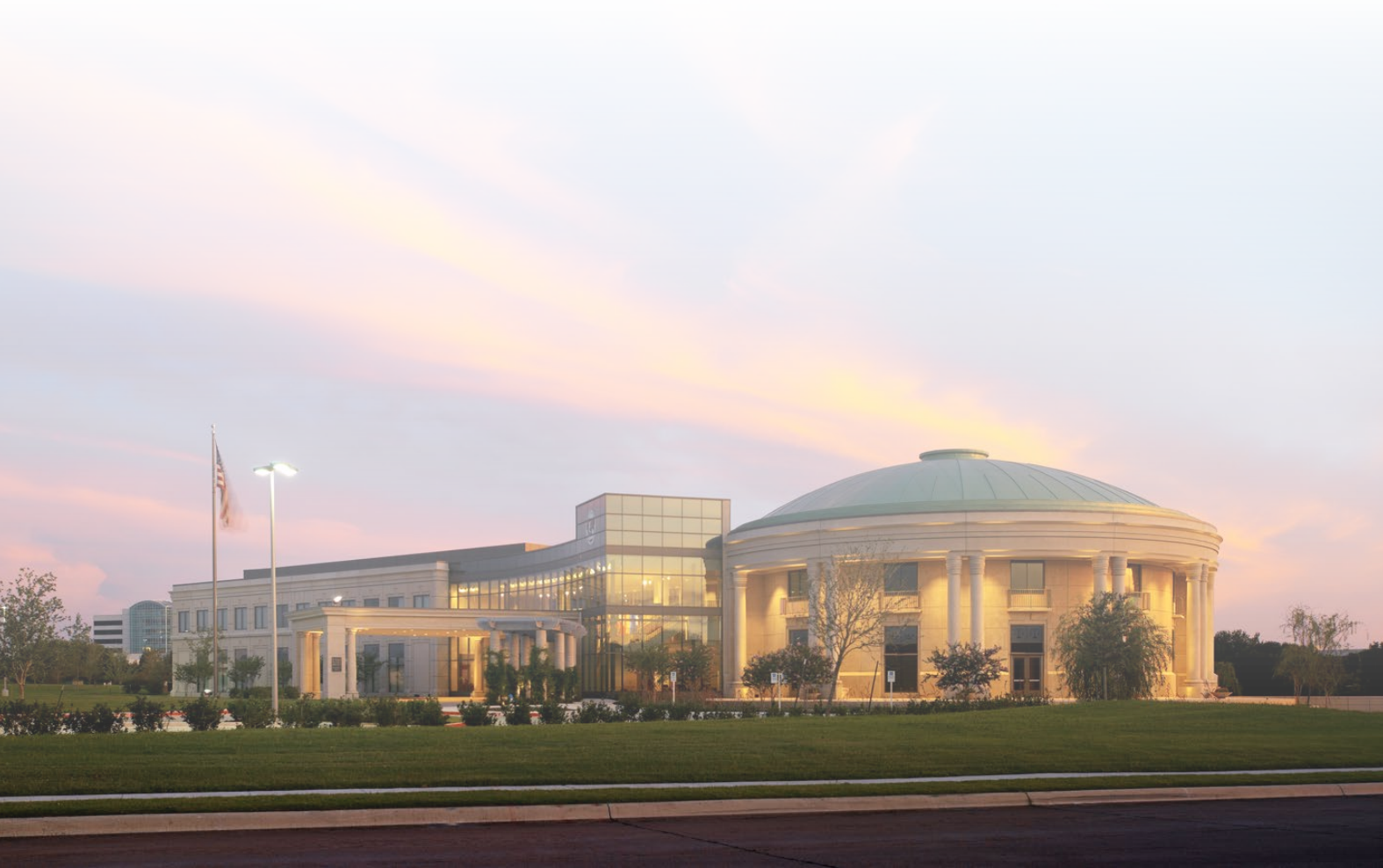

ITA IN REVIEW

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ITA IN REVIEW

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BOOK REVIEW
INTERNATIONAL ENERGY INVESTMENT LAW: THE PURSUIT OF STABILITY (2ND ED.)
BY PETER CAMERON

