Tilburg Law School

L.L.M International Business Law

2022 – 2023

Master Thesis

THE ROLE OF INTERNATIONAL ARBITRATION IN RESOLVING ESG DISPUTES

Author: **Ezgi Bilge Berber**

ANR: **U556962**

SNR: **2102527**

Supervisor: **Sanita van Wyk**

Date of Final Submission: 14 June 2023

Abstract

The concept of Environmental, Social, and Governance (ESG) has gained significant traction. ESG issues present significant risks and opportunities for corporations, as they are increasingly being included in regulations and agreements, including international commercial contracts and investment treaties. The increasing prevalence of ESG concerns in the business world makes ESG disputes inevitable. Resolving ESG disputes can be challenging, especially at the international level, and can sometimes result in a stalemate. However, arbitration can play a major role in ESG dispute resolution. The increasing prevalence of ESG obligations in international business relationships will lead to a greater reliance on international commercial and investment arbitrations as the preferred means of resolving ESG disputes. An analysis of the unique characteristics and challenges that arise in ESG disputes is conducted with the aim of evaluating the effectiveness of international arbitration in resolving them. The insights shed light on the strengths and challenges of international arbitration. This thesis provides valuable insights into the role of international arbitration in ESG dispute resolution.

Key Words: environmental, social, governance, ESG, sustainability, dispute, alternative dispute resolution, international arbitration.

Table Of Contents

Abbreviation List

ADR ..... Alternative Dispute Resolution

ABA..... American Bar Association

BITs..... Bilateral Investment Treaties

CSDDD .....Corporate Sustainability Due Diligence Directive

CSRD..... Corporate Sustainability Reporting Directive

EC..... European Commission

ECT.....The Energy Charter Treaty

ESG ..... Environmental, Social, and Governance

EU..... European Union

ICC.....International Chamber of Commerce

ICSID .....International Centre for Settlement of Investment Disputes

MCCs..... Model Contract Clauses

MITs.....Multilateral Investment Treaties

NAFTA ..... North American Free Trade Agreement

NFRD .....Non-Financial Reporting Directive

NGOs..... Non-Governmental Organizations

OECD..... Organization for Economic Co-operation and Development

PCA.....Permanent Court of Arbitration

PRI .....Principles for Responsible Investment

SCC .....Stockholm Chamber of Commerce

SFDR ..... Sustainable Finance Disclosure Regulation

UN..... United Nations

UNCITRAL ..... United Nations Commission on International Trade Law

UNGPs.....United Nations Guiding Principles on Business and Human Rights

UNFCCC.....United Nations Framework Convention on Climate Change

US..... United States

UK.....United Kingdom

GHG.....Greenhouse gas

List of Tables

List of Figures

Chapter 1: Introduction

1. Background to the research question

Over the past few decades, there has been increasing awareness that businesses can have a profound impact on the world beyond their financial bottom line. This has led to a shift from shareholder primacy to stakeholder primacy, driven by criticism of the traditional approach and demands for more environmentally and socially responsible corporate conduct.[1] In light of the growing significance of sustainability,[2] there has been a parallel evolution of related concepts, leading to the emergence of the concept known as Environmental, Social, and Governance (ESG).

The concept of ESG has become a crucial driving force behind significant changes in the business world, impacting investors' decision-making processes, companies' practices, corporate strategies, and the regulatory landscape.[3]

As a result, there has been a notable movement towards incorporating ESG principles into legal instruments. This movement encompasses the development of ESG regulations, and the inclusion of ESG clauses in commercial contracts and international treaties. However, this movement also brings heightened ESG risks. Moreover, when ESG risks are unclearly assigned or inadequately managed, they can escalate into conflicts among multiple stakeholders who may have divergent interests and perspectives. Despite efforts to manage ESG risks, conflicts can still arise due to the complexities involved in ESG matters. If conflicts are not adequately managed or resolved, they may escalate into claims by affected parties. Ultimately, inadequate resolution of claims can contribute to the escalation of disputes that require formal adjudication.

In the context of ESG issues, conducting dispute resolution processes presents challenges due to their multifaceted nature, diverse stakeholders, and novelty. These challenges include the complexity of ESG issues, a lack of consensus regarding the scope of ESG, balancing competing interests, regulatory complexity, data availability, stakeholder engagement, and the evolving nature of the ESG landscape. Moreover, ESG disputes involve a broad range of

[1] Shareholder primacy is a traditional corporate management approach that prioritizes maximizing returns for investor-shareholders, while stakeholder primacy is a more modern approach that prioritizes the interests of all stakeholders, including customets, employees, partners, communities and society at large. Mark Fenwick, Tronel Joubert, Sanita Van Wyk and Erik P. M. Vermeulen, 'ESG as a Business Model for SMEs' (2022) European Corporate Governance Institute - Law Working Paper 641/2022, Tilburg Law School Research Paper, 3-5 <https://ssrn.com/abstract=4098644> accessed 21 March 2023

[2] "Sustainability" refers to the concept of fulfilling present needs while preserving the ability of future generations to meet their own needs. This involves balancing economic, social, and environmental considerations to generate long-term value and a beneficial impact. For the purposes of this thesis, the term carries the same meaning in the context of "sustainable" "sustainable development", "sustainable business practices" or "sustainble business conduct". UN World Commission on Environment and Development, 'Report of the World Commission on Environment and Development: Our Common Future' (1987) United Nations General Assembly document A/42/427 <https://digitallibrary.un.org/record/139811> accessed 15 February 2023

[3] According to the OECD, the rise of ESG investing has been driven by a desire for better long-term financial value and alignment with values, as opposed to earlier approaches that relied on exclusionary screening and value judgments. Riccardo Boffo and Robert Patalano, 'ESG Investing: Practices, Progress and Challenges', (2020) OECD <www.oecd.org/finance/ESG-Investing-Practices-Progress-and-Challenges.pdf> accessed 2 February 2023

issues related to, including but not limited to, environmental damages, climate change impacts, sustainable investment commitments, labor standards, human rights violations, forced labor in supply chains, and corporate governance. Since ESG disputes often involve cross-border relationships, there is a need for a neutral forum and international enforcement. The increasing prevalence of ESG disputes has led to important questions regarding the effective resolution of these disputes.

International arbitration can be a viable option to resolve ESG disputes. However, it is important to note that the suitability of international arbitration depends on the specific nature and characteristics of each dispute. Due to the complexities and nuances associated with ESG disputes, understanding their unique characteristics and challenges of ESG disputes is crucial for evaluating the effectiveness of international arbitration. For example, the effectiveness of arbitration may be questioned in resolving public interest concerns, which are frequently at the core of ESG.

Compared to traditional litigation, arbitration may provide advantages, including, for example, confidentiality and/or the ability to select arbitrators with expertise in the relevant subject matter, enforcement of awards across national borders. On the other hand, the use of international arbitration to settle ESG disputes is not without its difficulties. Given the potential opportunities and difficulties, it is crucial to consider the role of international arbitration playing in ESG disputes.

The main objective of this thesis is to explore and analyze the role of international arbitration as a mechanism for resolving ESG disputes. It aims to contribute to a nuanced understanding of the role that international arbitration plays in resolving complex and evolving ESG disputes. By critically examining and evaluating the strengths and weaknesses associated with using international arbitration, this thesis aims to shed light on the effectiveness of international arbitration in resolving ESG disputes with both theoretical and practical implications.

2. Research question

This thesis aims to approach from an academic point of view the following research question:

What is the role of international arbitration in resolving ESG disputes?

The research question mentioned will be approached by addressing the following sub-questions through the chapters proposed for the present document:

Chapter 2 covers the following sub-questions:

- *What is the concept of ESG and what issues fall under the umbrella of ESG and its three pillars?*
- *What initiatives have led to growing awareness, and how has this focus affected the business landscape?*
- *What are some ESG risks that corporations may face?*
- *What are the regulations surrounding ESG at the different levels, and what are their legal implications?*
- *How have ESG considerations been incorporated into business contracts and investment treaties?*

Chapter 3 covers the following sub-questions:

— *What types of disputes are common in the realm of ESG and what factors contribute to their occurrence?*
— *What are the unique and shared characteristics of ESG disputes, and some challenges associated with ESG disputes?*

Chapter 4 covers the following sub-questions:

— *What is arbitration, and how prevalent are arbitration agreements in international commercial and investment relationships that involve ESG considerations?*
— *How is international arbitration used to resolve ESG disputes? What types of ESG claims/disputes can arise in international commercial and investment arbitrations?*
— *What are some examples of ESG disputes that have been settled through international arbitration?*
— *What improvements have been made to arbitration rules to promote the use of international arbitration as a mechanism for resolving ESG disputes?*
— *What are the beneficial characteristics of international arbitration in the context of ESG disputes, and how do they impact the resolution process?*
— *What are the challenges that may arise due to the limitations of international arbitration in resolving ESG disputes?*
— *How effective is international arbitration in resolving ESG disputes, and how does it compare to litigation?*

3. Methodology

The methodology employed in this thesis to analyze the role of international arbitration in resolving ESG disputes was comprehensive and involved a range of methodologies. This thesis utilizes a wide range of sources to enrich the analysis, such as guidelines, international agreements, domestic laws, international arbitration institutions, arbitration rules, publicly available arbitration decisions, academic journals, reports, and studies from organizations. The analysis of legal frameworks focuses primarily on international frameworks, as well as legal frameworks within specific jurisdictions, particularly in the European Union and European countries.

To establish a foundational understanding of ESG, a conceptual analysis was conducted by reviewing relevant academic literature, guidelines, standards, industry practices, and insights, in order to illustrate the theoretical implications. Investigating the environmental, social and governance factors that have influenced the conceptualization and adoption of ESG concepts as legal principles is crucial for understanding the evolution of ESG as a legal framework.

Since the impact of ESG considerations is still a controversial topic, qualitative research allows for a more in-depth understanding of the ESG concept by using document analysis. Legal policy analysis was used to evaluate the legal and policy frameworks that impact the use of arbitration for resolving ESG disputes. This analysis aimed to assess the compatibility of these frameworks with ESG principles and explore any regulatory gaps or challenges that may arise.

This thesis will also mention some case studies of ESG disputes to illustrate the practical implications of using international arbitration.

Comparative legal research will provide empirical research and contextual analysis to analyze ESG legal frameworks. Additionally, the comparative analysis will be used to gain insights into

the theoretical and practical implications and effectiveness of arbitration in resolving ESG disputes. Ultimately, the findings from the literature review and comparative analysis will be synthesized to provide a comprehensive understanding of the role of international arbitration in resolving ESG disputes.

4. Chapter overview

This thesis is structured into five chapters, beginning with an abstract and abbreviation list, followed by an introduction in Chapter 1.

Chapter 2 provides an analysis of ESG. The chapter explores the concept of ESG, its three pillars, the awareness of ESG, and ESG risks to highlight its importance. Additionally, it examines ESG regulations, incorporations into contracts and investment treaties, and the potential implications of these developments.

Chapter 3 delves into ESG disputes. This chapter outlines the types of disputes that may arise in the context of ESG and provides an overview of the common features of ESG disputes.

Chapter 4 explores international arbitration as a means of resolving ESG disputes. This chapter examines the prevalence of international arbitration in resolving such disputes and looks at the improvements made in arbitration rules to better accommodate ESG issues. Moreover, it discusses the beneficial characteristics of international arbitration in resolving ESG disputes, including its neutrality, expertise, procedural flexibility, centralized nature, enforceability, finality, confidentiality, and efficiency. Additionally, this chapter highlights the challenges related to ESG disputes in international arbitration, such as jurisdictional limitations, arbitrability, public policy, confidentiality versus transparency, third party participation, and the costs of arbitration as a monetary imbalance of power. Next, it evaluates the effectiveness of international arbitration in resolving ESG disputes and compares it to litigation.

Chapter 2: Exploring the Concept of ESG

1. Introduction to ESG

ESG, which stands for the three dimensions of environmental, social, and governance, has become a crucial concept not only for policymakers but also for businesses, including companies and investors. Adopting ESG practices simply represents a company's sustainability through its commitment to ESG issues. ESG is also considered an enhanced investment analysis.[4]

Shareholder theory proposed by Friedman suggests that companies should prioritize profits for shareholders over social responsibility.[5] However, a shift has occurred from shareholder primacy to stakeholder primacy.[6] Contrary to the traditional economic theory,[7] which suggests the idea that companies have no responsibility beyond maximizing shareholder value, the contemporary view supports that companies can "do well by doing good".[8] Thus, businesses should consider ESG issues in all aspects of their activities, including both their primary operations and supply chains.

2. Understanding the Three Pillars of ESG

2.1. "E" Environmental Pillar

The issues concerning the environment have been on the table, but in recent years, their increasingly visible impacts have led to increased attention and practical considerations. Environmental responsibility entails the idea that companies should prevent and reduce the environmental damage arising from their operations while promoting and enhancing environmental sustainability. The environmental pillar encompasses various factors related to companies' impact on the environment, including climate change, greenhouse emissions, natural resources, biodiversity, pollution, and waste.

2.2. "S" Social Pillar

The social pillar refers to the impact of businesses on society and their relationships with various stakeholders, and encompasses various issues including human rights, labor management, working conditions, modern slavery, and discrimination.[9] It covers both internal

[4] David Wood, 'What do we mean by the S in ESG? Society as a stakeholder in responsible investment' in Tessa Hebb and others (eds), *The Routledge Handbook of Responsible Investment* (Routledge 2015) 533.

[5] According to the Friedman doctrine, individuals should take on social responsibilities and the government should handle social issues. Milton Friedman, 'A Friedman doctrine - The Social Responsibility Of Business Is to Increase Its Profits' (1970) New York Times <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html> accessed 10 February 2023.

[6] Fenwick (n 1).

[7] According to the traditional economic theory of shareholder primacy, corporations have only one responsibility: to maximize shareholder value. See Christoph Schiller, 'Global Supply-Chain Networks and Corporate Social Responsibility' (2018) 13th Annual Mid-Atlantic Research Conference in Finance (MARC) Paper <https://ssrn.com/abstract=3089311> accessed 3 February 2023.

[8] Maximizing shareholder welfare and its value by engaging in environmental, social, and governance activities is often summarized as "doing well by doing good" since ESG practices are good for shareholders, while striving for environmental and social goals. Ibid.

[9] Wood (n 4) 556.

and external domains, including employees, suppliers, customers, society, and communities.[10] Social responsibility refers to a company's obligations to consider the impact of its actions on society and requires companies to adhere to higher business ethics and social ethics.

2.3. "G" Governance Pillar

The governance pillar represents a company's management structures, a system of checks and balances to manage risks, strategic developments, compliance issues, corruption and bribery policies. It is about organizations' internal and external social connections and their trustworthiness at individual, community, and national levels. The governance pillar generally encompasses issues related to governance structure, board diversity, executive compensation, corruption, data protection, and shareholder rights. According to the OECD, good corporate governance[11] promotes the establishment of a trustworthy, transparent, and accountable environment, financial stability, and business integrity.[12] It can improve risk-adjusted returns, thus directly benefiting investors.[13]

2.4. Overview of ESG Pillars

The following table provides examples of components of ESG pillars, but it is not an exhaustive or definitive list:

Table 1: Overview of ESG Pillars

Environmental Pillar	***Social Pillar***	***Governance Pillar***
◆ Climate change ◆ Greenhouse gas (GHG) emission ◆ Supply chain environmental due diligence ◆ Natural resources management ◆ Biodiversity preservation ◆ Pollution & waste reduction ◆ Energy efficiency ◆ Implementation of renewable and clean technologies	◆ Human rights ◆ Labor management ◆ Forced and child labor ◆ Modern slavery ◆ Working conditions ◆ Local community and labor relationships ◆ Human capital development ◆ Diversity and inclusion ◆ Inequality, sexual harassment, discrimination ◆ Product safety and quality ◆ Privacy and data security	◆ Corporate governance and risk management ◆ Board diversity ◆ Executive pay ◆ Corporate reporting obligations ◆ Business ethics ◆ Anti-bribery, corruption, anti-money laundering ◆ Director and officer fiduciary duties ◆ ESG-conscious investment ◆ Data protection ◆ Shareholders rights

It is important to highlight that the components of ESG pillars vary because there is no universally agreed-upon consensus among stakeholders and institutions. To gain insights, it is crucial to consult a multitude of sources, including academic literature, various institutions, and ESG ratings agencies such as MSCI, S&P Global, Refinitiv.[14] The issue arises because, for

[10] Leonardo Becchetti, Emanuele Bobbio, Federico Prizia and Lorenzo Semplici, 'Going Deeper into the S of ESG: A Relational Approach to the Definition of Social Responsibility' (2022) 12 Sustainability, 5.

[11] Corporate governance refers to the the principles and system of relationships between a company's management and governance.

[12] OECD, *G20/OECD Principles of Corporate Governance* (OECD Publishing 2015)

[13] Constantin Zopounidis, Alexandros Garefalakis, Christos Lemonakis, and Ioannis Passas, 'Environmental, social and corporate governance framework for corporate disclosure: a multicriteria dimension analysis approach' (2020) 58(11) Management Decision 2473, 2476.

[14] CFA Institute, 'ESG Investing and Analysis' <https://www.cfainstitute.org/en/research/esg-investing> accessed 3 February 2023; Corporate Finance Institute, 'ESG (Environmental, Social, & Governance)' <https://corporatefinanceinstitute.com/resources/esg/esg-environmental-social-governance/>

example, different ESG rating agencies have their own methodologies and use different criteria to evaluate ESG performance. The diversity of perspectives offered by numerous sources highlights the complexity involved in ESG issues. To provide a comprehensive overview of the components associated with each ESG pillar, the table represents a synthesized view based various sources.

Determining the components of ESG pillars is a fundamental aspect of comprehensively understanding the risks that companies and investments face. These components serve as a lens through which various risks can be identified and evaluated, providing greater insights into potential risks, and consequently the potential for disputes.

3. Growing Awareness of ESG and its Impact

The term ESG emerged as a taxonomy in the early 2000s,[15] but its conceptual roots trace back to pre-2000s social movements that led to an integrated view of business and society.[16] Since the early 2010s, companies and investors have increasingly recognized the importance of ESG.[17] The COVID-19 pandemic has accelerated discussions surrounding ESG issues.[18] This is because companies that have prioritized implementing sustainability strategies have demonstrated greater resilience during the economic downturn caused by the pandemic than

accessed 3 February 2023; MSCI, 'ESG Ratings Key Issue Framework' <https://www.msci.com/our-solutions/esg-investing/esg-ratings/esg-ratings-key-issue-framework> accessed 3 February 2023; PwC, 'Environmental, Social & Governance' <https://www.pwc.com/mt/en/publications/sustainability/esg-what-is-it-all-about.html> accessed 3 February 2023; Refinitiv, 'Environmental, Social and Governance Scores From Refinitiv' (2022) <https://www.refinitiv.com/content/dam/marketing/en_us/documents/methodology/refinitiv-esg-scores-methodology.pdf> accessed 3 February 2023; S&P Global, 'ESG Scores' <https://www.spglobal.com/esg/solutions/data-intelligence-esg-scores> accessed 3 February 2023.

[15] The term 'ESG' was coined during a United Nations Global Compact conference in 2005. The Global Compact, 'Who Cares Wins: Connecting Financial Markets to a Changing World' (2004) <https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/publications/publications_report_whocareswins__wci__1319579355342> accessed 11 February 2023.

[16] ESG evolved from earlier sustainability-focused frameworks. The roots of ESG can be traced back to the 1960s, when socially responsible investing (SRI) was introduced as a result of opposition to the Vietnam War and the civil rights movement. In the 1980s, the concept of corporate social responsibility (CSR) emerged, which refers to the idea that companies have an obligation to act in the best interests of society and the environment, not just their own profits. Tom Fanter, Andy Baker and Chris Graff, 'The History & Evolution of ESG' (2021) RMB Capital <https://rmbcapital.com/news-insights/history-evolution-esg> accessed 10 February 2023; Archie B. Carooll, 'Corporate Social Responsibility: Evolution of a Defitional Construct' (1999) 38(3) Business & Society 268, 275; Some argue that ESG, CSR, and SRI can be seen as subsets because of their different focuses.CSR refers to a company's efforts to be more socially aware, while SRI enables investors to select stocks or funds based on particular criteria, such as the level of shareholder participation or the investment's impact. However, compared to CSR and SRI, ESG is a set of principles used by socially responsible investors to screen investments based on a company's ESG practices and investors increasingly recognize the importance of ESG due to the materiality of risks beyond financial statements. See Tadahiro Nakajima, Shigeyuki Hamori, Xie He, Guizhou Liu, Wenting Zhang, Yulian Zhang and Tiantian Liu, *ESG Investment in the Global Economy* (Springer Singapore 2021) 21.

[17] Shang Gao, Fanchen Meng, Zhouyang Gu, Zhiyuan Liu, and Muhammad Farrukh, 'Mapping and Clustering Analysis on Environmental, Social and Governance Field a Bibliometric Analysis Using Scopus' (2021) 13 Sustainability 7304.

[18] See Ioannis Passas , Konstantina Ragazou, Eleni Zafeiriou, Alexandros Garefalakis, and Constantin Zopounidis, 'ESG Controversies: A Quantitative and Qualitative Analysis for the Sociopolitical Determinants in EU Firms' (2022) 14 Sustainability 12879.

those that have not.[19] Thus, sustainable companies are now being viewed as a safer bet in these uncertain times due to their ability to withstand challenges.

Correspondingly, ESG factors have become integral to the investment decision-making process. As per the findings of PwC's 2021 Global Investor Survey, the majority of investors consider ESG risks and opportunities when making investment decisions.[20] Similarly, the EY survey shows that the number of investors who conduct structured and methodical evaluations of non-financial disclosures has increased from 32% in 2018 to 72% in 2020.[21] Furthermore, companies that have high ESG ratings generally have better financial performance than those with low ratings.[22] There has been a recognition that businesses must integrate ESG factors into their strategies and operations to avoid and mitigate financial risks. As such, active engagement with ESG issues goes beyond choice and becomes a necessity.

The increasing importance of ESG considerations in business has also led to a shift in the legal landscape. ESG considerations were initially addressed through non-binding soft law instruments, yet recently hard law instruments have been on the rise. Similarly, ESG considerations are rapidly becoming a critical aspect of cross-border transactions.[23] The demand for ESG accountability has led to the inclusion of ESG-related clauses in agreements.

According to the survey conducted by Norton Rose Fulbright, although only 2% of respondents reported ESG-related litigation in 2022, 28% acknowledged that their exposure to ESG-related issues had deepened.[24] Similarly, 24% of respondents expect to face more ESG-related issues in the coming year.[25] The results indicate that ESG disputes are expected to become more prevalent in the future dispute landscape due to greater regulatory scrutiny and growing shareholder expectations.[26]

---

[19] See David C. Broadstock, Kalok Chan, Louis T.W. Cheng and Xiaowei Wang, 'The role of ESG performance during times of financial crisis: Evidence from COVID-19 in China' (2021) 38 Finance Reserch Letters 101716.

[20] PwC, 'PwC's 2021 Global Investor Survey' (2021) <https://www.pwc.com/gx/en/services/audit-assurance/corporate-reporting/2021-esg-investor-survey.html> accessed 5 March 2023.

[21] EY, 'How will ESG performance shape your future?' (2020) <https://www.ey.com/en_gl/assurance/how-will-esg-performance-shape-your-future> accessed 5 March 2023.

[22] MSCI study shows that companies with higher ESG scores experienced lower costs of capital and the cost of equity and debt followed the same relationship, while companies with lower ESG scores have a stronger relationship with the cost of capital. MSCI, 'ESG and the Cost of Capital' (2021) <https://www.msci.com/www/blog-posts/esg-and-the-cost-of-capital/01726513589> accessed 25 January 2023.

[23] Diane Okoko and Theophilus Aigbogun, 'The Implications of ESG-Based Contractual Provisions in International Arbitration' (2023) <https://www.lexisnexis.co.uk/blog/research-legal-analysis/the-implications-of-esg-based-contractual-provisions-in-international-arbitration> accessed 25 Janurary 2023.

[24] Furthermore, over one-third of those who are concerned about class actions in the upcoming year listed ESG-related class actions as their top concern. Norton Rose Fulbright, '2023 Annual Litigation Trends Survey' (2023) <https://www.nortonrosefulbright.com/en-us/knowledge/publications/52bd21a0/2023-annual-litigation-trends-survey> accessed 25 January 2023.

