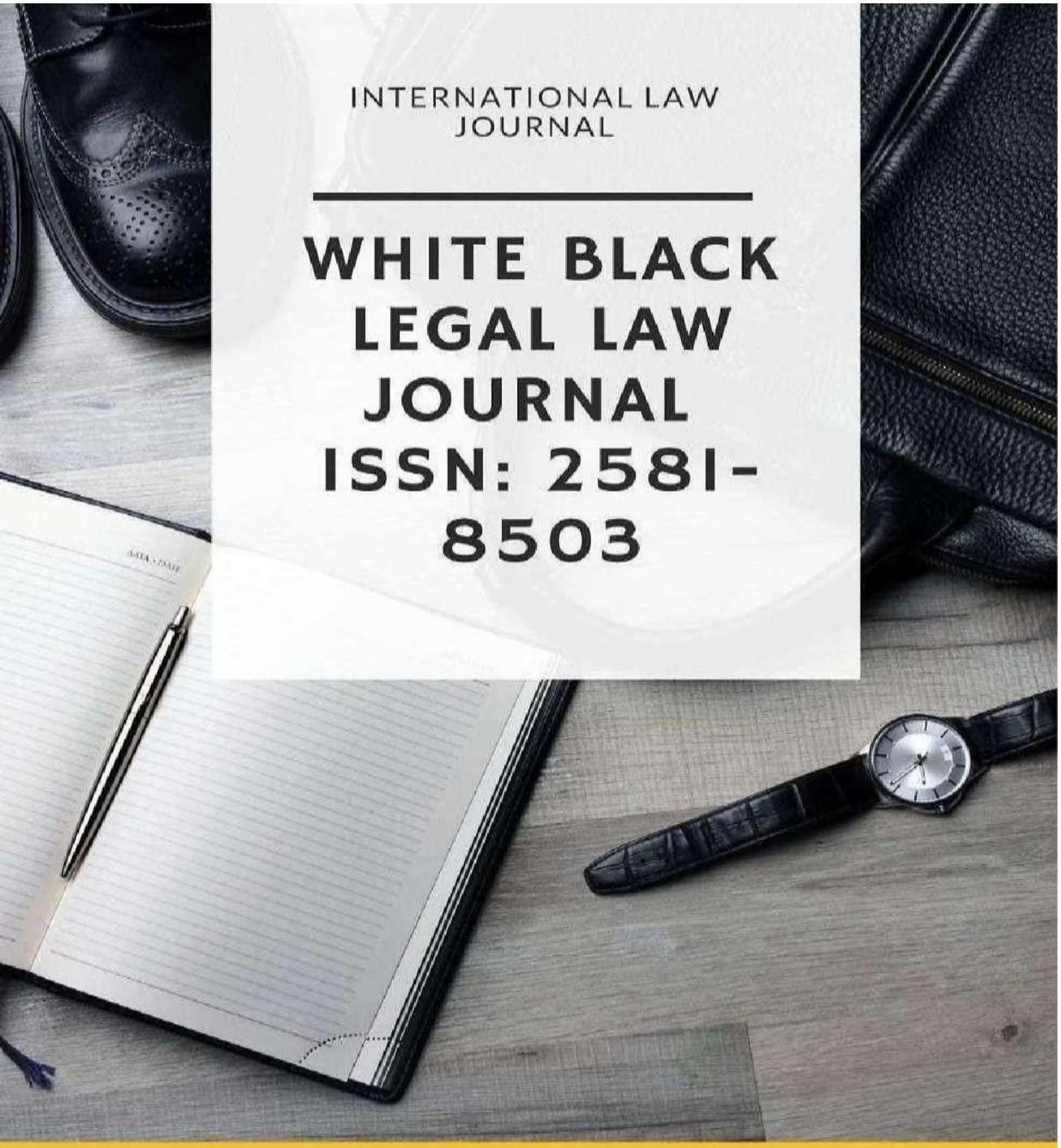

INTERNATIONAL LAW JOURNAL

WHITE BLACK LEGAL LAW JOURNAL

ISSN: 2581-8503

Peer - Reviewed & Refereed Journal

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www.whiteblacklegal.co.in
Volume 3 Issue 1 | March 2025 ISSN: 2581-8503

