INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed JournalMulti Disciplinary
Peer Reviewed Edition :

www.ijlra.com

 ISSN: 2582-6433

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ISSN: 2582-6433

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ISSN: 2582-6433

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INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANLAYSIS ISSN

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www.ijlra.com
Volume 2 Issue 7 | Jan 2024
ISSN: 2582-6433

ANALYSING SYNERGIES OF INTERNATIONAL ARBITRATION IN ALTERNATIVE ENERGY AND CLIMATE CHANGE - INSIGHT INTO ADVANCEMENT OF THE LEGAL FRAMEWORK"

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ABSTRACT

Alternative energy and climate change have been two socio-legal sectors that have gained attention on a global scale in recent times. The dilemma of climate change and the need for the transition to alternative energy sources is urgent. The operations of the businesses in these sectors lead to the commencement of complex and intricate disputes as those functioning in this industry havea multifaceted array of technological, legal, regulatory, and financial risks. This research paper endeavors to recognize the present legal position of climate change in India and map a future of arbitration as a much more suitable redressal forum for disputes arising in the climate change sector. Numerous investor-state, contractual, and technological disputes arising in the said sectors have made arbitration a potential redressal forum. Furthermore, this paper underscores that climate change will have a strong footing in the coming future and the legal strategy that will flourish is arbitration. The reasons for the significance of arbitration lie in its characteristics such as confidentiality, expertise, and absoluteness which have been comparatively analyzed with otherredressal modes in this paper. Therefore, this paper also emphasizes the edge arbitration has over the conventional redressal modes in the arena of climate change dispute resolution. Froma legal perspective, The Indian Council of Arbitration (ICA)[2] can serve as a suitable stand-in for climate change disputes because of its close relationship with the effort undertaken by the International Chamber of Commerce (ICC)[3]. To achieve this purpose, a doctrinal approach is employed. Mitigating climate change can be achieved through the successful adoption of alternative energy sources. To fully harness its potential, arbitration must be backed by stronglegal frameworks that have the capability to dispose of disputes of high

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[2] Indian Council of Arbitration, https://www.icaindia.co.in/.
[3] ICC | International Chamber of Commerce, ICC - INTERNATIONAL CHAMBER OF COMMERCE, https://iccwbo.org/.

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complexity. By examining the interplay between legal structures and societal considerations, this study offers valuable insights into the evolving landscape of international arbitration, paving the way for a more nuanced understanding of its role in shaping sustainable and equitable solutions for the challenges posed by alternative energy and climate change.

Keywords: Arbitration, Alternative, Climate, Disputes, International, Framework

I. INTRODUCTION

The confluence of climate change, alternative energy, and international arbitration creates an intriguing environment that necessitates close attention to legal details as well as a deep comprehension of socio-legal dynamics. As the global community grapples with the imperative to transition towards sustainable energy sources amidst escalating environmental challenges, the role of international legal frameworks becomes paramount. Most number of cases related to climate changedisputes have fallen beneath the radar but in recent years, several high-stake claims have beenfought very publicly before the highest courts and regularly in the courts of public opinion. This paper provides clarity as to how arbitration can be the most recommended form of legal aid in the sector of climate change and renewable energy. The judiciary and the legal fraternity will play a key role in molding the interpretation of legalities revolving around climate change with the ever-increasing economic activities affecting various socio factors.

The energy sector generates a significant number of disputes, and it continues to dominate the caseload of such institutions. Energy projects are typically lengthy, intricate, and money-intensive. When it comes to dispute resolution, arbitration has emerged as the standard practice, particularly on an international scale. Political shifts, environmental legislation,and geological phenomena impact these industries at large. Recent developments in the industry with respect to the establishment of international courts, regulation of its functioning, summits, and conferences such as the COP 27[4], Dublin Conference[5], etc. have substantiated the legal attention paid to this sector.

India being one of the major developing economies and growing economies has become a vital player in climate change politics. Nevertheless, it appears that India's legal system is not keeping

[4] COP 27 | UNFCCC, https://unfccc.int/event/cop-27.
[5] ECCA 2023 - European Conference on Climate Change Adaptation, CARO, https://www.caro.ie/training-events/events/ecca-2023-european-conference-on-climate-change-ad.

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up with the rapidly shifting environment lacking a competent system to combat disputes arising in this sector. With the increasing population of this nation, the legal system must formulate efficient laws to tackle the issue of climate change disputes. To understand the gaps in dealing with these disputes, this paper draws comparisons with the legal systems of other nations. This analysis is both necessary and timely since it tackles the complex and ever-changing socio-legal environment of today while aiming to create a resilient and peaceful world in the future.