[25] ibid.

[26] See also Byfield Reputation Counsel, 'Finding the right line: litigation PR in an evolving dispute ecosystem' (2022) <https://byfieldconsultancy.com/wp-content/uploads/2022/02/finding-the-right-line-byfield-09022022-v6.pdf> accessed 25 Janurary 2023.

Given the growing influence of ESG considerations in various areas, the same significance is increasing in the realm of arbitration. In line with this, many arbitration conferences being held worldwide cover ESG topics.[27]

4. Identifying ESG Risks

ESG risks manifest both physical risks such as pollution, unethical labor practices, corruption, misalignment of values, and a lack of diversity and inclusion, as well as transition risks such as regulatory, supply chain, litigation, and reputational risks.[28]

Publicized controversies surrounding ESG issues can cause significant damage to a company's reputation, trustworthiness, and credibility. This is because such scandals can expose a company's negligence, irresponsibility, and lack of integrity. Examples of these controversies include unethical practices, strikes, fraud, market manipulation, bribery, and corporate-caused environmental disasters. Importantly, their negative impacts can be more prominent than the positive impact of doing good,[29] as they can range from a tarnished image to the collapse of entire industries.[30] Companies may face serious consequences such as revenue loss, lower customer loyalty, fines, and litigation.[31] Numerous corporate scandals bear witness to these effects, to name a few examples, BP Deepwater Horizon oil spill,[32]

[27] E.g. Paris Arbitration Week 2022, German Arbitration Institute (DIS40 - Deutsche Institution für Schiedsgerichtsbarkeit) Autumn Conference in Berlin in 2022, and the London International Disputes Week 2022 are some examples. See The Paris Arbitration Week, 'PAW2022: ESG to the fore as arbitration community descends on Paris' (2022) <https://iclg.com/cdr/arbitration-and-adr/17765-paw2022-esg-to-the-fore-as-arbitration-community-descends-on-paris> accessed 25 January 2023; DIS40, 'Autumn Conference 2022: ESG – Dawn of A New Era of Disputes in International Arbitration?', DIS40-Event (2022) <https://www.disarb.org/veranstaltungen/dis40-autumn-conference-2022> accessed 25 January 2023; London International Disputes Week Limited, 'LIDW 2022 event homepage logo large', London International Disputes Week (2022) <https://2022.lidw.co.uk/> accessed 25 January 2023.

[28] Laura T. Starks, 'EFA Keynote Speech: "Corporate Governance and Corporate Social Responsibility: What Do Investors Care about? What Should Investors Care about?"' (2009) 44(4) Financial Review 461, 466-467.

[29] Joshua D. Margolis, Hillary Anger Elfenbein and James P. Walsh, 'Does it Pay to Be Good...And Does it Matter? A Meta-Analysis of the Relationship between Corporate Social and Financial Performance' (2009) SSRN Electronic Journal, 23 <https://ssrn.com/abstract=1866371> accessed 13 March 2023.

[30] Rebel Cole, Sofia Johan and Denis Schweizer, 'Corporate failures: Declines, collapses, and scandals' (2021) 67 Journal of Corporate Finance 101872 <https://www.sciencedirect.com/science/article/pii/S0929119920303163> accessed 13 March 2023.

[31] Claudia Champagne, Frank Coggins and Amos Sodjahin, 'Can extra-financial ratings serve as an indicator of ESG risk?' (2022) 54 Global Finance Journal 100638 <https://www.sciencedirect.com/science/article/pii/S1044028321000363> accessed 13 March 2023

[32] BP Deepwater Horizon Oil Spill occurred in 2010 when an offshore drilling rig exploded and sank in the Gulf of Mexico, releasing millions of gallons of oil into the Gulf of Mexico. The company was found grossly negligent and guilty of wilful misconduct, leading to civil and criminal penalties, massive fines and legal costs. Thus, the scandal damaged BP's reputation and finances and costed BP billions in lost revenue. United States Depatment of Justice, Office of Public Affairs, 'U.S. and Five Gulf States Reach Historic Settlement with BP to Resolve Civil Lawsuit Over Deepwater Horizon Oil Spill' (Press Release 2015) <https://www.justice.gov/opa/pr/us-and-five-gulf-states-reach-historic-settlement-bp-resolve-civil-lawsuit-over-deepwater> accessed 2 March 2023.

Volkswagen emissions scandal,[33] and Facebook's data privacy scandal.[34] It is acknowledged that public criticism in the business world has power.[35] On the other hand, companies that prioritize social responsibility are often rewarded in various ways, such as positive public perception, customer loyalty, competitive advantages, or attracting investors.[36] It is essential to understand that ESG risk levels and types vary by sector. For example, while capital-intensive industries like oil and natural gas are more susceptible to environmental risks, labor-intensive industries are more vulnerable to human rights and labor standards issues.[37]

Overall, in the context of ESG risks, legal risks (also referred to as liability or litigation risks) and reputation risks can be considered the two primary transition risks. Moreover, the level of public knowledge about legal risks may affect reputation risks. For example, lawsuits that are publicly known may receive significant media attention and have a greater impact on reputation. That's why, arbitration can play an important role in resolving ESG disputes by leveraging its private nature to avoid negative publicity and reputational damage.

5. ESG Regulations and Legal Implications

5.1. Global Frameworks

There have been global frameworks that have contributed to the promotion of ESG by providing guidelines, standards, and requirements, and by influencing contractual arrangements. Prominent examples include the United Nations (UN) Convention against Corruption,[38] the UN Framework Convention on Climate Change,[39] the Kyoto Protocol,[40] and

[33] Volkswagen installed illegal software (defeat devices) in diesel vehicles to manipulate emissions tests. The "dieselgate" scandal in 2015 severely damaged Volkswagen's reputation, sales and market share and also led to fines, penalties, lawsuits, and a criminal investigation. Edward Taylor, 'Volkswagen says diesel scandal has cost it 31.3 billion euros' *(2020) Thomsan Reuters* <https://www.reuters.com/article/us-volkswagen-results-diesel-idUSKBN2141JB> accessed 20 March 2023.

[34] Facebook collected its users personal data without their consent by political consulting firm Cambrdige Analytica who take advantage for political advertising. Facebook accused for violation of data privacy. Apart from massive fines, and the scandal caused to drop in share prices and loss of customer trust. Mike Snider and Edward C. Baig, 'Facebook fined $5 billion by FTC, must update and adopt new privacy, security measures' (2019) USA Today <https://eu.usatoday.com/story/tech/news/2019/07/24/facebook-pay-record-5-billion-fine-u-s-privacy-violations/1812499001/> accessed 20 March 2023.

[35] An internationally recognized instance is that the increased criticism about companies' approach to Russia due to ethical concerns related to the war in Ukraine led many companies to withdraw from Russia. Major brands, including Volkswagen, Nestle, Unilever, McDonald's, Starbucks, Coca-Cola, Visa, Mastercard, and American Express, cut off their business relations with Russia. Valerie Hohenberg and Theresia Franziska Welser, 'ESG, private enforcement and strategic litigation in times of war' (2022) Wolf Theiss <https://www.wolftheiss.com/insights/esg-private-enforcement-and-strategic-litigation-in-times-of-war/#_ftn10> accessed 28 March 2023.

[36] Marc Orlitzky, Frank L. Schmidt, and Sara L. Rynes 'Corporate social and financial performance: A meta-analysis' (2003) 24(3) Organization Studies 403, 426-427.

[37] See Champagne and others (n 31) 9.

[38] The UN Convention against Corruption is the first legally binding international treaty dealing with anti-corruption. United Nations Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005) 2349 UNTS 41, art 66.

[39] The UN Framework Convention on Climate Change (UNFCCC) aims to stabilize greenhouse gas concentrations in the atmosphere to prevent dangerous interference with the climate system. United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

[40] The Kyoto Protocol operationalized the UNFCCC by establishing quantified greenhouse gas emission reduction obligations for participating states. The Kyoto Protocol was the first international treaty to establish legally binding emission reduction targets. The states parties to the UNCCC adopted the Kyoto

the Paris Agreement.[41] Additionally, soft law instruments, such as the UN Guiding Principles on Business and Human Rights (UNGPs),[42] and the Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Corporations,[43] provide non-binding recommendations. By referencing and incorporating these global frameworks into contracts, businesses can demonstrate their commitment to ESG principles.

5.2. European Union Regulations

The European Union (EU) has implemented ESG reporting standards, including the Non-Financial Reporting Directive (NFRD),[44] Taxonomy Framework Regulation,[45] Sustainable Finance Disclosure Regulation (SFDR),[46] Corporate Sustainability Due Diligence Directive (CSDDD),[47] and Corporate Sustainability Reporting Directive (CSRD).[48] These standards aim to enhance transparency, accountability, and comparability of sustainability information, and expand ESG reporting requirements. The CSDDD represents a paradigm shift in global ESG regulation.[49] Following, the CSRD strengthens disclosure rules and provides a new sustainability reporting framework compared to the NFRD. Accordingly, for example, businesses should prepare a sustainability strategy that considers ESG factors both qualitatively and quantitatively.

The following table provides an overview of certain ESG regulations in the EU, along with their impact, and significance in the ESG landscape:

Protocol at COP-3 in 1997. It introduced 'flexibility mechanisms" allowing collaborate on project and transactions to achieve the emission reduction targets. These mechanisms consist of Joint Implementation, Clean Development Mechanism and International Emissions Trading. Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162.

[41] The Paris Agreement is an international treaty on climate change that adopted by 169 parties at the UN Climate Conference (COP21). It is a legally binding instrument concerning climate change for the first time, making it a landmark. Moreover, the disputes settled in accordance with Article 14 of the Paris Agreement. According to Article 14, the parties concerned shall seek a settlement of the dispute concerning the interpretation or application of the Convention through peaceful means of their own choice. Accordingly, arbitration can be chosen as an ADR. Paris Agreement (adopted in 12 December 2015, entered into force 4 November 2016) 3156 UNTS.

[42] United Nations Office of the High Commissioner for Human Rights, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2011) UN Doc A/HRC/17/31.

[43] OECD, *OECD Guidelines for Multinational Enterprises* (2011).

[44] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L330/1.

[45] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 [2020] OJ L 198/13.

[46] Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector [2019] OJ L 317/1.

[47] Proposal for a Directive of The European Parliament and of The Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 [2022] OJ 2022/0051/COD.

[48] Directive 2022/2464/EU of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting [2022] OJ L 322/15.

[49] Chris McGarry, Clare Connellan, Taylor Pullins, Maia Gez, Mark Clarke, Alexandre Hublet and William De Catelle, 'The Global ESG Regulatory Framework' (2022) White & Case LLP <https://www.whitecase.com/insight-alert/global-esg-regulatory-framework-toughens> accessed 2 February 2023.

Regulation	Impact	Significance
NFRD	Requires disclosure of non-financial information related to ESG matters	Improves transparency of ESG information, enables stakeholders to measure companies' ESG performance
Taxonomy Framework Regulation	Establishes a taxonomy to categorize sustainable financial products	Provides clarity and prevents greenwashing by defining criteria for environmentally sustainable economic activities
SFRD	Requires ESG information disclosure at the entity and financial product level	Enhances transparency and accountability in ESG disclosures in the financial sector
CSDDD	Establishes supply chain due diligence requirements	Requires make strategic and operational changes, and provides potential sanctions for breaches of requirements under the CSDDD
CSRD	Expands sustainability reporting for additional companies	Expands ESG reporting requirements, improves transparency and comparability of sustainability information

Table 2: Overview of Certain ESG Regulations in the EU

The ESG regulations listed in the table have established ESG obligations for companies and created responsibilities and liabilities for disclosure and compliance. Failure to meet these obligations could result in disputes with stakeholders. As new ESG regulations and requirements are being introduced, regulatory compliance is becoming increasingly important for companies to manage ESG risks and address potential disputes.

5.3. Domestic Laws

ESG regulations are also being implemented at the domestic level. Several European countries have taken significant steps to address ESG concerns by enacting domestic laws. Notable examples include the French Duty of Vigilance Law (2017)[50] and the German Supply Chain Due Diligence Law (2021)[51] , which establish due diligence obligations on companies to address both environmental and human rights risks in companies' operations and their supply chains.[52] On the other hand, the Norwegian Transparency Act (2021)[53] primarily concentrates on human rights.[54] Domestic laws may also have a more specific focus, such as the Dutch Child Labor Due Diligence Act (2019)[55] that aims to combat the issue of child labor in business

[50] French Vigilance Law (*Loi de Vigilance*) (2017) *Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.*

[51] German Supply Chain Due Diligence Act (*Lieferkettensorgfaltspflichtengesetz or LkSG*) (2023) *Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten.*

[52] Anne Lafarre and Sebastiaan Rombouts, 'Towards Mandatory Human Rights Due Diligence: Assessing its Impact on Fundamental Labour Standards in Global Value Chains' (2022) Tilburg Law School Research Paper, 14 <https://ssrn.com/abstract=4155836> accessed 3 June 2023.

[53] Norwegian Transparency Act (2021) Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions LOV-2021-06-18-99.

[54] Lafarre (n 52).

[55] Dutch Child Labor Due Diligence Act (2019) *Wet zorgplicht kinderarbeid.*

operations.[56] Additionally, the UK Modern Slavery Act (2015)[57] was an example of the trend towards mandatory disclosure rules for reporting efforts to prevent modern slavery. Overall, these are a few recent examples of mandatory domestic regulations that require companies to consider ESG factors in their operations and supply chains. Although these domestic laws do not exclusively focus on foreign investment, they aim to minimize practices that contradict ESG principles by imposing obligations on companies.[58]

The significance of national legislation in international arbitration arises in relation to the law of the place of arbitration (*lex arbitri*) and the place of enforcement. As such, tribunals have to consider the mandatory rules of the ESG laws of the jurisdiction when determining the applicable legal framework and interpreting obligations.

6. Integration of ESG Considerations in Commercial Contracts

6.1. ESG clauses in Commercial Contracts

In response to increased public scrutiny of business activities, businesses are increasingly integrating ESG considerations into their contractual relationships.[59] This involves incorporating ESG principles into contracts and implementing them into operations and supply chains, which may derive from ESG regulations or laws, or from a company's own ESG goals, policies, or commitments.

ESG clauses can take many different forms including:

- ESG due diligence obligations throughout supply chains to enable identification and remediation of the impacts of business activities
- Adoption of ESG standards
- Commitments and/or covenants to comply with ESG standards
- Representations and warranties to fully disclose ESG issues or to comply with ESG regulations
- Indemnification to compensate for any damages resulting from breaches of ESG obligations
- Compliance with ESG regulations, laws, and industry standards
- Mechanisms to address non-compliance situations (Reporting ESG performance and/or monitoring and oversight clauses)

Despite differences in their forms, it is important to draft ESG clauses as contractual guarantees to ensure that ESG obligations are enforceable and legally binding.[60] Correspondingly, a breach of ESG clauses can result in liability and exposure to legal and reputational risks for the contractual parties.

The inclusion of ESG clauses is progressively becoming prevalent in various types of commercial contracts. For example, a company may require its suppliers to meet certain

[56] Lafarre (n 52).
[57] UK Modern Slavery Act 2015 (2015) c.30.
[58] Nelson Goh, 'ESG and investment arbitration: a future with cleaner foreign investment?' (2022) 15 Journal of World Energy Law and Business 485, 489.
[59] Montserrat Manzano and Ana Toimil, 'The role of arbitration in ESG disputes' (2021) Von Wobeser ESG Articles <https://www.vonwobeser.com/index.php/publication?p_id=1650> accessed 10 February 2023.
[60] It should be noted that clauses in the preamble and recitals parts are not enforcable. Boilerplate clauses have a catch-all or umbrella approach to compliance, as they also called umbrella clauses.

sustainability criteria or adhere to human rights and labor standards in supply chain contracts. In another example, an acquirer may require the target company to disclose its environmental and social impact as a condition of the acquisition in mergers and acquisition contracts.

ESG clauses are generally drafted with broad language to encompass diverse ESG standards. However, using boilerplate language may not adequately address sector-specific ESG risks. Legal risks are heightened because it can be challenging to strike the appropriate balance between being specific and broad when drafting ESG clauses. In this respect, international and local organizations have developed model ESG clauses that can be negotiated and tailored to those particular circumstances, companies to integrate their contracts.

6.2. Model ESG Clauses

At the international level, the Chancery Lane Project creates climate contractual clauses.[61] At the local level, the American Bar Association (ABA) Working Group designed the Model Contract Clauses (MCCs) for companies to integrate ESG principles into their contracts.[62] Incorporating these MCCs can help companies align their supply chain contracts with the UNGPs and demonstrate their commitment to respect human rights throughout their supply chains. The recent MCCs 2.0 expand the scope of ESG obligations and require companies to take a proactive approach to protecting human rights, compared to earlier versions, which only require suppliers to make certain representations and warranties regarding their compliance with human rights standards. [63] MCCs 2.0 also include nonjudicial dispute resolution clauses, giving parties both arbitration and litigation options.

Despite the intended purposes of model clauses, there are concerns about their effectiveness in addressing ESG risks. In this respect, the Principles for Responsible Investment (PRI) have raised concerns about the risk of a "tick box approach" which prioritizes contractual compliance without adequately addressing the underlying ESG risks.[64] To minimize risk, it is important to assess the effectiveness of ESG clauses in addressing ESG risks by considering risks to all stakeholders, not just the business. Additionally, in order to ensure the effectiveness of ESG clauses throughout the supply chain, it is important to give careful consideration to their implementation. This is particularly important to address the differences in ESG regulations across various countries involved in international business transactions or supply chains. To address these concerns, implementing ESG clauses that require all parties/counterparties to comply can be effective.

---

[61] See. The Chancery Lane Project, 'Climate Clauses' <https://chancerylaneproject.org/climate-clauses/> accessed 12 February 2023.

[62] See David V. Snyder, Susan Maslow and Sarah Dadush, 'Balancing Buyer and Supplier Responsibilities: Model Contract Clauses to Protect Workers in International Supply Chains, Version 2.0' (2021) 77 The ABA Business Lawyer 115, American University, WCL Research Paper 2021/15, Rutgers Law School Research Paper No. Forthcoming <https://ssrn.com/abstract=3829782> accessed 12 February 2023.

[63] In 2018, ABA launched MCCs 1.0 as first version, and in 2021, ABA MCCs 2.0 as second updated version which expands the scope of ESG obligations to require buyers to engage themselves more proactively in the protection of human rights. Ibid.

[64] Principles for Responsible Investment, 'PRI Statement: European Commission Proposal on Corporate Sustainability Due Diligence' (2022).

7. Integration of ESG Considerations in Investment Treaties

Investment treaties, both bilateral investment agreements (BITs) and multilateral investment agreements (MITs), have been designed to protect foreign investors against host states.[65] These protections include non-discrimination, fair and equitable treatment, and/or expropriation clauses in investment treaties. Through these protections, investors may either foster or hinder the ESG goals. For example, a host state's ESG regulations may raise the cost of operations for investors, leading to disputes over violations of investment treaties, particularly non-discrimination provisions.

Nonetheless, the growing importance of ESG has also led to a growing movement towards the inclusion of ESG clauses in investment treaties.[66] The recognition of the absence of rules pertaining to investors' conduct and sustainable investments has driven changes in this regard.[67] Some European countries prioritize ESG aspects in their model investment treaties, such as the 2019 Dutch Model BIT, the 2019 Belgium-Luxembourg Economic Union Model BIT, and the 2022 Italy Model BIT.[68] For example, the 2019 Dutch Model BIT includes rules that affirm contracting parties' commitments to UNGPs on Business and Human Rights and the OECD Guidelines for Multinational Enterprises, establishing obligations related to environmental protection, labor standards, and human rights.[69] As a result, investors can be held accountable for failing to comply with these commitments and may be responsible for compensation. To that end, investors should closely review their activities to ensure compliance with applicable laws and regulations. Furthermore, arbitral tribunals are empowered to consider non-compliance by investors with their commitments when determining compensation.[70] Although a reduction in investor compensation does not apply to environmental harm, it is possible for non-compliance with international guidelines.[71] Ultimately, the 2019 Dutch Model BIT aims to encourage compliance with international ESG standards by making non-compliance a relevant factor in legal proceedings.[72]

In investment treaties, ESG clauses can also take various forms, such as ESG reporting requirements, sustainability impact assessments and investor conduct accountability. It is important to note that ESG clauses can be included in the treaty body or in the preamble, but

[65] Jean Ho, 'The Creation of Elusive Investor Responsibility' (2019) 113 AJIL Unbound 10, 11.

[66] Agreement Between The Belgium-Luxembourg Economic Union, on the one hand, and the Republic of Nicaragua, on the other hand, on the Reciprocal Promotion and Protection of Investments (signed 27 May 2005) ('BLEU-Nicaragua BIT') art 5.2 and 6.2; Agreement between the Government of the Republic of Turkey and the Government of the People's Republic of Bangladesh concerning the Reciprocal Promotion and Protection of Investments (signed on 12 April 2012) ('Bangladesh-Turkey BIT') art 4.

[67] Alessandra Arcuri and Bart-Jaap Verbeek, 'The New Dutch Model Investment Agreement. On the Road to Sustainability or Keeping up Appearances?' (2019) 12 Erasmus Law Review 37, 42

[68] Belgium-Luxembourg Economic Union (BLEU) Model BIT (2019); Dutch Model BIT (2019); Italy Model BIT (2022).

[69] Article 6 on Sustainable Development and Article 7 on Corporate Social Responsibility affirm the commitments to the international frameworks on sustainability, such as UNGPs on Business and Human Rights and the OECD Guidelines for Multinational Enterprises. See Arcuri (n 67) 44

[70] As per Article 23, in deciding on the amount of compensation, a tribunal is expected to take into account non-compliance by the investor with its commitments under the UNGPs on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.

[71] It has been criticized that potential reducing of damages as a means of addressing human rights violations does not provide for states and affected communities. Arcuri (n 67) 47

[72] See Eric De Brabandere, 'The 2019 Dutch Model Bilateral Investment Treaty: Navigating the Turbulent Ocean of Investment Treaty Reform (2021) 36(2) ICSID Review Foreign Investment Law Journal 319.

the latter way does not offer legally enforceable obligations, and thus provides weak ESG integration.[73] In contrast, ESG clauses in the treaty body can emphasize a state's right to regulate,[74] give primacy to international treaties,[75] and address the conduct of investors[76].[77] For example, the 2019 Dutch Model BIT has incorporated ESG clauses into the treaty, which is a significant improvement from the earlier 2004 version that only mentioned sustainable development in its preamble.[78]

Furthermore, a sustainable investment agreement emerged as a new type of investment agreement, focusing on ESG considerations.[79] As a recent example, the European Commission has entered into its first bilateral agreement on investment facilitation with Angola, which is intended to achieve good governance and cooperation, and promote sustainability goals.[80]

In addition to BITs, there is also an effort to incorporate ESG factors into MITs. The most notable example is the Energy Charter Treaty (ECT), [81] which is currently under revision in an effort to bring it in line with the objectives of the Paris Agreement. For example, the modernized ECT will limit investor protections for fossil fuel investments, and thus promote investments in renewable energy.[82]

Although modernized investment treaties represent a small portion of the existing treaties, they signify a growing trend towards prioritizing ESG concerns in investment treaties.[83] Overall, the integration of ESG clauses and investor accountability into investment treaties has been on the rise. Investors can be held responsible for their actions that are contrary to ESG aspects and may be required to pay compensation to affected parties. In respect of international arbitration, the ability to bring counterclaims for investor responsibility in investor-state arbitration can provide an effective check on investor behavior.

---

[73] Yannick Radi, 'The Tripartite Dimension of Conflicts of Interests: Workers, Foreign Investors and Host States in the Energy Sector' in Eric De Brabandere and Tarcisio Gazzini (eds), *Foreign Investment in the Energy Sector: Balancing Private and Public Interests* (Brill Nijhoff 2014) 217, 235-237.

[74] E.g. Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part (signed 27 June 2014, entered into force 1 July 2016) ('EU-Georgia Association Agreement') art 228.

[75] E.g. Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part (signed 27 June 2014, entered into force 1 July 2016) ('EU-Moldova Association Agreement) art 31 and 35.

