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Fostering Environmental, Social and Governance (ESG) Litigation for Sustainability

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Fostering Environmental, Social and Governance (ESG) Litigation for Sustainability

Kariuki Muigua*

Abstract

Attaining sustainability has become a global agenda in recent decades in light of mounting problems including environmental challenges such as climate change, together with issues of poverty, increasing disparity between societies and the tensions brought by social inequalities. Various approaches have been embraced at local, national, regional, continental and global levels towards fostering sustainability. Environmental, Social, and Governance (ESG) litigation has recently emerged as a vital tool aimed at fostering sustainability. This paper critically discusses the role of ESG litigation in promoting sustainability. It conceptualizes ESG and defines ESG litigation. The paper further examines the emerging trends and practices in ESG litigation and their place in the sustainability agenda. It also explores some of the concerns in ESG litigation. The paper further offers proposals towards fostering ESG litigation for sustainability.

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1.0 Introduction

Sustainability refers to creating and maintaining the conditions under which humans and nature can exist in productive harmony to support present and future generations¹. Sustainability is often thought of as composed of three overlapping, mutually dependent goals: to live in a way that is environmentally sustainable, or viable over the very long-term; to live in a way that is economically sustainable, maintaining living standards over the long-term; and to live in a way that is socially sustainable, now and in the future². Attaining sustainability has become a global agenda in recent decades in light of mounting problems including environmental challenges such as climate change, together with issues of poverty, increasing disparity between societies and the tensions brought by social inequalities³. This has led to the rise of the concept of Sustainable Development.

Sustainable Development refers to development that meets the needs of the present without compromising the ability of future generations to meet their own needs⁴. The concept of Sustainable Development seeks to foster sustainability by promoting environmental protection, economic development and social progress⁵. This idea has been embraced as the global blueprint for sustainability as envisioned under the United Nation's *2030 Agenda for Sustainable Development*⁶. The Agenda represents a shared blue

¹ United States Environmental Protection Agency., 'What is Sustainability.' Available at <https://www.epa.gov/sustainability/learn-about-sustainability> (Accessed on 03/02/2024)

² Heinberg. R., 'What Is Sustainability?.' Available at <https://cdn.auckland.ac.nz/assets/arts/documents/What%20is%20Sustainability.pdf> (Accessed on 03/02/2024)

³ Giovannoni. E., & Fabietti. G., 'What Is Sustainability? A Review of the Concept and Its Applications.' In: Busco, C., Frigo, M., Riccaboni, A., Quattrone, P. (eds) *Integrated Reporting*. Springer, Cham. Available at https://doi.org/10.1007/978-3-319-02168-3_2 (Accessed on 03/02/2024)

⁴ World Commission on Environment and Development., 'Our Common Future.' Oxford, (Oxford University Press, 1987)

⁵ Fitzmaurice. M., 'The Principle of Sustainable Development in International Development Law.' *International Sustainable Development Law.*, Vol 1

⁶ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 03/02/2024)

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print for peace and prosperity for people and the planet in the quest towards the ideal of Sustainable Development⁷. It envisions attainment of the ideal of Sustainable Development through 17 Sustainable Development Goals (SDGs) which seek to strike a balance between social, economic and environmental facets of sustainability⁸.

Various approaches have been embraced at local, national, regional, continental and global levels towards fostering sustainability. Environmental, Social, and Governance (ESG) litigation has recently emerged as a vital tool aimed at fostering sustainability⁹.

This paper critically discusses the role of ESG litigation in promoting sustainability. It conceptualizes ESG and defines ESG litigation. The paper further examines the emerging trends and practices in ESG litigation and their place in the sustainability agenda. It also explores some of the concerns in ESG litigation. The paper further offers proposals towards fostering ESG litigation for sustainability.

