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Arbitration in Resolving Climate Dispute

VISHWESH TIWARY¹ AND DR. UJJWAL KR. SINGH²

ABSTRACT

People must immediately address global warming and climate change. Daily evidence shows global warming is worsening. We must stay up while serving our needs and protecting the environment. Solving the climate change dispute has no limits. It takes time to reach environmental agreements amongst nations. However, new dispute resolution strategies may be possible. Section 2(f) of India's Arbitration and Conciliation Act covers international arbitration, which might involve a single individual, a corporation, or even a foreign government. By explaining more, India has started this process. Many solutions that could reduce global warming have yet to be discovered. Many chosen for arbitration know it's being discussed for various reasons. Commercial disputes, investment treaties, and other conflicts are resolved through arbitration and other non-traditional methods. Commercial and other types of arbitration are preferred for fast resolution due to their streamlined procedures, speedy decisions, and other benefits.

Climate change and commercial challenges are often prioritised, even if we equate climate change with international arbitration. Numerous measures by arbitration institutions show that international arbitration is responding to global warming. Numerous treaties, initiatives, and tribunal rulings are essential for solving the biggest environmental issues. Arbitrators are interested in climate change issues since they affect the public. For efficacy, concerns will be raised. Examining the arbitration industry's advances can help you understand. Despite their apparent unrelatedness, the 2016 Paris Agreement and arbitration will control climate change. These aspects must be related for better results.

To mitigate the worst effects of climate change, energy, land, urban infrastructure (including transportation and buildings), and industrial sectors must be rapidly and significantly modified. Due to global climate change, energy, land, urban, infrastructural, and industrial systems will need urgent and thorough alterations, which will lead to new investments and contracts and legal challenges. The Paris Agreement only applies to state parties, unless they have incorporated it into domestic law. Contracts to adopt energy or other systems for transitioning, mitigating, or adapting in compliance with the Paris Agreement and contracts without climate clauses can lead to disputes. The UNFCCC ratified the Paris Agreement in 2015, requiring all nations to pursue ambitious climate change mitigation and adaptation measures. The Paris Agreement's mitigation goal is a 2-

¹ Author is a student at Law College Dehradun, Uttarakhand University, India.

² Author is an Assistant Professor at Law College Dehradun, Uttarakhand University, India

degree Celsius global temperature drop from pre-industrial levels. The accord also seeks to improve nations' climate change adaptation. The Paris Agreement also supports vulnerable and developing nations in adapting. The ICC working group considered all climate change-related disputes and policies.

The 2018 IPCC Special Report on Global Warming of 1.5 degrees Celsius calls climate change a major issue. To avoid the worst effects of climate change, energy, urban infrastructure, land, and industrial systems must be overhauled immediately. The worldwide response to climate change will rapidly modify land, infrastructure, and industrial systems, creating new investment opportunities and contractual agreements and increasing contractual legal issues.

Keywords: *climate change, arbitration, environment.*

I. INTRODUCTION

The two most critical challenges, global warming and climate change, demand people's immediate attention. It is becoming more evident that global warming is becoming worse every day. It's essential to keep up even while meeting our needs and protecting the environment.

There are no boundaries when finding a solution to the disagreement over climate change. Finding common ground amongst nations on environmental matters takes time and effort. However, new methods for resolving conflicts may now be feasible. Section 2(f) of India's Arbitration and Conciliation Act establishes the purview of international arbitration, which can involve a private individual, a corporate organisation, or even the government of a country that is not India. India has already begun this process by providing further explanation.

Numerous methods have yet to be noticed but have the potential to play a significant role in reducing global warming. Many people being chosen for arbitration know that it is being discussed for various reasons. Arbitration and other non-traditional conflict resolution procedures are used to resolve commercial disputes, investment treaties, and many other disputes. Commercial and other types of arbitration have traditionally been preferred to resolve matters as quickly as possible because of their streamlined procedures, prompt decisions, and other advantages.

Even if we associate climate change with international arbitration, it is not surprising that climate change issues share precedence with business-related issues. The fact that international arbitration is adapting its strategy to address the problem of global warming is evident from the numerous actions done by the arbitration institutions. The execution of numerous accords and campaigns, in addition to the judgements rendered by the tribunals, is crucial for reducing the

most pressing environmental problems. Since climate change issues are significant to the general public, arbitrators are also interested in them. To ensure effectiveness, concerns will be raised. However, a thorough grasp of the same may be had by examining the arbitration industry's advancements. Although there is no apparent connection between the 2016 Paris Agreement and arbitration, both will be used to regulate climatic changes. To gain better results from these aspects, they must be related.

