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The Role of International Commercial Arbitration in Advancing Climate Justice in Bangladesh: A Legal, Institutional Perspective.

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Country: - Bangladesh

CHAPTER 1

ABSTRACT

This paper examines the legal, institutional, and procedural aspects of international commercial arbitration's involvement in addressing climate justice in Bangladesh. Considering Bangladesh's susceptibility to climate change and growing environmental problems, arbitration shows promise as a means of settling conflicts pertaining to both local and international accountability. The research aligns Bangladesh's Arbitration Act, 2001, with international frameworks such as the Paris Agreement, the UNFCCC, and the Kyoto Protocol. These frameworks, which address carbon reductions and sustainable development requirements, place an emphasis on fair and cooperative conflict resolution procedures[2]. By encouraging responsibility and prompt enforcement of environmental regulations, domestic measures such as the Environment Conservation Act,1995 and the Environment Court Act, 2010 supplement international arbitration[3]. Nonetheless, there are also gaps in the way arbitration frameworks include community involvement, local vulnerabilities, and openness. By addressing topics like lex arbitri, lex mercatoria, and the enforcement of awards under the New York Convention, this study highlights the potential for arbitration to integrate local and international environmental duties[4].

This research offers an organized framework to promote climate justice by examining case studies and the drawbacks of ad hoc arbitration, guaranteeing procedural equality and long-term results for Bangladesh by valid arbitration agreement and how bringing these concepts into alignment might result in just and effective climate justice solutions.

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[2] *Arbitration Act 2001; Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UNTS No 54113; United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994)1771 UNTS 107; Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162.*

[3] *Bangladesh Environment Conservation Act 1995; Environment Court Act 2010.*

[4] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention 1958)*

KEY WORDS

International Commercial Arbitration, Climate Justice, Bangladesh, Legal Framework, Institutional Perspective, Dispute Resolution, Environmental Law, Sustainable Development, Climate Arbitration, Regulatory Mechanisms, Access to Justice, Delocalization, *Lex Arbiti*, Lex Mercatoria, Arbitration Institutions, Legal Reforms, Institutional Perspective, Dispute Resolution, Regulatory Mechanisms, Equity, Enforcement, Procedural Fairness, Transparency, Local Communities, Public Participation, Transnational Governance.

INTRODUCTION

As a nation who is especially susceptible to environmental impacts, climate change has become recognized as one of Bangladesh's most significant issues. In response, this study looks at the institutional and legal frameworks that international business arbitration might use to promote climate justice in Bangladesh. As environmental concerns have grown increasingly essential to commerce across borders, there has been a growing intersection between climate justice and international economic arbitration. This development is apparent in situations when arbitration procedures handle disagreements over the effects of climate change and business environmental obligations. Due to the convoluted, cross-border character of environmental issues and the requirement for specialized adjudication methods, international commercial arbitration has grown in popularity as a venue for settling disputes pertaining to climate change. In Bangladesh, where climate change presents serious obstacles that call for strong legal frameworks and enforcement measures, this trend is apparent[5].

Bangladesh is extremely susceptible to the effects of climate change, including flooding, cyclones, and rising sea levels. The nation has created several laws and regulations to address these issues like The Environment Conservation Act, 1995 in Bangladesh provides legal foundation for Bangladesh's environmental preservation and protection is provided by this legislation. It created the Department of Environment, which oversees carrying out environmental laws and policies and is led by a Director General[6]. Food security, social protection, and health are the main topics of the Bangladesh Climate Change Strategy and Action Plan (BCCSAP), which describes adaptation and mitigation tactics and Arbitration could improve the way climate-related matters are handled in Bangladesh by Providing

[5] *Daniel Boffey, 'Court Orders Royal Dutch Shell to Cut Carbon Emissions by 45% by 2030' The Guardian (London, 26 May 2021) https://www.theguardian.com/business/2021/may/26/court-orders-royal-dutch-shell-to-cut-carbon-emissions-by-45-by-2030 accessed 9 September 2024*

[6] *Tahseen Lubaba, 'An Overview of Environmental Laws of Bangladesh' The Daily Star (Dhaka, 4 June 2019) https://www.thedailystar.net/law-our-rights/news/overview-environmental-laws-bangladesh-1753360 accessed 12 August 2024.*

Expertise, Ensuring Efficiency, and Facilitating International Cooperation[7]. Numerous parties from different jurisdictions, such as states, businesses, and non-governmental organizations, are frequently involved in climate change disputes. Because arbitration is flexible, confidential, and allows parties to choose arbitrators with specialist environmental knowledge, parties may prefer it to traditional court systems, which may not have the required knowledge or efficiency to handle such complicated issues. In recognition of this change, the International Chamber of Commerce (ICC) formed a task group to investigate the role of arbitration in disputes pertaining to climate change[8]. Conflicts resulting from the effects of climate change are increasingly being resolved through international commercial arbitration, which has historically been used to settle cross-border business disputes. This change is the result of a greater understanding that environmental concerns frequently touch on business interests, calling for efficient dispute resolution procedures[9]. The Arbitration Act,2001, which is in accordance with the UNCITRAL Model Law, provided the legal foundation for arbitration in Bangladesh and offers a framework for arbitrating disputes[10]. By acknowledging the legitimacy of arbitration agreements and the enforceability of arbitral rulings, this Act makes it easier to arbitrate disputes, especially those involving environmental and climate issues. Fairness and accountability in environmental measures are emphasized by international agreements such as the Paris Agreement[11]. By encouraging sustainable development and initiatives to end poverty, Article 2 of the Paris Agreement seeks to fortify the international response to climate change. This global pledge emphasizes how crucial it is to include climate justice into different legal and policy frameworks. There are still shortcomings in ensuring that arbitration decisions support fairness and sustainable development in spite of these frameworks[12]. The Arbitration Act 2001 along with additional national laws of Bangladesh offer a frame despite arbitrating disputes. There are still difficulties in ensuring that arbitration decisions support fairness and sustainable development in spite of these frameworks[13]. Bangladesh lacks clear procedures for integrating local voices and climate justice concepts into arbitration procedures, despite the ICC report on climate-related conflicts highlighting the potential

[7] *Ministry of Environment, Forest and Climate Change, National Adaptation Plan of Bangladesh 2023–2050 (UNDP 2022) https://www.undp.org/bangladesh/publications/national-adaptation-plan-bangladesh-2023-2050 accessed 12 August 2024.*

[8] *International Chamber of Commerce, Resolving Climate Change Related Disputes through Arbitration and ADR (ICC 2019) https://iccwbo.org/publication/icc-arbitration-and-adr-commission-report-on-resolving-climate-change-related-disputes-through-arbitration-and-adr/ accessed 12 August 2024*

[9] *'Resolving Climate Change Disputes Through Arbitration' Pinsent Masons (10 December 2019) https://www.pinsentmasons.com/out-law/analysis/resolving-climate-change-disputes-through-arbitration accessed 12 August 2024.*

[10] *Arbitration Act 2001; UNCITRAL Model Law on International Commercial Arbitration 1985 (as amended in 2006).*

[11] *Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UNTS No 54113.*

[12] *ibid art 2*

[13] *Arbitration Act 2001.*

of arbitration to involve impacted communities and incorporate scientific expertise[14]. By examining these factors, the study aims to provide a framework that will allow arbitrators to handle Bangladesh's climate issues while also considering local demands and international commitments.

CHAPTER 2

WHY ARBITRATION IS NECESSARY FOR CLIMATE JUSTICE WHETHER ARBITRABILITY CAN BE AN ISSUE?

Climate justice requires arbitration because it provides an impartial forum for effectively settling environmental conflicts, which is crucial for dealing with urgent climate challenges. Under the Arbitration Act,2001, arbitration can support legal proceedings in Bangladesh by giving parties the opportunity to discuss intricate climate issues affecting global stakeholders[15]. Section 10 of the Arbitration Act, 2010 emphasizes that, unless they are judged ineffective or incapable of being resolved in this manner, topics agreed to be arbitrated must be referred to arbitration[16]. Arbitration is a suitable instrument because the Paris Agreement and UNFCCC frameworks place an enormous value on cooperative dispute resolution for climate obligations[17]. The interplay of human rights, environmental responsibility, and arbitration is demonstrated in the case of Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic. In this instance, Argentina was sued by Urbaser, a shareholder in a concessionaire that provided Buenos Aires' water and sewer services, for monetary damages brought on by the nation's emergency measures during its economic crisis. Argentina countered that infringement of the human right to water resulted from the concessionaire's inadequate investment[18]. By recognizing that private organizations could have responsibilities pertaining to public interests, like environmental preservation and human rights, the tribunal established a landmark precedent by accepting jurisdiction over Argentina's human rights-based suit. This ruling emphasizes how complicated disputes involving both business and environmental issues can be resolved through arbitration. Arbitrability, as we

[14] *International Chamber of Commerce, Resolving Climate Change Related Disputes through Arbitration and ADR (ICC 2019)* https://iccwbo.org/publication/icc-arbitration-and-adr-commission-report-on-resolving-climate-change-related-disputes-through-arbitration-and-adr/ *accessed 12 August 2024.*

[15] *Arbitration Act 2001.*

[16] *Arbitration Act 2001 (n 31) s 10*

[17] *United Nations Framework Convention on Climate Change (adopted 9 May 1992, opened for signature 4 June 1992, entered into force 21 March 1994) 1771 UNTS 107. United Nations Framework Convention on Climate Change (adopted 9 May 1992, opened for signature 4 June 1992, entered into force 21 March 1994) 1771 UNTS 107.*

[18] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic (ICSID Case No. ARB/07/26) Award (8 December 2016).*

know it, is the ability to settle a dispute through arbitration. The tribunal agreed to hear Argentina's complaint in Urbaser v. Argentina, which claimed that the investor's insufficient investment infringed against the human right to water. This approval set a noteworthy precedent by proving that arbitration procedures may handle conflicts pertaining to environmental and human rights duties. It demonstrated that arbitration could handle complicated conflicts including both commercial and environmental considerations by broadening the range of issues that can be arbitrated to include those that are often regarded as public interest matters[19]. For time-sensitive climate challenges, arbitration provides an impartial, effective, and adaptable forum for conflict resolution. It enables parties to choose arbitrators with specialized knowledge in environmental science and law, resulting in well-informed and efficient decisions. Furthermore, arbitration procedures are typically quicker than regular court litigation, allowing for the timely action that is necessary to mitigate environmental impact. Additionally, open communication and creative solutions that benefit all parties and the community at large can be fostered by the confidentially of arbitration[20]. environmental disputes involve public interests; private arbitration may not be appropriate. This is demonstrated by UNCITRAL Model Law on International Commercial Arbitration (1985, amended 2006) Article 1(5) and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) Article V(2)(b)[21]. In line with Bangladesh's efforts to integrate arbitration with domestic laws like the Environment Court Act, 2010, which facilitates climate justice through enforceable arbitral awards, the Kyoto Protocol and UNFCCC frameworks promote non-judicial settlements[22]. Take into consideration the following rules for Bangladesh to avoid disputes over arbitrability—making sure that the topic is in line with the laws of both the enforcement jurisdiction and the arbitration venue: In the contract, make it clear which kinds of disputes are subject to arbitration. This accuracy guarantees that both parties understand the scope of arbitration and helps avoid ambiguities. Select a jurisdiction where the subject matter is deemed arbitrable as the arbitration's seat (legal

[19] *ibid.*

[20] *Sonali, 'Arbitrating Environmental Disputes: A Critical Analysis' iPleaders (5 June 2021) https://www.ipleaders.in/arbitrating-environmental-disputes-a-critical-analysis/ accessed 12 August 2024.*

[21] *UNCITRAL Model Law on International Commercial Arbitration (adopted 21 June 1985, amended 7 July 2006) art 1(5);Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3 (New York Convention) art V(2)(b).*

[22] *Bangladesh Environment Conservation Act 2010;Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162;United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.*

location)[23]. The enforceability of the award may be impacted by the law of the seat, which frequently regulates procedural matters. Determine which jurisdictions may seek enforcement of the arbitral ruling and make sure they acknowledge the arbitrability of the dispute's subject matter. The enforcement of the award depends on this foresight. Include a clause outlining the substantive law that will apply to the contract. When settling conflicts, this option might offer regularity and clarity. Be advised that public policy reasons may cause some countries to rule that some issues cannot be arbitrated[24]. It is essential to comprehend these limitations because if the award violates public policy in the enforcement jurisdiction, enforcement may be denied[25]. To negotiate the nuances of arbitrability across many legal systems, consult with attorneys with experience in international arbitration. Their knowledge can be useful in creating contracts that reduce the likelihood of disputes.