2.0 An Overview of ESG

ESG is an acronym for Environmental, Social and Governance, which has been described as a framework that helps stakeholders understand how an organization manages risks and opportunities around sustainability issues¹⁰. ESG is a framework used to assess an organization's business practices and performance on various sustainability and ethical issues¹¹. It also provides a way to measure business risks and opportunities in

⁷ Ibid

⁸ Ibid

⁹ Norton. C., 'Growing ESG Litigation Is Advancing Thinking on New Practices Needed.' Available at https://www.linkedin.com/pulse/growing-esg-litigation-advancing-thinking-new-practices-norton?utm_source=share&utm_medium=member_android&utm_campaign=share_via (Accessed on 03/02/2024)

¹⁰ Peterdy. K., & Miller. N., 'What is ESG?' Available at <https://corporatefinanceinstitute.com/resources/esg/esg-environmental-social-governance> (Accessed on 03/02/2024)

¹¹ Mathis. S., & Stedman. C., 'Environmental, Social and Governance (ESG).' Available at [https://www.techtarget.com/whatis/definition/environmental-social-and-governance-ESG#:~:text=Environmental%2C%20social%20and%20governance%20\(ESG\)%20is%20a%20framework%20used,and%20opportunities%20in%20those%20areas](https://www.techtarget.com/whatis/definition/environmental-social-and-governance-ESG#:~:text=Environmental%2C%20social%20and%20governance%20(ESG)%20is%20a%20framework%20used,and%20opportunities%20in%20those%20areas) (Accessed on 03/02/2024)

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sustainability and ethical areas¹². ESG has also been defined as a set of standards measuring a business's impact on society, the environment, and how transparent and accountable it is¹³. It can also be understood as a framework that helps stakeholders understand how an organization is managing risks and opportunities related to environmental, social, and governance criteria¹⁴. ESG incorporates environmental, social, and governance factors into investment and business decision-making processes¹⁵. ESG integrates environmental factors including environmental sustainability and climate change concerns such as climate resilience and low carbon development; social tenets such as improving social welfare and fostering inclusive participation with stakeholders; and governance factors including fostering good governance practices internally and externally in order to realize sustainability¹⁶. In addition, it has been pointed out that ESG involves monitoring and reporting environmental concerns such as carbon emissions, water consumption and waste generation; social concerns such as human rights, employee, product and customer related data and governance concerns such as political lobbying, anticorruption initiatives and board diversity¹⁷.

ESG is a concept that is vital in fostering sustainable, responsible or ethical investments¹⁸. It has been argued that ESG is usually a standard and strategy used by investors to evaluate corporate behavior and future financial performance of organizations¹⁹. It uses

¹² Ibid

¹³ British Business Bank., 'What is ESG - A Guide for Businesses.' Available at <https://www.britishbusiness-bank.co.uk/finance-hub/business-guidance/sustainability/what-is-esg-a-guide-for-smallerbusinesses/> (Accessed on 03/02/2024)

¹⁴ Peterdy. K., & Miller. N., 'What is ESG?' Op Cit

¹⁵ Barbosa. A et al., 'Integration of Environmental, Social, and Governance (ESG) Criteria: Their Impacts on Corporate Sustainability Performance.' *Humanit Soc Sci Commun* 10, 410 (2023). Available at <https://doi.org/10.1057/s41599-023-01919-0> (Accessed on 03/02/2024)

¹⁶ African Development Bank Group., 'Environmental, Social and Governance (ESG).' Available at <https://www.afdb.org/en/topics-and-sectors/topics/environmental-social-and-governance-esg> (Accessed on 05/02/2024)

¹⁷ Li. T., et al., 'ESG: Research Progress and Future Prospects.' Available at <https://pdfs.semanticscholar.org/0dd4/941e33330210daff5f37a1c8cdd0547d7.pdf> (Accessed on 03/02/2024)

¹⁸ 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

¹⁹ Li. T., et al., 'ESG: Research Progress and Future Prospects.' Op Cit

non-financial indicators to evaluate the performance of businesses and organizations²⁰. ESG involves gathering information on a company's policies, practices, and performance related to environmental issues (such as environmental impact and resource use), social issues (such as employee and community relations management), and governance issues (such as governance structure and transparency) and integrating them in corporate decision making²¹. The goal of ESG is to promote sustainable investments that generate long-term financial returns, taking into account the social and environmental impacts of economic activities and promoting transparency and corporate responsibility²². In addition, ESG seeks to integrate Environmental, Social and Governance factors in corporate activities in order to enhance the sustainability and social impact of business activities²³. Embracing ESG factors can therefore contribute to the environmental and economic performance of organizations in terms of investment and sustainability²⁴.

