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IS ALTERNATE DISPUTE RESOLUTION AN EFFECTIVE ALTERNATIVE WAY TO RESOLVE CLIMATE CHANGE DISPUTES?

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Introduction:

Life is a breeding ground for disputes between people, groups and nations. There are cultural differences, difference of opinion, situational differences etc. Unresolved differences paves way for disagreements which arises Dispute.

Climate change is a burning issue involving states and private parties. According to the IPCC Special report to avoid the perilous consequences of climate change, rapid changes needs to be ensued concerning the use of energy, land, industrial sector and infrastructure.¹

The operation of Private parties after the adoption of the Paris Agreement and United Nations Framework Convention on Climate Change (UNFCCC), were limited by regulations on carbon restrictions and other limitations. To ward off any chances of interstate disputes, Investor-state and contract disputes the ICC has come up with a Report on Resolving Climate Change Related Disputes via Arbitration and ADR. The paper shall analyse the role of ADR in resolving climate change-related disputes on the national and international forum.²

Climate Change Disputes:

¹Summary for Policymakers of IPCC Special Report on Global Warming of 1.5°C approved by governments, IPCC (May 1, 2020, 12:48 p.m), <https://www.ipcc.ch/2018/10/08/summary-for-policymakers-of-ipcc-special-report-on-global-warming-of-1-5c-approved-by-governments/>.

²ICC commission report, Resolving Climate Change Related Disputes through Arbitration and ADR, (May 2, 2020, 11:30 a.m), <https://iccwbo.org/content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf>.

Climate change disputes are large in the number involving the consumption and usage of energy, technology and finance. As per the ICC report, any dispute arising in the event of climate change or climate change policy laid down by the UNFCCC and Paris Agreement will eventually be termed as climate change disputes.

The report additionally incorporates disputes arising from :

- Modification of the contract in line with the Paris Agreement between the parties.
- Contracts which do not have a nexus with climate change but are impacted due to the change in laws or change in the environmental impact of climate change.
- Binding or submission agreement to resolve the disputes relating to environment or climate change disputes such that it does not invoke multi-jurisdiction and the dispute can be finalized within a given time frame.³

Applicability of ADR for climate change:

Disputes relating to climate change could arise in manifold ways. Arbitration comes in the picture to settle the disputes and is recognized under Article 14 of the United Nations Framework Convention on Climate Change. The convention allows parties the right to choose between peaceful means of dispute resolution arising out of the application or interpretation of the convention. A party while ratifying the convention must submit a declaration in an annexure that any dispute arising from the Convention may be settled by Arbitration per procedures adopted upon consensus.⁴

Article 24 of the Paris Agreement states Article 14 of UNFCCC will apply mutatis mutandis to the Paris Agreement.⁵

³Id.

⁴ Article 14 of the United Nations Framework Convention on Climate Change, <https://unfccc.int/resource/docs/convkp/conveng.pdf>.

⁵ Article 24 of the Paris Agreement, https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

Mitigating measures mentioned under the Paris Agreement encompass nationally Determined Contributors⁶ and REDD+⁷ to reduce deforestation, emissions, provide sustainable forest resources and enhance forest carbon stock * urges the concerned parties to change their existing functioning which may pave the way to disputes. Thus, mitigating measures mixed with arbitration arrangements may be a expeditious solution in resolving disputes.

Apart from the Paris Agreement, the Kyoto Protocol plays an important role in mitigating greenhouse gas emissions. Under this protocol, each country can emit an Assigned Amount Unit (AAU)⁸. Kyoto Protocol additionally allows countries with spare AAU to sell it to other countries through projects like Clean Development Mechanism or Joint Implementation projects and earn credits in the process. These are few instances where Alternative Dispute Resolution can play a vital role in resolving climate change related disputes.

Adapting ADR to suit climate change disputes:

In addition to the legal framework for adopting ADR in resolving climate change disputes, are other methods of adapting ADR to suit the growing international climate change architecture?

- **Need for greater expertise**

The most important factor in arbitrating climate change disputes is the need for proper expertise , to establish the issue and provide solutions for the same aided by an expert arbitrator, party-appointed expert, tribunal appointed experts or experts determined by rules (like ICC or PCA). The IBA report additionally recommends for adopting arbitration in dispute resolution relating to climate change. The institutions additionally have to develop rules and expertise based on contemporary environmental issues. Permanent Court of Arbitration has been a pioneer in

⁶ Nationally determined Contributions, United nations (May 1, 2020, 12:40 p.m), <https://unfccc.int/nationally-determined-contributions-ndcs>.

