<ct>**Navigating ESG arbitrability challenges in energy and climate: an in-depth analysis and future perspectives**

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Abstract:<ab>Over the past few years, there has been a notable surge in the inclusion of Environmental, Social, and Governance (ESG) clauses within both domestic and international agreements and contracts. This trend places a distinct focus on aspects related to climate change and energy. Implementation and enforcement challenges have emerged, prompting the exploration of remedies and procedural channels, wherein commercial and investment arbitration has gained recognition as a suitable dispute resolution mechanism.

Against this backdrop, this article examines ESG clauses from both substantive and procedural perspectives, emphasizing their relevance to climate change and energy issues in light of the Paris Agreement. The study presents a thorough analysis of conceptual frameworks, content, scope, and implementation of ESG clauses. Additionally, it explores procedural pathways for enforcement, encompassing commercial and investment arbitration, highlighting their advantages and downsides. A critical analysis of recent arbitration cases involving ESG clauses provides insights into future implications.

The study contributes to a deeper understanding of the challenges and significance surrounding the implementation of ESG clauses, particularly in the context of climate change and energy considerations, within contemporary international investment agreements and in the evolving landscape of commercial arbitration.</ab>

Keywords:<kw>Environmental, Social, and Governance (ESG) clauses, contractual obligations, enforcement mechanisms, arbitration, sustainability, climate change, energy transition, corporate governance</kw>

<a>1. Introduction

Over recent years, there has been a surge in the inclusion of Environmental, Social, and Governance (ESG) clauses within both national and international contracts and trade and investment treaties. This inclusion of ESG clauses into international legal frameworks and contractual agreements represents a pivotal stride toward the realization of sustainable and responsible business practices. ESG provisions articulate precise responsibilities for the concerned parties, with the overarching objective of grappling with pressing concerns related to the environment, human rights, and corporate governance.

While the pervasive integration of ESG clauses signals an increasing acknowledgment of the imperatives surrounding sustainable development and responsible business

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conduct, the effective implementation and enforceability of these clauses face several obstacles and challenges. Though the emerging literature has addressed the question of the provisions, there is a gap in terms of covering procedural aspects involved in the implementation.

The implementation of ESG clauses becomes more relevant in light of the Paris Agreement and COP28 which introduced the inaugural 'global stocktake', a comprehensive evaluation of worldwide climate actions and a call for increased ambition by the decade's end to fulfill the COP21 mandate outlined in the Paris Agreement and developed through the COP28 Decision (hereinafter referred to as 'the Decision').[1] The stocktake revealed a critical necessity to reduce global greenhouse gas emissions by 43% by 2030, relative to 2019 levels, to maintain the global temperature increase within the 1.5°C limit. Aligned with other COP28 outcomes, this Decision is poised to impact various sectors, notably influencing industry and the private sector, particularly in the realm of ESG issues.

Against this backdrop, the article presents a critical analysis of the inherent factors that may hinder the enforcement of ESG clauses in the arbitration setting, scrutinizing the content of the various clauses stemming from both international law instruments and contractual provisions. Thus, this article begins by examining the content of these clauses, shedding light on the standards and principles encompassed in the applicable legal frameworks. By understanding the scope and substance of ESG clauses, stakeholders and companies are better placed to evaluate their practical application and implications and, at the same time, there is a better system to track progress.

This article then critically studies the enforcement of ESG clauses by exploring various procedural avenues, encompassing both judicial avenues and alternative dispute resolution mechanisms, with a focus on commercial and investment arbitration. It aims to discern effective means for enforcing these clauses. Additionally, the study explores specific instances of ESG clauses, emphasizing their associated advantages. Through the analysis of ESG compliance and implementation, the research provides valuable insights into how such clauses can drive positive change and foster sustainable practices.

Drawing on recent arbitration cases, this study further investigates the challenges and implications surrounding ESG-related alternative dispute resolution. The article delves into the intricacies of enforcing ESG clauses, elucidating mechanisms to endow them with substantive legal weight. The scrutiny of pertinent cases underscores the discernible complexities inherent in the interpretation and application of ESG clauses within the realms of commercial and investment arbitration.

Ultimately, through a comprehensive examination encompassing the conceptual framework, content, enforcement mechanisms, and practical application of ESG clauses, the article enriches the current scholarly debate concerning sustainable development, responsible business practices, and the evolving terrain of international commercial and investment arbitration. This contribution is particularly pertinent given the increasing

[1] The COP28 Agreement (referred to as the Decision) was adopted in December 2023 and it aims to catalyze more robust climate action plans in the upcoming round of nationally determined contributions (NDCs) from state Parties, scheduled for submission by 2025.

imperative for private companies and businesses to grapple with climate change obligations.

<a>**2. What's in a name?: content, scope, regulation, and practical application of ESGs in the climate change and energy sector**

Originally conceptualized within the financial sector with a focus on sustainable investments, the ESG concept (which serves as an umbrella for the analysis) has evolved from the concept of Corporate Social Responsibility (CSR), becoming one of the main buzzwords. Under this new format, shaped now as ESGs, the emphasis is put on regulation, but also, on implementation.

ESG clauses encompass a wide range of standards and regulations, both at national and international levels that are applicable in the realm of international treaties and international contracts and the context of very specific legal frameworks of regional scope, such as the European Union's norms on corporate sustainability.[2] Based on their content and scope, these clauses can be categorized into distinct generations, reflecting the intricacies of their formulation and the obligations they place upon the parties involved.

Embedded within the Environmental Pillar, ESG clauses, integral to contractual frameworks, confront the nuanced challenges arising from climate change. Focused on mitigating greenhouse gas emissions, notably carbon dioxide (CO2), these provisions comprehensively address environmental impacts. Their scope spans optimizing energy generation and efficiency, managing finite resources, handling hazardous waste, mitigating air and water pollution, and preserving ecosystems through deforestation prevention. Aggregated, these provisions champion sustainable practices, mitigating the ecological footprint in commercial endeavors. While the main focus of this article is on the 'E' pillar, it is important to briefly acknowledge the other two pillars due to their interconnectedness.

Within the 'S' (Social/Human Rights) Pillar, ESG clauses address issues such as eradicating slavery and child labour, these provisions extend to indigenous community rights, covering labour disputes, occupational hazard prevention, fostering employee relations, and cultivating diversity, equity, and inclusion. Additionally, they engage with contemporary concerns like modern slavery, digital disconnection for work-life balance, and promote worker mental well-being.

Under the 'G' (Governance/Regulatory) Pillar, ESG clauses intricately interweave with corporate governance, regulatory adherence, and practices. Encompassing areas like remuneration, addressing corruption and white-collar crime, data protection, independence of management bodies, structural considerations, and equality and diversity promotion, these clauses navigate complex terrains including tax planning, strategies against aggressive tax practices, transparency, delineation of rights for partners and shareholders, and articulation of information obligations for management bodies.

[2] The EU has embarked on the approval of sets of norms regarding corporate sustainability, namely the Corporate Sustainability Reporting Directive (CSRD), the Corporate Sustainability Due Diligence Directive (CSDDD), the European Sustainability Reporting Standards (ESRS) and the Green Claims Directive.

Over time, ESG clauses have become more complex in their wording and content by linking them to specific international treaties (such as the Paris Agreement) or regional legal frameworks (like the EU Green Deal norms), this evolution has also been influenced by factors such as standardization efforts in specific sectors like climate change and the energy transition and the proliferation of international regulations in areas such as provisions against modern slavery and corruption.[3] Equally important, the framework of international business and human rights, and the consolidation of the EU corporate sustainability provisions have contributed altogether to create interwoven provisions that span across both environmental law and human rights law.