In order to mitigate the most severe consequences of climate change, it will be imperative to swiftly and substantially modify the energy, land, urban infrastructure (including transportation and buildings), and industrial sectors. The urgent and comprehensive modifications required for energy, land, urban, infrastructure, and industrial systems in response to global climate change will inevitably lead to new investments and contracts, as well as legal disputes arising from these contracts and other related issues. The Paris Agreement exclusively pertains to state parties, and its obligations are binding only on state parties, unless they have been integrated into domestic legislation. Disputes can occur regarding (i) contracts pertaining to the implementation of energy or other systems for transitioning, mitigating, or adapting in accordance with the commitments of the Paris Agreement; (ii) contracts lacking any explicit clauses related to climate. In 2015, the United States Framework Convention on Climate Change (UNFCCC) officially endorsed the Paris Agreement, which requires all countries to undertake ambitious actions to address climate change and adapt to its consequences. The primary objective of the Paris Agreement is to achieve a 2-degree Celsius reduction in global temperatures compared to pre-industrial levels, which is known as mitigation.³ Additionally, the agreement aims to enhance nations' capacity to cope with the impacts of climate change, referred to as adaptation. The Paris Agreement also aims to support developing nations and those that are vulnerable to making such adaptations. The ICC task group had a comprehensive outlook on conflicts related to climate change, aiming to encompass any dispute arising from or involving the consequences of climate change and its associated policies.

The IPCC Special Report on Global Warming of 1.5 degrees Celsius, published in 2018, identifies climate change as an exceptionally grave and pressing issue. To mitigate this issue, prompt and extensive overhauls in energy, urban infrastructure, land, and industrial systems are necessary to avert the most severe ramifications of climate change. The rapid modifications to land, infrastructure, and industrial systems driven by the global response to climate change will lead to a fresh range of investment opportunities and contractual agreements, consequently

³ International Chamber of Commerce, <https://iccwbo.org/content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf?cv=1>, 06th March, 2023.

leading to an increase in contractual legal disputes.

II. CLIMATE CHANGE DISPUTES

The purview of the Task Force has been expanded as a result of the earnest efforts of its members to address a wide variety of controversies. It is possible to describe it as "any conflict arising out of or about the effect of climate change and climate change policy, the United Nations Framework Convention on Climate Change ("UNFCCC"), and the Paris Agreement." The report divides the disagreements into three primary groups, which are as follows:

- Specific transaction, adaptation or mitigation contracts:

Contracts that are agreed to and carried out by the Paris Accord. Contracts of this type may be agreed upon and implemented by investors, industry bodies, states, funders, owners, and contractors.

- Contracts not concerning specific transactions, adaption or mitigation:

The fulfilment of contractual obligations is impacted by global warming and legislation changes. It is possible, but not guaranteed that these contracts will be modified to comply with the Paris agreement. The following factors could potentially affect the performance of a contract:

1. Change in national laws
2. Regulation or policy to meet commitments to the Paris agreement etc.
3. Voluntary commitments by industry and cooperation such as CSR.
4. Other impacts of climate change.

- Submission Agreements

Submission agreements, as their name suggests, are pacts or contract terms that provide that parties will submit their differences to a third-party arbitrator if a disagreement arises. An illustration of this would be a disagreement between a collection of low-lying island states directly affected by rising sea levels due to climate change and developed governments over the repatriation or restitution of their populations.

(A) Features of Climate Change-Related Disputes:

1. Access to relevant expertise - The ICC Report acknowledges the importance of ensuring that the right expertise is accessible to both the parties and the tribunal. The party has the authority to exert some level of control over the selection of arbitrators, including the ability to specify the level of competence and abilities required, as well as to seek consultation

from the ICC about the appointment of arbitrators. In proceedings, the arbitrator may choose to appoint either expert that the parties or experts have appointed that the tribunal has appointed.

