

Green Arbitration: Aligning Arbitration with Sustainable Development

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Abstract

Conflict management and access to justice are considered to be an important element of sustainable development agenda. To this effect, the same are well captured in the United Nations 2030 Agenda for Sustainable Development Goals under Goal 16 which seeks to promote peaceful and inclusive societies, providing access to justice for all and building effective, accountable and inclusive institutions at all levels. Arbitration is one of the most popular methods of conflict management globally due to its close resemblance to litigation, without being encumbered by the challenges that affect litigation.

This paper discusses how the concept of green arbitration can be promoted as a two pronged approach-achieving sustainable justice while promoting environmental sustainability. The author argues that this is a concept worth embracing in Kenya and internationally.

1. Introduction

Since the 1980s, sustainable development has played a role in influencing local public policy. According to the World Commission on Environment and Development, sustainable development is "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."¹ Thus, the widespread adoption of public policy agendas, such as localizing the United Nations Sustainable Development Goals, and the thousands of local governments worldwide creating sustainability plans reflect the need for a collective effort to overcome the social, ecological, and economic difficulties inherent in achieving sustainability.² The 2030 Agenda for Sustainable Development was adopted by the United Nations in 2015 and includes 17 Goals (SDGs).³ Conflict management and access to justice are considered to be an

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¹ MacDonald, A., Clarke, A., Ordonez-Ponce, E., Chai, Z. and Andreasen, J., 'Sustainability Managers: The Job Roles and Competencies of Building Sustainable Cities and Communities' (2020) 43 Public Performance & Management Review 1413, p.2.

² Ibid, p. 39.

³ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

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important element of sustainable development agenda.⁴ For human civilization to continue, peace and harmony are necessary. According to the United Nations (2016), SDG 16 demands for equal access to information and judicial services while creating inclusive, peaceful societies with access to justice.⁵

Arbitration is one of the most popular methods of conflict management especially by the commercial and business community globally due to its close resemblance to litigation, without being encumbered by the challenges that affect litigation.⁶ Arguably, commercial and business activities contribute a great deal to climate change and other ills that lead to environmental degradation.⁷

While the environmental effects of these economic activities are often mitigated through corporate social responsibility (CSR) activities, these may not at times be sufficient in tackling the resultant increased rates of degradation. Indeed, many of the top scientists in the world believe that human-caused climate change is the "defining issue of our time." Many people now prefer to use the term "Climate Crisis" to emphasise how quickly and severely the world's climate is changing and how urgently we need to take action to create a sustainable future.⁸ According to the Intergovernmental Panel on Climate Change (IPCC), global CO₂ emissions must decrease over the next ten years to around half of 2010 levels and achieve net zero by 2050. According to the IPCC, in order to keep global warming to 1.5 °C, all facets of society would need to undergo quick, significant, and unheard-of adjustments.⁹ In addition to climate change, the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) of the United Nations found equally alarming results in its 2019 assessment report on biodiversity and ecosystem services.¹⁰

It has also been observed that strong evidence exists for the unsettling relationship between environmental injustice, conflict, and transformation, which is most obviously evident in the

⁴ Muigua, D., 'Understanding the Place of Conflict Management in Sustainable Development Agenda' (27 September 2022) <<https://papers.ssrn.com/abstract=4371703>> accessed 31 March 2023.

⁵ Leal Filho, W., Tripathi, S.K., Andrade Guerra, J.B.S.O.D., Giné-Garriga, R., Orlovic Lovren, V. and Willats, J., 'Using the Sustainable Development Goals towards a Better Understanding of Sustainability Challenges' (2019) 26 International Journal of Sustainable Development & World Ecology 179.

⁶ Nevisandeh M, 'The Nature of Arbitration Agreement' (2016) 36 *Procedia Economics and Finance* 314.

⁷ 'Trade and the Environment - OECD' <<https://www.oecd.org/trade/topics/trade-and-the-environment/>> accessed 1 April 2023.

⁸ McGregor D, Whitaker S and Sritharan M, 'Indigenous Environmental Justice and Sustainability' (2020) 43 *Current Opinion in Environmental Sustainability* 35, p.35.

