Summary of the Fourth Annual Global Oil & Gas Institute

Baker McKenzie held its fourth annual Global Oil & Gas Institute (the "Institute") in Houston, Texas on May 10, 2017. The Institute brought together industry leaders and Baker McKenzie attorneys from around the world to offer a global perspective on the current oil and gas market and to discuss cutting-edge commercial topics and trends in the global oil and gas business.

The themes that emerged from this year's Institute were the uncertainty in the O&G industry and an increased accountability by the industry to O&G stakeholders and to the public. The uncertainty is driving a demand for predictable and stable policies and systems in order for companies to have the confidence to continue doing business in the O&G space; it is also driving investment in digital technology as the O&G sector tries to harness the impact of technology and to predict where it will go next. The increased accountability to stakeholders has impacted some O&G companies' decisions around socially responsible measures, including transitioning companies to a lower carbon energy future.

The Institute began with a keynote speech, which was followed by seven panel discussions and two presentations on specific topics. The panels were comprised of four to five individuals, one of whom was the moderator. The following is a high-level summary of some of the points made by the panels and presentations. For the Institute agenda and speakers please click here.

Keynote Address

The Institute's keynote speaker (the "Keynote") made the point that safety, technology and cost-saving measures have been changing the O&G industry since the Keynote's company first entered the market. The Keynote noted that some of the major challenges facing the industry today are stakeholder management and optimizing renewable energy and other measures intended to respond to climate change. The Keynote underscored the opportunities that digital technology is bringing to the industry, including mobile payments and apps that integrate with one's car. The Keynote also discussed the inter- and intra-industry competition in the O&G marketplace, which is driving more integrated supply chains, the standardization of technology and processes, and the use of existing O&G technology and technology from other industries (e.g., video gaming technology) to save costs.

Across Borders: US, Canada and Mexico Energy Policy Under the Trump, Trudeau and Peña Nieto Administrations

The Institute's first panel explored energy policies in Canada, Mexico and the US. Each panelist noted some uncertainty or complexity that could be ameliorated with predictable and standardized policies (e.g., the complexity around provincial governments in Canada; uncertainty around the Trump administration's policies; non-standard block size and bidder prequalification criteria in the initial Mexico contract auctions). The panelists' view on NAFTA (minus the Mexico representative, who abstained from the NAFTA discussion) was that it would likely be renegotiated, which could be a good thing if the renegotiation harmonized regulations and took into account the Mexico power liberalization. One panelist noted that President Trump might use NAFTA renegotiations to address labor and environmental issues. Another panelist made the point that regulations are important to the smooth and efficient operations of business, so people pushing for deregulation should be wary about empowering special interests and should instead focus on helping companies to avoid costs. The panel's final minutes were spent discussing policy trends that could affect the price of oil and gas. One panelist made the point that local policies do not determine O&G pricing but rather O&G pricing happens in the international marketplace because of free ocean trade. Another panelist, noting that politics drives policy, suggested that the O&G industry could better drive policy by focusing more on stakeholder engagement.

Commercial Activity in Oil & Gas

The second panel discussed commercial activity in oil and gas, noting that the changing price of oil is affecting the way O&G deals are done. For example, it was noted that by some estimates, private equity firms have around $1 trillion to invest in the energy industry and are changing the way their deals are structured due to the changing price of oil, with more firms partnering with two to three others in club-like deals in order to spread the risk. O&G companies are building sustained profitability with deals structured to provide portfolio diversity in areas such as geography and technology. Also, oilfield service companies are getting creative about when they bill and book revenue and partnering with operators and local service companies. Financing for O&G deals is expected to continue, in part because the O&G industry offers a clear and attractive story plus a longevity that is not seen behind the revolving door of industries like technology; one panelist noted an increased level of project finance from Japanese and Chinese banks. Sponsors would do well to anticipate the issues and risks that lenders will raise and have ways to mitigate them. The panel touched on ways to improve ordinary course contracts, including making the contractual process easier and educating operations teams; also suggested were allocating time to review contacts with portfolio teams to determine the pressure points and using automation to facilitate such review. The panelists noted the need for the O&G industry to attract younger professionals. Suggestions for how to do this included focusing on the technology in the industry, adding diversity to the sector, providing flexible working arrangements and opportunities to work abroad and assuaging young people's concerns about the energy industry's impact on the environment with reminders of energy's altruistic core, i.e., providing energy for daily life.

Navigating the Changing Tax Landscape

The third panel addressed the O&G industry's changing tax landscape and echoed the themes heard throughout the day of needing to counterbalance uncertainty with predictability and to have stakeholder involvement. The panel started by discussing the tax reform prospects in the United States. With respect to the border adjustment tax, the panel noted that there is not enough information to know how it will change things; regardless of the uncertainty, however, the panel highlighted that enactment of a border adjustment tax would have a ripple effect on other governments and supply chains. Some of the O&G majors are preparing for tax reform by realistically anticipating the bigger picture and modelling the areas presenting the most risk. The panel predicted that the tax reform conversation will continue, with many more administrative sessions on the horizon given the lessons learned from the healthcare debate. The panel then turned its focus to the OECD's base erosion and profit shifting policy ("BEPS"); this discussion repeated the day's theme of stakeholder engagement because BEPS provides an opportunity for socially responsible tax planning and O&G stakeholder engagement with governments to change and improve the O&G tax structure. It was noted that there is an increase in tax auditing in Latin American countries, with a focus on substance over form, and that artificial intelligence will likely be used to collect tax information and share it among countries. Finally, the panel discussed how O&G companies could achieve some of the certainty and stability they crave by using bilateral and multilateral investment treaties and fiscal stability clauses as tools to protect a company against radical, drastic changes to a tax regime. In order to most effectively use these tools, the O&G company would need to undertake some up-front planning, including building such treaty and fiscal stability protection into a contract or structuring or restructuring the investment to get the benefits of the treaty, e.g., establishing a mailbox company in the desired jurisdiction.

