

Dispute Resolution Mechanism in India's Renewable Energy Sector

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Abstract

There has been a tectonic shift in the energy sector of India from relying majorly on unconventional sources of energy like coal and oil to increased investment in the renewable form of energy and its major goal is by 2030, around half of India's energy security to rely solely on renewable energy, all due to United Nation' 2030 Agenda of sustainable development ["UN' 2030 agenda"] and the increasing pressure on the world's energy security due to the Russia- Ukraine war.

Thus, there has been huge investment in Solar and Wind Photovoltaic ["PV"] as a result there have been various new technologies, private players, and Special Purpose Vehicle ["SPV"] entering into all forms of contract at every stage of the development procedure in the greenfield advancement, and thus the number of disputes arising in the sector are more than ever. In September 2019, the Ministry of New and Renewable Energy ["MNRE"] released a blueprint for setting up of a Dispute Resolution Committee ["DRC "] to settle any unforeseeable disputes that may arise at any stage of the production to distribution of renewable energy in the country.

In this paper, I have summarized how India became the center of foreign investment in the energy sector, why is arbitration the best way to settle disputes arising in the renewable energy sector, the current guidelines set by MNRE on the same, and how far are they at pace with the current international guidelines.

Keywords: Renewable energy, MNRE, Arbitration, DRC.

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Introduction

India has always had a diverse energy supply involving coal, oil, gas solar, wind, etc., but the major power suppliers in the Indian energy market has always been coal and oil, making the fossil fuel industry comprise over 70% of the total energy supply in the country.¹ In the past few years, the level of global warming and climate change worldwide has increased at an alarming rate, and the average rate of increase in temperature has been twice as fast as 0.32 °F per decade since 1981.²

The Paris Convention of 2015, the United Nations Framework Convention on Climate Change [“UNFCCC”] came into force in 1944 to eradicate and stabilize the impacts of greenhouse gases [“GHGs”] and carbon dioxides [“CO₂”] in the environment along with the Kyoto Protocol with basically operationalizes UNFCCC.³ In 2012, the Doha Agreement was further implemented for the second commitment period in the Kyoto Protocol. The global sustainable development goals [“SDGs”] adopted in 2015 through the UNs’ 2030 agenda clearly lays down the need for increasing the reliability of the renewable sector as a form of energy in its goal number 6,7,12, and 13.⁴ The European Union [“EU”] has also incorporated European Green Deal to combat climate change by planning on making the EU to have net zero emissions of GHGs, making it carbon-free by 2050.⁵ The Intergovernmental Panel on Climate Change [“IPCC”] has further elaborated on the need of relying on renewable sources of energy.⁶ Along with that, India is also party to Bilateral Investment Treaties which words in adherence with the other agreements.

Another important reason for the sudden shift towards the reliability of the renewable energy sector is the Russia-Ukrainian war which has shattered the whole energy market in the world. The war has accelerated the process of the energy transition by giving it a more economical reason for the urgent shift in the global energy market due to the sudden increase in the oil and gas prices due to the 2022 invasion.⁷ Since Russia is a top supplier of energy in the world, shift to a conventional source of energy suddenly and increased investment in the area

¹ International Trade Administration,

<https://www.trade.gov/country-commercial-guides/indiaenergy#:~:text=The%20Indian%20power%20sector%20uses,large%20and%20small%20hydro%20plants.,> Accessed on June 26th, 2023 [10:30].

² Climate.gov, [https://www.climate.gov/news-features/understanding-climate/climate-change-global-temperature#:~:text=According%20to%20NOAA's%202021%20Annual,0.18%20%C2%B0C\)%20per%20decade.,](https://www.climate.gov/news-features/understanding-climate/climate-change-global-temperature#:~:text=According%20to%20NOAA's%202021%20Annual,0.18%20%C2%B0C)%20per%20decade.,) Accessed on June 26th, 2023 [11:11].