Nevertheless, the landscape is not devoid of challenges, encountering resistance in implementation and facing allegations of greenwashing.[4] In the realm of treaty-making, the advancement is substantiated through sustainable development chapters, cross-references, and the incorporation of international environmental and human rights treaties. Moving beyond mere standards and ratings, the question arises: is there a substantive impact in terms of contributions to environmental compliance?

The escalation of ESG-related obligations, whether arising from legal mandates or contractual agreements, alongside an expanding awareness of ESG principles within corporate policies and investment strategies, is anticipated to lead to a rise in prospective disputes. This phenomenon is noteworthy, especially considering the prevalence of arbitration clauses within commercial contracts and international trade and investment treaties, mandating parties to adjudicate disputes before an arbitral tribunal rather than state courts. A recurrent topic in current literature revolves around the appropriateness of (international) arbitration as a mechanism for addressing ESG-related disputes, particularly of those related to climate change and energy transitions.[5]

The dynamic evolution of the regulatory environment, marked by the emergence of new international treaties and investment agreements, alongside judicial and arbitral decisions, has prompted the extension of ESG clauses to encompass hitherto unexplored domains in the climate change and energy sectors.[6] As a result, the substance of these clauses requires ongoing adjustment and revision. In most cases, climate and energy-related ESG clauses consist of an inclusive list of open-ended provisions, with the

[3] There are different attempts to systematize ESG clauses, based on their content, see, for instance, The Chancery Lane Project, see, for instance, the climate change-related clauses, available at: https://chancerylaneproject.org/climate-clauses/ (accessed 5 January 2024).

[4] Notably, the New York Securities and Exchange Commission has probed instances of greenwashing. Financial Times, Investors warned of 'greenwashing' risk as ESG-labelled funds double. As regulators reclassify some investments, more due diligence on methodologies is needed, available at: https://www.ft.com/content/79772342-d260-4dd5-b943-5e75bc27878c (accessed 5 January 2024). In the UK, the Advertising Standards Authority, has recently emphasized the need for having a proper system in place, see Advertising Guidance – misleading environmental claims and social responsibility, Advertising guidance 23 June 2023.

[5] Studies about ESG have mushroomed recently, most of them deal with a general analysis of the state of the art, without any pretensions of providing an exhaustive list, see, for instance: A. Peter, 'Climate Change and Supply Chain Arbitrations: Impact of EU Law on the BRI and Non-EU Entities Arbitration' (2023) 89(4) The International Journal of Arbitration, Mediation and Dispute Management 437–85.

[6] See, for instance, the Global Reporting Initiative (GRI)'s work on new draft climate change and energy standards. M. Segal, 'GRI Releases Proposed Climate and Energy Transition Disclosure Standards' (21 November 2023), available at: https://www.esgtoday.com/gri-releases-proposed-climate-and-energy-transition-disclosure-standards/ (accessed 5 January 2024).

potential for incorporating future generations of clauses that may emerge in the evolving domains of environmental protection, climate change, and energy transition.

<b>2.1. Emerging transnational environmental law: the nexus between risk assessments and ESG regulations

In practice, ESG clauses entail a specific risk assessment procedure for evaluating and mitigating risks associated with the three pillars of ESG (environmental, social, and governance) within commercial transactions and supply chains.
This entails taking measures to avoid or mitigate risks, fulfilling information and disclosure requirements, engaging with stakeholders, ensuring robust governance and accountability, and integrating ESG factors into strategic decision-making processes. The effective execution and implementation of these risk assessment procedures are vital to preventing non-compliant parties from evoking legal provisions such as material adverse change or *rebus sic stantibus* clauses to shield themselves from contractual obligations. In terms of climate change and energy issues, carrying out these risk assessment procedures entails various activities. The final wording of the Decision not only marks a historic moment by explicitly referencing fossil fuels but also calls upon parties to contribute to 'transitioning away from fossil fuels in energy systems' in a manner characterized by justice, order, and equity. This signifies a departure from previous COP decisions that primarily focused on coal abatement, making it the first instance where the broader spectrum of fossil fuels, including oil and gas, is explicitly addressed.

This commitment made at COP 28 sends a powerful message emphasizing the global imperative to shift energy systems away from reliance on oil, gas, and coal. While critiques have labelled the wording as less forceful than a complete 'phase out', the choice of 'transitioning away' carries more weight than alternatives such as 'reducing' or 'phasing down' that were considered during negotiations. This development underscores a clear indication that ESG issues are at the forefront of the priorities for Paris Agreement's contracting parties.

In the context of climate change and energy matters, conducting comprehensive risk assessment procedures involves taking measures to prevent or alleviate risks, adhering to information and disclosure requirements, effective engagement with stakeholders (including regulators, investors, employees, consumers, or communities), ensuring robust governance and accountability within company management bodies, and unequivocally integrating ESG factors as indispensable determinants when formulating and executing strategic decisions.

Specifically, one of the key points is ensuring the accurate execution and implementation of risk assessment procedures across the various domains addressed by ESG clauses. This will be a crucial factor in terms of compliance as their correct implementation will prevent, in the future, the non-compliant party of a contract from shielding itself and defending its action based on certain figures contemplated in

different legal systems (such as the MAC clauses (material adverse change)[7] – or the *rebus sic stantibus*[8]).

Furthermore, in this new scenario, there is a shared responsibility as the entities in charge of supervising and conducting ESG risk assessments, such as law firms, auditors, engineering firms, and certification bodies, bear significant responsibility for climate and energy compliance. Under certain conditions, they may even be subject to liability if their services fail to meet the required level of due diligence in practice.

<b>2.2. ESGs and due diligence: unlocking global value chains in climate and energy

Precisely, another layer for the analysis relates to due diligence in international value chains and has gained prominence, as various national laws now mandate parties to verify that operations and contracts regarding the provision of goods and services do not involve the violation of fundamental human rights or environmental regulations, regardless of the geographical location of the infringement. All this entails obligations not only to carry out a rigorous *risk assessment* but also transparency obligations (*disclosure obligations*).[9] This imposes added responsibilities on parties to conduct rigorous risk assessments and fulfil transparency and disclosure obligations.[10]
When incorporated into a contract, ESG clauses are provisions that require companies to adhere to certain environmental, social, and governance standards when conducting business. Due diligence is the process of identifying, assessing, and managing potential risks and liabilities associated with a business transaction, investment, or operation. The relationship between ESG clauses and due diligence is therefore significant, as ESG clauses can be an important aspect of the due diligence process.

