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Preface

Welcome to *The Asia-Pacific Arbitration Review 2023*, a Global Arbitration Review special report. For the uninitiated, Global Arbitration Review is the online home for international arbitration specialists the world over, telling them all they need to know about everything that matters.

Throughout the year, we deliver our readers pitch-perfect daily news, surveys and features; lively events (under our GAR Live and GAR Connect banners (GAR Connect for virtual)); and innovative tools and know-how products.

In addition, assisted by external contributors, we curate a range of comprehensive regional reviews that go deeper into developments in each region than the exigencies of journalism allow. *The Asia-Pacific Arbitration Review*, which you are reading, is part of that series.

This review contains insight and thought leadership inspired by recent events from 53 pre-eminent practitioners. Across 20 chapters and 315 pages, they provide us with an invaluable retrospective on the past year. All contributors are vetted for their standing and knowledge before being invited to take part.

The contributors' chapters capture and interpret the most substantial recent international arbitration events across the Asia-Pacific region, with footnotes and relevant statistics. Elsewhere they provide valuable background on arbitral infrastructure in different locales to help readers get up to speed quickly on the essentials of a particular country as a seat.

This edition covers Australia, China, Hong Kong, India, Japan, Malaysia, Singapore, Sri Lanka and Vietnam and has overviews on topics including economic damages; energy disputes; private equity; construction and infrastructure disputes and the impact of sanctions; and hospitality disputes.

I hope you enjoy the volume and get as much from it as I did. If you have any suggestions for future editions, or want to take part in this annual project, my colleagues and I would love to hear from you. Please write to insight@globalarbitrationreview.com.

David Samuels
Publisher
May 2022

Asia-Pacific energy disputes – current and emerging trends

Michael Weatherley, Matthew Blycha, Georgia Quick and James Clarke
Ashurst

IN SUMMARY

Energy disputes represent some of the most complex and economically significant disputes in the Asia-Pacific region. While exceptionally diverse in their origins, this article identifies four current and emerging trends in the field against the backdrop of the increasingly clear distinction between 'conventional energy' disputes and disputes relating to the energy transition. Each of these trends holds practical lessons for those in the industry, including how these disputes might be best managed and resolved going forward.

DISCUSSION POINTS

- Gas and its mega disputes are here to stay. The recent spate of LNG price reviews, in particular, is throwing up a number of themes and lessons to which industry participants should be paying close attention.
- The next big set of 'conventional energy' disputes will likely relate to the well-publicised 'wave of decommissioning' set to take place in the coming years in respect of ageing offshore oil and gas assets. These are likely to be complex, multifaceted disputes for which parties should start preparing now.
- On the energy transition front, the increasing shift to renewable energy presents great opportunities but also great risk. A number of now familiar issues are generating significant numbers of disputes in this area as well as important lessons for industry players going forward.
- Climate change is not only an existential threat but fertile ground for dispute. The current spate of claims against governments, companies and directors is likely to increase in coming years. Managing these disputes requires significant forward planning and pre-emptive action.

One might think that 'energy disputes' is an impossibly broad topic to cover. Energy is derived, produced and used in countless different ways, each of which involves a vast number of different physical, commercial and regulatory touchpoints, and all of which can give rise to disputes. It is a topic that could encompass matters as disparate as disputes over the price of LNG, the financing of a wind farm, the operation of a coal-fired power plant, the merger of two energy companies and the expropriation by a state of an energy company's assets. Where does one even begin in providing an overview of a field like this?

In our view, it can only be through the lens of one's own experience. For the authors of this article, that experience is increasingly being pulled in two distinct directions – disputes concerning 'conventional energy' (that is, energy production and use tied to the extraction of fossil fuels) and disputes related to what we term 'energy in transition' (the move to low or zero-carbon energy sources as part of global efforts to address climate change).