³ United Nations Climate Change, https://unfccc.int/kyoto_protocol, Assessed on June 26th, 2023 [11:35].

⁴ UNDP, https://www.undp.org/sustainable-development-goals?gclid=Cj0KCQjwy9-kBhCHARIsAHpBjHgV8q4IZ0mX_Bckom-gXIZSEZVqcMRx1kWH6myv7_pk3VZfrBbvcp8aAgllEALw_wcB, Assessed on June 26th, 2023 [11:56].

⁵ A European Green Deal, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en, , Assessed on June 26th, 2023 [12:03].

⁶ IPCC, <https://www.ipcc.ch/report/renewable-energy-sources-and-climate-change-mitigation/>, , Assessed on June 26th, 2023 [12:33].

⁷ Jeff Tollefson, What the war in Ukraine means for energy, climate and food, Nature, (Assessed on June 26th, 2023, 13:52), <https://www.nature.com/articles/d41586-022-00969-9>.

is the only useful way to provide a balance in the world economy and increased energy need globally and as a result, almost all the states are enormously investing in the renewable sector.

The New Economic Policy in India was introduced in 1991 which brought with it three main concepts: Liberalisation, Privatisation, and Globalisation [“LPG”].⁸ Ever since the concept of LPG has emerged in the country, India has become a center of foreign investment, with private players entering the field, the emergence of new technologies, placing India at a global stand. India was facing coal shortages in the country in 2021 which led to a high increase in the price of power exchanges⁹ which made India realize that coal is not a reliable source of energy due to its uneven distribution and it was high time to shift towards a more reliable source of energy.¹⁰

At the 26th session of the Conference of the Parties [“COP26”], India presented a *Panchamrit* target to combat climate change in the country. India targets 500GW of wholly renewable supplied energy capacity by 2030, thus, 50% of the energy security in India to be supplied wholly through wind, solar, biomass, and other forms of renewable energy. India also aims reduction in carbon emissions by one billion tonnes by 2030, reduction in carbon intensity by 45%, and reach the target of net zero carbon emission by 2070.¹¹

This target can only be achieved through the increase in reliability towards the renewable energy sector. Currently, India stands at fourth rank globally in the Renewable Energy Installed Capacity.¹² Ever since India has announced its target in the COP- 26, the reliability of renewable sources needed to increase so a large number of tenders were invited in the area and both Public Sector Undertakings [“PSUs”] like Solar Energy Corporation of India [“SECI”], National Thermal Power Corporation [“NTPC”], National Hydro Electric Power Corporation Private Limited [“NHPC”], Satluj Jal Vidyut Nigam Ltd. [“SJVN”] or any PSU designated by MNRE and the private players like Tata Power Solar Systems Ltd., Adani Power, Jindal Power etc., and tenders were awarded to them.

The renewable energy hubs in India comprise majorly coastal states like Gujrat, Rajasthan, Tamil Nadu, Karnataka, Telangana, and Andhra Pradesh.¹³ Ever since the LPG schemes in the country, it has become an attractive place for investment looking at the investor’s perspective. The amount of investment in renewable energy in India reached US\$ 14.5 billion

⁸ Sambit Rath, All about liberalization, privatization, and globalization, iPleaders, Assessed on June 26th, 2023 [18:55], <https://blog.iplayers.in/all-about-liberalization-privatization-and-globalization/>.

⁹ The Economic Times, <https://economictimes.indiatimes.com/industry/renewables/view-private-sector-driving-renewable-energy-wave-in-india/articleshow/90724802.cms?from=mdr>, Assessed on June 27th, 2023 [10:10].

¹⁰ Balcerzak, F. (2023). "Chapter 1 Introduction". In *Renewable Energy Arbitration – Quo Vadis?*. Leiden, The Netherlands: Brill | Nijhoff. doi: https://doi.org/10.1163/9789004509344_002.

