Selendy | Gay

CLEAN ENERGY

NEWSLETTER EDITION NO. I JULY 2024

CONTENTS

EDITOR'S NOTE

by Rajat Rana

Welcome to Selendy Gay's first edition of our Clean Energy Newsletter. As we continue to make strides towards a sustainable future, the clean energy sector faces both promising developments and significant hurdles. Recent months have seen a surge in disputes within the industry, highlighting the complex international landscape we navigate. From supply chain controversies to regulatory compliance issues, these challenges underscore the growing pains of a rapidly evolving sector. In this newsletter, we highlight the latest disputes shaking up the industry and spotlight new developments, showcasing the innovation, resilience, and adaptability of the clean energy industry.

We hope you enjoy reading this newsletter and welcome your thoughts on future topics. We look forward to hearing from you.

CONTRIBUTORS

RAJAT RANA *Partner*

SEAN GOLDMAN-HUNT *Associate*

FLORIAN LOIBL *Associate*

MANUEL VALDERRAMA *Associate*

I.

Arbitration Developments in Africa and Chile in Disputes over Lithium Projects

ABYSSINIAN METALS THREATENS ETHIOPIA WITH TREATY CLAIM OVER LITHIUM PROJECT

Australian mining company Abyssinian Metals and its Dutch and Ethiopian affiliates have reportedly issued a notice of dispute against Ethiopia, threatening an investment treaty claim over the alleged cancellation of their lithium mining permit. The dispute centers on the Kenticha lithium and tantalum project in southern Ethiopia. Abyssinian secured the rights to that project through a joint venture with state-owned Oromia Mining Share Company in 2021.

According to reports, in October 2023, Oromia Mining terminated the joint venture agreement with Abyssinian, claiming Abyssinian failed to fulfill its investment commitments. This led Abyssinian and its affected affiliates to submit a notice of dispute under the Ethiopia-Netherlands bilateral investment treaty ("BIT").

Abyssinian asserts that the actions of its joint venture partner and the Oromia regional government are unlawful and have forced it to issue a force majeure notice to Ethiopia's Federal Ministry of Mines and Petroleum due to lack of access to the Kenticha project site.

SIMCO THREATENS CHILE WITH TREATY CLAIM OVER LITHIUM CONCESSIONS

In November 2022, a Chilean-Taiwanese mining venture, Simco SpA, threatened to bring a US$2.5 billion treaty claim against Chile over a dispute related to lithium concessions in the Maricunga salt flat.

The potential claim comes in response to the Chilean Mining Ministry's announcement that it is processing an application by a subsidiary of state-owned company Codelco to become the sole lithium operator in the area. Simco, co-owned by Chile's Errázuriz group and Taiwan's Simbalik group, claims it was authorized to exploit the salt flat's lithium deposits in 2013 and obtained the required environmental approval in 2020.

The company has argued that modifying Codelco's contract to grant it exclusive rights would constitute an expropriation without compensation, effectively erasing Simco's investments made in reliance on the Chilean state's authorization and approval.

CHILE GRANTS ALBEMARLE OPTION TO INCREASE LITHIUM QUOTA AS PART OF ARBITRATION SETTLEMENT

Chile's economic development agency, CORFO, has reached an agreement with U.S.-based Albemarle Corporation to resolve a pending arbitration dispute, granting the company an option to increase its lithium production quota by 240,000 metric tons of lithium metal equivalent.

The settlement, reached in April 2024, addresses CORFO's 2021 complaint filed with the International Chamber of Commerce (ICC) alleging that Albemarle had underpaid certain commissions to the state.

As part of the agreement, Albemarle now has the opportunity to raise its production quota by nearly 50% from its current level of about 460,000 metric tons of LME. To access the higher quota, the company must demonstrate its ability to use sustainable technologies such as direct lithium extraction, consult with local indigenous communities, and obtain the necessary environmental permits. The settlement also establishes new terms for setting a "preferential price" for producers of lithium products in Chile, aiming to facilitate long-term lithium carbonate supply agreements with Albemarle. The agreement, which is valid through 2043, also seeks to promote production with higher sustainability standards in the Salar de Atacama, the lithium-rich salt flat where Albemarle operates.

