2022
Volume 4, Issue 2

Institute for Transnational Arbitration
ITA IN REVIEW

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The Journal of the Institute for Transnational Arbitration

ITA IN REVIEW

VOL. 4 **2022** **NO. 2**

TABLE OF CONTENTS

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ITA in Review is

a Publication of the
Institute for Transnational Arbitration
a Division of the
Center for American and International Law

5201 Democracy Drive
Plano, TX 75024-3561

KEYNOTE ADDRESS: THE TRANSITION ROLLERCOASTER

by Peter Cameron

Keynote address delivered at the 10th ITA-IEL-ICC Joint Conference on International Energy Arbitration held on January 20-21, 2022.

I. INTRODUCTION BY MARK STEFANINI

Good morning ladies and gentlemen. It is my great privilege to introduce our keynote address by Professor Peter Cameron. Peter is a leading authority in the field of energy who has looked at the practice of energy arbitration from every conceivable angle.

Peter is professor of international energy law and director of the Centre for Energy, Petroleum and Mineral Law and Policy at the University of Dundee where he is responsible for inspiring around 250 graduate students each year from around the world. He is a barrister who has worked as an advisor to governments, companies, and international organizations, including the World Bank, the United Nations and the European Commission. In addition, he has sat as an arbitrator in ICSID arbitrations that have addressed renewable energy disputes and is regularly asked to act as an expert witness in international arbitration proceedings.

Peter is also a prolific author of energy law issues and has just published a new edition of his book with Oxford University Press titled, INTERNATIONAL ENERGY INVESTMENT LAW: THE PURSUIT OF STABILITY. This is a comprehensive and up-to-date analysis of stability in long-term energy contracts, which, apart from its very wide scope, examines a number of awards in energy disputes that Peter was able to locate, which other scholars have not yet discussed. The book examines many aspects of the energy transition, which Peter is going to discuss in his keynote address this morning. Peter has harnessed these many perspectives and sources of expertise to take a look at what we know and what we can extrapolate regarding questions about the energy transition for all participants and how it will affect international arbitration. It is aptly titled *The Transition Rollercoaster*.

II. KEYNOTE ADDRESS

Thank you for the introduction. I want to begin by thanking David Winn and the organizing committee for the invitation to join you today at this event. I am

sorry we cannot be together, in the same room. But I hope that this way of reaching you makes our short time together almost as pleasant as a face-to-face meeting. I was asked to talk to you today about the potential impacts of the so-called "energy transition" on international arbitration in the energy sector.

You might ask, what is the energy transition? It is the process in which the modern economies of the globe are shifting the balance of their energy consumption away from fossil fuels, such as oil, coal, and gas, to sources of energy that are significantly less carbon emitting. It refers to the subset of measures in the energy sector that are specifically designed to address climate change. The overall aim of the energy transition is to reduce global warming and the respective damage to the planet. Behind this process, you have the multilateral instrument called the "Paris Agreement" made under the United Nations Framework Convention on Climate Change (UNFCCC), which has been ratified by 193 nations as of the end of 2021.

In the last couple of years, pressure has increased significantly on governments, companies, and lenders to take action to support the Paris Agreement's aims. The energy sector has become a focal point in this effort—some would say that it is a target. The title of my talk, *The Transition Rollercoaster*, makes it clear that I think that this will be a bumpy transaction. However, some people find a rollercoaster quite exciting. So the metaphor also allows me to send a signal that however bumpy a ride, it could still be understood in a positive way.

Some of the challenges are already beginning to emerge in the field of international energy disputes. The first is the expansion of the state in relation to the energy sector. Although it has always had a very significant role in the energy sector, it is even more so now. The energy transition is, after all, the creation of policy and not the market. Unlike privatization and other state-driven policy, liberalization, or deregulation, the energy transition is not about how to make the market work better. At least not primarily. Rather, its justification is more ambitious than that. It claims to be about saving the planet. But there is a caveat here.