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

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Abstract

Organizations in the Alternative Energy and Climate Change industry involve intricate and complex disputes as those functioning have a complex array of technological, legal, and financial transactions. The authors explore the transformative Alternative Dispute Resolution (ADR) plays in advancing the current legal discourse. In the first part of the paper, the authors, by analysing relevant case laws, categorize disputes based on (i) nature, (ii) industry, (iii) phase and analyse the substantial role of International arbitration in their resolution. The second part of the paper examines the specific efforts taken by authorities such as the International Chamber of Commerce (ICC) in establishing a task force to enforce rules over the functioning of the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement. Numerous contractual disputes have made arbitration a potential redressal forum. The third part elucidates the reasons behind the significance through its characteristics such as confidentiality, expertise and enforceability which have been comparatively analysed with other redressal mechanisms with an emphasis on the Indian framework. Finally, the existing limitations of the framework are examined through a doctrinal approach combined with secondary quantitative data and subsequently, the authors put forth comprehensive recommendations to the working of International Arbitration by analysing its awards and various events such as the recent conference under COP 27 - Resolving Climate Change outside of State Courts. The authors thereby propose that, arbitration can boost infusion of funds, investor's confidence and government's efficiency in the sustainable development of alternative energy sources to help address climate change.

Keywords: International, Arbitration, Alternative Energy, Climate Change, ICC

I. INTRODUCTION

Climate Change is a widespread, complex, and imminent terror that affects people worldwide. With temperatures constantly rising since the Industrial Revolution, the anticipated cumulative impact involves the reduction of glaciers and polar ice caps, leading to significant sea level rises, and heightened occurrences of severe weather events such as storms, heat waves, floods, and droughts. These physical changes will inevitably result in wide-ranging social and economic consequences, including risks to global food security, water scarcity, millions of displaced individuals, and increased susceptibility to the spread of diseases. The current global economic system, based on resource extraction and consumption, has been labelled as the *"greatest market failure in history"*,[1] with significant contributions to climate change. The widely ratified United Nations Framework Convention on Climate Change (UNFCCC)[2] serves as a forum for international discussions and the formulation of principles in climate change law. Based on these legal principles, the 1997 Kyoto Protocol[3], which has been in effect since 2005, established specific rules and emission reduction targets. More recently, signatories to the Paris Agreement[4] committed to limiting global temperature increases to less than 2°C, preferably 1.5°C. Despite this international legal framework, meaningful changes in state and private behaviour to address climate change have yet to materialize. [5] To mitigate climate change, the key sector to undergo a radical transformation is the energy sector. It is imperative to switch to alternative energy sources, such as solar, wind, hydro, geothermal, and biofuels, to decrease reliance on foreign oil, increase job opportunities, strengthen energy security, and enhance public health. However, there are several obstacles to this transition, including high costs, complex technical issues, a lacklustre infrastructure, and resistance from various stakeholders, such as governments, consumers, and communities. These disputes could start on a local, national, regional, or even global scale. Therefore, it is important to have effective mechanisms to resolve disputes that may arise in the context of climate change and alternative energy development. One of the most widely used and preferred methods of dispute resolution in this field is international arbitration. International arbitration is a process of dispute resolution where the parties agree to submit their disputes to a neutral third party, called an arbitrator, who will render a binding decision based on the applicable law and facts.

II. OBJECTIVES

(i) Inspect and identify what climate change and alternative energy disputes are and examine the potential reasons behind its growth.

(ii) Examine the features of international arbitration in this sector and analyse the functioning of its framework.

(iii) Observe the prevailing limitations in for this sector and elucidate practical recommendations.

