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# ITA IN REVIEW

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# PANEL DISCUSSION: RESOURCE NATIONALISM IN EMERGING MARKETS

**Sylvia Noury**, *Moderator*

**R. Doak Bishop**, *Panelists*
**Juan Carlos Boué**, *Panelists*
**Kate Brown de Vejar**, *Panelists*
**E. Ned Mojuetam**, *Panelists*

Keynote address delivered at the 5th ITA–IEL–ICC Joint Conference held in Houston, Texas on January 18-19, 2018.

This panel addressed the prevailing trends in so-called "resource nationalism" in emerging markets, focusing on Latin America and Africa. Are we moving beyond outright expropriations? What are the more sophisticated ways in which governments are seeking to maximize their returns from their natural resources? How have investors reacted to such policies? How can the right balance be struck in this critical sector between legitimate sovereign policies seeking to protect the public interest and the legitimate expectations of investors?

SYLVIA NOURY: The topic of this panel is a somewhat controversial one: resource nationalism in emerging markets. As you might imagine this topic often elicits very different views, especially depending on which side of the investor-state divide one stands. We have tried to structure this panel to bring various different perspectives to bear. I, as moderator, will try to draw those perspectives out without taking a particular side myself. I will quickly introduce our panelists.

First, Doak Bishop, a partner in King & Spalding LLP, and co-chair of the firm's international arbitration group. Doak, of course, specializes in energy disputes and is best known for representing corporate investors against Latin American states. Thus, he will be bringing the corporate investor counsel view to bear on this panel.

Next is Juan Carlos Boué, a Senior Research Fellow at the Oxford Institute for Energy Studies. He began his professional life at Petróleos Mexicanos, and later became Special Advisor to the Venezuelan Minister of Oil and Petroleum, the President of Petróleos de Venezuela, and the Vice Minister for Hydrocarbons during the era of the Chavez Nationalizations, This gives you some clue to which perspective he might be bringing to this particular topic.

Next is Kate Brown de Vejar, who is a partner in DLA Piper in Mexico City. She also specializes in investor-state arbitration and international arbitration in general. She has significant experience, perhaps not surprisingly, in Latin America, although she does bring her Australian experience as well. Kate will be bringing today the perspective of counsel for the state.

Last but not least, Ned Mojuetam, who is general counsel for Chevron Africa and Latin America Exploration and Production, also based here in Houston. He has been previously based in London, Perth, and Nigeria. He has a global view of the issue. He has dealt with governments and sought resolution of these kinds of issues for many years, He brings extensive experience from the corporate investor perspective.

I should say that it became clear to all us that we had one threshold, perhaps an existential question to address before we talked in more substance: what do we mean by resource nationalism? Before delving into the detail of our topic, I should say that "resource nationalism in emerging markets" is an interesting way of phrasing it, because of course it is not *just* emerging markets that are subject to resource nationalism. Everyone in this room would know that when we talk about resource nationalism we have moved far beyond the old-fashioned outright expropriation, like the nationalization of oil fields in Libya and Iran in the 1950s and 1970s. Now, of course, there is a more nuanced spectrum of resource nationalism. I want to present threshold question to the panel: Ned, would you give the corporate investor perspective on what resource nationalism mean?

**E. NED MOJUETAM:** Thank you Sylvia. Sylvia has indicated that there are various definitions of the term resource nationalism, and each one of us will have a particular view of these definitions. Rather than go through all of them, I will highlight what I consider to be the ends of the spectrum. At one end of the spectrum, the view is that it is the predisposition of states and governments to control natural resources. At the other end of the spectrum there is the view that efforts to improve the benefits of the state and the government derive from natural resources. I understand and agree with the reference to control because I think governments already control natural resources. That is why states regulate natural resources and why they license them.

There tends to be a view that would identify control, expropriation, or seizure, as examples of resource nationalism. Perhaps that is the case, but what I think a more rounded and liberal definition is one that recognizes efforts by states to increase the benefits they get from their natural resources for their local economy, and for the local workforce.

**SYLVIA NOURY:** Thank you, Ned. Kate?

**KATE BROWN DE VEJAR:** I think the fact is that there is something fundamentally wrong with the term "resource nationalism" itself. It implies there is something negative about a state wanting to ensure that sufficient benefits accrue to its population from the exploitation of its finite and, by definition, valuable natural resources—the idea of nationalism is thought of as something so horrible. I think there is something wrong with the language used to describe the concept.

