



THE ROLE OF INTERNATIONAL ARBITRATION IN THE RISE OF ESG DISPUTES

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ABSTRACT

In the months preceding the Covid-19 pandemic, debates over corporate responsibility dominated headlines around the world. During the outbreak, increased criticism of corporate behaviour, regulatory, and investment practices helped to intensify the discourse about environmental, social, and governance (ESG) problems.

ESG problems continued at the top of the list for several countries, institutions, and enterprises in 2022 as well. A global trend of new ESG laws pushes for more broad and precise company exposures. There has been a significant rise in conflicts including ESG elements. For example, in connection to the environmental component of ESG, more than 1,000 cases relating to environmental change have been reported in various countries from 2015 to the present.

Also, such as Compulsory ESG due diligence laws have been implemented in areas of Europe to compel a much more effective stance to ESG risk assessment. However, many corporations have hugely improved their policy ideas and risk management practices by responding to investor demands and increasing government regulatory and litigation risk, including ensuring that ESG risks are properly handled

by third parties, in supply chains, and in the context of other business relations.

Lately, Arbitration has been the primary mechanism of settling international trade and investment conflicts for years now, and hence the integration of ESG aspects in foreign trade and investment agreements has been mirrored in arbitration conflicts arising from them. There are noteworthy examples in arbitration agreements where environmental adherence has been a substantial aspect of the case.

In this article, the author will analyse the influence of these trends on international arbitration as well as the possibility that ESG-related issues may become a more significant component of the arbitration scene.

Introduction

ESG has been used as a term for a variety of criteria useful in determining if economic growth is viable and sustainable for the sake of investment choices. Wealthy investors and investment firms, for example, utilised these considerations to determine financial structure to ensure long stability and economic success. Recently, the term has come to refer to a constantly expanding universe of rules, norms, and expectations for the sustainable management of a wide variety of concerns.

Eventually, the ESG issues have grown increasingly significant as companies, investors, and consumers have become more worried about the effect of their operations on the world and the people who live in it. ESG factors are no longer considered as being optional or on the periphery of a company's overall performance; rather, they are seen as being essential to both of those metrics. This trend has been fuelled by a variety of factors,



some of which include increased public awareness of environmental and social issues, the proliferation of ESG ratings and rankings, and the growing recognition that ESG issues can have a material impact on a company's financial performance. Other factors that have contributed to the growth of this trend include.

In this context, international arbitration plays a significant role in facilitating the resolution of ESG-related disputes that may arise between businesses, governments, and other stakeholders. This role is important because international arbitration can play a role in resolving ESG-related disputes. International arbitration offers several advantages, including the capacity to enforce decisions across borders, the flexibility to pick arbitrators with experience in certain fields, and the secrecy of proceedings. Additionally, it provides a neutral platform for the settlement of disputes. In this paper, we will investigate the growing significance of ESG and the role of international arbitration in greater detail.

Specifically, the author will investigate how international arbitration can assist in the resolution of disputes related to ESG issues, as well as the opportunities and challenges that this trend presents for the community of arbitrators.

The role of international arbitration in resolving ESG disputes

Many characteristics of international arbitration render it appropriate for the settlement of ESG-related conflicts. Arbitration provides a balanced venue as well as a flexible method. It also allows the parties to designate arbitrators with specialised knowledge (for example concerning human rights, climate change or other environmental matters). International arbitrators have also

proven their ability to settle conflicts involving a variety of relevant laws and, in some cases, soft law norms. The capacity to enforce globally under the New York Convention may also provide significant benefits. The Hague Rules on Business and Human Rights were established in 2019 by a group of arbitrators and human rights practitioners. Arbitration aims to keep these advantageous aspects while also providing a set of rules with adjustments required to handle concerns that are likely to occur in the context of commercial and human rights conflicts. This includes a Code of Conduct, which encourages good faith and cooperation while emphasising the advantages of a diverse tribunal and supporting the use of methods based on inclusivity, involvement, autonomy, and openness.

