



SCOTIA GROUP



POLICY PROPOSAL 6.
GREENING DISPUTE RESOLUTION

A PROPOSAL TO MANAGE
CONFLICT IN GREEN PROJECTS



Policy Proposal 6: Greening Dispute Resolution

A PROPOSAL TO MANAGE CONFLICT IN GREEN PROJECTS

Defining the Issue

The world is preparing for Glasgow COP 26 and the “T minus 9” years needed to reduce emissions by half relative to 2019 levels before 2030 and stated goals of being climate neutral by 2050. An element in the discussion which has been largely ignored, is how to deal with climate disputes arising from this global effort. It is not sufficient for States to make commitments to meet reduction goals. These commitments require a mechanism whereby they are objectively monitored and where not met, can be enforced. How is enforcement of State commitments realistically to be achieved? As important, how are costly disputes which will inevitably arise from Green Projects needed to meet reduction goals be managed and preferably avoided?

One can also envision a host of inflection points where issues/conflicts will overlap with many different stakeholders in the process of implementing environmental commitments within States. These include:

- States acting to meet their Glasgow commitments by eliminating or curtailing polluting actors and old energy;
- Investor State renewable energy projects that go wrong;
- Public private projects to implement State commitments locally, that are late and over budget;
- Companies pressured by stakeholders to implement environmental sustainability policies;
- Enterprises implementing ESG commitments made to employees, shareholders and the public;
- Financial institutions grappling with green financing;
- NGOs seeking to enforce environmental commitments at a Government and Corporate level;
- Communities and individuals seeking environmental justice.

Disputes arising in any of these spheres will detract from the ultimate objective to meet reduction goals in the time frame left. It is trite to say that traditional mechanisms of dispute resolution, be they national courts or arbitration, are costly, time consuming, destructive to relationships and do not ultimately provide an adequate remedy for the environmental issues at hand. While such methods might



Policy Proposal 6: Greening Dispute Resolution

clarify legal rights between specific parties, this is not the practical course, as we know that to make real progress we require collaboration and compromise to find lasting solutions. Ultimately the issues at hand in the context of achieving environmental sustainability goals in the time left, require a rethink of current dispute management responses. We need a radical change in emphasis from dispute resolution to conflict avoidance. There are also many stakeholders involved in the process and each has a voice and a need to participate, which simply is not provided for by traditional dispute resolution processes. Just as we will have to be innovative in rethinking the way we approach our environment and lifestyles to meet the needed drastic reduction in emissions, traditional methods of dispute resolution will have to be recalibrated to meet the challenges of creating a Green environment.

In fact, the Economist in its June 2021 Edition has summarised the challenge succinctly:

“A sobering \$35trn or so of investment will be needed in the next decade.

The priority for governments should be to encourage this surge in private investment, in two ways: by easing planning rules, and by helping companies and investors deal with risks. Green bottlenecks are a sign that decarbonization is at last shifting from theory to reality. A powerful push is now needed to help make the revolution happen.”

Essential Elements

In reflecting on the essential elements for managing conflict in this Green environment, the following is a starting point:

1. The mechanism needs to be collaborative not adversarial;
2. Its primary purpose should be dispute avoidance, rather than dispute resolution;
3. It needs to provide scope for a wide participation by stakeholders;
4. It has to be accessible and not restrictive, particularly financially;
5. It has to provide the scope to explore a wide range of possible options;
6. It needs neutral facilitators not decision makers, to facilitate negotiations allowing parties to develop realistic options to deal with issues arising on projects and to meet broader commitments;
7. It needs to be seen as providing a platform for the exchange of a wide variety of views and to consider expert opinions;
8. Facilitators have to be seen as credible and unbiased;
9. Facilitators must come from a variety of backgrounds, experience, and expertise to be respected and trusted by the parties;
10. Facilitators must be trained in dispute avoidance and mediation skills.



Policy Proposal 6: Greening Dispute Resolution

Potential Advantage of Using Modified Conflict Avoidance Boards (CABs)

Neither State Court Systems, nor arbitration provide a process which encompasses these essential elements, despite what the ICC advocated in its 2019 Commission Report “Resolving Climate Change Related Disputes through Arbitration and ADR”

Conflict Avoidance Boards or CABs may provide the basic structure to meet these requirements and when modified to include the techniques offered by mediation, to create a novel basis for both avoiding and managing conflict arising in creating a Green environment.

