

氣候變遷相關爭議仲裁會議 參與經驗分享



LCS & PARTNERS

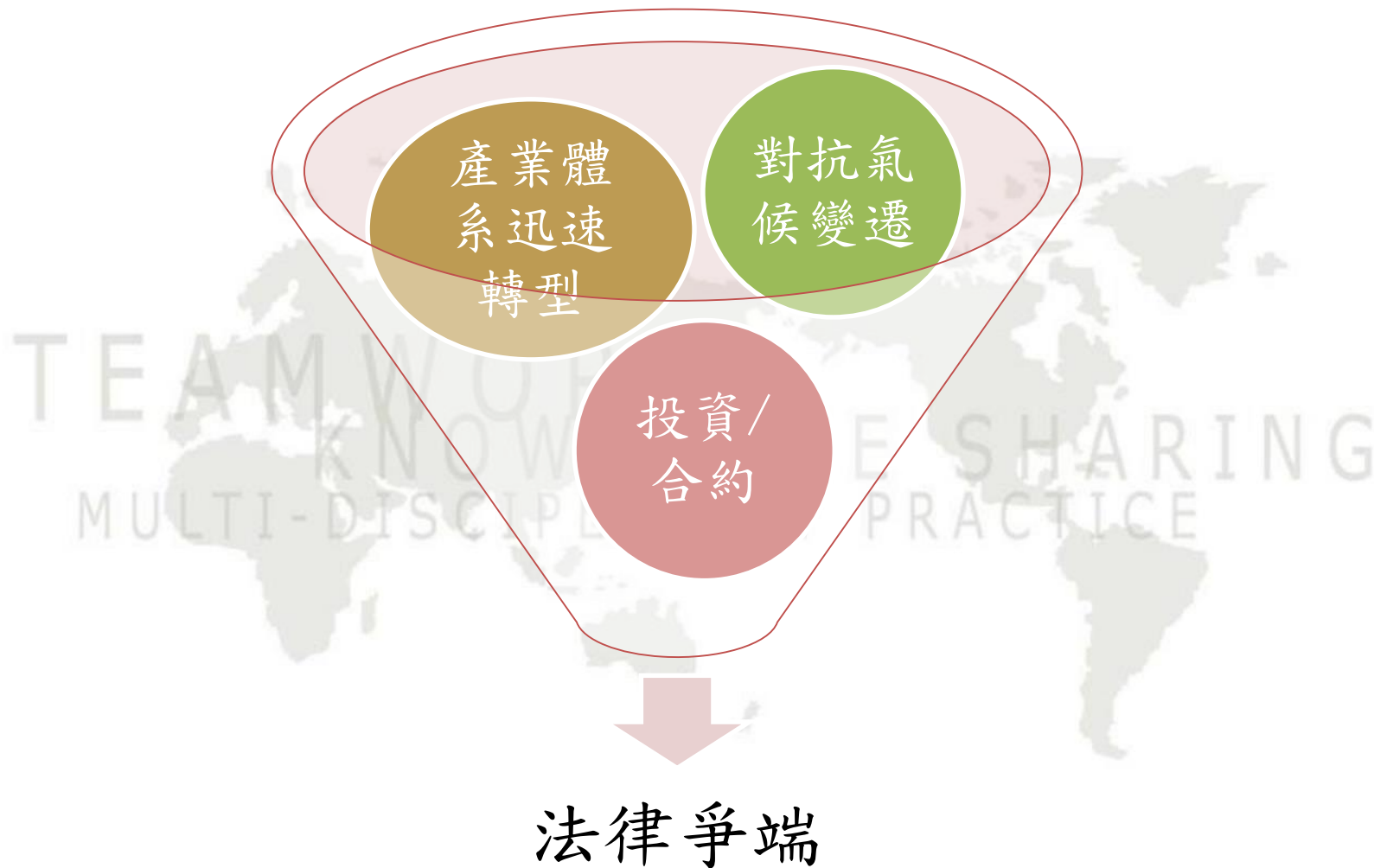
協合國際法律事務所

吳必然資深顧問

2020年10月6日

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緣起



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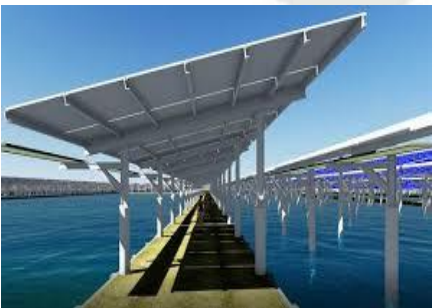
COMMISSION ON
ARBITRATION
AND ADR | LEADING DISPUTE
RESOLUTION
WORLDWIDE

ICC COMMISSION REPORT
Resolving Climate Change
Related Disputes through
Arbitration and ADR