II. HISTORY

In 1972, Prime Minister Indira Gandhi's speech at the first-ever United Nations Conference on Human Environment in Stockholm marked a crucial date in the history of climate change disputes. Her speech, which examined ecological challenges in development and environmental issues from the perspective of development, is remembered as a turning point in history. When climate change became a major global concern in the 1990s, it was presented as a diplomatic challenge for India, supported by a story about climate ethics that highlighted India's negligible contribution to the build-up of greenhouse gases (GHGs). Regarding climate change in India, the most significant piece of legislation is the Environmental Protection Act of 1986. The primary goal of the Act is to empower the federal and state governments to safeguard and enhance the quality of the environment. Secondly, mitigating and preventing pollution to the environment. The establishment of international agreements like the United Nations Framework Convention on Climate Change (UNFCCC)[6] in 1992 marked the first significant turning point. The foundation for collaborative efforts to address climate change globally was laid by this historic agreement. At the same time, the renewable energy industry began to take off, propelled by developments in technology and a growing realization of the limited availability of conventional energy sources.

Each State in India is required by the "Directive Principles of State Policy" to "seek to preserve and enhance the environment and to protect the forests and wildlife of the nation." Furthermore, "to protect and improve the natural environment including forests, lakes, rivers, and wildlife and to have compassion for living creatures" is a fundamental duty owed by every citizen. India's (activist) judiciary has been at the forefront of environmental policy development since the late 1980s and early 1990s. This trend has not abated. Judicial interpretation has extended the fundamental right to life guaranteed by Article 21 of the Constitution to encompass the right to a

[6] UNFCCC, https://unfccc.int/.

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clean, healthy, and pollution-free environment. A recurrent theme in India's development philosophy is sustainable development, which is further reinforced by the National Environment Policy, which was adopted in 2006 and has remained unchanged since then. Sustainable development is broadly understood to mean improving human well-being. The historical trajectory brings us to the present juncture, where the intersection of international arbitration, alternative energy, and climate change stands as a critical arena demanding nuanced analysis.

III. WHY ARBITRATION?

The elastic nature of arbitration makes it an exemplary platform for achieving prompt resolutions in climate change and alternative energy conflicts. These disputes not only have far-reaching impacts on the conflicting parties but also on the lives of the public at large.[13] Certain areas of law such as national, international, administrative, contractual, constitutional, human rights, etc. are affected during conflicts. Specific arbitration institutions such as the International Centre for Settlement of Investment Conflicts (ICSID)[7] have been set up to address the enormous multitude of issues, thus mandating a Climate and Alternative energy arbitration court set only to resolve these disputes.Among the otherascendancies, the parties who want tokeep sensitiveinformation, proprietary technology, or trade secrets out of the public eye, arbitration processes are often private and confidential, making it the most ideal form of dispute resolution for them along with the certitude that it is more cost-effective and is brisker than compared to traditional litigation. At present, 169 nations have ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards due to which, there is a significant likelihood that arbitral judgments will be upheld, and assuring that decisions are enforceable on a worldwide scale might be vital for parties involved.[8] In the realm of international arbitration for addressing matters concerning climate change and alternative energy sources, a significant avenue exists for securing interim measures both prior to the constitution of the arbitral tribunal and throughout the arbitration process, underscoring the procedural dynamism inherent in this context, certain irreparable issues are causing permanent harm which require immediate attention. Nevertheless, these conflicts typically require initial adjudication that cannot be postponed, injunctive relief can be obtained immediately in Arbitration which makes it a viable option. While arbitrators are not morally

[7] International Centre for Settlement of Investment Disputes, https://icsid.worldbank.org/
[8] International Arbitration: What it is and How it Works - PON - Program on Negotiation at Harvard Law School, https://www.pon.harvard.edu/daily/international-negotiation-daily/international-arbitration-what-it-is- and-how-it-works/ (last visited Aug 30, 2023).

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bound to deliver "pro-environment" verdicts, their responsibility lies in fostering informed discussions that lay the groundwork for more rational reactions; within this framework, Alternative Dispute Resolution (ADR) facilitates a gradual yet impactful momentum toward addressing climate change.[16]

IV. POTENTIAL OF ARBITRATION IN THE CURRENT LEGAL SCENARIO

A task force on "Arbitration of Climate Change Related Disputes" has been established by the ICC Commission on Arbitration and ADR with the assistance of the ICC Commission on Environment and Energy. For the Task Force and this Report, a valid and enforceable arbitration agreement must exist between the parties before a dispute involving climate change can be resolved.