ICC TRIBUNAL DECLINES TO HEAR CHINESE MINING COMPANY'S CLAIM OVER DRC LITHIUM PROJECT

In a recent decision, an ICC sole arbitrator, Simon Ndiaye from HMN Partners in Paris, refused to hear a claim brought by Jin Cheng Mining, a subsidiary of Chinese mining giant Zijin Mining, against an affiliate of the Australian company AVZ Minerals. The dispute revolves around Jin Cheng's alleged acquisition of a stake in a significant lithium project located in the Democratic Republic of the Congo (DRC).

Ndiaye's decision, issued on March 11, 2024, stated that for the ICC tribunal to have jurisdiction over the matter, the corporate registry of the joint venture company, Dathcom Mining, would need to be updated to reflect Jin Cheng as a shareholder. The arbitrator agreed with AVZ's argument that since Jin Cheng was not listed as a registered shareholder of Dathcom, it was not a party to the arbitration clause within the joint venture agreement. Ndiaye refrained from addressing AVZ's other claims, such as allegations of corruption against Jin Cheng.

At the heart of the dispute is AVZ's claim to a 75% stake in Dathcom Mining, which holds an exploration license for the Manono lithium and tin project in southern DRC, considered one of the world's most significant lithium deposits. In 2022, Zijin asserted that Jin Cheng had purchased a 15% interest in Dathcom from Cominière, a state-owned entity in the DRC, and that AVZ's stake in the project was only 60%. However, AVZ contends that any alleged transfer of the 15% interest to Jin Cheng would violate the pre-emptive rights outlined in the Dathcom shareholders' agreement.

The ICC case is just one of several ongoing arbitrations concerning the Manono project. AVZ has initiated separate ICC proceedings against Cominière and Dathomir Mining Resources, a DRC-based company, as well as an ICSID claim against the DRC under the country's Mining Code.

II.

Chile Opens Salt Flats to Private Investors

The Chilean government has announced the opening of 26 lithium-bearing salt flats to private investors, as part of its strategy to increase the country's production of the battery metal by 70% within the next decade. However, the Atacama and Maricunga salt flats, which hold the highest concentrations

of lithium in Chile, have been reserved for state majority control. The move aligns with President Gabriel Boric's national lithium policy, which aims to boost state control over the industry while attracting private capital.

The tender process for the 26 salt flats is set to conclude in July 2024, with the government expecting to see three or four new projects under development by 2026. In addition to the salt flats open for private investment, five others are already being developed by state-run companies seeking partners. The government has also expressed interest in participating in lithium projects outside Atacama and Maricunga, albeit without a majority stake.

Chile, the world's second-largest lithium producer after Australia, currently has only two companies extracting the metal – Chile's SQM and U.S.-based Albemarle, both operating in the Atacama salt flat. The state-owned copper giant Codelco has been tasked with negotiating joint ventures with these companies, having already reached a preliminary deal with SQM until 2060. Codelco also recently completed the acquisition of Australia's Lithium Power International, which holds a project in the Maricunga salt flat.

As part of its environmental protection efforts, the government plans to designate 30% of the salt flats as protected areas, although the specific locations have yet to be determined. The opening of these lithium-rich salt flats to private investment is expected to help meet the growing global demand for the metal, which is crucial for the production of electric vehicle batteries. Chile's own projections suggest that lithium demand will quadruple by 2030, reaching 1.8 million tonnes, while available supply is expected to reach 1.5 million tonnes.

ABSTRACT ARTICLES I & II

Global Point: The forthcoming U.S. Supreme Court ruling in *Relentless v. Department of Commerce* is looming over environmental litigation in the U.S. Indeed, the Court is poised to overturn the Chevron doctrine, a cornerstone of administrative law whereby courts grant agencies considerable deference when reviewing their regulatory choices. While the doctrine has long since fallen out of favor with the high court, it still plays a significant role in the lower courts. If the Supreme Court does ultimately overturn *Chevron*, agency actions will be subject to sharper scrutiny, strengthening the hand of any plaintiff challenging that action as going beyond the agency's remit. The ruling is slated to come down this summer.

III.