HOW ARBITRATION FRAMEWORKS COULD BETTER INCORPORATE PRINCIPLES OF CLIMATE EQUITY AND ADDRESS THE VULNERABILITIES OF CLIMATE- AFFECTED COMMUNITIES IN BANGLADESH?

By incorporating standards that promote equitable remedies for vulnerable communities affected by climate change, arbitration systems can incorporate climate equity for Bangladesh, for example, as a UNFCCC party, Bangladesh adheres to Article 14 of the UNFCCC, which establishes the framework for dispute resolution and supports equitable results through arbitration[26]. Methanex, a Canadian manufacturer of methanol, contested California's prohibition on the methanol-derived gasoline additive MTBE in the Methanex Corp. v. United States lawsuit. Methanex said that the restriction essentially expropriated its investment without paying compensation, in violation of the North American Free Trade Agreement (NAFTA). Because non-discriminatory laws for a public purpose that are enacted with fair process do not amount to expropriation that requires compensation, the panel rejected Methanex's allegations[27]. This case is relevant to Climate Equity and Bangladesh because it shows that environmental protection policies are justifiable when supported by scientific proof of public harm, even if they negatively impact enterprises. The case demonstrated the tribunal's acknowledgement of environmental health as a public matter, even if community

[23] *Methanex Corporation v. United States of America (NAFTA Ch 11/UNCITRAL, Final Award, 3 August 2005)*
[24] *ibid.*
[25] *UNFCCC (n 42) art 14.*
[26] *United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107, art 14.*
[27] *ibid.*

representation was not directly involved[28]. This establishes a precedent that might encourage impacted communities to have a role in future arbitration proceedings, particularly if corporate actions or environmental policies have a direct influence on their well-being. This would give these groups a voice in an indirect but significant way.

The following legal frameworks apply to Bangladesh:

1. **UNFCCC Article 14:** Offers dispute resolution procedures for the interpretation or implementation of the Convention, with a focus on peaceful measures such as negotiation[29].
2. **Article 24 of the Paris Agreement:** Adopts the UNFCCC Article 14 dispute resolution provisions, enabling parties to choose arbitration or the International Court of Justice in the event of a dispute[30].
3. **Bangladesh Environmental Conservation Act (1995):** This national law promotes environmental conservation and offers a framework for resolving environmental disputes at home while also being in compliance with international duties[31].

Benefits that Bangladesh can obtain via Including climate equity in arbitration can result in rulings that give disadvantaged communities' demands top priority and guarantee that environmental laws take into account their unique difficulties, global support and funding for climate adaptation and mitigation initiatives can be obtained by bringing national policies into line with international precedents. Setting precise rules for arbitration in environmental cases promotes fair dispute settlement and gives communities and investors peace of mind[32]. Techniques for Defacing That Bangladesh Can Use During arbitration procedures, make sure impacted groups have a forum to voice their concerns, either directly or through representatives and use solid scientific evidence to support environmental policies that may have an effect on businesses but are essential for the public's and the environment's health[33]. Lastly, harmonize national laws with international environmental agreements to enhance the legal foundation for protective measures and further more Develop legal skills to traverse international arbitration efficiently, ensuring that national interests and community welfare are adequately

[28] *ibid*
[29] *UNFCCC (n 42) art 14*
[30] *Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) art 4.*
[31] *Bangladesh Environment Conservation Act 1995.*
[32] *United Nations Framework Convention on Climate Change (adopted 9 May 1992, opened for signature 4 June 1992, entered into force 21 March 1994) 1771 UNTS 107*
[33] *ibid*

represented[34]. Bangladesh can address the vulnerability of its populations affected by climate change by implementing these strategies to improve the incorporation of climate equity within its arbitral systems. Benefits that Bangladesh can obtain via Including climate equity in arbitration can result in rulings that give disadvantaged communities' demands top priority and guarantee that environmental laws take into account their unique difficulties, global support and funding for climate adaptation and mitigation initiatives can be obtained by bringing national policies into line with international precedents. Setting precise rules for arbitration in environmental cases promotes fair dispute settlement and gives communities and investors peace of mind. Techniques for Defacing That Bangladesh Can Use During arbitration procedures, make sure impacted groups have a forum to voice their concerns, either directly or through representatives and use solid scientific evidence to support environmental policies that may have an effect on businesses but are essential for the public's and the environment's health. Lastly, harmonize national laws with international environmental agreements to enhance the legal foundation for protective measures and further more Develop legal skills to traverse international arbitration efficiently, ensuring that national interests and community welfare are adequately represented. Bangladesh can address the vulnerability of its populations affected by climate change by implementing these strategies to improve the incorporation of climate equity within its arbitral systems.

How can arbitration institutions prepare arbitrators to navigate complex climate science and policy intricacies?

Arbitration institutions might concentrate on specialist training in line with international norms, including those in Article 15 on compliance and capacity-building measures of the Paris Agreement, to give arbitrators the skills they need to handle complex climate science and policy[35]. International commercial arbitration is supported by Bangladesh's Arbitration Act, 2001, which enables foreign experience to improve arbitrators' environmental law understanding[36]. A Canadian company called Methanex argued that California's ban on MTBE, a gasoline additive made from methanol, was an indirect expropriation of its investment and hence a violation of NAFTA. Because of the groundwater contamination and related health hazards, MTBE was outlawed in California[37]. Methanex's allegations were rejected by the panel, which declared the ban to be a valid regulatory measure for environmental and public

[34] *Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UNTS No 54113.*
[35] *Paris Agreement (n 50) art 15.*
[36] *Arbitration Act 2001 Ch II.*
[37] *Methanex Corporation v United States of America (NAFTA Ch 11/UNCITRAL, Final Award, 3 August 2005)*

health. Because scientifically supported environmental protection measures are non-discriminatory and do not amount to expropriation under international investment accords, the tribunal upheld California's rule[38]. Environmental specialists were crucial in assisting the tribunal in comprehending the ecological and health hazards associated with MTBE contamination[39].

This case highlights the significance of:

1. **Scientific Expertise**: By incorporating environmental specialists, tribunals are better equipped to handle intricate matters.
2. **Balancing Interests:** In order to ensure that public health and environmental sustainability are given priority, arbitration decisions must strike a balance between business interests and regulatory measures.
3. **Capacity-Building:** In order to evaluate scientific facts and legal principles pertaining to climate change, arbitrators need specific training. Relevant legal frameworks for Bangladesh include the Arbitration Act of 2001, which facilitates international commercial arbitration and encourages the inclusion of foreign expertise to strengthen local arbitrators' proficiency in environmental law, and Article 15 of the Paris Agreement, which encourages compliance and capacity-building among parties, fostering the development of expertise to address climate disputes effectively[40]. Bangladesh may achieve from improved decision-making, which means that climate science training will empower arbitrators to render fair and knowledgeable rulings in cases involving environmental damage[41]. The second strategy is international collaboration, which can guarantee that Bangladesh's arbitration procedures comply with international norms by utilizing foreign frameworks and precedents[42]. Last but not least, the empowerment of vulnerable communities ensures equitable outcomes by enabling more knowledgeable arbitrators to address the unique vulnerabilities of communities impacted by climate change[43]. One way to increase

[38] *ibid.*
[39] *Methanex Corporation v United States of America (n 53).*
[40] *Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) art 15;Arbitration Act 2001*
[41] ICC Commission on Arbitration and ADR, *Resolving Climate Change Related Disputes through Arbitration and ADR* (2019) https://iccwbo.org/publication/resolving-climate-change-related-disputes-through-arbitration-and-adr/ accessed 12 August 2024
[42] Justice AFM Abdur Rahman, 'ADR Landscape in Bangladesh: Challenges & Reforms' *Lawyers Club Bangladesh* (5 May 2021) https://lawyersclubbangladesh.com/en/2021/05/05/adr-landscape-in-bangladesh-challenges-reforms/ accessed 17 August 2024.
[43] *Arbitration of Climate Change Disputes' Premier Environmental Lawyers (28 November 2019) https://www.premierenvironmentallawyers.com/news-publication/arbitration-of-climate-change-disputes/ accessed 12 August 2024.*

arbitrators' capacity is through specialized training, which means educating arbitrators on international environmental law, climate science, and the regulatory frameworks established by accords such as the Paris Agreement. Another is the use of expert panels to direct decision-making in arbitration hearings, which include scientific and environmental specialists[44]. In order to familiarize arbitrators with pertinent concerns, it is necessary to conduct mock arbitrations concerning climate disputes in order to find simulated arbitration scenarios. In the end but not least, establish cooperative partnerships by interacting with international arbitration organizations to exchange knowledge and obtain resources. Limited local expertise in climate science can be mitigated by forming partnerships with foreign institutions to train arbitrators. Additionally, choosing arbitrators who have no conflicts of interest can ensure impartiality and lessen potential bias in arbitration, which is required by regulations such as UNCITRAL and ICC rules[45].

CHAPTER 3

HARMONIZING ENVIRONMENTAL CONSERVATION ACT, 1995 AND THE ENVIRONMENTAL COURT ACT 2010 WITH INTERNATIONAL ARBITRATION IN ADDRESSING CLIMATE JUSTICE DISPUTES.