2. Urgent Resolution - To resolve controversies as quickly as possible, both parties and the arbitral tribunal should implement case management strategies through the process of identifying the scientific or technical concerns that can be handled through agreements between the parties or issues that can be settled exclusively based on papers rather than oral pieces of evidence or legal arguments. The International Criminal Court will use its expedited method if the parties choose. In addition to these aspects, the ICC Arbitration Rules already include provisions for emergency arbitration, an escalating dispute resolution clause, interim and conservatory procedures, and other similar provisions.
3. The application of the climate change commitment — Both the ICC and the arbitration tribunal are obligated to adhere to the laws and norms that are mandatory, which the parties have promised to do—because both national and international laws are constantly being updated. From this point on, greater reliance must be placed on the instruments. An illustration of this would be the Paris Agreement directly relied on by the Netherlands Model Bilateral Investment Treaty. When entering into commercial contracts, specific industries may require that the parties refer to *lex mercatoria*, industry-specific goods, or best practice as the governing law provision of the contract.
4. Transparency - Most of the time, disagreements on climate change are related to matters of public interest, making standard commercial arbitration challenging to observe. As a result, the UNICTRAL transparency Rules will be implemented, making it possible for the public to see the direct submissions, the list of exhibits, and the witness statements. Making the proceedings public and publishing the winners are two of how transparency can be achieved.
5. Participation in third-party Disagreements on climate change is multifaceted and complicated. Because it affects the people and the general community, the parties in dispute must give their consent for a third party to participate in the proceedings. Arbitration can provide several benefits, including the restriction of multiple proceedings, the establishment of a single, neutral, and influential forum, and the resolution of claims made by potentially affected stakeholders to address locals or satisfy specific requirements so that the project can continue. Joinder of the parties, the appointment of *amicus curiae*, extra joint parties, and the ability to make claims against several parties are all ways to consider a third party's viewpoint. Joinder of the parties is another option.

III. INTERNATIONAL SCENARIO

The extensive range of issues that can arise in environmental law conflicts, encompassing areas such as infrastructure, land, industry, finances, and insurance, contributes to the frequently observed complexity of disputes in this field. Illustrative Case Studies Demonstrating Varied Approaches to Resolving Environmental Law Disputes in Different Global Regions ADR proceedings have proven successful in numerous instances, even when dealing with intricate environmental issues. The inclusion of Alternative Dispute Resolution (ADR) mechanisms in international treaties is a clear illustration of its global significance. As an illustration, Article 11(2) of the Vienna Convention for the Protection of the Ozone Layer stipulates that in the event that the involved parties are unable to come to an agreement through negotiation, they have the option to collectively seek the assistance of a neutral third party or request mediation. This provision is applicable to the resolution of any dispute pertaining to the interpretation or implementation of the convention. Pursuant to paragraph three of Article 11 of the Convention, this requirement must be fulfilled prior to the parties engaged in a dispute being able to bring it before the International Court of Justice or arbitration. The 1979 Convention on Long-Range Transboundary Air Pollution, unlike the Vienna Convention for the Protection of the Ozone Layer, does not explicitly require the use of alternative dispute resolution (ADR) to resolve disputes between parties. As per Article 13, the parties are obligated to resolve the issue through dialogue or any other mutually acceptable method of conflict resolution. Within the framework of this Convention, the incorporation of alternative dispute resolution (ADR) methods, such as mediation, is a crucial consideration.

The Snoqualmie River Mediation centred around a conflict concerning the construction of a dam on a flood-prone river. The inhabitants in the vicinity expressed their dissent towards the decision, contending that it would adversely impact the unspoiled ecological surroundings for which the area is renowned. The mediation achieved success by facilitating an agreement that permitted the construction of the dam on a reduced land area. This arrangement effectively protected the farmers' interests while minimising the extent of disruption to the natural environment. Following the resolution of the Snoqualmie river dispute through mediation, several other countries, such as China, Australia, Thailand, and Canada, also adopted mediation as a means of settling environmental disputes. Various global agreements and agreements, including the United Nations Convention on the Laws of the Sea (UNCLOS), the Vienna Convention for the Protection of the Ozone Layer, and the World Trade Organisation Dispute Settlement Regime, have all endorsed the utilisation of mediation for resolving conflicts. Various legislative initiatives have been implemented globally to advocate for mediation as a

means of resolving environmental problems. The United States Institute for Environmental Conflict Resolution was established by the Environmental Policy and Conflict Resolution Act of 1998 in the United States of America. The European Union (EU) initiated its advocacy endeavours in 2002 to support the European Community's 6th Environment Action Programme (2002-2012). This initiative required the efficient application of alternative dispute resolution (ADR) and mediation techniques to address environmental concerns in European Union countries. Furthermore, Israel implemented a programme aimed at instructing environmental mediators, encompassing individuals from both Israeli and Palestinian backgrounds.