⁹ *Ibid*, p.35.

¹⁰ *Ibid*, p.35.

numerous instances of environmental conflict detailed in the Environmental Justice Atlas¹¹. These stories therefore offer persuasive evidence that environmental protection mobilisation is most usually started by local communities and indigenous peoples and frequently takes the shape of opposition to resource extraction methods that are viewed as being both unfair and unsustainable.¹² This paper discusses how the concept of green arbitration can be a proactive approach by the business community, promoted as a two pronged approach-achieving sustainable justice for commercial and business community while promoting environmental sustainability.

2. The Concept of Green Arbitration in International Arbitrations

An effort to lessen the effect that international arbitrations have on the environment is called the Campaign for Greener Arbitrations. In order to dramatically reduce the carbon footprint of the arbitration community, international arbitrator Lucy Greenwood established the campaign in 2019.¹³

A Steering Committee was formed by the Campaign for Greener Arbitrations in 2020 and is made up of individuals with an interest in the development of international arbitration, including practitioners, institutions, and legal service providers.¹⁴ The creation of a Framework and a set of Protocols to encourage better environmental behaviour through a number of action items was one of the Steering Committee's main goals. The Protocols provide useful advice for putting the Guiding Principles' principles into practice.¹⁵

3. International Framework for the Adoption of the Green Protocols

The Framework observes that the international arbitration community's activities have a sizable environmental legacy. A large-scale international arbitration was the subject of an initial research

¹¹ EJOLT, 'EJAtlas | Mapping Environmental Justice' (*Environmental Justice Atlas*) <<https://ejatlas.org/>> accessed 31 March 2023.

¹² Martin, A., Armijos, M.T., Coolsaet, B., Dawson, N., AS Edwards, G., Few, R., Gross-Camp, N., Rodriguez, I., Schroeder, H., GL Tebboth, M. and White, C.S., 'Environmental Justice and Transformations to Sustainability' (2020) 62 *Environment: Science and Policy for Sustainable Development* 19.

¹³ 'Campaign for Greener Arbitrations' (*Campaign for Greener Arbitrations*, 19 March 2023) <<https://www.greenerarbitrations.com>> accessed 31 March 2023.

¹⁴ 'Green Protocols' (*Campaign for Greener Arbitrations*) <<https://www.greenerarbitrations.com/green-protocols>> accessed 31 March 2023.

¹⁵ Ibid.

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by the Campaign for Greener Arbitrations, and the results suggested that just under 20,000 trees could be needed to offset all of the carbon emissions generated by just one adjudication.¹⁶

According to the Campaign's research, practitioners can significantly reduce these carbon emissions by concentrating on just three areas: (i) adopting clean forms of energy, (ii); reducing long-haul travel, and (iii) reducing waste. For instance, by completely ceasing to use hard copy filings, practitioners could significantly reduce these carbon emissions. Everyone in the arbitration community has a stake in lowering the carbon footprint of our sector.¹⁷

The "Green Protocols" are a series of guidelines created by the Campaign for Greener Arbitrations to nudge other stakeholders towards adopting more environmentally friendly behaviours and cutting back on carbon emissions. This Framework offers recommendations for implementing the Green Protocols, which are the Green Protocol for Arbitral Proceedings, the Green Protocol for Law Firms, Chambers, and Legal Service Providers Working in Arbitration, the Green Protocol for Arbitrators, the Green Protocol for Arbitration Conferences, the Green Protocol for Arbitral Hearing Venues, and the Green Protocol for Arbitral Institutions.¹⁸

The Green Protocols provide practical ways to implement the Campaign for Greener Arbitrations' Guiding Principles, which asks the arbitration community to commit to: Creating a workspace with a reduced environmental footprint, by looking for opportunities to reduce energy consumption and waste; Corresponding electronically, unless hard copy correspondence is expressly needed in the circumstances, while also being mindful that email has a carbon footprint; Encouraging the use of video-conferencing facilities as an alternative to travel (including for the purposes of conducting fact finding or interviews with witnesses); Avoiding printing, requesting the use of electronic rather than hard copies of documents and promoting the use of electronic bundles at hearings; Using, where possible, suppliers and service providers who are committed to reducing their environmental footprint (including for the purposes of arranging an arbitration hearing); Considering and/or suggesting, where appropriate, that witnesses or experts give evidence through video-conferencing facilities, rather than attend hearings in person; Avoiding unnecessary travel

¹⁶ 'Framework and Green Protocols' (*Campaign for Greener Arbitrations*)
<<https://www.greenerarbitrations.com/green-protocols/complete-set>> accessed 31 March 2023.

