

P5. Energy Transition – Potential Disputes, Possible Solutions

22 nd ASLI Conference 2025		
Panel Category	:	International Arbitration and Dispute Resolution
Panel Title	:	Energy Transition – Potential Disputes, Possible Solutions
Panel Abstract	:	<p>The world has seen a dramatic rise of disputes concerning climate change and the energy transition ('climate change-related disputes'). They include disputes over climate rights, disputes challenging fossil fuel permits, and disputes concerning the impacts of energy transition projects. At the same time, environmental, social, and governance (ESG) issues have become the core concerns in trade, commerce, and investment activities of businesses. Therefore, they have also become major sources of disputes which are reflected in climate change-related disputes.</p> <p>With this background, this panel discusses issues and challenges in achieving effective, just, and sustainable dispute resolution for climate change-related disputes. First, this panel discusses the concept of sustainability in investment law. It identifies a more recent development in investment treaty practice has been the inclusion of sustainability as a standalone obligation. It then examines the content of sustainability as a standalone obligation including more than a mere set of pre-existing, sustainability-related obligations (such as environmental, labor and human rights obligations).</p> <p>Secondly, this panel examines the potential role of mediation as a mechanism of dispute settlement for climate change-related disputes. It also discusses concerns regarding the use of mediation in this context.</p> <p>Thirdly, this panel discusses, from the practical perspective, the 'risks' of environmental and energy disputes. It suggests how such risks should be identified first and after identifying potential risks, how to formulate appropriate strategy to avoid, mitigate, manage, or resolve those risks for a particular type of business or investment activities. In doing so, it examines the cases which International Dispute Resolution and Risk Management Institute (IDRRMI) has handled or the author, as a designated mediator for investor-state disputes arising out of Closer Economic Partnership Arrangement between China and HKSAR, have experienced.</p> <p>Fourthly, this paper specifically examines potential disputes concerning the hydrogen trade. Regulatory framework for hydrogen is in the process of development, and hydrogen trade is likely to give rise to disputes relating tax, duties and subsidies in addition to issues relating to the production, storage, and distribution of hydrogen. This paper strives to offer suggestions to deal with those potential disputes and strategy to find possible solution. This paper also argues that reducing carbon and protection of environment is not only the commitment of States but also it is the responsibility of the community at large. If communities on its own can be self-reliant in securing or producing power, and energy for their use then it will ultimately help environment and governments to meet its own international obligations related to carbon emission.</p>

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Name of Convenor	:	Tomoko Ishikawa
Designation / Academic Post	:	Professor
Institution / Organisation	:	Nagoya University, Graduate School of International Development
Title of Paper		
Mediation for climate change-related disputes		
Abstract		
<p>Climate change-related disputes have distinctive features and dynamics. First, they involve a wide range of subject matter, sources of law, interests, and a diverse set of stakeholders. Secondly, they are marked by scientific uncertainty. Thirdly, they often involve long-term relationships among governments, project operators, funders, and local communities. Fourthly, like other environmental disputes, resolving climate change-related disputes requires appropriate expertise.</p> <p>These distinctive features underscore the potential role of mediation as a mechanism of dispute settlement. Mediation offers flexibility in addressing the subject matter and incorporating relevant stakeholders. By focusing on the parties' interests, mediation can produce creative and tailor-made solutions. As a non-adversarial process, it may prevent the escalation of disagreements and therefore help maintain relationships among parties. In mediation, parties have greater control over selecting mediators with relevant expertise to a greater extent than is typical in domestic courts.</p> <p>However, certain aspects of mediation raise concerns regarding its use in climate change-related disputes. Mediation does not produce legal precedents and therefore has little impact on the climate response. The confidentiality of mediation processes can raise accountability concerns. Mediation offers weaker protection for less powerful parties compared to the procedural rules of adjudication and arbitration, thereby posing a risk of power imbalances.</p> <p>This paper examines the benefits and concerns of the use of mediation in climate change-related disputes. It proposes principles and guidelines to promote mediation as a dispute settlement forum capable of achieving long-term solutions within short timeframes.</p>		
Brief Biography of Author		
<p>Tomoko Ishikawa is Professor at Nagoya University in Japan. She has served as an ICSID Conciliator, appointed by the Chairman of the Administrative Council (2017–2023), a member of the Legal Advisory Committee of the Energy Charter Treaty, an arbitrator at Shenzhen Court of International Arbitration, and a mediator at the Kyoto International Mediation Centre. Her professional experiences include serving as an Associate Judge at Tokyo District Court and holding the position of Deputy Director at the International Legal Affairs Bureau of the Ministry of Foreign Affairs of Japan, where she worked on bilateral/trilateral investment treaties, Free Trade Agreements, and WTO dispute settlement. Her recent publication includes Tomoko Ishikawa, <i>Corporate Environmental Responsibility in Investor-State Dispute Settlement: The Unexhausted Potential of Current Mechanisms</i> (Cambridge University Press, 2022) and Tomoko Ishikawa and Yarik Kryvoi (eds.), <i>Public and Private Governance of Cybersecurity: Challenges and Potential</i> (Cambridge University Press, 2023).</p>		