3.0 ESG Litigation: Opportunities and Challenges

It has correctly been observed that companies have historically viewed sustainability performance and statements as a voluntary undertaking, largely devoid of legal or market risk²⁵. As a result, management and oversight of a company's ESG and other sustainability issues including Corporate Social Responsibility CSR programs and reports often operated free from legal department oversight or interference²⁶. However, recent years have witnessed a proliferation of voluntary frameworks that have given rise to growing pressure on companies to adopt and report on rapidly evolving and

²⁰ The 3 pillars of Sustainability: Environmental, Social and Economic., Available at <https://www.enel.com/company/stories/articles/2023/06/three-pillars-sustainability> (Accessed on 03/02/2024)

²¹ Ibid

²² Ibid

²³ Li. T., et al., 'ESG: Research Progress and Future Prospects.' Op Cit

²⁴ Ahmad. H., Yaqub. M., & Lee. S. H., 'Environmental-, Social-, and Governance-Related Factors for Business Investment and Sustainability: A Scientometric Review of Global Trends.' Available at <https://link.springer.com/article/10.1007/s10668-023-02921> (Accessed on 03/02/2024)

²⁵ Hackett. D et al., 'Growing ESG Risks: The Rise of Litigation.' Available at https://www.bakermckenzie.com/-/media/files/insight/publications/2020/10/growing_esg_risks_the_rise_of_litigation.pdf (Accessed on 05/02/2024)

²⁶ Ibid

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expanding ESG standards²⁷. The growth of mandatory disclosure requirements on sustainability issues including ESG factors has led to the rise of ESG related litigation where plaintiffs have pursued with growing success legal challenges to company claims and disclosures related to ESG performance²⁸. It has been pointed out that ESG-related legal and regulatory developments are maturing from soft law recommendations to hard law obligations in multiple jurisdictions²⁹. As a result, there is increasing liability and risks associated with ESG factors that often results in disputes³⁰. It has been observed that ESG disputes continue to be on the rise globally often as a tool to push organisations to engage with the net zero transition with greater ambition, and to improve their ESG performance (including in relation to human rights) but also to challenge how ESG issues are being addressed³¹.

ESG related legal actions can either involve claims challenging the veracity of ESG statements based largely on a company's ESG conduct or suits directly contesting the propriety of company activities and performance³². The first category majorly deals with ESG disclosure and reporting standards and such suits are majorly concerned with ESG misstatements and omissions³³. The second category is concerned about a company's performance on various ESG tenets and such suits can involve a company's alleged impacts or misconduct related to climate and human rights³⁴.

²⁷ Ibid

²⁸ Ibid

²⁹ McKenzie, S., Philippides, M., & De. Meyer., 'A Look to the Future: Litigation Risks Faced by the Financial Sector in Relation to ESG Statements.' Available at <https://www.investafrica.com/insights-/a-look-to-the-future-litigation-risks-faced-by-the-financial-sector-in-relation-to-esg-statements> (Accessed on 05/03/2024)