¹¹ MNRE, <https://pib.gov.in/PressReleasePage.aspx?PRID=1795071#:~:text=Reach%20500GWNNon%2Dfossil%20energy%20capacity,by%202030%2C%20over%202005%20levels.>, Assessed on June 26th, 2023 [12:47].

¹² Press Information Bureau, <https://pib.gov.in/PressReleaseDetail.aspx?PRID=1885147>, Assessed on June 27th, 2023 [09:38].

¹³ India Brand Equity Foundation, <https://www.ibef.org/industry/renewable-energy/showcase>, Assessed on June 27th, 2023 [10:27].

in 2022 which was record-breaking.¹⁴ With this advancement in the energy sector of the country, there comes an increase in the number of disputes within the renewable energy sector.

Disputes Arising from the Energy Transition

The sudden shift in the energy market due to the fossil fuel phase out has resulted in numerous new Greenfield investments and thus there has been an integration of renewable energy in the existing projects. As per reports, the number of disputes in the energy sector will continue to increase in the next five years.¹⁵ Just like conventional source of energy, renewable projects too are long term, capital intensive, and complicated ventures.¹⁶ There is an involvement of multiple parties in the sector at multiple locations, and disputes may arise at any stage at any level in the process of power generation from the green sector.

SPV enters into various separate contract from start to end with various stakeholders in order to obtain permits, licences, and subsidies to develop, operate, and decommission the task of production to supply of energy. Legal relationships are involved at every single level as national regulators, administrative parties, contractors and transportation units are involved in order to obtain the required permissions and carry on the procedure established by law. Additionally various international investors, financial institutions, construction, and engineering companies are involved and play a major role in their field.¹⁷ Environmental legal framework in the country also plays a pivotal role in categorising disputes occurring in the sector.

The most prominent kinds of disputes which may arise during development and supply phase is the delay during the construction phase, resulting in delay in delivering power and one of the reasons for this delay is the procedure to obtain the required permits. There is a huge pressure upon the energy producing industries to come up with new planning, technologies, Joint Ventures ["JV"], and grid frequency. One of the disputes lies with the inherent risks of testing new technologies, and thus, with new technology, comes the risk of Intellectual Property Rights ["IPR"] related issues as new technologies and machines will come into picture, which needs to be protected from being copied by other companies. IPR disputes might arise on patented technologies, design related specifications, software, trademarks etc.¹⁸

¹⁴ India Brand Equity Foundation, [https://www.ibef.org/industry/renewable-energy#:~:text=Solar%20Parks%20in%20Pavagada%20\(2,is%20under%20installation%20in%20Gujarat.,](https://www.ibef.org/industry/renewable-energy#:~:text=Solar%20Parks%20in%20Pavagada%20(2,is%20under%20installation%20in%20Gujarat.,) Assessed on June 27th, 2023 [11:05].

¹⁵ Clea Bigelow-Nuttall and Mark Harris, Disputes arising from the energy transition will be many and varied, Pinsent Mason, (Assessed on June 27th, 2023, 17:13), <https://www.pinsentmasons.com/out-law/analysis/disputes-energy-transition-many-varied>.

¹⁶ Marily Paralika, Arbitration: An answer to disputes in the renewable energy sector?, Fieldfisher, (Assessed on June 27th, 2023, 17:20), <https://www.fieldfisher.com/en/insights/arbitration-an-answer-to-disputes-in-the-renewable>.

¹⁷ Marily Paralika, Design and build: Tackling energy construction disputes efficiently, ?, Fieldfisher, (Assessed on June 27th, 2023, 17:53), <https://www.fieldfisher.com/en/insights/design-and-build-tackling-energy-construction-disp>.

¹⁸ WIPO, <https://www.wipo.int/amc/en/center/specific-sectors/energy/>, Assessed on June 28th, 2023, [14:16].