To properly handle climate justice conflicts, Bangladesh's Environmental Conservation Act, 1995 (ECA 1995) and the Environment Court Act, 2010 (ECA 2010) must be harmonized with international arbitration systems and to increase effectiveness, these local laws' dispute settlement and environmental protection procedures might be matched with international norms[46]. Two gas blowouts happened in the Chattak gas field in Bangladesh in 2005 while Canadian company Niko Resources Ltd. was drilling there. These events had an impact on nearby populations and seriously harmed the ecosystem. The Bangladesh Environmental Lawyers Association (BELA) and the government of Bangladesh filed lawsuits to recover damages and compensation for the environmental devastation[47]. Niko filed for arbitration under the International Centre for Settlement of Investment Disputes (ICSID) and disputed liability. The compensation claims were permitted to proceed in Bangladeshi courts after the

[44] *Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 79*

[45] *UNCITRAL Model Law on International Commercial Arbitration (adopted 21 June 1985, amended 7 July 2006) UN Doc A/40/17, Annex I;ICC Rules of Arbitration (in force 1 January 2021).*

[46] *Bangladesh Environment Conservation Act 1995; Environment Court Act 2010.*

[47] *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Ltd. (BAPEX) and Bangladesh Oil Gas and Mineral Corporation (Petrobangla), ICSID Case No. ARB/10/18, Award (24 September 2021).*

ICSID panel accepted its jurisdiction over the matter. As the arbitration process proceeded, this ruling made it possible for domestic legal actions to address environmental harms. This case serves as an example of how international arbitration and national environmental legislation interact to solve environmental harm[48]. While the investor-state issue was handled by international arbitration procedures, local actions for environmental harm were made easier by the Environment Court Act of 2010. This two-pronged strategy emphasizes how crucial it is to align international arbitration with national laws in order to guarantee full climate justice[49]. In accordance with international environmental standards, Section 4 of the ECA 1995 gives the Director General the authority to take the required actions to stop environmental damage[50]. Additionally, Section 5 encourages adherence to international environmental norms by enabling the government to designate environmentally significant places. In contrast, Section 7 of the ECA 2010 creates Environment Courts that have jurisdiction over environmental issues, allowing environmental rules to be enforced and resolved quickly[51]. Conversely, the Arbitration Act of 2001 supports the enforcement of foreign arbitral rulings by providing a legal framework for both domestic and international arbitration, combining elements from the UNCITRAL Model Law[52]. Bangladesh can gain advantages by guaranteeing improved legal mechanisms by The ability to effectively handle complex environmental disputes is strengthened when domestic laws are aligned with international arbitration frameworks. This is because international arbitration allows for the inclusion of foreign expertise, which improves the arbitrators' proficiency in environmental law. Finally, it allows for the enforcement of Arbitral awards are acknowledged and enforceable through effective enforcement measures like harmonization, which offers a dependable way to address environmental harm[53]. In my humble view Bangladesh needs increase capacity in order to implement these strategies. Constructing something similar to guarantee informed decision-making, secondly, educate arbitrators and legal professionals on both international arbitration procedures and domestic environmental laws. Institutional Collaboration to make it easier to share resources and best practices, encourage collaboration between domestic courts and

[48] *Niko Resources v. BAPEX and Petrobangla (n 64).*
[49] *Environment Court Act 2010.*
[50] *Bangladesh Environment Conservation Act 1995 s 4.*
[51] *Environment Court Act 2010 ss 5, 7.*
[52] *Arbitration Act 2001;UNCITRAL Model Law on International Commercial Arbitration (adopted 21 June 1985, amended 7 July 2006).*
[53] *Akhlaq Choudhury and Khaled Moyeed, 'Spotlight on International Arbitration as a Means of Settling Disputes Arising from Climate Change' Kluwer Arbitration Blog (26 January 2016) https://arbitrationblog.kluwerarbitration.com/2016/01/26/spotlight-on-international-arbitration-as-a-means-of-settling-disputes-arising-from-climate-change/ accessed 19 August 2024.*

international arbitration organizations. Lastly, raising public awareness entails teaching all parties involved, including corporations and local communities about their rights and responsibilities under environmental regulations and arbitration procedures. Bangladesh can efficiently handle climate justice issues by coordinating national environmental laws with international arbitration frameworks, guaranteeing that environmental protection measures are strong, enforceable, and compliant with international standards.

CAN THE PRINCIPLES OUTLINED IN THE RIO DECLARATION BE EFFECTIVELY ENFORCED THROUGH INTERNATIONAL COMMERCIAL ARBITRATION MECHANISMS?

International commercial arbitration for climate justice can incorporate the Rio Declaration (1992), especially Principles 2 (state responsibility for preventing transboundary environmental harm) and 10 (public engagement and access to justice)[54]. Effective environmental conflict resolution requires arbitration, particularly when cross-border issues are involved. In accordance with the UNCITRAL MODEL LAW, the Arbitration Act, 2001 of Bangladesh guarantees the enforceability of arbitration rulings internationally, which is crucial in matters pertaining to climate change[55]. Early in the 20th century, sulfur dioxide vapors from the Trail Smelter, a Canadian smelting company in British Columbia close to the U.S. border, harmed the ecosystem of Washington, a nearby U.S. state. An arbitral tribunal was established to settle the dispute after the US government lodged a complaint against Canada[56]. The tribunal ordered compensation to the United States after finding that Canada was liable for the damage caused by the Trail Smelter's emissions and the ruling reinforced the idea that states are responsible for transboundary environmental damage by emphasizing that no state has the right to utilize its territory in a way that harms another state[57]. A seminal case that established important concepts in international environmental law, especially with regard to transboundary contamination and state accountability, is the Trail Smelter Arbitration (United States v. Canada) and in addition to laying the groundwork for environmental liability under international law and establishing the "polluter pays" principle, this decision is noteworthy because it sets the standard for future arbitration proceedings involving environmental

[54] *Rio Declaration on Environment and Development (adopted 14 June 1992) UN Doc A/CONF.151/26/Rev.1, principles 2, 10*

[55] *Arbitration Act 2001;UNCITRAL Model Law on International Commercial Arbitration (adopted 21 June 1985, amended 7 July 2006) UN Doc A/40/17, Annex I.*

[56] *Trail Smelter Arbitration (United States v Canada) (1941) 3 UNRIAA 1905*

[57] *ibid.*

problems[58]. The Rio Declaration's Principle 2 (1992) stipulates that governments have an obligation to make sure that activities within their borders do not harm other states' environments[59]. This case is closely related to that principle. Because it holds Canada responsible for averting transboundary harm, the Trail Smelter Arbitration is a prime example of how this concept is applied[60]. Bangladesh is dedicated to avoiding activities within its borders from harming other governments' environments, as seen by its signature on international environmental agreements such as the Paris Agreement and the Rio Declaration[61]. The Trail Smelter case's tenets give Bangladesh the legal groundwork to handle transboundary environmental problems, like pollution that impacts nearby nations[62]. In accordance with international norms of state accountability, Bangladesh's Environmental Conservation Act, 1995, gives authorities the authority to take the required actions to stop environmental degradation[63]. Furthermore, the Arbitration Act of 2001 makes it easier to settle conflicts through arbitration and guarantees that verdicts from foreign arbitrations are accepted and enforced in Bangladesh[64]. Bangladesh can use the "Polluter Pays" principle to hold polluters financially responsible for environmental damage, discouraging harmful activities and providing financing for remedial efforts. This will provide Bangladesh access to defensive mechanisms and preventive measures. Second, requiring Environmental Impact Assessments (EIAs) for projects that may have transboundary consequences guarantees that environmental factors are incorporated into development planning, protecting adjacent states from harm. Thirdly, regional cooperation can assist handle common environmental concerns and avoid conflicts by participating in regional environmental agreements and cooperative monitoring[65]. The Trail Smelter Arbitration strengthened the **"polluter pays"** principle, which is still a pillar of environmental law, making its use in a modern setting significant. By placing monetary blame on people who damage the environment, it encourages pollution control and internalizes environmental expenses. By passing laws that penalize polluters and use the money collected

[58] *Trail Smelter Arbitration (n 73).*
[59] *Rio Declaration (n 71) principle 2*
[60] *Trail Smelter Arbitration (n 73).*
[61] *Katarina Ruhland, 'Explainer: What Is the Polluter Pays Principle and How Can It Be Used in Climate Policy?' Earth.Org (28 March 2024) https://earth.org/explainer-what-is-the-polluter-pays-principle-and-how-can-it-be-used-in-climate-policy/ accessed 19 August 2024.*
[62] *Trail Smelter Arbitration (n 73)*
[63] *Bangladesh Environment Conservation Act 1995.*
[64] *Arbitration Act 2001.*
[65] Ruhland (n 78).

for environmental restoration and sustainable development projects, Bangladesh can adapt this idea to today's environmental problems[66].

ROLE OF THE ARBITRATION ACT, 2001, PLAY IN RESOLVING CLIMATE-RELATED DISPUTE IN BANGLADESH.

The primary legislative foundation for arbitration in Bangladesh, including both local and foreign issues, is the Arbitration Act, 2001, although the Act doesn't specifically address issues pertaining to the environment or climate, its provisions are sufficiently wide to cover them, so long as the parties involved consent to arbitration[67]. In order to maintain trust when settling disputes involving environmental issues, Section 13 requires arbitrators to disclose any potential conflicts of interest and Section 14 permits parties to challenge arbitrators if impartiality is compromised, thereby enhancing the fairness of the proceedings[68]. Section 39 makes arbitration awards binding, avoiding delays in enforcing crucial decisions required for climate protections which is because the doctrine of separability under Section 18 guarantees that, even if parts of a contract are invalid, the arbitration clause remains enforceable, ensuring the continuation of environmental dispute resolution[69]. For complicated and technical conflicts, such as those involving climate issues, arbitration provides a flexible and effective substitute for traditional litigation[70]. Arbitration can result in better informed and efficient settlements by letting parties choose arbitrators with specialized knowledge of environmental law or climate science[71]. This strategy works well in Bangladesh, where the court may encounter issues like backlogs of cases and a lack of specialized expertise in new areas like climate legislation[72]. The case of GPH Ispat Limited is a relevant illustration where The Bangladesh Forest Department filed a complaint against GPH Ispat in April 2019, alleging that the business had damaged biodiversity and interrupted natural water flow by building dams

[66] *Trail Smelter Arbitration (n 73).*
[67] *Arbitration Act 2001.*
[68] *Arbitration Act 2001, ss 13–14*
[69] *Arbitration Act 2001 (n 84) ss 18, 39*
[70] *Editoria, 'Arbitration in Environmental Disputes: Key Insights and Approaches' Laws & More (9 July 2024) https://lawsandmore.com/arbitration-in-environmental-disputes/ accessed 25 August 2024.*
[71] *Mohammad Abdul Hannan, 'Effectiveness and Challenges of the Environmental Courts in Bangladesh: A Critical Analysis on the Existing Laws' (2023) 4(1) BAUET Journal https://journal.bauet.ac.bd/effectiveness-and-challenges-of-the-environmental-courts-in-bangladesh-a-critical-analysis-on-the-existing-laws/ accessed 12 August 2024.*
[72] *Mohammad Golam Sarwar, 'Making a Case for Environmental Rule of Law in Bangladesh' The Daily Star (8 June 2021) https://www.thedailystar.net/law-our-rights/news/making-case-environmental-rule-law-bangladesh-2106989 accessed 6 September 2024.*

and cutting down hills without permission[73]. The business denied these allegations, claiming that their operations were part of a rainwater harvesting project's preparation and this case was transferred to the High Court in August 2023, which imposed a stay order after the lengthy legal proceedings, this case demonstrates how arbitration under this Act may be able to settle environmental conflicts more quickly[74]. A speedier and more specialized resolution might have resulted from the parties' choice to use arbitrators with environmental experience if they had chosen arbitration. This strategy might have lessened the drawn-out legal proceedings seen in this case. Bangladesh may obtain a number of advantages by incorporating arbitration into climate-related disputes, including "Efficiency" where arbitration can speed up dispute resolution, burdening courts and offering prompt remedies, secondly "Expertise" where parties can designate arbitrators with specialized knowledge in environmental and climate issues, resulting in better-informed decisions and "Flexibility" where arbitration permits procedures tailored to the particular needs of the dispute, which is beneficial in complex environmental cases. Bangladesh may speculate about the following tactics to use arbitration for climate-related disputes more likely to be legal reforms in accordance with global best practices, tweak the Arbitration Act, 2001 to specifically include provisions for environmental disputes. Secondly, Building Capacity through Training and Accreditation Programs to Create a Pool of Arbitrators with Knowledge of Climate Science and Environmental Law Lastly, Institutional Support, by Providing the administrative and technical assistance required to settle environmental disputes by establishing specialized arbitration centers or designating already-existing institutions.

CHAPTER 4

DOES ICC RULES FACILITATE ARBITRATION IN CROSS- BORDER ENVIRONMENTAL DISPUTE INVOLVING BNAGLADESH.