³⁰ Ibid

³¹ Ibid

³² Hackett, D et al., 'Growing ESG Risks: The Rise of Litigation.' Op Cit

³³ Ibid

³⁴ Ibid

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Claims challenging the veracity of ESG statements based largely on a company's ESG conduct mostly take the form of misrepresentation and "greenwashing" litigation³⁵. Greenwashing has been described as a phenomenon wherein corporations may strategically disclose environmental performance data in a manner that deceives both the general public and potential investors³⁶. It is often used as a strategy used by companies to create the impression that they are compliant with ESG requirements while hiding the true level of compliance, through marketing³⁷. Through greenwashing, firms exhibit an appearance of transparency and disseminate substantial volumes of ESG data but demonstrate inadequate results in many dimensions of their ESG endeavours³⁸. Greenwashing often results in ESG misrepresentation and is a major threat to sustainability³⁹. Greenwashing practices may result in a situation of information asymmetry, thereby causing detrimental effects on the financial interests of investors⁴⁰. Through greenwashing, it is plausible for corporations to conceal instances of pollution and even breaches of environmental legislation by engaging in symbolic compliance⁴¹. It has been observed that corporations are increasingly facing private lawsuits related to greenwashing on various grounds, including misrepresentation in their marketing materials or corporate disclosure⁴². ESG litigation related to misrepresentation and greenwashing is majorly grounded in consumer protection and unfair competition claims⁴³. Under this framework, companies can be sued on grounds that their products and services contain false or misleading affirmative statements or omit material information on ESG factors⁴⁴. In addition, there have been an increase of ESG suits

³⁵ Ibid

³⁶ Xia, F., Chen, J., Yang, X., Li, X. and Zhang, B., 'Financial Constraints and Corporate Greenwashing Strategies in China' (2023) 30 *Corporate Social Responsibility and Environmental Management* 1770

³⁷ Ibid

³⁸ Ibid

³⁹ Muigua. K., 'Greenwashing: A Hindrance to Achieving Sustainability?' Available at <https://kmco.co.ke/wp-content/uploads/2023/08/Greenwashing-A-hindrance-to-Achieving-Sustainability-Kariuki-Muigua-August-2023.pdf> (Accessed on 05/02/2024)

⁴⁰ Ibid

⁴¹ Ibid

⁴² Hackett. D et al., 'Growing ESG Risks: The Rise of Litigation.' Op Cit

⁴³ Ibid

⁴⁴ Ibid

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challenging ESG Statements in company reports, websites, and other marketing materials⁴⁵.

ESG litigation is also being widely embraced through suits directly contesting the propriety of company activities and performance⁴⁶. It has been pointed out that such claims can take the form of private law claims seeking monetary compensation (damages)⁴⁷; private/public law claims seeking to change companies' behaviour and/or bring about alternative outcomes such as compliance with ESG tenets⁴⁸; and public law claims directed at administrative decision-making, for instance judicial review cases on ESG⁴⁹. Under this category, there has been growth of ESG suits on issues such as climate change⁵⁰. It has been observed that as governments increasingly implement net-zero carbon targets and companies establish their own carbon-neutral or carbon-negative pledges, climate change related disputes are growing throughout the world⁵¹. Such disputes focus on issues such as infrastructure projects and whether these projects are aligned with the Paris Agreement⁵², contribution by companies towards the effects of climate change, and commercial disputes arising out of climate change events such as insurance claims and claims related to potential force majeure events⁵³. It has been asserted that the practice of taking legal action over climate change has been on the rise in national courts all around the world, with the majority of cases being claimed as

⁴⁵ Ibid

⁴⁶ McKenzie, S., Philippides, M., & De Meyer., 'A Look to the Future: Litigation Risks Faced by the Financial Sector in Relation to ESG Statements.' Op Cit

⁴⁷ Ahurst., 'ESG Litigation - Get Ready Respond and Resolve.' Available at <https://www.ashurst.com/en/insights/esg-litigation---get-ready-respond-and-resolve/> (Accessed on 05/02/2024)

⁴⁸ Ibid

⁴⁹ Ibid

⁵⁰ Latham & Watkins LLP., 'ESG Litigation Roadmap.' Available at <https://www.lw.com/admin/upload/SiteAttachments/ESG-Litigation-Roadmap.pdf> (Accessed on 05/02/2024)

⁵¹ Ibid

⁵² Ibid

⁵³ Ibid

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breaches of human rights⁵⁴. Such cases are concerned with themes such as climate rights, domestic enforcement, keeping fossil fuels in the ground, corporate accountability and responsibility, failure to adapt and the implications of adaptation, climate disclosures and greenwashing⁵⁵. Climate litigation is thus a vital tool towards sustainability.