Connectivity to the national grid for the power plants causes a ton loads disputes in the energy sector, and at almost all the phases including construction and operation phases, obtaining necessary permits causes great difficulty in the smooth operation of the power plant.¹⁹ Further, these kinds of projects are exposed to high profile scrutiny and thus, there is a high involvement of political parties, meaning investor interest is not always prioritized.

The changing legal environment means an increased operational cost and the renewable industry is often unpredictable and most of the times, the amount of energy generated is determined by the kind of weather, geographical events, and environmental conditions. The examples of such events would be unexpected ground conditions, material shortages, which mostly happens in the offshore wind projects. Sometimes, bad weather would result in delay in production of electricity and therefore there is a delay in the supply of electricity which in turn, causes disputes especially since the issue of global warming, the change in environment is extremely unpredictable and powerful. Further, there are various international investment disputes which are occurring since past decade.

Additionally there are various investor-state disputes about the withdrawal or curtailment of subsidies, and the national schemes related to the new arena is often found to be more favourable to the international investors.²⁰ Since energy generation projects are long term projects, there is a huge competition within the energy market, which gives birth to various additional disputes. Due to its long term nature, there might be chance for the change in the government, meaning new schemes, and new contracts with new governmental agencies.²¹ Other than that, disputes might also arise from safety implications, project's host jurisdiction, and technical complexities. Ever since the Russia- Ukraine war, the prices of energy has been fluctuating, and the renewable sector demands huge investment, and sometimes, the amount of investment might not match the results which is another cause for disputes. Various major countries like US, China, EU etc. are investing vigorously in the renewable sector²², and India has also stepped to keep up with the pace.

Arbitration as a Mechanism for Dispute Resolution in the Renewable Energy Sector

Due to frequent and repetitive disputes arising in the renewable energy sector, the number of cases arising in the area is many, leaving the parties to choose from various available options at hand like litigation, arbitration, investment treaty arbitration, and expert determination.²³ Various factors like the nature of parties involved, the complexity of the project, stage of the

¹⁹ Aceris Law LLC, <https://www.acerislaw.com/renewable-energy-arbitration/>, Assessed on June 28th, 2023, [14:47].

²⁰ Cameron, Peter D. "5 RENEWABLE ENERGY DISPUTES". *Delivering Energy Law and Policy in the EU and the US: A Reader*, Edinburgh: Edinburgh University Press, 2016, pp. 23-28. <https://doi.org/10.1515/9780748696802-009>.

²¹ Tariq Khan, *The Growing Need for Arbitration in Energy Disputes*, 2023 SCC OnLine Blog Exp 3, (Assessed on June 28th, 2023, 15:33), <https://www.sconline.com/blog/post/2023/01/14/the-growing-need-for-arbitration-in-energy-disputes/>.

²² Hajdukiewicz, A.; Pera, B. *International Trade Disputes over Renewable Energy—the Case of the Solar Photovoltaic Sector*. *Energies* 2020, 13, 500. <https://doi.org/10.3390/en13020500>.

²³ LexisNexis, <https://www.lexisnexis.co.uk/legal/news/resolving-disputes-on-renewable-energy-projects-what-tools-are-available-how-do-you-choose>, Assessed on June 28th, 2023, [16:29].

project, its location, and confidentiality considerations.²⁴ India is predicted to lead the renewable energy market and a large number of solar and wind PV are expected to grow and this installed PV would soon surpass coal and natural gas by 2024.²⁵ This has called for a need to involve and refer most of the cases arising due to the energy sector in the hands of arbitral proceedings.