[76] E.g. Dutch Model BIT (2019) art 23.

[77] Goh (n 58) 492-493.

[78] Roos van Os and Roeline Knottnerus, 'Dutch Bilateral Investment Treaties: A gateway to "treaty shopping" for investment protection by multinational companies' (2011) <http://somo.nl/publications-en/Publication_3708> accessed 3 March 2023.

[79] European Commission, 'EU and Republic of Angola launch negotiations for a first-ever Sustainable Investment Facilitation Agreement' (Press release 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3096> accessed 28 March 2023.

[80]European Commission, 'EU and Angola conclude first-ever Sustainable Investment Facilitation Agreement' (Press release 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6136> accessed 28 March 2023.

[81] Energy Charter Treaty (signed 17 December 1994, entered into force 16 April 1998) OJ L380/24.

[82] EU Directorate-General for Trade, 'Agreement in principle reached on Modernised Energy Charter Treaty' (2022) <https://policy.trade.ec.europa.eu/news/agreement-principle-reached-modernised-energy-charter-treaty-2022-06-24_en> accessed 28 March 2023.

[83] Goh (n 58) 492

8. Conclusion

This chapter provides a comprehensive overview of ESG concepts and practices, contributing to understanding the growing significance of ESG driven by increasing awareness among multiple stakeholders. The insights presented in this chapter also stress the potential risks of ignoring or mishandling ESG factors. Failure to address ESG risks could result in significant negative consequences for companies, including legal, financial, and reputational aspects, which can ultimately affect their bottom line.

Moreover, ESG significance has been reflected in the integration of ESG considerations into regulations at different levels. This integration includes regulatory ESG obligations which may pose disputes. In the same vein, ESG considerations are being integrated into business relationships to address and manage ESG risks. Accordingly, ESG clauses have been implemented in commercial contracts and investment treaties. By making compliance with ESG requirements a condition of doing business, these clauses ensure that suppliers and partners meet their ESG responsibilities, thereby reducing reputational and legal risks. However, implementing ESG clauses requires careful consideration of legal and practical challenges. In this respect, model clauses can be particularly useful in ensuring effectiveness, enforceability, and alignment with existing legal and international frameworks.

There are several factors that contribute to increased ESG dispute exposure.[84] Integrating ESG obligations into regulations and business relationships, as well as implementing ESG clauses in commercial contracts and investment treaties can serve as both a source of disputes and a potential risk allocation for preventing them. In light of the insights gained from this chapter, the subsequent chapter delves further into ESG disputes.

[84] According to the recent Norton Rose Fulbright survey, factors contributing to the expected increase in ESG dispute exposure include the lack of established metrics and requirements, regulatory focus, increased policing of claims, allegations of greenwashing or false ESG claims, breaches of contractual obligations related to climate change, increased awareness, and a focus on corporate governance. See Fulbright (n 24)

Chapter 3: Understanding ESG Disputes

1. Introduction to ESG Disputes

The rise in regulatory and contractual developments concerning ESG has led to a greater likelihood of disputes arising. The continuum model of dispute exposure[85] presented in Figure 1 provides a framework for understanding the relationship between risks and disputes, visualizing the flow from the occurrence of risks to disputes.

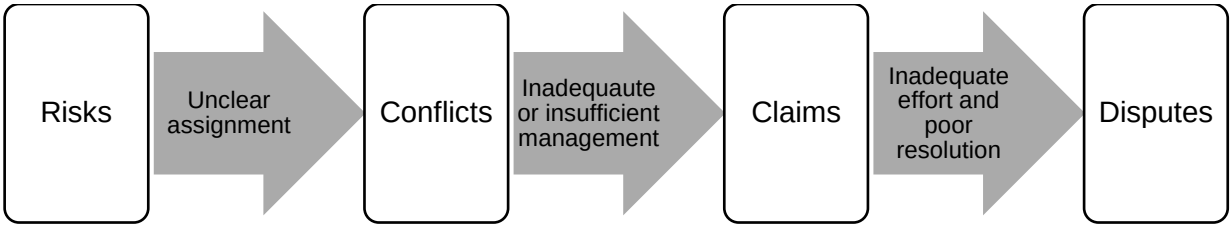


Figure 1: The continuum model of the dispute exposure

As illustrated, unclearly assigned risks can lead to conflicts that, if not properly handled, may escalate into claims. If these claims are left unresolved, they can ultimately lead to disputes. It is important to note that despite this sequential escalation, it is not always a linear process and can involve multiple factors and interactions.

The model highlights that that an increase in ESG risks can create a fertile environment for ESG disputes to arise. Thus, it is essential to adopt strategies to reduce the likelihood of ESG disputes from escalating or occurring. Utilizing the continuum model can assist in mitigating potential ESG disputes by identifying factors that may contribute to their emergence in advance. Moreover, comprehending the progression from risk to dispute can provide valuable insight into the various stages that culminate in disputes.

Based on the model, liability risks may cause legal disputes. If companies have acted negligently, violated legal requirements, or caused harm as a result of ESG failures, they may be held liable and face legal consequences. Moreover, liabilities can arise under different branches of law. Correspondingly, non-compliance with ESG standards and breach of ESG obligations may lead to not only administrative penalties and criminal actions, but also private disputes and civil liability for damages resulting from their ESG failures. There are several specific liabilities that companies may face in the context of ESG risks, such as compliance liabilities, legal liabilities, directors and officer's liabilities, parent company and supply chain liabilities. These potential liabilities can stem from a variety of sources including non-compliance with ESG regulations, false or misleading statements, breach of ESG clauses, breach of fiduciary duty, and failure to exercise supply chain due diligence.

Furthermore, ESG conflicts can involve a range of actors who may become claimants or plaintiffs in ESG disputes. There may be conflicting interests among various stakeholders. In order to gain a comprehensive understanding of the various stakeholders involved in ESG disputes, following table serves an analysis of actors/stakeholders:

[85] Nirmal Kumar Acharya, Young Dai Lee, and Hae Man Im, 'Conflicting factors in construction projects: Korean perspective' (2006) 13 Engineering, Construction and Architectural Management 543.

Actors/ Stakeholders	**Interests**	**Relationships***		
Corporations	Profitability (maximizing profits, maintaining operations, enhancing reputation)	Internal	Contractual	Primary
Managers	Performance/Efficiency			
Board of directors	Governance			
Shareholders	Reputation and Accountability (sustainable growth, transparent reporting, responsible investments)			
Employees	Activities and Well-being (Fair and safe working conditions, employee rights, fair compensation)			
Suppliers/supply chain actors	Resources and Sustainability (fair trade, sustainable sourcing, long-term partnerships)	External		
Investors	Capital/Returns (maximizing returns, considering ESG regulations)			
Customers	Quality/price and satisfaction (quality products/services, responsible consumption)			
Governments	Regulation/Compliance (protecting public interest, enforcing regulations)		Non-contractual	
Communities/ Individuals (Society)	Impact/Engagement and Welfare (preserving livelihoods, environment, well-being)			Secondary
NGOs	Advocacy (advocating for justice, holding corporations accountable)			

Table 3: Possible actors/stakeholders in ESG concerns
* The terms "internal-external," "contractual-non-contractual," and "primary-secondary" are used to describe various dimensions of the relationships between stakeholders.

Table 4 provides a comprehensive view of the possible actors/stakeholders and their respective interests in ESG concerns. In order to effectively resolve ESG disputes, it is important to have a comprehensive understanding of the involvement of various stakeholders, each with their own distinct interests. For instance, investors may prioritize financial returns on their investment, while governments may prioritize implementing regulations to protect public interests. The presence of multiple stakeholders can lead to a wide range of conflicts and claims, which adds to the complexity of ESG disputes. Furthermore, the diverse interests of these stakeholders can be in conflict with each other, further complicating the resolution process.

As shown in Table 4, the last three columns present various aspects of the relationships with stakeholders. These columns reflect varying levels of engagement, influence, and relationships that different stakeholders have with the corporation and its operations. The first blue column shows organization relationships whether the group of stakeholders is internal or external to the organization, the second green column indicates the presence of contractual relationships, and lastly the third red column relates to the level of importance or influence that the stakeholder has on the corporation. These different classifications demonstrate the multi-dimensional nature of stakeholder relationships in ESG concerns.

Overall, the table provides insights into the different interests and dimensions of the various stakeholders involved, highlighting the complex and multi-dimensional nature of ESG disputes.

2. Possible ESG Claims and ESG Disputes

Businesses may face legal claims related to ESG issues if they fail to meet regulatory or contractual obligations. ESG claims can be filed by a variety of actors, such as individuals, communities, NGOs, activist groups, investors, companies, and regulators. Potential legal claims related to ESG issues include, but are not limited to:

- Claims for non-compliance with ESG regulations
- Claims for breaches of contractual obligations or ESG representations and warranties
- Claims for misstatement and/or misrepresentation, false or misleading ESG claims
- Claims arising from reporting and disclosure obligations, based on companies' untrue or misleading disclosures on ESG
- Claims for breaches of legal duties
- Claims arising from the impact of improper business practices
- Claims arising from violations within supply chains and based parent company liability for actions of their subsidiaries related to ESG issues

ESG claims can be classified in various ways, and it is possible for some to fall into multiple categories simultaneously. Categorizing ESG claims into contractual and non-contractual can provide valuable insights, as the legal basis for such claims may differ depending on whether they are tied to a contractual obligation or not.

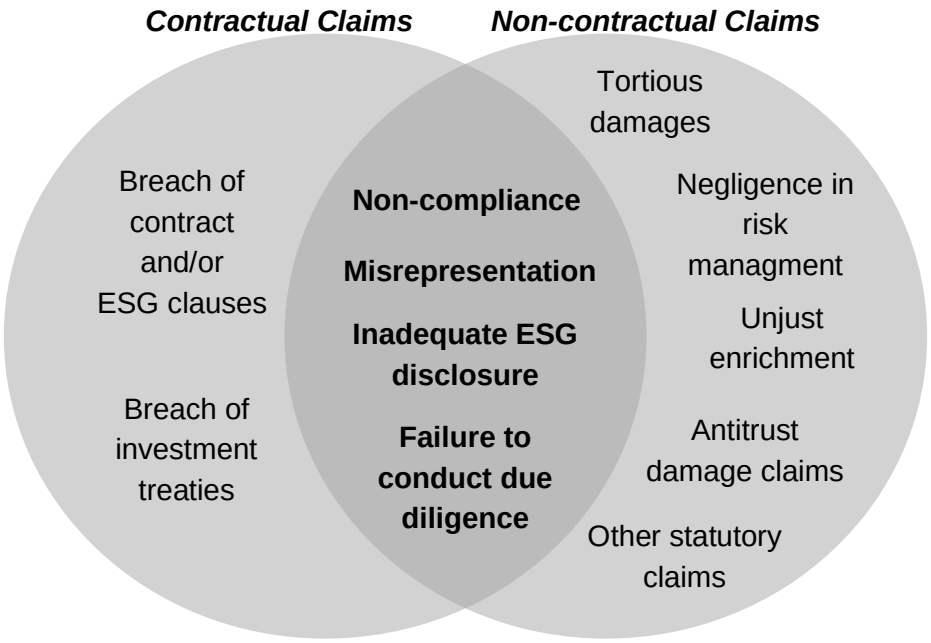


Figure 2: The Venn Diagram of Contractual versus Non-contractual Claims in ESG Disputes

The Venn diagram shown in Figure 3 provides a visual representation of examples of different ESG claims that can arise in ESG disputes, differentiating between contractual and non-contractual claims. This diagram is particularly useful in understanding how international arbitration can play a role in resolving ESG disputes, particularly in relation to contractual claims.

Claims arising from breach of contract can take various forms, such as claims for damages resulting from failure to fulfill ESG obligations under the contract, or claims for breach of

warranties or representations. The growing inclusion of ESG clauses increases the potential of ESG disputes arising from breaches of these clauses. In addition to claims arising from commercial contracts, protections for investors in investment treaties can give rise to claims. For example, investors may make claims against states for unfair treatment, discrimination or/and expropriation of their investments.

Regulatory proliferation in ESG can rise non-compliance claims.[86] Legislative developments enhancing accountability across supply chains are particularly promoting ESG claims.

Misrepresentation claims can occur in companies' disclosures but also in marketing their products or services. Similarly, inadequate ESG disclosure can give rise to claims for breach of fiduciary duties from shareholders and investors.

Companies can be legally obliged to carry out mandatory due diligence across their supply chains.[87] Correspondingly, companies have been facing claims for damages caused by actions of their subsidiaries, suppliers or controlled companies. In particular, global value chains have created novel accountability for legal claims against multinational companies, on the basis of parent company liability.[88] In this respect, the scope of corporate responsibility has been expanded as those companies who set ESG standards along their value chains.[89]

In order to establish a framework and enhance clarity in addressing diverse ESG disputes, it is beneficial to outline them as the following points:

- Disputes that aim to change or enforce ESG policies, and/or to ensure ESG regulatory compliance and enforcement
- Disputes that aim to seek compensation and remedies for damages associated with ESG issues, such as environmental harm, social injustices, or governance failures
- Contractual disputes arising from the need of implement ESG commitments in order to comply with evolving ESG regulations
- Contractual disputes arising from ESG-related events, or ESG obligations and liabilities
- Disputes between foreign investors and host states arising from ESG-related matters, including regulatory changes an ESG issues

---

[86] According to Queen Mary University London (QMUL) Survey Report, majority of respondents (63%) indicated that energy disputes due to new regulations for climate change mitigation would increase. Rapid changes in regulations will also give rise to conflicts regarding interpretation or implementation between project partners. Queen Mary University London and Pinsent Masons, 'Future of International Energy Arbitration Survey Report' (2023) <https://arbitration.qmul.ac.uk/media/arbitration/docs/Future-of-International-Energy-Arbitration-Survey-Report.pdf> accessed 20 March 2023.

[87] For instance, according to the CSDDD, companies must integrate ESG due diligence into all of their corporate policies and must identify and prevent risks to human rights, environment and governance in their operations and business relationships, including their value chains.

[88] Parent companies that govern multinational enterprises and global value chains may have responsibilities in relation to their supply chains.

[89] For example, claimants have sought to hold UK-based parent companies liable for actions of it subsidiaries abroad, which led to environmental damage and human rights violations. The parent company liability in such cases mainly depend on the level of control exercised by a parent company. The UK Supreme Court found that a parent company had assumed duty of care through its control and supervision of the subsidiary's operations. *Vedanta Resources Plc and another v Lungowe and others* [2019] UKSC 20; This reasoning was affirmed in different cases. E.g. *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3 (systemic health, safety and environmental failings of its overseas subsidiaries).

3. Exploring ESG Disputes based on ESG Pillars

3.1. Environmental Disputes

Companies have been facing challenges such as misrepresentations about their clean energy production, investments in carbon-intensive protects, regulatory compliance, and carbon emission reduction.[90] In 2022, energy companies are still the most frequent defendants, but over half of cases occurred in other sectors, namely plastics,[91] food and agriculture,[92] transport,[93] and finance[94].[95]

[90] E.g. *Australasian Centre for Corporate Responsibility v Santos* [2021] Federal Court of Australia NSD858/2021 (pending) (The company has been accused of making misleading representations about providing clean fuel natural gas and having a credible net zero emissions plan); *Lawyers for Climate Action Complaint to the Advertising Standards Board*, Advertising Standards Authority Complaints Board 21/194 (7 June 2021) (The company has been accused of making unsubstantiated claims about 'zero carbon gas' in their advertisements.); *Barbara Metz et al., v Wintershall Dea AG* [2021] Regional Court of Kassel (pending). (The plaintiffs argue that the company is violating fundamental rights by not adhering to a 'fair' carbon budget and extensively depleting the CO2 budget by 2030.); *ClientEarth v Shell's Board of Directors* [2023] EWHC 1137 (Ch) (ClientEarth alleged that Shell's Board of Directors failed to implement its Energy Transition Strategy and comply with the Dutch's order, resulting in inadequate reduction of GHG emissions.)

[91] E.g. *Last Beach Cleanup v TerraCycle, Inc. et al*, 4:21-cv-06086 (N.D.Cal. 2021) (Consumer product companies (TerraCycle and others) was alleged for engaging in unfair and deceptive business practice by misleadingly marketing products and packaging as 'recyclable'.); *Rosencrants v Danimer Scientific, Inc.*, 1:21-cv-02708 (E.D.N.Y. 2021) (The polymer/bioplastics companys was alleged for its false and misleading statements about the its biodegradeable plastic product.); *Earth Island Institute v Coca-Cola Co.*, 1:21-cv-01926 (D.D.C. 2022); *Swartz v Coca-Cola Co.* 3:21-cv-04643 (N.D.Cal 2022) (Coca-Cola was challenged twice, first for representating itself as a sustainable and environmentally friendly despite its plastic footprint as being one of the largest contributers to plastic pollution, and second for unfair and deceptive business practices by marketing plastic bottles as '100% recyclable'.).

[92] E.g. *Envol Vert et al. v Casino* [2021] Saint-Étienne Judicial Court (pending) (The French supermarket chain Casino was alleged fro environmental and human rights harms from its involvement in the cattle industry in Brazil and Colombia.); *Vegetarian Society et al of Denmark v Danish Crown* [2021] the Western High Court (pending) (The EU's largest pork was alleged for its "climate-friendly" claims which amount to misleding consumers through greenwashing.); *In re Oatly Group AB Securities Litigation*, 1:21-cv-06360-AKH (S.D.N.Y. 2022) (the oatmilk company was alleged for engagement in greenwashing.)

[93] E.g. *Deutsche Umwelthilfe (DUH) v Bayerische Motoren Werke AG (BMW)* [2021] Regional Court of Munich (pending); *Deutsche Umwelthilfe (DUH) v Mercedes-Benz AG* [2021] Regional Court of Stuttgart (pending) (The German environmental and consumer protection association DUH alleged BMW and Mercedez-Benz for violating the right to climate protection and impinging upon the rights of future generations by failing to commit to carbon neutrality in internal combustion engine cars.); *Kaiser, et al. v Volkswagen AG* [2021] Regional Court of Braunschweig (pending) (Volkswagen AG, another German company as one of the largest automakers in the world, has also faced similar allegations.)

[94] E.g. *Complaint to Ad Standards on HSBC's Great Barrier Reef ad*, Ad Standards 0265-21 (13 October 2021) (HSBC Bank was challenged for its misleading statements about its reef-focused campaings (protecting the Great Barrier Reef) which may be considered greenwashing due to its financial links to fossil fuel operations harming the climate crisis. Ad Standars, who administers advertising self-regulation system in Australia, was dismissed the claim.); *Abrahams v Commonwealth Bank of Australia* Federal Court of Australia NSD864/2021 (pending) (In another case in Australia, shareholders has seeking access to a bank's investment document and disclosure of climate-related information to assess its compliance with its E&S policies and Paris Agreement.)

[95] Joana Setzer and Catherina Higham, 'Global trends in climate change litigation: 2022 snapshot' (2022) London School of Economics and Political Science, 12 <https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2022/> accessed 20 February 2023.

Climate change litigation[96] against companies and governments has accelerated as the devastating effects of climate change have become more apparent and urgent.[97] These disputes can be related to proactively managing the visible or potential impacts of climate change.[98] For example, Shell was founded to have a duty of care, which requires companies to take responsibility as contributors to climate change effects.[99] The Hague District Court obligated Shell to reduce GHG emissions by at least 45%.[100] This was a landmark decision, marking the first instance of successful challenging the business model of a company.[101]

It is crucial to emphasize greenwashing[102] claims in this context, with over half of green claims[103] being misleading and almost half lacking supporting evidence.[104] Greenwashing occurs when a product or company is misrepresented as environmentally-friendly, exaggerating environmental credentials, mischaracterizing an environmental commitment, or understating GHG emissions.[105] As one might anticipate, the energy majors have been accused of greenwashing. These accusations stem from their misleading advertisements that suggest fossil fuels are green, and exaggerations of investments in clean energy resources.[106] Moreover, different ways of classifying products or services as 'green' or 'sustainable' can also pose greenwashing and other disputes. For instance, disputes may arise over whether a

[96] It refers to legal actions against companies for alleged failures to adress the threat of climate change or for conduct that has exacerbated the climate crisis.

[97] According to the Global Climate Change Litigation Database, (outside of the U.S.), legal cases against government consitute the majority (approximately 80%) compared to cases against corporations/individuals. The majority of cases against corporations are about environmental assessment and permitting, greenhouse gas (GHG) emissions reduction, misleading advertising, climate damage and disclosures. Climate Case Chart, 'Climate Change Litigation Databases' <http://climatecasechart.com/> accessed 23 March 2023.

[98] Jacob Grierson, Thomas Granier, and Sacha Karsenti, 'Is Arbitration Helping or Hindering the Protection of the Environment and Public Health?' (2021) 38(3) Journal of International Arbitration 327, 330.

[99] It is the situation in particular where these emissions (Scope 3 emissions), which are not directly produced or controlled by the company but indirectly responsible for across its value chain, account for majority of a company's carbon footprint (such as fossil fuel producer or seller companies).

[100] It is the first time a company has been legally obligated to reduce its carbon emissions. *Milieudefensie et al. v Royal Dutch Shell plc.* [2021] the Hague District Court C/09/571932 / HA ZA 19-379 (pending)

[101] Claimants argued that Shell's business model poses a threat to the climate goals of the Paris Agreement. The argument that government's inadequate action on climate change constituted a violation of a duty of care in *Urgenda decision* extended to private companies. *Urgenda Foundation v State of the Netherlands* [2015] the Hague District Court C/09/456689 / HA ZA 13-1396.

[102] Greenwashing refers to the practices of making false or misleading environmental claims in their disclosure or marketing.

[103] Green claims refers to claims about environmental merits of companies' products or services. European Commission, 'Green Claims' <https://environment.ec.europa.eu/topics/circular-economy/green-claims_en> accessed 28 March 2023.

[104] European Comission, 'Screening of websites for 'greenwashing' half of green claims lack evidence', (Press Release 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_269> accessed 28 March 2023.

[105] Ralph Cuervo-Lorens, Samantha Gordon, Talia Gordner, Julia Loney, Leila Rafi, Beth Riley, Martin Thiboutot, Patricia Chehadé and Kendra Wilson, 'Green or Grey: Regulators Target Greenwashing, Misleading Environmental, Social and Governance (ESG) Claims' (2022) McMillan LLP <https://mcmillan.ca/insights/green-or-grey-regulators-target-greenwashing-misleading-environmental-social-and-governance-esg-claims/> accessed 18 March 2023.

[106] Mei Li, Gregory Trencher, and Jusen Asuka, 'The clean energy claims of BP, Chevron, ExxonMobil and Shell: A mismatch between discourse, actions and investments', (2022) PLOS One 17(2) <https://doi.org/10.1371/journal.pone.0263596> accessed 28 March 2023; *The City of New York v. Exxon Mobil Corp.*, 21-vc-4807 (VEC) (S.D.N.Y. 2021) (The defendants were accused of misrepresenting the climate impact of fossil fuel products, exaggerating their investments in clean energy resources, and misleadingly greenwashing their corporate brands.)

particular product, service, or investment qualifies as 'green' under a certain taxonomy.[107] Additionally, companies are facing allegations of misrepresentations about the sustainability of their products to overcharge or induce customers to buy the products.[108]

In conjunction with these, establishing causation in claims for damages can be a significant challenge in environmental disputes. The complexity of supply chains, especially in the energy sector, lead to break in the chain of causation. As an illustration, GHG emissions from a source in one region can contribute to global warming. However, it can be difficult to trace causality from a source of GHG emissions to an event in a different jurisdiction than the source of the emissions.[109] That is to say, the issue of liability for damages that occur across borders poses challenges. In one case, the German court dismissed a claim that an energy company was liable as a GHG emitter for damages resulting from warming effects arising in different jurisdiction.[110] The court reasoned that there was no demonstrable causal chain.[111] Afterwards, the appeal court recognized the claim as meritorious in principle, but stated that the claimant should succeed on the evidential points that threats posed by environmental damage risks and contributions of the company to these threats.[112] While the number of climate change lawsuits continues to grow, admissibility remains as an obstacle.[113]

3.2. Social Disputes

Social disputes often stem from issues such as human rights violations, consumer harm, misleading advertising, diversity and inclusion, and labor issues. Disputes can also arise when a company's employees perceive that their rights or interests are being threatened or violated, especially with regard to employment practices or labor standards.[114] False or misleading commercial statements that constitute unfair competitive practices can also lead to disputes.