Conducting due diligence is a crucial step in recognizing potential risks and liabilities associated with a business transaction or investment. By incorporating ESG clauses into due diligence, assessments can help to identify any ESG-related risks and ensure that they are adequately addressed.[11]

Therefore, understanding the relationship between ESG clauses and due diligence is crucial, as ESG clauses play a significant role in the due diligence process, shaping the assessment and management of risks associated with environmental, social, and

[7] *MAC* clauses (*material adverse change*) constitute a legal figure whose purpose is to cover the parties to a contract against the risk of an adverse material change that could frustrate the purpose of the contract or deprive it of meaning. *MAC* clauses have their origin in *common law* and have traditionally been used in *M&A operations* (mergers and acquisitions), as well as in financing operations. But its inclusion also has a place in contracts of a different nature, such as successive contracts, supply contracts or lease contracts.
[8] This is a mechanism aimed at restoring the balance of benefits. Said mechanism is applicable when, due to supervening circumstances and totally outside the power of action of the contracting parties, one of them finds it absolutely impossible or burdensome to fulfill the obligation assumed in the contract. It has also been referred to as the business basis alteration theory. The application of this doctrine does not have extinctive effects of a contract, but rather its application only modifies the contract, aimed at compensating the imbalance of benefits.
[9] These transparency obligations have also been included in international investment arbitration through the adoption of various arbitration rules. See, among others, H. Yu and M.B. Olmos Giupponi, 'The Pandora Box Effects under the UNCITRAL Transparency Rules' (2016) 5 Journal of Business Law 347–72.
[10] J.N. Gordon, 'Unbundling Climate Change Risk from ESG' (*Oxford University Blog*, 8 September 2023).
[11] Conducting due diligence is a crucial step in recognizing potential risks and liabilities associated with a business transaction or investment.

governance factors in business transactions. Strictly speaking, rather than explicit and comprehensive clauses, the term ESG refers to a whole series of standards and regulations adopted, both nationally and internationally, that may apply to the field of international contracts.[12]

In summary, ESG clauses can be an important aspect of the due diligence process, helping to identify and mitigate potential risks and liabilities associated with a business transaction or investment. By incorporating ESG clauses into contractual agreements and due diligence assessments, investors can promote responsible business practices and protect against potential legal, financial, and reputational risks.

<b>2.3. Generations of ESG clauses, contractual clauses and corporate accountability

ESG clauses, in broad terms, can be categorized into distinct generations determined by their content and scope. This classification addresses the intricacy involved in drafting these clauses, specifically considering the content and the obligations imposed on the contracting parties. Consequently, certain ESG clauses exhibit greater complexity than others, giving rise to the differentiation among various 'generations' of clauses.

ESG clauses have been drifting towards greater complexity in their wording. The so-called first-generation clauses offer greater simplicity. This evolutionary process has occurred as a result of various factors, including the progressive standardization in some specific sectors -such as climate change- [13] and due to greater international and regional regulation in various areas such as, for example, in the field of sustainability disclosure.[14]

Some of the *ESG clauses* included in the most recent contracts are model or standard contractual clauses (also known as *MCC*), aimed at the protection of human rights, the environment, and governance. This is the case of the clauses proposed by the *International Bar Association* regarding the protection clauses for workers involved in international supply chains, mainly by imposing representations and warranties on suppliers.[15]

In 2021, an updated version of the MCC was launched, which expands the scope of the obligations contained in the ESG clauses to require buyers (wholesalers) to commit more proactively to the protection of human rights. Additionally, regulators have assumed an increasingly significant role in the enforcement and implementation of ESG clauses, particularly in the context of European Union law, particularly concerning Union

[12] The Chancery Lane Project, Climate Change clauses, available at: https://chancerylaneproject.org/climate-clauses/ (accessed 5 January 2024).

[13] The participation of the private sector in terms of *compliance* with the climate change regime has been analyzed from various perspectives. Like any recent phenomenon, there is an incipient literature that examines, in detail, the involvement of the private sector in the matter. See, among others, M.B. Olmos Giupponi, *International Environmental Law Compliance in Context: Mechanisms and Case Studies* (Routledge, 2021).

[14] H. Yu H and M.B. Olmos Giupponi, *Analyzing Obstacles and Challenges in Fighting Corruption in Cases of Illegal Investments: How to Bell the Cat?* (2023), paper available at: https://www.storre.stir.ac.uk/handle/1893/32108#.YfQKwerP02w (accessed 5 January 2024).

[15] *IBA Practical Guide on Business and Human Rights for Business Lawyers* . Adopted by resolution of the *IBA Council* dated 28 May 2016. Available at: https://www.ibanet.org/MediaHandler?id=d6306c84-e2f8-4c82-a86f-93940d6736c4 (accessed 5 January 2024).

regulations addressing environmental concerns.[16] In light of the Green Deal initiative and various regulations, the European Union is at the forefront of developing ESG legislation. This new regulation imposes transparency obligations on companies, compelling compliance with public information requirements dictated by community regulations on ESG matters. These obligations underscore the evident commitment of community authorities, focusing on sustainability evaluation within the European Union. In February 2022, the European Commission adopted the proposal for a Directive on the due diligence of companies in the field of sustainability, aiming to foster sustainable and responsible business practices in global supply chains. Likewise, under the 'S' pillar, there are specific rules such as the Accord on Fire and Building Safety in Bangladesh (the 'Bangladesh Acord') adopted in recent years provides some standards and rules applicable in the garment industry.[17]

Thus, this variation arises from the application of new-generation international treaties and standards or based on the application of certain investment treaties, whether multilateral or bilateral, as well as various decisions that have been handed down by both judicial and arbitral bodies. All this has prompted these clauses to cover new fields and sectors that, initially, were not even taken into consideration when negotiating this type of clause.

In turn, the entities in charge of supervising, managing, and executing the risk assessment procedures of ESG factors (such as law firms, auditors, engineering firms, certification entities), assume a very high degree of responsibility given that, under certain conditions and assumptions, they could even become subject to liability arising from the provision of their services if, in practice, the risk assessment carried out does not reach a sufficient degree of diligence.

Academic literature posits that the integration of ESG clauses into contractual agreements serves to mitigate risks and shield against potential liabilities. Notably, a study conducted by the Harvard Law School Forum on Corporate Governance revealed that the incorporation of ESG clauses in corporate contracts correlates with enhanced company performance, diminished litigation risks, and heightened trust and confidence among stakeholders.[18] The imposition of ESG standards on companies additionally empowers investors to align their investments with their ethical values and social responsibility objectives.

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[16] For an analysis of the inclusion of foreign investment clauses in the European Union, see M.B. Olmos Giupponi, 'Squaring the Circle? Balancing Sustainable Development and Investment Protection in the EU Investment Policy' (2016) 25(2) European Energy and Environmental Law Review 44–73.

[17] In 2013, responding to the imperative of enhancing workplace safety in the Ready-Made Garment (RMG) sector after the tragic Rana Plaza building collapse, the Accord on Fire and Building Safety in Bangladesh was established as a five-year agreement. Initially endorsed by 40 brands and retailers, two global trade unions (IndustriALL Global Union and UNI Global Union), and eight Bangladesh trade unions, this private initiative aimed to address safety concerns. Subsequently, in 2023, the signatories of the International Accord chose to reaffirm their commitments in Bangladesh, leading to the negotiation of the Bangladesh Agreement on Health and Safety in the Textile and Garment Industry (Bangladesh Safety Program) as an Addendum to the International Accord. The Accord is available at: https://internationalaccord.org/countries/bangladesh/ (accessed 5 January 2024).

[18] M. Rogerson, 'Which ESG proposals won the favor of investors?' (30 November 2023), available at: https://corpgov.law.harvard.edu/2023/11/30/which-esg-proposals-won-the-favor-of-investors/ (accessed 5 January 2024).