The Task Force was provided with the following duties:

1. To determine whether and, if so, how conflicts connected to climate change are currently resolved using ICC Arbitration and other dispute resolution systems.
2. To determine whether any qualities are necessary for a conflict resolution system to successfully resolve issues linked to climate change.
3. Review the ICC Mediation Rules, Expert Rules, and Dispute Board Rules in the context of disputes relating to climate change to determine whether it would be appropriate for ICC to provide any additional guidance and offer model language for dispute resolution clauses and procedures.
4. To compile a report that summarizes the Task Force's conclusions, keeping in mind that this output may include a description of the issues raised and recommendations for potential remedies for consideration by parties, potential parties, lawyers, and tribunals.

Business representatives, attorneys, arbitrators, arbitral institutions, in-house counsel, NGO representatives, business and industry groups, and academics are among the Task Force participants.

A broad range of business sectors, including manufacturing, heavy industry, agriculture, public sector operations, and service industries, are covered by the ICC cases. In recent years, the greatest number of cases were related to construction and energy. Specifically, engineering and

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construction comprised 23 percent of the 186 newly filed cases in 2017. With 155 new cases in 2017, the energy sector closely followed the aforementioned trend, accounting for 19% of all new cases. About 6% of cases were in the areas of telecommunications and specialized technologies, finance and insurance, general trade and distribution, industrial equipment, and health, pharmaceuticals, and cosmetics[9]. The Task Force projects that dispute related to climate change will rise exponentially based on the current and anticipated growth of investments in climate change related by States and the private sector in an attempt to meet the goals of the Paris Agreement.

V. TYPES OF DISPUTES

The scope of climate change and sustainability disputes that have been brought to court so faris enormous. This study seeks to divide debates over climate change and alternative energy sources based on nature.

1. NATURE:

a) **Joint venture/contractual issues -** A large number of stakeholders are involved in an investment that is considerable and long-term. These complex agreements may lead to disputes among stakeholders. This is mainly due to the fact that many investments and projects will include a range of novel components, including brand-new infrastructure, systems, and partnerships with non-traditional partners like energy and technology companies.

b) **Claims arising from weather conditions -** The weather, which can be unpredictable and challenging to predict and is growing more so as the consequences of climate change become more obvious, is a major factor in the majority of alternative energy endeavors. As a result, arguments over who is to blame for unfavorable weather may occur between the parties. This gives rise to delays, contract violations, and force- majeure claims.

c) **Technology-related disputes -** The likelihood of failure for parties is increased by the possibility that new technology has not been fully tested. When new technology doesn't live up to expectations, disagreements may develop. Parties are subject to allegations of negligence, fraud, or breach of contract. In the case of Mt Hojgaard A/S v. E.On Climate

[9] icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes https://iccwbo.org/wp-content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.

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and Alternates UK Robin Rigg East Ltd and Others10, the court determined that the contractor was required under the fitness for purpose obligation to ensure that the foundations will survive for 20 years. The ruling confirms that generally speaking, courts are prepared to fully enforce a demand that a product correspond to the contractual obligations. As with any new technology, there can also be disagreements over who is the rightful owner of the intellectual property and licensing rights.

d) **Investor-state disputes -** Due to circumstances like the COVID-19 pandemic, governments have been obliged to look for economic recovery solutions that involve reducing financial incentives or subsidies. This deficit has been bridged by private investment, particularly foreign direct investment (FDI). The significant number of claims, or around 40, lodged against Spain under the Energy Charter Treaty (ECT)11 as a result of modifications to Spain's alternative energy policies provide one excellent case. One frequently cited instance in the area of the environment is the Indus Waters Kishenganga arbitration (Pakistan v. India, PCA 2011-01),12 which was initiated under the Indus Waters Treaty. Undoubtedly, arbitration might play a similar role in disputes between states over the environment.

e) **Legal action as a means of seeking financial redress –** Claims brought against companies primarily to receive compensation for direct or indirect consequences of climate change on the claimant's property. For instance, take a look at the several high-profile lawsuits US cities and localities have brought against oil and gas majors in federal and state US courts.

