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INTERNATIONAL RENEWABLE ENERGY INVESTMENT ARBITRATION: A GLOBAL PERSPECTIVE

1. SAMANVI NARANG

TRIP FELLOW, JGLS, SONIPAT

2. SUNIDHI SETIA

TRIP FELLOW, JGLS, SONIPAT

3. SUHAIB SALMAN
Creative Head, Lawctopus

4. DARSHNA GUPTA

Academic Associate. Mahindra University

Abstract

Situating this research work in the global context would require acknowledging the need of an arbitration agreement between the host country and the foreign investors. To say that arbitration clauses haven't been able to protect the foreign investments cannot simply any longer be measured by a billion-dollar arbitral award. While most of the literature available in this context speaks about the simple quantification of success in terms of being able to refute a billion-dollar award, this research work is based on the premise that there is a need to move beyond the binary dependants. While upholding this view, we are at first acknowledging that there are other stakes involved which subsequently influence the investment decisions and on the second instance, ignoring that the primary purpose of litigants before the adjudicating authority is to reduce or nullify the monetary consequences claimed.

While discussion of global energy governance has gone up to contend that settlement mechanism under treaty frameworks can be and are being manipulated by the fossil fuel industry to slower the transitional investment in the clean energy projects. Drawing references from the models of governance, global experience on ISDS and arbitration frameworks, we hereby contend that the governance models based on the principle of self-discipline is a regulatory misnomer to simply create an imbalance between the interests of the stakeholders.

Renewable Energy Investment: The helicopter view

The saga of traditional energy resources primarily struggled between the nationalization and sovereignty claims. The transition from fossil fuels to alternative sources of energy generation was significantly pushed by the need of achieving sustainable development goals and climate change concerns. The renewable energy technologies started witnessing a rise in the initial years of second decade of this century. Years after years the countries moved their positions up in the table to shape the renewable energy investment scenario as it stands today. While we are reading this, more than 100 renewable projects must have been signed. The peculiar characteristic of the current renewable energy investment figures is the interplay of a variety of social, economic, cultural and political factors. As a consequence, states are faced with important decisions to make in the context of political, technological and social uncertainty about the future of energy and those decisions will have profound effects on the development of energy sector in the coming decades.[1]

The past decade saw a significantly increased level of investment, including foreign investment as a result of international initiatives on the development of alternative energy sources.[2] Recent years have also seen a dramatic increase in the amount of electricity generated from renewable resources, principally wind and solar.[3] The recent years have seen investments in not just setting up new generation equipments but also on ensuring that these technologies at the same time are efficient. Investment in renewable energy and energy efficiency would absorb the bulk of total energy investments.[4] The role of international organizations and initiatives to globalize and glocalize the renewable energy regime cannot hence be denied.

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[1] World Energy Scenario 2016: Executive Summary, WORLD ENERGY COUNCIL (2016).
[2] K. Talus, Introduction: Renewable Energy Disputes in Europe and Beyond: An Overview of Current Cases', 12 TRANSNAT'L DISP. MGMT. (2015).
[3] GORDEN E KAISER, *Arbitrations involving Renewable Energy*, GUIDE TO ENERGY ARBITRATIONS (3rd Edn., 2018).
[4] https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2018/Apr/IRENA_Report_GET_2018.pdf