In addition, human rights have emerged as key theme under ESG litigation⁵⁶. It has been correctly asserted that companies can face liability for human rights violations committed abroad by entities in their supply chain⁵⁷. In addition, it has been observed that the focus on supply chains has brought much greater scrutiny to the working conditions of those in the supply chain⁵⁸. Concerns of human rights of employees and the communities that are impacted by the activities of the supply chains have become paramount⁵⁹. In addition there is an increased recognition of the link between climate change and human rights and as a result, claims have been made against companies for poor health and safety conditions in their supply chain, particularly in cases of significant industrial accidents⁶⁰. Human rights are therefore central in ESG⁶¹. The 'S' tenet in ESG covers social factors including human rights, labour relations, employee welfare, community engagement, diversity and inclusion⁶². Companies are now increasingly required to embrace Human Rights Due Diligence (HRDD) in order to demonstrate compliance with human rights

⁵⁴ Muigua. K., 'Promoting Climate Litigation in Kenya for Sustainability.' Available at <https://kmco.co.ke/wp-content/uploads/2023/08/Promoting-Climate-litigation-in-Kenya-for-Sustainability-Kariuki-Muigua-August-2023.pdf> (Accessed on 05/02/2024)

⁵⁵ Ibid

⁵⁶ Hackett. D et al., 'Growing ESG Risks: The Rise of Litigation.' Op Cit

⁵⁷ Ibid

⁵⁸ Latham & Watkins LLP., 'ESG Litigation Roadmap.' Op Cit

⁵⁹ Ibid

⁶⁰ Ibid

⁶¹ Muigua. K., '(Re) Examining Environmental, Social and Governance (ESG) and Human Rights.' Available at <https://kmco.co.ke/wp-content/uploads/2024/01/Re-Examining-Environmental-Social-and-Governance-ESG-and-Human-Rights.pdf> (Accessed on 05/02/2024)

⁶² Ibid

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standards⁶³. In addition, there has been rise of private enforcement of human rights against companies through ESG litigation⁶⁴.

ESG litigation is therefore an essential tool aimed at fostering sustainability. Despite its efficacy, several hurdles may be experienced in ESG litigation. For example, in the field of climate litigation, some of the key challenges that may be experienced include determining whether or not the court has the jurisdiction to settle a dispute; locating the origin of an enforceable climate-related right or obligation; formulating a remedy that will lessen the plaintiffs' injuries; and marshalling the science of climate attribution⁶⁵. In addition, it has been pointed out that challenges may arise in the quantification of damages in ESG litigation⁶⁶. It is imperative to navigate these among other challenges in order to effectively cover the landscape of ESG litigation.

4.0 Way Forward

In order for companies to manage the risk and liability associated with ESG litigation, it is imperative for them to strengthen their ESG reporting and disclosure requirements⁶⁷. It has been observed that recent ESG trends have driven the requirement by businesses to report on ESG aspects such as human rights and environmental standards as evidenced by emerging legal frameworks requiring companies to report on human rights and environmental issues, emerging mandatory human rights due diligence legislation,

⁶³ Global Campus of Human Rights., 'Rethinking Environmental, Social, and Governance (ESG) Investing for Successful Sustainability and Human Rights.' Available at <https://gchumanrights.org/gcpreparedness/preparedness-development/article-detail/rethinking-environmental-social-andgovernance-esg-investing-for-successful-sustainability-and-human-rights-5039.html> (Accessed on 05/03/2024)

⁶⁴ Kemp. B et al., 'The Rise of ESG Litigation and Horizontal Human Rights Enforcement.' Available at <https://www.lexology.com/library/detail.aspx?g=07a94453-f2aa-490a-a7e1-f6c25256cbf9> (Accessed on 05/02/2024)