---

[107] For instance, there is a lack of clarity in the hydrogen market regarding how to classify different forms of hydrogen based on their production method. To illustrate, blue (or grey) hydrogen can be marked as "clean" despite producing carbon dioxide during its production process. Gauthier Vannieuwenhuyse, 'Exploring the Sustainability of Arbitration for Settling ESG and Human Rights Disputes' (2023) 40(1) Journal of International Arbitration, 13.

[108] E.g. *Marshall v Red Lobster Management LLC et al*., 2:21-cv-04786 (C.D.Cal. 2021) (The claimants argued that the restaurant chain misrepresented its seafood products on the menu by displaying them at a higher price to present itself as a sustainable provider of seafood, when in reality its suppliers use environmentally destructive practices.); *Commodore v H&M Hennes & Mauritz LP*, 7:22-cv-06247 (S.D.N.Y. 2022) (The claimants argued that H&M falsely advertised its "sustainably made" products at higher prices despite being largely made out of non-sustainable recycled polyester fibers.)

[109] *Luciano Lliuya v RWE AG* [2017] The Higher Regional Court of Hamm 5 U 15/17 (pending) (A Peruvian farmer sought to hold RWE liable for its contribution to glacial lake flood risk to claimant's house. Although RWE has no operations in claimant's country Peru, it has produced a great amount of GHGs in various countries.)

[110] Ibid.

[111] Ibid.

[112] The claimant should provide evidence that the threats of flooding due to the increased volume of a glacial lake, and contributions of the company to these threats. Ibid.

[113] Although attribution-science findings are undoubtedly important, courts rarely use it to determine causation due to its novelty. However, improved use of attribution science methods could help establish causation. Rupert F. Stuart-Smith, Friederike E. L. Otto, Aisha I. Saad, Gaia Lisi, Petra Minnerop, Kristian Cedervall Lauta, Kristin van Zwieten and Thom Wetzer, 'Filling the evidentiary gap in climate litigation' (2021) 11 Nature Climate Change 651.

[114] E.g. *Uber BV and others v Aslam and others* [2021] UKSC 5 (The judgement ruled that Uber drivers are workers, rather than self-employed independent contractors as Uber had argued, and therefore benefit from employment rights and legal protections, like national minimum wage and paid leave.); *In re Massey Energy Co. Securities Litigation*, 883 F. Supp. 2d 597, 5:10–cv–00689 (S.D.W. Va. 2012)

There have been examples of such misrepresentations regarding labor conditions[115] and environmental impacts.[116]

Supply chains pose the greatest risk in this area, and there is particular concern about the use of child and forced labor in large corporate supply chains. Parent companies are found responsible for social issues arising in their supply chains.[117] For instance, Nestlé has been accused of child labor and human rights abuses in its supply chain.[118]

It is noteworthy that there is a strong link between environmental and social pillars in terms of the enjoyment of human rights, including those of future generations, because of the profound effects of climate change on the planet. Thus, such environmental disputes can also include claims related to human rights violations.[119]

3.3. Governance Disputes

Governance disputes usually center around a company's corporate governance practices, with a focus on integrity and ethics. These disputes may include bribery and corruption, antitrust violations, executive compensation and data protection. Shareholders may demand board diversity and executive pay alignment with long-term ESG goals or shareholder interests.[120] Denial of shareholders' ability to vote on ESG matters or obstruction of relevant proposals may lead to shareholder activism and ultimately disputes if such activism is unsuccessful.

Corruption is one area where ESG and anti-money laundering regulations intersect. Boards and executives are accountable for implementing effective anti-money laundering controls, and can be held responsible for any involvement in money laundering. For example, Wirecard engaged in corrupt business practices and committed accounting fraud by issuing misleading statements, resulting in a failure to prevent corporate fraud and protect stakeholders' rights.[121]

Data protection claims have become a ripe target for class actions.[122] In the Facebook scandal example, personal data of millions of Facebook users was harvested without their consent.[123]

---

[115] E.g. *Nike, Inc. et al. v Kasky* 539 U.S. 654 (2003).

[116] E.g. *Ramirez v Exxon Mobil Corp*., 334 F. Supp. 3d 832, 3:16-cv-3111 (N.D. Tex. 2016) (pending).

[117] E.g. *Vedanta Resources* (n 89).

[118] *Nestle USA, Inc. v Doe et al.* 593 U.S., 19-416 (2021). Similar class actions have been filed aganist Cargill, Mars, Hershey and Barry Callebaut in the cocoa industry. See Anti-Salvery International, 'The Cocoa Instury in West Africa: A history of exploitation' (2004) <https://www.antislavery.org/wp-content/uploads/2017/01/1_cocoa_report_2004.pdf> accessed 27 March 2023.

[119] E.g. *Friends of the Earth et al. v Total* [2019] Nanterre High Court (pending); *Soubeste and Others v Austria and 11 Other States* [2022] ECHR 31925/22 (pending); *Notre Affaire à Tous Les Amis de la Terre, and Oxfam France v BNP Paribas* [2023] Judicial Court of Paris (pending).

[120] E.g. *The Police and Fire Retirement System of the City of Detroit v Elon Musk, et al.* [2020] C.A. 2020-0477-KSJM (pending) (In Tesla's stockholder derivative suit, the board members are accused of breaching their fiduciary duties by awarding themselves unfair and excessive compensation.).

[121] See Ibrahim E. Sancak and Edgar Löw, 'Revisiting Corporate Governance with Wirecard in the post-Enron Era' (2022) <https://ssrn.com/abstract=4313820> accessed 28 March 2023.

[122] This is the situation despite the recent *Lloyd v Google LLC* case, which halted the progress of data protection claims. The Supreme Court's decision has made it more difficult to bring data-based claims under the representative action procedure, requiring individual liability assessments for each claimant and limiting companies' exposure to large-scale data privacy claims. James Clarke,Tom Cummins, Martin Eimer, Tim West and Jonas Weissenmayer, 'Global Trends in ESG Disputes' (2022) ICLG – Class and Group Actions <https://www.ashurst.com/en/news-and-insights/insights/global-trends-in-esg-disputes/> accessed 27 March 2023.

[123] Snider (n 34).

This scandal exemplifies bad corporate behavior, as companies may act in illegal or unethical ways that harm society or violate the rights of certain groups.[124]

Failure to adequately oversee and manage ESG risks, as well as lack of adequate ESG disclosure can lead to legal claims. Disputes may arise if investors suffer a financial loss on their investments due to company's ESG disclosures that may be seen as untrue or misleading. In *Ramirez v ExxonMobil* case, shareholders sued the company and its executives, claiming they misled investors about climate change risks.[125] It is essential to point out that misleading ESG disclosure claims can be difficult to prove since such statements are often open to interpretation. Investors must show ESG statements were objectively untrue or misleading, and their investments were relied on such statements.[126]

The role of board of directors in ESG matter is mainly oversight, and directors have fiduciary duties.[127] If directors neglect their duty to protect shareholders' best interests, derivative claims are also possible.[128] For instance, in *Client Earth v. Shell's Board of Directors,* the claimants argued that the board failed to properly manage climate risks and breached its legal duty to shareholders, which requires promoting the company's success and acting with reasonable diligence.[129] Similarly, in another case, shareholders filed derivative lawsuits against directors and officers for breach of fiduciary duties, citing a failure to properly account for climate change risks and costs in their investments, asset valuations, and financial reporting, and also for unjust enrichment claims.[130]

3.4. Overview of ESG Disputes Based on Pillars

ESG disputes can be complex and multifaceted that are interconnected across the pillars of ESG. To illustrate the complexity and interconnectedness of ESG disputes, the Venn Diagram of ESG Disputes presented in Figure 3 provides examples of various ESG disputes.

[124] Davide Fiaschi, Elisa Giuliani, Federica Nieri, Nicola Salvati, 'How bad is your company? Measuring corporate wrongdoing beyond the magic of ESG metrics' (2020) 63(3) Business Horizons 287, 287

[125] *Ramirez* (n 116)

[126] The UK High Court has clarified the scope of section 90A: The liability for misleading statements made by companies issuing securities (liability on issuers of securities to pay compensation to persons who have suffered loss due to misleading statements made by issuer) requires proof of objective misleading (a manager/issuer knew the statement was untrue or misleading) and individual reliance (the claimant reasonably relied on the statement). *ACL Netherlands BV v Lynch* [2022] EWHC 1178 (Ch) (17 May 2022); See also Rebecca Dulieu, 'Liability for misleading or untrue statements: ACL Netherlands BV v Lynch' (2022) Norton Rose Fulbright <https://www.nortonrosefulbright.com/en/inside-disputes/blog/202211-liability-for-misleading-or-untrue-statements-acl-netherlands-bv-v-lynch> accessed 28 March 2023

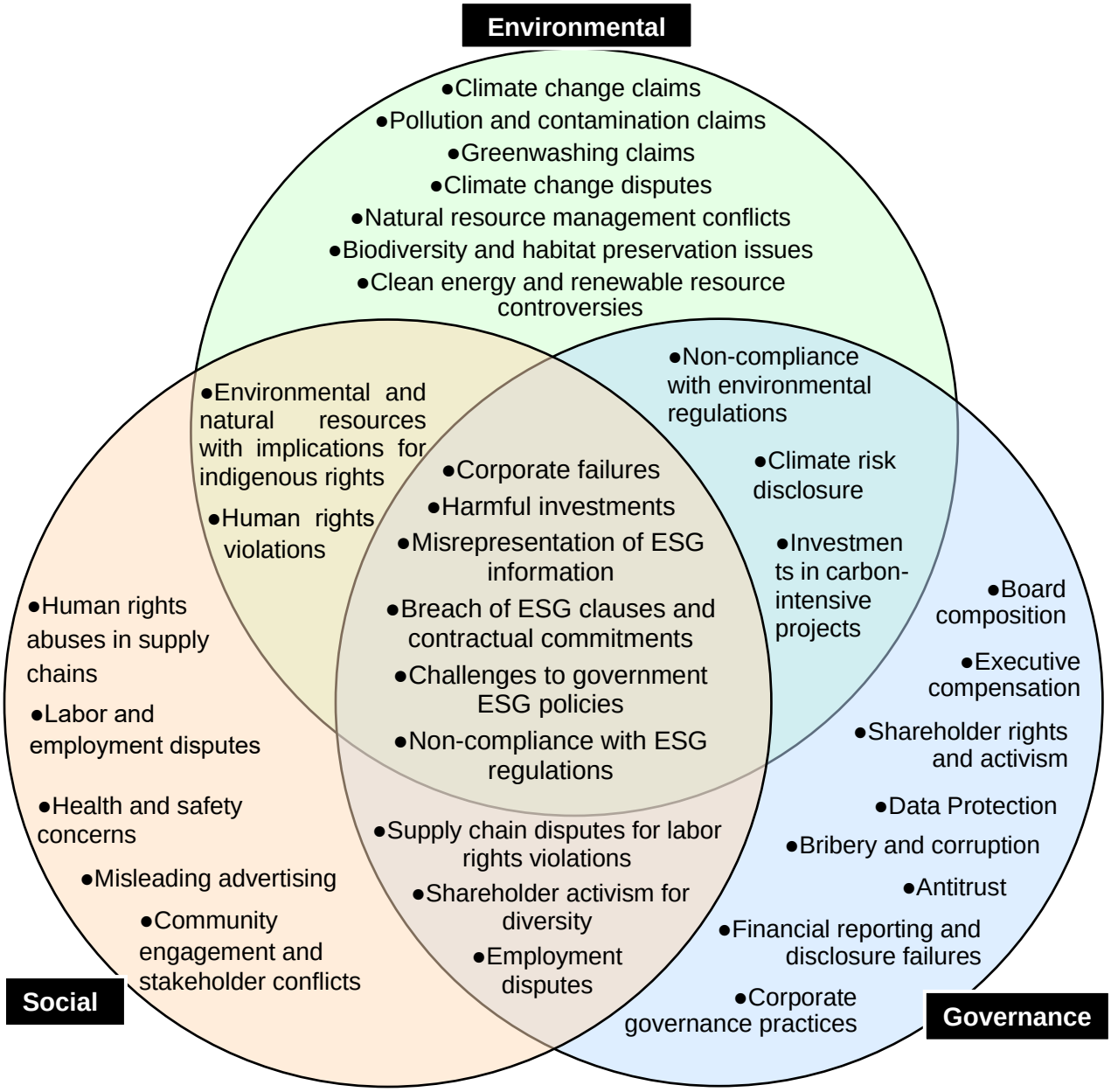
[127] Jurgita Ashley and Randi Val Morrison, 'ESG Governance: Board and Management Roles & Responsibities' (2021) Harvard Law School Forum On Corporate Governance <https://corpgov.law.harvard.edu/2021/11/10/esg-governance-board-and-management-roles-responsibilities/> accessed 27 March 2023

[128] Clarke and others (n 122)

[129] *ClientEarth* (n 90)

[130] *In re Exxon Mobil Corp. Derivative Litigation,* 3:19-cv-01067 (N.D.TeX 2019)

Figure 3:Venn Diagram of ESG Disputes



The diagram provides an overview of different types of ESG disputes, with each circle representing a specific category of dispute, namely environmental, social, and governance. The overlapping areas demonstrate intersections of these categories.

The diagram shows that ESG disputes can arise in various domains and can encompass diverse combinations of ESG pillars. It highlights the multidimensional nature and the complexity of ESG disputes. Given the need to consider various factors, it is important for dispute resolution mechanisms to provide a sophisticated approach to resolving complex issues. Overall, the Venn diagram provides insights for understanding the complexity and interconnectedness of ESG disputes and highlights the importance of taking a comprehensive approach to resolving them.

4. Shared Characteristics of ESG Disputes and the Corresponding Challenges in Resolution

There are key factors that affect the resolution process and outcomes of ESG disputes. Accordingly, it is important to develop a comprehensive understanding of ESG disputes. The shared characteristics and challenges of ESG disputes, along with the requisite factors for successful resolution, include:

- ***Complexity of ESG issues***. ESG disputes involve a multitude of complex and interconnected ESG issues, and require an integrated approach.
    - ***Multifaceted nature***. ESG disputes require a comprehensive understanding of the interplay between ESG factors and their impacts on various stakeholders.
    - ***Multiple stakeholders.*** ESG disputes involve a broad range of stakeholders, such as businesses, states, investors, communities, advocacy groups, NGOs, with their own distinct interests, concerns, and expectations. For example, some stakeholders prioritize positive ESG measures, while others prefer to focus solely on financial factors. It is important to have stakeholder representation in a neutral forum when addressing ESG disputes in order to ensure fairness and inclusivity.
    - ***Intersection of legal, business, and societal perspectives.*** It is important to balance the diverse and competing interests of various stakeholders involved in ESG disputes.
    - ***Legal complexities.*** ESG disputes may require to address complex legal aspects, including determining liability, and establishing causation between practices and damages which may be necessary for proving compensatory damage claims. An understanding of accountability mechanisms, a causal analysis, and an evidence-based approach may be required.
    - ***Complexity of global supply chains.*** Due to the involvement of numerous intermediaries, subcontractors, and suppliers, it can be difficult to monitor and ensure ESG compliance, and to trace the actions and impacts of transnational corporations and foreign investors across a supply chain's multiple tiers. Additionally, the doctrine of privity of contracts may limit the ability of actors in supply chains to bring claims if they lack a direct contractual relationship.[131] It can be challenging to identify corporate accountability for their actions in different parts of complex supply chains. Understanding supply chain dynamics is required.
- ***Public interest nature.*** ESG disputes often involve public interest considerations because of their broader implications for the general public beyond just contractual relationships. ESG issues can have significant implications on the environment, society, public health, economy, policy and regulations, and the broader goals of long-term sustainability. Public interest nature necessitates considering different perspectives of various stakeholders and addressing impacts. Thus, it requires enhancing accountability and transparency, considering both public and private interests, and striving for a balanced solution.

[131] Jaakko Salminen, 'Contract-Boundary-Spanning governance mechanisms: Conceptualizing fragmented and globalized production as collectively governed entities' (2016) 23(2) Indiana Journal of Global Legal Studies 709.

- ***International aspects.*** ESG disputes often have international aspects due to the global operations of multinational corporations and complex supply chains across multiple jurisdictions. Addressing the international dimensions of ESG disputes requires handling challenges related to jurisdiction, conflicting laws and regulations, cross-border operations, and collaboration with multiple legal systems. This requires consideration of different regulatory frameworks to identify ESG requirements, which can be complex due to differing approaches to ESG matters.
- ***Regulatory and compliance challenges.*** ESG disputes are subject to ESG regulations.
  - ***Complex regulations.*** They require an understanding of complex regulatory frameworks at different levels, including international, European, and national levels, that create compliance obligations and legal requirements.
  - ***Regulatory gaps****.* Governmental regulations may not be enough to address ESG issues in global supply chains and investment activities and to hold transnational corporations and foreign investors accountable.[132] Addressing uncertainties and inconsistencies in ESG regulations can be challenging.
  - ***Evolving ESG landscape.*** ESG standards are constantly evolving, which can pose lack of clarity in their application. Regulatory proliferation can create challenges in implementing ESG regulations, which are still in their early stages and have not yet been fully tested. It is important to have a flexible and adaptable approach.
  - ***Lack of standardization and consensus in ESG metrics****.* This may pose challenges in evaluating and reporting ESG performance to provide transparent and reliable data, especially when ESG benchmarking or third-party verification of ESG compliance is required.
- ***Extensive risk spectrum****.* ESG disputes encompass a variety of legal, regulatory, financial and reputational risks. Mitigating ESG risks requires effective resolution strategies.
  - ***Reputation vulnerability and risks.*** ESG disputes impact reputation, such as brand value, consumer trust and investor confidence.
  - ***Financial and operational consequences****.* Legal fees, regulatory fines, and reputation damage can affect the value of a business.
- ***Long-term and future-oriented effects.*** ESG issues may involve lasting effects and require comprehensive analysis of both immediate and potential long-term impacts.
- ***Need of urgent response and prevention***. ESG disputes may require responding promptly to urgent ESG concerns, and minimizing harm, such as environmental disasters, human rights violations, or systemic governance failures.

[132] The combination of increased corporate power, neoliberal deregulation and limited government regulations has led to a lack of effective regulations in global supply chains and investment activities. Claire Cutler, 'Private transnational governance in global value chains: Contract as a neglected dimension' in Claire Cutler and Thomas Dietz eds, *The politics of private transnational governance by contract* (Routledge Press 2017) 79, 80

5. Conclusion

This chapter provides a comprehensive overview of the potential disputes that can arise from ESG risks. The complex and multi-dimensional nature of ESG disputes, and the diverse interests of various stakeholders involved can lead to a wide range of conflicts and claims. Examples of different ESG claims and disputes are analyzed by considering different categorizations, including contractual and non-contractual claims; and environmental disputes, social disputes, and governance disputes.

As the shared characteristics and challenges of ESG disputes highlighted, the resolution of ESG disputes requires promoting transparency, accountability, stakeholder representation, and balancing stakeholder interests while considering regulatory frameworks and adapting to evolving ESG standards. The next chapter explores international arbitration and evaluate its effectives in light of the findings presented in this chapter.

Chapter 4: Understanding International Arbitration

1. Introduction to International Arbitration

In the light of the foreseeable increasing in ESG disputes, it is vital to develop effective mechanisms to resolve them. In a world lacking neutral supranational judicial bodies with mandatory jurisdiction over multiple countries, international arbitration offers an effective alternative to litigation in cross-border business relationships.[133]

Arbitration is one of alternative dispute resolution (ADR) methods.[134] Compared to other ADR methods, arbitration stands out as an effective option due to its adjudicative procedure in which a neutral third party (an arbitrator) makes a final and binding decision (an arbitral award) on a dispute.[135] Furthermore, it offers many features that distinguish it from litigation, such as the ability to select decision-makers, comparative efficiency, finality of decisions, and confidentiality. As discussed in detail below, there are more characteristics of arbitration that be perceived as valuable.[136]

International arbitration provides an effective forum for resolving cross-border disputes.[137] The recent QMUL survey further confirms that it is the preferred method for resolving such disputes.[138] Given the international aspects involved in ESG disputes, it is important to assess the effectiveness of international arbitration by considering the unique features and challenges of ESG disputes.

ESG disputes may occur in international commercial transactions that involve private contractual relationships, or in investment transactions between foreign investors and host states. Accordingly, commercial arbitration and investment arbitration are the two most prominent types in the context of resolving ESG disputes.

---

[133] Andrew Byrnes, Mika Hayashi, and Christopher Michaelsen, *International Law in the New Age of Globalization* (Martinus Nijhoff Publishers 2013) 348-349.

[134] Alternative dispute resolution (ADR) refers to any method of settling disputes outside of courts that are powered by the law. It provides alternatives to litigation and includes various methods, such as arbitration, mediation, negotiation, and conciliation.

[135] The four principles that (i) private in nature, (ii) third-party mechanism, (iii) rule-based, and (iv) adjudicatory can serve as guidelines to define arbitration. On the other hand, other ADR methods, namely mediation, negotiation and conciliation, are non-binding procedures where a neutral third party helps the disputes parties reach a mutually acceptable solution by facilitating communication. See Tony Cole and Pietro Ortolani, *Understanding International Arbitration* (Routledge 2020).

[136] According to the 2018 QMUL survey, the characteristics of international arbitration are ranked from most to least valuable as follows: (i) enforceability of awards, (ii) avoiding specific legal systems/national courts, (iii) flexibility, (iv) ability of parties to select arbitrators, (v) confidentiality and privacy, (vi) neutrality, (vii) finality, (viii) speed, (ix) cost, and (x) other. Queen Mary Univesity London, '2018 International Arbitration Survey: The Evolution of International Arbitration' (2018) <https://arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf> accessed 2 April 2023.

[137] William W. Park, 'Arbitration and Law', in Thomas Schultz and Federico Ortino (eds), *The Oxford Handbook of International Arbitration* (Oxford Academic 2020) 35, 43.

[138] Majority (90%) of respondents preferred arbitration as their method of resolving cross-border disputes, either alone (31%) or together with ADR (59%). Queen Mary University London, '2021 International Arbitration Survey: Adapting arbitration to a changing world' (2021) <https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf> accessed 2 April 2023.

2. Understanding the Arbitration and Exploring the Prevalence of Arbitration Agreements in ESG-related Relationships

Arbitration is characterized by the freedom of parties to control almost every aspect of the process, reflecting the principle of party autonomy. In the same vein, arbitration is contingent upon the mutual agreement of the parties involved. The presence of an arbitration agreement, which is a reflection of the parties' consent, is crucial in establishing the legitimacy of the entire arbitration proceedings.[139] Notwithstanding, investment treaty arbitration is characterized as "arbitration without privity" because foreign investors can bring claims without a direct contractual relationship.[140] Despite some distinct features of consent in investment treaty arbitrations, the importance of arbitration agreement remains consistent across all international arbitrations.[141]

Arbitration agreements are prevalent in international commercial and investment relationships because of strengths of international arbitration, such as neutrality, expertise, pro-enforcement. These agreements can be incorporated in a variety of legal instruments, including commercial contracts between private entities in commercial arbitration, and investment treaties or agreements between an investor and a host state in investment arbitration.[142] Importantly, the inclusion of arbitration agreements in contracts or treaties determines ESG claims of different natures, either contract-based or treaty-based.

Depending on the arbitration agreement, it can be *ad hoc* or institutional arbitration.[143] Regarding the latter one, the International Court of Arbitration (ICC) is widely selected as an arbitral institution in both commercial contracts and treaties. Additionally, the International Centre for Settlement of Investment Disputes (ICSID) is offered as an arbiter in the ECT[144] and in many investment treaties.[145]

---

[139] In the context of this thesis, the term "arbitration agreement" refers to both standalone arbitration agreements and arbitration clauses.