Arbitration in itself is the most suited process for obtaining relief in renewable energy disputes due to the involvement of a third party for an unbiased ruling which is favorable to both sides, it is relatively faster than litigation, reliable, and somehow cost-effective. The most attractive feature of arbitration is the protection of goodwill and reputation of the parties due to its confidential nature. Most of the cases indulged here are high profile and are prone to attract media attention, political agendas, and NGO involvement, in case of environmental issues. Most of the parties to the dispute are usually from different jurisdictions and arbitration as a mode of dispute resolution allows the party to decide among themselves, a place for arbitration, convenient to both parties, thus allowing them to choose a seat for arbitration and that place can be both in India as well as outside India.²⁶

Arbitration is considered as a simpler process if we compare it with the traditional method of litigation because it allows the parties to decide what laws will be applicable to them. Further, the Arbitral Awards passed are final and binding on the parties, and are irreversible.²⁷ It is a known fact today that the Indian courts are overburdened with new cases coming up every day and the older cases take years to reach to a result.²⁸

The energy field is a complicated field and it requires integrated, specialized knowledge of technologies, techniques, and legal framework, and only a few judges in India are able to provide that. However, arbitration allows the parties to choose an expert as their arbitrator thus, providing valuable knowledge and an informed decision to provide the Arbitral Award which is ultimately favorable to both parties. Arbitration allows the industry, businesses, regulators, and consumers to take more control.

The government of India in 2021, since the dawn of Covid-19 has allowed online filing and hearing of cases, the concept of Online Dispute Resolution [“ODR”] and the National Institution for Transforming India [“NITI Aayog”] also constituted a committee for mainstreaming of ODR in India.²⁹ This is further beneficial for the parties seeking relief at the comfort of their homes. It is not wrong to say that the future of renewables lies in arbitration itself.³⁰

²⁴ Freshfields Bruckhaus Deringer, <https://sustainability.freshfields.com/post/102hn4t/resolving-disputes-on-renewable-energy-projects-what-tools-are-available-and-ho>, Assessed on June 28th, 2023, [17:42].

²⁵ IEA, <https://www.iea.org/reports/renewables-2020?mode=overview>, Assessed on June 28th, 2023, [16:40].

²⁶ Clyde and Co., <https://www.clydeco.com/en/insights/2021/10/dispute-resolution-power-renewable-energy>, Assessed on June 28th, 2023, [17:23].

²⁷ Arbitration and Conciliation Act, 1996, S 35, No. 26, Acts of Parliament, 1949 (India).

²⁸ Devina Poonia, Nature of the disputes that can be solved through arbitration, iPleaders, (Assessed on June 29th, 2023, 13:37), <https://blog.iplayers.in/nature-disputes-can-solved-arbitration/>.

²⁹ Press Information Bureau, <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1777674>, Assessed on June 29th, 2023, [13:49].

International Arbitral Awards or Foreign Awards are also enforceable in India same as a court order.³¹ India is a party to New York Convention and Geneva Convention, so any Arbitral Award passed in any of the member countries of the said conventions is also enforceable in India.

Current Guidelines Regarding Arbitration of Renewable Sector Disputes in India

India imports most of its energy supplies from naturally enriched countries like Russia, and thus, disputes occur both domestically and internationally. The Draft National Energy Policy, 2017 has aimed towards universal electrification and thus, a number of private players were included in the energy market of India, thanks to the policy.³² In India, the Central Government exercises control over the Natural resources of the country as per Article 297 of the Constitution³³.

The Jawaharlal Nehru National Solar Mission [“National Solar Mission”] was launched in 2010 in three phases³⁴, further, in the year 2015, India along with France launched the National Solar Alliance at the COP21 where International Solar Alliance aimed to reduce the cost of production of solar energy.³⁵ In India, the electricity sector is governed under the Electricity Act, 2003, and the Act clearly provides for the referral of disputes to Arbitration.³⁶ The Supreme Court, in the case of Gujarat Urja Vikas Nigam v. Essar Power Ltd.³⁷, clarified the jurisdiction of the Electricity Act, 2003 and the Arbitration and Conciliation Act, 1996 [“Arbitration Act, 1996”], as to who will override who. It was held that except for Section 11 of the Arbitration Act, 1996³⁸, all other provisions will be applicable to Section 86(1)(f) of the Electricity Act, 2003. The Ministry of Power has also released the Draft Electricity (Rights of Consumers) Amendment Rules, 2023, which has proposed multiple Distribution Companies [“DISCOMs”] in the same area of supply.

