INTRODUCTION

In very recent times, the world at large has seen an increase in awareness regarding Environmental, Social, and Governance (ESG) issues, including the resultant effects of climate change and environmental degradation.

Some notable developments have occurred, and these developments have started to affect and will continue to affect how Companies in the different jurisdictions are responding and will respond to ESG issues. The recent Shell decision which was given by the Hague District Court would be the first time a court has actually imposed a legal obligation on a company to reduce its CO2 emissions,[1] a pointer to the fact that ESG issues are a growing concern in the international space. Also, The European Commission's 'Fit for 55%' policy[2] is one which intends to achieve a 55% reduction in carbon emissions by 2030 and net zero by 2050, and is also a pointer to the fact that the global world is experiencing quite an upsurge in ethical standards concerning Environmental, Social and Governance (ESG) issues.

Nigeria, as one of the leading oil-producing countries in the world, is gradually experiencing this social awakening, especially within the oil industry, and in the civic and energy sectors. In Nigeria, one of the existent ESG-related regulations is the Environmental Impact Assessment Act of 1992[3]. Among many other provisions, the EIA prohibits private persons and public bodies from undertaking or authorizing projects without a careful consideration of the possible adverse effect(s) of these projects on the environment. Also, the National Environmental Standards and Regulations Enforcement Agency (NESREA) Act of 2007[4] is an ESG regulation which is indigenous to Nigeria. The act ensures compliance with laws, guidelines, policies and standards of environmental matters.

Corporate sectors are now required to be transparent about their ESG due diligence, risk management, and reporting systems. To this end, in Nigeria, the Nigerian Stock Exhange's (NSE) Sustainability Disclosure Guidelines[5] were enacted in 2018 to promote and enforce a system of accountability and transparency through sustainability disclosure. ESG-related clauses are popularly and more frequently being integrated into commercial contracts as a risk-mitigation strategy. Companies must now meet the demands for ESG transparency and accountability. Companies are equally now taking note of concepts such as risk

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1 https://www.nytimes.com/2021/05/26/business/royal-dutch-shell-climate-change.html#:~:text=The%20District%20Court%20in%20The,of%202030%20compared%20with%202019. (Accessed November 20,2022)

2 https://www.consilium.europa.eu/en/policies/green-deal/fit-for-55-the-eu-plan-for-a-green-transition/#:~:text=The%20European%20climate%20law%20makes,EU%20climate%20neutral%20by%202050.

3 http://www.placng.org/lawsofnigeria/laws/E12.pdf

4 https://environreview.com.ng/wp-content/uploads/2020/07/NESREA-ACT.pdf

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management, due diligence, shareholder and employee activism, white washing, etc and these concepts sometimes result in ESG related disputes. In Nigeria, the Companies and Allied Matters Act (2020)[6] in Section 305(3) and (4) requires Directors to always act in the best interest of the company, its members and its employees. Arbitration, being the preferred mode of dispute resolution in the international space, therefore, comes into play at this juncture. It is in this context that we examine the impact of ESG vis-a-vis International Arbitration, more particularly, the convergence between the two.

WHAT IS ESG?

ESG are factors that are used to evaluate how companies and countries in different jurisdictions view and make advancements on Sustainability. It comprises a range of factors that are used in determining whether or not an economic activity is sustainable for the purposes of investment decision-making.

According to a Thomson Reuters report of 2018,[7] the wide range of factors for ESGs are divided into three categories, namely, Environmental, Social, and Governance. Environmental factors relate to: Climate Change and Greenhouse Gas Emissions (GHG), Energy efficiency, Resource depletion (including water), Hazardous waste, Air and Water Pollution, and Deforestation. Social factors relate to: Human Rights, working conditions including slavery and child labour, Local and Indigenous communities, conflict, health and safety, and employee relations and diversity. Governance issues relate to: executive pay, bribery and corruption, data protection, board independence, diversity and structure, tax strategy, transparency, and shareholder rights. In Nigeria, the Nigerian Sustainable Banking Principles (NSBP)[8] take cognizance of ESG-related issues. Here, amongst many others, banks undertake to avoid, minimize and offset the negative impacts of their business operations on the environment and the local communities where they operate. They also undertake to promote positive impact in the society and respect human rights in all their business activities.