¹⁷ Ibid.

¹⁸ Ibid.

and using video-conferencing facilities as an alternative; and Considering and questioning the need to fly at all times and offsetting carbon emissions for any arbitration-related travel.¹⁹

Notably, this Framework and the Green Protocols are not binding and are not intended to displace applicable rules or derogate from the arbitration agreement, unless and to the extent the Parties so agree (either in the arbitration agreement or subsequently) or the Tribunal so orders. This Framework and the Green Protocols do not establish liability or a liability standard for legal or regulatory purposes.²⁰

3.1. Green Protocol for Law Firms, Chambers and Legal Service Providers

The Green Protocol for Law Firms, Chambers, and Legal Service Providers Working in Arbitration ("Legal Advisors") contains suggested Sustainability Measures for minimising the impact of Legal Advisors and their employees on the environment, which can either be integrated into Legal Advisors' operations and/or adopted on a case-by-case basis by individuals at those Legal Advisors or be adopted by Legal Advisors individually or in their entirety, as appropriate.²¹

Additionally, it has been suggested that, while all of the Sustainability Measures outlined in this Protocol will contribute to reducing the environmental impact of Legal Advisors' practices, special attention should be paid to those that encourage the use of clean energy as a primary energy source and the reduction of air travel, as these two actions will have the largest proportional impact on the overall decline in emissions related to Legal Advisors' practices.²²

3.2. Green Protocol for Arbitrators

The Green Protocol for Arbitrators offers suggested sustainability measures that can be adopted in part or whole, as necessary, by arbitrators to reduce their particular impact on the environment during arbitral proceedings.²³

¹⁹ Ibid.

²⁰ Ibid.

²¹ 'Green Protocol for Law Firms, Chambers and Legal Service Providers' (*Campaign for Greener Arbitrations*) <<https://www.greenerarbitrations.com/green-protocols/law-firms-chambers-legal-service-providers>> accessed 31 March 2023.

²² Ibid.

²³ 'Green Protocol for Arbitrators.Pdf' (*Google Docs*) <https://drive.google.com/file/d/1A6JEh7470Sc3ppNxGc2R5BnDss3ahPDZ/view?usp=embed_facebook> accessed 31 March 2023.

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The Protocol proposes that arbitrators should make an effort to: Prefer electronic communications and letters over paper form when communicating with other Tribunal members, institutions, and Parties, unless it is absolutely essential; Use electronic tools to annotate papers, create and complete orders or awards, and prepare reports; Consider printing documents carefully, try to print just what is absolutely essential, and save electronic case files rather than hard copy files.²⁴

Arbitrators are also required to encourage Parties at the outset of the case to adopt Sustainability Measures, to reduce the environmental footprint of the arbitration, in particular Sustainability Measures aimed at reducing travel and paper waste.²⁵

They are also to encourage sustainable hearing, improve the energy efficiency of their home or outside offices to reduce their environmental footprint, encourage recycling, travel responsibly, and also, however, give due consideration to offsetting any residual emissions caused by their conduct, including through travel.²⁶

3.3. Green Protocol for Arbitration Conferences

The proposed Sustainability Measures in this Green Protocol for Arbitration Conferences are intended to reduce the environmental impact of arbitration conferences.²⁷ This Green Protocol for Arbitration Conferences should be adopted by conference planners in advance of the event.²⁸ If possible, organisers should choose a location that has sustainability certifications or an environmental policy in place. If none of these features are present, organisers should work with venue facilitators to implement the greener solutions outlined below.²⁹ Organisers are also required to endeavour to conduct all conference planning meetings remotely via virtual platform.³⁰ Additionally, organisers must pledge to use digital registration and payment options for sponsors and attendees, reduce or stop using paper for mailings, send conference materials electronically to attendees or make them scannable with QR codes, stop using paper for handouts, and make an