However, the use of arbitration as a conflict resolution method in an ESG setting has been criticised. Some consider it as improper the settlement of conflicts between businesses and people owing to the probable disproportion of resource base among the parties and the probability that companies will have an additional benefit as "repeat participants". Concerns like these have caused some organisations to discontinue the use of arbitration in specific situations, such as customer or labour conflicts, or charges of sexual harassment or discrimination. Some investment treaty courts have also been chastised for not taking proper consideration of environmental or human rights norms, as well as for lack of openness in processes that often include critical public interest issues such as tax, corruption, and public health.

Arbitration is used to resolve a significant number of disputes that are related to environmental, social, and governance issues. According to the International



Chamber of Commerce’s (ICC) 2020 Annual Report of Statistics on Dispute Resolution (ICC Dispute Resolution 2020 Statistics), which was published in 2021, “construction, engineering, and energy disputes represent, historically, the highest number of ICC cases, reaching 38% of all the new cases registered in 2021. This statistic was found in the ICC’s 2020 Annual Report of Statistics on Dispute Resolution”.¹

Therefore, the natural presence of arbitrations with ESG components may be shown by the fact that these spheres are, by their very definition, essential to national policies designed to fight climate change and to ensure that environmentalism and civil rights are upheld.

It has been said that worldwide ESG assets are on pace to approach \$50 trillion by the year 2025². This would represent more than a third of the overall \$140.5 trillion in expected total global assets under management. When it comes to investing, the emergence of ESG considerations has been a great change for corporate investors, but it is something that should be handled with apprehension. There are some people who are opposed to this idea, and The Economist referred to it as “three

letters that won’t rescue the earth” in one of their articles. The phrase “green-washing” may be used to conceal some ESG initiatives, as stated by The Economist⁴.

In the framework of investment law, there is a gradually changing equilibrium toward a host state’s power to regulate. This may be observed increasingly. More recent tendencies in treaty negotiating processes and attempts to modernise them have centred on the inclusion of stand-alone measures in this regard or full chapters in trade agreements on the environment. As a result of this, there may be an increased emphasis on the sovereign rights of the host state to regulate for the benefit of the public.

Disputes are likely to surface in the context of business arbitration when one or more of the following factors are present: (1) international obligations, such as the Kyoto Protocol and its Joint Implementing rules and regulations; (2) a company’s efforts to cut greenhouse gas emissions and its correlating investment opportunities, such as in renewable energy development projects; and (3) contractual arrangements that, at first glance, do not appear to be related to environmental concerns.⁵

¹ “ICC Dispute Resolution 2020 Statistics” (ICC *Dispute Resolution 2020 Statistics* 2021), p.17, <<https://iccwbo.org/publication/icc-dispute-resolutionstatistics-2020/>> accessed December 23, 2022.

² “ESG May Surpass \$41 Trillion Assets in 2022, But Not Without Challenges, Finds Bloomberg Intelligence”

(*ESG May Surpass \$41 Trillion Assets in 2022, But Not Without Challenges, Finds Bloomberg Intelligence*, January 24, 2022)

<<https://www.bloomberg.com/company/press/esg-may-surpass-41-trillion-assets-in-2022-but-not-without-challenges-finds-bloomberg-intelligence/>> accessed December 23, 2022.

³ Reichen L. and Lui J., “Berlin Dispute Resolution Days 2022: ESG – Dawn of A New Era of Disputes in International Arbitration?” (*Berlin Dispute Resolution Days 2022: ESG – Dawn of A New Era of Disputes in International Arbitration*, November 30, 2022)

<<http://arbitrationblog.kluwerarbitration.com/2022/11/30/berlin-dispute-resolution-days-2022-esg-dawn-of-a-new-era-of-disputes-in-international-arbitration/>> accessed December 23, 2022.