Cross-border environmental issues, particularly those affecting Bangladesh, can be resolved in large part thanks to the International Chamber of Commerce's (ICC) Arbitration Rules. In order to handle complicated environmental challenges, these regulations offer a well-organized framework that guarantees neutrality, enforceability, and the inclusion of specialized knowledge[75]. Notably Arbitration procedures in Bangladesh are governed by the Arbitration

[73] *'Clarification' The Daily Star (18 April 2019) https://www.thedailystar.net/opinion/clarification-1731257 accessed 12 August 2024.*
[74] *ibid.*
[75] *ICC Arbitration Rules (2021).*

Act, 2001,makes it easier to recognize and enforce foreign arbitral rulings because it is in line with international standards where section 3 outlines its applicability to arbitrations held in Bangladesh, and its sections 45, 46, and 47 ensure compliance with international arbitration standards by extending its provisions to specific foreign arbitrations[76]. A notable example is the ICC-administered Windstream Energy LLC v. Canada, where on 2010, the Ontario Power Authority and the U.S.-based company Windstream Energy LLC signed an agreement for the construction of a 300-megawatt offshore wind energy plant on Lake Ontario. However, citing the need for more scientific investigation, the Ontario government placed a ban on offshore wind projects in February 2011. Windstream's project was hampered by this suspension, therefore the business filed a claim for arbitration under Chapter 11 of the North American Free Trade Agreement (NAFTA), claiming that Canada had breached its duties by not treating them fairly.The arbitral tribunal decided in favor of Wind stream in September 2016, concluding that the moratorium was unfair treatment under NAFTA. In order to compensate Windstream for the monetary losses brought on by the project's cancellation, the tribunal granted it damages of almost CAD 25 million[77]. Due to disparate legal systems and treaty responsibilities, this case has limited direct significance to Bangladesh, even while it emphasizes the value of international arbitration in settling conflicts between states and investors over renewable energy policies[78]. A consideration for Bangladesh that can be drawn from this case is "Policy Stability" because the Windstream case emphasizes the significance of transparent and consistent environmental policies. For Bangladesh, maintaining policy stability can help draw in and keep foreign investments in the renewable energy sector, Secondly, the case emphasizes the efficiency of arbitration in resolving disputes arising from policy changes, and Bangladesh can use its current legal framework to effectively resolve such disputes, boosting investor confidence, Last but not least, one of the main concerns is environmental considerations are important to strike a balance between environmental preservation and investment promotion, and the Wind stream case serves as an example of how disputes may occur and how arbitration may be used to establish fair solutions[79]. Instead of using the International Chamber of Commerce (ICC) Arbitration Rules, the UNCITRAL Arbitration Rules were used to decide this case, notwithstanding this procedural discrepancy, the case provides insightful information on the function of international arbitration in settling

[76] *Arbitration Act 2001 (n 92) ss 3, 45–47.*
[77] *Windstream Energy LLC v Government of Canada (Award) PCA Case No 2013-22 (27 September 2016).*
[78] *Windstream Energy LLC v Government of Canada (n 95).*
[79] *ibid.*

conflicts between states and investors, especially those involving energy and environmental policies[80]. While the ICC arbitration rules are designed to offer a fair and effective dispute resolution process, this case highlights the flexibility of arbitration in resolving complex disputes involving environmental regulations and investment protections. It also shows how international arbitration can resolve conflicts resulting from changes in governmental policy that impact investments[81]. The advantages of Bangladesh implementing ICC arbitration rules include neutrality, as ICC arbitration provides a neutral forum that is necessary for settling disputes fairly, particularly in cross-border situations, and secondly Expertise where Experts in the fields of energy and environmental law make up the ICC's pool of arbitrators, guaranteeing well-informed decisions in complicated cases and lastly enforceability where Arbitral awards made under the ICC framework are accepted and enforceable globally, giving foreign investors peace of mind[82].

CHALLENGES MIGHT ARISE IN ENFORCING ARBITRATION AWARDS IN CLIMATE JUSTICE CASES UNDER THE NEW YORK CONVENTION (1958).

Since Article V(2)(b) of The New York Convention permits a court to refuse enforcement if the award conflicts with the enforcing state's public policy, I believe that enforcing arbitration awards in climate justice cases under the New York Convention (1958) can present difficulties, especially with regard to public policy exceptions and arbitrability issues means that, if an arbitral award goes against the public policy of the nation implementing it, courts have the authority to decline to enforce it under Article V(2)(b)[83]. California's ban on the gasoline additive MTBE was contested by a Canadian methanol manufacturer, who claimed that it was against NAFTA rules. Methanex's arguments were rejected by the tribunal, which emphasized that California's environmental laws were justifiable public policy initiatives meant to safeguard the environment and public health[84]. This case emphasizes how public policy frequently serves as the foundation for environmental rules. Therefore, the public policy exception may make it difficult to enforce an arbitral ruling in climate justice cases that is thought to compromise environmental protection[85]. Whereas Article V(2)(a) permits refusal of

[80] *UNCITRAL Arbitration Rules (2013); ICC Arbitration Rules (2021)*
[81] *ICC Arbitration Rules (n 99)*
[82] *ibid.*
[83] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3 (New York Convention) art V(2)(b)*
[84] *Methanex Corporation v United States of America (Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005) PCA Case No 1999-1.*

[85] *ibid*

enforcement if the subject matter isn't arbitrable under the enforcing country's laws[86]. The decision acknowledged the state's sovereign authority to regulate environmental issues, suggesting that arbitration may not be appropriate in cases involving such restrictions. This implies that a court may rule that a dispute involving sovereign environmental legislation is not arbitrable in climate justice cases, creating difficulties for enforcement under Article V(2)(a)[87]. The Arbitration Act, 2001 is one of the ways that Bangladesh, as a signatory to the New York Convention, applies its provisions into domestic law and the Convention's grounds for denial of enforcement, such as arbitrability and public policy, are reflected in Sections 45 and 46 of this Act. The government places a high priority on environmental protection because of Bangladesh's susceptibility to climate change[88]. As a result, arbitral rulings that go against national environmental policies may be contested on the grounds of public policy. Furthermore, in accordance with Article V(2)(a), disagreements pertaining to sovereign environmental legislation might not be subject to arbitration[89]. In my perspective the recommendations for Policy Clarity in Bangladesh by Define environmental policies precisely to guarantee that arbitration agreements and proceedings are in line with national goals, reducing conflicts during enforcement; provide judicial training to give the judiciary the knowledge of environmental law and international arbitration necessary to successfully negotiate the difficulties of enforcing arbitral awards in climate-related cases; and, last but not least, conduct legislative review to Make that arbitration laws are kept strong and functional by periodically reviewing and updating them to address new issues in climate justice.

THE PRINCIPAL OF LEX MERCATORIA INFLUENCE THE APPLICABILITY OF LAWS IN CLIMATE JUSTICE ARBITRATION.

The term "law merchant," or lex mercatoria, refers to a set of worldwide business standards and guidelines that go beyond national legal systems in an effort to standardize international commerce regulations. Lex mercatoria can affect how laws are applied in environmental arbitration by encouraging the adoption of international standards rather than rigorous adherence to national laws[90]. Under the Energy Charter Treaty (ECT), Swedish energy corporation Vattenfall AB filed for arbitration against Germany. German authorities'

[86] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3 (New York Convention) art V(2)(a).*
[87] *Methanex Corporation v United States of America (n 101).*
[88] *Arbitration Act 2001 ss 45 - 47.*
[89] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (n 103) r V(2)(a).*
[90] Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (5th edn, Oxford University Press 2009).

environmental constraints on Vattenfall's coal-fired power station proposal in Hamburg were the root of the conflict. According to Vattenfall, these actions infringed upon its ECT investor rights. Germany agreed to modify the environmental criteria as part of the 2011 settlement between the parties. By striking a balance between Germany's environmental goals and the ECT's protection of foreign investments, the settlement permitted Vattenfall to move on with its project under amended terms[91]. Question may now arise as to whether this case Relevance to Climate Justice-Related Arbitration under Lex Mercatoria? By balancing interests, this case serves as an example of how lex mercatoria principles might be applied in environmental arbitration. In line with lex mercatoria's focus on harmonizing disparate legal concepts, the tribunal's facilitation of a settlement demonstrated a balance between Germany's sovereign authority to adopt environmental rules and the protection of international investors' rights. Additionally, embracing transnational standards A fundamental component of lex mercatoria, the case illustrated the application of global norms above strictly state rules by citing the ECT, a multilateral accord[92]. Another concern that may now arise is what implications might Bangladesh Face? As a signatory to international environmental accords such as the Paris Agreement and the UNFCCC, Bangladesh can learn from this case for example, integrating lex mercatoria principles into global standards promotes the adoption of international norms, which helps Bangladesh meet its climate commitments while promoting economic growth[93]. It's also necessary to complete the Arbitration Framework, where Bangladesh's 2001 Arbitration Act complies with international norms and makes it easier to settle conflicts pertaining to foreign investments and environmental laws. Bangladesh may gain from this by promoting foreign direct investment in environmentally sustainable projects, adhering to transnational norms, and ensuring consistency in investment and environmental policies by aligning national laws with international standards[94]. Bangladesh should, in my humble view, adopt the following implementation strategies are legal reforms, which would update domestic laws to reflect international environmental and commercial standards; capacity building, which would train legal professionals in international arbitration and lex mercatoria principles; and,

[91] *Vattenfall AB v Federal Republic of Germany (ICSID Case No ARB/12/12) Decision on the Achmea Issue (31 August 2018)*

[92] *ibid.*

[93] *United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC)*

[94] *Arbitration Act 2001.*

most importantly, institutional development, which would strengthen institutions to handle complex environmental arbitration cases.

CHAPTER 5

HOW CAN BANGLADESH ADDRESS THE LIMITATIONS OF AD HOC ARBITRATION IN CLIMATE JUSTICE CASES?