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Name of Panelist	:	Mark Feldman
Designation / Academic Post	:	Professor
Institution / Organisation	:	Peking University, School of Transnational Law
Title of Paper		
Sustainability as a Standalone Obligation		
Abstract		
<p>Preambular language on sustainable development and sustainability in investment treaties has become quite common. Also common in investment treaties are provisions addressing different aspects of sustainability, including provisions on the right to regulate, the environment, labor rights, anti-corruption, indigenous rights and human rights.</p> <p>But a more recent development in investment treaty practice has been the inclusion of sustainability as a standalone obligation in international investment agreements (“IIA”s). Some recent treaties incorporate sustainability as a standalone obligation by requiring (i) host states to encourage the advancement of sustainable development within their territory or (ii) investments, to qualify as a protected “investment,” to contribute to a host state’s sustainable development.</p> <p>While the content of sustainability-related obligations (such as environmental, labor and human rights obligations) is often well-established, the content of sustainability as a standalone obligation, particularly in an international investment law context, is not. As IIAs incorporate sustainability obligations with greater frequency, the consistent and predictable application of those obligations in investment treaty arbitration will require a far clearer understanding of their content.</p> <p>This paper examines the content of sustainability as a standalone IIA obligation. The standalone obligation of sustainability should operate as more than an umbrella concept, the content of which should include more than a mere set of pre-existing, sustainability-related obligations.</p> <p>When interpreting and applying a standalone sustainability obligation under an IIA, some core element of that obligation – an element not merely related to, but rather inextricable from, sustainability – should be identified and developed. To support the identification of such a core element, this paper argues that interpretation of standalone sustainability obligations in IIAs should be informed by the development of a standalone sustainability principle under international environmental law generally and by the ongoing development of an intergenerational equity principle in the particular environmental context of climate change. Under that analysis, standalone sustainability obligations under IIAs have, at their core, a temporal, forward-looking element that serves as a limitation on protected economic activity by considering current and future impacts on affected third parties and the environment.</p>		
Brief Biography of Author		
<p>Mark Feldman is Interim Dean and Professor of Law at Peking University School of Transnational Law. He previously served as a member of the T20 Saudi Arabia Task Force on Trade, Investment and Growth, as a member of the E15 Initiative Task Force on Investment Policy (World Economic Forum/ICTSD), and as Chief of NAFTA/CAFTA-DR Arbitration in the Office of the Legal Adviser at the U.S. Department of State. As Chief, he led the team that represents the United States in investment treaty arbitration and provided legal counsel supporting the negotiation of U.S. bilateral investment treaties and investment chapters of free trade agreements (including TPP and U.S.-China BIT negotiations). His government experience also includes service as a law clerk to Judge Eric L. Clay on the U.S. Court of Appeals for the Sixth Circuit and as a Peace Corps volunteer in Lesotho during South Africa’s transition to democracy. In the private sector, he practiced law for several years at Covington & Burling.</p>		