Reviewed by Elizabeth J. Dye

I. INTRODUCTION

The second edition of Professor Peter D. Cameron's "International Energy Investment Law: The Pursuit of Stability" maintains the first edition's focus on the role that stability plays in international energy investment law but addresses issues in international investment law from the perspective of the states that give their consent to follow the rule of international investment law and discusses investment issues relating to non-fossil fuel sources of energy. It also gives thoughtful consideration to emerging energy sectors, including renewables, as well as non-investment laws, such as environmental laws and human rights, that are beginning to shape energy investment law landscape in new yet familiar ways. The book provides a comprehensive overview of the goals of stability in energy investment law, suggests how to implement these goals together with the challenges that may arise in the process, and poses thoughtful questions and answers to the role that stability is likely to play in the future of international investment law. The following summarizes the three main parts of the book, which are further divided into chapters (12 total), and the book also includes appendices, a select bibliography, and an index.

II. THE BOOK

A. *Part I.*

Part I examines the backdrop to the development of the extensive body of law that comprises international energy investment law and how there are "six characteristics of energy investments" that effect the law's development, including that energy investments are international, large scale, longer in duration than most, demonstrate a pervasive state presence, operate in a context of price volatility, and have a degree of complexity. Dr. Cameron adds two contextual features: the transformational potential that such investments pose in economic and social terms and the legacy of

investment history. Dr. Cameron explores how these features requires both states and investors to focus their efforts and attentions on the development and promotion of a stable legal framework for investments—and necessarily build in flexibility mechanisms to respond to volatility in the worldwide energy market to policy changes implemented by host states.

1. Chapter 1. Energy Investment Law.

Given the volume of energy investment worldwide (estimated to be $1.8 trillion annually), Professor Cameron elaborates on the aforementioned six characteristics and two contextual features of international investment. Chapter 1 also provides an overview of the aims, approach, scope, and structure of this book.

2. Chapter 2. States, Investors, and Energy Agreements.

This subpart examines the investment triangle (or "three basic elements of any investment relationship")—the relations between the host state, the investors, and the investment, as well as energy governance, which he describes as the "glue" that makes the main elements stick together. In discussing host states, he focuses on the states' multifaceted role, on the one hand as umpire or regulator, and on the other as participant and commercial partner. In discussing investors, he focuses on issues surrounding the notion of "investor" in a globalized economy, especially as it relates to different types of investors, and advances a unique typology to classify investors. With regards to the third element, the investment, he focuses on the debate among arbitral tribunals over what constitutes an "investment," and the modern-day challenge of interpreting and applying decades-old treaties in the context of now common yet increasingly complex investments in the energy sector. "Energy governance" involves energy contracts, the host state's sovereignty over energy, and investor-state arbitration, which all work together (in theory) to allow for peaceful ways of settling disputes among the parties.

This chapter concludes with an overview of the main investment agreement in six energy sub-sectors, including hydrocarbons, natural gas, electricity and renewable energy, coal and energy-related mining, unconventional energy (*i.e.*, hydrocarbons produced from shale rock or oilsands), and nuclear energy.

3. Chapter 3. Stability Based on Contract.

The focus of this chapter is the mitigation of political risk in an energy investment contract through the use of stabilization clauses, which Professor Cameron defines as a contractual assurance of negotiated terms against future legal or regulatory changes. He walks through the interplay between investment stability guaranteed in a contract and other legal instruments, including host state legislation, international treaties, and international law as the governing law of the contract. In doing so, the book examines the four principal kinds of stabilization clauses available to investors, including both the freezing kind of clause and the more flexible variety, variously called a balancing, equilibrium, or adaptation clause. This chapter also examines the issues surrounding renegotiation under balancing clauses, and the practical enforceability of stabilization clauses before international tribunals. The chapter ends by examining the legal foundations of two international pipeline projects and the ways in which they provide for long-term stabilization.