[140] Martina Magnarelli, *Privity of Contract in International Investment Arbitration: Original Sin or Useful Tool?* (Kluwer Law International 2020), 46-48

[141] Dispute resolution provisions in treaties, national legislation or investment contracts generally record the state's standing offer to arbitrate investment disputes. The foreign investor's acceptance by commencing arbitration proceedings creates a binding arbitration agreement. See Jan Paulsson, 'Arbitration Without Privity' (1995) 10(2) ICSID Review - Foreign Investment Law Journal 232

[142] While commercial arbitration involves disputes between private parties, investment (treaty) arbitration involves disputes between a foreign investor and a host state. It is important to emphasize that contract-based investment disputes are subject to international commercial arbitration if a state is acting as a private party in a commercial transaction (*iure gestionis* act). Magnarelli (n 140) 46-48

[143] Types of arbitrations for investment disputes include ICSID arbitration, institutional arbitration (like ICC or SCC), or *ad hoc* arbitration.

[144] The ECT grants investors the right to submit disputes to arbitration under four sets of rules: the ICSID Rules, the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or the SCC Arbitration Rules (art 25).

[145] The ICSID Convention itself does not provide a means for resolving investment disputes through arbitration, instead, an ICSID arbitration can only be initiated if both a foreign investor and a host state have given their consent. This consent typically takes the form of an arbitration agreement included in an investment contract, or is provided in a foreign investment law, a bilateral investment treaty (BIT), or another treaty. Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('ICSID Convention) (1965) 575 UNTS 159

3. The Use of International Arbitration as means of Resolving ESG Disputes

The inclusion of ESG clauses in commercial contracts and investment treaties, which often contain arbitration agreements, as well as the rise in ESG regulations, provides momentum for resolving ESG disputes through international arbitration, including both commercial and investment arbitrations. This viewpoint is supported by several scholars who explored the growing prevalence of ESG disputes in international arbitration.[146] It is worth noting that some scholars argue that investment arbitration is less used for ESG disputes compared to commercial arbitration due to the narrower scope of investment disputes, [147] or fewer provisions directly addressing ESG factors in investment agreements.[148] Besides, criticisms surrounding certain features of arbitration, it is widely accepted that international arbitration can provide an effective mechanism for resolving the growing number of ESG disputes.

In international commercial arbitrations, ESG disputes can arise from commercial contracts that contains ESG clauses and obligations. Additionally, international ESG commitments have led to ESG disputes in commercial arbitration if they are not delivered as promised. As an instance, the Kyoto Protocol and its Joint Implementation mechanism have been subject of disputes before various arbitration institutions.[149]

In international investment arbitrations, ESG disputes are likely to arise from investment treaties. Investors can have either positive or negative impact on ESG aspects depending on their actions. On the one hand, investors may allege host states (or companies) for their failure to protect ESG concerns, such as failure to protect the natural environment or enhance labor standards. On the other hand, investors may allege states for violations of investment treaties due to their practices and regulatory measures aiming to ESG. Conversely, states may assert counterclaims against investors for their ESG failures.

Regarding the latter allegations, ESG regulations may negatively affect the profitability of an investment and lead to investors' claims that their guarantees were breached. Broadly speaking, foreign investors have used protections in investment treaties to challenge a host state's ESG regulations.[150] However, for example, states may invoke their right to regulate in

---

[146] Grierson and others (n 98); Goh (n 58); Holly Stebbing and India Furse, 'ESG disputes in international arbitration' (2022) Norton Rose Fulbright <https://www.nortonrosefulbright.com/en/knowledge/publications/e01e3d5a/esg-disputes-in-international-arbitration> accessed 1 April 2023; Lucy Greenwood, 'The Canary is Dead: Arbitration and Climate Change' (2021) 38(3) Journal of International Arbitration 309; Nataša Lalatović and Dragana Nikolić, 'ESG-related Arbitrations: A New Kid On The Block' (2023) Mondaq <https://www.mondaq.com/arbitration--dispute-resolution/1280556/esg-related-arbitrations-a-new-kid-on-the-block> accessed 1 April 2023; Manzano (n 59); Okoko (n 23); Vannieuwenhuyse (n 107).

[147] Vannieuwenhuyse (n 107).

[148] Lalatović (n 146)

[149] E.g. *Naftrac Limited (Cyprus) v National Environmental Investment Agency of Ukraine*, PCA Case No. 2009-18, Award (4 December 2012) (PCA Environmental Rules). (the first environmental dispute over the allocation of units required to offset emissions against carbon credits). The PCA has handled various environmental disputes. See PCA, 'Cases - PCA' <https://pca-cpa.org/en/cases/> accessed 24 March 2023; See also Chester Brown, 'International, Mixed, and Private Disputes Arising Under the Kyoto Protocol', (2010) 1(2) Journal of International Dispute Settlement 447.

[150] E.g. *Metalclad Corporation v The United Mexican States,* ICSID Case No. ARB(AF)/97/1, Award (30 August 2000) (This case is example of a dispute arising from an environmental issue.); *Philip Morris Asia Ltd. v The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (17 December 2015); *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (8 July 2016) (In

protection of the public interest under the police powers doctrine,[151] and thus their actions do not amount to breach of the treaty.[152] Importantly, these claims involve a tension between promoting foreign investment and prioritizing ESG concerns.[153] Thus, in cases where an investor's protections and state's ESG objectives are in conflict, states may bring counterclaims. Some recent ICSID cases demonstrate the tribunal's tendency to hear ESG-related counterclaims.[154] Moreover, the issue of contributory fault has been considered in investment arbitration as compensation-reducing factors, meaning that tribunals consider investors' non-compliance in determining compensation,[155] even without any counterclaims.[156] Thus, considering contributory fault can serve as a means of holding investors financially accountable for any damage related to ESG concerns.[157]

4. Improvements in Arbitration Rules related to ESG Disputes

International arbitral institutions and organizations have also been developing suitable and specialized arbitral rules to address ESG disputes. In order to strengthen the use of international commercial arbitration as a suitable mechanism for resolving ESG disputes, several rules have been implemented. The Permanent Court of Arbitration (PCA) has created the PCA Environmental Rules[158] that are a set rules for resolving disputes related to environment and natural resources through arbitration.[159] Additionally, the Hague Rules on Business and Human Rights Arbitration provide a set of procedural rules for resolving disputes

these cases, investors challenged the state's public health measures aimed at restricting marketing of tobacco products. Investors alleged violation of inter alia expropriation. The tribunal found that the measures were a legitimate exercise of state's policy power to protect public health.)

[151] The police power doctrine allows states to regulate in order to protect the public interest, and the exercise of police power is considered legitimate if a state enacts regulations in a bona fide, non-discriminatory and proportionate manner. See Oliver Barron, 'The Police Powers Doctrine and Investment Law: Dusting Off An Old Concept in the Pursuit of Sustainable Development' (2018) <https://ssrn.com/abstract=3397422> accessed 26 March 2023.

[152] Goh (n 58) 497

[153] Ibid. 498-499

[154] Recent ICSID tribunals have found jurisdiction over counterclaims. E.g. *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic,* ICSID Case No. ARB/07/26, Award (8 December 2016*)* (Argentina brought the counterclaim on human rights. Although the counterclaim was not successful, the ICSID tribunal held that considerations of international human rigts obligations fell under its competence); *Perenco Ecuador Ltd v Republic of Ecuador and Empresa Estatal Petro´leos del Ecuador (Petroecuador),* ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim (11 August 2015); *Burlington Resources Inc v Republic of Ecuador,* ICSID Case No. ARB/08/5, Decision on Counterclaims (7 February 2017) (In these cases, the state brought successfully environmental counterclaims based on the United State-Ecuador BIT against the investors for environmental damage during their oil exploiation activities. The tribunal found investors liable and awarded damages to state.

[155] As mentioned above (n 70), this is included in the 2019 Dutch Model BIT.

[156] E.g. *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*, ICSID Case No ARB/84/3, Award (20 May 1992) (Profits resulting from the claimant's activities were found to violate international law and were deemed non-compensable.); *Copper Mesa Mining Corporation v Republic of Ecuador*, PCA No 2012-2, Award (15 March 2016) (Claimant's activities found to contribute to its own injury and reduced compensation by 30 per cent.); *Bear Creek Mining Corporation v Peru,* ICSID Case No ARB/14/21, Award (30 November 2017) (Claimant's activities found contribute to the social unrest that led to the withdrawal of the project).

[157] Goh (n 58) 500-501.

[158] PCA Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources ('PCA Environmental Rules') (2001).

[159] The PCA Environmental Rules are the first arbitration rules published by any arbitral institution in relation to climate change.

related to the impact of business activities on human rights, aiming to fill gaps in access to remedy.[160]

In addition to these, existing rules of institutions and organizations for comprehensive arbitration rules have been conveniently modified. For example, the United Nations Commission on International Trade Law (UNCITRAL) have been advocating for greater transparency by developing a set of procedural rules that provide for transparency and accessibility to the public of treaty-based investor-state arbitration.[161] Additionally, recent changes proposed in the ICSID Convention, Regulations and Rules enhance transparency and third-party funding, thereby impacting its use in ESG disputes.[162]

Many investment treaties lack investor accountability in investment treaties despite the efforts to address this issue. This is also reinforced by asymmetrical dispute settlement clauses that allow investors to bring claims against states, but not vice versa. Improvements in investment treaties have been take place in this respect, as mentioned earlier. Integrating investor responsibility into investment treaties and bringing counterclaims for it in investment arbitrations are steps to effectively address investors' misconduct.[163]

5. Leveraging the Strengths: Beneficial Characteristics of International Arbitration in ESG Dispute Resolution

5.1. Neutrality

International arbitration provides a neutral platform that is detached from parties or their home state governments. The parties' ability to choose an arbitrator who has no conflicts of interest or stake in the outcome ensures that disputes are resolved fairly and impartially. [164] This can reduce risks of national bias, parochial prejudice, or similar partiality. Opting for independent and impartial arbitrators with a neutral arbitration seat provides an even-handed means of resolving ESG disputes.[165] This is because ESG disputes may have significant impacts on various stakeholders. Thus, taking into account all parties' interests, including those of the affected communities and the environment, is achievable through a neutral mechanism.

5.2. Expertise

The complexity of ESG disputes often requires decision-makers with the relevant legal, scientific and technical expertise to be resolved effectively. This is also significant because of the growing number of ESG regulations at different levels. For instance, a dispute related to carbon emissions may require expertise in environmental science, while a dispute related to labor rights may require knowledge of international labor laws. In international arbitration, the ability of parties to select their decision enables them to choose those with the most relevant knowledge and experience to comprehend the complex details in question.[166] This means that

[160] The Hague Rules on Business and Human Rights Arbitration ('The Hague Rules') (19 December 2019)
[161] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ('UNCITRAL Rules on Transparency') (2013) A/68/462.
[162] ICSID Convention, Regulations and Rules (2022) ICSID/15/Rev. 3.
[163] See. Ho (n 65).
[164] The purpose of arbitration is to increase the prospect of a game decided by referees who have no stake in the outcome. Park (n 137) 69.
[165] Investors pressure to include arbitration agreements in investment treaties aim to protect themselves from a potential bias in legal disputes. Byrnes (n 133) 350-356.
[166] In national courts, the current system generally select judges regardless of their experience or expertise in the particular case at hand. Some national judiciaries have experienced judges who can resolve

parties can appoint arbitrators with ESG expertise who do not have to be lawyers. For example, arbitrators can be legal professionals who specialize in human rights law, or experts like engineers with a profound comprehension of the technology in energy transition cases. Along these lines, establishing a roster of arbitrators specializing in ESG disputes can be useful in selecting a qualified 'ESG arbitrator'. In this respect, the PCA Environmental Rules provides a list of arbitrators considered to have experience in environmental issues.[167]

5.3. Procedural Flexibility

International arbitration offers parties a high degree of procedural autonomy in determining the procedures and laws applicable to their arbitration. This flexibility enables parties to design procedures that are tailored to the parties' needs and suited the dispute's nature. Thus, specialized rules can be adopted to address specific ESG issues, such as the PCA Environmental Rules or the Hague Rules. Additionally, fast-track procedures can be implemented in ESG disputes where time is critical.

Furthermore, flexibility includes determining the scope of discovery or disclosure, presenting evidence and arguments, emphasizing certain types of evidence, length of the hearing, timetable, and other procedural matters.[168] Parties may engage their own experts, such as environmental or compliance specialists, human rights practitioners. Technical experts may be required to provide evidence, for example, on the extent of contamination and potential risks to health and the environment. Moreover, technical complexities of ESG disputes can be addressed through specialized procedures for testing and presenting expert evidence. These procedures can give expert evidence greater importance and subject it to scrutiny by other experts to ensure its accuracy and reliability. In another example, witness-conferencing can be designed to allow local community members who affected by company's activities.

5.4. Centralized

ESG disputes often involve parties from different jurisdictions, as it is the case in international disputes. This can lead to complications and delays if disputes are brought before different national courts. International arbitration aims to provide a single and centralized forum avoiding these challenges and ensuring consistent decisions. This is particularly important for ESG disputes, where one may need to consider the interests of multiple stakeholders.

5.5. Enforceability

The enforceability of awards is facilitated by the New York Convention[169] and favorable national arbitration legislation[170] in many countries. Despite ICSID awards, other international

---

complex transnational disputes with a high degree of reliability, but even in these jurisdictions, local idiosyncrasies can interfere with the objective of competence and objectivity in resolving commercial disputes.

[167] The PCA Environmental Rules includes a list of specialized list of arbitrators with environmental expertise (Annex 2) and a list of scientific and technical experts (Annex 3) who may be appointed as expert witnesses. See PCA, 'Panel of Arbitrators and Experts for Environmental Disputes' <https://pca-cpa.org/en/about/panels/panels-of-arbitrators-and-experts-for-environmental-disputes/> accessed 13 April 2023.

[168] Gary B. Born, *International Commercial Arbitration (*3rd edn Kluwer Law International B.V. 2021) 82-83.

[169] Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention') (1958) 330 UNTS 3.

[170] In many jurisdictions, national arbitration legislation has been designed based on the UNCITRAL Model Law. UNCITRAL Model Law on International Commercial Arbitration (1985) UN Doc A/40/17.

arbitral awards are subject to the New York Convention. It should be noted that ICSID awards are also easily recognizable and enforced in the courts of contracting states, without requiring additional review. The "pro-enforcement" regime provides expedited procedures for recognizing and enforcing abroad, with only limited grounds for denying recognition.[171] It provides parties with greater certainty regarding the outcomes of arbitration proceedings. Considering that ESG disputes often involve cross-border transactions and investments, enforceability is important to obtain a meaningful resolution. The ease of enforceability ensures that parties comply with ESG objectives and creates effective approach to address ESG issues on a global scale.

5.6. Finality

Arbitration awards are considered more final than judgments, which is known as the *res judicata* effect.[172] This is because the judicial scrutiny of awards is often limited to procedural fairness, jurisdiction, and public policy issues in setting aside proceedings.[173] The lack of comprehensive review of awards reduces costs and delays. However, this finality comes at the expense of limited judicial scrutiny: a wrong award cannot be easily corrected.[174]

5.7. Efficiency

Efficiency is crucial in ESG disputes due to their inherent urgency. Arbitration is often seen as a faster and cheaper alternative to litigation for resolving disputes, as it avoids the costs and delays associated with prolonged court proceedings.[175] However, both options can result in significant expenses and delays, particularly for major international disputes that can involve claims for large sums of money, complex legal and factual issues, and require extensive written and expert evidence, as well as lengthy hearings. On the other hand, as supported by findings from both ICC[176] and ICSID[177] arbitrations, the average length of arbitration proceedings is lower than that of courts, which can take years or even decades to conclude.[178] Moreover, the absence of appellate review and the availability of fast-track or expedited procedures can prevent unnecessary delays.[179]

[171] In contrast, the absence of global arrangements for enforcing foreign judgments compared to awards presents challenges in obtaining effective enforcement in many jurisdictions. International arbitral awards are generally more enforceable and more final than national court judgments. Born (n 168) 297

[172] The *res judiciata* effects means that arbitral awards have the same effect as domestic judgements.

[173] In international arbitration, there is setting aside proceedings, instead of appellate procedure.

[174] The survey identified the lack of an appeal mechanism on merits as the eighth worst characteristic of arbitration. See Queen Mary (n 136, 138).

[175] However, there have been criticisms over the cost of arbitration. Recent surveys show that users are dissatisfied with the cost of arbitration. Ibid.

[176] The average duration of proceedings in 2020 was 26 months.

[177] The average lenght of ICSID arbitration proceedings can last between three to four years. Holman Fenwick Willan, 'What Do The New 2022 ICSID Arbitration Rules Mean For The Parties?' (2022) <https://www.hfw.com/downloads/004223-HFW-IA-What-do-the-new-2022-ICSID-Arbitration-Rules-Means-for-the-Parties.pdf> accessed 15 April 2023.

[178] For example, *Massachusetts v U.S.* which was a climate change case that brought before US courts lasted almost two decades. Vannieuwenhuyse (n 107) 15.

[179] Some arbitral institutions have implemented fast-track or expedited procedures for disputes that require urgent disposition, including ICC, UNCITRAL, SCC have adopted fast-track or expedited procedures in recent years.

Furthermore, arbitration can provide quick and effective relief through an emergency arbitration, avoiding the delay of lengths court proceedings.[180] Arbitration rules that permit parties to take interim measures to prevent irreversible damages or violations related to ESG issues ensure that resolution process can address the specific needs and concerns of ESG disputes without delay. A notable example is the PCA Environmental Rules, which grant tribunals the power to take interim measures to prevent serious harm to the environment.[181] The orders given by emergency arbitrators can be enforced in multiple jurisdictions, providing effective ways to mitigate physical ESG risks that require urgent action.

Along with stating these, efficiency of arbitration can be influenced by various factors such as complexity, number of parties, and applicable laws. These factors become more critical in the context of ESG disputes due to the features of ESG disputes, such as complex issues, multiple stakeholders, and evolving regulations. As a result, resolving ESG disputes can be a challenging and time-consuming process. Thus, Assessing the efficiency of arbitration in ESG disputes requires careful consideration of the impact of their unique features on the resolution process.

5.1. Confidentiality[182]

Confidentiality is frequently preferred in international business disputes in order to maintain privacy and avoid reputational risks. One significant factor is that parties may prefer not to expose certain allegations to the public, including those related to bad faith, misrepresentation, incompetence, or inadequate practices.[183] From this perspective, international arbitration provides advantages to companies or investors, who face allegations, as it is confidential and private.[184] It worth mentioning that the level of confidentiality is determined by parties.[185] Parties

[180] Arbitral institutions' rules often provide efficient procedures to seek emergency measures from emergency arbitrators.

[181] Article 26 of the PCA Environmental Rules grants tribunals the power to take interim measures to 'prevent serious harm to the environment falling within the subject matter of the dispute'.

[182] Arbitration is often considered a confidential process due to its private nature. This means that the arbitration proceedings and related materials, including the existence of arbitration, are kept confidential and private between the parties involved, and thus cannot be divulged to third parties. Only parties, their legal representatives, and individuals specifically authorized by each party can attend the arbitration hearing, but they are subject to a duty of confidentiality. Julian Lew, Loukas Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2023) para. 1–26.

[183] Cindy G. Buys, 'The Tensions between Confidentiality and Transparency in International Arbitration' (2003) 14 American Review of International Arbitration 121, 123.

[184] International arbitration with non-public dispute resolution process provides more private and more confidential compared to litigation. This is because for example the hearings are typically closed to the public and press, both submissions and awards often remain confidential unless otherwise is agreed. Nevertheless, parties may want to make their disputes public in order to establish binding interpretations. Making the arbitration proceedings or awards public may enhance the company's reputation and demonstrate transparency, which can be valued by customers and investors.

[185] Although the general rule is that no publication takes place if one party objects, publishing awards can serve crucial purposes such as contributing to the development of arbitration, being used as precedents, and instilling confidence in the arbitration process. To ensure the privacy of the parties involved, awards can be published without including names or any other identifying information. Moreover, awards are published without parties' consent in practice. For instance, the ICC publishes some awards without disclosing the parties' identities for research purposes, and the ICSID publishes the existence of an arbitration, including the parties involved and basic details about the dispute, and in some cases, publishes its awards with consent from the parties. Loukas A. Mistelis, 'Confidentiality and Third Party Participation UPS v Canada and Methanex Corporation v United States' (2005) 21(2) Arbitration International 211, 214-219.

can also decide on arbitration proceedings' confidentiality even if it is not explicitly stated in an arbitration agreement, or by applicable arbitration laws, rules, or codes.[186]

Considering the impacts of ESG scandals on companies' reputation and financial performance, confidentiality can play a vital role in addressing ESG issues. That being said, some critics has been opposed resolving ESG disputes through arbitration due to confidentiality concerns, given the public policy importance of ESG issues.[187] Moreover, in the line with the critics, there is a trend towards transparency in international arbitration. This trend is evident in the Hague Rules,[188] UNCITRAL Rules,[189] and ICSID 2022 Rules[190]. However, the PCA Environmental Rules take into account the sensitivity of environmental matters and include additional measures to ensure confidentiality. [191]

Besides, the concept of confidentiality differs between commercial arbitration and investment arbitration, as the latter is regarded as having a public character.[192] This is because investor-state disputes frequently involve public interest issues that may have broader economic and policy implications for the public at large than contractual disputes.[193] Similar reasoning can be applied to ESG disputes, regardless of whether they are commercial or investment arbitration cases, due to their inherently public interest, as analyzed in following sections.

6. Addressing Weaknesses: Challenges of International Arbitration in ESG Dispute Resolution

6.1. Jurisdictional Limitations

ESG disputes can be resolved through international arbitration, depending on the jurisdiction of an arbitral tribunal and the admissibility of a claim.[194]

[186] Ibid 215-216.

[187] See Amanda Lees, Wilson Antoon, Erin Eckhoff and Jack McNally, 'Suitability of ISDS for Societal Challenges', (2022) Global Arbitration Review <https://globalarbitrationreview.com/guide/the-guide-investment-treaty-protection-and-enforcement/first-edition/article/suitability-of-isds-societal-challenges> accessed 25 April 2023.

[188] Article 38(2) of the Hague Rules gives tribunals a broad discreation to vary the level of transparency of proceedings, while still taking into account factors such as the safety, privacy and confidentiality to find a balance.

[189] See UNCITRAL Rules on Transparency (n 172).

[190] ICSID Convention (n 162).

[191] The PCA Environmental, art 15.

[192] Investment treaty arbitration is considered to have a public character because it involves substantive rights and obligations established by treaties, and governed by public international law and the law of the host state, and its awards has effects on the general public. Tomoko Ishikawa, 'Third Party Participation in Investment Treaty Arbitration' (2010) 59(2) The International and Comparative Law Quarterly 373, 375-376.

[193] Investors as claimants creates a presumption of public interest in both the outcome of arbitration but also arguments during the process. Loukas A. Mistelis, 'Confidentiality and Third Party Participation UPS v Canada and Methanex Corporation v United States' (2005) 21(2) Arbitration International 211, 219

[194] They are determined depending on various factors including the existence and validity of the arbitration agreement, the scope of the arbitration agreement, applicable law and rules, subject matter of the dispute, (the dispute failing within the scope of the arbitration agreement, and arbitrability of the dispute), compliance with timing and procedural requirements, merits of the claim.

First and foremost, tribunals have to ensure all parties' consent to arbitration.[195] While any stakeholder who are party to an arbitration agreement can submit the matter to arbitration, obtaining consent from all stakeholders can sometimes be challenging in ESG disputes.

Despite general acceptance of party autonomy, parties are not allowed to derogate principles of mandatory law and public policies. Given the public interest often at stake in ESG disputes, arbitration should be perceived as a socially acceptable and adequate forum, in other words, procedural (fair and transparent) and substantive (public policies) law requirements should be met. These considerations are discussed in following sections.

In investment arbitration, ESG claims can only be adjudicated if they form part of an investment claim or defense, and if the investment in question qualifies as one defined by the relevant treaty.[196] Most investment treaties only protect investments that are legal and compliant with regulations.[197] Although some tribunals consider the legality requirement of the investment as an admissibility issue,[198] others view 'in accordance with law' provisions as a jurisdictional limitation.[199] The increasing ESG compliance requirements in domestic legislation can thus affect foreign investors' ability to seek compensation. Furthermore, even the treaty lacks explicit 'in accordance with law' provision, the illegality of the investment can be argued based on general principles of international law, good faith,[200] international public policy,[201] or a host state's investment law.[202] Considering these, some of ESG issues can affect the arbitral tribunal's jurisdiction and the admissibility of an investor's claim in investment arbitration.