Bangladesh can create a structured arbitration method utilizing the Arbitration Act, 2001 and international accords like the Paris Agreement and the New York Convention (1958) to overcome the drawbacks of ad hoc arbitration in climate justice disputes[95]. Bangladesh can enforce foreign arbitral awards by applying international arbitration norms, as stipulated in section 3 of the Arbitration Act, 2001[96]. By adhering to Article 6 of the Paris Agreement, which promotes cooperative action, Bangladesh has contributed to the formalization of arbitration beyond ad hoc procedures for increased justice and transparency[97]. Furthermore, organized arbitration in environmental disputes is supported by UNFCCC Articles 14 and 24, which fortify Bangladesh's foundation for consistently handling complicated climate concerns[98]. Determining the maritime boundary in the Bay of Bengal, an area abundant in natural resources, was the subject of the 2012 Bangladesh v. Myanmar dispute before the International Tribunal for the Law of the Sea (ITLOS), emphasizes the benefits of organized arbitration frameworks and the drawbacks of ad hoc arbitration in intricate environmental conflicts[99]. Conflicts over access to fisheries and possible oil and gas deposits resulted from Bangladesh and Myanmar's overlapping claims in the Bay of Bengal. The main concern was drawing a distinct marine border to provide fair access to resources and environmental preservation[100]. The ITLOS ruling, which established a single maritime border between Bangladesh and Myanmar, was given on March 14, 2012. In order to account for the concavity of Bangladesh's coast, which would have otherwise resulted in a disproportionate cut-off effect on Bangladesh's maritime claims, the Tribunal employed the equidistance/relevant circumstances technique. This change balanced the rights and obligations of both countries and guaranteed an equal

[95] *ibid.*
[96] *Arbitration Act 2001 (n 113) s 3*
[97] *Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UNTS Registration No 54113, art 6.*
[98] *United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC) art 14, 24.*
[99] *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012, ITLOS Reports 2012, p. 4.*
[100] *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012, ITLOS Reports 2012, p. 4.*

resolution[101]. One may now wonder why this case is on this subject matter, what the arbitration frameworks are relevant to, and how Structured and Ad Hoc Arbitration differs from it. Thus, if we analyze the instance The success of organized arbitration under the United Nations Convention on the Law of the Sea (UNCLOS) is demonstrated by the ITLOS proceedings[102]. Ad hoc arbitration frequently lacks the established processes, legal clarity, and enforceable results that these frameworks offer. Ad hoc approaches are less appropriate for complicated environmental disputes involving numerous stakeholders and complex legal issues since they may have procedural flaws and lack safeguards to guarantee compliance[103]. Implications for Bangladesh, in my humble belief, can be addressed by implementing structured arbitration, whereby Bangladesh can profit from using frameworks for structured arbitration, such as UNCLOS, to settle environmental disputes. Fair and enforceable resolutions are made possible by these frameworks, which provide procedural clarity and conform to international legal norms[104]. In this case, the domestic legal framework is significant because arbitration proceedings are governed by Bangladesh's Arbitration Act, 2001. Although the act serves as a basis for arbitration, its efficacy in climate justice cases can be increased by incorporating provisions that are consistent with international environmental agreements[105]. Consistency and predictability are two advantages of structured arbitration. It provides uniform legal standards and procedures, which produce predictable results that are crucial for complicated environmental conflict, because structured arbitration awards are easier to enforce because to established procedures in international frameworks, enforceability is one of the goals ,Finally, expertise because Structured frameworks frequently have access to a group of environmental law specialists, which guarantees well-informed decision-making[106].

DOES THE CONCEPT OF DELOCALIZATION IMPACT THE ENFORCEMET OF ARBITRATION AWARDS RELATED TO CLIMATE ISSUES?

The idea of delocalization in arbitration has an effect on the implementation of environmental awards in Bangladesh because it permits international norms to take precedence over regional procedural restrictions, which occasionally run counter to national climate justice laws. In

[101] *ibid.*
[102] *ibid.*
[103] *United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).*
[104] *ibid.*
[105] *Arbitration Act 2001.*
[106] *United Nations Convention on the Law of the Sea (n 120).*

accordance with the 1958 New York Convention, Bangladesh's Arbitration Act, 2001 section 3 provides the foundation for both domestic and international arbitration, including the enforcement of foreign arbitral rulings[107]. Although local environmental conflicts are often handled by Bangladesh's environmental courts, as outlined in the Environment Court Act,2010 they have little authority to hear cases involving foreign parties means that The Environment Court Act,2010 have limited jurisdiction over international issues, even though they mostly handle local environmental problems[108]. Delocalization makes arbitration rulings less subject to national procedural regulations, which makes it more difficult to enforce them in Bangladesh's judicial system, particularly when dealing with ecologically sensitive matters[109]. Bangladesh depends on the 1958 New York Convention to recognize and enforce foreign awards; however, delocalized awards may encounter difficulties if they clash with national environmental regulations[110]. The question of whether arbitration may function outside of national laws is at the heart of the delocalization concept in international arbitration, especially in environmental conflicts. Proponents of delocalization argue for an impartial, flexible arbitration procedure independent of national legal systems. However, this case highlights the value of local legal systems and argues against total delocalization. The law of the seat (lex loci arbitri) is essential for guaranteeing that arbitration stays rooted in national legal systems, as demonstrated in this case when the English court declined to enforce an arbitral award that had been revoked by the court of the arbitral seat (China)[111]. A Chinese court, which served as the arbitration's seat, revoked the arbitral tribunal's decision in favor of Ferco Steel Ltd. The English court rejected Minmetals' attempt to enforce the verdict in England, stating that enforcement must adhere to the arbitration's legal oversight. Even though an annulled award was found to be lawful in another jurisdiction (in this case, England), the English court decided that its execution could not stand, the court emphasized that arbitration cannot function in a "legal vacuum" and must remain connected to local legislation in order to be dependable and enforceable[112]. The idea that arbitration cannot be entirely isolated from the legislative frameworks in which it functions is supported by this case. Scholars like Redfern and Hunter, who oppose delocalization, contend that arbitration may have issues with legitimacy and

[107] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3 (New York Convention); Arbitration Act 2001 (Bangladesh) s 3.*
[108] *Environment Court Act 2010.*
[109] *Alan Redfern and Martin Hunter, Law and Practice of International Commercial Arbitration (4th edn, Sweet & Maxwell 2004).*
[110] *New York Convention (n 129)*
[111] *Minmetals Germany GmbH v Ferco Steel Ltd [1999] 1 WLR 1537, 1540*
[112] *Minmetals Germany GmbH v Ferco Steel Ltd [1999] 1 WLR 1537, 1540*.

enforcement in the absence of connections to the national legal system. They stress that national laws offer crucial structure, establishing arbitration within a recognized legal framework and thereby improving the process's predictability and credibility. In my humble view structured arbitration procedures could be useful for settling climate justice conflicts including resource management, environmental damage, and climate adaption strategies in Bangladesh, a nation that is sensitive to climate change and has numerous environmental challenges[113]. The Minmetals case indicates that a strictly delocalized strategy could not work for Bangladesh since it could make it difficult to enforce awards, particularly in situations where local laws are not applicable. In order to guarantee that decisions are enforceable inside its borders, Bangladesh could instead implement an arbitration system that complies with national legal standards[114]. The Arbitration Act,2001, which regulates arbitration procedures in Bangladesh, is already in place. The framework can be modified to incorporate disputes pertaining to climate change, even though it does not specifically handle environmental issues[115]. I humbly believe that Bangladesh might guarantee the continued efficacy and enforceability of arbitration pertaining to environmental matters by adhering to the lex locus arbitri principles for instance, the local legal system might be used to enforce awards and integrate international arbitration techniques while making sure they are in line with national public policy in conflicts resulting from the effects of climate change if the arbitration is located in Bangladesh. In my humble belief, Bangladesh could take into consideration the following strategies to solve the difficulties presented by delocalization:

1. **Clear Legislation:** Add clauses to the Arbitration Act,2001 that guarantee arbitration pertaining to environmental issues is bound by national legislation, such as making sure environmental factors are taken into account during the arbitration procedure[116].
2. **Foreign Cooperation:** Bangladesh can partner with foreign organizations to develop particular environmental arbitration frameworks that respect national legal norms while adhering to international standards.
3. **Hybrid Approaches:** Using a hybrid arbitration process that incorporates both national and international norms may offer the necessary flexibility while preserving legal ties to Bangladesh's public policy.

[113] *Nigel Blackaby and others, Redfern and Hunter on International Arbitration (6th edn, Oxford University Press 2015).*
[114] *Minmetals Germany GmbH v Ferco Steel Ltd (n 129) 1540.*
[115] *Arbitration Act 2001.*
[116] *ibid.*

HOW DO THE ICSID ARBITRATION RULES APPLY TO STATE V. STATE DISPUTE IN CLIMATE CONTEXTS?

The main function of the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules is to enable arbitration between international investors and nations, can be modified, nevertheless, for disputes between states, such as those involving climate change[117]. Environmental organizations and other non-disputing parties may submit expert opinions on environmental issues to the tribunal in accordance with Rule 37 of the ICSID Arbitration Rules[118]. A balanced approach to state obligations in environmental situations has been promoted by the use of this provision in cases such as Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic, where third-party comments helped clarify environmental concerns.In this case, German investors in the Czech Republic's photovoltaic energy industry argued that changes to the nation's renewable energy regulations, such as the imposition of a "solar levy," infringed upon their rights under the Germany–Czech Republic Bilateral Investment Treaty (BIT) and the Energy Charter Treaty (ECT). The claimants contended that by lowering the financial incentives for the production of solar energy, these legislative amendments had a negative impact on their investments[119]. However, the tribunal rejected the allegations, concluding that the Czech Republic's actions were not discriminatory nor arbitrary. It came to the conclusion that the modifications were made in order to address the legitimate state goals of the quick growth of solar energy and the resulting financial burden on consumers. Because the Czech Republic had not explicitly guaranteed against future legislative changes, the tribunal further determined that the claimants' expectations of regulatory stability were unreasonable[120]. The tribunal's methodology for striking a balance between investor protections and a state's authority to regulate in the public interest is demonstrated by this case. It emphasizes how crucial it is for investors to understand the risks associated with regulatory changes and the need for host states to make explicit promises to respect particular legal frameworks[121]. In my humble assessment, the lessons learned from this case are relevant to Bangladesh's efforts to address global environmental challenges. The case emphasizes the need for transparent and robust legal frameworks to draw in and safeguard investments in industries like renewable energy, even if Bangladesh may not have specific treaties like the ECT or the

[117] *ICSID Rules of Procedure for Arbitration Proceedings (adopted 10 April 2006).*
[118] *ICSID Arbitration Rules (n 139) art 37.*
[119] *Antaris Solar GmbH and Dr. Michael Göde v Czech Republic (Award, 2 May 2018) PCA Case No 2014-01*
[120] *ibid*
[121] *ibid.*

Germany–Czech Republic BIT. When investors are reasonably assured that the regulatory environment will not change, they are more willing to commit to projects. Bangladesh should thus think about making clear promises on the stability of its laws pertaining to the environment and climate change in order to encourage investor trust and involvement in resolving these important concerns[122]. One of the arbitration services provided by the Bangladesh International Arbitration Centre (BIAC) is for environmental disputes, for example, the BIAC Arbitration Rules, 2019 set out dispute resolution procedures with a focus on Bangladeshi law and the Dhaka as arbitration seat[123]. I believe Bangladesh can gain from implementing a number of initiatives. For instance, involving environmental organizations can increase expertise and provide specialized information, which can result in better-informed judgments. An additional one would be Last but not least, adopting progressive arbitration procedures will improve Bangladesh's standing in international fora with along a balanced decision-making that takes into account both investment protections and environmental commitments guarantees equitable results and Bangladesh might want to amend the Arbitration Act to specifically permit third-party submissions in state-to-state disputes in order to implement these provisions and has to create guidelines by Outlining the requirements for receiving contributions from third parties in order to preserve procedural justice and need to Involve Stakeholders to work with environmental groups to make sure their opinions are pertinent and helpful. By taking these steps, Bangladesh can improve its ability to arbitrate international environmental disputes and guarantee that environmental concerns and state commitments are fairly represented.

CHAPTER 6

CAN BANGLADESH'S ADHERENCE TO THE PARIS AGREEMENT BE ENFORCED THROUGH ARBITRATION IN CASES OF NON-COMPLIANCE?