III. WHAT ARE CLIMATE CHANGE DISPUTES AND ITS REASONS?

Simply put forward, any dispute in relation to the impact of climate change, it's policies, treaties such as the UNFCCC and the Paris Agreement which impose responsibilities to member states can be placed within this category. What is certain is that the growing awareness of climate change since the past 20 years has resulted in the involvement of numerous actors including states, corporates as well as societies in the energy sector. Nationally Determined Contributions(NDC's) are efforts taken by each member state of the Paris Agreement which is to be prepared, communicated and maintained to mitigate climate change as per Article 4, Paragraph 2 of the Paris Agreement.[6] Therefore, International responsibilities and their subsequent domestic measures and legislations are a major factor for climate change and energy disputes. However, the climate change disputes have increasingly risen in an international context, as environmental protection and climate change are subject matters that by nature transcend national boundaries. For instance, the total number of climate change cases has more than doubled from 884 in 2017 to 2,180 in 2022.[7] This internationalisation of the issue accordingly raises the question of the extent to which international arbitration could be an appropriate forum to adjudicate such claims. Energy and Construction disputes accounted for 45% of the cases in 2022 at the International Chamber of Commerce(ICC),[8] a predominant institution for international arbitration. The substantial share of cases contributed from the energy sector has got to do with a plethora of reasons which have been explored and identified below.

(i) Disputes arising from climate change contracts

Various contracts are likely to be entered into by investors, states, private sector entities for the mitigation of climate change or the adoption of measures under commitments such as the Paris Agreement and the Energy Charter Treaty(ECT).[9] The ECT is an agreement since 1994 that established a multinational framework for the exchange of energy between countries. Spain has experienced an influx of 51 claims under various international arbitrational institutions including the ICSID and SCC relating to the ECT because it amended its energy regulations

and retracted financial incentives to alternative energy investors.[10] Second, numerous transactions of land, infrastructure and resources catering to the upcoming energy projects has resulted in the parties contracting to take necessary safety measures and also reinforce an effective dispute resolution method. Therefore, this paper has broadly categorized contractual disputes into the following;

a) Joint Venture Disputes
b) Construction related disputes
c) Technology related disputes
d) Investor State Disputes

(ii) Disputes arising from other contracts

These contracts may not have climate change related purposes and may even predate the Paris Agreement. Nonetheless, contracting parties' responses to other activities or environmental repercussions of global warming have the potential to affect every corporate activity and contractual connection. Activities like changes in national laws or regulations restricting the state to meet commitments under the Paris Agreement or environmental impacts of climate change have led to various claims. Second, contracts are also formulated considering how geopolitics impact the market. For instance, the conflict between Russia and Ukraine affected global pricing. Natural resources are abundant in Russia, especially gas and oil. Therefore, disputes of this kind not only have an impact on the local market but rather the global market, acting as a starting point for alternative energy wars. To illustrate, the Indian Government implemented the BS6 norms in the Automobile sector during 2020. The purpose was to moderate harmful emissions but led to repercussions primarily in the two and four-wheeler entry level segment. This led to OEM's sharing the brunt of the higher cost resulting in various contractual disputes due to non-fulfilment of obligations.

(iii) Submission Agreements

These are consenting agreements entered by the parties after the cause of action. It is for the purpose of filing an application at arbitration centres.

IV. THE WORKING OF INTERNATIONAL ARBITRATION

International arbitration is an Alternate Dispute Resolution Mechanism (ADRM) by which international disputes can be definitively resolved, pursuant to the parties' agreement as

discussed above. The framework of this mode can be broadly divided into two; (i) Institutional and (ii) Ad Hoc. Institutional arbitrations are overseen by an institutional body and controlled by arbitration rules specific to the institution. Two of the predominant institutions are the International Chamber of Commerce(ICC), The International Centre for Dispute Resolution(ICDR) which reported 710 and 755 new cases in 2022 respectively[11]. On the other hand, Ad Hoc arbitrations are conducted by Individual arbitrators and are generally controlled by the arbitration rules agreed upon by the parties in the contract. However, in institutional arbitration proceeding, the institutions normally do not resolve the disputes but administer the resolution of the dispute by appointing an arbitrator directly or of the parties' choice.