Implications will be derived from all these issues that, although at first seem secondary, will not be less important, such as higher emoluments in favour of the different operators involved (law firms, auditors, engineering or certification entities), which they will need to meet the premiums they will have to pay to the entities that insure their activities. Similarly, the model of emerging responsibility matches that of joint and several or subsidiary responsibility, when the international value chain is involved.[19]

In the realm of international contracts, it becomes imperative for the involved parties to conduct a thorough analysis of potential liability regimes that may be imposed on their own advisors. Such an analysis is necessary due to the varying degrees and scopes of liability that advisors may be subjected to, thereby serving as an additional safeguard to mitigate risks in the dynamic, innovative, and multifaceted domain of ESG clauses. By undertaking this preemptive assessment, parties aim to identify jurisdictions and legal frameworks that may be more favourable to their interests. Conversely, advisors will likely employ strategies aimed at mitigating the risks associated with their advisory services, such as selecting jurisdictions or legislation more conducive to their objectives and incorporating liability-limiting provisions within their contracts and general terms and conditions.

Concerning potential ESG arbitration claims, some arbitral institutions have responded to the increasing demand for ESG-related dispute resolution by introducing sector-specific rules. Leading this initiative, the Permanent Court of Arbitration is at the forefront of this emerging trend with its Optional Rules for Arbitration of Disputes Relating to Environmental and Natural Resources as discussed in the next section.

Will ESG claims necessitate new arbitration rules? Existing optional arbitration rules include a dedicated roster of arbitrators possessing expertise in this domain, alongside a catalogue of scientific and technical experts. While not suitable for all types of disputes, these Optional Rules could potentially form the foundation for forthcoming rules that arbitral institutions are likely to promulgate in the future.

Overall, diverse and interrelated regulatory frameworks, encompassing corporate governance, international investment law, and international business and human rights law, converge to govern ESG issues.

<a>**3. Exploring viable approaches to enforcing ESG clauses: seeking alternative avenues**

Turning to an examination of the various procedural dimensions commonly ascribed to ESG clauses, it is worth noting that within the domain of commercial, investment, and trade transactions, the stipulated clauses may not invariably conform precisely to the theoretical classifications. Furthermore, they may not comprehensively embody the entire spectrum of content envisioned from a strictly theoretical perspective.

[19] European Union regulations provide for the application of *due diligence procedures* in the international value chain. At the time of publication, there are several initiatives for the European Union to approve a Directive on *due diligence* and transnational companies. In this sense, a clear precedent that can set the guidelines to follow in the future is constituted by Regulation (EU) 2017/821, of the European Parliament and of the Council of 17 May 2017, which establishes obligations in terms of supply chain due diligence for Union importers of tin, tantalum and tungsten, their ores and gold originating from conflict-affected or high-risk areas.

Traditionally, as explained before, ESG clauses have been categorized into three distinct pillars: environmental, social/human rights, and governance. These pillars serve as broad frameworks for addressing specific aspects of sustainable and responsible business practices. When undertaking an examination of the procedural aspects associated with diverse ESG clause categories, it is crucial to acknowledge that, although the tripartite framework of environmental, social, and governance pillars serves as a fundamental basis for comprehending ESG clauses, practical application frequently necessitates an amalgamation of diverse regulations and standards spanning both national and international domains. Furthermore, the extent and substance of ESG clauses undergo continual evolution, for instance, clauses on corruption may bear direct consequences for climate change compliance. Overall, the three pillars are intertwined in the practice. In light of this dynamic landscape, the forthcoming analysis aims to explore distinct categories of ESG clauses and assess their relevance in advancing sustainable and responsible business practices.

Table 1 The tripartite foundation of ESG clauses

ENVIRONMENTAL **ENVIRONMENT, CLIMATE CHANGE & ENERGY**	***SOCIAL*** **HUMAN & LABOUR RIGHTS**	***GOVERNANCE*** **CORPORATE GOVERNANCE**
Climate change and greenhouse gas (GHG) emissions	Human rights	Bribery and corruption
Clauses related to energy Just transition Energy efficiency	Labour conditions, including slavery and child labour	Data Protection
Biodiversity Protection of natural resources	Local and indigenous communities	Independence, diversity, and structure of the management bodies
Waste management: hazardous waste	Labour disputes/strike	Tax planning
Pollution: Air and water pollution	Health and security	Transparency

Source: Authors' own elaboration

While these theoretical classifications provide a framework, in practice, the negotiation, drafting, and agreement of ESG clauses involve a combination of various national and

international regulations and standards. Furthermore, these clauses are subject to continuous evolution and redefinition in terms of their scope which has also an impact on procedural avenues to enforce them.

To start with, environmental clauses are rooted in Multilateral Environmental Agreements (MEAs), such as the Paris Agreement and relevant domestic environmental law norms. Often, for a breach of these clauses, a claim can be brought in the domestic jurisdiction. When it comes to international arbitration, often environmental claims are wrapped (or packed) as environmental counter-claims.[20]

Similarly, under the second pillar, human rights aspects (including the protection of indigenous peoples' rights) are dealt with in the national jurisdiction. It has been long debated whether international arbitration can serve as a forum for addressing human rights breaches, due to the complexities and considerations surrounding the intersection of legal mechanisms and human rights enforcement

In turn, clauses addressing governance matters predominantly focus on corruption and transparency, which are primarily addressed within the realm of public law, particularly administrative law, and criminal law. Within the clauses on governance, there exists a spectrum of provisions concerning the corporate governance of entities, falling within the domain of corporate law. Specifically, attention is drawn to regulations governing the composition and operations of boards, along with safeguards for shareholder rights, particularly those of minority shareholders. While these regulations predominantly apply in the aforementioned areas, it is noteworthy that their application extends beyond, with an emphasis on the pivotal role of management bodies in decision-making within a company, attributable to their substantial capacity and corresponding responsibility.

Moreover, it is worth noting that some clauses may fall somewhere in between different categories. This is the case for clauses that restrict investments in the defence and armaments sector, as well as those that reinforce compliance with international human rights law and international humanitarian law obligations. In any case, as we have previously emphasized, ESG clauses are continually evolving and susceptible to the dynamics of unfolding international events.[21]

Certainly, ESG clauses are gaining heightened significance in corporate decision-making processes, influencing expectations for accountability from their governing bodies. In companies, responsibility inherently rests with management leadership and administrative and oversight bodies, as the decision-making authority of ordinary employees is limited, ultimately aligning with the dependent nature of labour relations. Moreover, the mechanisms for accountability vary widely.

[20] On environmental counterclaims, see A. Alvarado-Garzón, *Environmental Counterclaims in Investment Arbitration. Deconstructing the Requirements of Jurisdiction, Connection and Cause of Action* (Springer, 2023).

[21] M. Levine, *ESG Goes to War* (9 March 2022), available at: http://www.bloomberg.com/opinion/articles/2022-03-09/esg-goes-to-war (accessed 5 January 2024); P. Hollinger, *Ukraine war prompts investor rethink of ESG and the defence sector*, available at: https://www.ft.com/content/c4dafe6a-2c95-4352-ab88-c4e3cdb60bba (accessed 5 January 2024).

<b>3.1. Preventing disputes: examining the essential role of proactive screening for ESG clauses

To forestall disputes, the practical implementation of ESG clauses necessitates a preliminary analysis that far surpasses the customary assessments typically conducted.