**SYLVIA NOURY:** Juan Carlos?

**JUAN CARLOS BOUÉ:** I share Kate's viewpoint about the usefulness of the term "resource nationalism" overall. Resource nationalism is a term that characterizes resource owners essentially as capital importers who merely sponge off the entrepreneurship and technical powers of others, taking advantage and exploiting what Raymond Vernon used to call the Obsolescing Bargain.[1] It is not a positive description. It amounts to a long list of things that companies do not like governments to do; it is a very long list indeed. However, at least in my experience, the concerns tend to dissipate when evaluated in the light of economic facts rather than assumptions or statements on the part of investor. I will return to that.

**R. DOAK BISHOP:** We are being entirely too diplomatic. Resource nationalism could be considered as a neutral term about protecting a nation's interest. But it can also, and in fact often is, used as a conative term, a pejorative term, similar to "economic nationalism" for example. I am not sure, however, if it necessarily is a

[1] RAYMOND VERNON, SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF U.S. ENTERPRISES (Longman 1971).

pejorative term. It seems to be used elsewhere these days. I tend to think of resource nationalism as a circumstance in which a government takes an opportunist attitude toward it resources and tries to claw back the benefits that it had bestowed upon international oil companies through a contract or a concession or through regulations. It is also a situation where the government is trying to after the fact—after the company has gone in and drilled the wells, made all of its investment, obtained production, etc.—to increase its own take at the expense of the international oil company. That is the way I would describe resource nationalism. It is not quite as diplomatic.

**SYLVIA NOURY:** This debate over the meaning of resource nationalism shows us that there is perhaps a fine line between what some would call legitimate national interest and what others would call illegitimate resource nationalism, to take Doak's expression of it. Ned, where does this line fall in your view?

**E. NED MOJUETAM:** There is clearly a difference of opinion as to whether the term "resource nationalism" is negative or not. If you step back from the connotation of the term and try to see the meaning of it, and apply that meaning to what states do, there is perhaps usefulness in the term. It makes us think about what is in a state's interest. Some will view expropriation, asset procedures, imposition of heavy taxes as being in a state's interest, but I differ.

State interests must be thought of as something positive in the medium to long term, as well as in the short term. If a state acts in a particular way that violates a previous agreement that threatens the relationship with private investors, who have come in to the country on the basis of documented promises by the government; if you put those actions side by side with those promises, then I would argue that the actions of a state that violate those agreements is not in the national interest. It sends the wrong messages to investors and potentially exposes the government to liability.

However, other actions by states do not necessarily violate their agreements, and one area where that is fairly common is local content requirements. There are many examples of states going too far using such tools, but I would submit that many states are learning. The journey to getting that right is a long one. For example, the intent behind local content is positive. To the extent that state's get it right and are reasonable in this approach to trying to benefit the local economy and do not in the process violate laws or a preexisting agreement, those actions in my view fall within a limited category of resource nationalism. These actions can help a country get more benefit from their national resources and therefore would be in the country's best national interest.

Now, where is the line? The line would fall where a country acts in violation of laws or contracts; of agreements it has signed and violates the promises it has made to foreign investors. If a country does that, this would not be, in my view, in the country's best national interest. Therefore, that is where a line would fall; between acting in the best national interest of government and resource nationalism.

**SYLVIA NOURY:** Thank you, Ned. This of course requires discussion of the documented promises, or the agreements that have been established. Perhaps investors and states may differ in their interpretation of what those agreements and promises were. I suspect that Juan Carlos might have something to say about that.

**JUAN CARLOS BOUÉ:** Ned's and Doak's comments are quite useful because they characterize resource nationalism essentially as shorthand for breach of contract; and it is usually reported like that in the media. For example, the government of Albania takes issue with how certain costs in a production sharing agreement are being reported and arbitration is initiated. The press reports it as Albania trying to rewrite the contract. In another example, Uganda taxes the proceeds of asset sales in Uganda. This could be the beginning of a slippery slope, but when an arbitral tribunal decides that the Ugandans were correct, the press does not pay so much attention. What is interesting about this, as Sylvia hints at, is that often the alleged breaches of contract are nowhere to be found in any contract subscribed by the parties. An even stranger circumstance occurs when there is a contract between the parties involved in the dispute, but the claimant alleges that the contract is of no relevance in determining the breaches that the state committed. A good example of this is the case of Exxon vs. Venezuela[2] in which the ICSID annulment panel recently upheld the Venezuelan government's viewpoint.

Slightly more interesting than the issue of contracts is the question of money, that Doak touched upon. The concept of resource nationalism is predicated on the notion that resource production consists of the application of entrepreneurial skills and technology to the exploitation of these resources and that the role of governments is merely to make sure that this happens with the least friction possible. However, this overlooks the fact that there are two sides to the resource production business. These resources have owners and the owners expect a fair remuneration for them. Thus, investment is not enough. But the conception behind resource nationalism seeks to deny this—right for compensation—and say that the role of government is merely to foster investment.