In context to the Climate Change Sector, Entities generally include international arbitration clauses in their commercial contracts, so that if a dispute arises with respect to the agreement they are obligated to arbitrate rather than to pursue traditional court litigation. Typical arbitration agreements are very short. The ICC model arbitration clause, for instance, merely reads: *"All disputes arising out of or in connection with the present contract shall 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".*[12] As examined previously, arbitration may also be used if a dispute has already broken, simply through a submission agreement in which the parties mutually consent to using arbitration.

Now that we have a basic understanding of the framework, the next step is to lay emphasis on its role in the Climate Change and Alternative Energy sector. To do so, this paper will examine the different approaches to International Arbitration. This can be majorly divided into two dimensions;

(i) Mandatory or Voluntary Approaches - There can be two approaches when it comes to climate change disputes. They are also called the Hard Law and the Soft Law. Hard Law refers to Binding international legal instruments including treaties, protocols, and amendments, as well as secondary legislator decisions taken pursuant to a treaty. These are practically measures adopted, provided that they are authorized by the Conference of the Parties. The COP is the supreme decision-making body. All States that are Parties to the Convention(UNFCCC) are represented at the COP, at which they review the implementation of the Convention and any other legal instruments that the COP adopts. Consequently, in order to ensure a stronger influence on state action, Soft Law instruments offer a combination of legal and nonlegal measures. In addition, there are

more infractions and breaches, which makes international arbitration a popular choice for resolving disputes.

(ii) Public and Private Approach - The Mandatory and Voluntary approach establishes the participation of public disputes in International Arbitration. However, Private entities have a much larger role in the Climate Change sector than generally perceived. . Unquestionably, public interest demands action on climate change, but private actors' contributions are still vital. The core idea is that, even if human activity has increased global warming, it is still possible to limit the effects of it. Private actors can contribute to climate change mitigation in different ways. Not only can they fund climate change mitigation actions, but they play a role in the development of climate change law and its implementation.[13] The United Nations General Assembly president Srgjan Kerim said, *"nearly 90 per cent of the funds needed to address global warming will derive from the private sector"*. International arbitration is the primary means of settling private sector conflicts in the energy and climate change sectors since its awards are enforceable almost everywhere in the globe, unlike domestic court rulings. A deeper analysis of private dispute resolution at International Arbitration Forums will be discussed further in this paper with by taking an analysis of the Indian Framework.

IV.I. INTERNATIONAL ARBITRATION FOR DOMESTIC DISPUTES WITH AN INDIAN ANALYSIS

We have explored the role of International Arbitration in international disputes so far. However, arbitration is also widely employed in domestic disputes. International arbitration awards can be enforced in numerous countries in the world and is regulated by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention).[14] The Convention has 172 state parties which means that any award by and international arbitration institution is enforceable in those countries. In India, Part II of the Arbitration and Conciliation Act (Arbitration Act)[15] governs its enforceability. It primarily provides two conditions for an award to constitute a 'foreign award'. First, *"(i) it must deal with differences arising out of a legal relationship considered commercial under the laws in force in India (contractual or not)"*, and *"(ii) the country where the award has been issued must be a country signatory to either the New York Convention or the Geneva Convention and must be notified by the Indian government as a reciprocating territory"*. For India's targets in its NDCs under the Paris Agreement to reduce its carbon footprint by 30-35 percent by 2030

and net zero by 2070.[16] This has led to a growing focus on alternate energy projects in India which includes solar plants, wind plants, hydropower plants etc. This has further led to a whole new genus for disputes, the settlement of which requires a strong arbitration regime in the country.