Antitrust Policy in Changing World

Antitrust was the topic of the fourth panel. The panel led with a discussion of whether antitrust policy fits its purpose, with a reminder to O&G companies that antitrust law looks at where effects are felt, not where the agreement took place or where the company resides. Next, the panel considered whether President Trump's "America First" energy policy would translate into less global cooperation on the antitrust front, with the conclusion that although no one knows, recent comments by key Trump administration officials seem encouraging of the current antitrust status. The panelists then discussed the key policy drivers they are seeing in antitrust and contrasted the European Commission's focus on consumer welfare with China's tendency to look at industrial policy first and the consumer benefits second. The panel concluded by exploring the antitrust trends and issues the O&G industry should pay attention to, which included leniency programs; energy cases, such as Gazprom in the EU and Japan's investigation into LNG; and antitrust's focus on human resource issues, such as no-poaching and wage-fixing agreements.

Operating Within the Rules: Sanctions

The fifth panel explored sanctions, noting a high correlation between sanctions and O&G products since countries subject to sanctions are often O&G producers and because O&G companies are sophisticated and well-organized and therefore a natural compliance target. First, the panelists explored how sanctions were developing globally, with the observation that there is a movement away from comprehensive trade sanctions (e.g., embargoes and trade blockades) to more targeted sanctions (e.g., impacting access to US financial systems) in an attempt to mitigate sanctions' impact on local citizens. Then, the panelists discussed the US direction on Iran and Russia, repeating the uncertainty heard in other Institute panels but predicting the JCPOA would stay in place as long as Iran complied with the letter of the plan. The point was made that due to Brexit, the EU might take a softer approach to sanctions without Britain's voice and Britain might take a stricter approach to sanctions without the need to obtain agreement from EU member states. Finally, the panel addressed ways companies could navigate the uncertain world of sanctions, which included instituting a compliance program; adopting a macro crisis management plan replete with an external partner to help interpret the legislation; and ensuring a company has a contractual mechanism in place, e.g., force majeure provision, to mitigate the often thousands of contracts breached when responding to a new sanction. The panel noted that a real issue for O&G companies when addressing sanctions is determining the ultimate beneficial owner with whom they are dealing.

Dispute Resolution in the Trump Era

The sixth panel focused on dispute resolution. The panel discussed the need to look at disputes from the contract drafting stage since so many disputes arise from or are impacted by contractual issues. The need to draft contracts with the input from cross-functional teams was highlighted, with the panelists noting that some of the most high risk contractual areas for O&G are intellectual property, non-compete, termination, exclusivity and cross-border enforcement provisions. It was also noted that more information and learning could be fed from disputes teams to contract teams because, although issues arising from major disputes are frequently shared, there is value in sharing lessons from the near misses and wins. Repeating the day's emphasis on predictability, it was noted that having the predictability of the US judicial system is very important. Arbitration is often preferred in international disputes, despite its expense, although there currently is momentum in international arbitration for the process to be cheaper and quicker. Collection was viewed as one of the biggest challenges in dispute resolution.

Evolving Challenges to Oil & Gas Projects Around the World

The seventh and final panel discussed the evolving challenges to oil and gas projects around the world in an environmental context, since O&G companies are being affected by environmental issues involving hundreds of billions of dollars and human social assumptions. Many commercial banks and public sector financial banks are looking at the environmental side of project finance, including greenhouse gas emissions. The human rights element is also becoming more prominent, with the World Bank making social inclusion requirements for financing. The panel next explored emerging environmental-related litigation risks and observed that organizations are increasingly filing legal actions by bringing environmental issues under the umbrella of human rights. Turning its focus to individual countries, one panelist noted that O&G companies doing business in Mexico should conduct environmental due diligence and consider the different civil, criminal and administrative liabilities an environmental violation can incur due to heightened environmental vigilance under Mexico's new National Agency for Industrial Safety and Environmental Protection of the Hydrocarbons Sector (ASEA). In Brazil, the

Carwash scandal has created opportunities for O&G companies looking to purchase some of Petrobras' divested assets. It has also empowered public prosecutors, some of whom are pushing for enforcement against the O&G industry in Brazil; therefore, O&G companies should be aware of each detail and guideline of the Brazilian agencies governing the O&G industry. NGOs are becoming more active in Brazil, which challenges O&G companies but also creates opportunities for transparency and compliance.

Update on Mexico Energy Reforms

The presentation updating the audience on the Mexico Energy Reforms noted that energy reform has been successfully created in Mexico. Ongoing work is being done to provide an efficient, transparent and legally clear platform for investment. Efforts are now underway to clarify elements around energy storage, and PEMEX continues to learn how to compete in the liberalized market.

Driving Business Through Digital Strategy

The presentation on O&G digital strategy made the point that the O&G industry has entered the fourth industrial revolution, a successor of the computer and internet age and not merely an extension of it, characterized by extreme connectivity and extreme automation. Legal issues impacting digitalization in the O&G industry include data protection and compliance; subsurface data rights and data licensing; export controls; and cybersecurity. It was noted that the O&G industry has a large amount of data that is siloed and therefore not being fully used by companies. Changing this behavior could help the O&G industry at large.