A historic worldwide agreement, the Paris Agreement was adopted in 2015 with the goal of reducing the rate of global warming and strengthening adaptive capabilities. Although it creates legally binding agreements for nations to cut greenhouse gas emissions, there is no official enforcement system in place to ensure adherence. Rather, the Agreement is based on a system of facilitative compliance that is intended to encourage adherence and openness through international collaboration and peer pressure[124]. The Paris Agreement is very

[122] *Antaris Solar GmbH and Dr. Michael Göde v Czech Republic (Award, 2 May 2018) PCA Case No 2014-01.*
[123] *BIAC Arbitration Rules (Bangladesh International Arbitration Centre 2019).*
[124] *Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UNTS Registration No. I-54113.*

important in Bangladesh's context because Bangladesh has pledged to lower its greenhouse gas emissions and improve resilience because the country is extremely exposed to the effects of climate change, such as rising sea levels and extreme weather events. In order to fulfill its climate commitments, the nation has filed its Nationally Determined Contributions (NDCs), which include detailed goals and measures[125]. The Paris Agreement creates a framework for accountability and transparency, but it does not offer a formal arbitration process for disputes arising between states over non-compliance. Article 15 of the Agreement establishes a committee to support implementation and encourage adherence, utilizing a non-punitive, non-adversarial, and facilitative approach. Instead than using coercive tactics, this mechanism seeks to help nations fulfill their obligations by offering support and direction[126]. Adhering to the Paris Agreement will help Bangladesh by giving it access to international climate money, technology transfer, and assistance for capacity building. Bangladesh may improve its adaptive capabilities, draw in investments in renewable energy, and support international efforts to mitigate climate change by actively engaging in the Agreement's procedures. Furthermore, adhering to the Agreement can improve Bangladesh's reputation abroad and promote bilateral collaborations centered on climate resilience[127]. Bangladesh can create strong national frameworks that complement the goals of the Paris Agreement in order to successfully carry out and oversee its climate commitments. This entails establishing precise goals for reducing emissions, creating thorough plans for adapting, and making sure that reporting and monitoring procedures are open and transparent. Interacting with global partners and stakeholders can also yield important resources and support for bolstering Bangladesh's climate action efforts[128]. In this regard, the Paris Agreement offers a thorough framework for nations to commit to and accomplish climate targets, even though it lacks a formal arbitration mechanism for enforcing state compliance. Significant advantages, such as increased resilience, access to foreign

[125] *Bangladesh, 'Nationally Determined Contribution (NDC) Updated Submission' (26 August 2021).https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Bangladesh%20First/Updated%20NDC%20Bangladesh%202021.pdf accessed 17 October 2024.*

[126] *ibid art 16.*

[127] *Bangladesh and France, 'Joint Statement: Partnership for Peace, Prosperity and People' (11 September 2023)https://www.elysee.fr/en/emmanuel-macron/2023/09/11/joint-statement-bangladesh-france-partnership-for-peace-prosperity-and-people accessed 12 August 2024.*

[128] *Bangladesh, 'Bangladesh Advances Climate Action with Enhanced Transparency Framework' (UNDP Bangladesh, 30 April 2024)https://www.undp.org/bangladesh/press-releases/bangladesh-advances-climate-action-enhanced-transparency-framework accessed 5 September 2024.*

assistance, and a more robust role in global climate governance, may result from Bangladesh's active involvement in and adherence to the Agreement[129].

INTERACTION OF THE PRINCIPLE OF LEX ARBITRI IN CLIMATE DISPUTE ARBITRATION

A key factor in balancing national laws with international commitments in the field of climate dispute arbitration is the principle of *lex arbitri*, which governs the arbitration procedure. This rule guarantees that arbitration procedures honor the country's commitments under international treaties as well as the domestic legal system. Choosing the location, or "seat," of arbitration is covered by a number of important international instruments: The New York Convention highlights the significance of the arbitration agreement and the parties' independence in choosing the venue, even if it makes no clear recommendations about how the arbitration should be conducted. Article 20 of the UNCITRAL Model Law on International Commercial Arbitration states that the parties may freely choose where the arbitration will take place. Without such an arbitration agreement, the arbitral tribunal chooses the location based on the case's facts and the parties' convenience[130]. Parties may agree on the arbitration's location under Article 18 of the ICC Arbitration Rules. The ICC Court determines the arbitration location if they don't[131]. Unless the parties agree differently, arbitrations must normally take place in the ICSID headquarters in Washington, D.C., per the ICSID Convention[132]. In accordance with the UNCITRAL Model Law, Bangladesh's arbitral Act, The Arbitration Act,2001 gives parties the freedom to choose the arbitral venue. Bangladesh, on the other hand, follows the territorial theory of arbitration, which holds that the arbitration is inextricably related to the local legal system. This implies that arbitrations held on Bangladeshi soil would be governed by its procedural laws[133]. The decolonized theory promotes a more globalized approach by arguing that arbitration should be freed from the restrictions imposed by the national laws of the seat. The territorial theory, on the other hand, places more emphasis on applying the laws of the seat. Adopting the decolonized doctrine could make it difficult for Bangladesh to enforce arbitral rulings because domestic courts could be hesitant to accept

[129] *Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UNTS Registration No. I-54113.*

[130] *UNCITRAL Model Law on International Commercial Arbitration (adopted 21 June 1985, amended 7 July 2006) art 20.*

[131] *International Chamber of Commerce, 'Arbitration Rules' (in force as of 1 January 2021) art 18.*

[132] *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) 575 UNTS 159.*

[133] *UNCITRAL Model Law on International Commercial Arbitration (adopted 21 June 1985, amended 7 July 2006) UN Doc A/40/17, annex I; Arbitration Act 2001.*

proceedings that are not firmly based in national law. After a moratorium on oil and gas development within 12 nautical miles of the coast was reinstated, Italy refused a production concession for the Ombrina Mare oil field, which led to a disagreement. Asserting that Italy's actions constituted wrongful expropriation, Rockhopper filed for arbitration under the Energy Charter Treaty. Significant damages were awarded after the tribunal decided in favor of Rockhopper. This case highlights the conflict between a state's duties under international investment agreements and its sovereign power to enact environmental rules. It emphasizes the significance of precisely establishing the arbitration's location and comprehending how national laws and international obligations interact[134]. Selecting the arbitration location has several advantages for Bangladesh, in my humble opinion. First, it can provide legal certainty because a clearly defined seat guarantees that the arbitration will be governed by a particular legal framework, which clarifies procedural matters. Secondly, it can ensure enforcement of awards because arbitral awards are more easily enforceable under the New York Convention if the arbitration is held in a contracting state. Finally, it can provide a neutral forum because choosing a neutral venue can improve the proceedings' perceived fairness[135]. However, improperly choosing the arbitration location might result in issues like jurisdictional challenges, where disagreements over which legal system would control the arbitration, which can cause delays and, most crucially, enforcement issues. problems where awards could encounter difficulties while being enforced if the legal foundation of the arbitration is not established. In order to manage these complexities, Bangladesh should align domestic laws with international standards to ensure that the Arbitration Act, 2001 is consistent with international instruments such as the UNCITRAL Model Law; provide clear guidelines where necessary to avoid ambiguities; and, finally, promote party autonomy to encourage parties to agree on the arbitration's location while respecting their autonomy. Enhancing judicial support by training the judiciary to uphold and enforce arbitral awards in accordance with international best practices is another crucial mechanism that should be implemented. Bangladesh can improve its arbitration system and successfully strike a balance between its international

[134] *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic (ICSID Case No. ARB/17/14) Final Award, 23 August 2022.*

[135] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3*

commitments and its national sovereignty in climate-related conflicts by implementing these measures[136].

CHAPTER 7

HOW DO INTERNATIONAL FRAMEWORKS LIKE THE KYOTO PROTOCAL AND UNFCCC CONVENTION SUPPORT ARBITRATION IN CLIMATE DISPUTE?

Through the establishment of cooperative commitments and procedures for handling compliance, international frameworks such as the Kyoto Protocol and the UNFCCC facilitate arbitration in climate conflicts[137]. Article 18 of the Kyoto Protocol gives parties the authority to implement compliance measures, which may provide arbitration to handle emissions target noncompliance and facilitate efficient dispute settlement[138]. In a same vein, the UNFCCC's Article 14 encourages arbitration and other forms of peaceful dispute resolution, enabling nations to resolve climate-related conflicts within a formal, legal framework[139]. Section 45 of the Arbitration Act, 2001 in Bangladesh emphasizes the importance of recognition and enforcement in order to make sure that international awards serve domestic interests[140]. Arbitration is further protected by the principle of separability, which states that the agreement is enforceable even in the event that other elements are contested[141]. Sensitive information is protected by privacy and secrecy, which is essential in issues involving the state and investor climate[142]. The Investor-State Dispute Settlement (ISDS) process becomes relevant when climate justice is a factor in investor-state disputes. If foreign investors feel that state activities, including those pertaining to environmental legislation, have negatively impacted their interests, they may use ISDS to start arbitration against host nations. Multilateral accords or Bilateral Investment Treaties (BITs) frequently include this mechanism[143]. The state-owned

[136] *UNCITRAL Model Law on International Commercial Arbitration (adopted 21 June 1985, amended 7 July 2006) UN Doc A/40/17, annex I;Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3;Arbitration Act 2001.*

[137] *Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162; United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.*

[138] *Kyoto Protocol (n 154); United Nations Framework Convention on Climate Change (n 162) art 18.*

[139] *United Nations Framework Convention on Climate Change Arbitral Rules (adopted 9 May 1992, entered into force 21 March 1994) art 14.*

[140] *Arbitration Act 2001 s 45.*

[141] *ibid s 7*

[142] *UNCITRAL Arbitration Rules (as revised in 2010) art 7.*

[143] *UNCTAD Secretariat, Recent Developments in Investor–State Dispute Settlement (ISDS) (UNCTAD Issues Note, July 2022)https://unctad.org/system/files/official-document/diaepcbinf2022d4_en.pdf accessed 12 August 2024.*

oil and gas corporation of Bangladesh, Petrobangla, contracted with the Italian engineering firm Saipem S.p.A. in 1990 to build a gas pipeline. According to the terms of the contract, any disagreements would be settled by arbitration in accordance with the norms of the International Chamber of Commerce (ICC), with Dhaka, Bangladesh, serving as the arbitration location. Saipem started ICC arbitration procedures in Dhaka as a result of disagreements that surfaced throughout the project. Petrobangla claimed procedural infractions and arbitrator misconduct throughout these processes, and requested intervention from Bangladeshi courts. The authority of the ICC tribunal was then withdrawn by the First Court of the Subordinate Judge of Dhaka. The ICC tribunal persisted in spite of this and rendered a decision in favor of Saipem in 2003[144]. The Supreme Court of Bangladesh's High Court Division, however, decided that the award could not be overturned or implemented. In 2004, Saipem responded by submitting a claim to the International Centre for Settlement of Investment Disputes (ICSID), claiming that Bangladesh's legal activities violated the Bangladesh-Italy Bilateral Investment Treaty (BIT) by expropriating its investment[145]. According to the ICSID tribunal, Saipem's contractual rights were essentially revoked by Bangladesh's judicial intervention, which amounted to an indirect expropriation. As a result, the tribunal granted Saipem damages of almost USD 6.3 million in 2009. In my humble view the main topics of this case are judicial intervention in contractual disputes and investment arbitration[146]. since these international accords concentrate on environmental policies and climate change mitigation, it has no direct bearing on the Kyoto Protocol or the United Nations Framework Convention on Climate Change (UNFCCC)[147]. Nonetheless, the case emphasizes how crucial it is to uphold international arbitration accords and the possible repercussions of legal acts that can be interpreted as weakening them[148]. When it comes to the implementation of global environmental accords such as the UNFCCC and the Kyoto Protocol, this principle is pertinent, participating nations must uphold their commitments and make sure that domestic legal acts do not conflict with international duties in order for these environmental systems to be effective[149]. I believe the Saipem case

[144] *Saipem S.p.A. v People's Republic of Bangladesh (ICSID Case No ARB/05/7, Decision on Jurisdiction, 21 March 2007).*

[145] *ibid.*

[146] *Saipem S.p.A. v People's Republic of Bangladesh (ICSID Case No ARB/05/7, Decision on Jurisdiction, 21 March 2007).*

[147] *Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162; United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107*

[148] *Saipem S.p.A. v People's Republic of Bangladesh (n 171).*

[149] *Kyoto Protocol (n 172); United Nations Framework Convention on Climate Change (n 172).*

emphasizes how important it is for Bangladesh's legal system to conform to international norms in order to prevent domestic court rulings from going against global accords, because it promotes confidence and collaboration with other countries and international organizations, this alignment is essential for Bangladesh to successfully execute and reap the benefits of international environmental agreements[150]. Bangladesh can benefit from adopting and upholding the Kyoto Protocol and the UNFCCC in a number of ways, including attracting foreign investment since a strong dispute resolution process guarantees investors equitable treatment, increasing Bangladesh's attractiveness as an investment destination. Another is effective dispute resolution, where arbitration offers a more efficient procedure than traditional court systems, resulting in speedier resolutions in the final international credibility category, this is because Bangladesh's reputation in the international arena is enhanced by adherence to international arbitration standards[151]. In my humble opinion Bangladesh might include explicit clauses in BITs to protect against future arbitration claims, particularly those that contest environmental policies and incorporating clauses that uphold the state's authority to enact environmental and public health policies can serve as a defence against lawsuits, ensure regulatory transparency by keeping environmental regulations uniform and clear, reduce disputes resulting from arbitrary actions, and engage in treaty reforms by helping Bangladesh bring its treaties into line with modern norms that strike a balance between state sovereignty and investor protection. Bangladesh can successfully negotiate the intricacies of investor-state conflicts while maintaining its commitment to climate justice by proactively improving its legal frameworks and investment treaties.