⁶⁵ Banda ML and Fulton CS, 'Litigating Climate Change in National Courts: Recent Trends and Developments in Global Climate Law' (2017) 47 Environmental Law Reporter

⁶⁶ May. S., & Radcliffe. M., 'The Evolving ESG litigation Landscape.' Available at <https://www.grantthornton.co.uk/insights/the-evolving-esg-litigation-landscape/> (Accessed on 05/02/2024)

⁶⁷ Ibid

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and increased legal enforcement and litigation risks⁶⁸. As a result, it is important for companies to treat public disclosures in relation to ESG matters seriously and consider taking independent auditing and verification steps, particularly for annual ESG-related reports and/or other material ESG disclosures⁶⁹. Such an approach can help companies effectively manage and reduce the risk of ESG related litigation⁷⁰.

In addition, it has been argued that there is need for companies to embrace best practices in order to mitigate the risks of ESG litigation and also address such litigation when it arises⁷¹. For example it has been suggested that companies should conduct risk assessments in order to determine the likelihood of ESG related suits and deal with such concerns immediately⁷²; undertake public engagement to order to ensure openness and transparency in ESG matters⁷³; build knowledge on ESG issues in order to be well equipped to handle ESG claims when they arise⁷⁴; and strengthen their management systems and internal practices in order to enhance compliance with ESG standards⁷⁵. It has been observed that ESG litigation is associated with several risks to companies including regulatory and enforcement risk, reputational risk, damage to brand, potential disruption by activists and financial risks such as loss of access to capital and financial losses as a result of damages, fines and other forms of monetary compensation⁷⁶.

It is also imperative to strengthen access to justice in ESG matters⁷⁷. It has been pointed out that in order for litigants to be given the right of access to courts in ESG matters,

⁶⁸ Mikhaeel. M., 'How Human Rights Due Diligence Affects the 'E' in ESG.' Available at <https://www.financierworldwide.com/how-human-rights-due-diligence-affects-the-e-in-esg> (Accessed on 05/02/2024)

⁶⁹ Latham & Watkins LLP., 'ESG Litigation Roadmap.' Op Cit

⁷⁰ Ibid

⁷¹ Ibid

⁷² Hackett. D et al., 'Growing ESG Risks: The Rise of Litigation.' Op Cit

⁷³ Ibid

⁷⁴ Ibid

⁷⁵ Ibid

⁷⁶ May. S., & Radcliffe. M., 'The Evolving ESG litigation Landscape.' Op Cit

⁷⁷ Muigua. K., 'Promoting Climate Litigation in Kenya for Sustainability.' Op Cit

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whether individually, collectively, or as a third party or amicus curiae, the criteria pertaining to standing, which differ from jurisdiction to jurisdiction, must be followed⁷⁸. It is also necessary to widen and strengthen the jurisdiction of courts on ESG issues such as climate change⁷⁹. Further, it has been pointed out that there is need to embrace techniques such as litigation funding in order to provide the financial stability and support needed to pursue legal action without compromising on the quality of representation or legal strategy in ESG matters⁸⁰. It has been argued that litigation funding can be an effective strategy for needy claimants to pursue claims against a company that they may ordinarily not be able to afford, enabling them to ultimately to hold companies to account for ESG failures⁸¹.

Finally, it is imperative for companies to think creatively and strategically in order to effectively resolve ESG claims⁸². It has been pointed out that ESG claims may significantly differ from other types of litigation companies have previously faced, hence the need for creative solutions towards these claims⁸³. For example, in ESG claims, there is need to bear in mind both the litigation aspects of a dispute, and broader ESG concerns including those around reputation and access to capital⁸⁴. As a result, it has been suggested that there is need for companies to be alive to the potential for resolving ESG claims outside the court room, and what mitigation strategies could be deployed to avoid litigation⁸⁵. It has been argued that Alternative Dispute Resolution (ADR) mechanisms can be ideal in managing ESG disputes by fostering privacy, cost effective and expeditious management of disputes while also allowing parties to select experts to hear and determine contentious