(A) Declarations of the Paris Agreement:

An international agreement on climate change that is legally binding is the Paris Agreement. At COP 21 in Paris, it was approved by 196 Parties on December 12, 2015, and it became effective on November 4, 2016.

Its objective is to keep global warming below 2 degrees Celsius, ideally below 1.5, compared to pre-industrial levels. Countries want to reach the global greenhouse gas emissions peak as soon as feasible to build a climate-neutral world by the middle of the century to meet this long-term temperature objective. The Paris Pact is a turning point in the global climate change process because it is the first time a legally enforceable agreement unites all countries in the fight against climate change and in an attempt to adapt to its effects. The Paris Agreement was established in 2015 by the United Nations Framework Convention on Climate Change (UNFCCC), marking the first time that all countries had pledged to make significant measures to thwart climate change and adapt to its effects. The Paris Agreement aims to mitigate global warming by 2 degrees Celsius over pre-industrial levels and improve a country's capacity to deal with climate change's effects or adapt to them. The Paris Agreement also intends to assist developing countries and countries that are at risk of implementing these changes. The ICC task group attempted to encompass any issue arising out of or involving the consequences of climate change and its policies by taking a more comprehensive approach to anticipating the disputes relating to climate change.

Climate change is one of the most significant challenges of all time, according to the 2018 IPCC Special Report on Global Warming of 1.5 degrees Celsius. To overcome this obstacle, swift and comprehensive changes must be made in the energy, urban infrastructure, land, and industrial systems to mitigate the worst effects of climate change. As a result, there will be a surge in contractual legal disputes due to the new, rapid changes to land, infrastructure, and industrial systems resulting from the worldwide reaction to climate change.

Arbitration in Climate Change-related disputes: The Task Force's first task is to investigate the current usage of ICC Arbitration and ADR services to settle disputes that may involve climate change and associated environmental challenges. Disputes resulting from "rapid and far-reaching transformation of energy, land, urban and infrastructure and industrial systems still need to be reflected in previous and ongoing ICC cases because the Paris Agreement and the IPCC Special Report are relatively new. There are three main contentions relating to it that are as follows :

- (i) Energy, land use, urban planning, infrastructure, and industry contracts frequently use ICC Arbitration and ADR, with these industries accounting for a large portion of ICC cases;
- (ii) climate change-related investment is proliferating, and systems transition on the scale suggested by the IPCC will reevaluate regulatory risk and investment strategy in industries where ICC Arbitration and ADR are already widely used; and
- (iii) climate change mitigation measures are being considered.

For climate change and "green" initiatives and programmers, the UN international development banks, international organisations, regional and state agencies, and private foundations have pledged or reserved cash. Notably, the climate-related commitments made by nations in their NDCs, which must be submitted every five years after that and are then monitored through an "enhanced transparency framework" intended to "build mutual trust and confidence and to promote effective implementation," are likely to result in an entirely new stream of investment. Several state-owned financial institutions and international development banks are also stopping their support of initiatives that would undercut the Paris Agreement's goals for combating climate change. These financial trends and policies are expected to persist and grow to "achieve a paradigm shift to low-emission and climate-resilient pathways." Additionally, States and regional governments are introducing national legislation and regulations to reduce greenhouse gas emission targets. Institutions are pulling funding from projects that do not include measures against high emitters, cap and trade mechanisms, or other internalisation devices. Increased emission level transparency and financial disclosure about climate change are different approaches. Public interest groups and non-governmental organisations (NGOs) are increasingly pursuing legal actions in various national courts and other fora, primarily to hold state parties responsible for their climate change-related promises.

The IPCC concisely summarised the size of the necessary transformation and the resulting business opportunity in the IPCC Special Report. It concluded that to prevent the worst effects

of climate change, we must keep global warming to 1.5°C, and it outlined the emission routes and system changes necessary to achieve this goal. Rapid and extensive changes in energy, land, urban and infrastructure (including transportation and buildings), and industrial systems are necessary for these approaches. According to the IPCC, transitioning to these systems will need a significant upscaling of investments in mitigation measures, a wide range of mitigation alternatives, and deep emissions reductions across all sectors. However, a speedy transition is not required. The Task Force anticipates that climate change-related conflicts will rise exponentially based on the existing and anticipated growth of investments connected to climate change made by States and the private sector to meet the goals of the Paris Agreement.

