

Infusing Environmental, Social, and Governance Tenets into Arbitration and Alternative Dispute Resolution

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Kariuki Muigua*

Abstract

This paper explores the need to infuse Environmental, Social, and Governance (ESG) tenets into arbitration and Alternative Dispute Resolution (ADR). It argues that ESG factors are pertinent in arbitration and ADR. The paper critically discusses the link between ESG and ADR mechanisms including arbitration. It also examines some of the ESG concerns in arbitration and ADR. The paper further offers ideas towards infusing ESG tenets into arbitration and ADR for sustainability and effective conflict management.

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1.0 Introduction

Environmental, Social, and Governance (ESG) is a concept that entails three central tenets that are used to measure the sustainability and ethical impact businesses and investments¹. ESG has also been defined as a framework that helps stakeholders understand how an organization is managing risks and opportunities related to environmental, social, and governance criteria (sometimes called ESG factors)². The idea of ESG takes the holistic view that sustainability extends beyond just environmental issues; it also seeks to incorporate social and governance criteria in the sustainability agenda³. ESG seeks to achieve sustainable, responsible and ethical investment by incorporating environmental, social and governance factors in corporate decision making⁴. ESG is usually a standard and strategy used by investors to evaluate corporate behaviour and to determine the future financial performance of businesses based on how they handle sustainability issues⁵.

ESG therefore seeks to incorporate environmental, social, and governance tenets into investment and business decision-making processes in order to foster sustainable, responsible, and ethical investments and business practices⁶. This concept urges businesses to embrace environmental factors including environmental sustainability and climate change concerns such as climate resilience and low carbon development⁷; social

¹ Kiehne. D.O., 'Environmental, Social and Corporate Governance (ESG) -Also an Innovation Driver?' Available at https://www.researchgate.net/publication/334398123_Environmental_social_and_corporate_governance_ESG_-_also_an_innovation_driver (Accessed on 26/04/2024)

² Peterdy. K., & Miller. N., 'ESG (Environmental, Social, & Governance)' Available at <https://corporatefinanceinstitute.com/resources/esg/esg-environmental-social-governance/> (Accessed on 26/04/2024)

³ Ibid

⁴ 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

⁵ Li. T.T et al., 'ESG: Research Progress and Future Prospects.' *Sustainability*, No. 13, 2021.

⁶ Stuart. L.G et al., 'Firms and social responsibility: A review of ESG and CSR research in corporate finance.' Op Cit

⁷ 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 26/04/2024)

tenets such as improving social welfare and fostering inclusive participation with stakeholders⁸; and governance factors including fostering good governance practices internally and externally in order to realize sustainability⁹. It has also been noted that the main drivers of ESG are concerns regarding the environment such as climate change, energy conservation, waste management and sustainability in general¹⁰; social concerns like diversity, human rights, consumer protection or animal welfare¹¹; and corporate governance concerns including management structure, employment relations, compensation of staff and executive as well as questions of responsible investments¹².

The United Nations Development Programme (UNDP) notes that 'E' tenet in ESG focuses on businesses' impact on the environment through their consumption of energy and raw materials¹³. These standards cover many factors, including how businesses contribute to climate change, pollution, waste, and natural resource depletion¹⁴. In addition, the 'S' tenet focuses on the impact businesses make on society¹⁵. These factors are related to labour and human rights, inclusion, equality, and community development¹⁶. Further, the 'G' tenet concerns practices and procedures adopted and implemented within a business to ensure it follows the laws and standards set out by its relevant stakeholders¹⁷. These standards are measured by actions business takes to ensure fair and transparent management, information disclosure, prevention of corruption, enabling diversity, transparent decision-making processes, cybersecurity, and privacy among others¹⁸.

⁸ Ibid

⁹ Ibid

¹⁰ Kiehne, D.O., 'Environmental, Social and Corporate Governance (ESG) -Also an Innovation Driver?' Op Cit

¹¹ Ibid

¹² Ibid

¹³ United Nations Environment Programme., 'Building a Sustainable Future: ESG Business Handbook' Available at https://www.undp.org/sites/g/files/zskgke326/files/2023-08/building_a_sustainable_future_esg_business_handbook.pdf (Accessed on 26/04/2024)

¹⁴ Ibid

¹⁵ Ibid

¹⁶ Ibid

¹⁷ Ibid

¹⁸ Ibid

ESG tenets evaluate businesses' sustainability and impact on environmental, social and governance issues far beyond their financial performance¹⁹. Businesses are therefore embracing the idea of ESG to measure their impact on the environment, society, and the economy²⁰. It has been noted that some of the ESG standards are imposed by laws and regulations of the country where the business operates, and others result from stakeholders' expectations and investors' pressure due to growing concerns regarding human rights and environmental issues²¹. ESG tenets apply not only to the investment community but also to customers, suppliers, and employees, all of whom are increasingly interested in how sustainable an organization's operations are²².