CABs have their origins in the dispute board model (DBs). DBs can be classified as Dispute Resolution Boards (DRBs) and Dispute Adjudication Boards (DABs); the former issue non-binding decisions while the latter produce binding decisions. Boards can be *ad hoc* (convening to hear a specific dispute) or standing (running for the duration of a project). CABs originate from the standing dispute board mode, meaning that they are formed at the outset of a project and remain in place until final performance. The additional characteristic of CABs, from traditional DBs, is their emphasis on conflict avoidance, rather than dispute resolution.

The Chartered Institute of Arbitrators (CIArb) issued a set of novel Dispute Board Rules in 2014. These rules are different from others in the context of emphasizing the conflict avoidance element of the board, rather than dispute resolution (hence the emphasis on CABs). In particular, the Rules provide for the provision of informal advice in Article 12:

“The true mission of a Dispute Board is not judicial; rather it is to prevent formal Disputes. The Parties may at any time jointly refer a matter or Dispute to the DB for it to give an informal advisory opinion as a means of Dispute avoidance and/or informally discuss and attempt to resolve any disagreement that may have arisen between the Parties during the performance of the Contract. The DB may provide the requested advisory opinion during a conversation with the Parties, during any meeting or site visit in the presence of both Parties or in a written note to the Parties, or, with the prior agreement of the Parties, provide informal assistance to resolve a disagreement in any other form.”

In fact, the importance of this conflict avoidance role was found to be so integral to the role of the board that in May 2021, the JCT adopted the CIArb Dispute Board Rules, as those to be utilized with its new form of contract and in introducing it stated:



Policy Proposal 6: Greening Dispute Resolution

“The DAB fulfils its avoidance function by providing informal advice under Article 9 of the JCT DAB Rules. The parties can request an informal advisory opinion at any time. This could be done during a site visit or in a written note to the parties. The parties are not bound by it, and the DAB may on its own initiative raise an issue with the parties in order to promote dialogue.”

The Basics

CABs are generally established via contract. As described herein some funders (such as the World Bank and all major development banks) require dispute boards as standard in projects over a certain value. Similarly, some jurisdictions encourage their usage via legislation or require all contractors on a project to work with a board.

CABs can have any number of board members, depending on how they are structured. Typically there is a 3-member CAB, each party selects a wing member of the panel, with a third member (acting as chairman) either appointed directly by the parties or by the parties’ board choices. However, this model is sometimes turned on its head, with parties agreeing a chairman, who then appoints wing members. CABs can also have a single member if it is a smaller project and 5 or more members on large projects.

The establishment of CABs via contracts carries a key benefit in the potential for flexibility around the scale and makeup of the board. Tailoring size and expertise to the project carries benefits for the quality of engagement and ensures value for money. Being able to choose the background, expertise and nationality of board members is critical for CABs dealing with environmental sustainability issues as it will add to the successful use of this mechanism. Depending on the project, the balance of board members be they scientists, environmentalists, financial experts, lawyers or engineers, will give the right balance to deal with the complexity of these Green projects.

Existing ADR Institutions have lists of qualified dispute board members which can be consulted for the selection of appointments and are also willing to act as appointing bodies. Some contracts name an institution such as FIDIC, CIArb, the ICC, ICE, DRBF or the AAA as a default nominating authority in case of disagreements or when CABs are established in advance of the awarding of contracts. CAB panellists will typically also be members of various industry representative groups such as CIArb, ICE or RICS, carrying requirements around training, standards and professional ethics. These Institutions should be partnered with to ensure that traditional DB membership criteria is enhanced to meet the conflict avoidance emphasis of CABs and the specific requirements of Green projects.



Policy Proposal 6: Greening Dispute Resolution

CABs can be configured to suit a wide variety of projects. This flexibility makes them ideal for Green projects where the subject matter and legal delivery structure can vary greatly. They are particularly ideal for joint ventures and teaming arrangements, which are often used in these projects. They might also be implemented on a national basis on a sector basis (renewables, green technology development, transition from carbon etc.) to ensure that State commitments made in Glasgow are monitored and provide a mechanism where performance can be discussed and modified with a broad range of stakeholders, if such commitments are not being met.