Rather than a superficial survey of the entire field, this chapter aims to cover one current and one emerging trend in each of the 'conventional energy' and 'energy in transition' fields. It aims to provide insights as to how these disputes are (or will be) unfolding in the Asia-Pacific region and how those in the industry and this region can best prepare themselves to manage and resolve them.

Conventional energy – current trend: gas and its mega disputes are here to stay

All countries are faced with an increasingly difficult balancing act of phasing out reliance on fossil fuels while still meeting the growing energy needs of their populations and economies. This is especially true in the Asia-Pacific region, home to a significant portion of the fastest-growing economies in the world. The journey of replacing carbon-intensive energy sources with greener sources of energy is, of course, a long one and transitional energy sources are seen as crucial to bridging the divide. For many countries, the solution (or at least part of it) is natural gas. While the picture varies from country to country, many expect continued, and in some cases increasing, demand for natural gas to 2040 and beyond. This demand – and the associated extraction, sale, transport and use of gas – will continue to drive disputes in this space for many years to come.

Typical natural gas disputes

Natural gas disputes vary widely in their origins, with this region seeing, among other things:

- disputes concerning the construction of upstream or downstream gas infrastructure, with the usual triumvirate of issues (time, cost and quality) being particularly pronounced in light of the size, complexity and remote locations of the infrastructure, as well as its sheer cost;
- sale and delivery disputes, with disputes relating to under-deliveries of LNG, in particular, becoming increasingly common of late. Sellers, with increasing frequency, fail to deliver one or more cargoes of LNG under long-term contracts, claiming that such failure to deliver arose from logistical issues, such as temporary plant shutdowns or force majeure events (including things like cyclones or covid-19-related disruptions). Buyers, on the other hand, seek compensation, suspecting that the sellers have in fact chosen to sell the cargoes attributable to the 'failed delivery' at a higher price in the spot market or, in the case of genuine shortfalls, to allocate the cargoes to more lucrative long-term contracts; and
- disputes related to recent geopolitical instability and sanctions that, along with associated price volatility and supply chain disruptions, are impacting contractual performance the world over and prompting a renewed wave of disputes over things like frustration, force majeure, change-in-law, hardship and termination.

Perhaps the most significant trend we are seeing, however, and the focus of the remainder of this section, is in relation to LNG price review disputes. While Asian buyers account for a significant percentage of the global demand for LNG and price review clauses have long been a feature of LNG sale and purchase agreements (SPAs) for sales into Asia, the region has not seen the same flood of price reviews and associated gas price arbitrations that Europe has experienced over the past decades. However, with an increasing shift away from traditional, non-adversarial attitudes to formal price review processes and increasing volatility in LNG markets, there has been a marked spike in price review activity in this region over the past few years.

What characterises Asia-Pacific LNG price reviews?

LNG price review disputes in this region are characterised by numerous recurring themes.

The first has been the relative uncertainty as to the process for their ultimate resolution. While many LNG SPAs in the region provide a clear trigger for a price review (often by way of notice after a set number of years) and a clear process for negotiation of a new price (usually for a defined period of at least six months), many such SPAs (and, in particular, older contracts) do not provide an express mechanism, such as arbitration, for resolving deadlock in those negotiations. In the absence of

such a mechanism, parties are finding themselves embroiled in preliminary disputes about where, if anywhere, the dispute about price should be resolved upon failure of negotiations. Attempts to refer such disputes to arbitration are met with challenges to the tribunal's jurisdiction on the basis that there is no 'dispute' for the purposes of the arbitration clause, merely a failure to reach an agreement, or, in other words, that the parties agreed to resolve the new price themselves by way of negotiations, not arbitration. While the merit of these challenges will always turn on the precise wording of the price review and arbitration clauses, they are in all cases dragging out and increasing the cost of disputes that are already inherently time consuming and costly.