The concept of ESG is pertinent in the sustainability agenda and achievement of the United Nation's 2030 Agenda for Sustainable Development²³. The rise of ESG has been necessitated by global sustainability problems including climate change, corporate corruption and financial inequality²⁴. ESG includes key elements around environmental and social impact, as well as how governance structures can be amended to maximize stakeholder well-being towards sustainability²⁵. Realizing ESG tenets is therefore necessary in order to achieve sustainability.

¹⁹ Ibid

²⁰ ESG., 'The Link Between ESG and Community Engagement: Building Stronger Relationships.' Available at <https://vakilsearch.com/blog/the-link-between-esg-and-community-engagement/> (Accessed on 26/04/2024)

²¹ United Nations Environment Programme., 'Building a Sustainable Future: ESG Business Handbook' Op Cit

²² Peterdy. K., & Miller. N., 'ESG (Environmental, Social, & Governance)' Op Cit

²³ Barbosa. A., et al., 'Integration of Environmental, Social, and Governance (ESG) Criteria: Their Impacts on Corporate Sustainability Performance.' *Humanities & Social Sciences Communications.*, 2023

²⁴ CMS., 'Putting the 'S' in 'ESG'- a Corporate Guide.' Available at <https://cms.law/en/int/publication/social-aspect-of-esg-lexicon-of-most-important-terms-and-phrases> (Accessed on 26/04/2024)

²⁵ Peterdy. K., & Miller. N., 'ESG (Environmental, Social, & Governance)' Op Cit

This paper explores the need to infuse ESG tenets into arbitration and Alternative Dispute Resolution (ADR). It argues that ESG factors are pertinent in arbitration and ADR. The paper critically discusses the link between ESG and ADR mechanisms including arbitration. It also examines some of the ESG concerns in arbitration and ADR. The paper further offers ideas towards infusing ESG tenets into arbitration and ADR for sustainability and effective conflict management.

2.0 Overview of Arbitration and ADR

ADR is an all-encompassing term that entails multiple non-judicial methods of managing conflicts²⁶. It refers to a set of processes that are used to manage conflicts without resort to courts²⁷. ADR mechanisms may be linked to but function outside formal court litigation processes²⁸. The United Nations notes that ADR (sometimes also referred to as “Appropriate Dispute Resolution”) is a general term, used to define a set of approaches and techniques aimed at resolving disputes in a nonconfrontational way²⁹. ADR techniques include negotiation, mediation, arbitration, adjudication, neutral evaluation, enquiry, expert determination, Traditional Dispute Resolution Mechanisms (TDRMs) and conciliation among others³⁰.

The concept of ADR is embraced at the global level under the *Charter of the United Nations*³¹. The Charter provides that parties to a dispute shall first of all seek a solution by *negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own*

²⁶ Block. M. J., ‘The Benefits of Alternate Dispute Resolution for International Commercial and Intellectual Property Disputes.’ *Rutgers Law Record.*, Volume 44, 2016-2017

²⁷ Muigua. K., ‘Alternative Dispute Resolution and Access to Justice in Kenya.’ Glenwood Publishers Limited, 2015

²⁸ Uwazie. E., ‘Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.’ *Africa Security Brief*, No. 16 of 2011

²⁹ United Nations., ‘Alternative Dispute Resolution Approaches and their Application in Water Management: A Focus on Negotiation, Mediation and Consensus Building’ Available at https://www.un.org/waterforlifedecade/water_cooperation_2013/pdf/adr_background_paper.pdf (Accessed on 26/04/2024)

³⁰ Muigua. K., ‘Alternative Dispute Resolution and Access to Justice in Kenya.’ Op Cit

³¹ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

choice³²(Emphasis added). This idea has also been embraced in Kenya under the Constitution which mandates courts and tribunals to promote ADR mechanisms including reconciliation, mediation, arbitration and TDRMs³³.

It has been noted that ADR processes are ideal in realizing access to justice³⁴. These mechanisms are characterized by key attributes such as informality, privacy, confidentiality, party autonomy and the ability to foster expeditious and cost effective management of disputes³⁵. ADR techniques can therefore cure challenges in formal justice systems including high court filing fees, bureaucracy, complex legal procedures, illiteracy, distance from formal courts, backlog of cases in courts and lack of legal knowhow and ensure access to justice³⁶.