According to this view, the only scarce resource is capital. The application of capital is the sole source of value and, hence, only capital and profit are of any legitimacy. Any actions companies take to maximize profits are OK, up to, an including, aggressive tax planning, as it is now called, whereas the actions of the government can be, and usually are, characterized as a breach of contract. So, yes, this a slightly different perspective.

**SYLVIA NOURY:** We all can probably agree on the fact that these issues will ultimately be decided on the facts of each particular case. Of course, a tribunal will look at whether this is a contract and what that contract says. Uganda is an interesting example because the two best known cases there, Heritage[3] and Tullow[4], had two very different contracts at play. One of them involved a tax exemption and the other did not. Perhaps that fact will ultimately determine what the result will be.

We mentioned policy levers—such as local content—and we should explore those. Why do governments pull these levers? What has brought them to use that power?

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[2] Exxon v. Venezuela, ICSID Case No. ARB/07/27, Decision on Annulment (Mar. 9, 2017).

[3] Heritage Oil & Gas Ltd. v. Uganda, UNCITRAL, Award (2015).

[4] Tullow Uganda Operations Pty. Ltd. and Tullow Uganda Ltd. v. Republic of Uganda, ICSID Case No. ARB/13/25, Order Taking Note of the Discontinuance of the Proceeding (July 15, 2015).

What is it that investors have done? Or, what outside circumstances have made them pull the levers? I think that is a good question for Kate. Why is it that governments do this? Do you think that the investors should be cast as the victims in this situation? Or, do they contribute to the problem?

**KATE BROWN DE VEJAR:** When a country is not receiving a "fair" share of the benefits which derive from the exploitation of their natural resources, then the state steps in to take corrective action. It is easy to point to the act of the state and call it resource nationalism, whether it is the institution of a windfall profits tax or a change to the law or regulation to say that the state needs an increased participation in petroleum projects. It is easy to say that this action is the cause of disruption or uncertainty. That, however, is a very simplistic approach. I think the correct answer explores the "why." Why did the situation become so untenable economically, politically, and in the public opinion, that the state had to take that action?

The focus of our discussion today is Latin America and Africa, but as an Australian in Mexico, I want to draw upon some examples from Australia. I believe these are illustrative of these exact kinds of issues arising in a jurisdiction which is not a high sovereign risk jurisdiction.

First, there are the current domestic gas prices in Australia. I do not know how many of you have heard about this in the headlines, but given the relatively low LNG export prices in the last couple of years many LNG terminals, which are relatively recent investment in construction in Australia, are operating well below name plate capacity, a number of LNG producers particularly on the East coast are using conventional gas rather than the higher cost coal seam gas (CSG) to feed their plants to meet their contractual obligations while still making a profit. This has had the effect of depleting the conventional gas available for local consumption, both on the wholesale market—to industry—and the retail market—to households. This has pushed up local prices to a point where there has been a real shift in public opinion, and it has become a really "hot potato" political issue.

This has caused an investigation by Australian Competition and Consumer Commission, the ACCC, which released an interim report in September 2017 on the wholesale gas market, finding that 2018 would in fact be a year that there is a significant short fall.[5] There is not enough gas, and this is reflected in gas prices offered to industry. Prices are multiples of historic levels, and they are multiples of the prices for exactly the same gas when purchased in Japan. The same problem affects the cost of household gas to the point where it is making headlines. I want to give you some examples of the headlines: "The Great Gas Robbery" reads one headline. Statements in the press include, "[w]hen you next look in horror at your gas bill, think this: you are the unwitting victim of a gigantic game of risk shifting by the multinationals."[6]

There have been government inquiries followed by the adoption by the government in July 2017 of what is called the Australian Domestic Gas Security Mechanism, which permits the government to implement gas export restrictions in the event of the declaration of a short fall year. That's drastic and very serious. That could mean the breach of any number of supply agreements entered into by international LNG companies.

In order to avoid 2018 being declared a short fall year, which would trigger these export controls, in October 2017 the LNG producers on the East coast entered into a heads of agreement with the federal government. By this agreement the LNG producers committed to offer sufficient gas to meet the expected short fall and any emerging additional short fall through the good faith offering of gas to the domestic market on reasonable terms. Thus, there are no export restrictions yet, but the Southern states of Australia have been experiencing an inordinately hot summer.

The agreement just relates to shortfalls, but it is not a solution to price, and prices remain very high. Thus, whether the Australian public will also continue to tolerate the extraordinarily high household costs of gas remains to be seen.