Statistical Overview

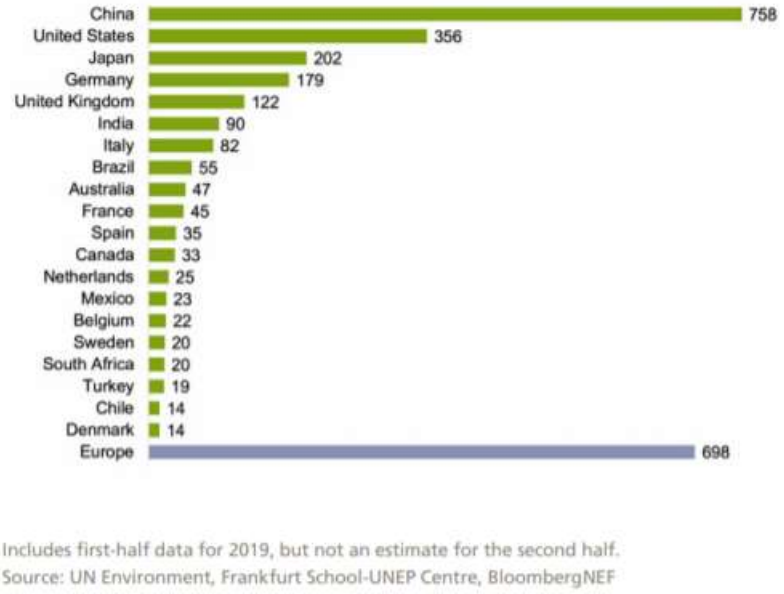


Fig. 1 Renewable Energy Capacity Investment from 2010 to 2019

The figure above shows the amount invested in renewable energy capacity in the top 20 markets up to the end of the first half of 2019.[5] The countries together have spent around US$14 Billion on renewable sources excluding8large hydro power projects. The runaway leader in the 2010s has been China, with investment of $758 billion, nearly 31% of the global total, with the U.S. second on $356 billion, or 14%.

In the top 20 countries hereinabove, eight are European countries. Headed by Germany with $179 billion and the U.K. with $122 billion, Europe's investment as a whole accounts for more than US$ 698 Billion calculated from 2010, i.e., 28% of the global total. Some European nations have experienced booms and busts in capacity investment during the decade – Germany and Italy. Spain stands at 11th in this list and has spent more than US$35 Billion on the renewable energy power generation.

The top 20 includes a7number of developing countries, dominating the Asian sub-continent; India8has spent more than $90 billion. However, in most cases, developing economies5have only broken6into their6stride on renewable8investment8since solar and7wind costs came3down to competitive4levels in mid-decade.

SAARC: Regional Overview

South Asia aims to increase its Capacity two-fold to meet the already demand and peak deficit issues and over it cater to the constantly increasing demand for electricity in the coming years. (Fig. 2)

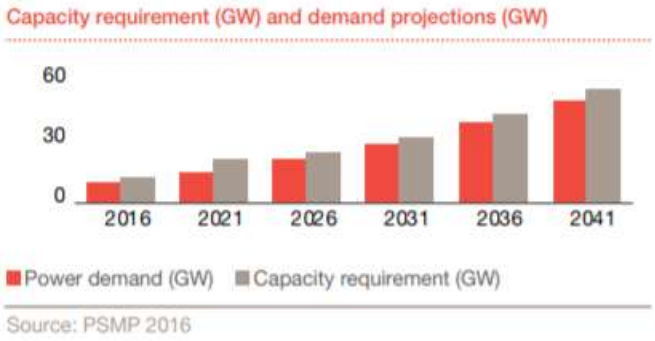


Fig. 2 Capacity and Demand

In South Asia, the countries have found power pooling as a feasible and futuristic solution to corroborate a regional resourceful development. South Asia is endowed with hydropower potential of 294,330 MW; coal reserves of 108,961 million tons; large renewable energy resources but relatively small reserve of 95 TCF of natural gas.[6]

[5] This data excludes the second half of 2019.

[6] REVIEW OF ELECTRICITY LAWS AND REGULATION OF SAARC MEMBER STATES *Available at* http://www.saarcenergy.org/wp-content/uploads/2018/05/2013-Review-of-Electricity-Laws-and-Regulations.pdf [Last accessed 13/05/2020 at 10.49 IST]

It is pertinent to note that the primary sources of energy were coal, oil and gas. Though these sources are in ample abundance, it shall always be relatively less, owing to the continuing increase in the population.

Renewable power grew by 17%, higher than the 10-year average and the largest increment on record (69 mtoe).[7] In the South Asian region, the renewable energy sources viz. solar energy, wind energy, hydropower, bio-fuel, nuclear energy are potentially aimed at. While abundance of these resources is not in question, potent infrastructure to support sustainable utilization of these resources is required.