Arbitration as an ADR process refers to a private and consensual process where parties in dispute agree to present their grievances to a third party for resolution³⁷. It has also been defined as a dispute management mechanism where parties through an agreement submit their dispute to one or more neutral third parties who make a binding decision on the dispute³⁸. Arbitration has a number of key attributes that makes it ideal in managing disputes including privacy, confidentiality, party autonomy, flexibility, and finality³⁹. Arbitration also has a transnational applicability which means that it applies across different jurisdictions and therefore guarantees neutrality in the determination of disputes by addressing differences that may arise as a result of multiple legal systems⁴⁰.

³² Ibid, article 33 (1)

³³ Constitution of Kenya, 2010., article 159 (2) (c), Government Printer, Nairobi

³⁴ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

³⁵ Ibid

³⁶ Ojwang. J.B , "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," *1 Kenya Law Review Journal* 19 (2007), pp. 19-29: 29

³⁷ Muigua. K., 'Settling Disputes through Arbitration in Kenya.' Glenwood Publishers, 4th Edition, 2022

³⁸ World Intellectual Property Organization., 'What is Arbitration' Available at <https://www.wipo.int/amc/en/arbitration/what-is-arb.html> (Accessed on 26/04/2024)

³⁹ Muigua. K., 'Settling Disputes through Arbitration in Kenya.' Op Cit

⁴⁰ Moses, 'The Principles and Practice of International Commercial Arbitration' 2nd Edition, 2017, Cambridge University Press

It also guarantees enforcement of decisions through the *New York Convention*⁴¹ which provides a harmonized legal framework for the recognition and enforcement of foreign awards in arbitration.

3.0 The Place of ESG in Arbitration and ADR

Despite the growing importance of ESG, some key concerns need to be addressed. One such challenge relates to the management of ESG disputes that may arise from time to time among stakeholders such as shareholders, investors, regulators, and communities⁴². The growth of ESG requirements has seen businesses being increasingly required to embrace ESG tenets in their corporate practices⁴³. ESG factors have become a critical aspect of business operations and investment decisions in the corporate world around the globe⁴⁴. Corporations are under immense pressure to ensure that their operations remain sustainable, socially responsible, and governed ethically⁴⁵. As a result, ESG clauses are being adopted in commercial and investment contracts⁴⁶. In case of violation of such clauses, ESG related disputes are bound to occur⁴⁷. It has been asserted that the increasing adoption of ESG related practices into pre-existing environmental, social and

⁴¹ United Nations Commission on International Trade Law., 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards.' (New York, 1958)

⁴² Rathi. S., 'Cracking The ESG Conundrum: Is Arbitration The Key To Resolution Of ESG Disputes?' Available at <https://www.mondaq.com/india/arbitration--dispute-resolution/1375770/cracking-the-esg-conundrum-is-arbitration-the-key-to-resolution-of-esg-disputes#:~:text=ESG%20issues%20usually%20involve%20multiple,arbitral%20awards%20across%20multiple%20jurisdictions> (Accessed on 26/04/2024)

⁴³ Muigua. K., 'The Place of Environmental, Social and Governance (ESG) in Arbitration' Available at <https://kmco.co.ke/wp-content/uploads/2022/09/The-Place-of-Environmental-Social-and-Governance-ESG-in-Arbitration-2.pdf> (Accessed on 26/04/2024)

⁴⁴ Rathi. S., 'Cracking The ESG Conundrum: Is Arbitration The Key To Resolution Of ESG Disputes?' Op Cit

⁴⁵ Ibid

⁴⁶ 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/internationalarbitration-in-2022/the-rising-significance-of-esg-and-the-role-of-international-arbitration/> (Accessed on 26/04/2024)

⁴⁷ Muigua. K., 'The Place of Environmental, Social and Governance (ESG) in Arbitration' Op Cit

governance models adopted by corporations is going to be disruptive⁴⁸. 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 with⁴⁹. ESG issues are therefore not only reshaping sustainability and corporate behavior across the globe but can also be a potential battleground in international disputes⁵⁰.

ESG disputes encompass private law claims where claimants seek to recover damages against companies⁵¹. In such instances, the damages sought may be for environmental damage, violation of human rights, personal injury or damage to property, or secondary claims arising from a company misrepresenting its sustainability credentials to customers or investors⁵². In addition, it has been noted that ESG tenets also inspire contractual disputes⁵³. As ESG becomes ever more important, ESG standards are being incorporated into supply contracts, manufacturing contracts and joint venture agreements, resulting in increased inter-company disputes in relation to the application of such standards⁵⁴. Due to the breadth of subject matter covered by ESG, the range of disputes that can arise is expansive⁵⁵. ESG disputes can encompass conduct arising out of, for instance, a corporate governance dispute, to a labour matter involving the breach of a worker's human rights, to a mass tort claim arising out of an environmental damage among others⁵⁶.