⁴ *ibid*

⁵ Hay E. “ESG Clauses and Dispute Risks” (*ESG Clauses and Dispute Risks*, December 11, 2022), <<http://arbitrationblog.kluwerarbitration.com/2022/11/11/esg-clauses-and-dispute-risks/>>



It brought to light how vitally important it is to use competent arbitrators and specialists. This is particularly true when one takes into consideration the complexities that exist within the method of renewable energy procedures. It is challenging for unpractised arbitrators to comprehend these intricacies, and it is hard for inexperienced professionals to describe them straightforwardly and consistently. Also, about the inclusion of contractual conditions in business contracts that address ESG concerns, such as the repercussions of breaching ESG rules or delivery delays caused by environmental causes. In addition, to investigating the patterns that have emerged in environmental issues that have been brought up in investor-state arbitration proceedings. To begin, during the last several years, there has been a rise in the number of conflicts between investors and states. In the past, environmental concerns were more often utilised as a barrier in arbitration proceedings (for example, as a defence to explain a challenge by the investor). However, in recent years, environmental problems have been increasingly employed as a weapon rather than a shield (such as States making counterclaims based on breaches of environmental law). Thirdly, there is a growing readiness on the part of tribunals to investigate and deal with concerns pertaining to environmental law.

Best practices for incorporating ESG considerations into international arbitration

In international arbitration, there has been an increasing awareness in recent years of the significance of taking into account ESG

problems. This pattern is a reflection of the increased awareness of the possible effect that commercial conflicts may have on society and the environment, as well as the growing relevance of ESG issues in the larger business and legal landscape. As a consequence of this, there is a rising need for the development and adoption of best practices concerning the inclusion of ESG factors into international arbitration. This need is being driven by a diverse group of stakeholders, including investors, firms, and governments, all of whom are increasingly looking for ways to guarantee that environmental, social, and governance factors are taken into account when resolving economic conflicts.⁶ In this article, we will discuss some of the most effective procedures that may be used concerning the integration of ESG factors into international arbitration. These procedures will be outlined in detail.

1. Identifying ESG considerations in international arbitration

Identifying the pertinent concerns and deciding how they should be taken into account in the course of the dispute resolution process is one of the primary obstacles that must be overcome to successfully include ESG factors in international arbitration. To guarantee that environmental, social, and governance factors are appropriately addressed during international arbitration, the parties and arbitrators involved might adopt a

2/11/esg-clauses-and-dispute-risks/> accessed December 23, 2022.

⁶ Manzano M and Toimil A, "The Role of Arbitration in ESG Disputes" (*The role of arbitration in ESG*

disputes, November 12, 2021)

<https://www.vonwobeser.com/images/PDF_news/ARBITRAJE_ESG_ING.pdf> accessed December 22, 2022.



variety of procedures.⁷ The first thing that needs to be done to integrate ESG factors into international arbitration is to identify the pertinent topics. This can include looking through the appropriate contracts, agreements, and other legal papers to see whether there are any clauses or provisions that pertain to environmental, social, or governance concerns.⁸ Examining any pertinent industry standards or guidelines, as well as any pertinent laws or regulations that apply to the conflict, may also be a part of this process.⁹ It is essential to keep in mind that the legal papers or rules that regulate a dispute may not always include a clear reference to environmental, social, or governance concerns.¹⁰ In situations like these, it may be necessary to take into consideration the broader context in which the dispute arises, such as the industry in which the parties are active, the nature of the business activities that they engage in, and the potential impacts that the dispute could have on society and the environment.¹¹

2. Determining the relevance of ESG issues

After the relevant ESG problems have been identified, the next stage is to establish whether or not these issues are relevant to the

dispute. This may comprise analysing the possible implications of the disagreement on the relevant ESG problems, as well as the potential impacts of the settlement of the dispute on these issues.¹² Alternatively, this may involve reviewing the potential impacts of the resolution of the dispute on these issues. It is essential to keep in mind that not all environmental, social, and governance factors will be relevant to every disagreement. The relevance of an environmental, social, or governance (ESG) issue will be determined by the particular circumstances of the case, which will include the nature of the business activities that the parties are engaged in, the industry in which they operate, and the potential impacts of the dispute on society and the environment. It may be necessary to address environmental, social, and governance concerns during the primary arbitration processes in certain instances.¹³ On the other hand, there are certain situations in which it could be better to discuss these concerns in a different setting, such as with a mediator or a panel of experts. The nature of the dispute, the level of difficulty associated with the ESG problems, and the preferences of the parties will all play a role in determining which venue is most suitable for resolving matters related to

⁷ Nelson Goh, “ESG and Investment Arbitration: A Future with Cleaner Foreign Investment?” (2022) 15 *The Journal of World Energy Law & Business* 485.