ICC
INTERNATIONAL
CHAMBER
OF COMMERCE

- ICC仲裁及ADR委員會設立
「與氣候變遷相關爭端之仲裁」
工作小組
- 2018/03/26：第1次成立會議
- 2018/10/06：委員會會議討論
第1次草案報告
- 2019/02：分送修正後草案報告，
小組成員表示意見
- 2019/04/02：ICC仲裁及ADR委
員會通過報告
- 2019/11/28：公布報告

與氣候變遷相關爭端之類型



1. 執行氣候變遷之減緩或調適而新簽訂之契約：

- 聯合國氣候變化綱要公約
- 巴黎協定
- 再生能源供應、風場開發契約
- 以適當且有效的爭端解決機制強化風險管控

與氣候變遷相關爭端之類型

2. 與對抗氣候變遷目的無關、惟履約過程中受減緩/調適/轉型措施影響之既有商務契約
- 為符合巴黎協定承諾
 - 國家進行法規或政策變更
 - 企業/產業依據永續性CSR所為的自願性承諾
 - 氣候變遷之環境影響
 - 原契約條款未處理相關風險分配問題

3. 就與環境及氣候變遷相關之既有爭端提出仲裁協議

- 捷克、義大利及西班牙等國均因再生能源躉購費率及補助機制變動引發國際投資爭端
- *JSW Solar and Wirtgen v. Czech Republic*
- *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*
- *Mesa Power v. Canada*

訴訟未必是適當的爭端解決方式

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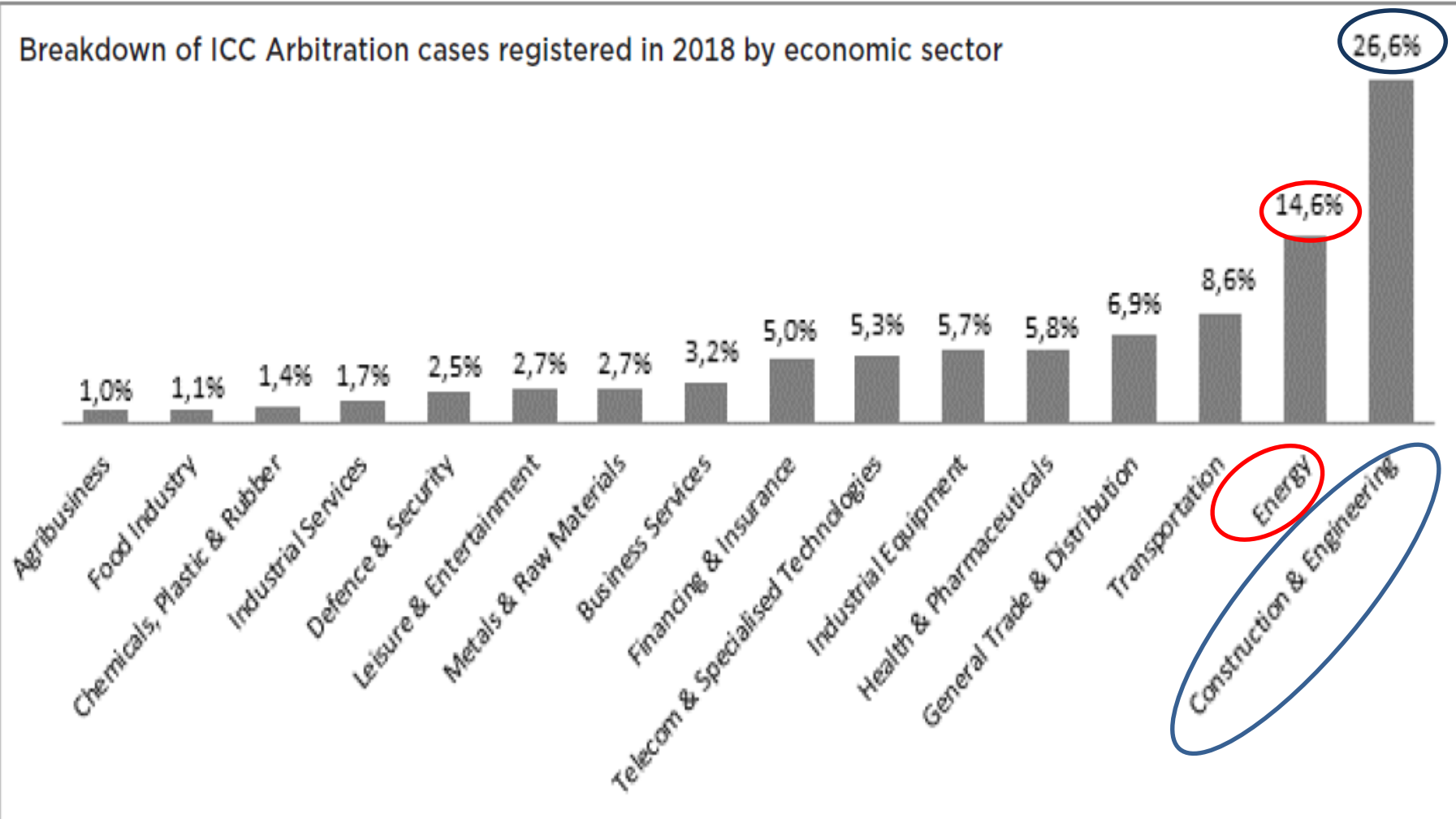
- 風力發電風場/太陽能模組佈建
 - 耕地面積/漁獲減少
 - 受影響者眾
 - 單一仲裁協議
 - 避免多重管轄/裁判矛盾
- 商務爭端 & ISDS