VI. INTERNATIONAL LEGISLATIONS AND STATUTES

1. The UNFCCC (United Nations Framework Convention on Climate Change)[13]- The UNFCCC was established in March 1994, with an almost global membership today. The key feature of Article 14 addresses the mode and methodology of dispute resolution.

a) The first subclause under Settlement of Disputes states that the respective parties will seek to resolve their dispute through negotiations or any other peaceful manner of their choice first.

[10] The Supreme Court, *MT Højgaard A/S (Respondent) v E.On Climate & Renewables UK Robin Rigg East Limited and Another (Appellants) - The Supreme Court*, https://www.supremecourt.uk/cases/uksc-2015-0115.html.
[11] Energy Charter Treaty - Energy Charter, https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/
[12] *Indus Waters Kishenganga arbitration (Pakistan v. India, PCA 2011-01*
[13] UNFCCC, *supra* note 6.

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b) The parties are obliged to submit the dispute either to ICJ or Arbitration in consonance with the approach stated under the Conference of Parties (COP).
c) At the request of either of the parties, a conciliation commission ought to be created, granting a recommendary reward which must be accepted by the parties in good faith.
d) The stipulations outlined in this Article shall apply to any associated legal instrument that the Conference of the Parties may decide upon unless the said instrument specifies otherwise.
e) Only two states have recognized arbitration as a DRM under Article 1414 of the UNFCC.
f) Articles 13 and 1415 of the UNFCC discuss the various methods of dispute resolution mechanisms.

2. Kyoto Protocol[16] -

The Kyoto Protocol was established on 11th December 1997 in Japan atCOP 3 and is ratified by 192 parties. In comparison to the UNFCC, the Kyoto Protocol imposesspecific obligations on its member states. The key features of this protocol include:

a) *Article 18* of the Kyoto Protocol mirrors *Article 13*[17] of UNFCC. The difference under this treaty was that it was successful in the establishment of a non-compliance mechanism.
b) The treaty also adopts *Article 14*[18] of UNFCC with regard to traditional dispute resolution provisions.

3. The Paris Agreement[19] -

The Paris Agreement came into force in November at the UN Climate Change Conference in December 2015 and was ratified by 195 countries. The key features of the Paris Agreement include:

a) *Article 24* of this agreement replicates *Article 14* of the UNFCC. It elaborates on the dispute settlement modes.
b) Only one state has recognized arbitration as a DRM under *Article 24* of the Paris

[14] *Id.*
[15] *Id.*
[16] Text of the Kyoto Protocol | UNFCCC, https://unfccc.int/process-and-meetings/the-kyoto-protocol/history-of-the-kyoto-protocol/text-of-the-kyoto-protocol.
[17] UNFCCC, *supra* note 6.
[18] *Id.*
[19] The Paris Agreement | UNFCCC, https://unfccc.int/process-and-meetings/the-paris-agreement.

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Agreement, namely the Netherlands.

The Paris Agreement does not provide clear or evident guidelines as to what disputes can be addressed through arbitration. Thus, this leads to vagueness and non-clarity.

4. Energy Charter[20]-

The ECT came into force in April 1998 and has been signed by morethan 50 parties. This treaty stimulates cooperation in the energy field while safeguarding energyinvestments. The Energy Charter entails provisions for the settlement of disputes between contracting parties and investors via binding International Arbitration. Nonetheless, it is observed that various countries like France, Germany, Poland, and innumerable members of EUstates have withdrawn from ECT.

VII. LIMITATIONS AND RESPECTIVE RECOMMENDATIONS

This mechanism displays several shortcomings that call for careful thought when dealing with complicated and multidimensional subjects. The complex nature of climate change and alternative energy, which encompasses scientific, environmental, and socioeconomic components, provides difficulties that could test the established arbitration system:

1. ***Unconsolidated parallel proceedings*** - Conflicting decisions being made in various forums are more likely when processes are ongoing simultaneously. Apart from this, when disputes are split up across several tribunals or courts, the effectiveness of arbitration may be hampered. Due to the frequency of transactions involving several parties and different contracts, as well as the potential for claims under State contracts and investment treaties to overlap, parallel or multiple processes are more common in the energy sector. A party is not required to agree to arbitration in every case involving a similar contract. To avoid multiple lawsuits in several forums, a feasible recommendation would be to include the same dispute resolution clauses in all such contracts. This is required to streamline future disputes and conserve time and resources by averting several arbitration hearings.

[20] Energy Charter Treaty - Energy Charter, https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/.