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

²⁷ 'Green Protocol for Arbitration Conferences.Pdf' (*Google Docs*)

<https://drive.google.com/file/d/1DwneSKq5KjaHOeXwqS4ejHzKwAXEA3G-/view?usp=embed_facebook>
accessed 31 March 2023.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

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effort to limit the amount of other materials distributed.³¹ Organisers are also required to endeavour to implement electronic platforms or QR codes for daily check-in at conferences.³²

Wherever possible, organisers must take into account employing clean or renewable energy sources. Additionally, or in any case, the organisers shall make every effort to use energy suppliers that support renewable energy and/or have solid Environmental, Social, and Governance (ESG) credentials.³³ Also, organisers must choose host locations that strive to lower their energy usage and environmental impact.³⁴

Organisers must also convey to conference sponsors their preference for using digital marketing materials and minimising the usage of printed materials whenever possible.³⁵

The protocol includes a non-exhaustive list of items that organisers should use as a guide to limit or eliminate the use of single-use and/or plastic items whenever possible and where it is deemed safe, with alternatives suggested as needed. Organisers should in addition make an effort to choose host venues that follow environmentally friendly disposal practices.³⁶

The organisers must make an effort to work with vendors who follow or aim to follow similar sustainability measures, such as the use of locally sourced materials, ecologically friendly products, and alternatives to single-use packaging. Caterers, printers, organisations that produce documents, couriers, cleaners, marketing and advertising experts, off-site event venues, and utilities providers are a few examples of these vendors.³⁷

Organisers are also to travel responsibly, obtain electronic feedback and offset carbon emissions.³⁸

3.4. The Green Protocol for Arbitral Hearing Venues

The recommended Sustainability Measures in this Green Protocol for Arbitral Hearing Venues are intended to reduce the environmental impact of arbitration facilities and hearing venues.³⁹ This Protocol, or any of its component elements, must be adopted by facilitators as standard operating

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

³⁹ 'Green Protocol for Arbitral Hearing Venues.Pdf' (*Google Docs*)

<https://drive.google.com/file/d/1J2sLfRbT8aU5UCmxSl0_t58sy0SS2ToP/view?usp=embed_facebook> accessed 31 March 2023.

procedure. Alternately, parties may ask that a venue comply with this Protocol or any of its component sections before to and throughout the course of a certain matter.⁴⁰

Wherever possible, facilitators must think about employing clean or renewable energy sources. Additionally, or in any case, Facilitators must make an effort to use energy suppliers who support renewable energy and/or have solid ESG credentials.⁴¹

To lessen their environmental impact, facilitators must work to cut energy use and increase the energy efficiency of their premises and equipment.⁴² Where possible, communication and correspondence between Facilitators, Parties, and the Tribunal must be done online or through audio or video conferencing. The use of technology platforms and devices for evidence display during hearings is the responsibility of the Facilitators.⁴³

Facilitators must also minimise use of printers and paper, encourage recycling, to eliminate or limit the use of single-use and / or plastic items, where possible and where deemed safe, partner with ‘green’ organisations and suppliers, travel responsibly, and offset carbon omissions.⁴⁴

3.5. The Green Protocol for Arbitral Institutions

The proposed Sustainability Measures in this Green Protocol for Arbitral Institutions are intended to reduce the environmental impact of Arbitral Institutions.⁴⁵ Arbitral Institutions are required to make a commitment to collaborating with their staff and leadership groups in order to assess current environmental policies and procedures and, if necessary, take into account and put into practice this Protocol's suggestions. Arbitral Institutions may also appoint "Green Ambassadors," whose responsibility it is to assist their organisation in creating policies and best practices based on the suggestions made in this Green Protocol. The impact of these rules and best practices should be frequently reported to high management via Green Ambassadors.⁴⁶

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ ‘Green Protocol for Arbitral Institutions (1).Pdf’ (*Google Docs*)

<https://drive.google.com/file/d/1YPcSgRzS2rHTJvYtPlltTL6jA0f7B6oJ/view?usp=embed_facebook> accessed 31 March 2023.