Until now, the designation of a specific law governing a contract (or the decision not to designate, relying on general conflict rules such as the Rome I Regulation in the European Union) has often been undertaken casually, without a comprehensive assessment of the ensuing consequences associated with such a choice or lack thereof. In recent times, there has been an observable deepening in the scrutiny undertaken by prospective contracting parties, who engage in a preliminary inquiry even before contract execution. Such inquiries encompass considerations such as the nature of recoverable damages in specific jurisdictions, the extent and nature of indirect damages, the status of punitive damages (whether they exist, their absence, or their scope), as well as moral or reputational damages and their parameters. Additional aspects include the non-application of liability-limiting clauses in cases of fraudulent conduct, potential legitimization of certain entities (consumer associations, NGOs, etc.) concerning the initiation of legal actions and their acknowledgment under applicable procedural laws. Furthermore, considerations extend to the inclusion of non-signatory parties in arbitration agreements, the potential intervention of parties not originally involved in the dispute (*amicus curiae*), the mandatory application of certain rules of imperative law, the clear or ambiguous delineation of public order concepts that may impede the recognition of foreign arbitration awards and judgments, and the facilitation of adopting and enforcing precautionary measures to secure future dispute-related expenses or anti-suit injunctions.

However, these analyses are on the verge of being supplanted by the imperative to evaluate additional issues that, thus far, have been overlooked. These considerations may extend beyond the boundaries of the purely legal domain, to the extent that the establishment of interdisciplinary teams within law firms is needed to comprehensively address all pertinent fields. It is noteworthy that many of these issues necessitate a clear understanding of scientific or technical intricacies.

In addition, meticulous attention must be directed toward other dimensions within the domain of ESG clauses. This entails a comprehensive examination of the consequence or potential sanctions arising from non-compliance, incorporating considerations such as brand and reputational damage, the erosion of confidence in governing bodies, financial implications, and the prospect of administrative or criminal penalties, including disqualifications or prohibitions from contracting or participating in public tenders. Furthermore, the availability of procedural mechanisms is contingent upon the specific jurisdiction and the procedural rules applicable to each unique circumstance.

<b>3.2. Actions arising from ESG clauses in the climate change and energy realm

The identification of rights holders and the elucidation of potential actions emanating from ESG clauses represent pivotal aspects necessitating meticulous scrutiny from a legal standpoint. The intricacy of these matters demands a comprehensive analysis of the stakeholders vested with the standing (active legitimacy) to assert their rights. It is imperative to articulate explicit guidelines delineating the precise actions accessible to

each class of rights holders. From a theoretical point, the individuals or entities considered legitimately empowered to exercise such actions can be systematically classified.

In terms of the rights at stake, it is crucial to discern the individuals or entities who hold these rights. While the list may initially appear intricate, it is essential to precisely identify the interested parties who possess active legitimacy to determine the available mechanisms and actions about each category.

Within a broader theoretical framework, legitimacy may be ascribed to various individuals or entities. Directly affected parties, constituting individuals or groups whose rights have been directly infringed or impacted by the ESG breaches, represent one facet. On the other hand, indirectly affected parties, although not directly implicated, possess a substantial interest in ESG violations due to their connections with either the directly affected parties or the subject matter.

Representatives and advocacy organizations, such as legal representatives, advocacy groups, or non-governmental organizations (NGOs), may be duly authorized to act on behalf of the affected parties, advocating for their rights and seeking redress. Regulatory authorities and government bodies, as public entities tasked with overseeing and enforcing ESG regulations, can be legitimately empowered to take action against violations.

Furthermore, legitimacy extends to shareholders and investors, encompassing individuals or institutions with a financial stake in the company or project. They may possess the right to initiate legal proceedings if ESG breaches adversely affect the value or performance of their investments. Similarly, consumers and customers, maintaining a contractual or consumer relationship with the violating entity, may have the standing to seek redress for any harm caused by ESG violations.

Competitors and industry associations also feature in this landscape, holding a legitimate interest in addressing ESG breaches that confer an unfair advantage or contravene industry standards. In this multifaceted context, delineating the legitimacy of various actors becomes essential in navigating the complexities of ESG clauses and their enforcement.

Emphasis must be placed on recognizing that the specific entitlements and legal actions available to distinct categories of interested parties are contingent upon the applicable legal framework and jurisdiction. Among these categories are individuals (irrespective of their consumer status) and associations of claimants or affected parties. Additionally, non-governmental organizations (NGOs) and other pressure groups play a role, alongside law firms that function as coordinators of collective actions. Third-party funders, companies, and financial institutions and investment funds, serving as financiers, are integral participants in this legal landscape. Moreover, governments and public administrations, including supranational organizations, wield influence, as do business organizations and sectoral pressure groups, along with insurers. The nuances of legal actions and entitlements within each category necessitate meticulous consideration of the prevailing legal context and jurisdictional intricacies.

A special case regards class actions under consumer law, colloquially referred to as collective actions or group arbitration, which is a well-established tradition in jurisdictions governed by common law and has gradually extended to other legal systems in recent times. Nevertheless, its implementation in various jurisdictions is subject to constraints and limitations. Consequently, a substantial disparity and lack of uniformity exist among different legal systems regarding the application of class actions.

The European Union has enacted the Directive (EU) 2020/1828 which establishes the groundwork for future collective actions in the realm of consumer protection.[22] While it is premature to gauge the actual impact arising from the practical implementation of this directive, it provides specific guidelines applicable to disputes involving ESG clauses, including the invocation of cessation measures, compensatory measures compelling employers to propose remedies like compensation, repairs, substitutions, price reductions, termination of contracts, or even reimbursement of payments already made. Among the areas falling within the directive's purview, Annex I, exemplifies ecological design requirements for energy-related products, tire labelling concerning fuel consumption efficiency, the European Union eco-label, and energy efficiency.

<a>**4. Exploring the arbitrability of ESG clauses: identifying the optimal legal framework**

Failure to adhere to or inadequately comply with ESG clauses may result in litigation, either in traditional courts or through alternative dispute resolution mechanisms. Such disputes, characterized by their unique nature, often diverge from the customary conflicts typically encountered by the involved companies.

Before delving further, a concise examination of a matter with direct implications for the prospective interplay between ESG clauses and commercial and investment arbitration is essential. Consequently, the resolution of a dispute via the commercial arbitration mechanism hinges on the arbitrability of the dispute itself.

In this context, there has been a gradual broadening of the scope of issues subject to resolution through international arbitration over the years. However, certain fields and matters still lack definitive solutions, such as climate and energy law disputes, and the arbitrability of a specific dispute may legitimately become a point of contention within the arbitration process. Factors contributing to such disputes include considerations of material public order, the presence of mandatory legal rules, the existence of exclusive and precluding jurisdiction in favour of judicial courts, or situations where contracting parties have expressly limited, within the bounds of their dispositional power, the arbitrability of a particular dispute.

<b>4.1. ESG clauses and international arbitration

[22] Directive issued by the European Parliament and the Council on 25 November 2020, addressing representative actions for safeguarding collective consumer interests. Each Member State is required to transpose it into their respective legal systems by 25 December 2022. The application of its provisions has been extended until June 2023.