V. INTERNATIONAL ARBITRATION AS A PREFERRED CHOICE

In comparison to domestic court litigation, international arbitration is conducted before private arbiters known as arbitrators as opposed to domestic courts. It is a private, enforceable, consensual, and binding method of resolving international disputes that is usually quicker and less expensive than going via domestic legal channels. Arbitral practitioners are particularly interested in the international energy business since it is the single largest user of international arbitration. To understand why, this paper examines the factors behind the same;

(i) Freedom of choice – The international arbitration framework provides parties the option to choose their arbitrators which is beneficial due to the requirement of specialized arbitrators in the Climate Change and energy sectors. The place of arbitration(seat) and the rules of the procedure including the language and governing law can be as per the requirements of the parties. Therefore, based on the relationship between the parties and the subject matter, alterations like doing away with document production, direct testimony in writing can be made to the procedure to save time and effort.[17]

(ii) Neutrality – We have established that the parties choose the arbitrators, and since each party has an equal say in the matter, the arbitrator remains a neutral and unbiased authority. A quorum of three arbitrators is formed when each party chooses one arbitrator, and they then choose a third arbitrator. As a result, there is less probability that the prize will cause you to be unhappy. Additionally, neutrality is maintained since there is no risk of bringing legal action in the national courts of the other party, which would prevent each country's public policy from being applied irrelevantly.

(iii) Technical Expertise – Climate Change and Energy disputes highly involve disputes based on technical terms. Therefore, it becomes challenging to decide the dispute without technical expertise in the field. Arbitration provides flexibility in choosing arbitrators to the party based on competence and expertise. For climate-related construction disputes, experts with knowledge in environmental science, sustainable construction, and climate impact assessment can be appointed to resolve technical

issues. Expert determination is primarily utilised in cases involving very specific issues, where a conclusion requires actual competence, or in disagreements about valuation in situations where culpability has already been established.

(iv) Enforcement – The arbitration mechanism removes the possibility of domestic courts interfering by allowing awards to be enforced globally. Domestic courts frequently hesitate to issue orders that go against the State. Because arbitration is a party-neutral method of resolving disputes, it minimises the influence of national courts, preserving the legitimacy of verdicts. Due to their heavy caseloads and lack of focus on each individual issue, domestic courts typically provide awards of lower quality and less practicality.

(v) Confidentiality – Arbitration proceedings and awards are confidential in nature. This feature is very vital to disputes involving trade secrets, IP disputes, and other competitive practices. Therefore, parties would prefer a closed environment for dispute resolution to avoid any undue advantage given to competitors.[18] This is a positive factor for growth and will encourage private and public funding in the alternative energy sector.

(vi) Speed - International arbitration is a faster alternative to regular judicial litigation for the resolution of disputes. Awards are generally final and can be challenged in limited circumstances such as misconduct or procedural discrepancies. This leads to very limited appeals and a one-step dispute resolution. Emergency Arbitration and Expedited proceedings are features in various institutions catering to cases wherein interim cost is high. Arbitration also provides for interim relief catering to cases such as land disputes or IP claims.

V.I. COMPARITIVE ANALYSIS WITH LITIGATION, MEDIATION AND DOMESTIC ARBITRATION

Now that we have established the distinguishing characteristics of international arbitration, the next step is to analyse the rationale of private and public entities in adopting international arbitration as a preferred forum over other mechanisms such as litigation, mediation and domestic arbitration. Fundamentally, it is a matter of time, confidentiality and flexibility that makes international arbitration more favourable than litigation. International arbitration typically involves less extensive discovery than litigation. This is generally attractive to climate alternate energy entities because of the non-disclosure of business secrets, attendant reduction

in expense and duration. Even in cases of objections of jurisdiction such as nor arbitral cases of criminal nature, it is usually addressed by the international arbitral institution itself. When it comes to mediation, which is another alternate dispute resolution mechanism, wherein a neutral third party known as the mediator assists the parties into negotiating and reaching a mutually satisfactory settlement to their dispute. International Arbitration is comparatively more beneficial to entities in the climate change sector because it is a time invested process to reach a mutual consensus, and there is no strict binding nature resulting in problems with enforceability.[19] Finally, international arbitration is a straightforward option when compared to domestic arbitration because Climate Change disputes entails international parties. Even if the issue at hand is domestic in nature, due to the technical expertise, predominant forum in this sector and no change in enforceability, it tends to be a viable choice for domestic investor-state and domestic private disputes as well.