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Name of Panelist	:	Francis WH Law
Designation / Academic Post	:	Professor
Institution / Organisation	:	Chairman of the Hong Kong International Mediation Centre Chairman of the International Dispute Resolution & Risk Management Institute President of the Academy of International Dispute Resolution & Professional Negotiation.
Title of Paper		
Dispute resolution for climate disputes under the prospective of ESG		
Abstract		
<p>Environmental, Social and governance issues have become the core concerns in trade, commerce, and investment activities of businesses. Therefore, they have also become major sources of disputes which are reflected in climate disputes as well as energy related disputes. For development purposes trade, commerce, and investments are necessary so from the practical perspective this paper argues that environment and energy disputes, like any other disputes, should be considered as a “risk”. This paper suggests how such risks should be identified first and after identifying potential risks, how to formulate appropriate strategy to avoid, mitigate, manage or resolve those risks for a particular type of business or investment activates. In support of this argument, I will discuss cases which International Dispute Resolution and Risk Management Institute (IDRRMI) has handled or I, as a designated mediator for investor-state disputes arising out of Closer Economic Partnership Arrangement between China and HKSAR, have experienced. In this regard, my main aim is to demonstrate how a combination of dispute resolution techniques could be deployed to resolve climate or energy disputes. This presentation will also attempt to bridge the gap between theory and practice and vice-versa.</p>		
Brief Biography of Author		
<p>Dr. Francis Law is an experienced international business consultant and expert of dispute resolution. He has more than 29 years of experience in Public Administration Management, Human Resources, Conflict Management and corporate development. Dr. Law has the expertise in organizational development, competency building, leadership development, performance management and executive coaching.</p> <p>Dr. Law has conducted a wide variety of mediation cases, including employment, professional liability, probates, personal injury, international trade, workplace and cross-border disputes. He is currently serving on a number of Mediator Panels: HKMC, HKMAAL, China Council for the Promotion of International Trade Mediation Center/ China Chamber of International commerce (CCPIT/CCOIC) Mediation Center, Shenzhen and Dongguan, Hong Kong Institute of Arbitrators (HKIArb), and Shenzhen Civil & Commercial Mediation Center, Thailand Arbitration Centre (THAC), Vienna International Arbitration Centre (VIAC). He was invited to be an Annexed Mediator of the People’s Court of Qinghai, China. Since 2012, he has been appointed by the Secretary of Justice of Hong Kong as the member of the Steering Committee on Mediation, Accreditation Sub-committee, Regulatory Framework Sub-committee and Public Education and Publicity Sub-committee.</p>		

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Name of Panelist	:	Rajesh Sharma
Designation / Academic Post	:	Associate Professor
Institution / Organisation	:	RMIT University, Melbourne

Title of Paper

Hydrogen Trade: Regulatory Challenges, Potential Disputes and Possible Solutions

Abstract

Hydrogen has now become a source of energy which is going to be instrumental in reducing carbon emission significantly. Automobiles, ships and airplanes are now using or preparing to use hydrogen as their fuel. Now many countries are in a “Hydrogen Rush” to establish itself as a hub of hydrogen. Some countries like Australia have already started exporting hydrogen to Japan and in the future Australia wants to export hydrogen to many other countries which are in the process of reducing their carbon emission. However, export and import regime of hydrogen at the international level is at an early stage and regulatory framework is in the process of development. Trade of hydrogen, in future will also raise potential disputes relating tax, duties and subsidies in addition to issues relating to production, storage and distribution of hydrogen. This paper argues that if regulatory response does not speed up and catch up with the technological advancement in the field of hydrogen, then it will raise significant disputes at domestic and international level. The production process and methods of Hydrogen, colour labels (specially, “Green Hydrogen”) or certification of Hydrogen will also impact the definition of “like products” in international trade of hydrogen. This paper strives to offer suggestions to deal with those potential disputes and strategy to find possible solution. This paper also argues that reducing carbon and protection of environment is not only the commitment of States but also it is the responsibility of the community at large. If communities on its own can be self-reliant in securing or producing power, and energy for their use then it will ultimately help environment and governments to meet its own international obligations related to carbon emission.

Brief Biography of Author

Dr. Rajesh Sharma is an Associate Professor of Legal and Dispute Studies at RMIT University, Melbourne. He is the Director of IDRRMI-RMIT Dispute Resolution Centre, an Adjunct Professor at Academy of International Dispute Resolution and Professional Negotiation (AIDRN) and the Program Director Graduate Certificate in Dispute Resolution, at RMIT. Currently, Dr. Sharma is a Project Member on Japanese government funded project “Building Climate Change Governance through Multistakeholder Cooperation: The Case of Low-Carbon Hydrogen Projects”. Dr. Sharma has given training and taught courses on arbitration, mediation, negotiation, foreign investment arbitration, WTO Law, international trade, banking law, foreign investment in several countries. He is a core member (representing Australia) on the Committee for the Establishment of the Centre of Excellence for Dispute Resolution for Indian Ocean Rim Association (IORA). Dr. Sharma is a Member of the ISDS Academic Forum, an elected Associate Member of Academy of Comparative Law and a member (representing Australia) of the ICC Task Force on Disability Inclusion in the International Commercial Arbitration. Dr. Sharma is serving as a founding member of the Steering Committee for the ICC-Asia-Pacific Mediation Competition in Australia. Dr. Sharma is panel arbitrator and mediator in China, Hong Kong, India, Japan, and Korea. Dr. Sharma is the first Indian to hold PhD in Law from China. He holds PhD from the Chinese University of Political Science and Law, Beijing. He has published a book with Wolters Kluwer titled “Dispute Settlement Mechanism in the FTAs of Asia”. Dr. Sharma is the Winner of the ADR Teacher Award 2022 and 2024 in Australia.