Worthy of note is the fact that although these ESG factors are not seen as financial performance indicators, there is already an overwhelming acceptance of the fact that these factors possess the capacity to pose material financial risks to countries and companies, which is why regulators are working to promote effective risk management of these ESG

[6] https://www.cac.gov.ng/wp-content/uploads/2020/12/CAMA-NOTE-BOOK-FULL-VERSION.pdf
[7] https://www.herbertsmithfreehills.com/insight/the-rising-importance-of-esg-and-its-impact-on-international-arbitration
[8] https://www.cbn.gov.ng/out/2012/ccd/circular-nsbp.pdf

factors, in order to achieve sustainability goals and to manage risk to investors, the capital markets of different countries, and more broadly, the financial ecosystem.

THE INCIDENCE OF ESG DISPUTES IN ARBITRATION

Arbitration, as has been established, is the preferred mode of resolving international disputes. The 2020 Annual Report of Statistics on Dispute Resolution of the International Chamber of Commerce (ICC) (ICC Dispute Resolution 2020 Statistics), which was published in 2021, reported that Construction, Engineering, and Energy disputes represented the highest proportion of ICC disputes, reaching 38% of all the new cases which were registered in 2021. A cursory look at these areas would inform the looker that these areas are in themselves crucial to national policies meant to fight climate change and guarantee environmental protection and human rights. This, therefore, confirms the convergent point between arbitration and ESG components.

ESG disputes arise at different levels, some of which are outlined below:

1. **Disputes arising out of commercial contracts.**

Globally, one veritable way through which companies are managing ESG risks is by inserting ESG conditions into commercial contracts. For instance, the American Bar Association (ABA) in 2018 launched the first version of the Model Contract Clauses (MCCs)[9] which are geared towards the protection of the human rights of workers involved in International Supply Chains.

Section 1.1 of the Model Contract Clauses puts an obligation on buyers and suppliers to have a human rights due diligence process that would enable them to identify, prevent, mitigate and account for how they address the impacts of their activities on the human rights of individuals which are affected by the supply chain. *Section 1.3 of the Model Contract Clauses* equally imposes a mutual obligation on parties to a contract to combat abusive practices in supply chains.

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9 https://www.americanbar.org/content/dam/aba/administrative/human_rights/contractual-clauses-project/mccs-full-report.pdf

Some ESG-related provisions have equally been seen to be of benefit to third parties. For example, suppliers in a business transaction could undertake to adhere and comply with international best labour practices and standards, which could be of benefit to the employees of either of the parties. After the Rana Plaza tragedy,[10] a number of brands in the global fashion industry and other trade unions signed the 2013 Accord on Fire and Building Safety in Bangladesh,[11] which amongst others, involved an agreement on Fire and building safety standards that would be necessary to protect workers in the textile industry. There have been some cases initiated by some parties to the Accord that alleged breaches of the agreement by some of the fashion retailers. On the 17th of January, 2018, some labour organizations based in Switzerland (UNI Global Union and IndustriALL Global Union) reached a $2.3 million settlement with a fashion brand in an arbitration proceeding which was brought under the 2013 Accord on Fire and Building Safety in Bangladesh.

The aforementioned labour organizations brought the action against the brand (whose name was not disclosed), stating that the brand did not have mechanisms in place to expeditedly remedy hazards, consequently leaving thousands of workers in hazardous conditions. The Labour organizations also argued that the brand was in breach of the Accord's requirements to ensure financial capability in fixing safety related issues. As at when the case was filed in October 2016, none of the known suppliers of the brand had either completed the required remediations or fixed their high risk safety hazards, including but not limited to the lack of sprinkler systems and fire alarms, and the failure to separate flammable materials from the factories' boilers.[12]

The unions' claim for arbitration spurred several of the brand's contracted factories towards better progress—one went from a remediation rate of roughly 50 percent in October 2016 to more than 90 percent in October 2017. However, many other factories supplying the brand continue to lag far behind, with remediation rates hovering near 50 percent and serious structural and fire safety issues left unresolved.