Given the prevalence of standard clauses on arbitration submission, there is an examination of the viability of resorting to either investment or commercial arbitration for the resolution of ESG-related disputes. Numerous standard clauses are already in existence, and the following provisions, frequently utilized for this objective, warrant consideration:

- <bl>The model clause issued by the American Bar Association concerning the human rights of workers engaged in international supply chains (2018 and 2021).[23]
- Another series of model clauses proposed by the Chancery Lane Project (Climate Contract Playbook) that cover different issues, in terms of climate change, energy transition, among others.[24]
- The Bangladesh Accord (Bangladesh Accord) which protects the rights of workers in the textile industry is also referred to in international contracts.[25]
- The International Chamber of Commerce has created a Task Force (ICC Task Force on the Arbitration of Climate Change Related Disputes), which has drawn up a series of clauses that refer specifically to the fight against climate change.[26]
- Similarly, the Permanent Court of Arbitration has published a series of optional rules for the resolution of disputes related to the environment or natural resources.[27]
- The Hague Rules on Business and Human Rights Arbitration (The Hague Rules on Business and Human Rights Arbitration) present another alternative way to submit these disputes to arbitration (2019).[28]
- Finally, contracts that regulate issues in matters of energy, natural resources, infrastructure, and construction tend to include, in an increasingly recurrent manner, ESG clauses and opt for arbitration as a mechanism for dispute resolution.</bl>

As for the different types of controversies or disputes that may arise from non-compliance/defective compliance with the clauses incorporated into the contracts, these can be of various categories, as explained below for merely illustrative purposes:

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[23] American Bar Association, available at: https://www.americanbar.org/groups/human_rights/business-human-rights-initiative/contractual-clauses-project/ (accessed 5 January 2024).

[24] Chancery Lane, *Toolkit*, available at: https://chancerylaneproject.org/toolkit/ and *Climate clauses – Contractual clauses you can incorporate into law firm precedents and commercial agreements across the world*, available at: https://chancerylaneproject.org/climate-clauses/ (accessed 5 January 2024).

[25] Workers Rights Consortium, *Bangladesh Accord*, available at https://www.workersrights.org/our-work/binding-safety-accords/ (last accessed on 5 January 2024).

[26] ICC Arbitration and ADR Commission Report on Resolving Climate Change Related Disputes through Arbitration and ADR, available at: 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 5 January 2024).

[27] PCA´s *Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or The Environment*, available at: https://docs.pca-cpa.org/2016/01/Optional-Rules-for-Arbitration-of-Disputes-Relating-to-the-Environment-and_or-Natural-Resources.pdf (accessed 5 January 2024).

[28] Center for International Legal Cooperation, *The Hague Rules on Business and Human Rights Arbitration,* available at: https://www.cilc.nl/project/the-hague-rules-on-business-and-human-rights-arbitration/ (accessed 5 January 2024).

- <bl>Disputes arising from specific contracts regarding adaptation, mitigation, or energy transition to meet certain objectives or commitments related to climate change in light of the Paris Agreement;
- Disputes arising from non-compliance and/or defective compliance in contractual matters arising from changes in local regulations or the impact of environmental changes.</bl>

It should be clarified that, even in cases in which there is no enabling arbitration clause, if any of these disputes arise, they can be submitted by the parties, *a posteriori*, to be settled through arbitration.

<b>4.2. Navigating procedural avenues for addressing disputes arising from ESG clauses: the role of investment arbitration

Potential controversies and disputes may manifest through diverse procedural avenues, namely in commercial and investment arbitration. Disputes stemming from commercial contracts offer the possibility of resolution before judicial courts or through alternative dispute resolution mechanisms, particularly commercial arbitrations, contingent upon the arbitrability of the issues in question. Similarly, disputes may be primarily adjudicated within national jurisdiction before courts, encompassing matters related to climate change policies, regulatory compliance, corporate governance, consumer protection, criminal actions, and tort claims. The imperative to resort to judicial courts rather than opting for commercial arbitration may be dictated by the non-arbitrability of a specific dispute. Additionally, disputes arising from investment treaties may emerge, with conflicts between foreign investors and the host State of the investments.

In the realm of investment arbitration, instances have arisen that confirm this trend, exemplified by *Urbaser v. Argentina*;[29] *Aven v. Costa Rica*;[30] *Bear Creek Mining v. Peru*[31]

[29] *Urbaser* is considered one of the most paradigmatic cases in terms of protection of the right to water, which was alleged in the counterclaim by the Republic of Argentina, as the defendant State. In this regard, two considerations can be made. First, the acceptance of the counterclaim was based on a broad jurisdictional clause, which is not always permitted by the applicable treaty. As is well indicated in the award, if the States wish to insert a possibility of counterclaim in the investor-State arbitration, it is important to draft the jurisdictional clauses clearly. Second, it should be noted that the arbitral tribunal, citing international human rights instruments, determined that human rights obligations, such as the right to water, can be directly imposed on international corporations. However, on the other hand, the award demonstrates that international human rights obligations are directed primarily at States and are not drafted in such a way as to contain binding obligations on corporations. If States wish to impose direct obligations on investors, it is important to do so through explicit language in the BIT. A recent example in this context is the Morocco-Nigeria BIT. In the *Urbaser* case, the tribunal was unable to imply that international human rights instruments created direct obligations for the foreign investor. See *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic,* ICSID Case No. ARB/07/26 available at: https://www.italaw.com/cases/1144 (accessed 5 January 2024).

[30] In *Aven,* the controversy arose regarding the protection of wetlands in the territory where the investment project was to be carried out. See *David R. Aven and Others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, available at: https://www.italaw.com/cases/2959 (accessed 5 January 2024).

[31] In *Bear Creek,* the Canadian investor had found evidence of significant silver ore deposits at the Santa Ana mine in Peru, but was eventually barred from continuing to mine due to the local population's great

and *World Duty Free v. Kenya*.[32] A common feature of these cases lies in the convergence of investment projects and activities with the protection of diverse rights and interests, including those of local populations, as seen in *South American Silver Limited v. The Plurinational State of Bolivia*.[33] In this case, the arbitral tribunal declared that there was expropriation of the investment by Bolivia due to non-payment of compensation but only awarded costs to the British investor.[34] This trend has been bolstered by a recent increase in cases that substantiate and strengthen this development.

Particularly concerning clauses addressing the energy transition and climate change, there has been a notable increase in cases, such as *RWE v. Netherlands*,[35] *Uniper v. Netherlands*,[36] and *Rockhopper v. Italy*.[37]

Similarly, this gradual recognition of ESG clauses has been reflected in the drafting of Bilateral Investment Treaties (BITs) such as the Morocco-Nigeria BIT,[38] the Indian Model Investment Treaty (*Indian Model BIT*),[39] and the Netherlands Model Bilateral Investment Treaty (*Netherlands Model BIT*).[40]

<b>4.3. Examining the inherent advantages of commercial arbitration: a call for necessary adjustments

In the realm of commercial arbitration, traditional principles assume heightened significance. Characteristics intrinsic to commercial arbitration, such as expediency, efficiency, flexibility, and the appointment of specialized arbitrators in specific matters, emerge as distinct advantages compared to litigation before national courts. The paramount virtue of commercial arbitrations becomes particularly evident in disputes anticipated to be highly complex.

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mistrust of the project and the investor, culminating in violent protests and social unrest. See *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/2, available at: https://www.italaw.com/cases/2848 (accessed 5 January 2024).

[32] The case involved the application of the principles of international law and public policy to cases of corruption. *World Duty Free Co. Ltd. v. Republic of Kenya,* ICSID Case No. ARB/00/7, available at: https://www.italaw.com/cases/3280 (accessed 5 January 2024).

[33] Case PCA No. 2013-15, available at: https://www.italaw.com/cases/2121 (accessed 5 January 2024).

[34] Investment Treaty News, available at https://www.iisd.org/ (accessed 7 January 2024).

[35] *RWE v. Kingdom of the Netherlands* – Climate Change Litigation, ICSID Case Nº ARB/21/4, available at: https://climatecasechart.com/ (accessed 7 January 2024).

[36] ICSID Case Nº ARB/21/22.