⁴⁸ 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 26/04/2024)

⁴⁹ Ibid

⁵⁰ Hamilton. J & Coulet-Diaz. M., 'Arbitration & the ESG Era' available at <https://www.whitecase.com/news/media/arbitration-esg-era> (Accessed on 26/04/2024)

⁵¹ Ashurst., 'Global Trends in ESG Disputes' Available at <https://www.ashurst.com/en/insights/global-trends-in-esg-disputes/> (Accessed on 26/04/2024)

⁵² Ibid

⁵³ Ibid

⁵⁴ Ibid

⁵⁵ International Bar Association., 'Report on Use of ESG Contractual Obligations and Related Disputes' Available at <https://www.ibanet.org/document?id=report-on-use-of-ESG-contractual-obligations> (Accessed on 26/04/2024)

⁵⁶ Ibid

Effective management of ESG disputes is key in fostering sustainability and preserving the reputation and profitability of businesses⁵⁷. It has been correctly noted that litigation may not be well suited for addressing the unique issues that may arise in ESG disputes since they often involve multiple legal, social, and ethical issues⁵⁸. In addition, it has been pointed out that since ESG disputes often involve multiple parties and stakeholders with different perspectives, it may be difficult to arrive at a satisfactory resolution through litigation⁵⁹. Arbitration and ADR therefore have a key role to play in managing ESG disputes.

ADR mechanisms such as mediation and arbitration are ideal in managing ESG disputes by fostering privacy, confidentiality, cost effective and expeditious management of disputes while also allowing parties to select experts to hear and determine contentious ESG matters⁶⁰. It has 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 interests⁶¹. ADR techniques such as arbitration and mediation allow businesses to attain these benefits by ensuring privacy, confidentiality, cost effectiveness and expeditiousness in management of disputes and further promoting the enforceability of decisions⁶².

Arbitration is a viable mechanism for managing ESG disputes. Some of the key advantages of utilizing arbitration in managing ESG disputes is that arbitral awards are

⁵⁷ Rathi. S., 'Cracking The ESG Conundrum: Is Arbitration The Key To Resolution Of ESG Disputes?' Op Cit

⁵⁸ Ibid

⁵⁹ Ibid

⁶⁰ 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 26/04/2024)

⁶¹ Ibid

⁶² Moses, 'The Principles and Practice of International Commercial Arbitration' Op Cit

likely to be recognized and enforced (almost) globally pursuant to the New York Convention⁶³; injunctions can (in principle) be obtained quickly in cases of irreversible environmental damage or gross human rights violations⁶⁴. Arbitration also ensures neutrality of forum and flexibility as to where proceedings are held in addition to flexibility of procedure and availability of specialized procedural rules on ESG disputes⁶⁵.

Arbitration is also viable in managing ESG disputes since parties have the ability to appoint independent arbitrators with specific expertise in ESG issues, such as climate change and human rights⁶⁶. Arbitration allows parties to select experts to hear and determine contentious and technical ESG matters⁶⁷. ESG disputes may involve complex scientific and technical issues⁶⁸. For example, in climate change disputes, there may be need to determine whether the carbon emission of a company is in adequate compliance with the international climate targets⁶⁹. The principle of party autonomy allows parties to select arbitrators with capacity and knowledge in such matters therefore ensuring effective and efficient management of ESG disputes⁷⁰.

Arbitration is also suitable in managing ESG disputes based on international trade and investment treaties⁷¹. It has been noted that international trade and investment treaties are increasingly incorporating ESG protections with the purpose of ensuring that

⁶³ Akeb. S., 'Here We Go: ESG-Disputes in International Arbitration' Available at <https://www.taylorwessing.com/en/insights-and-events/insights/2023/07/here-we-go-esg-disputes-in-international-arbitration> (Accessed on 26/04/2024)

⁶⁴ Ibid

⁶⁵ Gaffney. J., 'In Praise and Criticism of Arbitration as a Means of Resolving ESG Disputes' Available at <https://arbitrationblog.kluwerarbitration.com/2023/04/18/in-praise-and-criticism-of-arbitration-as-a-means-of-resolving-esg-disputes/> (Accessed on 26/04/2024)

⁶⁶ Akeb. S., 'Here We Go: ESG-Disputes in International Arbitration' Op Cit

⁶⁷ Thailand Arbitration Center., 'Alternative Dispute Resolution: Significance of ESG in Arbitration.' Op Cit

⁶⁸ Rathi. S., 'Cracking The ESG Conundrum: Is Arbitration The Key To Resolution Of ESG Disputes?' Op Cit