ESG issues can also be used as a defense if an investor's actions or an investment itself violated applicable laws or regulations. For example, an investor may breach environmental regulations,[203] or engage in bribery or corruption during an investment's operation phase. [204] Thus, investors can be exempted from legal protections, or damages awarded to them can be reduced because their practices are not complaint with ESG aspects.

---

[195] According to Competence-Competence *(compétence de la compétence)* principle, the arbitral tribunal has the ability to decide for itself whether it has the jurisdiction to decide a dispute brough before it by examining existence and validity of an arbitration agreement.

[196] Makane Moïse Mbengue and Deepak Raju, 'Energy, Environment and Foreign Investment' (Eric De Brabandere and Tarcisio Gazzini in eds) *Foreign Investment in the Energy Sector: Balancing Private and Public Interests* (Brill Nijhoff 2014) 171, 189.

[197] Most treaties define an investment as being 'made in accordance with law' of host state.

[198] E.g. *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008).

[199] E.g. *Inceysa Vallisoletana S.L. v Republic of El Salvador,* ICSID Case No. ARB/07/20, Award (2 August 2006); *Gustav F.W. Hamester GmbH & Co K.G. v Republic of Ghana*, ICSID Case No ARB/07/24, Award (18 June 2010).

[200] E.g. *Gustav* (n 199) (The tribunal found that investments made in violation of national or international principles of good faith through corruption, fraud, or deceitful conduct are not protected.)

[201] E.g. *Inceysa* (n 199) (The tribunal found that the claimant's investment obtained through fraud is not protected by the BIT because it violates international public policy.)

[202] E.g. *Saba Fakes v Republic of Turkey*, ICSID Case No. ARB/07/20, Award (14 July 2010) (The tribunal also considered the host's state investment law in evaluting a lawfulness of the investment); *Mamidoil Jetoil Greek Petroleum Products Société S.A. v Republic of Albania*, ICSID Case No. ARB/11/ 24, Award (30 March 2015) (The tribunal took a broader view of the laws, including those related to environmental protection); It is important to note that international invesment law and environmental law can diverge or converge. See Mbengue (n 196) 176-180.

[203] E.g. *Cortec Mining Kenya Ltd. v Republic of Kenya*, ICSID Case No. ARB/15/29, Award (22 October 2018) (The tribunal ruled that failure to comply with the protective environmental regulatory framework was a serious breach.)

[204] See e.g. *Gustav* (n 199).

6.2. Arbitrability in ESG Disputes

Arbitrability refers to the capability of disputes to be resolved through arbitration, and it presents a limitation on the freedom of parties to submit disputes to arbitration.[205] Certain subjects, which are exclusively under the jurisdiction, are non-arbitrable.[206] The non-arbitrability doctrine is based on the idea that certain matters are intertwined with public interests or third-party interests, and are thus not appropriate to handle behind closed doors. Considering this standpoint, the crux of the debate regarding the arbitrability of ESG disputes is due to their public interest nature.

Arbitrability of ESG disputes varies across countries depending on their own political, social, and economic policies.[207] Broadly speaking, based on objective arbitrability test,[208] disputes related to ESG obligations contained in commercial contracts are arbitrable because of being contractual disputes.

Criminal offences, insolvency, bankruptcy matters, and *in rem* rights[209] are generally non-arbitrable. On the other hand, *in personam* rights[210] are generally arbitrable. Indeed, ESG issues that are not involve rights *in rem* are arbitrable.[211] However, the Environmental Crime Directive requires member states to criminalize serious violations of environmental legislation.[212] Thus, infringements of environmental rules may be non-arbitrable due to their determination as a criminal matter.

[205] The issues of arbitrability are not left to the discretion of parties or the interpretation of the arbitration agreement. They are determined by legislation directed at arbitration agreements, regardless of the parties' intentions. In other words, the arbitrability is a question of legislative intent and conflict of laws. A dispute is arbitrable where it meets the general requirements of arbitrability according to the applicable law and where there are no limitations on arbitrability imposed by the same law. L. Yves Fortier, 'Arbitrability of Disputes', in Gerald Aksen, Karl-Heinz Böckstiegel, Paolo Michele Patocchi and Anne Marie Whitesell (eds), *Global Reflections on International Law, Commerce and Dispute Resolution*, *Liber Amicorum in honour of Robert Briner* (ICC Publishing 2005) 269, 270.

[206] Nonarbitrability does not affect validity and legality of an entire arbitration agreement. It is different from substantive invalidity of an arbitration agreement and illegality of an arbitration agreement. Contractual invalidity, which derives from generally applicable contract law principles, refers to the situation where the entire arbitration agreement is deemed invalid. The illegality of an arbitration agreement, when it is illegal and unenforceable, occurts if it is used for illegal purposes such as money laundering, or if it violates legal prohibitions such as trade sanctions. Born (n 168) 1033-1037.

[207] The scope of arbitrability is established by national laws and can be vary across different national laws. The meaning of arbitrability is narrower in Europe, compared to U.S. legal terminology. To give examples of laws that have broad definitions of arbitrability, Swiss law allows any dispute involving economic interest or property to be subject to arbitration, while German law permits any claim having pecuniary value for the parties to be arbitrated. On the other hand, Belgian and Dutch law limit arbitrability to disputes arising out of specific legal relationships that are permissible to compromise.

[208] Arbitrability has two dimensions: subjective and objective. While subjective arbitrability (*rationae personae*) is related to the contractual capacity and consent of parties, objective arbitrability (*rationae materiae*) refers to limitations on the types of disputes that can be arbitrated based on their subject matter of the dispute.

[209] Rights *in rem* refer to rights related to a specific asset or property and exercisable aganist anyone.

[210] Rights *in personam* refer to contractual rights of the parties involved in the subject matter of the dispute.

[211] Roderick R.C. Salazar III, 'The Arbitrability of Environmental, Social and Governance (ESG) Issues' (2022) Fortun Narvasa & Salazar <https://www.fnslaw.com.ph/the-arbitrability-of-environmental-social-and-governance-esg-issues/> accessed 20 March 2023.

[212] Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law [2018] OJ L 328.

Nevertheless, in recent times, the non-arbitrability doctrine has become more moderate.[213] This pro-arbitration approach allows new areas of law to be arbitrated, including antitrust and competition, consumer protection, environmental protection disputes with certain conditions.[214] Despite controversies, some disputes related to ESG have been considered arbitrable to some extent, including those related to human rights, environmental concerns, labor,[215] corporate governance disputes,[216] misrepresentation, civil claims related to corruption and bribery,[217] and other miscellaneous claims including product liability claims.[218] Importantly, corporate governance disputes, particularly those involving corruption, bribery, or money laundering, may have a greater potential to implicate strong public interests than other ESG disputes In such cases, a tribunal must consider whether it has a duty to investigate.[219]

Ultimately, the arbitrability of ESG disputes depends on the facts and circumstances of the case, as well as the law governing arbitration in the relevant jurisdiction. While some developments suggest that ESG disputes are being taken more seriously, even being treated similarly to criminal matters, others promote the use of arbitration by broadening the scope of arbitrable matters.

6.3. Public Policy Considerations

In order to benefit from a pro-enforcement regime, arbitrators must consider public policy aspects of ESG regulations.[220] ESG rules may be considered mandatory and qualify as public policy depending on the country's approach. Importantly, the legal strength of ESG rules can be uncertain when applied in an international context.[221]

The application and enforcement of ESG regulations may depend on several factors, including the underlying foundation, public policy goals, the specific practice, and the level of risks. The specific facts and circumstances should be taken into account when considering ESG regulations. For example, while polluting grounds that harm the environment may be deemed breaches of public policy, others like non-hazardous waste disposal that are less harmful may be treated differently. Additionally, disputes brought by investors over ESG regulations related to public policy, such as health, environment, public welfare in investment arbitrations concern not only the parties involved but also the public.[222]

---

[213] This is partly due to the emphasis placed on party autonomy in international commercial matters.

[214] See Karim Y. Youssef, 'The Death of Inarbitrability', in Loukas Mistelis and Stavros Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009).

[215] In some jurisdictions, claims related to discrimination, wages, and retirement benefits in employment disputes can be resolved through arbitration. Certain European jurisdictions, such as Belgium, Italy, England, and France, deem labor or employment disputes non-arbitrable. On the other hand, in other jurisdictions like Germany, the Netherlands, Switzerland, and the US, at least some types of these disputes can be resolved through arbitration.

[216] Corporate governance disputes between shareholders, a company, and its officers are considered arbitrable to some extent in some jurisdictions, such as Germany, Switzerland, and the Netherlands.

[217] In most legal systems, civil claims related to corruption and bribery can be settled through arbitration, except for cases involving criminal or administrative liability and associated sanctions.

[218] Born (n 168) 1059 – 1131.

[219] There may be need of actions taken by state judges rather than arbitrators because some disputes involve prosecutorial or administrative discretion.

[220] Awards that contradict public policy cannot be recognized.

[221] Certain ESG legislation may be categorized as 'overriding mandatory rules', which implies that they should apply regardless of the conflict of laws rules. Other ESG legislation may strive to protect fundamental core values.

[222] See Ishikawa (n 192) 376.

6.4. Balancing Confidentiality and Transparency

Corporate practices that do not consider ESG concerns can have global consequences that go beyond the parties involved in disputes, potentially affecting public interests. As a result, it is necessary to increase transparency, particularly in cases where public interests are involved in ESG disputes. This reasoning is already used in investment arbitration to emphasize the need of transparency.

Publicizing ESG disputes may encourage companies to take ESG seriously, particularly when their reputations are at stake. Conversely, keeping ESG disputes private can enable infringing parties to hide their misconduct and evade accountability.[223] This is why confidential arbitration without public scrutiny may not achieve the goal of influencing business conduct, unlike strategic litigation.

Moreover, in investor disputes over ESG regulations, the potential "chilling effect" on host states willingness to adopt and enforce its ESG standards.[224] This effect can occur due to not only arbitration costs but also a lack of transparency in cases where investors threaten to take action against states.[225] Similarly, in breaching stabilization clauses in ICSID contract-based arbitration can lead to compensation claims and capital flight, and also have a chilling effect on public policy development.[226]

Overall, the tension between the desire of confidentiality and the need of transparency is apparent in ESG disputes. To address the tension and strike a balance, the level of confidentiality should be determined by the details of each specific case. To illustrate, in some cases, disclosing information about the actual or potential impacts of a project on the environment is necessary, while in other cases, keeping information private may be necessary to protect trade secrets or other sensitive information.

Lack of transparency can also restrict non-parties from participating in the process and representing public interest aspects in ESG disputes.

6.5. Third Party Participation

On the basis of the consensual nature of international arbitration, only the contracting parties can participate in the arbitration proceedings. According to principle of privity of contract,[227] the scope of an arbitration agreement is limited to contracting parties in principle. In other words,

---

[223] Vannieuwenhuyse (n 107) 16

[224] There can be negative impact on the state's ability and willingness to develop its regulatory framework depending on how we interpret the clash between two investment protection standards (fair and equitable treatment and protection of investors' legitimate expectations, and indirect expropriation). In cases where investors has prevailed, it may raise concerns that could result in a regulatory chill. See e.g. *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award (4 May 2017) (The tribunal held that changes to the regulatory framework for renewable energy violated investors' legitimate expectations and breached fair and equitable treatment.); *Bilcon of Delaware et al v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015) (The tribunal did not consider broader public policy concerns or balance investor expectations against sustainable development goals, such as environmental protection.) Nevertheless, in other cases, tribunals have been more respectful of a state's right to regulate in the public interest. See also e.g. *Philip* (n 150).

[225] The use of investment treaty arbitration, which permits investors to challenge environmental measures implemented by host states, can pose a potential "chilling effect". Ishikawa (n 192) 395

[226] Ibid 397.

[227] Privity means that only the parties to a contract are entitled to enforce the rights and obligations within the contract, it follows as a consequence that a third party cannot enforce the contract.

third parties, by definition, are excluded. Nonetheless, applying this principle too strictly may lead to inconvenient and unfair outcomes in ESG disputes. This is because parties in ESG disputes may not commonly have contractual relationships. On the other hand, third parties like affected communities or other stakeholders can provide valuable perspectives to address the impacts of business practices.[228] Moreover, the consequences of ESG issues can extend beyond contractual parties and affect external and multiple stakeholders. This is why ESG issues are prone to the involvement of third parties to consider and incorporate interests of all relevant stakeholders.

Compared to litigation, international arbitration often lacks avenues for third party involvement. Most arbitration laws prioritize party autonomy over procedural efficiency. Interested third parties have options before courts without contractual relationships. However, the third-party beneficiary doctrine[229] does not have the same application in arbitration as it does in litigation. Extension of the arbitration agreement to the third parties under this doctrine requires beyond merely being a third-party beneficiary.[230] In this respect, the UK Contracts (Rights of Third Parties) Act (1999) recognizes and extends this doctrine to arbitration agreement.[231] It provides a potential solution by allowing third party beneficiaries to enforce a term of a contract and to arbitrate ESG disputes under certain circumstances.[232] For example, if ESG clauses in a supply chain contract qualify as a substantive term and are subject to an arbitration agreement, a third-party beneficiary, such as a community affected by the supplier's activities, may be able to initiate arbitration proceedings. Additionally, ABA MCCs 2.0 proposes a model clause to waive the privity of contract for third-party beneficiaries in the supply chain and allow them to enforce their rights.[233]

In the realm of ESG disputes, amicus curia[234] is one of the methods for third party participation.[235] Intervening as an amicus often related to public interests, such as human rights and environmental protection.[236] For example, amicus can be interested civil society groups,

---

[228] ICC Commission on Arbitration and ADR, 'Resolving Climate Change Related Disputes through Arbitration and ADR' (2019) <https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/icc-arbitration-and-adr-commission-report-on-resolving-climate-change-related-disputes-through-arbitration-and-adr/> accessed 28 March 2023.

[229] It is a legal concept that allows non-signatories to a contract to receive benefits from that contract and demand performance of those benefits under certain circumstances.

[230] It requires that the contract specifies the third parties' benefits, the benefits are intended, and the scope of arbitration clause allows for such a extension.

[231] According to Section 8 of the UK Contract (Rights of Third Parties) Act 1999, if a third party enforces a substantive term of the initial contract that is subject to an arbitration agreement, the third party shall be deemed a party to the arbitration agreement. UK Contract (Rights of Third Parties) Act (1999) c.31

[232] It is worth noting that there have been no known instance where this Act being used in disputes related to ESG. Additionally, there are differing opinions about this Act's effect on third-party beneficiaries' right to enforce a term of the contract. See Bernard Hanotiau, *Complex Arbitrations: Multi-party, Multi-contract, Multi-issue – A comparative Study* (2n edn Kluwer Law International 2020) 29-31.

[233] See Snyder (n 62).

[234] Amicus curia (friend of the court) is the method of third party participation to provide information, expertise or insight relevant to the dispute.

[235] In arbitration proceedings, joiner, consolidation and amicus curia are considered as methods for third party participation, but joiner of a third party and consolidation of different arbitrations require the consent of the parties. Lew (n 193) 389-392.

[236] Some criteria for the involvement of amici curiae in arbitration proceedings is identified, including the procedural rules for the tribunal's decision-making power in relation to amici, the public nature and public interest of the dispute, the potential contribution of third party, the balance of the benefit of amicus briefs with the burden on the parties, the prohibition on raising new issues by the amici, parties' right to respond

and their amicus curiae submissions can be seen as an attempt by NGOs to promote the implementation of ESG standards. However, it is also argued that amicus submissions may introduce political considerations into a neutral process, potentially leading to a loss of legitimacy and increase in lobbying effects.[237]

It should be emphasized that the use of amici curia has been more prevalent in investment arbitration compared to commercial arbitration due to the fact that issues of public interest arise in investment claims.[238] Amicus curiae participation is generally accepted in ICSID arbitration,[239] but there are also cases where such requests were rejected.[240]

Overall, third-party participation in ESG disputes ensures that public interests and broader issues like sustainable development and human rights are taken into account.[241] Incorporating a mechanism for third party involvement and addressing parallel proceedings can promote efficiency.[242] It also enhances legal and procedural transparency, legitimacy and accountability.

6.6. Costs of Arbitration as Monetary Imbalance of Power

Compared to litigation, parties in arbitration are required to pay the fees of arbitrators, an arbitral institution, and logistical expenses.[243] The allocation of costs can vary depending on the type of arbitration, the details of the case, and the jurisdiction.[244] To minimize

---

to the amici's points, and the limited access of amici to arbitration documents. Loukas A. Mistelis, 'Confidentiality and Third Party Participation UPS v Canada and Methanex Corporation v United States' (2005) 21(2) Arbitration International 211, 226-227.

[237] Hanotiau (n 232) 354.

[238] The participation of third parties as amicus curiae in investment arbitrations have been acknowledged in the ICSID Arbitration Rules (rule 37) and the UNCITRAL Rules on Transparency (art 4). Rule 37 of the ICSID Arbitration Rules has allowed for amicus curiae briefs to be accepted in both treaty-based and contract-based arbitration, if the dispute is of public nature and certain criteria are met.

[239] For example, in *Philip Morris* case, the tribunal found the participation of some international public health communities crucial in the assessment of the effectiveness and reasonableness of the measures. *Philip* (n 150).

[240] E.g. *Aguas del Tunari, SA v Republic of Bolivia* ICSID Case No. ARB/02/3, Letter by NGO to Petition to Participate as amici curiae (29 Janurary 2023) (Amicus curiae requests of environmental NGOs and individuals were rejected, arguing that the interplay of the ICSID Convention and BIT, and the consensual nature of arbitration implies that acceptance of such submissions is at the parties' discretion.); *Bear Creek* (n 156) (The tribunal rejected one amicus curia submission because it was deemed unhelpful for the decision-making process.)

[241] Nathalie Bernasconi-Osterwalder and Lise Johnson, 'International Investment Law and Sustainable Development: Key cases from 2000-2010' (2011) International Institute for Sustainable Development, 29.

[242] To prevent parallel proceedings in other fora and ensure a focused dispute resolution process, including a waiver by third parties can provide clarity and prevent parties from pursuing multiple simultaneous proceedings.

[243] Despite arbitration's additional expenses, they may be outweighed by the costs of legal representation in parallel or multiple proceedings in national courts. International disputes can be brought before multiple courts on different jurisdictions. This can result in higher legal expenses and delays. It is the case particularly in case of the absence of exclusive forum selection clause. Additionally, arbitration can avoid the costs of re-litigation of factual issues, costly fact-finding, and disagreements over court procedures, which can be occur in litigation.

[244] There are different approaches regarding cost allocation, namely the "pay your own way" approach, where each party bears its own legal fees and splits the tribunal costs (also known as "American rule"), and the "costs follow the event" approach where the unsuccessful party bears the cost of arbitration (also known as loser pays" or "English approach"). Although the latter approach is commonly followed in international commercial arbitration, there is no uniform approach in investment arbitration. See

discouragement caused by the allocation of costs, an approach tailored for ESG disputes can be adopted.

The complexity and evolving nature of ESG disputes may increase arbitration, especially if extensive testimony and evidence are required.[245] For example, if the dispute over environmental pollution requires determining liability and damages, continued monitoring may be necessary, resulting in additional costs.

The potential costliness of the arbitration process may pose a financial barrier creating a power imbalance between parties. This can lead to an amplification of privilege, where the more powerful and well-resourced parties can leverage their financial resources to gain a greater advantage in the arbitration process and the outcome in their favor.[246] Furthermore, multinational corporations with more resources than some countries may create an imbalance of resources in investment arbitrations.[247]

To overcome financial barriers, one possible solution is to provide funding to the disadvantaged party. This can help level the playing field and ensure equal access to the arbitration process. In ESG disputes, claimants can seek support from third-party funders, but they may face challenges in receiving aid from NGOs if the dispute is arbitrated. This is because third-party funders prefer to fund cases that involve public litigation, which is more transparent. Moreover, the unpredictability of damages and higher threshold for liability associated with ESG disputes may make them less attractive for third-party funding. Apart from third-party funding, fast-tracking arbitration, choosing a convenient place for the hearings,[248] or using remote hearings[249] can help save costs. By considering possible mitigations, parties can promote greater accountability for ESG issues, leading to better outcomes for those affected by the dispute.

6.1. Potential Imbalance of Knowledge

In addition to potential imbalance in financial power, there may also an imbalance in knowledge. Parties who have greater access to information and bargaining power may have an advantage. For instance, consumers are often considered as weaker parties compared to

Kateryna Bondar, 'Allocation of costs in investor-State and commercial arbitration: towards a harmonized approach' (2016) 32(1) Arbitration International 45.

[245] The high costs of arbitration can be attributed to a variety of factors, such as the need for expert witnesses, lengthy written submissions, detailed factual and expert evidence.

[246] Lisa E. Sachs, Lise Johnson, Kaitlin Y. Cordes, Jesse Coleman and Brooke Güven, 'The Business and Human Rights Arbitration Rule Project: Falling Short of its Access to Justice Objectives' (2019) Columbia Center on Sustainable Investment 5.

[247] According to 2015 Global Justice Now's research, many global corporations including Walmart, China National Petroleum, Royal Dutch Shell, Exxon Mobil, Volkswagen, Toyota Motor, Apple and BP have become wealthier than some countries, such as Switzerland, Norway and Russia. Pat Sweet, 'Corporations dominate world's top 100 economic entities' (2016) Accountancy Daily <https://www.accountancydaily.co/corporations-dominate-worlds-top-100-economic-entities> accessed 10 April 2023.

[248] The place of arbitration does not determine the location for the hearings, but rather the law governing the arbitration proceedings. Hence, it is possible to conduct arbitration hearingsa in a location other than the seat of arbitration.

[249] Remote hearings, such as those conducted through video conferencing, offer a cost-effective alternative to in-person hearings, thanks to technological advancements. Additionally, they are a more environmentally-friendly option.

sellers due to their limited bargaining power and knowledge.[250] Repeat players may also have advantages over one-shooters in arbitration hearings due to their familiarity with the process and experience in presenting the facts that best support their positions.[251]

Given disparity in experience, knowledge, and resources between the parties, arbitration may undermine substantive rights and hinder access to justice, particularly in ESG disputes related to human rights.[252] Additionally, there is a risk of potential abuse by either the other party or the arbitrator, for example, if arbitration is designed in a way that makes it difficult for some parties to succeed. Moreover, weaker parties are more likely to bear a disproportionate amount of risks in arbitration involving employment issues. This is because the success of employees in arbitration related to employment discrimination cases, such as racial and sexual harassment, is lower than in litigation.[253]

7. Evaluation the Effectiveness of International Arbitration in Resolving ESG Disputes

7.1. A Comparative Analysis of Arbitration and Litigation in Resolving ESG Disputes

The table below presents a comparative analysis of arbitration and litigation in resolving ESG disputes based on various criteria. It highlights the strengths and weaknesses of each method, enabling stakeholders to select the most effective method for resolving ESG disputes by considering these factors.

Table 4: A Comparison of Arbitration and Litigation in ESG Disputes

Criteria	**Arbitration**	**Litigation**
Forum	Private forum	Public court system
Resolution process	Consensual process initiated by agreement	More adversarial process initiated by filing a lawsuit
Decision-makers	Neutral arbitrator(s)	Judges
Control over process	Parties have more control	Court procedures governed by rules
Expertise	Opportunity to select arbitrators with ESG expertise	Judge's expertise in the relevant area of law
Procedural flexibility	Parties have more control over procedure	Procedures governed by court rules
Customization of process	Parties have flexibility in designing the process	Process governed and bound by court rules and procedures

[250] See Konstanze von Papp, 'The Nature of EU Law and International Arbitration' *EU Law and International Arbitration: Managing Distrust Through Dialogue.* (Oxford: Hart Publishing 2021) 16, 42.

[251] "Repeat players" refer to parties who participate in multiple arbitration before, while "one-shotters" refer to parties who participate in arbitration for the first time. This is particularly evident in business to consumer disputes, where manufacturers often have a strong position. Shauhin A. Talesh and Peter C. Alter, 'The devil is in the details: How arbitration system design and training facilitate and inhibit repeat-player advantages in private and state-run arbitration hearings' (2020) 42(4) Law & Policy 315.