I have a second example rather briefly. In December last year the Australian tax

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[5] Australian Competition & Consumer Comm'n Gas Inquiry 2017-2020, Interim Report (Sept. 2017), *available at* https://www.accc.gov.au/publications/serial-publications/gas-inquiry-2017-2020/gas-inquiry-september-2017-interim-report.

[6] Andrew Probyn, *The Great Gas Robbery is Happening Before Our Eyes. But What Can We Do About It?*, http://www.abc.net.au/news/2017-03-17/the-great-gas-robbery/8363798.

office released public records showing that Exxon Mobile Australia reported no taxable income and paid no corporate tax in the years 2013 to 2014 and 2014 to 2015, despite reporting an annual income of 9.6 billion and 8.5 billion Australian dollars in those year, respectively.

There is nothing that Australians hate more than a tax cheat. Maybe losing to the English at cricket, but that has not happened this summer. The headlines are awful, and the Australian government has launched a senate committee investigation into Exxon Mobile Australian's tax records. There is no outcome yet, but Exxon Mobile has already lost in the public opinion. The pressure on the government to take corrective action in this regard is very, very high.

I present these examples because the measures discussed, such as export controls, tax investigations, and possibly an unfavorable tax assessment applied to past financial years are types of measure which are typically labeled resource nationalism. As these examples from Australia show, a democratic government and a developed country, maybe forced to react to public outcry and immense politic pressure. These pressures build up because there is evidence that private resource companies are reaping hefty rewards from the exploitation of finite national resources and not enough benefit is inurning to the state, or it is actually the public that is subsidizing those profits.

The behavior of private resource companies, whether it is using conventional gas through their LNG plants in order to make sure that they can still make a profit or meet the profitability forecast to please shareholders, or engaging in tax minimization schemes, contribute significantly to the problem of the imbalance, which is the trigger for state action. Private resource companies need to understand that states and their constituents expect, and legitimately so, that they will be paid a "fair" price for giving that company the right to exploit a finite natural resource. Any arrangement, contractual or otherwise, which ultimately means that the state is not receiving a "fair" benefit—for example, that Australian households have to pay double what the same gas cost in Japan—those are not sustainable arrangements and they will provoke state corrective action. That is what generates the uncertainty that nobody wants—not the state or the investor.

I wanted to come back to what I thought was a good definition of where the line of legitimate verses illegitimate state action might lie. I think Ned framed it in positive terms. When parties come to an arrangement, maybe a high tax level is initially good, but what about the mid to long term? The resource-companies relationship with the state has to last and circumstances do change. They need to foster that relationship over the duration of a long-term investment. Thus, if the contract the company negotiated hard for, no longer makes sense in the context of that long-term relationship changes have to be made. It is not in the company's interest to damage a long-term relationship with the state.

**SYLVIA NOURY:** Thank you, Kate. We will be tackling tax as a substantive issue later, so I will not make any comments on that in particular. But I would like to ask Ned to offer his observations on this point.

**E. NED MOJUETAM:** Yes, Kate you made very good points. I represent investors, so we tend to think long term. I am going to move away from who is right and who is wrong. What is important is how each side reacts to the pressure. States are sovereign. They have the right to act—pass laws, regulate, etc. However, it is in the interest of states to be measured in how they react. Reactions should not be excessive on the part of the state. Private investors should also be willing to listen where it is obvious that the contract terms as they are no longer sustainable. Both sides should come together and to try to find solutions.

If you step away from the complexity of who is right and who is wrong and focus on a solution that could avoid a dispute, then that is the path to an outcome that, hopefully, will work for everyone, including pressure from society. Whether or not the investor is a victim depends on how they behave. If they are pushing the rules or pushing the boundaries, they cannot portray themselves as victims. If they are wrong, they cannot be victims. However, if they are working within the rules and circumstances have changed to the point where something has to be done, then state ought to engage with investors and seek out solutions. Companies have shown that they can at least sit down and work with states to find the right outcomes for everyone. To the extent that they do that, it can reduce the negativity associated with resource nationalism.

**R. DOAK BISHOP:** We have a way of determining who is right and wrong, and that is to study the contract, to examine the laws, to analyze the regulations. That is how we tend to define what the boundary between illegitimate conduct and legitimate conduct is—studying the contract, examining the laws, and analyzing the regulations. We tend to look at the issue of normative conduct and determine whether such action it is an attempt to circumvent provisions in a contact, such as a fiscal stabilization clause.