The second associated theme is that many price review provisions require the relevant negotiations to be conducted in good faith. Given the inherently subjective nature of the phrase 'good faith', and questions as to the enforceability of good faith obligations (particularly under English law), these provisions can generate considerable uncertainty as to the scope of the parties' respective obligations and whether breach of those obligations provides a basis for claim in the event of deadlocked negotiations.

Finally, we are seeing hard-fought battles over how the new price is to be reached (noting, of course, that this is not a dynamic unique to price reviews for sales into Asia). Many price review provisions in this region adopt a benchmarking process, seeking to align the price under the SPA with the market more generally, rather than maintaining the parties' original bargain in light of altered economic circumstances (as is common in the European context). The challenge is how such benchmarking and alignment is achieved, particularly where the clause provides simply that the price should be aligned with 'comparable' LNG SPAs or similar without any greater detail as to what those phrases mean. This lack of specificity is driving widely divergent positions, which often scuppers negotiations and prolongs arbitrations.

How can these price reviews be better managed?

What is most apparent from the trends noted above is that an efficient, cost-effective and successful price review process must start with a well-drafted price review clause. In our view, that entails at minimum:

- a clear time limit for price review negotiations and inclusion of an express mechanism (such as arbitration) for breaking the deadlock if the parties cannot agree on a new price; and
- clearly defining which types of reference contracts ought to be included in the data set for the benchmarking process, as opposed to relying on vague and subjective terminology, such as 'comparable contracts' and 'market price'. While this is a necessarily complex exercise that must be approached on a case-by-case basis,

the reference contracts should be defined by reference to factors such as their term and quantity, geographical markets, price structures, delivery basis, when they were agreed or revised, their delivery time frame and whether they are conditional or binding. At the same time, care must be taken to ensure that the reference contracts are not defined in an overly restrictive manner that may result in a set of reference contracts that is not representative of the broader market.

Conventional energy – emerging trend: the offshore decommissioning wave

The clearest emerging trend in the conventional energy space relates to the well-publicised wave of decommissioning set to take place in the coming years in respect of ageing offshore oil and gas assets.

Global decommissioning expenditure is forecast to total almost US$100 billion between 2021 and 2030.[1] While a number of mature operations in the UK continental shelf and the Gulf of Mexico are coming to the end of their economic life, Australia and South East Asia are tipped to be the next big markets for decommissioning. It is estimated that 200 offshore fields in South East Asia are likely to stop producing by 2030, consisting of over 1,500 platforms and over 7,000 wells.[2] In Australia, decommissioning liability is set to total US$40.5 billion over the next 50 years, with half of this work to occur by 2030.[3]

Decommissioning entails dismantling, removing and disposing of all structures making up offshore assets and supporting infrastructure. This is in addition to plugging and abandoning wells and environmental remediation of the site. The cost of decommissioning begins in the hundreds of thousands of dollars for a small structure, and can run into the billions for large networked assets. Decommissioning is a complex and costly process that involves a number of stakeholders, and as decommissioning activity increases in the Asia-Pacific, so too does the likelihood of disputes between operators, joint venture participants, regulators, contractors and subcontractors.

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1 Christian de los Reyes Ullevik, 'Are we entering a decade of offshore decommissioning?', IHS Markit (5 October 2021) <https://ihsmarkit.com/research-analysis/decade-of-offshore-decommissioning.html>.

2 Damon Evans, 'Southeast Asia braces for huge wave of decommissioning', Energy Voice (9 December 2019) <https://www.energyvoice.com/oilandgas/asia/213619/southeast-asia-braces-for-huge-wave-of-decommissioning/#:~:text=More%20than%20200%20offshore%20fields,as%20much%20as%20%24100%20billion>.

3 Centre of Decommissioning Australia, A Baseline Assessment of Australia's Offshore Oil and Gas Decommissioning Liability, 7 (https://www.nera.org.au/Publications-and-insights/Attachment?Action=Download&Attachment_id=358).