Overview of India's Renewable Energy sector

India climbed up from fourth to the third most attractive renewable energy market after China and USA surpassing France in 2019.[8] The Indian renewable energy is ranked fourth in wind power[9], fifth in solar power and7sixth in renewable power7installed capacity as of 2019[10]. Installed renewable power generation capacity has increased at a fast pace4over the past few years, posting a CAGR of 17.28 per cent5between FY14–19. Renewable energy sources generated power increased from 101.84 billion units in 2018 to 126.76 billion units in 2019. The renewable energy will account 55 per cent of the total installed power capacity by 2030, i.e. renewable energy capacity of 500 GW by 2030.[11]

Although, the experts find the targets of 2022 too ambitious, the steady upward trends in the power generation graphs from the renewable energy sources indicate sanguinity in the Indian renewable energy sector. As on January 31, 2020, the installed renewable energy capacity is 86.32 GW, of which solar and wind comprises 34.03 GW and 37.60 GW respectively.[12] Biomass and small hydro power constitute 9.86 GW and 4.67 GW, respectively.[13] Wind power projects with capacity of 15,100 MW have been issued, out of which4projects of 12,162.50 MW capacity have been already allotted.[14] The power generation from wind, solar, biomass reached 54.39 Billion Units, 34.79 Billion Units and 2.07 Billion Units, respectively, by the end of third quarter of 2019.[15]

The Ministry of New and Renewable Energy (MNRE), Government of India, has formulated an action plan to achieve a total capacity of 60 GW from hydro power and 175 GW from other RES by March, 2022, which includes 100 GW of Solar power, 60 GW from wind power, 10 GW from biomass power and 5 GW from small hydro power. This has been proving to be the major thrust for the sector in India as the market players have enough incentives to move to clean source. Government of India is aiming to achieve 225 GW of renewable energy capacity by 2022, much ahead of its target of 175 GW as per the Paris Agreement.[16] Under9Union Budget 2019-20, Rs 4,272.16 Crores (US$ 611.26 Million) has5been allocated for8grid-interactive renewable energy schemes5and8projects. The Government of India allocated Rs 3,004.90 crores (US$ 416.48 Million) in the budget 2019-20 for development7of solar power projects including both grid-interactive and-off-grid and decentralized categories.

Despite the budget allocations from the Union budget, India is yet to achieve more than 50 per cent of its 2022 renewable energy capacity goal. Foreign investment is thus crucial to achieve the 2022 goals. Foreign investors usually prefer to invest in a country which has signed a Bilateral Investment Treaty with the country of the investor. The BIT, thus, plays a crucial role for investors to make an investment decision. While the potential for renewable energy projects in India is known, the regulatory and legal environment which is friendly to foreign investors lacks.

From Regional to Global Integration: The not-so-smooth transition

Free trade arrangements between countries leads to the establishment of the trust required to promote the development of a regional power pool.[17] Over last 7 years, it is seen how bilateral trade in power between South Asian countries has accrued economic benefits. However, these results are not that significant. One of the reasons could be lacunas in the policy framework. While it is only lately that Government of India has released Guidelines on Cross border electricity trade, the national electricity framework has played a key role in navigation of cross-border electricity trade between primary SAARC countries India-Pakistan-Nepal-Bangladesh-Bhutan.

Borderless trade strikes a new opportunity for achieving the socio-economic objective of ensuring continuous and uninterrupted power supply. Multitude of power sources amplifies the trade prospects in the South Asian region. Primary shift from use of fossil fuels for meeting energy requirements towards renewable and cleaner sources of electricity amplifies the room to maneuver between the patterns of electricity demand and abundance of resources.

Following the western trend, the SAARC nations stepped forward to expand a regional energy cooperation arrangement wherein the resources collectively shall be utilized to not only boost the economies of the South Asian countries but also to serve greater

[7] BP STATISTICAL REVIEW OF WORLD ENERGY 2018 *Available at*https://www.bp.com/content/dam/bp/business-sites/en/global/corporate/pdfs/energy-economics/statistical-review/bp-stats-review-2018-full-report.pdf [Last accessed 13/04/2020 at 10.45 IST]
[8] 54th Issue Index Scores RECAI EY 2019. https://assets.ey.com/content/dam/ey-sites/ey-com/en_ro/news/2019/12/ey-recai-country-index-and-chart.pdf
[9] https://ourworldindata.org/renewable-energy
[10] https://www.irena.org/Statistics/View-Data-by-Topic/Capacity-and-Generation/Country-Rankings
[11] Optimal Generation Mix, Central Energy Agency http://cea.nic.in/reports/others/planning/irp/Optimal_generation_mix_report.pdf
[12] 19th Electric Power Survey
[13] *Id.* at 6
[14] As on December, 2019.
[15] *Supra* n. 9 at 12.
[16] MNRE, GOI Action Plan 2022.
[17] Musiliu O. Oseni & Michael G. Pollitt, *Institutional Arrangements for the Promotion of Regional Integration of Electricity Markets International Experience* (2017) http://documents.worldbank.org/curated/en/707091468183843171/pdf/WPS6947.pdf [Last accessed on 12/02/2019 at 18.18 IST]