[252] See Sachs and others (n 246).

[253] Pat K. Chew, 'Arbitral and Judicial Proceedings: Indistinguishable Justice or Justice Denied?' (2011) 46 Wake Forest Law Review 185, 186.

Enforceability (Enforcement of decisions)	Generally enforced across jurisdictions (pro-enforcement)	Enforcement may require additional legal proceedings
Efficiency (Speed)	Generally faster; taking months	Potentially longer; taking years
Evidence rules	Flexibility in choosing rules of evidence	Strict adherence to legal rules of evidence
Cost	Costs may vary, but potentially lower	Costs may vary but, potentially higher
Accessibility	Costs are typically paid by the parties involved and can be high, which can be a challenge for those with limited resources	Court litigation also has significant costs, such as court fees and legal representation
Confidentiality and Transparency	Confidential to protect sensitive business information and reputation	Generally public and, allowing for transparency, accountability and public scrutiny
Preserving relationships	Can be less adversarial, allowing to maintain business relationships	Can strain relationships due to adversarial nature
Finality of decisions	More final and binding	Generally final and binding
Appeal process	Limited or no appeal	Opportunity for appeal
Precedent and Consistency	Limited impact on future cases	Establishes legal precedent

As outlined in the table, arbitration and litigation offer different approaches to resolving ESG disputes. Arbitration, for instance, offers a comprehensive approach, lower costs, and expertise decision-makers. However, it may limit public transparency and scrutiny. On the other hand, litigation can provide transparency, accountability, and public scrutiny, but it may be more expensive and time-consuming, and may not offer the same level of flexibility in tailoring resolution strategies to specific ESG risks.

Based on the comparative analysis, it can be concluded that arbitration is a preferable option over litigation for resolving ESG disputes due to various reasons, such as its ability to effectively handle the complexity of ESG issues, preserve business relationships, and address international aspects and the extensive risk spectrum. However, the effectiveness of each method ultimately depends on various factors, such as the nature of the dispute, the specific circumstances of each case, the specific needs and preferences of the parties involved, the available resources, and the desired outcomes.

7.2. Evaluation of the Effectiveness of International Arbitration in ESG Disputes

The following table evaluates the effectiveness of international arbitration based on the criteria of ‘the shared characteristics and corresponding challenges in resolving ESG disputes’, as analyzed above. The analysis involves determining whether international arbitration possesses the requisite factors for effective resolution and examining its implications. Ultimately, it highlights the role of international arbitration in resolving ESG disputes.

*Table 5: Evaluation of the Effectiveness of International Arbitration in Resolving ESG Disputes**

* In order to clearly show the implications, arrow symbols are used in the table. An up-pointing triangle (▲) indicates positive implications, and a down-pointing triangle (▼) indicates negative implications.

Criteria	**Requisite Factors for Effective Resolution**	**Implications of International Arbitration**
Complexity of ESG issues *- Multifaceted nature* *- Multiple stakeholders* *- Intersection of Legal, Business, and Societal Perspectives* *- Legal complexities* *- Complexity of global supply chains*	Comprehensive approach Stakeholder representation Accessibility and affordability	▲ Expertise of arbitrators in ESG matters (multidisciplinary expertise, in-depth knowledge of ESG matters, and understanding of legal frameworks, corporate practices, and stakeholder expectations) ▲ Neutrality (a fair and unbiased resolution process by providing an impartial forum) ▲ Flexibility (to accommodate the particular needs of ESG disputes; e.g., participation of multidisciplinary experts, utilization of evidence and expert testimony) ▼ Challenges in ensuring fair representation of all affected communities: third party participation issues and potential limitations (e.g., principle of privity of contracts, contractual and jurisdictional limitations) ▼ Potential power imbalances ▼ Limited time ▼ Longer proceedings and higher costs due to complexity, the need for expert analysis, scientific evidence etc.
Public interest nature	Accountability and transparency Balance private and public interests	▲ Confidentiality to protect reputation ▲ Ability to balancing confidentiality and transparency ▲ Growing recognition of the importance of transparency and efforts to promote transparency ▼ Lack of transparency ▼ Limited public visibility and awareness ▼ Limited opportunities for third party participation ▼ Challenges in incorporating public interest considerations withing the confines of private arbitration ▼ Arbitrability ▼ Public policy and enforcement issues
International aspects	Familiarity with different regulatory frameworks Enforceability	▲ Arbitration is often considered as the best method of resolving cross-border business disputes. ▲ Ability to navigate diverse legal systems and a deep understanding of local customs, laws and practices, and non-binding soft law standards

		▲ Pro-enforcement (enforceability of arbitral awards across different jurisdictions) ▲ Flexibility (not limited by the boundaries of specific legal systems)
Regulatory and compliance challenges *- Complex regulations* *- Regulatory gaps* *- Evolving ESG landscape* *- Lack of standardization in ESG metrics*	Navigating complex regulatory frameworks Filling legal and regulatory gaps Adaptability	▲ Expertise in the field of ESG and knowledge of ESG regulations ▲ Flexibility to interpret relevant regulations and standards, and to consider various metrics and industry-specific standards ▲ Flexibility to adopt ESG tailored procedures ▲ Ability to respond to emerging ESG issues and adapt procedures accordingly
Extensive risk spectrum ***-*** *Reputation vulnerability and risks* *- Financial and operational consequences*	Effective resolution strategies	▲ Confidentiality to mitigate reputation risks and to protect sensitive business information ▲ Better management of excessive litigation risk and limitation of multiple proceedings (by offering an arbitral forum for potentially affected stakeholders) ▲ Avoiding public, lengthy and costly litigation ▲ Efficiency and speed in addressing financial and operational implications, potentially reducing long-term costs ▼ Using confidential arbitration can give the impression that the company is trying to hide its harmful practices or avoid public scrutiny and responsibility
Long-term and future-oriented effects	Consideration of future impacts	▲ Efficiency by flexibility in adopting proceedings tailored to ESG disputes ▲ Finality. The finality of arbitration provides a conclusive resolution, minimizing the potential for prolonged legal battles and offering certainty for parties involved. ▼ Increased duration and costs

Need of urgent response and prevention	Timely and efficient resolution	▲ Ability to take interim measures to prevent further damage or violations and to address the need for immediate action ▲ Efficiency and speed resolution ▲ Flexibility in adopting accelerated timelines and streamlined procedures to address time-sensitive ESG disputes

From a critical and broader perspective, it can be stated based on the evaluation conducted in Table 5 that international arbitration can effectively resolve ESG disputes by promoting various strengths, such as expertise, neutrality, flexibility, and efficiency. Achieving these requires arbitrators with in-depth knowledge of ESG and related legal complexities, an impartial and adaptable approach, and well-designed procedures. It is important to strike a balance between public and private interests and to ensure fair representation of all stakeholders. In order to address public interest concerns and maintain credibility of the arbitration, the process should ensure fair representation, promote transparency and accountability, and balance confidentiality with the need for public awareness. In order to promote inclusivity in ESG dispute resolution, it is important to overcome obstacles to effective stakeholder participation and address power imbalances. Failing to do so may result in a sense of exclusion or unfairness among some stakeholders.

Overall, international arbitration has the potential to play a critical role in resolving ESG disputes. It is important to consider that the implications of international arbitration can vary depending on different factors affecting its effectiveness, including details of each case, the choice of law and place of arbitration, and chosen arbitration rules.

8. Conclusion

ESG disputes can arise in international commercial and investment arbitrations. In commercial arbitration, disputes may arise from ESG clauses in commercial contracts or international ESG commitments. Similarly, in investment arbitration, ESG disputes may arise from investment treaties when investors claim that host states have failed to protect ESG concerns, or failed to protect investments due to regulatory changes. Conversely, states may assert counterclaims against investors for their ESG failures. Furthermore, the recent improvements in arbitration rules demonstrate the growing importance of ESG concerns, aiming to strengthen the use of international arbitration as means for resolving ESG disputes.

International arbitration offers several strengths, including neutrality, expertise, procedural flexibility, centralized forum, enforceability, finality, efficiency, and confidentiality. By leveraging the strengths of arbitration, stakeholders can work towards fair, efficient, credible and effective means of addressing ever-evolving and complex ESG issues on a global scale. Despite its strengths, some weaknesses of international arbitration may make it challenging to use international arbitration to resolve ESG disputes. Several challenges can arise, such as, jurisdictional limitations, arbitrability, public policy concerns, the lack of transparency, third-party participation, high costs of arbitration, and power imbalances. Striking a balance between confidentiality and transparency, incorporating a mechanism for third-party involvement,

tailoring the approach to ESG disputes, and carefully considering the relevant jurisdiction can address these weaknesses and minimize their threats.

The effectiveness of utilizing international arbitration to settle ESG disputes has been assessed by examining its strengths and weaknesses. Although arbitration can be advantageous in limiting multiple legal proceedings and enhancing corporate reputation, it's equally important to consider the importance of transparency and the need to incorporate public interest considerations within the confines of private arbitration. The evaluation emphasizes the importance of expertise, neutrality, flexibility, accountability, transparency, and efficiency in resolving ESG disputes while considering stakeholder representation, public interests, international aspects, regulatory challenges, risk mitigation, long-term effects, and the need for urgent responses.

Chapter 5: Conclusion

1. Findings and Analysis

This thesis aims to address the following research question: *What is the role of international arbitration in resolving ESG disputes?*

The objective of this thesis was to explore the role of arbitration in resolving ESG disputes, and to assess its effectiveness and potential as a valuable resolution mechanism in addressing ESG concern.

At the outset, the concept of ESG was explored in chapter 2, and the assessment of ESG factors was conducted to identify any potential sources of disputes accordingly. According to the analysis conducted, the concept of ESG has become a substantial and integral component of modern business practices, being increasingly recognized and emphasized by corporations, investors and governments and other stakeholders. Failure to manage ESG risks may result in reputational damage, financial losses, and legal liabilities.

The significant prominence of ESG concerns in the business world is reflected in the increase of ESG regulations, as well as the inclusion of ESG clauses in international commercial contracts and investment treaties. However, such regulatory and contractual developments also entail potential risks. Failure to comply with ESG obligations mandated by ESG regulations at different levels can result in significant consequences, including legal penalties and reputational damage. Additionally, the growing incorporation of ESG considerations in contractual relationships is seen as a potential source of disputes in the future, increasing the likelihood of breaches of ESG clauses.

In Chapter 3, an in-depth analysis of ESG disputes was presented. As discussed, ESG risks that are not clearly identified can lead to conflicts, which in turn can result in legal claims. ESG claims can arise from a variety of issues, including failure to comply with regulatory or contractual obligations, misrepresentations, inadequate disclosure, a lack of proper due diligence or breach of ESG representations and warranties. Due to interdisciplinary nature of ESG, its disputes cover a broad range of issues, including but not limited to, environmental issues such as climate change, waste and resources management, biodiversity protection; social issues such as human rights violations, diversity and inclusion, labor issues, modern slavery; and governance issues such as bribery and corruption, tax strategy, antitrust, executive compensation, and data protection. Ultimately, ESG disputes possess unique characteristics and challenges that require careful consideration.

The analysis of ESG disputes in section 4 of Chapter 3 shed light on their shared characteristics and challenges, including the complexity of ESG issues, the involvement of multiple stakeholders at both national and international levels, their public interest nature, their international aspects, regulatory and compliance challenges, extensive risk spectrum, the long-term and future-oriented effects of ESG actions, and the need of urgent response. Importantly, they are interconnected and overlap, influencing and adding layers to one another. The analysis highlights the significance of tailored approaches by demonstrating that each has its own set of requisite factors for effective resolution. Taking a comprehensive and systematic approach to analyzing ESG disputes has led to the determination of key criteria for evaluating

the effectiveness of international arbitration as a resolution mechanism, providing insights into the factors that contribute to effective dispute resolution.

Following that, the subsequent Chapter 4 provided an exploration and comprehensive analysis of international arbitration. As international arbitration remains the preferred method of dispute resolution for cross-border disputes, the presence of ESG clauses in contracts and investment treaties suggests an increase in ESG disputes being resolved through international arbitration. This increase is due to the growing recognition of ESG factors in business and investment decisions and the growing inclusion of ESG obligations. Additionally, ESG regulatory changes may lead to an increased occurrence of conflicts in investment arbitrations.

The growing importance of conducting business in accordance with ESG considerations, coupled with the widespread use of arbitration as an international dispute resolution mechanism, suggests a significant increase in the number of arbitrations related to ESG matters in the coming years. Based on the considerations drawn in section 3 of Chapter 5, the use of international arbitration is expected to increase in ESG disputes resolution.

Developments in arbitration regulations, ESG guidelines, and roster of specialized ESG arbitrators have contributed to promote transparency and public interest, enhancing the role of arbitration in addressing ESG disputes. By adopting best practices, developing new standards, and integrating ESG considerations into the arbitration process, stakeholders can enhance the effectiveness and relevance of international arbitration in resolving ESG disputes.

The thesis has also critically examined the strengths and weaknesses of international arbitration, providing insights into the theoretical and practical implications of using international arbitration as a method of resolving ESG disputes. As determined by the analysis, international arbitration possesses numerous strengths in addressing ESG disputes, including neutrality, expertise in complex regulatory frameworks and legal systems, procedural flexibility in accommodating the particular needs of ESG disputes, centralized forum, enforceability across jurisdictions, finality, efficiency, and confidentiality. These strengths allow for fair and balanced resolutions, tailored procedures, efficient processes, and confidentiality, making international arbitration an effective and advantageous mechanism for resolving ESG disputes. Nevertheless, there are also some challenges as weaknesses, such as jurisdictional limitations, arbitrability, public policy concerns, lack of transparency, the limited opportunities for third-party participation, high costs of arbitration, and power imbalances. These may restrict stakeholder involvement. To address these challenges, potential solutions include prioritizing transparency and accountability, providing funding to disadvantaged parties, and incorporating a mechanism for third-party involvement. Tailoring the approach to ESG disputes and considering the relevant jurisdiction can address weaknesses and minimize threats. Despite these challenges, the benefits of confidentiality, party autonomy, and efficiency can still make arbitration the preferred forum for many contracts that include ESG clauses.

The comparative analysis of international arbitration and litigation in resolving ESG disputes conducted in section 7.1 of chapter 5 showed that the acclaimed characteristics of international arbitration make it a preferred alternative to litigation. However, the effectiveness of each method may vary depending on the specific circumstances and the preferences of the parties involved.

The effectiveness of international arbitration has been evaluated based on the criteria of shared characteristics and challenges in ESG disputes in section 7.2 of chapter 5. It provides a comprehensive analysis of the implications of utilizing international arbitration as a means to resolve ESG disputes. This evaluation assesses the adequacy of international arbitration in possessing the requisite factors for effective resolution and thoroughly examines its strengths and weaknesses in the context of resolving ESG disputes. It provides valuable insights into leveraging the strenghts and addressing the weaknesses of international arbitration to achieve fair, efficient, transparent, and accountable resolutions for all stakeholders involved in ESG disputes. At its core, this comprehensive evaluation sheds light on the role of international arbitration in resolving ESG disputes.

In a comprehensive analysis, the findings demonstrated that international arbitration can be considered as procedurally suitable for resolving ESG disputes, but certain adjustments should be to improve the process.[254] When considering the suitability and effectiveness of international arbitration, it is essential to balance the strengths and weaknesses of arbitration, consider the specific characteristics of the dispute, the relevant legal framework, and the extent of stakeholder involvement. By promoting inclusivity, transparency, accountability, engaging knowledgeable arbitrators, considering stakeholder representation, and understanding supply chain dynamics, arbitration can effectively analyze the interplay between ESG factors and their impacts on various stakeholders. It is important to designed process to account for key issues such as potential power imbalances between parties, the public interest in resolving such disputes, and the importance of having arbitrators with expertise.[255]

2. Insights, Contributions and Significance

The analysis provided a comprehensive framework for understanding ESG disputes and their resolution through international arbitration. This analysis includes identifying key benefits and challenges in international arbitration, evaluating its effectiveness in resolving ESG disputes, and thus examining the role of international arbitration in resolving ESG disputes. By situating this research within the broader context of international arbitration and ESG practices, this thesis advances the understanding of the evolving role of arbitration in addressing ESG issues. The insights gained from this research can inform the development of best practices, guidelines, and policies that promote effective ESG dispute resolution.

The significance of this thesis lies in its contribution to the understanding of ESG dispute resolution as it provides a comprehensive analysis of the role of international arbitration in resolving ESG dispute. This analysis contributes to a deeper understanding of ESG disputes and highlights the importance of effective conflict resolution mechanisms to address the challenges they present. The thesis offers valuable insights and practical recommendations. For instance, it emphasizes the need for a multidisciplinary approach that takes into account the broader implications of ESG issues, and highlights the impact of ESG factors on dispute

[254] Grierson and others (n 98) 332

[255] According to the UN report, it is important to integrate similar principles into the framework of arbitration processes for business and human rights disputes. UN Working Group on Business and Human Rights, 'Guiding Principles on Business and Human Rights At 10: Taking stock of the first decade' (2021) A/HRC/47/39 Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises <https://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx> accessed 10 May 2023

outcomes. Overall, the conclusion provides valuable insights into resolving ESG disputes through international arbitration and offers a roadmap for effectively utilizing international arbitration to resolve ESG disputes while ensuring fairness, transparency, and accountability for all stakeholders.

Paired with the rise in regulations, clauses and obligations, ESG disputes can have significant implications for companies, and it is essential to address ESG risks effectively to avoid legal and reputational damage. Parties can manage reputation risks before they escalate into larger issues and scandals by including specific dispute resolution clauses, in addition to ESG clauses, in order to avoid public litigation. It is important for companies to thoroughly comprehend the implications of legally binding contracts, to avoid potential disputes over interpretation, performance, or breach of the contract.

To enhance the role of international arbitration in resolving ESG disputes, transparency, accountability and other factors that present as important components can be prioritized by developing and adopting news standards and guidelines.

3. Limitations and Future Research

Although the scope of this thesis was primarily focused on the role of international arbitration in ESG dispute resolution, it also raises the question of combining arbitration with other alternative dispute resolution methods such as mediation and conciliation. This presents potential areas for future exploration and analysis of hybrid models for resolving ESG disputes.

The research encountered challenges in obtaining comprehensive data on ESG-related arbitration cases due to the confidential nature of arbitration proceedings and the lack of an available and accessible database. Future studies should consider developing specialized databases for alternative data sources and methodologies. The identified challenges underscore the need for continued research and collaborative efforts to enhance the effectiveness of arbitration as a means of resolving complex ESG disputes. Additionally, investigating the role of technology, such as blockchain and smart contracts, in facilitating ESG dispute resolution processes could lead to new opportunities for efficient and transparent resolution mechanisms.

4. Final Remarks

Throughout this thesis, the role of international arbitration in resolving ESG disputes has been explored in depth. The comprehensive analysis provides an important contribution to the existing literature and valuable insights for practitioners, businesses, and policymakers on ESG disputes and international arbitration. It has demonstrated that international arbitration can play a valuable role in resolving ESG disputes, given its potential to provide an effective resolution mechanism, tailored procedures, and efficient processes.

The growing prevalence of ESG clauses in international commercial contracts and investment treaties will foster a heightened reliance on international commercial and investment arbitrations as the preferred means for resolving ESG disputes. This shift reflects the growing recognition of arbitration's ability to provide effective and tailored solutions in the complex and nuanced realm of ESG disputes. As a result, international arbitration will increasingly assume a pivotal role in resolving ESG disputes, reflecting the continuously growing prevalence of ESG considerations in international business relationships.

Bibliography

Book

Born G, *International Commercial Arbitration* (3rd edn Kluwer Law International B.V. 2021)

Byrnes A and others, *International Law in the New Age of Globalization* (Martinus Nijhoff Publishers 2013)

Cole T and Ortolani P, *Understanding International Arbitration* (Routledge 2020)

Cutler C, 'Private transnational governance in global value chains: Contract as a neglected dimension' in Cutler C and Dietz T (eds), *The politics of private transnational governance by contract* (Routledge Press 2017) 79

Fortier Y, 'Arbitrability of Disputes', in Aksen G and others (eds), *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Briner* (ICC Publishing 2005) 269

Hanotiau B, *Complex Arbitrations: Multi-party, Multi-contract, Multi-issue – A comparative Study* (2n edn Kluwer Law International 2020)

Hayashi M, and others, *International Law in the New Age of Globalization* (Martinus Nijhoff Publishers 2013)

Lew J, Mistelis L and Kröll S, *Comparative International Commercial Arbitration* (Kluwer Law International 2023)

Magnarelli M, *Privity of Contract in International Investment Arbitration: Original Sin or Useful Tool?* (Kluwer Law International 2020)

Mbengue M and Raju D, 'Energy, Environment and Foreign Investment' in De Brabandere E and Gazzini T (eds) *Foreign Investment in the Energy Sector: Balancing Private and Public Interests* (Brill Nijhoff 2014) 171

Nakajima T and others, *ESG Investment in the Global Economy* (Springer Singapore 2021)

OECD, *G20/OECD Principles of Corporate Governance* (OECD Publishing 2015)

Park WW, 'Arbitration and Law', in Schultz T and Ortino F (eds), *The Oxford Handbook of International Arbitration* (Oxford Academic 2020) 35

Radi Y, 'The Tripartite Dimension of Conflicts of Interests: Workers, Foreign Investors and Host States in the Energy Sector' in De Brabandere E and Gazzini T (eds), *Foreign Investment in the Energy Sector: Balancing Private and Public Interests* (Brill Nijhoff 2014) 217

von Papp K, 'The Nature of EU Law and International Arbitration' *EU Law and International Arbitration: Managing Distrust Through Dialogue.* (Oxford Hart Publishing 2021) 16

Wood D, 'What do we mean by the S in ESG? Society as a stakeholder in responsible investment' in Hebb T and others (eds), *The Routledge Handbook of Responsible Investment* (Routledge 2015)

Youssef K, 'The Death of Inarbitrability', in Mistelis L and Brekoulakis S (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009)

Case Law

Abrahams v Commonwealth Bank of Australia Federal Court of Australia NSD864/2021 (pending)

ACL Netherlands BV v Lynch [2022] EWHC 1178 (Ch) (17 May 2022

Aguas del Tunari, SA v Republic of Bolivia ICSID Case No. ARB/02/3

Australasian Centre for Corporate Responsibility v Santos [2021] Federal Court of Australia NSD858/2021 (pending);

Barbara Metz et al., v Wintershall Dea AG [2021] Regional Court of Kassel (pending).