⁴⁶ Ibid.

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Arbitral Institutions are also to use clean or renewable energy sources wherever possible, improve the energy efficiency of facilities and equipment to reduce their environmental footprint, encourage the use of technology for the conduct of proceedings to minimise printing, the use of paper and travel where appropriate, minimise printing and use of paper, encourage recycling, eliminate or limit the use of single-use and/or plastic items, where possible and where deemed safe to do so, partner with “green” organisations, travel responsibly, incentivise their staff through schemes that encourage greener behaviours, consider allowing their staff a permitted amount of hours each year, where business/operational needs allow, to volunteer with organisations involved in sustainability initiatives, offset carbon emissions and when implementing this Protocol shall consider publicly reporting on targets and achievements, in order to track progress, promote accountability, and encourage other institutions to adopt Sustainability Measures which reporting may also include any costs savings resulting from the implementation of Sustainability Measures.⁴⁷

4. Green Arbitration: Aligning Arbitration with Sustainable Development Agenda

The foregoing section has outlined the measures and efforts that the international arbitration community seeks to employ in order to align arbitration practice with sustainable development goals of climate change mitigation through responsible and sustainable utilisation of resources. The proposed protocols hold the promise of aligning arbitration with the SDGs. The Sustainable Development Goals (SDGs), which were established by the United Nations (UN) in 2015, are largely acclaimed as a major accomplishment since they reflect a worldwide understanding of an all-encompassing approach to deal with the social and environmental problems facing people throughout the world.⁴⁸

In addition, the Sustainable Development Goals (SDGs) envision a world where democracy, good governance, and the rule of law are essential for sustainable development, which includes inclusive and sustained economic growth, social development, environmental protection, and the eradication of poverty and hunger.⁴⁹ In this sense, "steering"—which comprises both procedures and institutions—is referred to as "governance" since it entails a certain amount of power. Process

⁴⁷ Ibid.

⁴⁸ Higgs, Kerryn. "How sustainable are the SDGs?" (2020): 109-130, 109 <<https://anzsee.org.au/wp-content/uploads/2020/07/EESolutionsFutureRoyalDraftJuly2ndFINALEbook.pdf#page=109>> accessed 1 April 2023.

⁴⁹ United Nations, *Transforming Our World: The 2030 Agenda for Sustainable Development* | Department of Economic and Social Affairs' <<https://sdgs.un.org/2030agenda>> accessed 1 April 2023.

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refers to how choices are made on priorities, how disagreements are handled, if at all, and how coordination of people's actions with regard to resource usage is made simpler. The structural part, on the other hand, deals with the organisation and 'management' of these operations.⁵⁰

Addressing conflict of whatever nature is part of the social aspects of sustainability that must be put into consideration if sustainable development agenda is to be achieved. Thus, the sustainable development agenda advocates for an integrated approach to tackling environmental management challenges as well as social problems affecting the society.⁵¹ The Organisation for Economic Co-operation and Development(OECD) calls for an integrated approach to the implementation of sustainable development and argues that many SDGs are interconnected with each other; an integrated approach implies managing trade-offs and maximising synergies across targets.⁵² The fundamental action principle of Sustainable Development is integrated decision-making, which is the process of taking environmental, social, and economic goals and issues into consideration when making decisions.⁵³

Sustainable Development's environmental component must be considered in its economic, social, and governance facets. This is due to the fact that fostering sustainable economic growth depends on environmental protection, as the natural environment supports economic activity both directly and indirectly through ecosystem services like carbon sequestration, water purification,⁵⁰ managing flood risks, and nutrient cycling.⁵⁴

The Sustainable Development Goals (SDGs) are global, multifaceted, and ambitious, and it is arguable that in order to fulfil them, we need an integrated framework that encourages a growth path that protects the environment and whose benefits are shared by everyone, not just by the fortunate few.⁵⁵ Thus, the idea of Sustainable Development forces us to reconsider how we interact

⁵⁰ Vatn, Arild, *Environmental governance: institutions, policies and actions*, Edward Elgar Publishing, 2015, p. 133.