Kate mentioned "fair" price, that resource companies are entitled to a "fair" price. Well, that is a "siren" song. Resource companies are entitled to the contract price that they negotiated. That is why companies have negotiations; that is why they enter into the long-term contracts. That is what a company is entitled to, not what the government wants it to be later, trying claw back benefits and saying: "We are going to define what price you get."

**SYLVIA NOURY:** Thanks, Doak. We have two substantive issues we are going to tackle. One is local content, which Ned mentioned earlier, and the other is taxation. Ned, can you kickoff with local content and perhaps from your experience in both Africa and Latin America give us a little elaboration on what this means?

**E. NED MOJUETAM:** There is no generally accepted definition of "local content." It is really a general strategy by states to try and improve the benefits to the local economy and the local workforce. The general concept around local content is sustainable development for the local economy, and technology skills development for local workforce, among others. How you implement it is important to the keep a positive relationship with the investor.

The World Bank states that local content policies "[a]im to leverage the extractive value chain to generate sustained and inclusive growth through economic diversification and employment opportunities."[7] Fairly general, but specific enough

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7 World Bank, http://www.worldbank.org/en/topic/extractiveindustries/brief/local-content-in-oil-gas-and-mining.

to indicate the objective and principles behind the concept itself. This has been described as, if you like, a moderate form of resource nationalism. Perhaps it is. However, sovereign states have a right to improve the local economy, to improve the local workforce and the rest. I will give two other perspectives besides the World Bank.

The Nigerian local content regulation defines local content as the quantum of composite value added or created in the Nigerian economy. To make that determination the regulation evaluates the systematic development of capacity and capabilities through the deliberate utilization of Nigerian human resources, materials, and services in the Nigerian oil and gas industry. When Nigeria started to use these regulations, everyone was resistant. Companies were resisting it. Now, companies highlight their contributions to local content, using that as a way to get mileage in the social realm. Companies show how they help the local economy, how they are part of the local population, how they are part of the country, actually. They are not outsiders just coming in to reap the benefits and leave.

There is a relationship between the definition of resource nationalism and local content, to the extent that local content that benefits from natural resource exploitation, applied to the local workforce and the local economy to encourage sustainable growth. I have seen many examples where states and companies have worked together collaboratively to achieve a positive result.

My final example is Brazil, where local content is defined as the contractual commitment of purchasing local goods and services on a competitive basis. The intent and objective is clear—helping the local economy grow and develop a local workforce. As an investor, you want to be able to work with the government to achieve this goal. In conclusion, I will say that companies have come to see that, when the local workforce is developed and is skilled, it is more cost effective to get the skills that they need locally than to import them.

**SYLVIA NOURY:** It seems that this could be a very good area of collaboration between states and investors. However, Doak made a good point; one always has to measure that against the existing contracts, the existing obligations. Of course, when you have dramatic measures which contravene existing agreements, then the state might find itself on the wrong side of the line. A good example, which of course has not yet been ultimately tested, is in South Africa. There, some of the local content rules are more far reaching, such as the divestment of twenty-six percent of mining companies which must be transferred to historically disadvantaged South Africans. One case that was brought to test that, the Foresti case,[8] settled before an ultimate merits award was rendered. It would be interesting to see the results when some of the more far reaching local content laws are tested.

I am going to move on to tax. I want to hear a little bit from Doak on what the high-profile manifestation is of what some call resource nationalism. We have seen it all over the world, it is not just restricted to Africa and Latin America. One of the biggest examples, of course, is India. Doak, how about a synopsis from your perspective?

**R. DOAK BISHOP:** Over the past 15 years, in particular, with oil prices fluctuating, we have seen an attempt by many countries to impose new taxes or increase taxes on international oil companies. I will take three examples. Algeria a few years ago imposed a tax on exceptional profits which resulted in several investment arbitrations against Algeria. Ecuador, in the early 2000s adopted law 42, which imposed a 50% they referred to as participation, not a tax—there were tax stabilization clauses at least arguably in its contracts with IOCs, so they referred to this as a participation not a tax—and that would apply when oil prices were above 30 dollars a barrel. Later, by a presidential decree, that 50% amount was increased to ninety-nine percent of the exceptional profits. Venezuela imposed a 33% extraction tax, which it later increased to 50% and then on to 95%.

I am going to leave those three examples, and I want to talk specifically about three cases in this area that lead to awards. I think these are instructive. All of them involve the government of Ecuador. The Perenco vs. Ecuador[9] case is the first one.

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[8] Piero Foresti, et al. v. The Republic of South Africa, ICSID Case No ARB (AF)/07/1, Award (Aug. 4, 2010).