Disputes with governments and regulators

Determining who is responsible for the liabilities that arise from decommissioning is often a trigger for disputes. The Northern Endeavour FPSO is perhaps the most high-profile example of a decommissioning challenge with a regulator in the region. In 2015, the Northern Oil & Gas Australia Pty Ltd (NOGA) group of companies acquired the Laminaria and Corallina oil fields in the Timor Sea, including the Northern Endeavour FSPO. In 2020, the NOGA group went into liquidation, leaving the Australian government with responsibility for maintaining the ageing FPSO and preparing for decommissioning.[4] This resulted in a levy on offshore petroleum production to cover the costs, and sparked amendments to the Australian offshore oil and gas decommissioning framework, including trailing liability for previous titleholders.[5]

Arbitrations can arise when trailing liability legislation comes into conflict with contractual arrangements. This was seen in arbitration proceedings between Chevron and Thailand over decommissioning costs associated with one of Thailand's largest gas fields and a concession agreement for those fields dating back to 1971. Thailand introduced retrospective liability in 2016, intending that operators remain liable for the costs of decommissioning assets on transfer.[6] PTTEP won the Erawan concession from Chevron in 2018, and Thailand then requested that Chevron take on the roughly US$2 billion cost of decommissioning.[7] Chevron commenced arbitration proceedings against Thailand, in which Chevron asserted it is only liable for decommissioning infrastructure that is no longer usable, though not for infrastructure that is taken over by PTTEP.[8] The result (whether by award or settlement) may never see the light of

4 Steve Walker, Review of the Circumstances that Led to the Administration of the Northern Oil and Gas Australia (NOGA) Group of Companies (Commonwealth of Australia, June 2020) 4 (https://www.industry.gov.au/sites/default/files/2020-08/review-of-circumstances-that-led-to-the-administration-of-noga-executive-summary-and-recommendations.pdf).

5 Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Amendment Act 2021 (Cth) (https://www.legislation.gov.au/Details/C2021A00097) and Offshore Petroleum and Greenhouse Gas Storage Amendment (Titles Administration and Other Measures) Act 2021 (Cth) (https://www.legislation.gov.au/Details/C2021A00096?msclkid=240142a1a8e411ec984ff65ef584bcf2).

6 Ministerial Regulation Prescribing Plans and Estimated Costs and Security for Decommissioning of Installations Used in the Petroleum Industry BE 2559 (2016) (Thailand).

7 Chayut Setboonsarng, 'Thai PTTEP yet to reach agreement with Chevron on access to Erawan gas field', Reuters (5 August 2021) <https://www.reuters.com/business/energy/thai-pttep-yet-reach-agreement-with-chevron-access-erawan-gas-field-2021-08-05/>.

8 Jack Ballantyne, 'Chevron resumes claim against Thailand', Global Arbitration Review (6 October 2020) <https://globalarbitrationreview.com/chevron-resumes-claim-against-thailand>.

day given its confidential nature but, to the extent further details are released, they will no doubt be studied closely by other foreign investors in Thailand who have stakes in soon-expiring offshore energy concessions.

Disputes between joint-venture participants

Allocating decommissioning liability is also a source of dispute between joint-venture participants or unitholders. While operating agreements such as the AIPN Model JOA (2012) set up decommissioning regimes and trust funds,[9] there is still considerable opportunity for dispute. Arbitration may arise in relation to:

- the decision to decommission, as it relies on forecasting the value of remaining reserves based on future oil and gas prices;
- the decommissioning work programme and budget, as it entails assumptions about the state of the asset and estimates of decommissioning costs; and
- the trigger date for contribution to a decommissioning fund, as it involves weighing estimated decommissioning costs against the value of remaining reserves.

Disputes with contractors and subcontractors

Disputes with contractors and subcontractors in decommissioning will likely turn on the same issues as other large-scale construction disputes, including:

- contractual risk allocation mechanisms;
- compliance with variation provisions; and
- assumptions on which work was tendered.

