

**The Place of Environmental, Social and
Governance (ESG) in Arbitration**

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Abstract

The paper critically discusses the relationship between Environmental, Social and Governance (ESG) and arbitration. The paper argues that arbitration represents a viable mechanism for managing ESG related disputes while simultaneously promoting ESG tenets. It addresses some of the current concerns in ESG and the ability of arbitration to deal with these concerns. The paper further proposes recommendations towards embracing arbitration in management of ESG disputes for Sustainable Development.

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1. Introduction

Environment, Social and Governance (ESG) is a concept that seeks to promote sustainable, responsible and ethical corporate behavior by incorporating Environmental, Social and Governance concerns in corporate decision making¹. The growing threat of climate change and climate crisis has forced many investors to embrace sustainability as a key factor in investment decision-making². Further, social concerns touching on issues such as human rights, diversity, consumer protection and welfare and protection of animals especially endangered species have led to many companies taking their social responsibilities and especially impact of their commercial activities on the local communities where they operate more seriously than ever³. In addition, there has been growing corporate governance awareness since the 2008 global economic recession which has led to increase shareholder and stakeholder activism in demanding more responsive management structure, better employee relations, and reasonable executive compensation in companies⁴.

Consequently, how corporations handle environmental, social and governance issues is increasingly becoming a major concern especially for investors and other key stakeholders. Most investment decisions including assessment and valuation are incorporating ESG criteria with companies that are rated as having strong sustainability programs enjoying more preference from investors⁵. Matters touching on climate change and sustainability dominate current ESG focus⁶. In addition, human rights and especially

¹ Stuart. L.G et al., 'Firms and social responsibility: A review of ESG and CSR research in corporate finance.' *Journal of Corporate Finance* 66 (2021): 101889.

² De Francesco. A.J., 'The impact of sustainability on the investment environment.' *Journal of European Real Estate Research* (2008)

³ Cedric.R., 'Accountability of Multinational Corporations for Human Rights Abuses.' *Utrecht Law Review* 14.2 (2018): 1-5.'

⁴ Martin.C et al., 'Corporate governance and the 2008-09 Financial Crisis.' *Corporate Governance: An International Review* 19.5 (2011): 399-404; See also Erkens. D.H, et al Corporate governance in the 2007-2008 financial crisis: Evidence from financial institutions worldwide." *Journal of corporate finance* 18.2 (2012): 389-411.

⁵ Muigua. K., 'Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2022/07/Embracing-ESG-Principles-for-Sustainable-Development-in-Kenya.pdf> (accessed on 28/09/2022)

⁶ Ibid

the rights of indigenous peoples and governance structures of companies are enjoying prominent attention⁷. Many projects, investors and sponsors are also demanding more detailed identification and mitigation of environmental and social impacts of investment projects before making commitment or funding⁸. The importance of ESG tenets is evidenced by the change in the legal and regulatory landscape to reflect the expectations of investors, customers, employees and other stakeholders⁹.

The public scrutiny of corporations and the need to operate within socially acceptable standards have resulted in many corporations incorporating ESG commitments in commercial contracts¹⁰. These commitments can take various forms including respect for the environment, human rights and labour laws.¹¹ ESG related disputes can arise where corporations violate such commitments. Such disputes can be managed through various mechanisms including arbitration.

The paper seeks to discuss the place of Environmental, Social and Governance (ESG) in arbitration. It brings out the nexus between ESG and arbitration. The paper further highlights and discusses the viability of arbitration in management of ESG related disputes. It also proposes interventions towards embracing arbitration in management of ESG disputes for Sustainable Development.

⁷ Ibid

⁸ Muigua. K., 'Realising Environmental, Social and Governance Tenets for Sustainable Development' available at <http://kmco.co.ke/wp-content/uploads/2022/07/Realising-Environmental-Social-and-Governance-Tenets-of-Sustainable-Development-Kariuki-Muigua-July-2022.pdf> (accessed on 28/09/2022)

⁹ Ibid

¹⁰ Von Wobeser., 'The Role of Arbitration in ESG Disputes' available at https://www.vonwobeser.com/index.php/publication?p_id=1650 (accessed on 28/09/2022)

¹¹ Ibid

2.0 The Nexus between Environmental Social and Governance (ESG) and Arbitration

Arbitration is form of Alternative Dispute Resolution (ADR) mechanisms. ADR refers to a set of mechanisms that are applied in management of disputes without resort to adversarial litigation¹². It has been described as a private and consensual process where parties to a dispute agree to present their grievances to a third party for resolution¹³. In Kenya, arbitration alongside other ADR mechanisms has been recognized under the Constitution¹⁴.