EPA Regulations

In the past several months, the Biden administration has promulgated two highly consequential regulations for the development of renewable energy in the U.S. The first, finalized on March 20, 2024, and entitled "Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles" (Tailpipe Rule), aims to cut fleet-wide vehicle tailpipe emissions by 50% of 2026 levels by 2055. The second, finalized on April 25, 2024, and entitled "NSPS [New Source Performance Standards] for Greenhouse Gas (GHG) Emissions from New, Modified, and Reconstructed Fossil

Fuel-Fired Electric Generating Units (EGUs)" (Power Plant Rule) will require coal-, oil-, and gas-fired power plants to reduce their GHG emissions by 90% by 2032, promising to all but eliminate the burning of coal for power in the U.S. Both rules are expected to generate substantial litigation; in fact, the tailpipe regulation has already been challenged.

A. TAILPIPE RULE

The transportation sector is now the largest source of carbon emissions in the U.S., prompting considerable attention from federal regulators and advocacy from environmental groups since Biden took office. The Tailpipe Rule — the Administration's, and arguably the country's most significant response to the issue to date — is the culmination of a multiyear rulemaking. The Administration had proposed an even stricter standard in 2023 but relaxed its requirements in response to an extensive notice and comment process and in anticipation of legal challenges. The final regulation seeks to raise electrical vehicle's share of new car sales from last year's 7.6% to 56% by 2032, with an additional 16% being hybrids. Rather than imposing a ban on gasoline-fueled cars and trucks or mandating the sale of electric vehicles, the Rule requires manufacturers to progressively decrease average emissions across their entire fleet, with limits that can only be met with a massive transition towards electric cars. Non-compliant companies could face substantial penalties.

The EPA, the agency that promulgated the Rule, is authorized by section 202(a) of the Clean Air Act to cap the total pollution produced by cars in the U.S. each year. In the watershed 2007 *Massachusetts v. EPA* decision, the Supreme Court held this statutory section extends to GHGs. Since that ruling, the agency has invoked 202(a) several times in publishing tailpipe regulations.

On April 18, 2024, in a widely expected move, a group of 25 Republican states led by Kentucky and West Virginia filed a Petition for Review in the D.C. Circuit, asking the court to vacate the rule.

The filing is preliminary, meaning it does not lay out in detail petitioners' arguments, but it does state that "Petitioners will show that the final rule exceeds the agency's statutory authority and otherwise is arbitrary, capricious, an abuse of discretion, and not in accordance with law." In addition to the latter claims, which arise under the Administrative Procedure Act (APA), the petitioners will likely contend that the EPA's interpretation is incorrect and not entitled to deference—an argument that, as previewed above, might soon receive a powerful boost from the Supreme Court—and that the Rule violates the major questions doctrine.

The APA challenge will likely turn on the EPA's supposed over-emphasis on the economic and environmental benefits of the regulation as well as its failure to properly account for the cost of compliance.

As for the "Chevron" argument, petitioners will likely argue that correctly interpreted does not allow for such "sweeping" regulation as this and that the EPA accordingly stretched the proper understanding of the law. This argument will be reinforced by reference to the major questions doctrine, which petitioners will claim bars the agency from enacting such an economically and politically consequential rule without an explicit directive from Congress.

Indeed, these are the same arguments certain states, including West Virginia, made in 2022, which eventually found a sympathetic ear in the Supreme Court's blockbuster decision in *West Virginia v. EPA*, 597 U.S. 697 (2022), discussed in more detail below. The claims there concerned a different section of the Clean Air Act (111(d)) and another source of GHG emissions (power plants), but the states' playbook will likely be the same.

Two weeks after the challengers filed their petition, a group of 22 Democratic states led by California

submitted preliminary arguments in defense of the Rule, seeking to enter the litigation as intervenors with a special stake in the outcome. The supporting states argued that the EPA was well within its Clean Air Act authority, as clarified in *Massachusetts v. EPA*, to promulgate the regulation, and detailed the substantial interest that each of them has in the outcome of the dispute.