The expanded draw of state regulation is accompanied by an acknowledged need to rely on the private sector as a source of investment capital. For example, the International Energy Agency (IEA), based in Paris and part of the Organization

for Economic Co-operation and Development (OECD), has recently estimated that around 70% of the clean energy investment will have to come from the private sector. So, given the way the modern economy works, the expansion of state roles will be accompanied by efforts to secure very large-scale funding from the private sector. This is something of a paradox about the energy transition. There will be more state involvement in the energy transition and, at the same time, there will be more reliance on private capital.

Another aspect of this is the imbalance between states in the energy sector. For many states with national oil companies, like the Nigerian National Petroleum Corp. (NNPC) and the Saudi Arabian Oil Co. (Saudi Aramco), there will be a need to adapt their role to a new world that seems to threaten their very existence. That is a big subject, and it is one for another talk. But it is also an area where the state role is likely to expand. Among other things, I anticipate that states will seek new relationships with the private sector.

For lawyers and policymakers in the energy field, the challenge will be to adapt existing protections for investors, especially foreign investors, to encourage investment in the energy transition. But what about existing energy investments? These will tend to be predominately in fossil fuels. What will happen with those investments? The energy transition has the potential to be highly disruptive for existing investments.

The energy transition may also affect international arbitration in several ways. First, there is the novel, untested character of transition policies that will generate disputes with respect to cleaner forms of energy. Although we have already seen many disputes in this area, I anticipate that we will see more. This is highly significant since it is the very area in which organizations like the IEA are telling us that more investment is urgently needed. I will have more to say about this in a moment.

Second, governments are likely to come under pressure to change policies for existing and planned oil and gas projects, and perhaps coal projects as well, to cause new waves of disputes between investors and states, similar to disputes associated with resource nationalism. Indeed, the national origin of these measures, albeit justified in terms of international contributions to net zero goals, creates a kind of climate nationalism for the resources sector.

I am now going to sketch out how these two aspects of the energy transition might impact international energy arbitration, drawing largely on previous investor-state arbitrations. A starting point is to analyze previous energy disputes involving "new" forms of energy and how they might apply to disputes arising from the energy transition. For example, some commentators have classified wind and solar energy as new forms of energy, but they have been around in commercial use for several decades. Where disputes have emerged in this sector, and there have been many, the geographical origin has been very different from that in traditional energy disputes. Many of these arbitrations have arisen in Europe. It is already clear, beyond any doubt, that these forms of energy have the potential to deliver as many arbitrations as any of the more established forms of energy.

The important role that government subsidies play in this sector of so-called new forms of energy means that, where policies are adopted to roll back the incentives that were originally offered, claims have been largely for compensation. That could sometimes constitute indirect expropriation. Disputes of this kind involving Spain and Italy have led to more than sixty known arbitrations so far. These are examples of the expanded state role deliberately aimed at promoting cleaner forms of energy and doing so by attracting large investment from foreign and domestic investors. However, when the same state, perhaps a different government, realigns its policies in ways alleged to be unfavorable to existing investors in a style that is almost classical in the world of international energy investment, then disputes are likely to arise.

The disputes that we have seen so far related to clean energy are treaty-based disputes in the vast majority of cases. Many of the arbitration awards for these disputes are in the public domain. One may ask about the kinds of protection claimants and respondents can expect from investment treaty arbitration when applied to the kinds of energy that are central to the energy transition. Based on the cases that we have seen so far, there are several. First, there are dozens of cases arising out of the much-publicized rollbacks of legislation aimed at promoting renewable energy investments. These have largely occurred in Europe so far, although similar measures have been taken or are under discussion in countries such as Mexico, Ukraine, and probably quite a few others.

Second, there have been cases arising from measures taken by sub-federal

entities. For example, in *Windstream Energy LLC v. Canada*,[1] the claims relate to a moratorium on offshore wind energy that was imposed by the provincial government of Ontario. We have also been hearing of similar claims originating from local communities and indigenous peoples.

Among the many cases arising from European measures, such as the PV *Investors v. Spain*[2] or *Eskosol S.p.A. v. Italy*,[3] are issues that will be familiar to many of you. For example, the kind of stability that an investor can reasonably expect to benefit from in a long-term agreement and whether such stability is indeed granted by a specific statutory instrument to the investor. Another example is whether an investor's legitimate expectation can be based on a host state's legal order or a subset of it, such as a dedicated regime to regulate renewable energy. Another issue is the meaning of a stable legal, business framework in, for example, Article 10(1) of the Energy Charter Treaty (ECT).