Bear Creek Mining Corporation v Peru, ICSID Case No ARB/14/21, Award (30 November 2017)

Bilcon of Delaware et al v. Government of Canada, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015)

Burlington Resources Inc v Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Counterclaims (7 February 2017)

ClientEarth v Shell's Board of Directors [2023] EWHC 1137 (Ch)

Commodore v H&M Hennes & Mauritz LP, 7:22-cv-06247 (S.D.N.Y. 2022)

Complaint to Ad Standards on HSBC's Great Barrier Reef ad, Ad Standards 0265-21 (13 October 2021)

Copper Mesa Mining Corporation v Republic of Ecuador, PCA No 2012-2, Award (15 March 2016)

Cortec Mining Kenya Ltd. v Republic of Kenya, ICSID Case No. ARB/15/29, Award (22 October 2018)

Deutsche Umwelthilfe (DUH) v Bayerische Motoren Werke AG (BMW) [2021] Regional Court of Munich (pending)

Deutsche Umwelthilfe (DUH) v Mercedes-Benz AG [2021] Regional Court of Stuttgart (pending)

Earth Island Institute v Coca-Cola Co., 1:21-cv-01926 (D.D.C. 2022)

Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Award (4 May 2017)

Envol Vert et al. v Casino [2021] Saint-Étienne Judicial Court (pending)

Friends of the Earth et al. v Total [2019] Nanterre High Court (pending);

Gustav F.W. Hamester GmbH & Co K.G. v Republic of Ghana, ICSID Case No ARB/07/24, Award (18 June 2010)

In re Exxon Mobil Corp. Derivative Litigation, 3:19-cv-01067 (N.D.TeX 2019)

In re Massey Energy Co. Securities Litigation, 883 F. Supp. 2d 597, 5:10–cv–00689 (S.D.W. Va. 2012)

In re Oatly Group AB Securities Litigation, 1:21-cv-06360-AKH (S.D.N.Y. 2022)

Inceysa Vallisoletana S.L. v Republic of El Salvador, ICSID Case No. ARB/07/20, Award (2 August 2006)

Kaiser, et al. v Volkswagen AG [2021] Regional Court of Braunschweig (pending)

Last Beach Cleanup v TerraCycle, Inc. et al, 4:21-cv-06086 (N.D.Cal. 2021)

Lawyers for Climate Action Complaint to the Advertising Standards Board, Advertising Standards Authority Complaints Board 21/194 (7 June 2021)

Luciano Lliuya v RWE AG [2017] The Higher Regional Court of Hamm 5 U 15/17 (pending)

Mamidoil Jetoil Greek Petroleum Products Société S.A. v Republic of Albania, ICSID Case No. ARB/11/ 24, Award (30 March 2015)

Marshall v Red Lobster Management LLC et al., 2:21-cv-04786 (C.D.Cal. 2021)

Metalclad Corporation v The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000)

Milieudefensie et al. v Royal Dutch Shell plc. [2021] the Hague District Court C/09/571932 / HA ZA 19-379 (pending)

Naftrac Limited (Cyprus) v National Environmental Investment Agency of Ukraine, PCA Case No. 2009-18, Award (4 December 2012) (PCA Environmental Rules)

Nestle USA, Inc. v Doe et al. 593 U.S., 19-416 (2021)

Nike, Inc. et al. v Kasky 539 U.S. 654 (2003)

Notre Affaire à Tous Les Amis de la Terre, and Oxfam France v BNP Paribas [2023] Judicial Court of Paris (pending)

Okpabi and others v Royal Dutch Shell Plc and another [2021]

Perenco Ecuador Ltd v Republic of Ecuador and Empresa Estatal Petro´leos del Ecuador (Petroecuador), ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim (11 August 2015)

Philip Morris Asia Ltd. v The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (17 December 2015)

Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award (8 July 2016)

Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award (27 August 2008)

Ramirez v Exxon Mobil Corp., 334 F. Supp. 3d 832, 3:16-cv-3111 (N.D. Tex. 2016) (pending)

Rosencrants v Danimer Scientific, Inc., 1:21-cv-02708 (E.D.N.Y. 2021)

Saba Fakes v Republic of Turkey, ICSID Case No. ARB/07/20, Award (14 July 2010)

Soubeste and Others v Austria and 11 Other States [2022] ECHR 31925/22 (pending)

Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt, ICSID Case No ARB/84/3, Award (20 May 1992)

Swartz v Coca-Cola Co. 3:21-cv-04643 (N.D.Cal 2022)

The City of New York v. Exxon Mobil Corp., 21-vc-4807 (VEC) (S.D.N.Y. 2021)

The Police and Fire Retirement System of the City of Detroit v Elon Musk, et al. [2020] C.A. 2020-0477-KSJM (pending)

Uber BV and others v Aslam and others [2021] UKSC 5

Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic, ICSID Case No. ARB/07/26, Award (8 December 2016)

Urgenda Foundation v State of the Netherlands [2015] the Hague District Court C/09/456689 / HA ZA 13-1396

Vedanta Resources Plc and another v Lungowe and others [2019] UKSC 20

Vegetarian Society et al of Denmark v Danish Crown [2021] the Western High Court (pending)

Journal Articles

Acharya N and others, 'Conflicting factors in construction projects: Korean perspective' (2006) 13 Engineering, Construction and Architectural Management 543

Arcuri A and Verbeek B, 'The New Dutch Model Investment Agreement. On the Road to Sustainability or Keeping up Appearances?' (2019) 12 Erasmus Law Review 37

Becchetti L and others, 'Going Deeper into the S of ESG: A Relational Approach to the Definition of Social Responsibility' (2022) 12 Sustainability, 5

Bernasconi-Osterwalder N and Johnson L, 'International Investment Law and Sustainable Development: Key cases from 2000–2010' (2011) International Institute for Sustainable Development

Bondar K, 'Allocation of costs in investor-State and commercial arbitration: towards a harmonized approach' (2016) 32(1) Arbitration International 45

Broadstock D and others, 'The role of ESG performance during times of financial crisis: Evidence from COVID-19 in China' (2021) 38 Finance Reserch Letters 101716

Brown C, 'International, Mixed, and Private Disputes Arising Under the Kyoto Protocol', (2010) 1(2) Journal of International Dispute Settlement 447

Buys C, 'The Tensions between Confidentiality and Transparency in International Arbitration' (2003) 14 American Review of International Arbitration 121

Carooll A, 'Corporate Social Responsibility: Evolution of a Defitional Construct' (1999) 38(3) Business & Society 268, 275

Chew P, 'Arbitral and Judicial Proceedings: Indistinguishable Justice or Justice Denied?' (2011) 46 Wake Forest Law Review 185

Fiaschi D and others, 'How bad is your company? Measuring corporate wrongdoing beyond the magic of ESG metrics' (2020) 63(3) Business Horizons 287

Goh N, 'ESG and investment arbitration: a future with cleaner foreign investment?' (2022) 15 Journal of World Energy Law and Business 485

Greenwood L, ‘The Canary is Dead: Arbitration and Climate Change’ (2021) 38(3) Journal of International Arbitration 309

Ho J, ‘The Creation of Elusive Investor Responsibility’ (2019) 113 AJIL Unbound 10

Mistelis L, ‘Confidentiality and Third Party Participation UPS v Canada and Methanex Corporation v United States’ (2005) 21(2) Arbitration International 211

Orlitzky M and others, ‘Corporate social and financial performance: A meta-analysis’ (2003) 24(3) Organization Studies 403

Paulsson J, ‘Arbitration Without Privity’ (1995) 10(2) ICSID Review - Foreign Investment Law Journal 232

Sachs L and others, ‘The Business and Human Rights Arbitration Rule Project: Falling Short of its Access to Justice Objectives’ (2019) Columbia Center on Sustainable Investment 5

Starks L, ‘EFA Keynote Speech: “Corporate Governance and Corporate Social Responsibility: What Do Investors Care about? What Should Investors Care about?”’ (2009) 44(4) Financial Review 461,

Stuart-Smith R and others, ‘Filling the evidentiary gap in climate litigation’ (2021) 11 Nature Climate Change 651

Zopounidis C and others, ‘Environmental, social and corporate governance framework for corporate disclosure: a multicriteria dimension analysis approach’ (2020) 58(11) Management Decision 2473

Legislation, Guidelines, and International Agreements

Agreement Between The Belgium-Luxembourg Economic Union, on the one hand, and the Republic of Nicaragua, on the other hand, on the Reciprocal Promotion and Protection of Investments (signed 27 May 2005) (‘BLEU-Nicaragua BIT’)

Agreement between the Government of the Republic of Turkey and the Government of the People's Republic of Bangladesh concerning the Reciprocal Promotion and Protection of Investments (signed on 12 April 2012) (‘Bangladesh-Turkey BIT’)

Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part (signed 27 June 2014, entered into force 1 July 2016) (‘EU-Georgia Association Agreement’)

Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part (signed 27 June 2014, entered into force 1 July 2016) (‘EU-Moldova Association Agreement)

Belgium-Luxembourg Economic Union (BLEU) Model BIT (2019)

Belgium-Luxembourg Economic Union Model BIT (2019)

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (‘New York Convention’) (1958) 330 UNTS 3

Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('ICSID Convention) (1965) 575 UNTS 159

Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law [2018] OJ L 328

Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L330/1

Directive 2022/2464/EU of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting [2022] OJ L 322/15

Dutch Child Labor Due Diligence Act (2019) *Wet zorgplicht kinderarbeid*

Dutch Model BIT (2019)

Energy Charter Treaty (signed 17 December 1994, entered into force 16 April 1998) OJ L380/24

French Vigilance Law (*Loi de Vigilance*) (2017) *Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*

German Supply Chain Due Diligence Act (*Lieferkettensorgfaltspflichtengesetz or LkSG*) (2023) *Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten*

ICSID Convention, Regulations and Rules (2022) ICSID/15/Rev.

Italy Model BIT (2022)

Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162

Modern Slavery Act 2015 (2015) c.30

Norwegian Transparency Act (2021) Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions LOV-2021-06-18-99

OECD, OECD Guidelines for Multinational Enterprises (2011)

Paris Agreement (adopted in 12 December 2015, entered into force 4 November 2016) 3156 UNTS

PCA Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources ('PCA Environmental Rules') (2001)

Principles for Responsible Investment, 'PRI Statement: European Commission Proposal on Corporate Sustainability Due Diligence' (2022)

Proposal for a Directive of The European Parliament and of The Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 [2022] OJ 2022/0051/COD

Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector [2019] OJ L 317/1

Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 [2020] OJ L 198/13

The Hague Rules on Business and Human Rights Arbitration ('The Hague Rules') (19 December 2019)

UK Contract (Rights of Third Parties) Act (1999) c.31

UNCITRAL Model Law on International Commercial Arbitration (1985) UN Doc A/40/17

UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ('UNCITRAL Rules on Transparency') (2013) A/68/462

United Nations Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005) 2349 UNTS 41

United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107

United Nations Office of the High Commissioner for Human Rights, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2011) UN Doc A/HRC/17/31

Online Sources

Anti-Salvery International, 'The Cocoa Instury in West Africa: A history of exploitation' (2004) <https://www.antislavery.org/wp-content/uploads/2017/01/1_cocoa_report_2004.pdf> accessed 27 March 2023

Ashley J and Morrison R, 'ESG Governance: Board and Management Roles & Responsibities' (2021) Harvard Law School Forum On Corporate Governance <https://corpgov.law.harvard.edu/2021/11/10/esg-governance-board-and-management-roles-responsibilities/> accessed 27 March 2023

Barron O, 'The Police Powers Doctrine and Investment Law: Dusting Off An Old Concept in the Pursuit of Sustainable Development' (2018) <https://ssrn.com/abstract=3397422> accessed 24 26 March 2023

Boffo R and Patalano R, 'ESG Investing: Practices, Progress and Challenges', (2020) OECD <www.oecd.org/finance/ESG-Investing-Practices-Progress-and-Challenges.pdf> accessed 2 February 2023

Byfield Reputation Counsel, 'Finding the right line: litigation PR in an evolving dispute ecosystem' (2022) <https://byfieldconsultancy.com/wp-content/uploads/2022/02/finding-the-right-line-byfield-09022022-v6.pdf> accessed 25 Janurary 2023

CFA Institute, 'ESG Investing and Analysis' <https://www.cfainstitute.org/en/research/esg-investing> accessed 3 February 2023; Corporate Finance Institute, 'ESG (Environmental, Social, & Governance)' <https://corporatefinanceinstitute.com/resources/esg/esg-environmental-social-governance/> accessed 3 February 2023

Champagne C and others, ‘Can extra-financial ratings serve as an indicator of ESG risk?’ (2022) 54 Global Finance Journal 100638 <https://www.sciencedirect.com/science/article/pii/S1044028321000363> accessed 13 March 2023

Clarke J and others, ‘Global Trends in ESG Disputes’ (2022) ICLG – Class and Group Actions <https://www.ashurst.com/en/news-and-insights/insights/global-trends-in-esg-disputes/> accessed 27 March 2023

Climate Case Chart, ‘Climate Change Litigation Databases’ <http://climatecasechart.com/> accessed 23 March 2023

Cole R and others, ‘Corporate failures: Declines, collapses, and scandals’ (2021) 67 Journal of Corporate Finance 101872 <https://www.sciencedirect.com/science/article/pii/S0929119920303163> accessed 13 March 2023

Cuervo-Lorens R and others, ‘Green or Grey: Regulators Target Greenwashing, Misleading Environmental, Social and Governance (ESG) Claims’ (2022) McMillan LLP <https://mcmillan.ca/insights/green-or-grey-regulators-target-greenwashing-misleading-environmental-social-and-governance-esg-claims/> accessed 18 March 2023

DIS40, 'Autumn Conference 2022: ESG – Dawn of A New Era of Disputes in International Arbitration?', DIS40-EVENT (2022) <https://www.disarb.org/veranstaltungen/dis40-autumn-conference-2022> accessed 25 January 2023> accessed 25 January 2023

Dulieu R, ‘Liability for misleading or untrue statements: ACL Netherlands BV v Lynch’ (2022) Norton Rose Fulbright <https://www.nortonrosefulbright.com/en/inside-disputes/blog/202211-liability-for-misleading-or-untrue-statements-acl-netherlands-bv-v-lynch> accessed 28 March 2023

EU Directorate-General for Trade, ‘Agreement in principle reached on Modernised Energy Charter Treaty’ (2022) <https://policy.trade.ec.europa.eu/news/agreement-principle-reached-modernised-energy-charter-treaty-2022-06-24_en> accessed 28 March 2023

European Comission, ‘Screening of websites for ‘greenwashing’ half of green claims lack evidence’, (Press Release 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_269> accessed 28 March 2023>

European Commission, ‘EU and Angola conclude first-ever Sustainable Investment Facilitation Agreement’ (Press release 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6136> accessed 28 March 2023

European Commission, ‘EU and Republic of Angola launch negotiations for a first-ever Sustainable Investment Facilitation Agreement’ (Press release 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3096> accessed 28 March 2023

European Commission, ‘Green Claims’ <https://environment.ec.europa.eu/topics/circular-economy/green-claims_en> accessed 28 March 2023

EY, ‘How will ESG performance shape your future?’ (2020) <https://www.ey.com/en_gl/assurance/how-will-esg-performance-shape-your-future> accessed 5 March 2023

Fanter T and others, ‘The History & Evolution of ESG’ (2021) RMB Capital <https://rmbcapital.com/news-insights/history-evolution-esg> accessed 10 February 2023

Fenwick M and others, ‘ESG as a Business Model for SMEs’ (2022) European Corporate Governance Institute – Law Working Paper 641/2022, Tilburg Law School Research Paper, 3-5 <https://ssrn.com/abstract=4098644> accessed 21 March 2023

Friedman M, ‘A Friedman doctrine - The Social Responsibility Of Business Is to Increase Its Profits’ (1970) New York Times <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html> accessed 10 February 2023

Gao S and others, ‘Mapping and Clustering Analysis on Environmental, Social and Governance Field a Bibliometric Analysis Using Scopus’ (2021) 13 Sustainability 7304 <http://dx.doi.org/10.3390/su13137304> accessed 4 February 2023

Grierson J and others, ‘Is Arbitration Helping or Hindering the Protection of the Environment and Public Health?’ (2021) 38(3) Journal of International Arbitration 327

Hohenberg V and Welser T F, ‘ESG, private enforcement and strategic litigation in times of war’ (2022) Wolf Theiss <https://www.wolftheiss.com/insights/esg-private-enforcement-and-strategic-litigation-in-times-of-war/#_ftn10> accessed 28 March 2023

ICC Commission on Arbitration and ADR, ‘Resolving Climate Change Related Disputes through Arbitration and ADR’ (2019) <https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/icc-arbitration-and-adr-commission-report-on-resolving-climate-change-related-disputes-through-arbitration-and-adr/> accessed 28 March 2023

Ishikawa T, ‘Third Party Participation in Investment Treaty Arbitration’ (2010) 59(2) The International and Comparative Law Quarterly 373

Lafarre A and Rombouts S, ‘Towards Mandatory Human Rights Due Diligence: Assessing its Impact on Fundamental Labour Standards in Global Value Chains’ (2022) Tilburg Law School Research Paper, 14 <https://ssrn.com/abstract=4155836> accessed 3 June 2023

Lees A and others, ‘Suitability of ISDS for Societal Challenges’, (2022) Global Arbitration Review <https://globalarbitrationreview.com/guide/the-guide-investment-treaty-protection-and-enforcement/first-edition/article/suitability-of-isds-societal-challenges> accessed 25 April 2023

Li M and others, ‘The clean energy claims of BP, Chevron, ExxonMobil and Shell: A mismatch between discourse, actions and investments’, (2022) PLOS One 17(2) <https://doi.org/10.1371/journal.pone.0263596> accessed 28 March 2023

London International Disputes Week Limited, 'LIDW 2022 event homepage logo large', London International Disputes Week (2022) <https://2022.lidw.co.uk/> accessed 25 January 2023

Manzano M and Toimil A, ‘The role of arbitration in ESG disputes’ (2021) Von Wobeser ESG Articles <https://www.vonwobeser.com/index.php/publication?p_id=1650> accessed 10 February 2023

Margolis J and others, ‘Does it Pay to Be Good...And Does it Matter? A Meta-Analysis of the Relationship between Corporate Social and Financial Performance’ (2009) SSRN Electronic Journal, 23 <https://ssrn.com/abstract=1866371> accessed 13 March 2023

McGarry C and others, ‘The Global ESG Regulatory Framework’ (2022) White & Case LLP <https://www.whitecase.com/insight-alert/global-esg-regulatory-framework-toughens> accessed 2 February 2023

MSCI, ‘ESG and the Cost of Capital’ (2021) <https://www.msci.com/www/blog-posts/esg-and-the-cost-of-capital/01726513589> accessed 25 January 2023

MSCI, ‘ESG Ratings Key Issue Framework’ <https://www.msci.com/our-solutions/esg-investing/esg-ratings/esg-ratings-key-issue-framework> accessed 3 February 2023

Norton Rose Fulbright, ‘2023 Annual Litigation Trends Survey’ (2023) <https://www.nortonrosefulbright.com/en-us/knowledge/publications/52bd21a0/2023-annual-litigation-trends-survey> accessed 25 January 2023

Okoko D and Aigbogun T, ‘The Implications of ESG-Based Contractual Provisions in International Arbitration’ (2023) <https://www.lexisnexis.co.uk/blog/research-legal-analysis/the-implications-of-esg-based-contractual-provisions-in-international-arbitration> accessed 25 Janurary 2023

Passas I and others, ‘ESG Controversies: A Quantitative and Qualitative Analysis for the Sociopolitical Determinants in EU Firms’ (2022) 14 Sustainability 12879

PCA, ‘Cases - PCA’ <https://pca-cpa.org/en/cases/> accessed 24 March 2023

PwC, ‘Environmental, Social & Governance’ <https://www.pwc.com/mt/en/publications/sustainability/esg-what-is-it-all-about.html> accessed 3 February 2023

PwC, ‘PwC’s 2021 Global Investor Survey’ (2021) <https://www.pwc.com/gx/en/services/audit-assurance/corporate-reporting/2021-esg-investor-survey.html> accessed 5 March 2023

Queen Mary University London and Pinsent Masons, ‘Future of International Energy Arbitration Survey Report’ (2023) <https://arbitration.qmul.ac.uk/media/arbitration/docs/Future-of-International-Energy-Arbitration-Survey-Report.pdf> accessed 20 March 2023

Queen Mary University London, ‘2021 International Arbitration Survey: Adapting arbitration to a changing world’ (2021) <https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf> accessed 2 April 2023

Queen Mary Univesity London, ‘2018 International Arbitration Survey: The Evolution of International Arbitration’ (2018) <https://arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf> accessed 2 April 2023

Refinitiv, ‘Environmental, Social and Governance Scores From Refinitiv’ (2022) <https://www.refinitiv.com/content/dam/marketing/en_us/documents/methodology/refinitiv-esg-scores-methodology.pdf> accessed 3 February 2023

S&P Global, ‘ESG Scores’ <https://www.spglobal.com/esg/solutions/data-intelligence-esg-scores> accessed 3 February 2023

Salazar III R, ‘The Arbitrability of Environmental, Social and Governance (ESG) Issues’ (2022) Fortun Narvasa & Salazar <https://www.fnslaw.com.ph/the-arbitrability-of-environmental-social-and-governance-esg-issues/> accessed 20 March 2023

Salminen J, ‘Contract-Boundary-Spanning governance mechanisms: Conceptualizing fragmented and globalized production as collectively governed entities’ (2016) 23(2) Indiana Journal of Global Legal Studies 709

Sancak I and Löw E, ‘Revisiting Corporate Governance with Wirecard in the post-Enron Era’ (2022) <https://ssrn.com/abstract=4313820> accessed 28 March 2023

Schiller C, ‘Global Supply-Chain Networks and Corporate Social Responsibility’ (2018) 13th Annual Mid-Atlantic Research Conference in Finance (MARC) Paper <https://ssrn.com/abstract=3089311> accessed 3 February 2023

Setzer J and Higham C,, ‘Global trends in climate change litigation: 2022 snapshot’ (2022) London School of Economics and Political Science <https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2022/> accessed 20 February 2023

Snider M and Baig E, ‘Facebook fined $5 billion by FTC, must update and adopt new privacy, security measures’ (2019) USA Today <https://eu.usatoday.com/story/tech/news/2019/07/24/facebook-pay-record-5-billion-fine-u-s-privacy-violations/1812499001/> accessed 20 March 2023

Snyder D and others, ‘Balancing Buyer and Supplier Responsibilities: Model Contract Clauses to Protect Workers in International Supply Chains, Version 2.0’ (2021) 77 The ABA Business Lawyer 115, American University, WCL Research Paper 2021/15, Rutgers Law School Research Paper No. Forthcoming <https://ssrn.com/abstract=3829782> accessed 12 February 2023

Stebbing H and Furse I, ‘ESG disputes in international arbitration’ (2022) Norton Rose Fulbright <https://www.nortonrosefulbright.com/en/knowledge/publications/e01e3d5a/esg-disputes-in-international-arbitration> accessed 1 April 2023

Sweet P, ‘Corporations dominate world’s top 100 economic entities’ (2016) Accountancy Daily <https://www.accountancydaily.co/corporations-dominate-worlds-top-100-economic-entities> accessed 10 April 2023

Talesh S and Alter P, ‘The devil is in the details: How arbitration system design and training facilitate and inhibit repeat-player advantages in private and state-run arbitration hearings’ (2020) 42(4) Law & Policy 315

Taylor E, ‘Volkswagen says diesel scandal has cost it 31.3 billion euros’ (2020) Thomsan Reuters <https://www.reuters.com/article/us-volkswagen-results-diesel-idUSKBN2141JB> accessed 20 March 2023

The Chancery Lane Project, ‘Climate Clauses’ <https://chancerylaneproject.org/climate-clauses/> accessed 12 February 2023

The Global Compact, ‘Who Cares Wins: Connecting Financial Markets to a Changing World’ (2004) <https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/publications/publications_report_whocareswins__wci__1319579355342> accessed 11 February 2023

The Paris Arbitration Week, ‘PAW2022: ESG to the fore as arbitration community descends on Paris’ (2022) <https://iclg.com/cdr/arbitration-and-adr/17765-paw2022-esg-to-the-fore-as-arbitration-community-descends-on-paris> accessed 25 January 2023

UN Working Group on Business and Human Rights, ‘Guiding Principles on Business and Human Rights At 10: Taking stock of the first decade’ (2021) A/HRC/47/39 Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises <https://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx> accessed 10 May 2023

UN World Commission on Environment and Development, ‘Report of the World Commission on Environment and Development: Our Common Future’ (1987) United Nations General Assembly document A/42/427 <https://digitallibrary.un.org/record/139811> accessed 15 February 2023

United States Depatment of Justice, Office of Public Affairs, ‘U.S. and Five Gulf States Reach Historic Settlement with BP to Resolve Civil Lawsuit Over Deepwater Horizon Oil Spill’ (Press Release 2015) <https://www.justice.gov/opa/pr/us-and-five-gulf-states-reach-historic-settlement-bp-resolve-civil-lawsuit-over-deepwater> accessed 2 March 2023

van Os R and Roeline K, ‘Dutch Bilateral Investment Treaties: A gateway to “treaty shopping” for investment protection by multinational companies’ (2011) <http://somo.nl/publications-en/Publication_3708> accessed 3 March 2023

Vannieuwenhuyse G, ‘Exploring the Sustainability of Arbitration for Settling ESG and Human Rights Disputes’ (2023) 40(1) Journal of International Arbitration

Willan H F, ‘What Do The New 2022 ICSID Arbitration Rules Mean For The Parties?’ (2022) <https://www.hfw.com/downloads/004223-HFW-IA-What-do-the-new-2022-ICSID-Arbitration-Rules-Means-for-the-Parties.pdf> accessed 15 April 2023