B. POWERPLANT RULE

Following one major regulation with another, two weeks after finalizing the Tailpipe Rule, the EPA published its finalized rule capping GHG emissions from powerplants. The Powerplant Rule, part of a suite of stringent new regulations targeting fossil-fuel run power stations, requires, among other things, a 90% reduction in GHG emissions by 2032. The careful design of the regulation is a direct response to *West Virginia v. EPA*, where the Supreme Court held that the agency cannot regulate "beyond the fence-line" by explicitly forcing power generators to transition to renewable generation methods. However, the Court did preserve EPA's power to regulate powerplant GHGs in other ways, such as the imposition of strict emission reduction targets that generators can meet in a variety of ways, including, hypothetically, carbon capture and storage. Experts have observed, though, that with the current state of technology, the only way to satisfy the new standards will be to transition to renewable fuels.

The attorney general of West Virginia has already promised to challenge the Rule in court. While nothing has been filed at this point, the arguments will surely be similar to those discussed above, with the likely coalition of state petitioners set to claim that the Rule violates the major questions doctrine, the APA, and exceeds EPA's authority under the Clean Air Act.

IV.

Windfarm Litigations

One of the major flashpoints in recent renewable energy litigation has been the proposed, and sometimes actualized, development of offshore windfarms, particularly in the Northeast. President Biden has committed his administration to permitting 16 of these projects by the end of 2024. In recent years, lawsuits, and the considerable delays they bring, have been a major factor in determining the ultimate success or failure of offshore windfarms. For example, Cape Wind, the first offshore farm planned in the U.S., was ultimately cancelled for violating the terms of its state power contract due to litigation delays, despite the project's proponents having beaten back many of the challenges to the project. Several other of these litigations have ended up in federal court, some of which have been dismissed, while others continue to wind their way through the appeals process. Two recent cases highlight these divergent possible outcomes.

A. SAVE LONG BEACH ISLAND V. U.S. DEPARTMENT OF COMMERCE

This past march, the first utility-scale offshore windfarm in the U.S. was completed on the Outer Continental Shelf off the coast of Rhode Island. The 130 MW installation's twelve turbines provide power to Long Island and the Rockaways in New York state.

The month before, the project, along with several other proposed Northeast windfarms in earlier stages

of development, recorded another major victory when the U.S. District Court for the District of New Jersey dismissed a lawsuit seeking to block the construction and operation of the farms. *Save Long Beach Island v. U.S. Dep't of Com.*, No. CV231886RKJBD, 2024 WL 863428 (D.N.J. Feb. 29, 2024). Plaintiffs, a local resident, Stern, and a nonprofit corporation called "Save Long Beach Island," challenged the National Marine Fisheries Services' (NMFS) incidental take/harassment authorizations for the projects, a key regulatory approval indicating an anticipated "negligible" impact on only a "small number" of federally protected marine mammals, claiming that NMFS' decision violated the Marine Mammal Protection Act (MMPA), the Administrative Procedure Act (APA), and the National Environmental Policy Act (NEPA). Plaintiffs claimed that the authorizations violated: 1) the MMPA because the projects would cause more than "negligible" harm to protected North Atlantic Right Whale and Humpback Whale species, primarily through the propagation of undersea noise pollution, 2) the APA because NMFS arbitrarily and capriciously determined the number and severity of anticipated takes, and 3) NEPA because NMFS impermissibly failed to review the cumulative impacts of its authorizations.

NMFS moved for dismissal of the action on several grounds, including that plaintiffs lacked standing to bring the claims. To show standing, plaintiffs must demonstrate, among other things, an imminent and concrete injury they have sustained, or will sustain, as a result of the challenged conduct. In its seminal decision in *Lujan*, the Supreme Court toughened the standing requirement across the board, but particularly in environmental cases. *Lujan* demands that plaintiffs show more than a nebulous, non-particularized interest in, say, a protected species. While the court in that case acknowledged that a desire to observe a species is a cognizable interest, a plaintiff must be able to point to a demonstrated commitment to so observe – a "someday wish" is not enough. Thus, the Court deemed insufficient plaintiffs' argument they had been harmed by the endangerment of a protected species in a place where they had previously travelled to see that species but had no substantiated plans to return.

