

## ESG IN ARBITRATION FOR THE 21ST CENTURY IN AFRICA

- ESG refers to a model through which corporations and investors integrate **environmental, social and governance** concerns into business models.
- ESG entails **monitoring and reporting environmental concerns** such as carbon emissions, water consumption, waste generation; **social concerns** such as employee, product and customer related data and **governance concerns** such as political lobbying, anti-corruption initiatives and board diversity.
- ESG concerns are **paramount** since social, environmental and governance concerns have become a societal focal point in light of the **sustainable development agenda**.
- The **Sustainable Development Goals** seek to **achieve global development within the ESG framework** by addressing social concerns such as poverty, hunger, health and education, gender equality, access to clean water and employment by promoting investments in areas such energy, industry, innovation and infrastructure while mitigating the effects of climate change.
- **Good governance** is integral in achieving the sustainable development agenda.
- National laws such as the **Constitution** of Kenya capture ESG concerns by enshrining national values and principles of governance such as **social justice, good governance and sustainable development**.
- ESG concerns seek to **achieve sustainable, responsible and ethical investment**.
- It seeks to achieve **socially responsible investments** by **incorporating ESG concerns in investment decisions over and above profitability**.
- ESG concerns have **shaped economic behavior** with an increasing number of corporations and investors considering ESG concerns in their investment decisions.
- ESG concerns are important in Africa in **promoting sustainable investment and development**.
- The growing threat of **climate change** and climate crisis has forced many investors to embrace **sustainability** as a key factor in investment decision making.
- The Continent continues to face **environmental challenges** such as **drought and famine** that can be attributed to the **climate change concern**. Further, social concerns such as unemployment, gender inequalities, poverty and access to education and housing are well documented. The continent also faces governance concerns as evidenced by cases of poor governance and corruption in some countries.

- ESG concerns are thus important in Africa to enable the continent to reap from its vast resources.
- Corporations and investors should thus take into account ESG concerns in order to promote sustainable development in Africa.
- ESG concerns have the ability to enhance the **competitive strategy and financial performance of corporation.**

### ESG Concerns in Arbitration

- The manner in which corporations conduct their affairs raises certain ESG concerns.
- Failure to facilitate transition into clean energy production and reduction of Co2 emissions has resulted in climate change litigation against corporations.
- Some multinational corporations have also been accused of perpetrating human rights abuses in the investment sphere.
- These concerns have resulted in an increase in ESG-related disputes mostly lodged against corporations.
- Since arbitration is the most preferred mechanism for management of disputes especially at the international scene, there is likely to be an increase in the use of arbitration in management of ESG-related disputes.
- ESG clauses are increasingly being incorporated in commercial contracts where corporations are committing themselves to reduce carbon emissions and safeguard human rights. Arbitrators may find themselves interpreting such clauses when disputes arise.
- Further, in the investment sphere, states are now including ESG considerations in trade and investment treaties in order to promote sustainability. Thus, in investment arbitration, arbitrators may be called upon to interpret ESG provisions in investment treaties.
- Arbitrators are now being called upon to consider ESG concerns when rendering their decisions.

### Way Forward

- Arbitrators should familiarize themselves with the concept of ESG in order to render effective awards in ESG related disputes.
- Arbitrators should seek expert assistance in complex ESG matters such as determining adherence to climate change commitments through low carbon transition.
- Arbitrators should always uphold human rights in their awards which is a key concern in ESG.
- Arbitral awards should promote good governance practices such as transparency, accountability, reporting and disclosure.

- Promoting the concept of Sustainable Development which is the underlying theme in ESG.