⁶⁹ Ibid

⁷⁰ Ibid

⁷¹ Akeb. S., 'Here We Go: ESG-Disputes in International Arbitration' Available at <https://www.taylorwessing.com/en/insights-and-events/insights/2023/07/here-we-go-esg-disputes-in-international-arbitration> (Accessed on 26/04/2024)

contracting parties promote and effectively achieve their ESG objectives⁷². Consequently host states are more likely to bring claims or counterclaims against foreign investors for failure to meet their ESG-related obligations or in situations where investor protection clauses frustrate a host state's ESG objectives⁷³. Investors and states may be subject to arbitration proceedings pursuant to existing investment treaties or pursuant to ESG clauses in investment treaties⁷⁴. The activities of investors such as Multinational Corporations especially those involved in the exploration of natural resources in the global south have resulted in environmental concerns such as environmental degradation, extinction of biodiversity, contamination and destruction of soil and air pollution affecting the socio-economic lives of indigenous populations⁷⁵. They have also been accused of flouting human rights through bad labour practices, displacement of people and land injustices against the neighbouring communities while undertaking investment activities in developing countries⁷⁶. As a result, there has been rise in investment treaty arbitration across the globe including Africa where MNCs are contractually bound through investment treaties to comply with ESG standards such as environmental governance and respect for human rights and are further subjected to ADR mechanisms especially arbitration when they violate ESG requirements stipulated in investment treaties⁷⁷.

International commercial arbitration is also crucial in managing cross-border ESG disputes⁷⁸. It has been noted that cross-border ESG disputes may be managed via

⁷² Ibid

⁷³ Ibid

⁷⁴ International Bar Association., 'Report on Use of ESG Contractual Obligations and Related Disputes' Op Cit

⁷⁵ Ajibade, L.T & Awomuti, A.A. 'Petroleum Exploitation or Human Exploitation? An Overview of Niger Delta Oil Producing Communities in Nigeria' *African Research Review*, Vol. 3 (1), 2009. Pp. 111-124

⁷⁶ Ibid

⁷⁷ Dagbanja. D., 'The Environment, Human Rights, and Investment Treaties in Africa: A Constitutional Perspective.' *Handbook on International Investment Law and Policy*, 2020, P 1-30

⁷⁸ Muigua. K., 'Linking Alternative Dispute Resolution (ADR) and Environmental, Social and Governance (ESG) Tenets for Sustainable Development' Available at <https://kmco.co.ke/wp->

international commercial arbitration if the underlying business agreements contain arbitration clauses⁷⁹. The advantages of international commercial arbitration over litigation such as providing faster, more efficient and less expensive solutions are especially important in ESG disputes⁸⁰. International commercial arbitration also ensures confidentiality and allows for the application of interim measures, which are often very important in ESG disputes⁸¹. Further, in international commercial arbitration, parties can also engage their own experts or allow third parties to join the arbitration proceedings, such as environmental or compliance specialists, human rights practitioners among others therefore ensuring the viability of the process⁸².

The use of arbitration in managing ESG disputes can also ensure grant of interim reliefs in instances like irreversible environmental damage or gross violation of human rights⁸³. It has been observed that in arbitration proceedings, injunctive reliefs can be obtained in an expedited manner, and since ESG disputes usually require initial adjudication that cannot be delayed, injunctive reliefs from arbitration proceedings are best suited for such purposes⁸⁴. For example, in the event that a business practice could cause irreparable environmental damage, the parties concerned could take advantage of emergency arbitration procedures before the constitution of the arbitral tribunal⁸⁵.

Arbitration is therefore a key approach for effective management of ESG disputes. Other ADR processes are also vital in the ESG debate. For example, utilizing mediation in

[content/uploads/2023/07/Linking-Alternative-Dispute-Resolution-ADR-and-Environmental-Social-and-Governance-ESG-Tenets-for-Sustainable-Development.pdf](https://www.schoenherr.eu/content/uploads/2023/07/Linking-Alternative-Dispute-Resolution-ADR-and-Environmental-Social-and-Governance-ESG-Tenets-for-Sustainable-Development.pdf) (Accessed on 26/04/2024)

⁷⁹ ESG-Related Arbitrations: A New Kid on the Block., Available at <https://www.schoenherr.eu/content/esg-related-arbitrations-a-new-kid-on-the-block> (Accessed on 26/04/2024)

⁸⁰ Ibid

⁸¹ Ibid

⁸² Ibid

⁸³ Mondaq., 'International Arbitration and ESG: A New Trend in Dispute Resolution.' Available at <https://www.mondaq.com/pdf/1273354.pdf> (Accessed on 26/04/2024)