In this case, both Stern and Save LBI claimed to have a special interest in the protection of the whales – Stern because he lived nearby and studied marine mammal life, and Save LBI because its organization mission was the protection of Northeast marine species. The court disagreed, holding that neither plaintiff showed any individual, personal injury. It found that Stern's interest was merely "academic" or "philosophical", and that Save LBI similarly failed to show a concrete injury, paying particular attention to the absence of financial harm to the organization or any of its members. The court further held that Save LBI failed to show it had "associational" standing, another way an advocacy organization can come before a court. Stern was the only member of the organization mentioned in the complaint, and because he did not have standing, neither did Save LBI.

Having been decided on these grounds, the ruling makes clear that a better situated plaintiff could have better luck challenging the projects. The sprawling Vineyard Winds litigation is a case in point.

B. VINEYARD WIND LITIGATIONS

If completed, the massive 62-turbine Vineyard Wind 1 windfarm, currently under construction 15 miles off the coast of Massachusetts, will generate over 800 MW of renewable energy and power over 400,000 homes. The federal permitting process, which had been delayed under President Trump over purported safety and fishing industry concerns, was completed on May 11, 2021, by the Biden Administration. Beginning shortly thereafter, three separate lawsuits were filed challenging the permitting of the project. The suits were filed by a small-scale onshore solar developer, Nantucket residents, and commercial fishing interests, respectively. Challengers variously argued that the permits violated a

series of federal laws, including the Endangered Species Act (ESA), the MMPA, and NEPA. The core of their arguments was that the responsible federal agencies (including NMFS) had failed to adequately consider the supposedly harmful environmental and climate impacts the project could generate, as well as the effect the windfarm may have on the protected North Atlantic Right Whale.

All of the challenges ended up before the U.S. District Court for the District of Massachusetts, which uniformly dismissed them, though on different grounds. In the case brought by fishermen, the court held that plaintiffs lacked standing to sue under the above-mentioned three statutes. The Court reasoned that while the fishermen had shown they stood to suffer an economic harm due to the project—impaired fishing capabilities—they failed to show an environmental harm, a prerequisite for bringing such claims. *Seafreeze Shoreside, Inc. v. United States Dep't of the Interior*, No. 1:22-CV-11091-IT, 2023 WL 6691015 (D. Mass. Oct. 12, 2023). The court reached the merits of the other two cases, granting standing to the solar developer to sue under the MMPA, and the Nantucket residents to sue under the ESA, because both plaintiffs had viewed the protected whale in the past and planned to do so again. *Melone v. Coit*, No. 1:21-CV-11171-IT, 2023 WL 5002764 (D. Mass. Aug. 4, 2023), aff'd, 100 F.4th 21 (1st Cir. 2024). Both challengers argued that the federal agencies acted arbitrarily and capriciously in issuing the permits by failing to take proper account of potential harm to the whales. Ultimately, the court rejected their claims, noting that regulators had not only considered these impacts but had required the use of protective measures and, contrary to plaintiffs' arguments, had relied on the best available science. *Id.*

Both merits plaintiffs appealed the district court's summary judgment against them to the First Circuit. In late April this year, a panel of that appellate court affirmed the lower court's rulings. *Melone v. Coit*, 100 F.4th 21 (1st Cir. 2024)

In the ESA case, the court began by reasoning that NMFS was entitled to deference in preferring certain scientific studies over others. The court thus found that NMFS' biological opinion (BiOp), an assessment required by the ESA, did, indeed, rely on the best available science and adequately considered alleged threats to protected species. Moreover, the court held that NMFS did not act arbitrarily or capriciously in deciding that prescribed mitigation measures were adequate to address potential effects to the whales. Because NMFS abided by the Act, the court finally found that the Bureau of Ocean Energy Management (BOEM), which, per the statute, published an environmental impact assessment that relied on the BiOp, did not act arbitrarily or capriciously either.

In the MMPA appeal, which was published a day after the ESA opinion, the court, referring to its day-earlier decision, affirmed that NMFS acted properly in issuing final permits under the law. The court held that the agency did not act arbitrarily or capriciously when it concluded that the project's expected non-lethal "harassment" of 5.4% of North Atlantic Right Whales constituted a "small number" of affected individual species members. Agreeing with the lower court, the panel found that NMFS was entitled to deference in applying its scientific expertise to determine that the type of harassment the project would likely produce would have a "negligible impact" on the whales. Finally, the court rejected plaintiffs' argument that NMFS improperly scoped the activities and geographical range implicated by the permits, holding that the agency had defined these consistent with the MMPA.