4. Chapter 4. The Classic Tests of Contract-Based Stability.

This chapter examines twelve well-known, early investment cases, including *Aramco*,[1] *Sapphire*,[2] and the *Libyan*[3] cases to highlight examples of expropriations that took place in the 1960s, 1970s, and 1980s. The author describes the arbitral awards that arose from these disputes as the "classic tests" of the validity, scope, and function of contractual stabilization in international energy arrangements. Interestingly, Professor Cameron points out that despite the awards' association with an approach to stabilize long-terms contracts, the contracts at issue in these cases failed to provide investors with the level of security they had hoped for when they negotiated their contracts.

5. Chapter 5. Stability Based on Treaty

Chapter 5 reviews the features of the investment treaty regime that are most relevant to energy investment law and its goal of providing investors with the kind of

[1] Saudi Arabia v. Arabian American Oil Company (ARAMCO), Award (Aug. 23, 1958), 27 I.L.R. 117 (1963).

[2] Sapphire Int'l Petroleums Ltd. v. Nat'l Iranian Oil Co., Award (Mar. 15, 1963), 35 I.L.R. 136 (1963).

[3] Libyan Am. Oil Co. ("LIAMCO") v. Libya, Award (Apr. 12, 1977), 17 I.L.M. 3 (1978), 4 Y.B. COM. ARB. 177 (1979).

long-term stability that is emblematic of energy investments. The author reminds us that the investment treaty system has been established incrementally by states themselves, and not private investors, and examines the history behind the explosive growth of international investments agreements, including on the one hand the need for an enforcement regime for investors to revert to when disputes between themselves and states arise, and on the other hand the perception that political risk was higher-than-average for foreign investors and the view that this perception would inhibit the flows of foreign investment into developing countries and emerging market economies.

The chapter next examines general treaty standards most relevant to the notion of stability in international investment: the Fair and Equitable Treatment (FET) standard and the related meaning of "legitimate expectations," the standard of full protection and security, and the notion of an umbrella clause. Next, Professor Cameron discusses the impact of the Energy Charter Treaty (ECT)[4] on energy investment, as well as USMCA[5] and NAFTA Chapter 11,[6] and ends with the outsized role that ICSID plays in investor state arbitrations.

B. *Part II.*

Part II examines the challenges to the stability framework in international energy investment through cases studies from (i) Latin America, (ii) East Europe/Central Asia, and (ii) Africa. Chapters 6, 7, 8, and 9 assess whether the investment treaty regime has fulfilled its promise of providing long-term stability to both investors and states. Finally, it examines critically several areas of public interest over which states have always found it important to retain regulatory oversight.

1. Chapter 6. Meeting Challenges to Investment Stability-Across the Energy Spectrum.

In this Chapter, the author argues that the inclusion of the FET standard in international investment treaties is the most important feature of energy

[4] Energy Charter Treaty, 2080 U.N.T.S. 100 (Dec. 17, 1994).

[5] United States-Mexico-Canada Trade Agreement,

[6] North American Free Trade Agreement, 32 I.L.M. 605, Ch. 11 (Jan. 1, 1994).

investments. The author notes that tensions between states and investors arose from two broad processes in what he describes as policy formation and legal implementation: (i) the response of populist governments to rising commodity prices and (ii) the effects of liberalized policies that incentivized inward investment on a large scale. The author also contrasts the different legal guarantees that arose in the context of the hydrocarbons and electricity and gas utilities sectors, and the different expectations that investors could have with respect to each sector.

This Chapter examines five principal challenges to the stability of energy investments, and the role of international investment law in responding to them. The author identifies the challenges as (i) threats presented by regulatory acts and taxation measures, (ii) expropriation, direct and indirect, (iii) defenses for state action in emergency situations—such as the well-known 'state of necessity'—(iv) the time and complexity of arbitral procedures in investment arbitration, and (v) the various measures introduced by governments in their efforts at lowering carbon intensity in their energy use.

Next, the Chapter discusses the fulsome and complex body of case law that has developed on the relationship between FET and legitimate expectations and the provision of a stable and predictable legal and business framework. The author determines that the case law reflects that FET protection is not equivalent to that of a stabilization clause, and an investor must navigate several challenges before receiving FET protection. Finally, the Chapter examines the ways in which tribunals ensure that investors accept their responsibilities to the host state and give a brief review of the debate on reforming the energy investment system itself.