There have also been interesting discussions about due diligence and the kind of signals that investors ought to consider when making their final decision to invest. Ignoring them may mean that the expectations that they relied on are deemed unsound by a tribunal. So far, arbitrators in these many cases have taken widely different positions on the questions or the issues that I have mentioned above.

The second aspect of the energy transition that I want to consider today concerns the more established sources of energy, especially oil and coal. According to Rystad Energy, which is a specialist consultancy firm, the amount of investment estimated to go into the global oil and gas industry in 2022 is going to be $628 billion.[4] It seems to me to be a pretty large figure. All of that will be based on contracts that provide certain forms of legal protection. These mechanisms of legal protection have been tried and tested many times. And many of these contracts will contain stabilization clauses.

In that context, how might the energy transition affect this huge amount of

[1] Windstream Energy LLC v. Canada, PCA Case No. 2013-22, Award (Sept. 27, 2016).

[2] PV Investors v. Spain, PCA Case No. 2012-14, Award (Feb. 28, 2020).

[3] Eskosol S.p.A. in liquidazione v. Italy, ICSID Case No. ARB/15/50, Award (Sept. 4, 2020).

[4] *Global oil and gas investments hit $628 billion in 2022, led by upstream gas and* LNG, RYSTAD ENERGY (Jan. 11, 2022), https://www.rystadenergy.com/newsevents/news/press-releases/Global-oil-and-gas-investments-to-hit-628-billion-in-2022-led-by-upstream-gas-and-LNG/.

existing activity? So far, we have seen examples of arbitrations arising out of attempts by governments to adjust the energy mix in their countries, involving mandatory closures and phase-outs. These measures have mostly related to coal-fired power generation and eroding the value of assets already created or investments already made. These are alleged to have become stranded assets, that is, they no longer serve a commercial purpose.

Compensation claims have followed in at least two recent Dutch cases: *RWE AG v. Netherlands*[5] and *Uniper SE v. Netherlands*.[6] These cases concerned the accelerated timetable for phasing out coal-fired power plants. In Canada, the moratoria on hydrocarbon exploration in Alberta and Quebec provinces have also led to arbitrations: *Lone Pine Resources Inc. v. Canada*[7] and *Westmoreland v. Canada I & II*.[8]

However, the impacts of the energy transition on the oil industry are potentially much wider than this. The short-term impacts may be limited, but they need to be weighed very carefully against the creation of a new, unfamiliar set of risks to the investor-state relationship. For example, possible decisions not to develop a discovery due to projected falls in demand may lead to disputes with host governments or national oil companies, attempts to secure an early exit or to terminate an agreement with the host state, changes in decommissioning timing, and even, perhaps, reviews of existing contract terms in light of national contributions on the climate change rules. Indeed, decommissioning is already leading to quite a few investor-state arbitrations in Southeast Asia. There are thousands of long-term contracts in place with terms that pre-date the energy transition discussion and that envision, even only implicitly, an endless horizon of demand for fossil fuels. That world is definitely gone. If this transition is supposed to be just one, then we will not see a number of bodies like international development banks, international NGOs, and so on, all lining up to assist governments, especially in the newer oil-producing countries, in reviewing their contract terms. We have seen quite a lot of this in the international mining sector

[5] RWE AG v. Netherlands, ICSID Case No. ARB/21/4 (pending).

[6] Uniper SE v. Netherlands, ICSID Case No. ARB/21/22 (pending).

[7] Lone Pine Resources Inc. v. Canada, ICSID Case No. UNCT/15/2 (pending).

[8] Westmoreland Mining Holdings LLC v. Canada, ICSID Case No. UNCT/20/3, Award (Jan. 31, 2022).

in recent years, but perhaps similar attention will soon be directed to the international oil industry. The energy transition is in its early days, but, if it happens, we can expect that it will trigger future disputes between states and investors.