Plaintiffs have already made clear that they plan to appeal the decisions to the Supreme Court, which, as discussed above, is set to dramatically roll back the level of deference afforded to federal agencies. It remains to be seen whether the sort of complex scientific judgments at issue here will lose that protection, or, for that matter, whether the high court will even grant certiorari in this case. Regardless, the First Circuit decisions mark a substantial victory for Northeast windfarms and the Biden administration's renewable energy push.

V.

UK Biomass Strategy

In late 2023, the non-profit organization The Lifescape Project requested judicial review of the UK government's Biomass Strategy, which was published earlier that year. In the energy context, "biomass" refers to the use of organic materials like wood, bioethanol (generally derived from corn), and agricultural residue to generate power. The Strategy outlines the government's plan to use biomass energy alongside carbon capture and storage (BECCS) to help achieve the country's net zero goals.

The Lifescape Project has challenged the government's characterization of biomass energy as a low carbon or renewable energy source, pointing to experts who have questioned the role it can or should play in addressing climate change and the Strategy's failure to account for the lifecycle emissions that can be expected from the technology, including the manufacture and burning of the biomass. The Lifescape Project has taken issue with the fact the threat that biomass energy poses to forest ecosystems.

The formal grounds for the challenge are threefold. First, The Lifescape Project has argued (a) that the Secretary of State, the official that promulgated the Strategy, did so irrationally by failing to comprehensively assess the role biomass can realistically play in helping the UK achieve its carbon reduction goals; (b) that the Strategy violates the UK Climate Change Act's requirement that the government enact policies that reduce carbon emissions; and (c) that the consultation process leading up to the publication of the Strategy was defective for failing to disclose key scientific analyses and providing too limited an opportunity for comment.

VI.