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2. ***Lack of sufficient expertise*** - Arbitrators are frequently chosen based on their legal understanding, prior international arbitration experience, and general business or financial knowledge. In certain situations, arbitrators could lack the in-depth knowledge necessary to completely appreciate and decide on those matters. Conflicts involving biotechnology, alternative energy, climate change, and other specialized industries can entail complex technical intricacies. Arbitrators without the appropriate knowledge may misinterpret these specifics, which might result in poor or inaccurate awards. Not every arbitral institution is equipped with a pool of arbitrators that are experts in the energy sector, and even otherwise, there is a dearth of expertise in this field. An appropriate solution to this is to provide sufficient training must be provided to the arbitrators before they hear the matter on the specific case that appear before them. Resource materials and tests on the subtopic for the selection of the arbitrator for that case ensures expertise. This establishes a specialized binding mode of redressal.

3. ***Pro-investor*** - Investor-state disputes frequently involve the selection of arbitrators from a pool of experts in both international arbitration and investment law. Although it is believed that these arbitrators will act partially, there may be an impression that they benefit investors. This perception results from elements such as the backgrounds of the arbitrators, the types of cases they have handled in the past, and the possibility of repeat appointments by parties or law firms representing investors. Some have emphasized a potential resource imbalance regarding disputes between multinational corporations and governments. According to Global Justice Now's figures, the imbalance can be highlighted.[21]

4. ***Reasoning behind arbitral awards is unknown to the public*** - First off, the lack of publicly available precedent and legal counsel is a result of arbitration confidentiality. Due to this, it could be challenging for parties and attorneys to predict outcomes in cases that are identical. Second, disagreements involving the environment or alternative energy sources that are of public concern may have far-reaching effects. Lack of openness may make it more difficult for the public to understand and address these issues. Thirdly, the secrecy surrounding arbitration can create a perception of unfairness or prejudice when it comes to conflicts between investors and states or other powerful entities, which can cause the public to lose trust in the process.

[21] GLOBAL JUSTICE NOW, https://www.globaljustice.org.uk/news/69-richest-100-entities-planet-arecorporations-not-governments-figures-show/

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5. ***Enforcement of awards and interference of domestic courts*** - Parties to arbitration are frequently from nations with distinct legal systems. It is challenging to foresee how straightforward it will be to enforce an award in each country because enforcement methods and procedures might vary greatly between jurisdictions. In recognition and enforcement proceedings, some jurisdictions construe the public policy widely, and thus, it becomes difficult to enforce the awards. An essential component of the international arbitration framework is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. However, not all nations have ratified the convention. A party may objectto a specific government notification or policy that has an impact on price. These challenges typically take the form of lengthy, unresolved writ petitions in High Courts. Because the outcome of the writ petition will have an impact on the Arbitral Tribunal's decision, the arbitration processes suffer as a result. In some circumstances, courts will also issue anti-arbitration injunctions to halt the arbitration.

6. ***Guidelines for formulating contracts*** – A set of rules for the formation of contracts for specific scenarios must be established. In various scenarios, such as price reviews, changes in regulations, etc. for shorter periods, say three years instead of five, may eliminate or at least bring down the need for price reviews, thereby refuting a significant dispute ground altogether.

7. ***Seat of Arbitration*** - An international standard schedule entailing the rules for the applicability of jurisdiction based on the circumstances should be established and enforced. Various issues, such as joint venture deadlocks, the particular performance of the contract, etc., may not be subject to arbitration under the laws of the arbitration seat or the jurisdiction. Such energy conflicts make it difficult to arbitrate on the relevant issues because the awardcould be overturned.

VIII. CONCLUSION

Looking back at the historical development, it is clear that the problems caused by climate change require an active legal response. International arbitration has become essential in resolving the complex energy disputes of today and navigating the landmark agreements of the late 20th century. This is because environmental disputes are becoming increasingly complex. The legal frameworks governing international arbitration must continue to evolve, recognizing the

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interconnectedness of global challenges and the imperative to foster collaboration. Finally, the development of the legal framework in the areas of climate change, alternative energy, and international arbitration is not just a legal project; it is a collective project that takes into account the rights, aspirations, and welfare of societies all over the world. We can pave the way for a sustainable future where legal systems function as tools for social justice, environmental stewardship, and justice by adopting this all-encompassing viewpoint. At a crossroads where climate change is accelerating, the socio-legal fabric we weave now will surely influence the shape of the world we leave for future generations.