[9] Perenco Ecuador Ltd. v. Ecuador, ICSID Case No. ARB/08/6, Decision on Remaining Issues

That case arose under the France-Ecuador Bilateral Investment Treaty (BIT), which had a limited tax carve-out provision. Thus, taxes were not entirely carved out of the purview of the BIT, which has turned out to be important. That tribunal found that the taxes in Law 42 were not expropriatory. They found that they were taxes and not just contributions or participations. They found that the 50% tax rate of Law 42 did not violate the Fair and Equitable Treatment (FET) provision of the treaty, but that the 95% rate did violate it. Then there were other clauses that were arguably stabilization clauses, but this tribunal held they were not tax stabilization clauses.

The second case reached very different results and that is the Burlington Resources vs. Ecuador case.[10] It came up under the US-Ecuador BIT, which does have a tax carve-out provision, which arguably means that to come under the treaty you had to prove an expropriation. That tribunal found that Law 42 was a windfall profits tax. It was not expropriatory according to the tribunal. The tribunal held that Ecuador did breach fiscal stabilization provisions in the contract. Ultimately, what the tribunal found was that when Ecuador took the blocks away from Burlington Resources, that was an expropriation and that was the basis of the tribunal's findings. The tribunal awarded a net of 340 million dollars to Burlington as a result of that.

The third case is Murphy Oil vs. Ecuador,[11] which also came up under the US-Ecuador BIT. There the tribunal found that Law 42 was not a tax, and found that it was a participation, which is what it said it was on its face. You will notice that this is the opposite decision the tribunal found in Burlington. This tribunal also found that the clauses 15 to 22 were not tax stabilization provisions. Again, the opposite finding that you saw in the Burlington case. The tribunal found that the 50%rate did not violate the FET provision, but the 95% rate did, and it awarded Murphy about 30 or 35 million dollars.

Now, as you can see, these cases vary substantially in terms of their decisions, in

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of Jurisdiction and on Liability (Sep. 12, 2014).

[10] Burlington Res. Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Liability (Dec. 14, 2012).

[11] Murphy Exploration & Prod. Co. Int'l v. Republic of Ecuador, PCA Case No. 2012-16, Partial Final Award (May 6, 2016).

terms of their interpretation of the treaties and their interpretation of the stabilization clauses of the contracts. The lesson to be drawn here is, first, that it matters very much if you have a tax carve-out provision in the treaty, or just a limited carve-out, or none. It matters very much whether you have a fiscal stabilization provision in your contract and exactly what type it is and exactly what the wording of it is. It matters how high the tax rate is.

What can companies overseas do to protect themselves? The obvious answer is: get a fiscal stabilization clause in your contract. There are different kinds that have different legal effects. What I recommend is an allocation of risk or what is also referred to as a tax paid clause, which allocates the risk of any new taxes or any increased taxes to the national oil company so that the national oil company automatically takes on the burdens of any increases in that regard. This tends to solve a lot of interpretative problems. That would be my recommendation.

**SYLVIA NOURY:** It is interesting to hear about the cases that have come to a resolution in Ecuador. In Algeria my understanding is that there has been only one result in an ICC case where the tribunal found in favor of Algeria, and there have been a variety of settlements. That relates to the point that each contract needs to be looked at very carefully.

We have other tax cases involving capital gains taxes that we have seen around the world we mentioned in India and Africa. Different results coming out in those different cases, so I think the moral of the story, as Doak has said, is to look very carefully at your contract and negotiate it very carefully. I will pass the baton on to Juan Carlos. I would suspect you may have different view about taxation and how that amounts to resource nationalism.

**JUAN CARLOS BOUÉ:** Ever so slightly different, yes. Again Doak put his finger on the important issues which is the attitude to windfall profits. If you only believe that capitalists are the sole legitimate recipients of the benefits of the exploitation of these resources, then windfalls have to be presented as a reward for entrepreneurship and risk taking even though they are nothing of the kind. By definition these are extraneous events that are driven by scarcity essentially. From Ecuador onwards, we know that economic regulation of this sort essentially rewards ownership. When there are windfalls these generate returns to capital that are far beyond what is required for its reproduction, and the reproduction of capital is the name of the game in capitalism.

However, this is obscured in disputes by referring to the full enjoyment of investments; as if the enjoyment of investment is only a matter of time—enough time has to transpire—regardless of what happens to prices in the interim. That approach ignores that, because of the behavior of prices, the company may have made all of its money in a year, and in two years it already had a tremendous return on investment. If only it were as easy as reading the contracts, but of course, corporations are not devoid of power. Emphasis is put on the fact that governments are sovereigns, but often they are not nearly as powerful as their corporate counterparts. I have been involved in situations where the contract at issue did have a definition of what the price was and how windfall taxation beyond that would apply; obviously the most famous of these cases is Exxon.[12] If it only were a matter of reading the contract and everybody would be happy, I do not think that is how it works.