A route to greener arbitration: Lucy Greenwood created the Campaign for Greener Arbitrations (CGA) 2019 in 2019 with the goal of reducing the carbon footprint of international arbitrations. This initiative is being led by an arbitration community Steering Committee. This campaign is based on a series of protocols with the purpose of generating practical measures that may be applied to achieve the Campaign's Guiding Principles.

Several green protocols have been proposed, some of them are as follows:

1. The Green Protocol for Arbitral Proceedings

This protocol proposes actions that the parties or the tribunal can use to conduct arbitral proceedings. The parties can conduct remote proceedings, reducing travel time and eliminating paper printings, for example.

2. The green protocol for law firms and legal service providers.

This procedure has concentrated on the firm's day-to-day operations. Firms are obligated to motivate their staff to work more environmentally friendly. The business must appoint "Green Ambassadors" to develop new rules for firm operations in order to decrease environmental depletion. Firms must also utilise employee incentive programmes to persuade them to follow this technique.

3. The green procedure for arbitrators

The independent arbitrators are obligated to seek direction from this procedure in this case. They are supposed to minimise travel, energy use, and other resource waste. The arbitrators anticipated the conduct norms to be integrated with green guidelines.

4. The green protocol for arbitration institutions.

The protocol requires institutional representatives to oversee the firm's internal and external activities. The institutions must endeavour to inspire the parties and arbitrators to conduct the

processes remotely, as well as supply such infrastructure.

5. The locations of the arbitration hearings

This protocol must be followed by all facilitators of arbitral procedures. They are urged to use technology platforms to promote digital representations of cases and file exchange, in order to save paper effort. They must also use renewable energy when executing such processes.

So, this campaign may be effective by just following a few criteria, such as reducing hard copy packages and travelling as little as feasible. The Campaign also intends to broaden its study to include e-mail usage and energy consumption, as well as other facets of international arbitration procedure not covered in the original impact assessment.

IV. CONCLUSION

Climate change is a critical concern, and the efforts done by the arbitral institutions are critical. So far, it has been established that arbitration addresses concerns with climate change, but self-contribution to making arbitration greener is a novel notion. It would take time for this system to be fully adapted in the wild, but it would make significant contributions to nature. This will also boost the worldwide prominence of arbitration. Arbitration will be labeled as a means for resolving yet another difficulty. These actions will become increasingly important in the near future. This will also pave the way for new efforts in the realm of international arbitration. The Commission on Arbitration and ADR brings together international conflict resolution specialists from all over the world and from a variety of jurisdictions. The Commission conducts research and develops findings and guidelines on legal, procedural, and practical issues of conflict settlement. The Commission also considers and contributes to the development of proposed amendments to the International Chamber of Commerce Rules of Arbitration and other arbitration rules, as well as writes and approves the International Chamber of Commerce Mediation Rules, Expert Rules, and Dispute Board Rules. International arbitration has been used to settle disputes resulting from big cross-border transportation projects. The PCA handled arbitration issues resulting from environmental damage caused by a cross-European railway system known as the Iron Rhine. The PCA upheld the "polluter pays" principle in relation to chloride discharges into the Rhine River in one arbitration, and held that prior agreements must be interpreted in light of contemporary environmental considerations, such that the costs of environmental protection measures must be included in the costs to reactivate a railway. Wärtsilä, a Finnish technology company, has signed a five-year services agreement that includes a new obligation that the boats covered by the agreement comply with the International Convention for the Prevention of Pollution from Ships ("MARPOL"). In 2005, the MARPOL

Convention was revised to manage air pollution by regulating sulphur oxide, nitrogen oxide, ozone depleting chemicals, volatile organic compounds, and shipboard incinerator emissions. Wärtsilä contracts also include International Maritime Organization sulphur limitations, which go into effect on January 1, 2020. In addition, the corporation emphasises sustainability and energy efficiency in its long-term services deal with cruise operator Carnival Corporation, which includes "performance-based" obligations. These standards emphasise improved performance as well as a reduction in the company's environmental imprint.

V. REFERENCES

1. ICC Report, <https://iccwbo.org/content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf>
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