

# **THE GLOBAL GOALS OF ESG (ENVIRONMENTAL, SOCIAL AND GOVERNANCE)—ARE ARBITRAL INSTITUTIONS DOING THEIR PART (AT LEAST, WITH RESPECT TO THE ENVIRONMENTAL PILLAR)?**

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## **ABSTRACT**

*This paper deals with the possibilities and arguably the responsibility of arbitral institutions to contribute to the fulfillment of Environmental, Social and Governance (commonly abbreviated as “ESG”) goals. In doing so, this article will focus on the*

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*environmental pillar of ESG. Considering the increasing importance of climate change and the increase of individuals acknowledging and thereby limiting their adverse contribution to the environment, why should arbitral institutions not have ESG goals as well? With the growing importance of ESG, it is likely that the three pillars of ESG will be a factor increasingly considered when actors of arbitration decide which institution to use for their proceedings. With this in mind, these authors will aim to evaluate whether arbitral institutions are aware of the need to improve their role with regards to ESG, what arbitral institutions are doing currently, and what can be done in the future to contribute towards fulfilling ESG goals. While there may not be a single global solution, arbitral institutions can adopt several measures to limit their adverse contribution to ESG matters and thereby do more than what is currently being done.*

**KEYWORDS:** *arbitral institutions, carbon footprint, climate change, environment, environmental impact, ESG, green pledge, green protocols*

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*Hours are like diamonds, don't let them waste  
Time waits for no one, no favors has he  
Time waits for no one, and he won't wait for me.<sup>1</sup>*

## I. INTRODUCTION

The notion of Environmental, Social, and Governance (hereinafter “ESG”) is still relatively recent, yet has gained an enormous amount of attention. Everywhere you look ESG is one of the most prominent topics:

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<sup>1</sup> “*Time Waits for No One*” is a song by the *Rolling Stones* from the 1974 album “*It's Only Rock 'n Roll*” (released 18 October 1974). It was the first song recorded for this album and written by the *Glimmer Twins*, i.e., Mick Jagger and Keith Richards.

books,<sup>2</sup> articles,<sup>3</sup> podcasts,<sup>4</sup> journals,<sup>5</sup> webinars,<sup>6</sup> and conferences.<sup>7</sup> With this regard, the lyrics of “New Kid in Town” by the *Eagles* come to mind:

*There's a new kid in town  
Just another new kid in town . . .  
Ooh, ooh, everybody's talking 'bout  
The new kid in town . . .<sup>8</sup>*

ESG is a way of doing business by considering environmental, social and governance factors.<sup>9</sup> ESG is related to corporate social responsibility (CSR)<sup>10</sup> and therefore has a part in demonstrating whether a business is

<sup>2</sup> See generally KARLHEINZ SPITZ ET AL., ENVIRONMENTAL SOCIAL GOVERNANCE: MANAGING RISK AND EXPECTATIONS (2022); HARALD CHRIST & PETER GASSMANN, 4.ZERO: DIE ESG-REVOLUTION (2022); JOHN HILL, ENVIRONMENTAL, SOCIAL, AND GOVERNANCE (ESG) INVESTING: A BALANCED ANALYSIS OF THE THEORY AND PRACTICE OF A SUSTAINABLE PORTFOLIO (2020).

<sup>3</sup> See generally Stephan Wilske, *Zur klimaschonenderen Führung von internationalen Schiedsverfahren—Verlust von Rechtschutz oder Win-win-Situation? [For a More Climate-Friendly Management of International Arbitrations—Loss of Legal Protection or Win-Win Situation?]*, 2022(1) ESG 18 (2022) (Ger.); Sebastian Daub et al., *Die wachsende Bedeutung von ESG in M&A Transaktionen [The Growing Importance of ESG in M&A Transactions]*, 2 DB 35 (2021) (Ger.).

<sup>4</sup> Arbitration Insider: *Why Is Climate Change and Arbitration Such a Hot Topic?*, FRESHFIELDS BRUCKHAUS DERINGER, <https://www.freshfields.com/en-gb/our-thinking/our-podcasts/risk-and-compliance-podcast/arbitration-insider-why-is-climate-change-arbitration-such-a-hot-topic/> (last visited May 12, 2023) [hereinafter *Arbitration Insider*]; Unions & ESG and the IPCC Climate Report, MSCI (Apr. 8, 2022), <https://www.msci.com/research-and-insights/podcasts/esg-now/unions-esg-and-ipcc-climate-report>; The ESG Podcast: *Should Every Organization Have an ESGP Strategy, with Matt Peacock*, ESG FOUND., <https://esgfoundation.org/episode-20> (last visited May 12, 2023); *ESG und Fragerechte des Arbeitgebers im Arbeitsverhältnis [ESG and the Right to Question of the Employer in the Employment Relationship]*, GLEISS LUTZ (June 15, 2022), [https://www.gleisslutz.com/de/aktuelles/know-how/ESG\\_und\\_Arbeitsrecht.html](https://www.gleisslutz.com/de/aktuelles/know-how/ESG_und_Arbeitsrecht.html).