public good. Subsequently, in 2014 the SAARC framework Agreement for Energy (Electricity) Cooperation **("SAARC Electricity Agreement")** was signed with a vision to create a cohesive sustainable power for South Asia.

In South Asia, the integration of grid between two countries is an essential step leading towards multilateral regional trade cooperation.[18] While India serves the common link, it is essential to appreciate that when the multilateral trade through an integrated grid infrastructure is implemented, it shall lead to not only sharing resourceful development but also shall help the countries in this region to achieve their sustainable development goals. The multilateral trade agreements in the SAARC region have promoted the intraregional trade and investment flows than before, caused the convergence of macroeconomic interdependence in the region.[19]

With the announcement of One Sun, One World, One Grid **("OSOWOG")** by PM Narendra Modi in 2018, the regional integration model stepped into the new era of global integration.

One Sun One World One Grid

Post the announcement of the vision for global interconnectedness, MnRE has called for technical and financial proposals from the firms seeking to develop and catalyze the grid infrastructure. As the author is writing, the proposals are being evaluated and institutional framework is being decided.

Following are the phases in which OSOWOG initiative is planned:

Phase I (Middle East-South Asia-South East Asia (MESASEA) interconnection): Indian Grid interconnection with Middle East, South Asia and South-East Asian grids to share solar and other renewable energy resources for meeting electricity needs including peak demand.[20]

Phase II (Solar and other Renewable Energy resources-rich regions' interconnection): MESASEA grid getting interconnected with the African power pools to share solar and other renewable energy power of the countries located in solar and renewable energy-rich areas.[21]

Phase III (Global interconnection): One Sun One World One Grid vision.

As a part of this process, SUPRABHA a Technical Assistance (TA) program to accelerate the deployment of grid connected rooftop solar installations in India was also commissioned.[22] World Bank has extended USD 625 million concessional loan to State Bank of India to debt finance Grid Rooftop Solar PV projects. Besides, this TA Program is governed by the steering committee comprising of MNRE, SBI and World Bank. In line with this, the task of developing a vision, implementation plan, road map and institutional framework for implementing OSOWOG has been taken up by the TA Program.[23] While we are way past the question whether we should have an integrated model, the question now remains is how should we do that?

Implementation and Policy Challenges

As ambitious as it sounds, the challenges posed in the implementation of unified framework shall face practical and policy issues. The infrastructure inadequacies in each tranche of the power supply chain affect the timeline and success of this initiative. As with any transmission project, interconnector development can take many years and will involve multiple stakeholders.[24] The involvement of multiple stakeholders as much may be harmonized would neglect some aspect or the other. The impact of integrating the grid infrastructure is manifold. Despite the notional belief that governmental control fairly represents the social circumstances, plethora of energy projects have displayed valuing commercial and financial interests over those who give them the power to even decide upon these interests.

The policy challenges pop up from participating country's urge to maintain comprehensive regulatory control in exchange of sharing their sovereign rights. The doors to inter-jurisdictional integration open at different pedestals. The demographic conditions might not always be feasible for a sound and integrated model. This not only poses additional regulatory challenges but also leads us to political ones. While the political scenario of the different countries have different historical backgrounds and may not necessarily align to the interconnected grid agenda. Aligning the political institutions to bring in place the regulatory framework that upholds the values of all the countries is crucial to policy making.