The issue with taxes for countries such as Venezuela and Mexico is of great importance because they rely on those taxes. In the UK, where fiscal receipts are extraordinarily, it does not matter that much because the UK does not rely on these receipts, but Venezuela, and to a lesser extent Mexico, did and do. Thus, if you have a situation where the contracts eliminate the fiscal receipts of the country then that is a big problem. In Venezuela this led directly to the rise to power of Hugo Chavez. The extraordinary thing about that is that I do not think that there would be anybody, especially in America who would dispute the fact that the rise of Chavez was a colossal strategic reversal for US interests. This was by far the most pro-American country in Latin America, and yet see what happened.

The reason why that happened was because the proposals of Chavez all of a sudden were seen as reasonable. The context was an economic system where most of the production was in the hands of foreign oil companies and the national oil

[12] Exxon, *supra* note 2.

company, and the national oil company was used as an instrument of foreign oil companies to pay no taxes.

In 2002, for example, no income tax whatsoever was paid from production activities of petroleum in Venezuela. Most of the government income that year came from the fact that it had revised the statutory rate of royalty the previous year and applied that to extractions.

One would have thought that considering where Venezuela went, people especially in America would have been cautious and learned their lessons in terms of not pushing for such liberalization. However, nothing of the kind has happened. The opening of Mexico's markets is a repetition of Venezuela's. All of the important and substantive measures that have to do with economics were patterned after or were pioneered in Venezuela. Measures such as relatively complex profit bases taxation that is very difficult to administer, and the disappearance of the royalties, which are very difficult to evade. This has the effect of allowing companies to reduce their taxable base to zero. The government has even set upper limits—there is a very limited role to cash bonus bidding—on how much companies can pay.

Overall it seems to me that this is going to be a recipe for a huge number of problems in the future. I hope I am wrong, but my impression from the Mexican liberalization as compared to the Venezuelan experience, which of course ended disastrously, is that it can be like in the Talleyrand quote "they forgot nothing, and they learned nothing."[13]

The one thing that they did learn was that the provisions in the Venezuelan arrangements that allowed the government to enact windfall taxation has not been enacted. In Mexico those have not been repeated and instead the fiscal regime has essentially been "contractualized." This is similar to what occurred to the Middle East concession tax regime back in the 1950s. I just do not see how that can end well. My fondest hope is that I am going to be wrong, but I am not that hopeful.

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[13] Quote attributed to Charles Maurice de Talleyrand-Périgord. Note potential misattribution as it is recognized that Talleyrand-Périgord may have borrowed from a 1796 letter from a French naval officer Charles Louis Etienne to Mallet du Pan. *See* CRAUFURD TAIT RAMAGE LL.D., BEAUTIFUL THOUGHTS FROM FRENCH AND ITALIAN AUTHORS (Howell 1866)

**SYLVIA NOURY:** Kate, I think I owe you a right on reply on whether you share such a pessimistic view of your country, in one minute please.

**KATE BROWN DE VEJAR:** I think there are two questions. The first one is, what on earth is going to be the outcome of the election in July? That is a big question mark and that could have severe impacts. I do not have a crystal ball, but I have been listening very carefully to what Andres Manuel Lopez Obrador is saying.

There's some anxiety, about what will happen if he comes in. At the same time, his inner circle and he have been doing road shows, to showcase what they will bring to the table if he comes to power. One of those things is that respect for and the rule of law will be restored; one of his big platforms is anti-corruption His view is that the current administration has not been very good at respecting the rule of law, so he would like to make that a central platform. Part of that is, obviously, respecting existing contractual terms. That does not mean he will not seek to renegotiate deals that he views as not consistent with how he sees the energy sector.

Irrespective of the outcome of this election, the fundamental question is exactly the one that Juan Carlos poses, which is: are the deals which have already been struck so liberal and so vulnerable to aggressive tax minimization schemes, so as to allow the costs of a particular project to reduce the profit so there is no tax base to tax at the end of the year? Are they so vulnerable to what I would call abuse by the resource companies that there will be a call for change irrespective of the outcome of the elections?

I have a somewhat pessimistic view as well.

**SYLVIA NOURY:** Thank you, all. I am going to have to draw this session to a close. So I would like to thank our speakers for some very insightful comments on this rather controversial topic.