⁸⁴ Ibid

⁸⁵ Ibid

managing ESG related disputes can offer a quick, flexible, consensual, and win-win solution based on the mutually accepted interests of the parties therefore enhancing a sustainability-oriented business culture⁸⁶. Mediation has been described as an ESG tool and its use adds ESG value to businesses⁸⁷. It is therefore ideal in managing ESG disputes where there is need to preserve consumer and business relationships⁸⁸. Mediation plays a key role by offering an efficient and collaborative means to resolve disputes quickly and fairly⁸⁹. By opting for mediation, companies can avoid protracted litigation, reduce legal costs, and preserve valuable business relationships⁹⁰. Mediation also promotes transparency and accountability, two essential pillars under the 'G' tenet of ESG⁹¹. By resolving disputes in an open and transparent manner through mediation, companies demonstrate their commitment to good governance and accountability⁹². Utilizing mediation also fosters participation therefore allowing companies to build stronger and long-term relationships with their stakeholders and to promote corporate social responsibility⁹³.

Another key ADR process that is applicable in ESG is negotiation. This technique is an informal process that involves the parties meeting to identify and discuss issues at hand

⁸⁶ 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 26/04/2024)

⁸⁷ Ibid

⁸⁸ Ibid

⁸⁹ Maia. A., 'The Importance of Mediation in ESG: Promoting Sustainability in Corporations' Available at [https://mediationblog.kluwerarbitration.com/2024/03/08/the-importance-of-mediation-in-esg-promoting-sustainability-in-corporations/#:~:text=The%20Importance%20of%20Mediation%20in%20ESG%3A%20Promoting%20Sustainability%20in%20Corporations,-Andrea%20Maia%20\(Mediar360&text=Environmental%2C%20Social%2C%20and%20Governance%20\(to%20align%20with%20ESG%20principles.](https://mediationblog.kluwerarbitration.com/2024/03/08/the-importance-of-mediation-in-esg-promoting-sustainability-in-corporations/#:~:text=The%20Importance%20of%20Mediation%20in%20ESG%3A%20Promoting%20Sustainability%20in%20Corporations,-Andrea%20Maia%20(Mediar360&text=Environmental%2C%20Social%2C%20and%20Governance%20(to%20align%20with%20ESG%20principles.) (Accessed on 26/04/2024)

⁹⁰ Ibid

⁹¹ Ibid

⁹² Ibid

⁹³ Ibid

so as to arrive at a mutually acceptable solution without the help of a third party⁹⁴. It can facilitate parties in coming up with creative solutions in various contexts including the workplace⁹⁵. Negotiation can therefore be utilized to achieve ESG requirements at workplaces such as fair labour practices that entail the right to equal pay, workplace safety and leave among other entitlements⁹⁶. Fair labour practices are a crucial component of the 'Social' pillar in the ESG debate⁹⁷. Negotiation is a big part of life and can be used effectively at workplaces by employees to negotiate with their employers for favorable working terms and conditions including fair labor practices which are vital in the ESG agenda⁹⁸.

It is therefore evident that arbitration and other ADR processes such as mediation and negotiation have a key role to play in realizing ESG tenets. Due to the increased integration of ESG tenets into commercial contracts, international trade and investment treaties, laws and regulations, it is inevitable that ESG disputes will be majorly be managed through arbitration and other ADR processes⁹⁹. The attractive features of arbitration and ADR makes these processes appropriate means of managing ESG disputes¹⁰⁰. It is therefore necessary to infuse ESG tenets into arbitration and ADR for sustainability. It is also vital to address some of the key concerns in arbitration and ADR that affect the suitability of these processes in managing ESG disputes. These include enforceability challenges, court intervention, difficulties in quantification of damages in ESG disputes, power imbalances, and complexity of evidence¹⁰¹.

⁹⁴ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

⁹⁵ ESG., 'The Path to Equal Pay is Through Negotiation.' Available at <https://esgnews.bg/en/the-path-to-equal-pay-is-through-negotiation/> (Accessed on 26/04/2024)

⁹⁶ Ibid

⁹⁷ Stuart. L.G et al., 'Firms and social responsibility: A review of ESG and CSR research in corporate finance.' Op Cit

⁹⁸ ESG., 'The Path to Equal Pay is Through Negotiation.' Op Cit

⁹⁹ Akeb. S., 'Here We Go: ESG-Disputes in International Arbitration' Op Cit

¹⁰⁰ Ibid

¹⁰¹ Rathi. S., 'Cracking The ESG Conundrum: Is Arbitration The Key To Resolution Of ESG Disputes?' Op Cit