⁸ Holly Stebbing and India Furse, “ESG Disputes in International Arbitration - Arbitration & Dispute Resolution - Worldwide” (*ESG Disputes In International Arbitration - Arbitration & Dispute Resolution - Worldwide*, November 14, 2022) <<https://www.mondaq.com/uk/arbitration-dispute-resolution/1250560/esg-disputes-in-international-arbitration>> accessed December 22, 2022.

⁹ *ibid.*

¹⁰ Goh (n 2).

¹¹ “WTO | Understanding the WTO - A Unique Contribution” (*WTO | Understanding the WTO - A*

unique contribution)

<https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm> accessed December 22, 2022.

¹² “IFC Performance Standards on Environmental and Social Sustainability” (*International Finance Corporations*, January 1, 2012).

¹³ Leo Mark, “The Arbitrability of Environmental, Social and Governance (ESG) Issues - Fortun Narvasa & Salazar” (*Fortun Narvasa & Salazar*, November 2, 2022) <<https://www.fnslaw.com.ph/the-arbitrability-of-environmental-social-and-governance-esg-issues/>> accessed December 22, 2022.



environmental, social, and governance concerns. It may be required to take into consideration the availability of specialised knowledge in some situations, as well as the need for a conflict resolution procedure that is more informal or flexible.¹⁴

3. Incorporating ESG considerations into the terms of reference

The most effective way to include environmental, social, and governance factors in international arbitration is to include explicit clauses pertaining to these concerns in the terms of reference for the arbitration.¹⁵ This might contain rules that require the parties to evaluate the possible consequences of the dispute on ESG concerns, or it could include measures that require the arbitrator to consider these aspects when making their judgement. The inclusion of certain clauses pertaining to ESG factors in the terms of reference may be one way to assist in ensuring that these problems are given the appropriate amount of attention throughout the arbitration process.¹⁶ In addition to this, it may assist in providing clarity and transparency with respect to the duties of both parties as well as the role of the arbitrator in connection to ESG concerns. Incorporating environmental, social, and governance factors (ESG) into international arbitration is possible by including explicit provisions dealing with these matters in the arbitration rules that apply to the case.¹⁷ This

might contain rules that require the parties to evaluate the possible consequences of the dispute on ESG concerns, or it could include measures that require the arbitrator to consider these aspects when making their judgement. It is possible to assist guarantee that these concerns are given the appropriate amount of attention in the arbitration process by including explicit provisions about ESG considerations in the arbitration rules. In addition to this, it may assist in providing clarity and transparency with respect to the duties of both parties as well as the role of the arbitrator in connection to ESG concerns.¹⁸

4. Seeking the appointment of an arbitrator with expertise in ESG issues

To ensure that environmental, social, and governance (ESG) problems are fully examined in the arbitration process, it may be necessary, in some circumstances, to seek the appointment of an arbitrator who has competence in these areas. This may be of utmost significance in situations in which the environmental, social, and governance (ESG) concerns at hand are highly intricate or in which specialist knowledge is necessary to accurately assess the relevance of those issues to the dispute.¹⁹

¹⁴ *ibid.*

¹⁵ Kleiman E, Pauly C and Day J, “Arbitrability and Public Policy Challenges” (*Arbitrability and Public Policy Challenges - Global Arbitration Review*, January 2, 2019) <<https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/1st-edition/article/arbitrability-and-public-policy-challenges>> accessed December 22, 2022

¹⁶ *ibid.*

¹⁷ Mark (n 8).