It is argued that ESG principles have become a model for sustainable business development through which a corporations' goal for solving environmental, social and governance problems is achieved¹⁵. Consequently, ESG considerations have an increasing impact in international business as evidenced by the incorporation of sustainability clauses in investment contracts¹⁶. In such contracts, investors are required to adhere to the concept of sustainable development as envisaged under the contracts and failure to do so may result in ESG related disputes.

In the wake of the climate change debate, there have been calls for responsible business practice towards climate change mitigation through measures such as reduction of carbon emissions¹⁷. The Paris Agreement on Climate Change has raised the awareness of the need for global efforts to combat climate change and the role of responsible and ethical corporate behavior towards achieving this goal¹⁸. Further, corporations are increasingly required to safeguard human rights as envisaged by 'S' pillar of ESG¹⁹.

¹² Muigua. K., 'Settling Disputes Through Arbitration in Kenya' Glenwood Publishers Limited, 4th Edition, 2022

¹³ Ibid

¹⁴ Constitution of Kenya, 2010, Article 159 (2) (c)

¹⁵ Mazhorina. M.V., 'ESG Principles in International Business and Sustainable Contracts' available at https://aprp.msal.ru/jour/article/view/3223?locale=en_US (accessed on 28/09/2022)

¹⁶ Ibid

¹⁷ International Arbitration in 2022., 'The Rising Significance of ESG and the Role of International Arbitration' available at <https://www.freshfields.com/en-gb/our-thinking/campaigns/international-arbitration-in-2022/the-rising-significance-of-esg-and-the-role-of-international-arbitration/> (accessed on 28/09/2022)

¹⁸ Von Wobeser., 'The Role of Arbitration in ESG Disputes' Op Cit

¹⁹ Ibid

However, some corporations have been accused of violating these ESG concerns as a result of their business practices. Some corporations have been accused of failing to promote climate change mitigation through reduction of carbon emissions and transitioning to cleaner energy production²⁰. Further, some corporations have been accused of violating fundamental human rights such as the right to a clean and healthy environment especially in the investment sphere in Africa²¹. These instances have resulted in an increasing number of ESG-related disputes.

The growth of ESG concerns has seen corporations being increasingly required to embrace ESG principles in their business practices. Consequently, ESG clauses are being adopted in commercial and investment contracts²². In case of violation of such clauses, ESG related disputes are bound to occur. It has been asserted that adoption of ESG-related practices into pre-existing social and governance models adopted by corporations would be disruptive²³. The inclusion of ESG clauses in commercial contracts not only points to the importance of ESG concerns to companies but it also serves as potential source of disputes where such considerations are not complied with²⁴. ESG issues are not only reshaping corporate behavior across the globe but can also be a potential battleground in international disputes²⁵. This creates the need for an effective mechanism of management of such disputes in order to enhance ESG principles in the quest for Sustainable Development.

²⁰ Ibid

²¹ Muigua. K., 'International Investment Law and Policy in Africa: Human Rights, Environmental Damage and Sustainable Development' available at <http://kmco.co.ke/wp-content/uploads/2018/11/International-Investment-Law-and-Policy-in-Africa-AILA-Conference-Paper-5-11-2018.pdf> (accessed on 28/09/2022)

²² International Arbitration in 2022., 'The Rising Significance of ESG and the Role of International Arbitration' Op Cit

²³ The ALP Review., 'The Importance of ESG and its effect on International Arbitration' available at <https://www.alp.company/sites/default/files/ALP%20Review%20-%20The%20Importance%20of%20ESG%20and%20its%20effect%20on%20International%20Arbitration.pdf> (accessed on 28/09/2022)

²⁴ Ibid

²⁵ Hamilton. J & Coulet-Diaz. M., 'Arbitration & the ESG Era' available at <https://www.whitecase.com/news/media/arbitration-esg-era> (accessed on 28/09/2022)

Arbitration has for a long time been the most viable mechanism for management of international commercial and investment disputes²⁶. It offers a neutral forum for the management of disputes and addresses some of the concerns that parties may have in relation to the other parties' legal system²⁷. In international commercial and investment arbitration, parties are reluctant to submit to the jurisdiction of the other party due to the likelihood of favoritism by the host judicial system²⁸. Further, arbitration has the potential of facilitating expeditious management of disputes²⁹. In international commercial and investment arbitration, there is need to manage disputes expeditiously in order to preserve the commercial interests of parties.³⁰ The viability of arbitration in management of international commercial disputes is further enhanced by the availability of a legal framework for the recognition and enforcement of foreign arbitral awards. The *New York*³¹ Convention provides the legal framework for the recognition and enforcement of foreign arbitral awards across different jurisdictions.