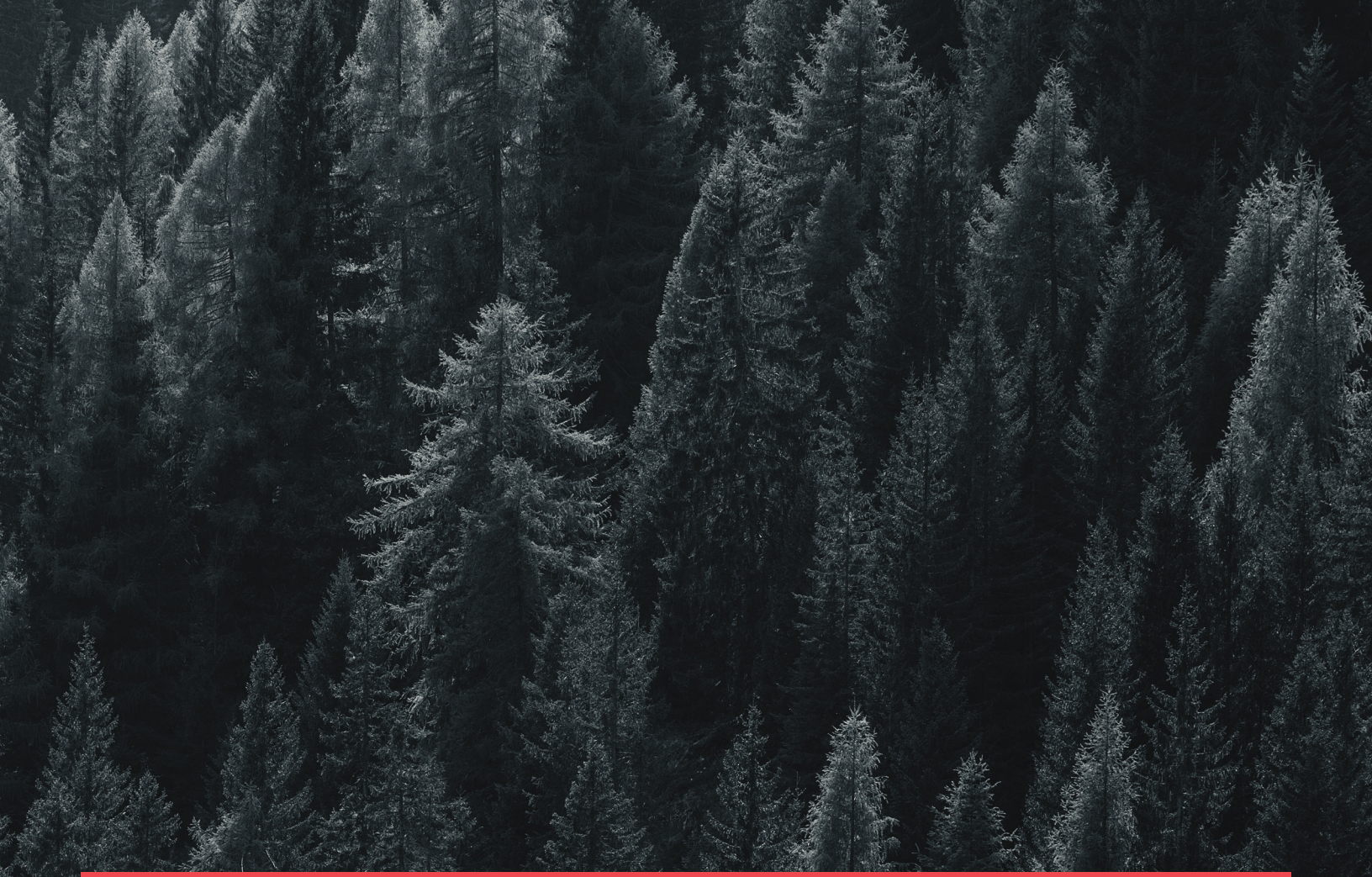
Sigma Lithium Arbitration

Few, if any minerals are as crucial to the renewable energy transition as lithium. The element is used in batteries small and large to store energy, a key capacity for intermittent sources of renewable energy like wind and solar, as well as for deployment in electric vehicles. Vancouver-based Sigma Lithium is a major player in the industry, operating one of the largest lithium mines on the planet. In April, the company announced that it planned to increase its annual output from the current 270,000 metric tons to 520,000.

In October 2021, Sigma announced it had signed a binding term sheet with battery maker LG Energy Solution Ltd. for a take or pay offtake agreement. Sigma committed to supply LG with 60,000 tons of lithium concentrate per year in 2023, scaling up to 100,000 for the years 2024 through 2027, with optional additional supply of up to 15,000 tons per year through 2023 and up to 50,000 through 2027. While Sigma stated in October 2021 that both companies intended to further negotiate to complete a definitive agreement, it acknowledged that the parties intended the term sheet to be legally binding.

In March of this year, LG initiated an arbitration against Sigma before the American Arbitration Association's International Centre for Dispute Resolution for Sigma's alleged breach of the term sheet. Sigma announced it plans to fight the initiation, but neither side has made public the specific nature of the dispute, with Sigma citing confidentiality obligations.

The rapidly expanding lithium market has seen several similar offtake term sheets. Indeed, in November 2018, Sigma announced an agreement with Mitsui & Co., Ltd., and Vulcan Energy entered into one with LG in July 2021.



Selendy|Gay

IF YOU NEED ADVICE OR HAVE A QUESTION, PLEASE CONTACT US.

KEY CONTACTS

FAITH GAY *Partner* fgay@selendygay.com (212) 390-9001

PHILIPPE SELENDY *Partner* pselendy@selendygay.com (212) 390-9002

JENNIFER SELENDY *Partner* jselendy@selendygay.com (212) 390-9003

RAJAT RANA *Partner* rrana@selendygay.com (212) 390-9015

SELENDY GAY is a premier diputes firm founded in 2018 by a group of leading litigators from the nation's best law firms. Our firm brings together nearly 80 talented attorneys – including 17 partners – in a single New York office dedicated to the most complex and challenging courtroom disputes and arbitrations, around the world and across an array of practice areas and industries. Our clients include corporations, individuals, financial institutions, nonprofit organizations, and other stakeholders in a wide range of proceedings.