¹⁸ *ibid.*

¹⁹ Hay E, Van H and Berg D, “ESG Clauses and Dispute Risks - Kluwer Arbitration Blog” (*ESG Clauses and Dispute Risks - Kluwer Arbitration Blog*, December 11, 2022) <<http://arbitrationblog.kluwerarbitration.com/2022/12/11/esg-clauses-and-dispute-risks/>> accessed December 22, 2022.



Case Studies Of International Arbitration In ESG Disputes

1. Kingdom of Spain, Italy, and the Czech Republic regarding renewable energy incentives

Following the decision made by these three states to stop offering investment incentives connected to renewable energy, several foreign investors have filed complaints against the respective governments of these states to have the matter resolved through international arbitration in accordance with the European Energy Charter Treaty. The investors have asserted that the criteria of fair and equitable treatment have not been met because their reasonable expectations have not been met. The verdicts in these instances have been inconsistent, and some of them are still pending. For instance, the demand for compensation that was made in *PV Investors v. Spain* PCA Case No. 2012-14²⁰ was for more than 2 billion euros. The decision led to an award for compensation that was 5% of the total amount that the plaintiffs had requested.

2. David Aven and others vs. the Republic of Costa Rica²¹

The legal proceedings were on an investment in a tourist project located on the central Pacific coast of Costa Rica and were referred to as the “Las Olas Project.” In accordance with the regulations governing the preservation of the environment in the area, the construction project was halted once it was revealed that the property in question included both wetlands and forests. The

plaintiffs said that Costa Rica had violated its duties under the DR-CAFTA and asked for damages in the neighbourhood of one hundred million dollars in US currency. In September 2018, the arbitral panel came to a unanimous decision and issued an award rejecting all of the claimants’ claims. The arbitral tribunal also ordered the claimants to pay all of the expenses associated with the arbitration.

3. Bear Creek Mining Corporation vs. Republic of Perú²²

The legal proceedings were on an investment in a tourist project located on the central Pacific coast of Costa Rica and were referred to as the “Las Olas Project.” In accordance with the regulations governing the preservation of the environment in the area, the construction project was halted once it was revealed that the property in question included both wetlands and forests. The plaintiffs said that Costa Rica had violated its duties under the DR-CAFTA and asked for damages in the neighbourhood of one hundred million dollars in US currency. In September 2018, the arbitral panel came to a unanimous decision and issued an award rejecting all of the claimants’ claims. The arbitral tribunal also ordered the claimants to pay all of the expenses associated with the arbitration.

4. Urbaser SA and Consorcio de Aguas Bilbao Bizkaia vs. The Argentine Republic²³

The proceedings were initiated in connection with the claimants’ subsidiary losing a

²⁰ *PV Investors v. Spain*, PCA Case No. 2012-14.

²¹ *David Aven and others vs. Republic of Costa Rica*, ICSID Case No. UNCT/15/3.

²² *Bear Creek Mining Corporation vs. the Republic of Perú*, ICSID Case No. ARB/14/21.

²³ *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia vs. The Argentine Republic*, ICSID Case No. ARB/07/26.



concession for receiving water and sewerage services. The concession had been awarded to the claimants. A counterclaim was filed by Argentina, which claimed that the claimants' management of the concession had violated international human rights commitments (namely, the human right to water). In December 2016, the tribunal accepted jurisdiction over Argentina's counterclaim and acknowledged expressly that the treaty's reference to general principles of international law encompassed international human rights obligations. Both of these events took place in the context of the tribunal accepting jurisdiction over Argentina's counterclaim. However, in this specific instance, the counterclaim was thrown out because there were no relevant human rights responsibilities that the claimants had infringed. This was the reason for the dismissal of the counterclaim on the merits.

5. Metal Tech Ltd. vs The Republic of Uzbekistan²⁴

The proceedings were about an agreement for a joint venture that had been made between the claimant and two state-owned firms based in Uzbekistan. The claimant said that the Uzbek government took actions that led to the termination of the agreement's guarantee of their right to export materials, and those actions led to the cancellation of that right. Uzbekistan has objected to the jurisdiction of the tribunal because the agreement was gained by fraudulent methods. As a result, they have rejected any responsibility for the

incident. In October 2013, the tribunal admitted that the relationship between the parties was tainted with corruption. As a result, it concluded that it did not have the authority to hear the case because the claimant's investments had not been carried out in accordance with the laws of the host state.