⁷⁸ Ibid

⁷⁹ Ibid

⁸⁰ Runyon. N., 'How Litigation Funding Drives Progress in the ESG Agenda.' Available at <https://www.thomsonreuters.com/en-us/posts/esg/litigation-funding-esg-agenda/#:~:text=A%20driving%20force%20in%20access%20to%20justice&text=Litigation%20funding%20also%20provides%20the,of%20representation%20or%20legal%20strategy>. (Accessed on 05/02/2024)

⁸¹ Ibid

⁸² Latham & Watkins LLP., 'ESG Litigation Roadmap.' Op Cit

⁸³ Ibid

⁸⁴ Ibid

⁸⁵ Hackett. D et al., 'Growing ESG Risks: The Rise of Litigation.' Op Cit

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ESG matters⁸⁶. In addition, it has correctly been observed that businesses would normally prefer to have their disputes managed in a private manner in order to prevent ruining their image in public and also in an expeditious and cost effective manner in order to protect business interests⁸⁷. It has also been pointed out that the use of ADR mechanisms such as mediation in managing ESG related disputes is a practical demonstration of a sustainability-oriented business culture since mediation can offer a quick, flexible, consensual and win-win solution based on the mutually accepted interests of the parties⁸⁸. ADR mechanisms can therefore be an effective tool to enable companies manage the risks associated with ESG litigation⁸⁹.

5.0 Conclusion

ESG litigation is an essential tool aimed at fostering sustainability. Through ESG litigation, claims can be filed challenging the veracity of ESG statements based largely on a company's ESG conduct⁹⁰. In addition, suits can be filed directly contesting the propriety of company activities and performance⁹¹. There has been a global increase in ESG litigation on issues such as greenwashing, climate change and human rights⁹². Through litigation, companies are being obliged to comply with ESG standards including environmental protection, respect for human rights and good governance practices⁹³. Despite its efficacy, the landscape of ESG litigation faces problems such as jurisdictional challenges, quantification of damages and access to justice⁹⁴. It is imperative to address such concerns in order to strengthen the enforcement of ESG standards. This calls for

⁸⁶ Thailand Arbitration Center., 'Alternative Dispute Resolution: Significance of ESG in Arbitration.' Available at <https://thac.or.th/alternative-dispute-resolution-significance-esg-arbitration/> (Accessed on 05/02/2024)

⁸⁷ Ibid

⁸⁸ Gramatidis.B & Emvalomenos. D., 'Sustainability in Dispute Resolution -Mediation as an ESG Practice.' Available at <https://www.bahagram.com/sustainability-in-dispute-resolution-mediation-as-an-esgpractice/> (Accessed on 05/02/2024)

⁸⁹ Ibid

⁹⁰ Hackett. D et al., 'Growing ESG Risks: The Rise of Litigation.' Op Cit

⁹¹ Ibid

⁹² Latham & Watkins LLP., 'ESG Litigation Roadmap.' Op Cit

⁹³ Ibid

⁹⁴ May. S., & Radcliffe. M., 'The Evolving ESG litigation Landscape.' Op Cit

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strengthening of ESG disclosure and reporting standards⁹⁵; embracing best practices in order to mitigate the risks of ESG litigation⁹⁶; strengthening access to justice in ESG matters⁹⁷; and embracing ADR mechanisms in managing ESG claims⁹⁸. Fostering ESG litigation for sustainability is an agenda that needs to be realized.

⁹⁵ Ibid

⁹⁶ Latham & Watkins LLP., 'ESG Litigation Roadmap.' Op Cit

⁹⁷ Muigua. K., 'Promoting Climate Litigation in Kenya for Sustainability.' Op Cit

⁹⁸ Gramatidis.B & Emvalomenos. D., 'Sustainability in Dispute Resolution -Mediation as an ESG Practice.' Op Cit

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