[37] *Rockhopper Exploration Plc, Rockhopper Italia S.p.A. and Rockhopper Mediterranean Ltd v. Italian Republic* (ICSID Case No. ARB/17/14).

[38] The BIT between Morocco and Nigeria (2016) contains different clauses including those on international standards and corporate social responsibility, available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaties/tips/3711/morocco---nigeria-bit-2016- (accessed 5 January 2024).

[39] India's Model BIT was adopted in 2016, and includes clauses that refer broadly to ESG. See a commentary of the content of the treaty, available at: https://www.brookings.edu/wp-content/uploads/2018/08/India%E2%80%99s-Model-Bilateral-Investment-Treaty-2018.pdf (accessed 5 January 2024).

[40] Netherlands Model BIT (2019) includes non-traditional clauses. The text of the treaty can be found here: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download (accessed 5 January 2024).

Equally notable is the need for multidisciplinary legal teams and specialization among arbitrators taking into consideration that they have constrained time availability due to handling numerous cases. This limitation impedes their ability to invest ample time in studying and analyzing intricate disputes, which would necessitate extensive study hours and the review of numerous documents – some not written in the judiciary's working language and potentially originating from diverse legal cultures. These factors pose clear disincentives for resolving disputes of this nature in courts of justice, highlighting commercial arbitration as a viable alternative.

However, certain traditional features of commercial arbitration, such as neutrality and confidentiality, might prove counterproductive in the context of ESG disputes. In many instances, plaintiffs in these procedures may strategically seek the inherent impact of publicizing cases against alleged violators of ESG clauses. This entails the fear among defendants of public scrutiny, reputational costs, and potential impacts on stock prices. Given the influential role of popular justice, manifested through traditional media and increasingly through social networks, the negative consequences can occur immediately – long before the legal resolution of the dispute. Even if the action is eventually dismissed, repairing the damages caused during this period may be nearly impossible.

In light of these considerations, certain past experiences and recent updates to regulations by arbitration courts attempt to mitigate these challenges. These efforts involve assigning less importance to the principles of privacy and confidentiality in favour of enhanced transparency in arbitration. This seeks an intermediary approach, allowing greater publicity for actions taken, and empowering the involvement of interested third parties while concurrently safeguarding the identity of the aggrieved parties.

<b>4.4. Exploring cross-fertilization: the future landscape of international arbitration and ESG clauses

In the realm of international commercial arbitration, instances pertaining to environmental, social, and governance (ESG) issues are relatively nascent. As aforementioned, instances of resolved ESG-related disputes are observable within the domain of investment arbitration. Conversely, within the broader spectrum of international contracts, ESG clauses have gained prominence, their status elevated through inclusion in existing investment treaties.

One of the first arbitrations that have clearly arisen in the field of ESG clauses corresponded to the arbitrations initiated by two Swiss unions (UNI Global Union and IndustriALL Global Union) against some multinationals in the textile sector under the Bangladesh Agreement (Bangladesh Accord) that protects the rights of workers in the textile industry and to which we have previously referred.[41]

[41] These arbitrations, which were administered by the Permanent Court of Arbitration, were prematurely aborted before the corresponding awards were issued by signing a friendly agreement reached in January 2018 that entailed the payment of an approximate amount of about 2.3 million dollars, although the specific terms of the agreement reached are confidential.

It is important to highlight that, within these arbitrations (halfway between investment arbitrations and commercial arbitrations), the Arbitral Tribunal weighed the application of the principle of confidentiality and agreed that, although the identity of the defendants and the relative details regarding the processing of the arbitration procedures would remain confidential, certain documents would see the light so that they could be known by the general public (although adopting certain measures aimed at protecting their confidentiality, such as the drafting of a non-confidential version in which certain passages containing confidential data had been suppressed).

One of the trends that can be seen in the field of ESG clauses is that the commercial arbitrations that will cover said clauses will tend to be configured as hybrid models halfway between traditional commercial arbitrations and investment arbitrations against States.

In this sense, in a kind of cross-fertilization process of investment arbitrations, certain practices and uses will be adopted that, over time, will be generalized for commercial arbitrations, such as giving greater publicity to the awards issued in favour of transparency and facilitating the intervention of subjects who, originally, were not a signatory party to the arbitration agreement.

In a global landscape increasingly embracing class actions, the trend suggests a growing prominence of arbitration as the preferred mechanism for resolving disputes related to ESG clauses and class actions.

The intricacies inherent in commercial arbitrations arising from ESG clauses will necessitate heightened specialization among the participants involved in these proceedings. This specialization is expected to extend to arbitrators responsible for adjudicating disputes, legal practitioners, experts, and even the arbitral institutions managing and overseeing the arbitration processes.

Given the distinctive complexity of ESG clauses, which encompass diverse fields beyond the conventional organization of law firms, the need for multidisciplinary teams is becoming more prevalent. These teams must not only possess legal expertise but also engage external professionals equipped with technical and scientific knowledge to complement the legal understanding required for effective representation and resolution.

In this same vein, a comprehensive examination of the arbitrators' profile constituting an arbitral tribunal becomes imperative, given the necessity for experts specialized in diverse disciplines. Additionally, the engagement of experts and advisors is crucial for continuous support, extending beyond the mere presentation of reports and deposition during hearings. Their involvement may encompass:

- <bl>Providing assistance and support to arbitrators during hearings, ensuring a comprehensive understanding of witness statements, especially those from experts. This enables arbitrators to seek additional clarifications on non-legal but scientific or technical matters.

- Playing a significant role in the deliberation phase of the awards, involving a prior examination and scrutiny of the awards by the court. This process serves to draw the arbitrators' attention to aspects related to the merits of the dispute.</bl>

Finally, the emergence of initiatives whose purpose will be to guarantee that the arbitration procedures themselves (and the intervening subjects, be they the courts, arbitrators etc.), are fully committed to complying with the best ESG practices in their respective fields of action (in this sense, the protocols included in the campaign for greener arbitrations – *Campaign for Greener Arbitrations* (2019)[42] – have turned out to be precursors and have marked the path that could be followed in the future in other fields). Given the importance that the signatory parties of a contract grant to ESG clauses, it would be manifestly contradictory that, for example, arbitration courts ignore compliance with and respect for ESG principles.

<a>**5. Examining challenges and procedural barriers in enforcing ESG clauses related to climate and energy in international arbitration**

Despite providing a neutral platform for addressing ESG claims, international arbitration comes with its share of procedural challenges. In this section, we delve into the intricate landscape of procedural obstacles, with a specific focus on the financial aspects that often pose challenges to the efficacy of the arbitration process. This is an attempt to shed light on the multifaceted issue of cost and financial tension, elucidating how the financial burden associated with legal representation, expert witnesses, and the overall complexity of proceedings can hinder the resolution process. Furthermore, we examine instances in which one party's refusal to provide necessary funds introduces financial tension, thereby hindering the seamless progression of the arbitration. This examination aims to provide a comprehensive understanding of the procedural nuances involved in international commercial and investment arbitrations, shedding light on the intricacies that may impact the overall effectiveness of the dispute resolution mechanism when it comes to resolving climate and energy-related disputes.

<b>5.1. Costs and financial obstacles

International arbitrations often prove to be financially burdensome, this is primarily attributable to the substantial costs incurred in engaging legal representation, securing the expertise of witnesses, and managing the intricacies of complex proceedings. The financial implications associated with these components raise pertinent questions regarding the accessibility and affordability of the arbitration process. There are several nuanced financial intricacies that underscore the financial burdens of investment arbitrations.