Consequently, the adoption of ESG elements in international commercial and investment agreements has resulted in the use of arbitration to manage disputes arising from such agreements³². ESG concerns have become prominent in investor-state arbitration with arbitral tribunals having to determine issues relating to climate change, corruption and human rights³³. It has been asserted that the growth of ESG will redefine the practice of arbitration as it seeks to adapt to the new concerns created by ESG³⁴. However, the flexibility of arbitration and its ability to adapt to emerging concerns means that it is well

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²⁷ Moses. L.M, *'The Principles and Practice of International Commercial Arbitration'* 2nd Edition, 2017, Cambridge University Press

²⁸ Ibid

²⁹Muigua. K., 'Promoting International Commercial Arbitration in Africa' available at <http://kmco.co.ke/wp-content/uploads/2018/08/PROMOTING-INTERNATIONAL-COMMERCIAL-ARBITRATION-IN-AFRICA.pdf>

³⁰ Ibid

³¹ United Nations Conference on International Commercial Arbitration, 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards' United Nations, 1958

³² Von Wobeser., 'The Role of Arbitration in ESG Disputes' Op Cit

³³ Ross. A., 'We need talk about ESG' available at <https://globalarbitrationreview.com/we-need-talk-about-esg> (accessed on 28/09/2022)

³⁴ Hamilton. J & Coulet-Diaz. M., 'Arbitration & the ESG Era' Op Cit

positioned to manage ESG disputes³⁵. However, there is need for reform in order to enhance the role of arbitration in managing ESG disputes.

3.0 Enhancing the Role of Arbitration in Management of Environmental Social and Governance (ESG) Disputes

Arbitration represents a viable mechanism for management of ESG disputes. The following can be done towards enhancing the use of arbitration in ESG disputes:

3.1 Knowledge in ESG Concerns

Statistics show that many ESG related disputes are being managed through arbitration³⁶. According to the International Chamber of Commerce, engineering, construction and energy disputes represent the highest number of cases handled representing 38% of all cases registered in 2021³⁷. Such disputes entail ESG components such as renewable energy projects, environmental protection and human rights concerns³⁸. This demonstrates that ESG and arbitration are inextricably linked. Arbitration practitioners thus need to equip themselves with knowledge in ESG related matters in order to be better placed to manage ESG related disputes.

3.2 Promoting Sustainable Development

Sustainable Development has been defined as development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs³⁹. This concept entails a combination of elements including environmental protection, economic development and social issues⁴⁰. The importance of Sustainable

³⁵ Ibid

³⁶ Von Wobeser., 'The Role of Arbitration in ESG Disputes' Op Cit

³⁷ International Chamber of Commerce., 'ICC Dispute Resolution Statistics: 2020' available at <https://iccwbo.org/publication/icc-dispute-resolution-statistics-2020/> (accessed on 28/09/2022)

³⁸ Ibid

³⁹ World Commission on Environment and Development, *Our Common future*. Oxford, (Oxford University Press, 1987).

⁴⁰ Fitzmaurice, M., 'The Principle of Sustainable Development in International Development Law' *International Sustainable Development Law*, Vol. 1

Development has seen the adoption of the Sustainable Development Goals as the global blueprint of development⁴¹. Most of the Sustainable Development Goals entail aspects of ESG such as clean water and sanitation, affordable and clean energy, industry, innovation and infrastructure and climate action⁴². Arbitration practitioners should therefore promote the principles of sustainable development when managing ESG related disputes. This could entail requiring investors to comply with the host country environmental laws and ESG standards in mining, energy and construction disputes which have an ESG bearing⁴³.

3.3 Upholding Human Rights

The 'S' pillar in ESG seeks to promote responsible and ethical corporate behavior through aspects such as respect for human rights⁴⁴. However, corporate behavior especially in the investment sphere in Africa has resulted in gross violation of human rights⁴⁵. Some corporations which have invested in oil exploration have been accused of human right abuses, environmental degradation and unsustainable peace due to their business culture⁴⁶. In Kenya, a multinational corporation that has invested in the agricultural sector has been accused of human right abuses such as killings, rape, and other forms of sexual and gender-based violence allegedly committed by its guards, bad labour practices and land injustices against the neighbouring communities⁴⁷.

⁴¹ United Nations., 'Sustainable Development Goals' available at <https://sdgs.un.org/goals> (accessed on 28/09/2022)

⁴² Ibid, Goals 6, 7, 9 and 13.