4.0 Infusing ESG tenets into Arbitration and ADR

It is necessary to infuse tenets into arbitration and ADR for sustainability and effective conflict management. This goal can be realized by integrating ESG clauses in commercial and investment contracts including clauses concerning respect for human rights, environmental conservation, fair labour practices and climate action¹⁰². This can ensure enforcement and compliance with ESG requirements by businesses¹⁰³. It has been observed that one way in which companies can embrace sustainable business practices is through incorporating ESG factors into commercial contracts¹⁰⁴. Such clauses can be incorporated into many different types of contracts including supply contracts, transactional documents, public sector contracts, employment agreements, shipping agreements, and insurance agreements among others¹⁰⁵. By introducing these commitments into contracts, businesses seek not only to avoid harmful business practices, but also to improve stakeholder relationships, achieve wider reputational benefits and ensure regulatory compliance¹⁰⁶. In addition, businesses may be held accountable for breach of such commitments through arbitration and ADR¹⁰⁷. By integrating ESG clauses into contracts, organizations can demonstrate their commitment to comply with ESG standards while also subject themselves to dispute management processes that may flow from failure to comply with such standards¹⁰⁸. Arbitration and ADR may be utilized in such circumstances.

¹⁰² Millar. L., 'Reviewing and Negotiating Climate Change and other ESG clauses in Commercial Contracts.' Available at <http://in-houseblog.practicallaw.com/reviewing-and-negotiating-climate-change-and-other-esgclauses-in-commercial-contracts/> (Accessed on 27/04/2024)

¹⁰³ Ibid

¹⁰⁴ International Bar Association., 'Report on Use of ESG Contractual Obligations and Related Disputes' Op Cit

¹⁰⁵ Ibid

¹⁰⁶ Ibid

¹⁰⁷ Ibid

¹⁰⁸ Ibid

It is also necessary to uphold human rights in arbitration and ADR¹⁰⁹. Human rights standards are integral in the ESG agenda¹¹⁰. The 'S' tenet of ESG seeks to foster human rights among other social factors¹¹¹. Human rights are pertinent in arbitration since they may apply to arbitral proceedings through procedural safeguards in relation to impartiality and independence of the tribunal¹¹²; recourse to arbitration may come into tension with human rights norms guaranteeing the right of access to court, due process and the right to a public hearing¹¹³; and human rights can be considered in commercial arbitration as established trade practices involving the corporate responsibility to respect human rights¹¹⁴. They can also apply in the form of business and human rights arbitration, specifically designed to arbitrate human rights impacts or failures to respect human rights in the global supply chain¹¹⁵. In addition human rights are often invoked in arbitration between states and foreign investors, through allegations of either state or investor infringements of such rights¹¹⁶. Human rights are therefore key in arbitration and ADR. The *United Nations Guiding Principles on Business and Human Rights*¹¹⁷ provide a framework for realizing Environmental, Social and Governance standards by enshrining the corporate responsibility to respect human rights towards attaining the ESG pillars through sound environmental management, protection of human rights and good corporate governance. In addition, the *Hague Rules on Business and Human Rights*

¹⁰⁹ Muigua. K., 'Reflections on Human Rights in Arbitration' Available at <https://kmco.co.ke/wp-content/uploads/2023/06/Reflections-on-Human-Rights-in-Arbitration.pdf> (Accessed on 27/04/2024)

¹¹⁰ Ibid

¹¹¹ Kiehne. D.O., 'Environmental, Social and Corporate Governance (ESG) -Also an Innovation Driver?' Op Cit

¹¹² Agius. M., 'Human Rights in International Arbitration' Available at <https://globalarbitrationreview.com/review/the-european-arbitration-review/2023/article/human-rights-in-international-arbitration> (Accessed on 27/04/2024)

¹¹³ Ibid

¹¹⁴ Ibid

¹¹⁵ Ibid

¹¹⁶ Ibid

¹¹⁷ United Nations Guiding Principles on Business and Human Rights., Available at https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf (Accessed on 27/04/2024)

*Arbitration*¹¹⁸ flow from the UN Guiding Principles on Business and Human Rights and provide a framework through which business entities can be compelled to comply with ESG standards including human rights through arbitration. It is therefore necessary to foster human right in arbitration in order to realize ESG factors especially the 'S' tenet that covers human rights.