India has its Ministry of New and Renewable Energy to take care of the renewable energy sector and reduce India’s reliance on fossil fuels.³⁹ Further, the Indian Renewable Energy Development Agency [“IREDA”] regulates the financing along with the promotion of friendly competition within the energy sector.⁴⁰ The government of India has also established

³⁰ Ioana Knoll-Tudor, 2023 PAW Recap – Day 3: Arbitrating Renewable Energy Disputes in the CEE Region, Kluwer Arbitration Blog, Assessed on June 29th, 2023 (14:31)

³¹ Arbitration and Conciliation Act, 1996, S 49, No. 26, Acts of Parliament, 1949 (India).

³² Niti Aayog, https://www.niti.gov.in/sites/default/files/2022-12/NEP-ID_27.06.2017.pdf.pdf, Assessed on June 29th, 2023 (17:07).

³³ INDIA CONST. art. 297

³⁴ IEA, <https://www.iea.org/policies/4916-jawaharlal-nehru-national-solar-mission-phase-i-ii-and-iii>, Assessed on June 29th, 2023 (17:15).

³⁵ MNRE, <https://mnre.gov.in/isa/#:~:text=Established%20by%20Prime%20Minister%20Narendra,and%20development%2C%20and%20capacity%20building.>, Assessed on June 29th, 2023 (17:19).

³⁶ The Electricity Act, 2003, S 86(1)(f), No. 36, Acts of Parliament, 1949 (India).

³⁷ (2008) 4 SCC 755

³⁸ Arbitration and Conciliation Act, 1996, S 11, No. 26, Acts of Parliament, 1949 (India).

³⁹ MNRE, <https://mnre.gov.in/the-ministry/what-does-the-ministry-do/#:~:text=The%20Ministry%20of%20New%20and,energy%20requirements%20of%20the%20country.>, Assessed on July 1st, 2023 (10:00).

⁴⁰ IREDA, <https://www.ireda.in/ireda-functions-and-duties>, Assessed on July 1st, 2023 (10:07).

SECI which aims to build 'Green India' and promote the development of solar power plants in the country.⁴¹

The aim which India has set in the COP26 asks for around 533 billion \$ worth of investment solely for the renewable power sector.⁴² Renewable power in India is governed through the Energy Conservation Act, 2001, which provides for the efficient use of energy. It provides for the establishment of Bureau of Energy Efficiency ["BEE"].⁴³ After COP26, the government of India passed the Energy Conservation (Amendment) Act, 2022, in order to further facilitate India in achieving *Panchamrit* and the development of the carbon market of the country.⁴⁴ The Government of India, in 2022, announced the Green Hydrogen Policy to further show its commitment of combatting climate change.⁴⁵ The Arbitration and Conciliation (Amendment) Act, 2015, introduced the fast-track arbitration proceedings and provided that Arbitral Award needs to be passed within twelve months from the initiation of Arbitral proceedings.⁴⁶ This made arbitration even more popular as a method for dispute resolution in almost all sectors.

Most of the disputes occurring in the renewable sector will be resolved through Investment Arbitration which aims to resolve the disputes occurring between foreign investors and the host states.⁴⁷ This means that Bilateral Investment Treaties ["BIT's"], Free Trade Agreements ["FTA's"] and multilateral agreements, like, The Energy Charter Treaty ["ECT"] will be applicable here.⁴⁸

ECT came into force in 1998, and provides for the regulation of Dispute Resolution in Part V of the treaty.⁴⁹ ECT provides for the settlement of disputes between investors and contracting parties⁵⁰, and the settlement of disputes between the contracting parties.⁵¹ Afghanistan and

⁴¹ SECI, <https://www.seci.co.in/about/vision-and-mission>, Assessed on July 1st, 2023 (10:10).