But what effect do these challenges have on the framework for arbitrating investment disputes between the integrating countries? These regulatory and infrastructural challenges situated in the regional cooperation realm lead us to finding arbitration as the solution. Whether arbitration is successful or effective

The treaty model of protection has been always brought about as the highest possible model for protection of interests of investors. While the author is not denying the potential of treaty model for investment protection, she is trying to put together the challenges

[18] *Supra* at n. 10.
[19] Rakesh Kumar, *India & South Asia: Geopolitics, regional trade and economic growth spillovers,* 29(1) THE J.O F INT'L TRADE & DEV. 69-88 (2019).
[20] *Request for proposals for developing a long-term vision, implementation plan, road map and institutional framework for implementing "ONE SUN ONE WORLD ONE GRID",* Ministry of New and Renewable Energy Ref. No. 322/2/2020-NSM (2020).
[21] *Id.* at 4.
[22] Manu Tayal, MNRE Invites Proposals to Develop Institutional Framework for 'One Sun One World One Grid' Implementation May 27, 2020
[23] *Id.*
[24] *Integrating Power Systems across Borders,* IEA Report (June 2019).

the grundnorm of treaty framework shall pose in the growth of the regional integration initiative. Arbitration as a dispute settlement mechanism has always been second in the line only after the party consultations and negotiations to amicably resolve what they call as 'difference'.

Most regional trade agreements prefer to bring in place a Committee of experts considering the perennial expertise the resolutions would need. The first stage of resolution starts with amicable resolution of the dispute whereby one Contracting State initiates 'Bilateral consultation' making a request to the Committee of Experts at the SAARC Secretariat.[25] If these consultations fail, the Committee of Experts may appoint a specialist to investigate and adjudicate the dispute. The parties have a subsequent right to appeal to SAFTA Ministerial Council **(SMC)**. Even after the appeal, if one of the parties fails to comply with the adjudication order, the other contracting state may withdraw the trade concessions offered.

The simply principle of 'resolve and continue' lies at the core of any trade agreement. However, the 'resolve' comes with embellishments compounded by the threads of political, economic and social aspects of the participating nations. While the codification of treaties and agreements is a long thought process involving numerous deliberations, what the framers think is implied in the representations is usually missing and mostly unaccounted for. The 'social' of the trade agreements is not only reflected by the operational dispute settlement clause but also by objectives with which the treaty/agreement has been discussed and worded. Investors in the renewable energy sector have a strong interest in the stability of this regulatory regime.[26]

Renewable Energy Investment Arbitration: The Dawn

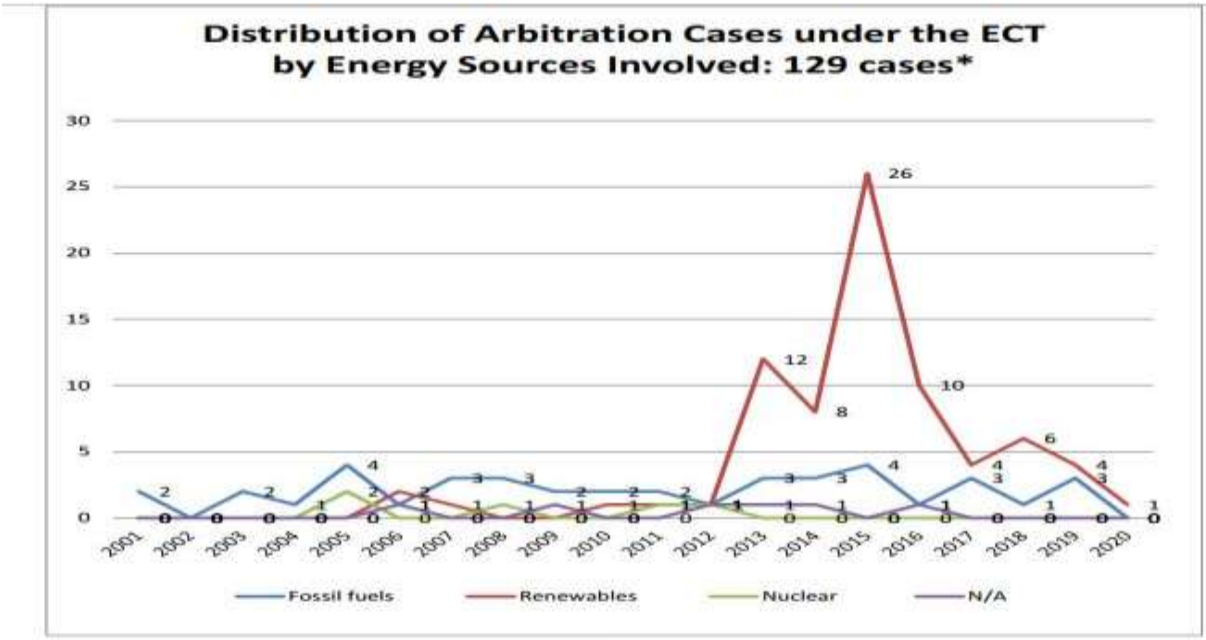
Arbitration as a dispute resolution mechanism in the international investment law has been as old as the energy projects. The existing models of investment under the bilateral investment treaties have facilitated significant energy projects in countries across the globe. While some of the highest compensations granted by any arbitral tribunals in an investor states dispute were energy disputes. However, with this transition from traditional sources of power generation to cleaner energy sources, the trends in renewable energy investment arbitrations have been different. The churn in the investments brought by the regulatory and sovereign actions of the host states can be conveniently challenged before the arbitral tribunals.