⁵¹ See Hussein Abaza and Andrea Baranzini, *Implementing Sustainable Development: Integrated Assessment and Participatory Decision-Making Processes* (Edward Elgar Publishing 2002).

⁵² Rizza Ambra, 'An Integrated Approach to the Sustainable Development Goals' (*Assembly of European Regions, 4 March 2019*) <<https://aer.eu/integrated-approach-sdgs/>> accessed 1 April 2023.

⁵³ Dernbach, J.C. and Mintz, J.A., "Environmental laws and sustainability: an introduction. *Sustainability*, 3 (3), 531-540." (2011), 532.

⁵⁴ *UN Environment*, 'GOAL 8: Decent Work and Economic Growth' (UNEP - UN Environment Programme, 2 June 2021) <<http://www.unep.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-8>> accessed 1 April 2023.

⁵⁵ Ramos, G., "The Sustainable Development Goals: A duty and an opportunity." (2016): 17-21, in Love, P. (ed.), *Debate the Issues: New Approaches to Economic Challenges*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264264687-3-en>. 1 April 2023.

with the world and how we anticipate that governments would implement policies that promote that worldview.⁵⁶

Corporations, through following ESG frameworks or guidelines, can also play a huge role in promoting sustainability within the localities that they operate in and the country at large. ESG Reporting should be encouraged and used as a tool of promoting sustainability within the companies, communities and country. Under this, organisations make it part of their operational procedures to report publicly on their economic, environmental, and/or social impacts, and hence its contributions – positive or negative – towards the goal of Sustainable Development.⁵⁷ As the business community seeks to invest in various sectors, there is a need for them to take into account ESG requirements under SDGs. The law (government) and other policy makers should work towards supporting businesses in their efforts to transition to more sustainable business models, through using various legal, policy and other effective incentives. The law should move towards ensuring that non-financial reporting on ESG becomes the standard mode of operation for ease of enforcing such principles as “the polluter pays principle”, among others. This is especially important as it has been pointed out that ‘previous literature, which attempted to investigate the link between sustainability and investment performance, found that a critical barrier to ESG integration is that investors lack reliable and non-manipulated information’, at least in other jurisdictions, practices which may also take place in Kenya.⁵⁸ While it may not be disputed that institutional investors vary in their approaches to integrating ESG factors into their investment decisions, the end game should at least show some tangible and verifiable positive results.⁵⁹ It has also been suggested that businesses and companies should embrace technology and innovation in engineering and product development as well as with regard to management

⁵⁶ Ibid.

⁵⁷ ‘(10) Global ESG Disclosure Regulations: From Awareness to Practice towards Sustainability | LinkedIn’ <<https://www.linkedin.com/pulse/global-esg-disclosure-regulations-from-awareness-dr-mahendra/>> accessed 1 April 2023; Boffo R and Patalano R, ‘ESG Investing: Practices, Progress and Challenges’ [2020] Editions OCDE, Paris; ‘What ESG Reporting Is and How to Do It | A MovingWorlds Guide’ (*MovingWorlds.org*) <<https://movingworlds.org/esg-reporting-guide>> accessed 1 April 2023; PricewaterhouseCoopers, ‘ESG Reporting and Preparation of a Sustainability Report’ (*PwC*, 26 January 2021) <<https://www.pwc.com/sk/en/environmental-social-and-corporate-governance-esg/esg-reporting.html>> accessed 1 April 2023.

⁵⁸ Roy, P.P., Rao, S., Marshall, A.P. and Thapa, C., ‘Mandatory Corporate Social Responsibility and Foreign Institutional Investor Preferences’ (2020).

⁵⁹ OECD, *OECD Business and Finance Outlook 2020: Sustainable and Resilient Finance* (OECD 2020) <https://www.oecd-ilibrary.org/finance-and-investment/oecd-business-and-finance-outlook-2020_eb61fd29-en> accessed 1 April 2023.