⁴² Kowtham Raj VS and Satwik Mishra, Covid-19: Will arbitration help India navigate legal wildfire expected in energy sector?, Live Mint, (Assessed on July 1st, 2023, 10:17), <https://www.livemint.com/industry/energy/covid-19-will-arbitration-help-india-navigate-legal-wildfire-expected-in-energy-sector/amp-11587364501945.html>.

⁴³ Energy Conservation Act, 2001, S 3, No. 52, Acts of Parliament, 1949 (India).

⁴⁴ Surabhi Khattar, Ashutosh Singh, and CAM Disputes Team, The Energy Conservation (Amendment) Act, 2022: Key Highlights, Cyril Amarchand Mangaldas Blogs, (Assessed on July 1st, 2023, 10:33), <https://corporate.cyrilamarchandblogs.com/2023/01/the-energy-conservation-amendment-act-2022-key-highlights/#:~:text=The%20Amendment%20Act%20introduces%20new,be%20notified%20in%20the%20future.>

⁴⁵ Ministry of Power, https://powermin.gov.in/sites/default/files/Green_Hydrogen_Policy.pdf, Assessed on July 1st, 2023 (11:03).

⁴⁶ Arbitration and Conciliation (Amendment) Act, 2015, S 29B, No. 3, Acts of Parliament, 1949 (India).

⁴⁷ International Arbitration Information by Aceris Law LLC, <https://www.international-arbitration-attorney.com/investment-arbitration/>, Assessed on July 1st, 2023 (10:44).

⁴⁸ Yazad Udwardia and Abeer Tiwari, india's Tryst with Energy Investment Arbitration and the Contemporary World, Indian Journal of Projects, Infrastructure and Energy Law, (Assessed on July 1st, 2023, 10:50), <https://ijpiel.com/index.php/2022/04/04/indias-tryst-with-energy-investment-arbitration-and-the-contemporary-world/>.

⁴⁹ Kaj Hobér, Investment Arbitration and the Energy Charter Treaty, Journal of International Dispute Settlement, Volume 1, Issue 1, February 2010, Pages 153–190, <https://doi.org/10.1093/jnlids/idp003>.

⁵⁰ ECT, Art 26.

⁵¹ ECT, Art 27.

Turkmenistan are registered members of ECT, meaning Turkmenistan- Afghanistan-Pakistan-India [“TAPI”] pipeline is being registered as an ECT contracting party entity.⁵²

On 20th September, 2019, MNRE issued an order for a Dispute Resolution Mechanism [“DRM”] for the resolution of unforeseeable disputes between wind and solar developers and SECI and NTPC, wherein MNRE proposed setting up of DRC. In the order, MNRE also proposed the blueprint of DRC, and stated that DRC will be a three-member committee that will be appointed with the due permission of MNRE, and after the application is brought before it, the DRC shall hold hearings on the subject and submit its recommendations to MNRE not later than 21 days of such reference.⁵³

However, only after two months after MNRE released the blueprint, it released an amended version of the guidelines for DRC. It proposed to set up DRC which expands its scope to resolve the issues arising both out of contractual and non-contractual agreements.⁵⁴ The committee was formed to majorly deal with the cases related to time extensions and other common issues which arise during the normal day-to-day functioning of the power plants.