Decommissioning offshore assets is unique in its particular vulnerability to inclement weather or ocean conditions, and reliance on specialised contractors and equipment. Further, there may be unexpected requirements in reverse engineering an asset decades after its installation. Plans and site surveys may not reflect the structure following repairs and modifications over time and these factors may result in disputes regarding variations, latent conditions and delay.

Managing decommissioning disputes

While there is potential for a range of disputes in connection with decommissioning, there are several strategies available to avoid and manage disputes.

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9 Association of International Petroleum Negotiators, Joint Operating Agreement (2012) <https://www.aipn.org/forms/store/ProductFormPublic/joint-operating-agreement-2012>.

The first is anticipating decommissioning liability. As distributing liability for decommissioning has been the greatest trigger for disputes, operating agreements and transactions assigning interests in oil and gas projects should carefully consider decommissioning obligations. While older agreements may not contain explicit procedures, decommissioning obligations are likely to be impacted by contractual provisions such as stabilisation, choice of law and environmental remediation clauses.

The second is paying attention to the changing regulatory landscape. The introduction of trailing liability in jurisdictions in the Asia-Pacific suggests that contracting and transacting out of decommissioning liability is falling away as an effective option. Understanding any tension between contracting and statutory regimes is helpful in mitigating future disputes. Navigating the complex and changing regulatory landscape is important for operators and contractors alike. There has been growing public and industry attention to environmental remediation, particularly the suitability of in-situ decommissioning and disposal of hazardous materials.[10] If this is the next area for regulatory reform, contractors are likely to be subject to increased environmental obligations.

The third is relying on standard form decommissioning contracts. Looking to the experience in the UK, the development of standard form construction contracts is a likely response to increased decommissioning activity. Standardising terms, as in the LOGIC and DISMANTLECON contracts,[11] will assist in streamlining both contract negotiation and disputes.

Energy in transition – current trend: renewable energy, with great opportunity comes great risk

As part of global efforts to address climate change, investments have continued to surge across all forms of renewable energy, in both developed and developing economies. Whether as a result of changing regulatory landscapes, adoption of new technologies or the perennial challenge of managing time and costs on major projects, the scope for

10 National Offshore Petroleum Safety and Environmental Management Authority, NOPSEMA takes compliance action against Woodside Energy Ltd (5 February 2021) <https://www.nopsema.gov.au/blogs/nopsema-takes-compliance-action-against-woodside-energy-ltd>.

11 Leading Oil & Gas Industry Competitiveness, Standard Contracts (2021) <https://www.logic-oil.com/content/standard-contracts0>; Baltic and International Maritime Council, DISMANTLECON (2021) <https://www.bimco.org/contracts-and-clauses/bimco-contracts/dismantlecon>.

disputes between players in this industry has proved significant. Four types of issues, in particular, have featured prominently in those disputes. Investment treaty issues are dealt with elsewhere in this article.

Performance issues with new technologies

Renewables projects often involve complex and relatively untested technology (or, at least, existing technology being put to use in a new, larger or more arduous operating environment, or by a party to whom it might not be completely familiar).

It is relatively common on renewables projects, therefore, for that technology not to work as intended. When that happens, disputes inevitably follow. Depending on when the relevant problem is discovered, disputes can arise in respect of variation regimes, construction completion regimes, commissioning and performance testing regimes, post-completion defect regimes, or operation and maintenance regimes (including availability guarantee regimes). In all of these scenarios, there is scope for disagreement as to responsibility for the performance issues and the resulting time and cost consequences. This is particularly pronounced on projects where the designers, equipment suppliers, construction contractors, and operation and maintenance contractors are different parties and, predictably, seek to blame the other's contribution. That such contractors are coming from an increasingly large and varied pool (both in terms of size, experience and sophistication) only exacerbates the issue.