IN WHAT WAYS CAN BANGLADESH LEVERAGE THE BRICK KILN ACT 2013 TO PROVIDE ARBITRATION IN ADDRESSING ENVIRONMENTAL DISPUTES?

One important piece of legislation in Bangladesh that aims to regulate the brick manufacturing sector and lessen environmental damage is the Brick Manufacturing and Kiln Establishment (Control) Act, 2013, this Act promotes sustainable industrial practices and lowers emissions, which are in line with the goals of the United Nations Framework Convention on Climate Change (UNFCCC)[152]. Section 4 of the Act requires brick kilns to obtain licenses in order to ensure that they operate within environmental standards where section 7 places restrictions on

[150] *Saipem S.p.A. v People's Republic of Bangladesh (n 171).*
[151] *Kyoto Protocol (n 172); United Nations Framework Convention on Climate Change (n 172).*
[152] *Brick Manufacturing and Kiln Establishment (Control) Act 2013 ; United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.*

harmful fuels, and section 7A establishes guidelines for waste disposal in order to minimize pollution. The Act places a strong emphasis on regulations surrounding the establishment of brick kilns and manufacturing practices in order to control pollution and environmental harm[153]. Articles 2 and 3 of the UNFCCC focus on reducing greenhouse gas emissions to prevent dangerous impacts on the climate, and these articles set out principles that encourage all countries to protect the environment and work towards sustainable development, promoting actions that limit pollution and enhance environmental responsibility, these sections directly contribute to reducing emissions from brick kilns, which is in line with the UNFCCC's emphasis on lowering pollution for a healthier environment[154]. Such environmental conflicts can be resolved through arbitration thanks to the Arbitration Act, 2001, which offers a flexible framework that permits industry-specific solutions[155]. In my humble view and assessment I believe Bangladesh may achieve advantages by adopting strategies like mandatory arbitration clauses when it becomes necessary to include provisions in license agreements requiring disputes to be settled through arbitration, guaranteeing prompt and knowledgeable adjudication. Secondly, panels of arbitrators with environmental expertise must be established to handle disputes and ensure that decisions are well-informed. More importantly, public participation is crucial in this case because it must enable community stakeholders to raise environmental concerns during arbitration, improving inclusivity and transparency and Fast-Track Arbitration should be another crucial tool. In order to resolve and lessen environmental harm as soon as possible, it is necessary to implement expedited arbitration procedures for urgent environmental disputes[156]. In order to protect sensitive business information during arbitration while maintaining transparency in environmental matters, Bangladesh should make plans for industrial data confidentiality. Additionally, one of the most desirable concerns is the recognition of arbitration awards, which must guarantee that they are legally binding and enforceable, providing certainty and compliance. Special attention should be paid to penalty clauses, which include enforceable penalty provisions for non-compliance with environmental

[153] *Brick Manufacturing and Kiln Establishment (Control) Act, 2013, ss 4, 7, and 7A.*

[154] *United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107, art 2 and 3.*

[155] *Arbitration Act 2001*

[156] *ICC Arbitration and ADR Commission, Report on Resolving Climate Change Related Disputes (November 2019)https://iccwbo.org/publication/resolving-climate-change-related-disputes-through-arbitration-and-adr/ accessed 12 August 2024; Shubhang Gomasta, 'Solving Environmental Issues and Disputes through Arbitration: A Critical Study' (2024) 4(1) Indian Journal of Integrated Research in Law 577https://ijirl.com/wp-content/uploads/2024/02/SOLVING-ENVIRONMENTAL-ISSUES-AND-DISPUTES-THROUGH-ARBITRATION-A-CRITICAL-STUDY.pdf accessed 12 August 2024.*

standards, upheld through arbitration, and international standards, which align arbitration decisions with global environmental standards, encouraging accountability and adherence to best practices. I humbly believe the Periodic Review of Standards raises concerns about the necessity of requiring arbitrators to evaluate adherence to changing environmental regulations in order to ensure continued compliance and one of the most crucial mechanisms that must be addressed is the use of preventive arbitration mechanisms, which use arbitration to proactively provide guidance on compliance and avert disputes before they arise[157]. Protective Actions In order to avoid ambiguities, Bangladesh can work by implementing a clear legislative framework that defines the scope and procedures for arbitration within the Act. Another issue is capacity building, which calls for training arbitrators and legal professionals in environmental law and arbitration procedures as well as ensuring public awareness through education of stakeholders regarding their rights and obligations under the Act and the arbitration process[158]. Adopting these tactics will enable Bangladesh to fulfill its obligations under international environmental accords and advance sustainable industrial practices by successfully utilizing the Brick Kiln Act to support arbitration in environmental disputes.

NECESSITY OF AN ARBITRATION AGREEMENT AND VALIDITY.

A fundamental component of national and international dispute resolution frameworks is the legitimacy of arbitration agreements. To guarantee that these agreements are enforceable, a number of legal documents specify particular requirements. Contracting states are required by Article II (1) to accept written arbitration agreements pertaining to arbitrable subject issues[159]. According to Article II (2), an arbitral clause in a contract or arbitration agreement that is signed by the parties or included in a correspondence or telegram exchange is considered a "agreement in writing[160]. In the event that the arbitration agreement is deemed illegal by the relevant legislation, Article V(1)(a) permits the refusal of award recognition[161]. According to Article 7, an arbitration agreement is a contract between parties that commits them to arbitrating all or some of the disputes that have or may arise between them pertaining to a certain legal relationship, it accepts written and electronic correspondence as legitimate means

[157] *ibid*

[158] *International Centre for Climate Change and Development, 'CAPACITY BUILDING | CAP-RES: Building Climate Resilience in Bangladesh through Capacity Building, Innovation and Advocacy' (21 March 2024)https://icccad.net/dhaka-tribune-articles/capacity-bulding-cap-res-building-climate-resilience-in-bangladesh-through-capacity-building-innovation-and-advocacy/ accessed 12 August 2024.*

[159] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3 (New York Convention) art II(1).*

[160] *ibid art II(2).*

[161] *ibid art V(1)(a).*

of contract[162]. Arbitration agreements must be in writing in order to ensure mutual consent and clarity under the ICC Rules. They stress how crucial it is to outline the range of conflicts that are subject to arbitration as well as the procedures that must be adhered to[163]. In order to establish ICSID's jurisdiction over the dispute, Article 25(1) requires the parties to give their written consent to arbitration. This permission is essential to the arbitration process and needs to be unambiguous[164]. The Kyoto Protocol (1997) and the Paris Agreement (2015)Arbitration agreements are not expressly covered by these international environmental agreements. Nonetheless, they encourage parties to resolve conflicts amicably by negotiation and other mutually agreed-upon techniques, which may include arbitration. The UNFCCC encourages the settlement of conflicts by mutually agreed-upon peaceful measures but does not specifically require arbitration, much like the Paris Agreement and Kyoto Protocol[165]. In accordance with international norms, Section 9 of Bangladesh's Arbitration Act, 2001, mandates that an arbitration agreement be in writing, this clause facilitates enforceability by guaranteeing that the parties' intention to arbitrate is expressly recorded[166]. The variations between these instruments are Although a written arbitration agreement is required by all of these documents, their definitions of "writing" and formal criteria vary. While the UNFCCC and the Paris Agreement lack clear standards on arbitration agreements, the New York Convention and UNCITRAL Model Law have detailed clauses outlining the agreement's form[167]**.** The Ombrina Mare oil field off the coast of Italy was purchased by Rockhopper, an oil and gas development firm based in the United Kingdom. Following a large investment, Rockhopper's operations were essentially shut down when Italy passed legislation prohibiting offshore oil and gas development within 12 nautical miles of the coast. Rockhopper claimed that Italy's actions amounted to wrongful expropriation and filed for arbitration under the Energy Charter Treaty (ECT). The ICSID tribunal ruled in Rockhopper's favor, concluding

[162] *UNCITRAL Model Law on International Commercial Arbitration (adopted 21 June 1985, amended 7 July 2006) art 7.*

[163] *International Chamber of Commerce, Arbitration Rules (in force 1 January 2021).*

[164] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (ICSID Convention) art 25(1).*

[165] *United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 ; Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162 ; Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UNTS Registration No. I-54113.*

[166] *Arbitration Act 2001 s 9.*

[167] *United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107; Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3; UNCITRAL Model Law on International Commercial Arbitration (adopted 21 June 1985, amended 7 July 2006).*

that Italy's legislative actions violated the ECT by amounting to indirect expropriation without sufficient compensation. The court gave Rockhopper a damages amount of almost USD 190 million[168]. A few may now wonder what factors are relevant to the validity of an arbitration agreement. The importance of a legitimate arbitration agreement in international dispute settlement is shown by this case. The arbitration language in the ECT, to which both parties had agreed, served as the foundation for the tribunal's jurisdiction. This consent is a prime example of how a legitimate and unambiguous arbitration agreement makes it easier to settle complicated international conflicts, such as those involving investments and the environment[169]. The question of how these concerns relate to Bangladesh may now come up. With the passage of the Arbitration Act, 2001 and its ratification of the New York Convention, Bangladesh has brought its arbitration procedures into compliance with international norms. Bangladesh can efficiently handle both internal and international conflicts, particularly those involving environmental issues, by making sure that arbitration agreements are in writing and precisely stated[170]. In my humble view Bangladesh can take a number of proactive steps to allay worries about the legality of arbitration agreements, such as focusing on legislative clarity or explicit legal provisions that clearly outline the conditions for a legitimate arbitration agreement under the Arbitration Act of 2001, stressing the need for written agreements and outlining acceptable formats[171]. The second strategy is capacity building, which includes training programs to create thorough training initiatives for judges, arbitrators, and legal professionals to improve their knowledge of arbitration laws and best practice and institutional support is also provided to strengthen organizations such as the Bangladesh International Arbitration Centre (BIAC) to offer resources and advice on creating and implementing arbitration agreements[172]. Judicial support, which includes court rulings that encourage the judiciary to defend the legitimacy of arbitration agreements and prevent needless involvement in arbitration processes, is one of the primary implementation needs another is the creation of specialized arbitration benches, which guarantee knowledge and uniformity in rulings by assigning specific judicial benches to handle arbitration-related cases[173]. Last but not least, clear drafting is necessary to ensure contract precision by emphasizing precise language in

[168] *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic (ICSID Case No. ARB/17/14, Final Award, 23 August 2022).*
[169] *ibid*
[170] *Arbitration Act 2001; Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3.*
[171] *Arbitration Act 2001.*
[172] *Bangladesh International Arbitration Centre (BIAC)https://www.biac.org.bd/ accessed 19 August 2024.*
[173] *Singapore International Arbitration Centre (SIAC)https://www.siac.org.sg/ accessed 22 August 2024.*

arbitration clauses to prevent ambiguities that might give rise to disputes over their validity and comprehensive clauses should also include important elements like the arbitration's scope, arbitrators' selection, governing law, and procedural rules within agreements. Bangladesh may create a more robust and dependable arbitration environment that complies with international standards and facilitates efficient dispute resolution by putting these steps into place, which will also increase the legality and enforceability of arbitration agreements[174].

RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARD.

In climate-related arbitration proceedings, adherence to rulings is largely dependent on the acceptance and enforcement of arbitral awards. Numerous international agreements and domestic legislations, each with unique features, deal with these issues. In climate-related arbitration matters, acknowledging an arbitral award is crucial to upholding rulings and guaranteeing that parties abide by the tribunal's conclusions. As long as an award does not conflict with public policy or the national interest, Bangladesh's courts are likely to uphold it. This is because Section 45 of the Arbitration Act, 2001, states that foreign arbitral awards will be recognized and enforceable in Bangladesh if they meet certain criteria, which are in line with the standards of the New York Convention. With some exceptions, such when they clash with public policy, The New York Convention requires contracting governments to accept and uphold foreign arbitral rulings[175]. The United Nations Commercial Arbitration Model Law With a focus on minimal court interference, it provides guidelines for identifying and implementing arbitral rulings and serves as a model for national legislation[176]. In order to be recognized under frameworks such as the New York Convention and the International Centre for Settlement of Investment Disputes (ICSID) Convention, which stipulate that awards made under ICSID are binding and enforceable in contracting states as if they were final judgments of local courts, the International Chamber of Commerce (ICC) Arbitration Rules make sure that awards adhere to international standards[177]. The United Nations Framework Convention on Climate Change (UNFCCC) encourages arbitration for dispute resolution, which has an

[174] *International Centre for Dispute Resolution (ICDR) http://icdr.org/about_icdr accessed 22 August 2024; Permanent Court of Arbitration (PCA) https://pca-cpa.org/home/ accessed 25 August 2024;*

[175] *Arbitration Act 2001 s 45; Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3.*

[176] *UNCITRAL Model Law on International Commercial Arbitration (adopted 21 June 1985, amended 7 July 2006).*

[177] *International Chamber of Commerce, Arbitration Rules (in force 1 January 2021); Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159.*

impact on how such awards are recognized and enforced. The Paris Agreement and Kyoto Protocol, which are primarily environmental treaties, mandate that arbitration be used to resolve disputes[178]. Under the terms of the U.S.-Ecuador Bilateral Investment Treaty, Chevron and Texaco filed an arbitration suit against Ecuador, claiming that Ecuadorian courts had denied them justice in relation to their environmental issues. The panel determined that Ecuador had breached its treaty duties and decided in favor of Chevron. In order to ensure accountability for environmental harm, this case emphasizes how important it is to recognize arbitral rulings in environmental disputes. In accordance with the requirements of the New York Convention, Bangladesh is required to recognize and uphold foreign arbitral rulings and the Arbitration Act of 2001 recognizes this commitment and offers a framework for enforcement. Arbitral awards may not be recognized by Bangladesh if they address issues that are not arbitrable under Bangladeshi law or conflict with national interest or public policy[179]. These clauses guarantee that enforcement is consistent with national sovereignty and legal norms. In conclusion, maintaining rulings in climate-related conflicts depends on the acceptance and enforcement of arbitral awards. This process is facilitated by Bangladesh's legal framework, which promotes environmental justice and respect to international norms in accordance with international conventions.

SHOULD ARBITRAL AWARDS UNDER CLIMATE ARBITRATION CONTRIBUTE TO BROADER GLOBAL CLIMATE COMMITMENTS, SUCH AS THE PARIS AGREEMENT AND SDGs?

Environmental goals should be respected in international arbitration by ensuring that arbitral rulings in climate-related disputes are in line with global climate commitments like the Paris Agreement and the Sustainable Development Goals (SDGs)[180]. This strategy strengthens the incorporation of environmental factors into regulatory requirements and business obligations. Limiting temperature rise is emphasized in Article 2 of the Paris Agreement, which also encourages climate-conscious decision-making in conflicts[181]. International commercial arbitration is supported by Bangladesh's Arbitration Act 2001, and the country can promote

[178] *United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107; Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162; Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UNTS Registration No. I-54113.*

[179] *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador (PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018).*

[180] *Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 3.*

[181] *ibid art 2.*

environmental justice in line with its SDG commitments by including climate goals into awards[182]. The conflict started because of Argentina's 2001–2002 financial crisis, which resulted in emergency measures that affected concessions for public services. A concessionaire in charge of water and sewage services in the Province of Greater Buenos Aires was owned by Urbaser S.A., a Spanish business. Urbaser filed a claim for arbitration against Argentina under the Argentina-Spain Bilateral Investment Treaty (BIT) after the concessionaire suffered financial losses as a result of the emergency measures[183]. The tribunal recognized that businesses might be held accountable for human rights, such as the right to water. The tribunal acknowledged Argentina's counterclaim jurisdiction, which was a major step in taking human rights into account in investment arbitration, even though it did not find Urbaser accountable for violating its human rights duties. This case is relevant because it shows how environmental obligations and investment arbitration interact[184]. The Paris Agreement and the Sustainable Development Goals (SDGs), which promote sustainable development and corporate responsibility in environmental protection, are in line with the tribunal's view that enterprises may have obligations pertaining to human rights, including environmental rights[185]. Adhering to the Paris Agreement benefits Bangladesh in the following ways like environmental protection and ethical business practices are encouraged where arbitral awards are aligned with climate commitments to support Bangladesh's sustainable development goals; and international standing is enhanced by Bangladesh can improve its standing in the international community and draw in eco-aware investments by showcasing its commitment to international environmental norms[186]. By incorporating specific environmental obligations into contracts that are subject to arbitration, making sure that tribunals take these factors into account when making decisions, and using the public policy exception under Section 45 of the Arbitration Act, 2001, to deny enforcement of awards that violate national environmental policies or international climate commitments, Bangladesh can, in my humble opinion, put the following strategies into practice to ensure that arbitral awards are in line with its climate commitments[187].

[182] *Arbitration Act 2001*

[183] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic (ICSID Case No. ARB/07/26).*

[184] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic (ICSID Case No. ARB/07/26).*

[185] *Paris Agreement (n 208).*

[186] *ibid.*

[187] *Arbitration Act 2001 s 45.*

CHAPTER 8

RECOMMENDATIONS

In my humble opinion Bangladesh is at a turning point in its history, where the effects of climate change necessitate quick and creative solutions. The way the country handles environmental issues may change if it adopts international commercial arbitration as a weapon for climate justice. First and foremost, arbitration clauses in environmental contracts urgently need to be validated. These agreements need to be carefully drafted to guarantee enforcement on a local and international level, offering legal certainty in conflicts involving both public and private parties.To increase confidence in arbitration procedures, arbitral awards must be recognized and upheld. In order to guarantee that foreign awards are enforceable unless they are in opposition to state policy, Bangladesh should reaffirm its adherence to the New York Convention[188]. This ensures that arbitration panel rulings are upheld and carried out as soon as possible. However, selecting the arbitration's location is just as important. To build trust among stakeholders, neutral locations in Bangladesh or regional centres with a track record of efficiency and fairness should be given priority[189]. Additionally, the Arbitration Act, 2001 needs to be in line with global agreements such as the Kyoto Protocol and the Paris Agreement. This would guarantee that arbitration procedures in Bangladesh are capable of managing the intricate nature of climate-related conflicts while striking a balance between the needs of environmental sustainability and economic growth[190]. Enhancing public trust and accountability in these proceedings can be achieved by implementing transparency measures, such as disclosing arbitration results when appropriate. Building institutional capacity is another area Bangladesh needs to concentrate on. To successfully manage conflicts, arbitrators require specific expertise in international legal frameworks and environmental science[191]. The knowledge and resources required to develop a group of competent experts who can handle the complex relationship between environmental regulations and business interests can be obtained through cooperative efforts with international organizations[192]. Regarding policy suggestions, Bangladesh ought to incorporate community perspectives into arbitration

[188] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958), entered into force 7 June 1959) 330 UNTS 3*

[189] *ibid.*

[190] *Arbitration Act 2001 (Bangladesh); Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162;Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 3.*

[191] *ibid.*

[192] *ibid.*

procedures. Those most impacted by environmental decisions will have a forum to voice their grievances and pursue justice thanks to this addition. The nation can address the vulnerabilities of its populations affected by climate change by integrating the concepts of sustainability and equity into arbitral procedures[193]. Finally, a strong mechanism for resolving climate disputes can be established by using current legal frameworks, such as the Environment Court Act, 2010, and cultivating collaborations with international organizations[194]. Bangladesh must provide an example for how arbitration may be a force for climate justice by combining local realities with international commitments. In a time of unparalleled environmental change, these actions not only solve current issues but also open the door for sustainable development.

CONCLUSION

The conclusion of my study highlights the revolutionary potential of international commercial arbitration to further climate justice in Bangladesh. This strategy provides a fair way to deal with the intricate relationship between local socioeconomic realities and international environmental commitments. When combined with global frameworks like the UNFCCC, Kyoto Protocol, and Paris Agreement, arbitration can offer a methodical, effective, and equitable means of settling conflicts pertaining to climate change. Although the Arbitration Act, 2001 provides a solid basis, it has to be improved to solve loopholes in enforcement, openness, and community involvement[195]. The necessity of incorporating fairness, sustainability, and inclusion concepts into arbitration frameworks is one of the study's main conclusions. Since they frequently suffer the most from the effects of climate change, vulnerable populations ought to have a significant say in arbitration processes. Enhancing arbitrators' ability to comprehend the subtleties of climate science and policy is also essential to guaranteeing well-informed decision-making[196]. In order to improve procedural fairness and award enforcement, the report also emphasizes how crucial it is to align Bangladesh's domestic legislation with international arbitration standards. Adopting these policies will benefit Bangladesh greatly. In order to ensure that international commitments are met and local environmental laws are upheld, arbitration can provide the nation with an impartial forum to

[193] *ibid.*

[194] *Environment Court Act 2010.*

[195] *United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107; Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162;Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 3;Arbitration Act 2001.*

[196] *ibid.*

resolve conflicts involving multinational firms. By demonstrating Bangladesh's dedication to sustainable development and legal stability, this system can help draw in green investments. But there are difficulties. Bangladesh now adheres to a territorial theory of arbitration, which can be at odds with international tendencies that support delocalization. This might make it more difficult to enforce judgments or maintain impartiality while arguing with foreign parties[197]. Bangladesh must prioritize judicial training, establish clear norms about the arbitration venue, and incorporate arbitration clauses into environmental agreements in order to overcome these obstacles. In conclusion, there is a chance to address urgent environmental issues and promote social and economic advancement by incorporating international arbitration within Bangladesh's climate justice framework[198]. Bangladesh can show how legal innovation may promote sustainability and equality in the face of global climate change by implementing the research's suggestions and establishing itself as a regional leader in climate arbitration.

[197] *ibid.*
[198] *ibid.*