2. Chapter 7. Latin America: Treaty and Contract Stability in the Face of Policy Realignment and Crisis

Chapter 7 examines how the legal protection of long-term energy investments has responded and fared to the variety of challenges in the Latin American setting, including the wide swings toward and then away from foreign investment in the energy and mining sectors. In particular, the author raises and then examines whether legal protections given to investors have worked when predecessor governments in Latin America sought to unilaterally amend existing contracts or the

legal and political environments in which those contracts are operational. For example, this chapter discusses the investment policies swings in Venezuela, Bolivia, Ecuador, and most notably Argentina in the face of State measures taken in response to its economic crisis in 2002-2003.

The author walks through the political context from which unilateral states' measures arose Venezuela, Bolivia, Ecuador, and Argentina, and then examines how Peru, Venezuela, and Colombia have taken their own approaches to contract-based stabilization through the use of Legal Stability Agreements. In Latin America, it has been applied to investments generally and not only to energy investments.

The author examines several case studies in Latin American countries, including the CMS *v. Argentina* case,[7] which arose when an investor that had purchased a minority shareholding in an Argentina company that operated a gas transportation network in northern Argentina was suddenly subject to government measures taken during the economic crisis. The tribunal found that Argentina's actions had violated standards of protection in the relevant BIT but declined to hold that Argentina had expropriated the investment at issue in the arbitration. The author notes that the outcome of this case supports a view that asserting other treaty standards are more likely to result in a favorable outcome from the investor than a claim of expropriation, and notes that *Enron v. Argentina* failed on similar grounds.[8]

3. Chapter 8. Russia, Ukraine, and Central Asia: Treaty and Contract Stability in the Post-Soviet Space

Chapter 8 examines the different strategies worked out by investors and host states Russia, Ukraine, and Central Asia to provide long-term stability for energy investments, including stabilization by contract, by treaty and domestic law. The author discusses the history of energy investment and the development of both domestic and international regimes to govern energy investment in each country and region. The author next examines what he describes as the major tests of these stability mechanisms, particularly against the background of rising commodity prices

[7] CMS Gas Trans. Co. v. Argentina, ICSID Case No. ARB/01/8.

[8] Enron Corp. v. Argentina, ICSID Case No. ARB/01/3.

in the first decade of the twenty-first century in Russia, Kazakhstan, Ukraine, and Central Asia and the Caspian Sea region. Similar to Chapter 7, this Chapter then weighs the actions of the host state against the performance of contractual obligations by the investor. Next, the author considers the (modest) role gas contracting and the sale and transit of natural gas from Russia to European consumers has played in foreign investment in this region.

The Chapter next discusses the different forms of stability introduced by the ECT. The author notes that the political aims of the ECT have largely failed due to Russia's withdrawal from the treaty in 2009 and its de facto refusal to meaningfully engage up until that point, but that nevertheless the ECT's legal framework have proven quite successful in managing foreign investment claims. The author discusses earlier awards made under the ECT, including the *Plama v. Bulgaria* award[9] in which the investor claimed that Bulgaria had interfered with the operation of an oil refinery in which Plama had purchased an equity interest. The tribunal found that Plama had acted contrary to the principle of good faith, which includes the obligation that an investor provide relevant and material information to the host state when seeking approval from an investment, and that Plama was guilty of malpresentation. The author also includes an in-depth discussion of the well-known *Yukos* cases[10] and the question of whether Russia was subject to the provisional ratification of the ECT. Finally, the author considers the substantive protections given to investors in the mining sector in this region.

4. Chapter 9. Africa: Treaty and Contract Stability

This Chapter discusses the importance of large-scale foreign investment to African governments but notes that the relative goals of governments and investors in the region have traditionally been at odds: while African governments would benefit from investment in manufacturing or infrastructure development, the investors' focus has been on exporting raw materials out of Africa, leading to a lack of

[9] Plama Consortium Ltd. v. Rep. of Bulgaria, ICSID Case No. ARB/03/24.

[10] Yukos Universal Ltd. (Isle of Man) v. Russ., UNCITRAL, PCA Case No. 2005-04/AA227; Yukos Capital Ltd. (formerly Yukos Capital SARL) v. Russ., UNCITRAL (Geneva Tribunal), PCA Case No. 2013-31.

meaningful development in host countries in Africa.

