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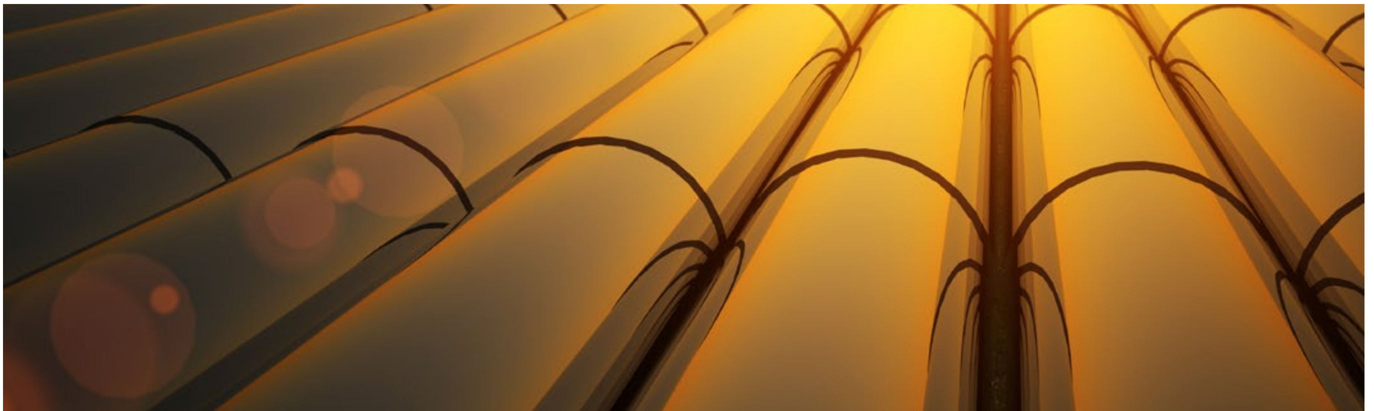

CLIMATE CHANGE LAW. CURRENT PERSPECTIVES.

Private Enforcement of Public Good: International Arbitration Agreements as a Mechanism For Climate Change Enforcement

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Private Enforcement of Public Good: International Arbitration Agreements as a Mechanism For Climate Change Enforcement

It appears, at first glance, to be a powerful tool in the fight against climate change. The Glasgow Financial Alliance for Net Zero (GFANZ) is a group of over 450 financial firms united by "science-based commitments to net zero", and responsible for more than US$130 trillion of assets. Launched by UN Special Envoy for Climate Action and Finance Mark Carney (ex-head of the Bank of England), GFANZ aspires to "demonstrate[e] firms' collective commitments to supporting companies and countries to achieve the goals of the Paris Agreement". The bottom line: projects which do not have climate-friendly credentials could be shut out from finance.

But GFANZ is less fearsome than it might look. It lacks clear and mandatory standards: there are "no blanket requirements for companies to stop financing coal", and "banks would be allowed to make their own judgments on the carbon content of their portfolios, on a case by case basis".

Even looser are the commitments made by individual firms operating in climate-sensitive areas, such as oil majors. These vary widely in both aspiration and detail, and are subject to changing corporate policy, shareholder tolerance, and the tides of global events.

What is more, both organised and unorganised climate pledges are not backed up by an effective enforcement mechanism. Even if an appetite for binding commitments were to emerge, it is presently unclear if, and if so how, they would be policed. Very recently, there have been some imaginative attempts at hard-edged enforcement (for example, a shareholder suit alleging breach of directors' duties for "failing to revise a strategy in line with the Paris agreement"), but existing legal frameworks are unlikely to stretch far enough to support systematic or enduring change.

There might be a solution. While transnational regulation by or between states continues to move at a slow pace (arguably far too slow), this enforcement gap could be addressed by the adoption of international commercial arbitration to police contract-based public interest standards. An example of such a model now has a proven track record of success over a number of years: the Accord on Fire and Building Safety in Bangladesh, commonly known as the Bangladesh Accord.

The Accord was born out of the 2013 collapse of a garment factory in Dhaka, Bangladesh, which caused 1,134 deaths, and was symptomatic of failures in regulation and regulatory enforcement in the Bangladesh garment sector. Very soon after the disaster, leading apparel brands, retailers and importers, on the one hand, and local unions and international trade union federations, on the other, entered into a written contract, with three key features:

- The contract provides for enforceable legal obligations on the industry side, in particular by way of a system of oversight, credible inspections, mandatory remediation, and transparent reporting.

- Those obligations are owed to the signatory unions as contractual counterparties. The 'public interest' side of the arrangement is thereby given substantive legal rights.

- Following a pre-arbitration dispute resolution process through a Steering Committee, those rights are enforceable through international commercial arbitration. The arbitration agreement provides for the default application of the 2010 UNCITRAL Rules, and there is now an express choice of Dutch law. Resulting arbitral awards are enforceable under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards as ordinary commercial awards.

The Bangladesh Accord therefore represents an innovative use of a familiar and well-established commercial legal tool in the service of public interest aims. Crucially in terms of a globalised industry, it also sits almost entirely apart from domestic law and regulation, and public international law.