⁷ Un-Redd Program, UN Environment, (May 1, 2020, 1p.m) <https://www.un-redd.org/>

⁸ Assigned Amount Units, Carbon Market Watch, (May 1, 2020, 12:45 p.m), <https://carbonmarketwatch.org/2012/05/30/ji-and-aau-surplus/>

formulating PCA Environmental Rules⁹ which also lays down a list of scientific and persons with expertise from which the parties in concern may choose their arbitrators, mediators or conciliators.

In the Indus Waters Kishenganga Arbitration case¹⁰ adjudged by the Permanent Court of Arbitration, the treaty entailed a clause where an expert arbitrator had to be appointed as a mediator. Therefore, the expertise of an arbitrator, mediator or conciliator in the field of environment shall aid in understanding the problem and suggesting a sustainable solution to the issue.

- **Giving voice to non- parties**

Climate change disputes are multifaceted involving non-parties usually the affected population. These third parties may be strangers but their involvement can significantly change the course of proceedings. The involvement of third parties must involve a clear consent from the concerned parties. If the agreement does not entail any provision relating to third party involvement the parties to the dispute can agree on the course of proceedings when the issue in concern comes to light. Appointing an Amicus Curiae is another way of hearing out the concern of the respective parties.

However, appointing an Amicus Curiae is not always a novel method as it has already been applied in WTO proceedings in furnishing the court with facts and perspectives concerning a dispute has not turned out a viable solution. Similarly, the UNCITRAL Rules entails provisions invoking third party statements and ensuring greater transparency in proceedings.¹¹Involving the third party into climate change disputes assures a sustainable solution.

⁹ of Permanent Court Of Arbitration Optional Rules For Arbitration Of Disputes Relating To Natural Resources And/or The Environment, (May 2,2020,1:30p.m), https://pca-cpa.org/wp-content/uploads/sites/6/2015/11/Optional-Rules-for-Arbitration-of-Disputes-Relating-to-the-Environment-and_or-Natural-Resources1.pdf.

¹⁰ Indus Waters Kishenganga Arbitration case, Permanent Court of Arbitration, (May 3, 2020, 11: 40a.m), <https://pca-cpa.org/en/cases/20/>.

¹¹ Article 4 of UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration,(May 1,2020,1:45p.m), <https://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf>.

- **Need for urgent resolutions**

Greater flexibility in procedure will ensure speedy solutions concerning climate-related disputes. ICC in this report analysed the officiousness of dispute resolution bodies¹² and which are suited for long term projects? ICC provides solutions via dispute boards where funding is subjected to Equator Principle's Disputes. PCA additionally offers greater flexibility to parties ensuring urgent resolution to the issue in concern. A case of such kind was filed under PCA Environmental Rules and shifted to PCA's Conciliation rules later and immediate relief was ensured.¹³ For issues relating to disaster management in times of climate change quick solutions must be suggested in consonance with the preservation of human rights.

- **Transparency**

Generally, public interest related issues fail to come in light because of the lack of transparency. Traditional commercial arbitration is best known for its secrecy. But the same cannot be ensured in disputes relating to climate change as these are issues involving multifaceted stakeholders. Transparency of the proceedings can be ensured by publicising the case documents and awards. UNCITRAL Rules on Transparency¹⁴ lays down a set of provisions to provide accessibility and transparency. These rules also entail certain exceptions where information on certain confidential business information need not be disclosed. These provisions must be adhered to while hearing matters related to climate change disputes.

Conclusion:

A new green economy as predicted by the UNFCCC and Paris Agreement shall involve complex legal relationships with state and private players. To ease the tension between them and to arrive at conceivable solutions, alternative dispute resolution is the most plausible solution. Institutions like PCA and ICC are already dealing in matters relating to energy, infrastructure etc and making

¹² Supra note 2.

¹³ PCA, Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment, (May 2, 2020, 3:30 p.m) https://pca-cpa.org/wpcontent/uploads/sites/175/2016/01/Optional-Rules-for-Conciliation-of-Disputes-Relating-to-the-Environment-and_orNatural-Resources.pdf.

¹⁴ Supra Note 11.

the application of Alternative Dispute Resolution a reality. Thus coupled with a few adaptability changes in the traditional dispute resolution method, cost-effective and time-bound solutions one can envisage a greener and cleaner earth. Alternate dispute resolution is the most effective dispute resolution mechanism for climate change-related issues and turning it into reality will save the future generation from the plague of a climate war.



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