Professor Cameron discusses the evolution of energy investment in Africa, starting in the post-colonial period of the 1980s wherein several large states, including Algeria, Angola, Egypt, Equatorial Guinea, Gabon, Libya, and Nigeria that built up their export-driven energy industries on the back of substantial foreign investment from the 1980s onwards, and the second wave of energy investment that arose in the early 2000s in Ghana and Senegal, and the East, such as Mozambique, Tanzania, and Uganda. This chapter focuses on several African states within each of these two groupings (first wave group and second wave group) and will examine how legal stability for long-term, often complex energy investments has been tested, and with what results in terms of preserving (or ending) the relationship between host state and investor. In particular, the author points to the range of stabilization instruments used in Africa, from stabilization clauses in long-terms agreements, to legislative guarantees (such as Nigeria's law applicable to an LNG project) or presenting a negotiated contract to the legislature for adoption as a *lex specialis* (as has been used in Egypt for many decades). However, in his conclusion, the author poses the question of whether these varied stabilization instruments are effective, and then points to the fact that many disputes in Africa reach a settlement which benefits both host states and investors in two ways: (i) the commercial relationship continues and (ii) provides for a commercial relationship satisfying to both parties. The author leaves us with the thoughtful view that Africa is the region least prone to nationalistic ideology of any of the other regions discussed in his book, and that African states are the most effective at managing disputes with investors in a pragmatic manner.

C. *Part III.*

Part III examines two important areas relevant to the stability of investments: the prospect and practice of damage awards in the event of a breach of state assurances, and the enforcement of arbitral awards, before concluding with an overall assessment and a look ahead. The question addressed is whether the various steps taken in pursuit of stability have in fact led to an improvement in the investors' ability to

mitigate risk: for example, by smoothing out the cycles that generate investor vulnerability, while protecting state interests. If so, have they done so at the price of harming the sense of mutual benefit that states and investors need to have about the operation of the international investment regime? Have they depoliticized the legal relationship between the investor and the host state, or failed in this objective?

1. Chapter 10. The Limits to Investment Stability: Environmental and Human Rights Issues.

Chapter 10 discusses the challenges to long-term stability of investments in energy and natural resources caused by actions stemming from exercise of the host states' powers in climate change policies, environmental and social sustainability, and human rights, bolstered by the adoption of the UN Sustainable Development Goals and this Paris Agreement on Climate Change.[11]

This chapter examines the ways in which these two sets of issues, environmental and climate change, and human rights, have been accommodated within the framework of international energy investment law to deliver legal stability. The author notes that both sets of issues provided a basis for which States can raise defenses for a breach of obligations to investors with a view to limiting or precluding their liability.

For example, the author examines the inclusion of environmental provisions in BITs or international investment treaties obligating contracting parties to enforce their environmental laws, such as the US Model BIT (2021),[12] the DR-CAFTA (2004),[13] and in NAFTA (1994).[14] Specifically, the DR-CAFTA obligates its member states not to fail to effectively enforce their environmental laws 'in a manner affecting trade between the Parties'.

The author discusses the different types of claims that can be brought (both by or

[11] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

[12] US Model BIT (2021), *available at* https://trade.gov.

[13] The Dominican Republic - Central America Free Trade Agreement, May 28, 2004, 43 I.L.M. 514 (2004), available athttp://www.ustr.gov/TradeAgreements/Bilateral/CAFTA/CAFTA-DRFinalTexts/SectionIndex.html.

[14] North American Free Trade Agreement, *supra* note 6.

against the state or investor) under these environmental provisions. The author notes that these provisions also attract a much wider involvement of actors than is usual in investor–state proceedings, creating a complex set of dynamics. One example examined by the author is the engagement of local communities and indigenous peoples, very evident in hydrocarbons and mining disputes in Latin America. Another example is the *Chevron and TexPet v. Ecuador* case[15] involving a dispute between two US oil companies and the State of Ecuador over the costs of cleaning up an area damaged by hydrocarbons operations, which first arose as a lawsuit against Chevron filed by several indigenous communities.