In addition, it is vital to foster good corporate governance through ADR processes¹¹⁹. These mechanisms can promote good corporate governance by fostering effective management of governance conflicts¹²⁰. For example, it has been noted that mediation is often more appropriate where interests of the disputing parties need to be addressed and where commercial relationships need to be preserved and even enhanced¹²¹. It can therefore promote good corporate governance by fostering collaboration, cooperation and preserving relationships among various stakeholders in an organization¹²². Arbitration is also applicable in managing governance conflicts between organizations and third parties¹²³. Negotiation is also suitable in managing governance conflicts such as conflicts between board members or board members and shareholders¹²⁴. ADR techniques can therefore foster good corporate governance by providing an avenue for effective management of governance conflicts¹²⁵. It has been noted that good corporate governance cannot thrive in an environment of conflicts¹²⁶. Good corporate governance

¹¹⁸ The Hague Rules on Business and Human Rights Arbitration., Available at https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-HumanRights-Arbitration_CILC-digital-version.pdf (Accessed on 27/04/2024)

¹¹⁹ Muigua. K., 'Managing Governance Conflicts Through Alternative Dispute Resolution in Kenya' Available at <https://kmco.co.ke/wp-content/uploads/2020/08/Managing-Governance-Conflicts-Through-Alternative-Dispute-Resolution-in-Kenya-3.pdf> (Accessed on 27/04/2024)

¹²⁰ Ibid

¹²¹ King Report on Governance for South Africa, available at https://cdn.ymaws.com/www.iodsa.co.za/resource/resmgr/king_iii/King_Report_on_Governance_for.pdf (Accessed on 27/04/2024)

¹²² Ibid

¹²³ Muigua. K., 'Managing Governance Conflicts Through Alternative Dispute Resolution in Kenya' Op Cit

¹²⁴ Ibid

¹²⁵ Ibid

¹²⁶ Ibid

is one of the fundamental factors in the ESG agenda under the 'G' pillar¹²⁷. Arbitration and ADR are vital in enhancing good corporate governance and it is therefore necessary to embrace these processes.

Finally, it is imperative for ADR practitioners including arbitrators and mediators to build capacity in relation to ESG tenets¹²⁸. ADR practitioners should enhance their capacity on ESG-related trends, regulations and standards, and ensure that they are proactive in complying with ESG best practices so as to promote appropriate ADR procedures for ESG-related disputes¹²⁹. Institutional capacity can also be strengthened by ADR institutions adopting specialized procedural rules for ESG disputes and further developing training and certification programmes in ESG dispute management¹³⁰. Capacity building is a crucial technique in infusing ESG tenets into arbitration and ADR.

5.0 Conclusion

The increasing adoption of ESG related practices into pre-existing environmental, social and governance models adopted by corporations is resulting in ESG disputes¹³¹. ESG issues are therefore not only reshaping sustainability and corporate behavior across the globe but can also be a potential battleground in international disputes¹³². Effective management of ESG disputes is key in fostering sustainability and preserving the reputation and profitability of businesses¹³³. Arbitration and ADR techniques are ideal in managing ESG disputes. They can enhance privacy, confidentiality, efficiency, and flexibility while also fostering cost effective and expeditious management of ESG

¹²⁷ Kiehne. D.O., 'Environmental, Social and Corporate Governance (ESG) -Also an Innovation Driver?' Op Cit

¹²⁸ Mondaq., 'International Arbitration and ESG: A New Trend in Dispute Resolution.' Op Cit

¹²⁹ Ibid

¹³⁰ Ibid

¹³¹ The ALP Review., 'The Importance of ESG and its effect on International Arbitration' Op Cit

¹³² Hamilton. J & Coulet-Diaz. M., 'Arbitration & the ESG Era' Op Cit

¹³³ Rathi. S., 'Cracking The ESG Conundrum: Is Arbitration The Key To Resolution Of ESG Disputes?' Op Cit

disputes¹³⁴. Arbitration also allows parties to select tribunals with expertise in ESG while its transnational applicability is relevant in cross-border ESG disputes¹³⁵. It is therefore necessary to infuse ESG tenets in arbitration and ADR. This ideal can be realized through integrating ESG clauses in commercial and investment contracts¹³⁶; upholding human rights in arbitration and ADR¹³⁷; fostering good corporate governance through ADR processes¹³⁸; and building capacity on ESG and ADR¹³⁹. Infusing ESG tenets into arbitration and ADR is integral in realizing sustainability and effective conflict management. This ideal should therefore be accelerated.

¹³⁴ Thailand Arbitration Center., 'Alternative Dispute Resolution: Significance of ESG in Arbitration.' Op Cit

¹³⁵ Akeb. S., 'Here We Go: ESG-Disputes in International Arbitration' Op Cit

¹³⁶ Millar. L., 'Reviewing and Negotiating Climate Change and other ESG clauses in Commercial Contracts.' Op Cit

¹³⁷ Muigua. K., 'Reflections on Human Rights in Arbitration' Op Cit

¹³⁸ Muigua. K., 'Managing Governance Conflicts Through Alternative Dispute Resolution in Kenya' Op Cit

¹³⁹ Mondaq., 'International Arbitration and ESG: A New Trend in Dispute Resolution.' Op Cit

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