**SYLVIA NOURY** is a partner in the Freshfields international arbitration group based in London. Her practice focuses on investor-state disputes in the energy, natural resources and telecoms sectors in emerging markets. She has represented corporations and states in numerous commercial and investment treaty arbitrations, including under the rules of ICSID, UNCITRAL, ICC, LCIA, and AAA. In the ENR sector, Sylvia represented BG, CMS, National Grid, and Total in their treaty arbitrations against the Government of Argentina arising from its 2002 economic emergency measures, leading to four favorable awards against Argentina. She has also represented Anglo American in its treaty arbitration against the Government of Venezuela and Tullow Group in its ICSID arbitrations against the Government of Uganda. Sylvia is a member of the Board of Directors of the Stockholm Chamber of Commerce and a member of the Arbitration Committee of ICC UK, as well as participating in various other arbitration organizations, and has spoken and published widely in the field of arbitration. She is ranked in Chambers, Legal 500 and LATIN LAWYER 250, and is valued for her “outstanding intellect and no-nonsense attitude.” She has been selected as one of the 45 leading figures of the international arbitration bar under the age of 45 (“GAR 45 under 45”), featured in The Lawyer’s “Hot 100” lawyers and listed by Latinvex as one of Latin America's Top 100 Female Lawyers. Sylvia is a Founder and Co-Chair of the Steering Committee of the Equal Representation in Arbitration Pledge. She holds a law degree from Cambridge University where she was awarded the Clive Parry Scholarship for Public International Law

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**JUAN CARLOS BOUÉ** is Senior Research Fellow at the Oxford Institute for Energy Studies. His professional activities have alternated between academia, government, and the oil industry, but they have always been focused on the political economy, industrial economics, and international governance structure of petroleum. Boué began his career at the international trading arm of Petróleos Mexicanos, the Mexican national state oil company, where he eventually became the manager responsible for all commercial aspects of Mexico's crude oil export sales, as well as secretary of the inter-ministerial government committee entrusted with reviewing all oil export pricing and policies. He later became special advisor to the Venezuelan Minister of Energy and Petroleum, the president of the Venezuelan state oil company Petróleos de Venezuela S.A. (PDVSA) and the Venezuelan Vice-Minister for Hydrocarbons and sat on the boards of most of PDVSA's refining ventures abroad. Boué has written widely on the industrial economics of the oil and gas exploration and production, and petroleum refining industries, as well as on auction design for oil and gas bidding rounds, the international arbitration of upstream petroleum agreements and the taxation and political economy of oil in general.

**KATE BROWN DE VEJAR** is a partner at DLA Piper in Mexico City, where she specializes in international commercial and investment arbitration. She has represented private corporations, sovereign states and state-owned entities in connection with a wide range of commercial and investor-state arbitrations under the leading institutional and *ad hoc* arbitration rules, with a particular focus on complex construction disputes. She is on the Board of Directors of the Mexican Centre of Arbitration for the Construction Industry. Since 2008, she has been a member of the Australian Delegation to UNCITRAL Working Group II. She was co-Chair of Young ICCA (2014-2016) and is on the executive committee of Young Arbitral Women Practitioners. A graduate of Harvard Law School/University of Queensland, Kate is fluent in English, French and Spanish.

**EYITEMI NED MOJUETAN** is the General Counsel, Chevron Africa and Latin America Exploration and Production (CALAEP) in Houston, Texas, United States. In this role, Ned oversees the legal matters of three upstream Business Units: Nigeria/Mid-Africa, Southern Africa, and Latin America. Before taking up this position, Ned was the General Counsel of Chevron Nigeria Limited and the other Chevron companies in Nigeria, overseeing all the legal matters in the

Nigeria/Mid-Africa Business Unit, a position he has held since May 2012. Ned received his LL.B. (Bachelor of Laws) from the University of Benin in 1988 and was called to the Nigerian Bar in 1989. He received his LL.M (Master of Laws) from the University of London, United Kingdom, in 1998. Ned joined Chevron Nigeria Limited in April 1992 as an Attorney and has held positions of increasing responsibilities since then. Prior to his role as General Counsel of Chevron Nigeria Limited, Ned served as Lead Counsel in the West African Gas Pipeline Project based in London, in the United Kingdom, as the Lead Project Counsel in the OKLNG Project in Nigeria, and as a Senior Counsel, Negotiations & Legal, Chevron Australia Pty Ltd., based in Perth on the Gorgon LNG Project. In addition, Ned had at different times, previously served as Manager, Lands and as Manager, Gas Policy, both for Chevron Nigeria Limited. Ned also served on the Board of Directors of Chevron Nigeria Limited and the other Chevron companies in Nigeria from May 2012 to June 2017. Ned is a member of the Association of International Petroleum Negotiators, the International Bar Association and the Nigerian Bar Association.

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