ESG-related provisions are increasingly becoming prevalent in long-term investment contracts, including those in the energy, construction, and mining sector. Investors are usually obligated to comply with specified ESG standards in their sub sectors. Other examples of ESG-related provisions include Climate Change goals, like the Chancery Lane Project,[13] which is an effort made by lawyers based in the United Kingdom to develop and

[10] https://www.ilo.org/global/topics/geip/WCMS_614394/lang--en/index.htm
[11] https://bangladeshaccord.org/signatories
[12] https://www.industriall-union.org/global-unions-reach-us23-million-bangladesh-accord-settlement-with-multinational-brand
[13] https://chancerylaneproject.org/climate-clauses/

integrate contractual provisions which champion the cause against climate change. ESG-related provisions also include responsible business commitments, e.g, the code of conduct of Responsible Business Alliance, which companies in cross-border communities utilize to develop contractual provisions that cover diverse ESG issues.

Due to the commercial importance of these factors, and their relevance in Joint-Venture agreements, M & A transactions, Simple, and Complex contracts, they are likely to generate disputes if the relevant ESG conditions are not complied with, or if the ESG-related warranties or representations are later seen to be false.

2. Investment Treaties

ESG protections and provisions are now being integrated into international trade and investment treaties. States across the globe are increasingly including ESG provisions in trade and investment treaties and are using these treaties as mechanisms for the advancement of their sustainability objectives. States now bring claims or counterclaims against investors for ESG failures, or in situations where investor-protection clauses antagonize a state's ESG objectives. These disputes are usually brought for dispute resolution under the ambit of the International Centre for the Settlement of Investment Disputes.

A notable example of an ESG-related treaty is The Energy Charter Treaty[14] which entered into legal force in 1988. It was intended to be a multilateral framework for energy cooperation among states. It was designed for the promotion of energy security through the operation of more competitive energy-based markets while upholding the principles of sustainable development, and sovereignty over energy resources. The EU-Angola Sustainable Investment Facilitation Agreement[15] is equally another ESG-related investment treaty with an aim to achieve good governance and cooperation and to promote sustainable development and responsible investment. The treaty provides sets of international standards that signatories are to comply with, which are along the lines of the promotion of sustainable development.

Some other ESG-related treaties include the South African Development Community Model Bilateral Investment Treaty of 2012,[16] which provides in Article 15.1 that "Investors and their investments have a duty to respect human rights in the workplace and in the community and State in which they are located. Investors and their investments shall not

[14] https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf
[15] https://trade.ec.europa.eu/doclib/docs/2021/june/tradoc_159654.pdf
[16] https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf

undertake or cause to be undertaken acts that breach such human rights. Investors and their investments shall not assist in, or be complicit, the violation of the human rights by others in the Host State, including by public authorities or during civil strife". Article 15.3 equally provides that Investors and their investments cannot establish or operate investments in manners that are inconsistent with international, environmental, labour, and human rights which are binding on the Host State.

The South African case of MEJCON-SA & Others v Uthaka Energy (Pty) Ltd & Ors (11761/2021) [2021] ZAGPPHC 195 (30 March, 2021) is equally a clear pointer to the fact that ESG principles are increasingly becoming adopted by cross-border communities in Africa, and that the courts in these jurisdictions are upholding ESG principles. In this case, the High Court of Pretoria granted an urgent relief to the Mining and Environmental Justice Community Network of South Africa for an interdict against the defendant (Uthaka Energy (Pty) Ltd (Uthaka) to prohibit mining activities on properties which were within the boundaries of the Mabola Protected Environment. To further crystallize the position of the High Court of Pretoria on this issue, the Constitutional Court in November 2021 dismissed an application by Uthaka to appeal the interdict order which had been earlier given by the High Court of Pretoria.

In the case of Jonah Gbemre V. Shell Petroleum Development Company Nigeria Ltd & Ors (2005) AHRLR 151 (NgHC 2005)[17]. The Federal High Court held that the constitutional provision for the right to life and dignity of human persons is inclusive of the right to a clean, pollution-free and poison-free air. The Court further held that due to persistent gas flaring activities, the rights of the life and the dignity of human persons have been wantonly violated.