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structures and entrepreneurship, which will arguably continue to be crucial to overall sustainability strategy. Doing more with less may be a challenge that technology may help solve since it can reduce the strict ecological limitations while also relieving political and economic pressures (thereby allowing space and opportunity for more sustainability solutions from all quarters).⁶⁰

There is a need to adopt innovative governance approaches which integrate economic, social development and sustainable development principles at multiple levels of social organization in addressing the serious challenges facing our globe and achievement of the 2030 Agenda on Sustainable Development Goals.⁶¹

According to some arbitration specialists, using new "green" arbitration rules will cut arbitration costs for businesses and improve the environment.⁶² The use of these protocols in arbitration processes will promote actions that not only save clients' money but also allow the firms to achieve their goal of going net zero.⁶³ A carbon offset is a reduction or removal of one metric tonne of carbon dioxide (CO₂) from the atmosphere that is used to compensate for emissions that occur elsewhere.⁶⁴ With the implementation of the protocols, arbitration practitioners are urged to interact online, use videoconferencing rather than face-to-face meetings wherever it is appropriate and viable, and work with electronic bundles rather than paper papers at hearings.⁶⁵

One method that businesses may reduce ESG risks is through proper contract management. The exceptional supply chain disruption caused by the Covid-19 epidemic has given businesses the chance to assess their current supply chains and try to integrate ESG principles into their contract portfolio. These ESG tenets may come from a company's own ESG objectives and policies or from governing legislation. When there are disparities in norms, rules, or degrees of openness across several nations throughout the supply chain, ESG contractual terms will be particularly important.

⁶⁰ Clune WH and Zehnder AJB, 'The Three Pillars of Sustainability Framework: Approaches for Laws and Governance' (2018) 9 *Journal of Environmental Protection* 211.

⁶¹ Kramer, J.M. and Johnson, C.D., "Sustainable Development and Social Development: Necessary Partners for the Future." *Sustainable Development* (1996), p.89.

⁶² "Green" Protocols Can Cut Cost of Arbitration for Businesses' (*Pinsent Masons*, 30 March 2023) <<https://www.pinsentmasons.com/out-law/news/green-protocols-cost-of-arbitration>> accessed 1 April 2023.

⁶³ *Ibid.*

⁶⁴ 'Don't Forget Green Arbitration Protocols as in-Person Hearings Return' (*Pinsent Masons*, 30 March 2023) <<https://www.pinsentmasons.com/out-law/analysis/dont-forget-green-arbitration-protocols-as-in-person-hearings-return>> accessed 1 April 2023.

⁶⁵ "Green" Protocols Can Cut Cost of Arbitration for Businesses' (*Pinsent Masons*, 30 March 2023) <<https://www.pinsentmasons.com/out-law/news/green-protocols-cost-of-arbitration>> accessed 1 April 2023.

Contractual arrangements mandating all counterparties to adhere to specified ESG-related requirements can be used to resolve jurisdiction-based differences.⁶⁶

Courts have traditionally been the venue for most ESG disputes, but as ESG-related contract clauses have increased and ESG provisions have been incorporated into international investment treaties, commercial and investor state arbitration is anticipated to play a much larger role in ESG dispute resolution in the future.⁶⁷ It has been suggested that if the international arbitration community is to stay relevant, it needs to address environmental concerns as they relate to international disputes and as they relate to each individual's practice.⁶⁸

It has been observed that almost 93% of the emissions that have been detected are associated with travel, notably air travel in business class, which, depending on the size and area of the seat, typically consumes two to three times as much energy as flying in economy class. Both the elimination of hard copy submissions and the reduction of one long-distance aircraft for each arbitration would significantly reduce carbon emissions.⁶⁹ It is crucial for arbitrators and other stakeholders to consider the actions they might take to lower the carbon emissions generated by the field of arbitration given the rising attention that businesses and clients are placing on Environmental, Social, and Corporate Governance (ESG) problems.⁷⁰

Arbitration practitioners should think about putting suitable Green Protocols provisions into practice. The Framework identifies a number of variables to take into account when determining whether a measure is appropriate, such as the relevant procedural rules, the relevant laws, the burden and costs of implementation, the accessibility and usefulness of electronic resources, the impact on diversity, the cultural expectations of the parties, and the availability of cybersecurity

⁶⁶ 'ESG Disputes in International Arbitration' (<https://www.nortonrosefulbright.com/en/knowledge/publications/e01e3d5a/esg-disputes-in-international-arbitration>) <<https://www.nortonrosefulbright.com/en/knowledge/publications/e01e3d5a/esg-disputes-in-international-arbitration>> accessed 1 April 2023.