Moreover, an additional layer of complexity arises in instances where one party strategically withholds necessary funds, thereby attempting to stifle the adversary's

[42] Protocols for 'Green' Arbitrations, available at: https://www.greenerarbitrations.com/ (accessed 5 January 2024).

pursuit of justice. This asymmetry in financial contributions introduces a palpable financial tension, potentially hindering the resolution process. Consequently, exploring the interplay between financial constraints and the overarching goals of arbitrations is imperative for comprehending the broader landscape of procedural challenges within this critical sphere of international dispute resolution.

<b>5.2. Constraints on procedural flexibility

The inherent flexibility of arbitration proceedings, a hallmark of its appeal, occasionally leads to unintended consequences when dealing with ESG climate and energy claims. Delays and prolonged disputes may arise due to strategic manoeuvres such as recusals, bifurcations, trifurcations, and additional procedural steps. In all proceedings, a balance between procedural flexibility and the imperative for a swift resolution must be found, considering the strategic implications of the parties' strategies and their impact on the efficiency of the arbitration process.

<b>5.3. Evidentiary hurdles

Arbitration encounters distinctive challenges in evidence gathering and collaboration with third parties compared to traditional courts. Without delving into details, take, for instance, the intricate landscape of witness admissibility, discovery procedures, and third-party cooperation. The guidance provided by the International Bar Association (IBA) Rules and Prague Rules is juxtaposed with practical disparities across jurisdictions, exploring potential avenues for harmonization and enhanced collaboration.

<b>5.4. Precautionary measures and emergency arbitrations

Securing timely precautionary measures or emergency relief is a complex task in commercial and investment arbitrations. Challenges arise in obtaining interim measures, navigating emergency arbitration procedures, and ensuring their recognition and execution across jurisdictions. This section intricately dissects the hurdles parties may face in protecting their interests during the critical early stages of the dispute resolution process.

<b>5.5. Corruption risks and criminal prejudice

Investment arbitrations expose parties to corruption risks, particularly in jurisdictions marked by prevalent corruption. At the same time, the fight against corruption is at the core of the 'G' (governance) pillar. Proving corrupt practices or criminal acts that influence investments introduces a layer of complexity. This section underscores the need for a fair and unbiased process in addressing these challenges, examining the evolving landscape of anti-corruption efforts within the sphere of international dispute resolution.

<b>5.6. Third-party funding and international arbitration

The utilization of third-party funding (TPF) introduces uncertainties and potential conflicts of interest in investment arbitrations. Varying regulatory frameworks across jurisdictions raise concerns about the fairness and legitimacy of TPF arrangements. This

section meticulously explores the impact of TPF on the integrity of the arbitration process, considering its implications as potential unfair competition practices that may affect the neutrality of the proceedings.

<b>5.7. Confidentiality and jurisdictional discrepancies

Legal privilege, including attorney-client confidentiality, varies across jurisdictions, influencing the protection of confidential information. Challenges in navigating these jurisdictional variances and their potential impact on parties' decisions regarding the seat of arbitration are the most relevant. This section underscores the need for parties to carefully weigh the implications of legal privilege rules in shaping the dynamics of the arbitration process.

<b>5.8. Assessment of evidence and applicable law

The assessment of evidence in international arbitrations is a multifaceted process influenced by factors such as the applicable law and arbitrators' traditions and training. This section delves into the complexity of determining applicable law and establishing standards for evidence assessment. It critically examines how these factors may influence the arbitration outcome, offering insights into the evolving nature of evidentiary considerations within the international arbitration landscape.

<b>5.9. Recognition and enforcement of awards

Challenges in the recognition and enforcement of investment arbitration awards come to the forefront, especially when interpretive criteria discrepancies arise. This section meticulously explores the hurdles parties may encounter in enforcing awards across different jurisdictions. The potential impact on the efficacy of the arbitration process and the resultant uncertainty for investors are critically examined, shedding light on the evolving landscape of award enforcement within the international arena.

These obstacles within investment arbitrations highlight the complexities and potential pitfalls that parties may encounter when seeking to enforce ESG clauses through arbitration in international settings.

<a>6. Conclusion. What lies ahead for ESG-related arbitration in the climate change and energy sectors?: a proposal for an ESG toolkit

This article has attempted to shed light on the significant obstacles that hinder the effective implementation and enforceability of ESG clauses. It provided a critical analysis of the dispute resolution mechanisms, challenges in investment and commercial arbitrations, and various factors impacting the arbitration process. By identifying these obstacles, stakeholders can better navigate the complexities surrounding ESG clauses and work towards developing more effective mechanisms for their enforcement.

To conclude, the growing inclusion of ESG clauses, added to the factors that we have analyzed in the article, make us foresee the emergence of an area of investment and commercial arbitration with a certain specialization to be able to manage arbitrations in

an effective way, and to meeting the expectations of the parties and, in turn, verifying compliance with standards and regulations in key sectors such as the environment, social rights and the fight against corruption.
The success of ESGs relies upon having a proper system of incentives that fosters cooperation, and collaboration. To move the discussion forward in terms of compliance, a new design of the provisions is included in both contracts and international treaties.

In turn, the incorporation of an ESG toolkit with a focus on climate and energy disputes into international arbitration would help manage cases with ESG elements. Arbitrators wield significant influence in fostering awareness and comprehension of ESG issues among involved parties. Arbitrators can integrate ESG considerations into the procedural facets of arbitration. This may entail devising tailored procedures for handling ESG-related disputes, such as the inclusion of specialized experts or establishing specific timelines for presenting evidence on ESG matters.

An ESG toolkit for international arbitrators refers to a set of resources, guidelines, and best practices that can assist arbitrators in effectively addressing ESG issues within the arbitration process. It aims to provide arbitrators with practical tools and knowledge to help parties navigate ESG-related disputes and ensure that ESG considerations are appropriately considered throughout the arbitration proceedings.

Arbitrators can encourage parties to explore alternative dispute resolution mechanisms suited to ESG disputes, such as mediation or conciliation. Regarding evidence, guiding parties in the collection and presentation of evidence related to ESG issues are within the purview of arbitrators. This would involve offering insights into the types of evidence that are pertinent and admissible, such as scientific studies, industry standards, expert reports, or sustainability reports. Arbitrators can also assist in assessing the credibility and reliability of ESG-related evidence and determining its weight in the overall decision-making process.

Arbitrators can prompt parties to enlist expert witnesses possessing relevant expertise in ESG matters. These experts can contribute insights on specific ESG issues, provide technical analysis, and aid arbitrators in comprehending complex scientific or regulatory aspects. Additionally, arbitrators may consider appointing independent experts for objective assessments and opinions on ESG-related matters.

In the process of decision-making and determining remedies, arbitrators can factor in ESG considerations. This may involve evaluating the potential environmental or social impacts of a dispute, assessing adherence to relevant ESG standards or guidelines, and weighing the long-term sustainability implications of different outcomes. Exploring innovative remedies that advocate responsible business practices and urging parties to incorporate ESG performance into ongoing operations are avenues arbitrators can explore.

In sum, an ESG toolkit for international arbitrators would serve as a comprehensive resource to elevate understanding and integration of ESG considerations within the arbitration process. Through guidance, awareness promotion, and incorporation of ESG-related aspects into decision-making, arbitration could contribute to the effective

implementation of ESG principles in dispute resolution, fostering sustainable and responsible business practices.