<sup>5</sup> See the German journal “ESG” by publishing house C.H. Beck (Munich) launched in March 2022 and “The Journal of Impact and ESG Investing”, launched in fall 2020 by Portfolio Management Research (London, New York, Hong Kong).

<sup>6</sup> LCIA and CIArb London Joint Webinar: “Green ADR: How Do We Recalibrate for the Future?”, LCIA NEWS (Feb. 18, 2021), [https://www.youtube.com/watch?v=v\\_gsfFXJ4DI](https://www.youtube.com/watch?v=v_gsfFXJ4DI) [hereinafter LCIA and CIArb London Joint Webinar]; Global ESG Global Supply Chain Webinar: Emerging Law Governing Labor, Working Conditions & Environmental Risks, DENTONS (2021), <https://vimeo.com/637938481/db471e215a>.

<sup>7</sup> 2022 Conference Guide, ESG AFR. CONF. (Oct. 25-26, 2022), <https://esgafricaconference.com/conference-guide/>; 2022 ESG Virtual Conference, THE INST. OF INTERNAL AUDITORS (Sept. 29, 2022), <https://www.theiia.org/en/events/conference/virtual-conferences/2022-esg-virtual-conference>; Mercedes-Benz Group ESG Conference 2022, MERCEDES-BENZ MEDIA, <https://media.mercedes-benz.com/2022-mercedes-benz-group-esg-conference?video=e0fd6a79-821d-48e9-8598-0dd7643b49c9> (last visited May 12, 2023).

<sup>8</sup> “New Kid in Town” is a song by the *Eagles* from their 1976 studio album “Hotel California”. The song was written by Don Henley, Glenn Frey and J.D. Souther.

<sup>9</sup> Kezia Farnham, *Why Is ESG Important? The Growing Significance of ESG and the Role of the Board*, DILIGENT (Sept. 21, 2021), <https://www.diligent.com/insights/esg/why-is-esg-important/>.

<sup>10</sup> Whilst the terms “Corporate Social Responsibility” [hereinafter CSR] and “Environmental, Social, and Governance” [hereinafter ESG] are often used synonymously, they still differ. “While CSR holds businesses accountable for their social commitments in a qualitative manner, ESG helps measure or quantify such social efforts.” Carl Hung, *Three Reasons Why CSR and ESG Matter to Businesses*,

acting ethically or not.<sup>11</sup> The “E” stands for environmental, the “S” for social and the “G” for governance.

The environmental pillar concerns issues including climate change and greenhouse gas emissions, energy efficiency, deforestation and air and water pollution amongst others.<sup>12</sup> The social pillar, however, includes human rights, working conditions, employee relations and diversity, as well as health and safety.<sup>13</sup> The governance pillar includes issues such as executive pay, bribery and corruption, tax strategies, board independence and structure, and data protection.<sup>14</sup>

While the term “ESG” is mostly used in the context of companies, the truism of Leo Tolstoy applies who allegedly said: “everybody thinks of changing humanity, and nobody thinks of changing himself.”<sup>15</sup> Therefrom one can draw the conclusion that every individual, companies and also arbitral institutions nowadays have a responsibility to contribute to improving the world by considering ESG themes. The question is whether arbitral institutions want to be part of the problem or the solution.<sup>16</sup>

This article will solely focus on arbitral institutions and their take on ESG. Many (certainly not all) institutions have recognized all of the aforementioned three pillars. The environmental pillar has been adopted by arbitral institutions through the adoptions of the guidelines of the Green Pledge and Green Protocols. The social pillar has been incorporated by arbitral institutions through the increase of diversity in the appointment of arbitrators.<sup>17</sup> The diversity issue began with the idea of equality between females and males, however, now has evolved to include handicapped participants in arbitration or the Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, and Asexual (hereinafter “LGBTQIA”) community. Arbitral institutions have implemented the social pillar in various ways. Examples include the International Centre for Settlement of Investment Disputes (hereinafter “ICSID”) increasing the number of female arbitrators from 14%

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<sup>11</sup> FORBES (Sept. 23, 2021), <https://www.forbes.com/sites/forbesbusinesscouncil/2021/09/23/three-reasons-why-csr-and-esg-matter-to-businesses/?sh=6b50cb6c39b9>.