Discerning what caused the problem is often a matter of complex scientific or engineering expertise, sometimes in very niche or nascent areas where the availability of independent experts with sufficient experience and the willingness to be involved in dispute processes can be quite limited. One of the most effective strategies for dealing with such disputes is obtaining relevant expert input as early as possible. In our experience, the more independent the input the better. A frank third-party appraisal can allow an early narrowing of issues and possible settlement. To the extent a settlement cannot be achieved, such experts will assist with the inevitable need to master the technical issues and exactly how they fit with the contractual and regulatory framework.

Disputes over licensing, permissions and consents

Like most major projects, the development phase of any renewable energy project involves obtaining things like environmental approvals, planning consents, regulatory consents, land use agreements and permits to transport large items of equipment.

Renewable energy projects are typically located in remote, green field locations, often require a lot of space and can have environmental impacts that may be uncertain or difficult to assess (wind farms being a prime example). Those kind of difficulties can

lead to delays in obtaining approvals and consequent disputes all along the contract chain as deadlines are not met. Approvals processes in the renewables sector often receive considerable public and political scrutiny exacerbating difficulties.

To avoid disputes in this area time should be spent upfront understanding the relevant regulatory and legal landscape. That means assessing not only what permits will be required for a project but also when they can expect to be received, what conditions might be imposed upon them and what can be done if permits are delayed, denied or later amended.

Delays in connecting to the grid

Many renewable energy projects involve independent power producers (IPPs) supplying electricity to a national grid. This necessarily involves a physical interface between the IPP's power generation infrastructure and the grid (via associated infrastructure such as switchyards, substations and transmission lines). As the grid is usually owned and operated by a separate (often state-owned) power utility, this also involves a legal and commercial interface between the IPP and the power utility, usually by way of a connection or power purchase agreement (PPA).

In many jurisdictions, achieving connection to the grid is a complex process and one of the biggest sources of delay in getting any project up and running. Attempts to connect are often beset by delays in regulatory processes, difficulties in obtaining the modelling information necessary for design and connection, delays in the construction of connection infrastructure (often the responsibility of utilities), mandates by power utilities to modify or upgrade equipment, and consequent delays in commissioning processes. This often produces disputes as to who bears the time and cost consequences of these events, particularly where risk allocation for them has not been specifically or clearly addressed in the construction contract or the PPA and an understanding of the difficulties with grid connection is constantly evolving. In addition, changes to the national electricity rules, designed to improve grid stability as more and more new renewables projects come onto the grid often results in change-in-law claims. Engineering, procurement and construction delays will also have a knock on effect to the downstream PPAs.

To avoid these issues, thorough due diligence must be done into the regulatory environment governing the connection. In addition, at the time of drafting the relevant construction and connection agreements, it is crucial to clearly define roles and responsibilities in relation to these risks.

Raw material price and supply disputes

Another source of disputes is equipment suppliers demanding increased prices on the back of alleged increases in the price of raw materials, typically arising out of supply chain disruptions.

Some supply contracts may have price escalation or price review clauses that operate where input prices have increased. The operation of these clauses is usually straightforward and including them in a contract is one way to avoid surprises during the term of the contract (and avoid disputes). However, in the absence of these clauses, suppliers might attempt to pass on price increases by way of force majeure, hardship or change-in-law clauses in the supply contract. This will obviously depend on the reasons for the price increase and the relief available under the relevant clause. Another way might be by way of applicable sale of goods legislation that permits the price increase to be passed on.

In practice, however, we typically are seeing parties willing to take a pragmatic and amicable approach to resolving supply disputes arising out of supply chain disruptions, perhaps reflecting the repeat nature of business in this sector and the resulting need to preserve relationships. Whatever the scenario, early engagement and open discussion of these issues is to be encouraged.

'Energy in transition' – emerging trend: climate change as an existential threat and fertile ground for dispute

With widespread acceptance that climate change is an urgent global threat, climate change disputes are becoming increasingly rife. As at May 2021, over 1,800 climate change-related cases had been filed in 40 different countries in the space of a year.[12] Those cases come in various forms, with claims being brought against governments and companies alike and resolved both in courts and by arbitration.