⁴³ The ALP Review., 'The Importance of ESG and its effect on International Arbitration' available at <https://www.alp.company/sites/default/files/ALP%20Review%20-%20The%20Importance%20of%20ESG%20and%20its%20effect%20on%20International%20Arbitration.pdf>

⁴⁴ Muigua. K., 'Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya.' Op Cit

⁴⁵ Muigua. K., 'International Investment Law and Policy in Africa: Human Rights, Environmental Damage and Sustainable Development' Op Cit

⁴⁶ Maiangwa.B & Agbibo.D., 'Oil Multinational Corporations, Environmental Irresponsibility and Turbulent Peace in the Niger Delta' Africa Spectrum 2/2013: 71-83

⁴⁷ Kenya Human Rights Commission., 'Heavy price for... egregious human rights violations' available at <https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/737-heavy-price-for-kakuzi-s-egregious-human-rights-violations.html> (accessed on 29/09/2022)

Some of these disputes have ended up in arbitration where tribunals are called upon to adjudicate on human rights issues⁴⁸. Arbitrators should thus seek to uphold human rights in such disputes by rendering awards that are in line with human rights standards⁴⁹. By promoting human rights, arbitrators will be embracing the ‘S’ pillar that is fundamental in the ESG debate.

3.4 Promoting Good Governance

The Governance pillar in ESG seeks to achieve good financial and accounting standards as well as legal and regulatory compliance, such as transparency, corporate structures and ethics in corporate conduct⁵⁰. It also seeks to align Governance with the Sustainable Development Goals where governance issues include industry, innovation and infrastructure (Goal 9); peace, justice and strong institutions (Goal 16); and partnerships with public and private institutions (Goal 17)⁵¹. Good governance can be promoted through arbitration by rendering awards that adhere to good governance practices such as transparency, accountability, reporting and disclosure.

3.5 Seeking Expert Assistance in Complex ESG Matters

Arbitration has a significant role in promoting ESG tenets in areas such as climate change. Arbitrators play a significant role in shaping and adapting international law to respond to the climate crisis⁵². However, in some instances, arbitration has been slow to act to act in response to the climate crisis⁵³. Some climate change concerns such as determining adherence to climate change commitments through low carbon transition requires arbitrators to be fully informed and engaged in such concepts⁵⁴. This may require expert

⁴⁸ Amao. O., ‘Corporate Social Responsibility, Human Rights and the Law: Multinational corporations in Developing Countries.’ Routledge, 2011.

⁴⁹ Krajewski, M. ‘Human Rights in International Investment Law: Recent Trends in Arbitration and Treaty-Making Practice.’ Available at SSRN 3133529 (2018).

⁵⁰ RL360, “Governance-The G in ESG,” Available at: <https://www.rl360.com/row/funds/investment-definitions/g-in-esg.htm> (accessed on 29/09/2022)

⁵¹ Sustainable Development’ available at <https://sdgs.un.org/goals> (accessed on 29/09/2022)

⁵² Greenwood. L., ‘The Canary is Dead: Arbitration and Climate Change’ *Journal of International Arbitration*, Volume 38, Issue 3 (2021)

⁵³ Ibid

⁵⁴ Miles. W., ‘BVI: A Frontline Focus for Resolving Future Climate Change Related Disputes’ available at https://www.bviiac.org/Portals/0/Files/Publications/Wendy%20Miles%20QC_BVI_A%20Frontline%2

analysis and guidance from persons with requisite knowledge in environmental matters⁵⁵. Arbitrators should therefore seek expert assistance in such issues in order to be fully informed and render awards that promote ESG principles.

4.0 Conclusion

The relationship between Environmental, Social and Governance (ESG) and arbitration continues to grow. Adoption of ESG by corporations as a means of promoting responsible and ethical business practices and the wide use of arbitration in management of international commercial and investment disputes points to increased use of arbitration in management of ESG related disputes⁵⁶. In managing such disputes, arbitrators should promote ESG considerations whilst balancing the needs and interests of parties involved in issues such as climate change⁵⁷. Arbitration represents a viable mechanism for managing ESG disputes while simultaneously promoting Sustainable Development. There is need to enhance the viability of arbitration in management of ESG related disputes.

[0Focus%20for%20Resolving%20Future%20Climate%20Change%20Related%20Disputes.pdf](#) (accessed on 29/09/2022)

⁵⁵ Cummins. T et al., 'ESG Litigation - How Companies Can Get Ready, Respond and Resolve Claims' available at <https://www.emerald.com/insight/content/doi/10.1108/JOIC-07-2021-0032/full/html> (accessed on 29/09/2022)

⁵⁶ Von Wobeser., 'The Role of Arbitration in ESG Disputes' Op Cit

⁵⁷ Ibid

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