以仲裁解決與氣候變遷相關爭端之趨勢

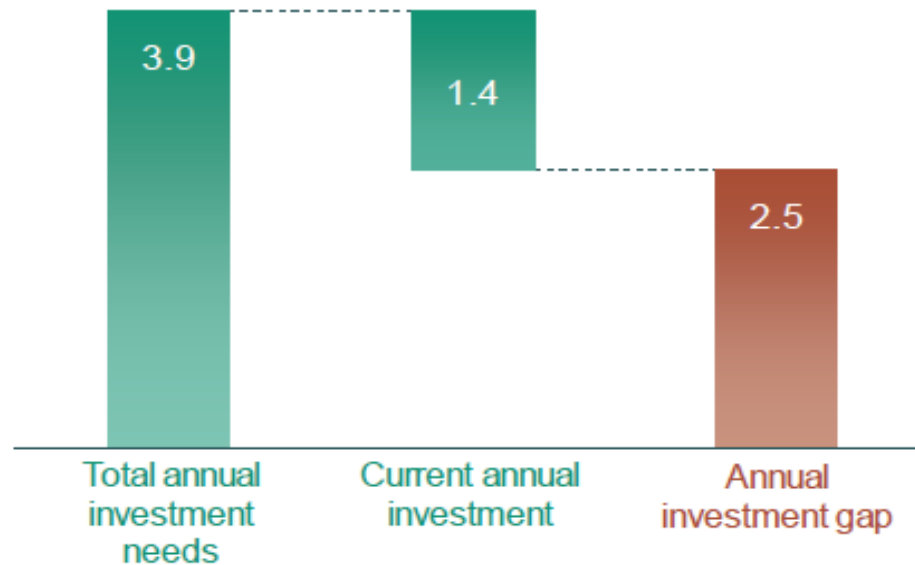


Breakdown of ICC Arbitration cases registered in 2018 by economic sector



SDG investment gap

Estimated annual investment needs in key SDG sectors in developing countries, 2015–2030
(Trillions of US dollars, annual average)



Source: ©UNCTAD, WIR 2014.

與氣候變遷相關爭端之仲裁程序特色

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(1) 利用及仰賴適當的科技或其他專業之專家

- 具適當專業知識之仲裁人
- 當事人指定之專家
- 仲裁庭指定之專家
- ICC Expert Rules

(2) 利用既有措施及程序加速爭端解決

- 緊急仲裁
- 暫時性/保全措施
- ADR
 - 調解
 - 專家裁定 (expert determination)
 - 爭議處理委員會 (Dispute Boards)

(2) 利用既有措施及程序加速爭端解決 – ADR/先調後仲

In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the ICC Mediation Rules. If the dispute has not been settled pursuant to the said Rules within [45] days following the filing of a Request for Mediation or within such other period as the parties may agree in writing, such dispute shall thereafter be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration

(3) 適用氣候變遷承諾及法規

– Netherlands Model BIT, Art. 6.6

“Within the scope and application of this Agreement, the Contracting Parties reaffirm their obligations under the multilateral agreements in the field of environmental protection, labor standards and the protection of human rights to which they are party, such as **the Paris Agreement.**”

(3) 適用氣候變遷承諾及法規

— 契約準據法條款

This contract shall be governed by the laws of [...]. In addition, the parties recognise the importance of achieving the ultimate objective of the United Nations Framework Convention on Climate Change (“UNFCCC”), the Paris Agreement and related agreements in order to address the urgent threat of climate change, and agree that this contract shall be construed in a manner that is consistent with that objective.

與氣候變遷相關爭端之仲裁程序特色

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(4) 強化程序之透明化程度

- 公共利益
- 透明 vs. 保密

(5) 第三方參與

- 追加當事人
- 仲裁程序合併
- 法庭之友

(6) 成本

- 仲裁費預付

台灣相關政策及產業

- 前瞻基礎建設計畫



綠能



數位



水環境



軌道



城鄉建設

- 自主減碳承諾

- 溫室氣體減量及管理法第4條

溫室氣體長期減量目標：2050年溫室氣體排放量降為2002年排放量50%以下。



- 產業契約範本

- FIDIC工程契約範本

- 再生能源合約範本

- PPA

- Finance Term Sheet

- Supply Agreement

- Installation Agreement

- Operation & Maintenance Agreement



- 損賠計算

- 在再生能源案件中，不論是施工、產品責任或併購等爭議，**躉購費率 (FiT)** 在損賠額計算上扮演重要角色。





謝謝聆聽，敬請不吝指教。