Claims against governments

Climate change claims are often levelled against governments for alleged failure to adhere to various statutory and common law duties. This includes increased reliance on legal action to address government emissions commitments. In 2019, the Dutch

12 London School of Economics, Global trends in climate change litigation: 2021 snapshot (May 2021), p. 5 (https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation_2021-snapshot.pdf).

Supreme Court held in the *Urgenda* case[13] that the Netherlands must reduce its greenhouse gas emissions by at least 25 per cent by the end of 2020, demonstrating that court-ordered emissions targets are now a possibility. Although the *Urgenda* outcome hinged upon the European Convention on Human Rights, First Nations leaders in the Torres Strait Islands recently instigated an action inspired by *Urgenda*. It is alleged that the Australian government has breached a duty of care to take reasonable steps to protect the land and people in the Torres Strait Islands from the effects of climate change.[14] The Federal Court of Australia is expected to hear the matter in 2022.

Government approvals of high emissions projects also spark legal action. In *Sharma v Minister for the Environment*, the Federal Court of Australia found that the Environment Minister owed a duty of care to Australian children who may suffer from the effects of climate change as a result of the government's approval of plans to extend an open-cut coal mine in New South Wales.[15] The Full Federal Court heard an appeal in October 2021 and in March 2022 overturned the Federal Court's decision.[16] In a detailed judgment of significant length, Chief Justice Allsop and Justices Beach and Wheelahan set out their various reasons for finding that the Minister did not owe a duty of care in the circumstances. The judges each emphasised different factors for overturning the primary judge's decision. These included that the finding of a duty of care would result in indeterminate liability and that the principle of causation could not be properly satisfied because there is insufficient closeness between the Minister's decision and any harm that might arise out of the extension of the coal mine. At the time of writing, it remains to be seen whether the Full Court's decision will be appealed to the High Court of Australia. In any event, the case has, to date, been the subject of significant media coverage and is indicative of an emerging trend of holding governments to account for climate change-related decisions by way of formal legal action.

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13 *Urgenda Foundation v State of Netherlands* [2015] HAZA C/09/00456689 (http://climatecasechart.com/climate-change-litigation/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/).

14 *Pabai Pabai & Anor v Commonwealth of Australia* (https://www.fedcourt.gov.au/services/access-to-files-and-transcripts/online-files/pabai-v-australia).

15 *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560 (https://www.fedcourt.gov.au/services/access-to-files-and-transcripts/online-files/minister-for-the-environment-v-sharma).

16 *Minister for the Environment v Sharma* [2022] FCAFC 35 (https://www.fedcourt.gov.au/services/access-to-files-and-transcripts/online-files/minister-for-the-environment-v-sharma).

Climate change arbitrations brought against states under multilateral or bilateral investment treaties have been instigated by foreign investors in renewable energy industries and fossil fuel industries alike.[17] Like fossil fuel projects, renewables projects generally require very significant upfront capital investment. To attract that investment, governments have offered a variety of support mechanisms, primarily in the way of subsidies or attractive tariff arrangements. These support mechanisms are inherently political, however, and expose renewables projects over their lifetime to changes in the political wind and resulting changes in regulation. These changes are relatively common and may be prompted by the decreasing cost of new technologies over time (affecting the level of support that governments can reasonably offer) or as a result of financial circumstances (such as in the wake of the 2008 global financial crisis, with numerous European countries retroactively reducing the financial support afforded to investors in solar PV projects). Changing these support mechanisms can very easily undermine the economic value of the project. States that have done so have found themselves defending claims from investors, whether under bilateral or multilateral investment treaties (such as the Energy Charter Treaty) or pursuant to contractual stabilisation clauses in long-term contracts between the investor and the state or a state-owned entity (such as a concession agreement or PPA). Spain, having recently reformed its renewable energy incentives, has been subject to some 50 treaty claims of this nature as at September 2021. In response to these disputes, states have started including carve-outs in their investment treaties for environmental measures (eg, the EU–China Comprehensive Agreement of Investments).