One major trend that is noteworthy is the fact that there are increased obligations for investors contained within the treaties. The purpose of Bilateral Investment Treaties was prior to now, to provide protection and a means of recourse for investors against foreign states. ESG-related provisions seem to signify a shift in these protections somewhatFor example, the 2019 Model BIT of Netherlands[18] provides that investors can be held responsible for a failure to comply with the United Nation's Guiding Principles on Business and Human Rights, and the Organisation for Economic Co-operation and Development (OECD) guidelines for multinationals. An example of this is the ICSID case of Urbaser V. Argentina ICSID Case No. ARB/07/26,[19] where the ICSID tribunal found in favour of

[17] https://www.globalhealthrights.org/wp-content/uploads/2013/02/HC-2005-Gbemre-v.-Shell-Petroleum-Development-Company-and-Ors..pdf

[18] https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf

[19] https://www.italaw.com/cases/1144

Argentina's counterclaim, based on Argentina's allegation that Urbaser's failure to provide the relevant investment violated the human right of access to water.

THE SUITABILITY OF INTERNATIONAL ARBITRATION TO THE RESOLUTION OF ESG RELATED DISPUTES

A glance at the features of International Arbitration informs of its suitability for the resolution of ESG-related disputes. Apart from the flexible and neutral nature of arbitration, the principle of party autonomy affords the parties the opportunity to appoint arbitrators that have specialist expertise (e.g Labour Law, Human Rights, Climate change, or other ESG-related matters). Under the New York Convention, and also in line with the trends in recent times, the possibility that arbitral awards will be enforced is high, and this makes International arbitration an effective method for the resolution of ESG-related conflicts.

In using International Arbitration as a means of resolving ESG disputes, there is the possibility of getting interim measures before the arbitral tribunal is set up, or during the arbitration. This is very important in instances like irreversible environmental damage or gross violation of human rights.[20] Injunctive relief can be obtained in an expedited manner, and since ESG disputes usually require initial adjudication that cannot be delayed, injunctive reliefs from Arbitration proceedings are best suited for these purposes. For instance, in the event that a business practice could cause irreparable environmental damage, the parties concerned could take advantage of emergency arbitration procedures before the constitution of the arbitral tribunal.

The ICC Arbitration Rules in Article 29 of the Rules and Appendix V ("Emergency Arbitrator Provisions")[21] offer a procedure for parties to seek urgent relief. Its a mechanism to address urgent issues and proffer short-term solution for parties that cannot wait for the constitution of an Arbitral Tribunal.

In the course of the arbitration, arbitrators can equally hear third parties (amicus curiae), which can involve the participation, for example, of associations that have played important roles in tackling environmental challenges, climate change, and the protection of humans.

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[20] ICC Rules of Arbitration, 2017, article 28 and article 29; London Court of International Arbitration (LCIA) Arbitration Rules, 2020, articles 9B and 25; Singapore International Arbitration Centre (SIAC) Arbitration Rules, 2016, article 30; Hong Kong International Arbitration Centre Arbitration Rules (HKIAC), 2018, article 23; American Arbitration Association (AAA), rules 37 and 38

[21] https://iccwbo.org/dispute-resolution-services/arbitration/emergency-arbitrator/

Arbitral proceedings have evolved over the years by putting in place measures geared towards the setting up of standards that are purpose-built for addressing the needs of special kinds of disputes, including ESG-related disputes. In 2014, the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitrations[22] entered into force so as to encourage higher standards of transparency in Investment arbitration, a support for disclosures of ESG standards. This seeks to give the public access the records of the arbitration, including, but not limited to: The Parties' submissions, witness statements, expert reports, the arbitral tribunal's awards, decisions, and orders. Some other transparency related aspects including the obligation to disclose the identity of third-party funds. Some recent investment treaties now refer expressly to the UNCITRAL Transparency Rules and extend their applicability to disputes under them, whether or not these disputes are initiated in accordance with the UNCITRAL Arbitration Rules.

Other measures that have been implemented to incorporate best practices in ESG-related arbitration include the Report of the ICC Task Force on Arbitration in Climate Change-Related Disputes,[23] and The Hague Rules on Business and Human Rights Arbitration[24]. The Report of the ICC Task Force on Arbitration in Climate Change related disputes identified three categories of contracts that could give rise to climate change related disputes, including General contracts in sectors bordering around energy, infrastructure, transportation, agriculture, manufacturing and process. Other categories include contracts which are concluded with a view to implementing the transition, adaption, mitigation commitments in the Paris agreement, and submission agreements which are entered into after the arisal of a dispute. It was stated that parties to these types of contracts are usually existing users of ICC Arbitration. The report provided that over 40% of the ICC cases which were registered in 2018 concerned the Construction section (26.6%), and Energy sector (14.6%)