⁶⁷ Ibid.

⁶⁸ 'New Report: Green Technology Disputes at the SCC Arbitration Institute | Hem - Stockholms Handelskammars Skiljedomsinstitut' <<https://sccarbitrationinstitute.se/en/new-report-green-technology-disputes-scc-arbitration-institute>> accessed 1 April 2023.

⁶⁹ 'The Green Pledge: No Talk, More Action' (*Kluwer Arbitration Blog*, 20 March 2020) <<https://arbitrationblog.kluwerarbitration.com/2020/03/20/the-green-pledge-no-talk-more-action/>> accessed 1 April 2023.

⁷⁰ 'The Campaign for Greener Arbitrations: Encouraging Sustainable Practices in International Arbitration | Jus Mundi Blog' (11 August 2021) <<https://blog.jusmundi.com/the-campaign-for-greener-arbitrations-encouraging-sustainable-practices-in-international-arbitration/>> accessed 1 April 2023.

measures. Separately, people should think about making the broad tenets of the Green Pledge a commitment, as should law firms. Given the urgency of climate change, now is the moment for actions, not words, according to the slogan of the Campaign.⁷¹

It is worth noting that adoption of green arbitration will not only contribute positively to climate change mitigation but will also potentially increase profitability by saving certain costs. This is because the Green Protocols primarily focus on three critical areas in which changes in the behavioural practices of arbitration practitioners could have the largest impact in substantially reducing our carbon emissions. Specifically, the community is encouraged to: (i) adopt clean forms of energy, (ii) reduce or eliminate long-haul travel and (iii) minimize waste, for example by eliminating hard copy filings altogether. Arbitration stakeholders who are committed to effectuate change should begin by reviewing the Protocol(s) which are most relevant to their practices.⁷²

This is a practice shift in future practice of arbitration that is worth embracing in both domestic and international arbitration across all countries as part of implementation of SDGs.

5. Conclusion

Green arbitration is thus a concept worth embracing in Kenya and internationally. This is important considering that the key principles of the Green Pledge consist of: encouraging the use of electronic correspondence and electronic submissions; avoiding printing unnecessarily and promoting the use of electronic bundles at hearings; encouraging the use of videoconferencing facilities as an alternative to travel, where appropriate (including for the purpose of fact-finding interviews with witnesses and cross-examination of witnesses or experts); selecting suppliers and service providers that are committed to reducing their environmental impact; and avoiding unnecessary travel and offsetting carbon emissions for arbitration-related travel.⁷³ This is a huge step towards achieving

⁷¹ ‘The Campaign for Greener Arbitrations: Encouraging Sustainable Practices in International Arbitration | Jus Mundi Blog’ (11 August 2021) <<https://blog.jusmundi.com/the-campaign-for-greener-arbitrations-encouraging-sustainable-practices-in-international-arbitration/>> accessed 1 April 2023.

⁷² ‘The Campaign for Greener Arbitration’s Green Protocols: Actions Not Words’ (*Kluwer Arbitration Blog*, 22 April 2021) <<https://arbitrationblog.kluwerarbitration.com/2021/04/22/the-campaign-for-greener-arbitrations-green-protocols-actions-not-words/>> accessed 1 April 2023.

⁷³ ‘The Campaign for Greener Arbitrations: Encouraging Sustainable Practices in International Arbitration | Jus Mundi Blog’ (11 August 2021) <<https://blog.jusmundi.com/the-campaign-for-greener-arbitrations-encouraging-sustainable-practices-in-international-arbitration/>> accessed 1 April 2023.

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sustainability in all aspects of the economy, and requires the concerted efforts of all stakeholders. Aligning arbitration with Sustainable Development is an ideal whose hour is now.

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