Challenges And Opportunities For The Use Of International Arbitration In ESG Matters

Concerns about the environment, society, and governance (ESG) are increasingly being brought up in international commercial arbitration. ESG concerns, which refer to the environmental effect, social responsibility, and governance practises of a company or organisation, may have a substantial influence on the success and long-term viability of a business, in addition to the interests of the many parties that have a stake in the firm.²⁵ The use of international arbitration to address challenges relating to ESG issues provides several possibilities in addition to obstacles. On the one hand, international arbitration has various benefits for the resolution of ESG conflicts. These benefits include the capacity to provide a platform that is impartial and unbiased, as well as its speed, efficiency, and flexibility.²⁶ In addition, parties involved in an international arbitration case are free to choose their arbitrators, which might be an advantage if the parties are looking for arbitrators who are knowledgeable in ESG issues.²⁷

²⁴ Metal Tech Ltd. vs The Republic of Uzbekistan, ICSID Case No. ARB/10/3.

²⁵ Holly Stebbing and India Furse, "ESG Disputes in International Arbitration - Arbitration & Dispute Resolution - Worldwide" (*ESG Disputes in International Arbitration - Arbitration & Dispute Resolution - Worldwide*, November 14, 2022)

<<https://www.mondaq.com/uk/arbitration-dispute-resolution/1250560/esg-disputes-in-international-arbitration>> accessed December 22, 2022

²⁶ *ibid.*

²⁷ Manzano M and Toimil A, "The Role of Arbitration in ESG Disputes" (*The role of arbitration in ESG disputes*, November 12, 2021)



However, employing international arbitration to settle ESG problems presents several obstacles to overcome. The fact that there are no predetermined guidelines or protocols that have been formed to deal with ESG issues is a problem.²⁸ Although there are a number of international arbitration rules that guide the resolution of disputes involving ESG issues, such as the United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency in Treaty-based Investor-State Arbitration, these rules are not always comprehensive or well-established.²⁹ For example, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.³⁰

The lack of openness and transparency that characterises international arbitration processes is another obstacle. Because the procedures of international arbitration are often kept private, it may be difficult for stakeholders, such as communities that are being impacted by the dispute, to get access to information about the proceedings or to participate in the process.³¹ This may be especially troublesome in the context of ESG issues since disputes of this nature often include a large range of parties with a variety of interests. The possibility of favouritism

occurring during international arbitration processes is the third obstacle. Even while it is widely believed that international arbitration is a neutral and fair venue for the resolution of disputes, there have been some questions expressed concerning the possibility of partiality in a few specific instances. For instance, if the parties themselves choose the arbitrators or if the arbitrators themselves have financial or other conflicts of interest that might affect their decision-making, there may be a perception of bias in the process.³²

The rising acknowledgement of the significance of ESG concerns in international commerce, as well as the increased readiness of businesses and organisations to address these issues via arbitration, presents one option. This pattern has been reflected in the development of specialised arbitration institutions and rules, such as the International Centre for Dispute Resolution (ICDR) and the ICDR Rules, which are specifically geared toward the resolution of ESG disputes.³³

Arbitration, which is being used more often these days to settle challenges on things like climate change and environmental sustainability, presents still another

<https://www.vonwobeser.com/images/PDF_news/ARBITRAJE_ESG_ING.pdf> accessed December 22, 2022

²⁸ Pérez L and Hunt V, “Does ESG Really Matter--and Why?” (*McKinsey & Company*)

<<https://www.mckinsey.com/capabilities/does-esg-really-matter-and-why>> accessed December 24, 2022.

²⁹ Montineri C and Salasky J, “UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration” (2013) 31 *ASA Bulletin* 774.