CAB members are trained in dispute avoidance technics and issue spotting, so that matters can be raised with parties, helping them to plan for potential issues arising and to formulate work around plans to avoid conflict. Having regular meetings with the parties and participating in the project from the outset, allows the board to become an integral part of the project, win credibility and respect and be listened to. This is therefore a far more effective mechanism for allowing communication between parties to continue and realistic solutions to problems be dealt with collaboratively. In addition, training CAB members in the art of mediation and the skill associated with it, will make them even more effective in facilitating negotiations between parties and in the basics of formulating realistic options. It is clear that the process used by CABs and mediation are different, particularly meeting separately with parties which is employed within mediations. CABs avoid private meetings to ensure transparency, in the event that they have to perform an adjudicative function. This does not mean however that skills used by mediators, such as coaching, reality testing and reframing as well as assisting parties to reflect on potential options to work around issues, cannot be employed by CAB members.

When dealing with issues arising on a Green project, CABs will have to expand their remit, not only to hear from the parties themselves, but also from other stakeholders to ensure that all interests are heard and considered in the ultimate recommendations made. This goes beyond the current remit of most CABs but will be essential to ensuring that robust and lasting solutions with broad social buy in, can be found to avoid future disputes from arising. The lesson from mediation can be adopted here, that all interested stakeholders and not only the parties themselves can be brought into a mediation, so that all interests can be considered in formulating effective options considered by the parties to find resolutions. Given the range of experience and expertise in CAB members, this method of achieving sustainable outcomes will be appreciated by them and with consent of the parties, certainly form part of their recommendations or if needed adjudicated outcome.

Thinking outside of the box on how to restructure our thinking around the use of CABs and designing processes whereby the widest use of them in the context of Green projects can be employed, is the challenge ADR Institutions and practitioners must now grasp. Reviewing historical forms that DBs have taken on various projects and how they have evolved over time is instructive.



Policy Proposal 6: Greening Dispute Resolution

Current Funder Initiatives

The financial services industry is promoting various voluntary initiatives to promote sustainable funding. For instance, 92 financial institutions in 32 countries have signed up to the **Equator Principles (EP)** pursuant to which they commit to only funding projects that appropriately manage social and environmental risks and with respect to which a **grievance mechanism** is designed to receive and facilitate resolution of concerns and grievances about the project's environmental and social performance. CABs could form part of such a grievance mechanism.

Another initiative is that of the **Principles for Responsible Investment ("PRI")** which now has 2,250 signatories, including asset owners, investment managers and service providers. An element of the PRI is that signatories must report their climate change risks, which includes the risk from disputes.

Insurers are also getting involved in managing climate risks. **ClimateWise** is a voluntary network of 28 leading insurers, reinsurers, brokers and industry service providers facilitated by the University of Cambridge Institute for Sustainability Leadership. The group is driven by its members who come together to address key sustainability challenges. In particular, members of **ClimateWise** seek to promote six core principles that include reducing environmental impact and supporting climate awareness. Each member submits an annual report summarising actions taken within their business to promote these principles across their business activities, the results are then collated and published. Encouraging the use of CABs in green projects that are insured by members would be an additional matrix to support climate awareness.

Proposition

That the Scotia Group recommend to COP 26 the use of CABs as a conflict avoidance mechanism in all Green Projects.

Just as the World Bank has for many years now found that the use of DBs in projects it has funded, has brought about projects delivered on time and at cost with fewer disputes, so too CABs should be made a critical element in sustainable environmental funding. As Funders, be they Government agencies, private equity or traditional banks look at funding the Green economy and as insurers provide policies for these projects, CABs should become an integral part of those contractual arrangements. In turn, Companies and Industry sectors seeking to meet ESG commitments, will have to include CABs in their projects. In addition, their stakeholders will demand it. To ensure that current and future environmental commitments can be met Policy Makers will have to make the inclusion of CABs a



Policy Proposal 6: Greening Dispute Resolution

criteria for ensuring responsible lending practices. Given the time frame of 2030 to 2050, this may even have to be done by regulation.

CABs can become an integral part of Environmental Sustainability and the Green Economy through a combination of legislation and funders lending criteria. This will ensure that they are employed in every meaningful Green project to assist in avoiding destructive disputes.

The Scotia Group recommending the use of CAB's in Green Projects, backed by Private Funders and Government will allow for a mechanism emphasizing conflict avoidance to be entrenched in Green Projects, giving them a better opportunity to be completed on time and at cost. Factors critical to meeting COP 26 environmental goals and pledges.

Submitted By:

Wolf von Kumberg
CEO & Registrar
IDR London

President
Global Resolution
Washington & London

Annette Magnusson
Former SG of the Stockholm Chamber of Commerce
Co-Founder of Climate Change Counsel