Seeing that the report agrees with the suitability of arbitration for the resolution of climate change related disputes (as a subset of ESG issues). The report identified some procedural measures to make for an increased effectiveness of arbitration as a suitable mode to resolve arbitral disputes. It was stated that tribunal members and experts to be selected must have the appropriate scientific expertise and know-how. It was equally stated that expedited measures for transparency and urgent interim relief must be implemented. It was also

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22 https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rules-on-transparency-e.pdf

23 https://iccwbo.org/content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf

24 https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf

suggested that while arbitrating climate change disputes, third-party participation and the allocation of costs be taken into consideration.

There are however few criticisms of the suitability of Arbitration to ESG disputes. Some people have highlighted a potential imbalance of resources regarding disputes between Multinationals and Governments. According to the statistics made by Global Justice Now in 2017[25], 157 out of the 200 economic entities were companies and not states. The figures inform that Multinationals like Walmart, Apple, and Shell have got more wealth than countries like Belgium, Russia, and Sweden.[26] According to a report by ABC Finance in February 2020,[27] the 10 most profitable companies combined as of 2020 would be the third wealthiest country, with a higher GDP than Japan. Also, Saudi Aramco, which was the world's richest company in 2020, and was once again declared the world's richest country again in a report by The Cable News Network[28], was reported by ABC Finance to be more profitable than Italy, Brazil, Canada, and Russia

Complaints have equally been made regarding a dearth of adequate standards of transparency in commercial arbitration proceedings. In commercial arbitrations involving State companies, any of the parties to the suit can, by virtue of Article 22 of the ICC Arbitration Rules, request the arbitral tribunal to issue orders on the confidentiality of the arbitral proceedings, as well as any other matter relating to the arbitration. The possible implication of this is that information on the reasoning behind the award, and the existence of the arbitration in itself will be confidential and unknown to the general public. Only parties to the dispute may access the documents filed during the arbitration, and this limits the access of the public to these precedents.

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[25] Global Justice Now, October 17, 2018, available at: https://www.globaljustice.org.uk/news/69-richest-100-entities-planet-arecorporations-not-governments-figures-show/;

[26] Joe Myers, How do the world's biggest companies compare to the biggest economies?, World Economic Forum, October 19, 2016, available at: https://www.weforum.org/agenda/2016/10/corporations-notcountries-dominate-the-list-of-the-world-s-biggest-economicentities

[27] https://abcfinance.co.uk/blog/companies-more-profitable-than-countries/

[28] https://edition.cnn.com/2022/05/12/investing/saudi-aramco-becomes-most-valuable-company-intl-hnk/index.html

Despite these few criticisms, it is actually safe to assert that arbitration is best suited for resolving ESG related disputes. ESG obligations are increasingly being featured in commercial activities across the globe. ESG risk allocation clauses are now very frequent in commercial contracts. The 2019 report of the International Chamber of Commerce (ICC) task force on 'Resolving Climate Change Related Disputes through Arbitration and ADR'[29] agreed with the fact that ESG disputes are increasingly being resolved through arbitration and that arbitration is a very suitable means of resolving ESG related disputes.

It was noted that it is a common occurrence for ESG cases to contain strong international issues, especially cases involving companies that have different supply chains that operate in cross-border communities, which would require a critical appreciation and analysis of international law, as well as the local laws in force in different jurisdictions. Arbitration is usually regarded as the best mode of resolving disputes emanating from ESG disputes between cross-border communities due to, among other factors, the New York Convention[30], which makes the enforcement of awards in any jurisdiction possible and seamless.

CONCLUSION

Due to the proliferation of ESG-related issues across the globe, the possibility that ESG related disputes will continually be on the rise is very high, hence the importance of arbitration as a means of resolving disputes, and a mechanism to ensure that there is a balance of interests between the parties involved in these issues, given that arbitration is a preferred dispute resolution mechanism in relation to cross-border commercial transactions and activities.

It is essential that arbitrations and arbitration counsel alike become familiar with ESG-related trends, regulations and standards, and that they are proactive in complying with best practices so as to form the appropriate arbitration procedures for ESG-related disputes.

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29 https://iccwbo.org/content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf

30 https://www.newyorkconvention.org/