Despite the speed with which it was negotiated and signed (a little less than three weeks after the factory collapse), the Accord is an effective instrument. The Steering Committee (consisting of members appointed by the industry and union sides, with a neutral chair from the International Labour Organisation) provides governance oversight; inspections are carried out by an independent Safety Inspector; and administrative support is provided by an Amsterdam-headquartered Secretariat. Funding is provided by the industry signatories. The arbitration mechanism is available not only for industry–Union disputes (its most obvious application), but also for disputes between signatory companies, between the Steering Committee, or following a complaint originating with the Safety Inspector.

After almost a decade of operation, the Bangladesh Accord is now a proven success. As at May 2021, 1,692 factories were covered, over 38,000 inspections had been carried out, and 93 percent of safety issues identified during initial inspections had been remediated.

The arbitration agreement has also been called upon twice, following service of notice of arbitration by the international trade union federations in two cases in 2016. Both proceedings (which were distinct but coordinated) were administered by the Permanent Court of Arbitration, and progressed as far as the determination of preliminary issues and document production before settlement. Parts of the proceedings were publicised under a transparency regime (although the identities of the respondent companies were kept confidential). The settlements, as publicly disclosed, involved the remediation of factories or the funding of such remediation.

There are also signs of endurance in both the Bangladesh Accord itself, and what can be termed the "Accord model". After the protracted negotiations following the expiry of its initial five-year term in 2018 (including opposition from the Bangladeshi government) and an interim extension, a new two-year extension was agreed with effect from 1 September 2021. The industry signatories number over 200, and the latest version of the Accord now has provision for extension to factories in other parts of the world.

Separately, at least two other initiatives have adopted the Accord model in pursuit of different aims. In 2019, three fashion brands, a factory operator, and a collection of unions and women's rights and labour organisations signed the Lesotho Agreements, which provide for various enforceable obligations designed to combat gender-based violence in Lesotho's garment industry. As with the Bangladesh Accord, those obligations are enforceable by arbitration, in this case seated in the United States. Similarly, and very recently, the well-known brand H&M and one of its Indian suppliers, together with union and labour organisations, entered into the Dindigul Agreement to Eliminate Gender-Based Violence and Harassment (although it is unclear whether it includes an arbitration agreement).

So, what of the potential application of the Accord model to climate-oriented goals? Although vastly larger in scale and complexity than worker safety in particular regions or sectors, combating climate change involves a similar collective action problem: the environment is a public good, damaged to the detriment of everyone by the externalities of carbon-producing activity, but with no

individual actor having sufficient incentives to avoid it. Market participants do not wish to disadvantage themselves compared to others in the same industry. In the absence of (or perhaps pending) timely and effective regulation, collective voluntary action is required to redress what would otherwise be a market failure.

The Accord model represents a mechanism for such collective action on a level playing field: consensus is translated into binding contractual obligation, backed up by mandatory enforcement, with the institutional and legal framework provided by the private sector (with a fairly passive and uncontroversial overlay of public international law, in the form of the New York Convention). Given institutional and political strains in the public international legal order, and the relative lack of success at last year's Glasgow COP26, such industry-wide but essentially private and voluntary collective action could play a vital role in achieving outcomes within the necessary timeframes to avoid catastrophic climate change.

That there may be a sufficient collective to achieve that is suggested by the relatively concentrated nature of global oil and gas production in particular. The top 100 companies account for 70 to 80 percent of global oil and gas activity, a considerably smaller group than the signatories to the Bangladesh Accord. And although well over half of production activity (and even more in proven reserves) rests with state-controlled national oil companies, a sizeable minority is in the hands of private-sector international oil companies, in turn dominated by just a few Western supermajors.

Some of these major IOCs (privately owned international oil companies, including Shell, BP, Total and Conoco Phillips), and certain NOCs (national oil companies, notably Saudi Aramco, PetroChina and Petrobras), have publicly stated that they are working towards net-zero status. Given these claims, it is not an implausible prospect that the right conditions will arise for a multi-party, industry-wide binding agreement in the Accord model, with enforcement through international arbitration — a legal mechanism with which oil and gas companies, and the energy sector as a whole, are very familiar. In particular, if a critical mass of industry participants emerge, others may follow at least in part simply because their competitors are also willing to sign up. There already exists a multiplicity of suitable public-sector counterparties, and the industry is clearly capable of providing the necessary funding for operational and administrative support.

A different impetus may also come from the perceived mitigation of the risk of direct governmental or international regulation, or increasing exposure to (non-contractual) civil claims in company or tort law or otherwise. A similar dynamic led to creation of two voluntary schemes — TOVALOP (the Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution) and CRISTAL (Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution) — in the aftermath of the 1967 Torrey Canyon grounding and oil spill. Those schemes emerged ahead of subsequent international conventions, as a means for the tanker and oil industry to tackle on an industry-wide basis a serious environmental problem.

Could an Accord model-type system work to reduce the climate impact of the oil and gas sector? The potential scale of an arrangement along those lines is clearly vast. But international arbitration is a system that comfortably deals with disputes worth multiple billions of dollars, and has the proven capacity to compel even states and state-level actors (the routine business of international investment tribunals). And while there would no doubt be a role for states to nudge or encourage (or in the case of NOCs, procure) participation, such a private-law agreement may be easier to achieve, and indeed more effective at least in the short term, than the sort of global consensus between states that is still lacking, or taking too long.

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