Claims against companies and directors

The energy transition has also engendered a desire in stakeholders to hold energy companies to account for alleged failures to adequately disclose or adapt to risks to their businesses posed by climate change. This includes a growing wave of actions by shareholders and regulators alleging that companies are 'greenwashing' by making misleading statements designed to give the impression that the company's procedures, polices or products are environmentally friendly. For example, the Australasian Centre for Corporate Responsibility recently brought proceedings against a large Australian

17 For example, *Uniper v Netherlands* (ICSID Case No. ARB/21/22) (https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/21/22) and *Lone Pine Resources Inc v Government of Canada* (ICSID Case No. UNCT/15/2) (https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=UNCT/15/2).

energy company alleging that the company has violated Australia's consumer protection and corporations laws by making statements to the effect that it provides clean energy natural gas and has plans to achieve net zero emissions by 2040.

We are likely to see more climate change proceedings designed to hold companies liable based on an alleged duty of care. In May 2021, in proceedings brought by a group of NGOs, a Dutch district court ruled that a multinational oil and gas company owed an unwritten standard of care in relation to climate change under Dutch law and human rights law.[18] The landmark decision is demonstrative of a broader global trend where courts are looking to international norms and soft law instruments when deciding what is expected of companies in relation to climate change action.

The role of arbitration in climate change disputes

Many recent high-profile climate change disputes have been activist-led and therefore heard in local courts, where the decisions will carry precedential value and garner publicity. Increasingly, however, international arbitration is the preferred forum to resolve disputes in a world where states and commercial parties are subject to a plethora of international agreements, and where rapid domestic and international regulatory change is afoot with respect to climate change. This is reflected in the bilateral investment treaty claims against Spain referred to above.

One particularly attractive characteristic of international arbitration is that parties can establish an arbitral tribunal with the relevant technical expertise to determine the dispute in an efficient and effective manner. This is important because climate change disputes are often characterised by complex scientific, technical and financial concerns. Another consideration is the confidentiality afforded by arbitration, which can be particularly attractive to commercial parties where the dispute concerns trade secrets, technical know-how or research and development.

Tips to avoid or manage climate change disputes

In responding to mounting pressure to take leadership on climate change action, companies and their directors should have a sound understanding of the risks that climate change poses to their business and the legal requirements to manage and

18 *Milieudefensie et al v Royal Dutch Shell* [2021] (under appeal) (http://climatecasechart.com/climate-change-litigation/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/).

disclose such risks. This will mitigate the risks of failing to comply with applicable duties or of engaging in greenwashing by ensuring any statements made align with a company's existing data, value drivers, strategies, objectives and time frames.

Companies looking to invest in a foreign country should carefully consider what protections and recourse may be available to protect those investments. As well as pushing for contractual stabilisation clauses in contracts with states or state-owned entities, this means proper investment treaty planning – things like establishing a chain of ownership to an entity registered in a jurisdiction that is a signatory to a relevant treaty; considering which particular corporate nationality and treaty offers the best investment protection; checking specific wording of the relevant treaty to ensure that the protections will apply; and investigating whether it is necessary to establish more than a shell company. All of this should be done before the investment is made. Changing nationality or inserting a company in the chain of ownership part way through the investment risks arguments from the state that the dispute was foreseeable or on foot when the change was made and the claim is therefore an abuse of process.

As climate change actions in respect of government decision-making gain traction, it is increasingly important for governments and their agents to think carefully about project approvals and, more specifically, the processes by which they approve projects that may have detrimental effects on the environment or its inhabitants. In particular, governments ought to rigorously document the details and basis of their decision-making in case those decisions are ultimately challenged in court or arbitration.

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