Although, as of today the number of investor state disputes in the renewable energy sector is still meager, the need to monitor the renewable energy investment dispute settlement framework will soon arise. As of today, the statistical evidences continue to consider renewable energy as part of energy disputes as a whole. This in essence creates a uniform and hence limited scope of regulatory amendments and changes in the way States and investors approach the renewable energy projects.

The most renewable energy investment disputes have been registered under the Energy Charter Treaty.[27] Energy Charter Treaty presents a multilateral investment treaty framework for essentially countries that are part of European Union. ECT has witnessed 129 arbitrations disputes until March 2020, 56% of which are still pending. The first ECT case was registered in 2001 and, between 2011 and October 2017, there has been a boom of investment arbitration cases concerning renewable energy sources (53 cases, most of them still pending). The existing 35 final awards include 10 cases where no ECT breach was found, 8 cases that were dismissed on lack of jurisdiction grounds and 12 cases in which the claimant was awarded compensation for damages.[28] The figure below indicates that the number of disputes concerning renewable energy sources were at peak during the middle years of this decade. Spain has witnessed maximum number of investment arbitrations and thereby maximum costs. Despite the upward trends, the number of claims shows a sharp fall if we talk about the renewable energy projects in specific.

Talking about ICSID, the number of new cases in energy sector registered under the ICSID Convention in the year 2019 increased to 26% of the total. Claims under the ECT resulted in Western Europe being the most sued region before ICSID in 2015. This huge growth in the number of investment treaty cases did not take place without consequences.

[25] Article 20, South Asian Free Trade Agreement SAFTA.
[26] Charles A. Patrizia et. al., *Investment Disputes Involving the Renewable Energy Industry Under the Energy Charter Treaty, Guide to Investment Arbitration* (2nd Edn. 2019). https://globalarbitrationreview.com/chapter/1142579/investment-disputes-involving-the-renewable-energy-industry-under-the-energy-charter-treaty#_ftn50.
[27] Andris Piebalgs & Ernesto Bonafé , *The New International Energy Charter: Sustainable Energy Transition, Investment Dispute Resolution and Market Regulation*, 33 POLICY BRIEF (2017).
[28] https://www.energychartertreaty.org/cases/statistics/



Fossil Fuels		Renewables		Nuclear		N/A	
Total Damages Claimed	Total Damages Awarded	Total Damages Claimed	Total Damages Awarded	Total Damages Claimed	Total Damages Awarded	Total Damages Claimed	Total Damages Awarded
approx. EUR 9 billion + the Yukos cases (EUR 84 billion)	approx. EUR 503 million + the Yukos cases (EUR 37 billion)	approx. EUR 21 billion	approx. EUR 1 billion	approx. EUR 5 billion	approx. EUR 74 million	approx. EUR 543 million	approx. EUR 11 million

** In seven of these cases, it has not been possible to identify particular energy sources. 56 cases are still pending and in some of the cases, there is no publicly available information on the exact amounts claimed and/or awarded.*

Fig. 3 Arbitration cases under ECT according to sources

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