For the international oil and gas industry, there is also a question that was asked in some of the recent renewable energy cases. That is, at the time you took the decision to invest, were there any signals that a prudent investor would have interpreted as giving a warning that the host state may well make significant, possibly sweeping changes to its laws? This very important question can also arise in cases about allocating decommissioning costs. Perhaps it is time to look carefully at any public documents that could be construed by a cautious tribunal as conveying that kind of signal, especially if the investment is high value, which is very common in the international oil and gas industry.

Relatedly, it is worth mentioning those cases that have arisen indirectly through the application of environmental restrictions, justified by reference to the promotion of climate change-related goals. The ECT case, *Rockhopper Italia S.p.A. v. Italy*[9] arises from the reintroduction of a moratorium on oil and gas projects when the investor was engaged with a permitting process for the development of a field offshore, leading to a claim for compensation. It is also worth mentioning the North American Free Trade Agreement (NAFTA) case, *TransCanada Corp. v. United States*,[10] which is another example of a compensation claim arising out of environmental permitting decisions. This arose from a denial of a presidential permit for the Keystone XL Pipeline. This category of disputes is interesting because it shows the potential influence of local communities and activist groups in promoting claims. So far, where that has been evident, it has tended to be more visible in the courts rather than in arbitration.

I am now going to go over my conclusions. What I have tried to do today is to share with you some tentative, provisional thoughts about a complex and unprecedented process that will have many implications for the management of disputes in the energy sector. Of course, not all disputes in the energy sector will

[9] Rockhopper Italia S.p.A. v. Italy, ICSID Case No. ARB/17/14 (pending).

[10] TransCanada Corp. v. United States, ICSID Case No. ARB/16/21 (discontinued).

be directly or indirectly related to issues arising from the energy transition, but in my view, a growing number will be.

The energy transition may cause sudden policy shifts by governments and raise new concerns about how to apportion liability for the costs of mitigation or adaptation to climate change. Unlike the rollercoaster in the title of this talk, this process will not be guided by some controlling body. It will be a multi-speed process with different countries taking different actions according to different timetables and using different methods to achieve a common set of targets.

Given the long-term character of most energy investments, this is not a good sign. However, in terms of dispute potential and the future of investor-state arbitrations, the dynamics of cases today do not, at least as far as I can see, suggest any deep-seated concerns about the system or a reluctance to activate it.

Finally, let me remind you that the underlying relationship between investors and host states is a cooperative one aimed at achieving mutual benefits and mitigating the risk of disputes arising later on. Indeed, advisory relationships can result from this dynamic. It is that cooperative spirit that is going to be needed more than ever in the coming years as this energy transition unfolds.

Thank you for your attention.

PETER CAMERON is Professor of International Energy Law and Policy and Director of the Centre for Energy, Petroleum and Mineral Law and Policy at the University of Dundee. A graduate of the University of Edinburgh, Peter joined the Department of Public International Law at the University of Leiden in The Netherlands, and subsequently was Professor at the Robert Schuman Centre for Advanced Studies at the European University Institute in Florence, Italy. Peter played a leading role in establishing the International Energy Arbitration Centre in Edinburgh and also the UK Association of Energy Law and Policy. He is a Fellow of the Chartered Institute of Arbitrators; a long-time member of the International Bar Association and has served on several of its committees; and is a member of the Association of International Petroleum Negotiators. He qualified as a barrister (England and Wales, Middle Temple), and has regularly been asked by governments and investors to testify in litigation and international arbitral proceedings as an expert.

INSTITUTE FOR TRANSNATIONAL ARBITRATION
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THE CENTER FOR AMERICAN AND INTERNATIONAL LAW

The Institute for Transnational Arbitration (ITA) provides advanced, continuing education for lawyers, judges and other professionals concerned with transnational arbitration of commercial and investment disputes. Through its programs, scholarly publications and membership activities, ITA has become an important global forum on contemporary issues in the field of transnational arbitration. The Institute's record of educational achievements has been aided by the support of many of the world's leading companies, lawyers and arbitration professionals. Membership in the Institute for Transnational Arbitration is available to corporations, law firms, professional and educational organizations, government agencies and individuals.

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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.

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Institute for Transnational Arbitration
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Table of Contents

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