In 2020, the MNRE released a set of clarifications for its DRM, the MNRE through this order clarified that if the number of days of time extension allowed by the government is less than the number of days of time extension claimed by the solar or wind developer, then the refund will be in proportion to the number of days allowed as per the total number of days claimed by the developer. Before this, MNRE stated that the fee payable would be 5% of the performance bank guarantee in case of an extension of time dispute. A minimum fee of \$1,406.72 would be payable even if 5% of the guarantee was less than \$1,406. Later on, the MNRE clarified that the amount could, in no case, exceed \$140,672.⁵⁵

On 3rd March, 2022, MNRE issued the procedural guidelines for DRC upon unforeseeable disputes. On 7th June, 2023, wherein MNRE revised the guidelines for setting up DRC, and it clearly stated that the revised guidelines would supersede all the previous orders regarding DRC. DRC is set up for resolving the unforeseen disputes that may arise in the implementation of contractual agreements and also for dealing with issues that are beyond the scope of Contractual Agreements between Renewable Energy Power Developers/ EPC Contractors and SECI/ NTPC/NHPC/ SJVN/ any other Renewable Energy Implementing Agency [“REIA”], which will be designated by MNRE.⁵⁶

⁵² Jamal, Fazil, Energy Charter Treaty: A View from India (October 20, 2020). *International Journal of Law, Management and Humanities*, Volume 5, Issue 4 (2022), Pages: 1616 - 1630. DOI: <https://doi.org/10.1000/IJLMH.113503>, Available at SSRN: <https://ssrn.com/abstract=4195188>.

⁵³ MNRE, <https://mnre.gov.in/img/documents/uploads/7dc32f804c2f4d1aaac36687aea8bc19.pdf>, Assessed on July 1st, 2023 (13:51).

⁵⁴ Anjana Parikh, MNRE Amends Guidelines for Dispute Resolution Mechanism for Wind and Solar Developers, Mercom, (Assessed on July 1st, 2023, 14:02), <https://www.mercomindia.com/mnre-amends-guidelines-wind-solar-developers>.

⁵⁵ Rakesh Ranjan, MNRE’s Clarifications on the Dispute Resolution Mechanism for Solar and Wind Developers, Mercom, (Assessed on July 1st, 2023, 14:29), <https://www.mercomindia.com/mnre-clarifications-dispute-resolution-mechanism>.

⁵⁶ MNRE, https://mnre.gov.in/img/documents/uploads/file_f-1686128097720.pdf, Assessed on July 1st, 2023 (15:20).

As per the new order, In case of all disputes, whether covered by Power Purchase Agreement [“PPA”] / EPC Contract/ Agreement or not, the application should be first made to REIA, and the REIA will pass a speaking order on the same. REIA would be bound to give its decision within 21 days of receiving the application. The order further said that all the meetings of the DRC would be held on the premises of MNRE, while the transportation of DRC members would be taken care of by SECI.⁵⁷

Conclusion

The renewable energy sector has been growing at a hectic pace, and the whole sector is developing every day, which means new ideas and innovations are coming up every single day. There has been a huge pressure on India to keep up with other developed countries and deliver the projected renewable energy in the stipulated time period.

There have been a number of emerging cases in the renewable energy sector and these disputes must be resolved fast and in an effective manner which is the only way, the target which India has set at the COP 26 could be achieved. However, there is somehow an excess of delegation of power when we look at the current guidelines formulated by MNRE. The current procedure suggested by MNRE, which sought to establish DRC in order to save time of the court, complicates things more, which will be even more time-consuming. The final decision of DRM must be used to gain investors’ confidence, and with excessive delegation, the whole point of confidentiality and protection of goodwill of the parties will be defeated, which is the backbone of Arbitration.

Further, ever since, the TAPI consortium became a part of ECT, it has become important for India and has always been to comply with the international guidelines set by various BIT, unilateral, and multilateral treaties. However, the current scenario of MNRE orders are not up to mark as it poses a lot of burden on the parties to understand when to consult whom whereas the international guidelines are simple and proper authority is given.

Alongside, the kinds of disputes specified in the DRC blueprint, only expand to the normal day-to-day disputes, and in cases of any severe dispute, the parties would ultimately revert to litigation, which again, defeats the whole purpose of having a separate committee set up for promoting arbitration as a method of dispute resolution in the renewable energy sector.

⁵⁷ Supra Note