The Chapter next discusses policies that contemplate a transition away from fossil fuels and their implications not only for future investments but for existing, late-life hydrocarbons projects. The author predicts that change -of-law issues seem likely to arise in some parts of the world when hydrocarbons structures are decommissioned, as well as an increase in treaty-based disputes related to decommissioning.

The Chapter next discusses human rights and the expansion of legal interest in controls over business in the past decade, and how stabilization clauses in long-term contracts have been amended in recent years so as not to curtail a host states' ability to act in order to protect human rights. The author believes that emerging generations of BITs will impose obligations related to human rights on investors and points to earlier arbitrations involving Argentina—such as *Vivendi v. Argentina*[16] and *Urbaser v. Argentina*[17]—in which Argentina used, as a defense, its obligation to ensure that the right to water was not undermined by third parties. Though the objection in *Urbaser* was ultimately unsuccessful, the author observes that the award may be indicative of future trends, as: (1) the tribunal referred to several international declarations and resolutions to support its view that international law 'accepts

[15] Chevron Corp. & Texaco Petroleum Corp. v. Ecuador (II), PCA Case No. 2009-23.

[16] Compañiá de Aguas del Aconquija S.A. & Vivendi Universal S.A. v. Argentina, ICSID Case No. ARB/97/3.

[17] Urbaser S.A. & Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentina, ICSID Case No. ARB/07/26.

corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce', including the commitment to comply with human rights; and (2) the tribunal explained that treaties must be interpreted according to Article 31(3)(c) of the Vienna Convention (account must be taken of 'any relevant rules of international law applicable in the relations between the parties').[18] Accordingly, the author concludes that tribunals may give effect to or take account of international standards on the protection of human rights by means of treaty interpretation.

2. Chapter 11. Damages and Enforcement of Awards.

The first part of this chapter gives a broad overview of the principles that are typically applied to the award of damages in energy investment cases and the main approaches adopted by tribunals to give a value to an energy investment. The author uses case studies to consider how these approaches have been applied in selected energy disputes. The author observes that tribunals in energy have displayed a marked tendency to rely heavily on testimony from experts in arbitral proceedings. The second part of this Chapter considers the ways in which an arbitral award in an energy investment dispute is enforced. Finally, the author examines the role of settlement agreements in energy investment arbitrations.

3. Chapter 12. States, Investors, and Energy Agreements

This Chapter returns to and builds upon the six features of energy investments and the two contextual factors influencing energy investments identified in Chapter 1, based upon the insights gained from the chapters of this book: the framework chapters (Chapters 2, 3, 4, and 5); the case studies (Chapters 7, 8, and 9); the carve-outs (Chapter 10) and the group of 'final' issues, damages, enforcement, and settlement (Chapter 11). In particular, the author explores the forms that legal stability takes in the international energy takes given the inevitability of changing circumstances over the life of long-term contracts, and how such forms of legal stability manage the relationship between the host state and the investor.

[18] Vienna Convention on the Law of Treaties, May 23, 1969, Art. 31(4), 1155 U.N.T.S. 331.

III. CONCLUSIONS

Professor Cameron provides a thorough and thoughtful overview of the different and widely varying aspects of international energy investment law. In particular, the book's careful attention to historical and current trends provides an indication of future areas for the expansion of energy investments, and predicts how investment disputes may shift correspondingly, making the book a worthwhile and enjoyable ready for any practitioner. It would also be an engaging and informative read for a law student, or anyone interested in the historical roots of energy investments generally, and the evolution of energy investment law specifically. In sum, this well-written book gives a broad but nuanced view of energy investment law.

ELIZABETH J. DYE is an Associate in the Construction Counseling and Dispute Resolution group at Pillsbury Winthrop Shaw Pittman, LLP in Houston, TX. She focuses her practice on complex commercial litigation and international arbitration, with particular experience in construction and infrastructure disputes. Elizabeth has significant experience in litigation, arbitration, and international arbitration. She has represented and counseled clients involved in ICC, JAMS, AAA, and ICSID, as well as before Texas courts. Her experience in complex commercial litigation includes breach of contract and breach joint venture disputes and insurance coverage disputes on behalf of policyholders.

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