VI.METHODOLOGY

The objective of this methodology is to provide a clear framework as to how the recommendations were drafted. This assures that the information acquired is certain, credible, and legitimate. The study used a doctrinal analysis technique to examine the function of arbitration in climate change and alternative energy issues. The primary goal of this research is to comprehend the significance of arbitration in the growing climate change issues. The secondary goal is to assess its efficacy and limitations. The doctrinal study delves deeply into legalities to comprehend the structure and principles controlling arbitration in climate change and alternative energy conflicts. A variety of situations have been investigated to comprehend the diverse results. It is crucial to emphasize, however, that the conclusions may be constrained by the lack of empirical data on international arbitration.

VII. LIMITATIONS AND RECOMMENDATIONS TO THE FRAMEWORK

(i) Transparency and Confidentiality

a) The feature of confidentiality precludes the disclosure of information to a third party in international arbitration. While this acts in favour of the parties, in sectors such as climate change which involve vast amounts of public interest, there are greater demands for transparency. As a result, the interests of the public and private are at odds. Put another way, measures addressing climate change benefit society as a whole since they

lower greenhouse gas emissions, which not only enhances human well-being but also helps avert starvation, drought, and rising sea levels. However, the same can have an impact on businesses' bottom lines since they must spend money on technology improvements in order to shift to more environmentally friendly business practices. Therefore, the public should be aware of any situations in which commitments related to climate change are compromised.

b) While the number of disputes relating to climate change and energy is growing, very little is known about the claims and arguments of the parties. Due to this, it could be challenging for parties and attorneys to predict outcomes in cases that are identical. Additionally, the secrecy surrounding international arbitration can create a perception of unfairness or prejudice when it comes to conflicts between investors and states.

c) The international arbitration institutions on the other hand have not really played their role in truly publishing details of cases. Even if the parties consent to waive confidentiality, institutions such as the ICSID tend to publish only the final award on their website. Other details of importance such as facts, arguments and data to truly act as a precedent is absent.

Recommendations – International arbitration institutions must include a mandatory clause in their rules specifying that confidentiality does not apply to any claim in which a member state is a party. Private conflicts, whether domestic or foreign, may be resolved with the parties' mutual consent. To provide for the publication of parties' submissions, orders, decisions, etc., the institutions must periodically update their data and review their policies with regard to limited disclosure. In a recent empirical study, around one-third of participants regarded transparency as a barrier to international arbitration as a means of resolving disputes related to climate change. A few recent actions have been made by the United Nations Commission on International Trade Law to further the same.

(ii) Uniformity

a) The arbitration clauses in a number of agreements, including Power Purchase Agreements (PPAs), used in the alternative energy industry are inconsistent. State parties frequently get into contracts with energy producers and investors as a result of these arrangements. When state governments are involved, a conflict of jurisdiction often results.

b) Questions may arise as to whether conflicting awards on recurring issues can arise due to the multiplicity of claims and diversity of arbitral institutions in the climate change

sector. Inconsistent awards can restrict the development of international investment law and jeopardise its predictability.

Recommendations - Uniformity in arbitration agreements can be solved by adopting a standard arbitration clause that is widely accepted by the parties involved. This clause should be drafted in a way that it is neutral and does not favour any particular party. The clause should also specify the governing law and the seat of arbitration to avoid any jurisdictional issues. For instance, FIDIC contracts as drafted by the International Federation of Consulting Engineers, serve as a standard in the construction sector. The inclusion of such pre-determined and uniform arbitration clauses will be a crucial step to ensuring uniformity, stability and predictability in energy disputes. Inconsistent awards can be tackled by increasing the role of legal precedents in arbitration. The same can be done only if measures are taken to liberalise confidentiality clauses.