³⁰ *ibid.*

³¹ De Ly F, Friedman M and Di Brozolo LR, “International Law Association International Commercial Arbitration Committee’s Report and

Recommendations on ‘Confidentiality in International Commercial Arbitration’” (2012) 28 *Arbitration International* 355.

³² *ibid.*

³³ Sanchez JF and Rajpal K, “Open Letter to International Arbitration Institutions and Counsel: A Real-World Concrete Solution to Increase Diversity in International Arbitration Tribunals - Kluwer Arbitration Blog” (*Open Letter to International Arbitration Institutions and Counsel: A Real-World Concrete Solution to Increase Diversity in International Arbitration Tribunals - Kluwer Arbitration Blog*, November 5, 2022)

<<http://arbitrationblog.kluwerarbitration.com/2022/>> accessed December 24, 2022.



possibility.³⁴ This involves the use of international arbitration as a means of enforcing international environmental treaties and accords, such as the United Nations Framework Convention on Climate Change (UNFCCC).³⁵ The employment of international arbitration as a method of enforcing the terms of these agreements and resolving disputes may be a quick and effective way to accomplish both of these goals in these types of situations. The expanding use of investor-state arbitration to address disputes relating to environmental, social, and governance issues offers the third potential.³⁶ Disputes of this kind may pertain to ESG concerns, and investor-state arbitration makes it possible for investors to file claims against governments that they believe have violated investment agreements or international law. The use of investor-state arbitration in these types of instances may offer investors a venue for the resolution of disputes and the pursuit of compensation for damages that have been incurred as a consequence of violations of investment agreements or international law.³⁷

The possibility for more openness in international arbitration procedures is one further option that presents itself when ESG issues are resolved via the use of international arbitration. Even though the processes of international arbitration are normally held in private, there have been a number of efforts and advances recently that have the goal of increasing the level of openness within these proceedings.³⁸ For instance, the United

Nations Conference on Trade and Development (UNCTAD) has published a handbook titled the UNCTAD Handbook on Transparency in Treaty-based Investor-State Arbitration. This handbook offers direction on how transparency can be utilised in the proceedings of investor-state arbitration. In addition, several arbitration organisations, such as the ICDR, have developed rules or recommendations on the subject of openness in the processes of international arbitration.³⁹

Conclusion

As started this article with the Covid-19 pandemic that has pushed ESG problems to the forefront for businesses and further discussed some of the key ESG issues in the future years that are anticipated to include the environment, civil rights, public health and safety, taxes, privacy laws, and misconduct.

ESG problems are already well-known in the field of arbitration agreements, where conflicts over the energy revolution and human rights are common. ESG-related conflicts will also become more common in commercial arbitration as corporations modify their operations to conform to new rules and regulations, as well as to react to economic demands. The growing significance of environmental, social, and governance factors in a business setting is anticipated to increase both the number and diversity of conflicts concerning these factors. It is highly probable that a considerable number of these conflicts will fall to be settled through arbitration

³⁴ “ESG and ADR | ADR.ORG” (*ESG and ADR* | ADR.ORG, May 9, 2022) <<https://www.adr.org/blog/ESG-and-ADR>> accessed December 24, 2022.

³⁵ Legum B, “Trends and Challenges in Investor-State Arbitration” (2003) 19 *Arbitration International* 143.

³⁶ *ibid.*

³⁷ Sanchez (n 34).

³⁸ Pérez L (n 28).

³⁹ Kleiman (n 16).



proceedings given that arbitration continues to be the favoured method for dispute resolution among the majority of the world's most significant corporate entities in relation to cross-border economic business. Increasing public concern over environmental, social, and governance concerns, as well as associated legislative shifts, may also imply that ESG issues come up more often in investment treaty arbitration. However, it is still very necessary for arbitrators and arbitration counsel to get more aware of ESG legislation and standards to establish proper arbitration processes for ESG-related conflicts and to react actively to do so. This will assist to guarantee that arbitration continues to be a useful venue for resolving disputes in this rapidly expanding field and will contribute to its continued effectiveness.