(iii) Multi Party

Disputes in the climate change sector entails multiple actors. Given the multi-party nature of most alternate energy projects, a significant drawback of arbitration is its difficulty to extend the binding effect of the award to third parties, make a third party notice or even join a party to the proceedings.

Recommendations – There is opportunity for consolidation in cases with several parties involved, either in accordance with the arbitration clause's wording or the arbitral institution's regulations. The same parties may have gone into multiple contracts, partnerships, and joint ventures; arbitration guarantees that an award made in one of these agreements will have the same effect on all other project agreements. For example, claims originating from multiple contracts may be brought in a single arbitration under the stated terms of Article 9 of the ICC Arbitration Rules. The drawback is that any ancillary contracts would need to specifically include arbitration as a recourse for the parties.

(iv) Jurisdiction

a) International arbitration can be used only if there exists an arbitration clause in an existing agreement or if the parties mutually submit to using arbitration. However, various disputes might impact external entities when it comes to climate instance, new alternative energy projects may violate certain human rights due to relocation of individuals. In such matters, Public Interest claims cannot be filed at international arbitration institutions like how PIL’s are filed in domestic courts. This restricts the disputes than can be addressed at international arbitration.

b) Not all kinds of disputes can be addressed with international arbitration. According to *Booz Allen & Hamilton Inc. v. SEBI*[20], the court made a statement on its jurisdiction, "*Generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals*." A handful of disputes are not subject to arbitration, including those involving criminal charges, marriage discord, child custody, insolvency, and estate planning. Therefore, the jurisdiction of international arbitration is limited.

Recommendations – Restriction to consenting disputes is a major drawback of international arbitration. There is no solution as such to go around it. However, a clause to include a public interest exception in the arbitration clause of the agreement. This exception would allow public interest claims to be filed at international arbitration institutions. The exception should be drafted in a way that it is clear and unambiguous and should specify the types of public interest claims that can be filed. With respect to lack of jurisdiction, they may bifurcate the proceedings and hear the issue of jurisdiction separately, based on the merits of the case.

(v) Finality

Arbitration decisions are meant to be final, and generally there are no appeals. However, disputes become the subject of litigation if one party refuses to comply with an arbitration award and the other party seeks enforcement under either federal or state statutes.

Recommendations - Since this limitation is a matter of their characteristics, there is no such solution to overcome it. However, the bright side is that, the role of litigation is going to be limited to the enforcement of the award and examining the reasons behind it and cannot dive into the underlying validity of the award. Therefore, there is no overlapping jurisdiction and only a forum to seek relief.

(vi) 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.

Recommendations - 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.

VIII. CONCLUSION

The global nature of these disputes is apparent, marked by a significant rise in cases, particularly within the energy sector. This trend underscores the imperative for efficient mechanisms to resolve disputes. Opting for international arbitration presents specific advantages when dealing with climate change disputes. The structure of international arbitration, whether institutional or ad hoc, delivers the necessary flexibility and adaptability crucial for intricate matters in the realms of climate change and energy. Nevertheless, challenges persist, prompting practical suggestions. Concerns about transparency and confidentiality could be alleviated by tailored regulations necessitating disclosure in cases with public interest implications. The challenge of achieving uniformity in arbitration agreements necessitates widely accepted standard clauses to avert jurisdictional conflicts. The confined jurisdiction of arbitration might find relief through the integration of a public interest exception into arbitration clauses. While the conclusiveness of arbitration decisions is inherent, it underscores the necessity for robust enforcement mechanisms. In essence, international arbitration serves as a formidable tool for settling climate change and alternative energy disputes, furnishing a balanced framework that considers the interests of various stakeholders. Addressing its limitations through deliberate reforms will contribute to a more resilient and effective system for grappling with the intricate challenges posed by climate change globally.

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