<sup>12</sup> Farnham, *supra* note 9.

<sup>13</sup> *The Rising Importance of ESG and Its Impact on International Arbitration*, HERBERT SMITH FREEHILLS (July 27, 2021), <https://www.herbertsmithfreehills.com/insight/the-rising-importance-of-esg-and-its-impact-on-international-arbitration>.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> LEO TOLSTOY, *Three Methods of Reform (From the Private MS. Diary)*, in SOME SOCIAL REMEDIES: SOCIALISM, ANARCHY, HENRY GEORGISM AND THE LAND QUESTION, COMMUNISM, ETC. 28, 29 (1900).

<sup>17</sup> Wilske, *supra* note 3.

<sup>18</sup> Stephan Wilske & Laura Bräuninger, *Arbitrators*, in 1 CAMBRIDGE COMPENDIUM OF INTERNATIONAL COMMERCIAL AND INVESTMENT ARBITRATION 330, 336-37 (Stefan Kröll et al. eds., 2023) (discussing the development of diversity in the appointment of female arbitrators).

in 2020 to 31% in 2021,<sup>18</sup> the International Chamber of Commerce (hereinafter “ICC”) International Court of Arbitration creating a Disability and Inclusion Task Force,<sup>19</sup> and the launch of the ICC World Business Pride in March 2021, a staff-led initiative for and about the LGBTQIA community and allies.<sup>20</sup> The change in governance structure has been implemented by initiatives such as by including green ambassadors—which is part of governance due to the appointment of ambassadors relating to the hierarchy within the organization—<sup>21</sup> or by the ICC Task Force “Addressing Issues of Corruption in International Arbitration”.<sup>22</sup>

However, this paper will focus on the environmental pillar of ESG as this is the most pressing due to the imminent threats of climate change, evidenced by the frequent extreme weather events on the news.<sup>23</sup> Nowadays both the public and the private sector are faced with increased pressure to not only implement measures that limit their adverse contribution to climate change, but to also help their country comply with the targets under international agreements such as the Paris Agreement 2015.<sup>24</sup> Hence, this includes individuals and arbitral institutions alongside the countries themselves.

This article will proceed as follows. With a focus on the environmental pillar of ESG, Section A of this paper will concern the importance of this pillar. The same section will continue to explain why this is relevant to arbitral institutions, with a focus on their contribution to the environment. Section B will continue to discuss awareness of institutions concerning the issue at hand, specifically whether arbitral institutions are implementing this

<sup>18</sup> Toby Fisher, *ICSID Reports Increase in Cases and Gender Diversity*, GLOB. ARB. REV. (Aug. 4, 2021), <https://globalarbitrationreview.com/icsid-reports-increase-in-cases-and-gender-diversity>.

<sup>19</sup> *ICC Names New Disability and Inclusion Task Force Leadership*, INT'L CHAMBER OF COM. [hereinafter ICC] (Dec. 3, 2021), <https://iccwbo.org/media-wall/news-speeches/icc-names-new-disability-and-inclusion-task-force-leadership/>.

<sup>20</sup> *Diversity and Inclusion*, ICC, <https://iccwbo.org/about-icc-2/diversity-and-inclusion/> (last visited May 12, 2023).

<sup>21</sup> *Arbitration Insider*, *supra* note 4.

<sup>22</sup> *Policy Commissions*, ICC, <https://iccwbo.org/policy-commission/#block-accordion-1> (last visited July 28, 2022).

<sup>23</sup> Paul Kirby, *Heatwave: Ferocious European Heat Heads North*, BBC (July 19, 2022), <https://www.bbc.com/news/world-europe-62216159>; Jasmine Andersson & Doug Faulkner, *Heatwave: Fires Blaze After UK Passes 40C for First Time*, BBC (July 19, 2022), <https://www.bbc.com/news/uk-62217282>; Meredith Deliso & Mary Kekatos, *Hurricane Ian Death Toll Now More than 100 After Storm Slams into Florida, North Carolina*, ABC NEWS (Oct. 13, 2022, 7:38 AM), <https://abcnews.go.com/US/multiple-deaths-reported-hurricane-ian-slams-florida/story?id=90693636>; Richard Davies, *Indonesia — 4 Dead, 7 Missing After Floods and Landslides in Java, Sumatra and Sulawesi*, FLOODLIST (last visited Mar. 16, 2023), <https://floodlist.com/asia/indonesia-floods-landslides-java-sumatra-sulawesi-march-2023>; Horn of Africa: Extreme Drought Deepens Hunger in a Region Facing Conflict, AFR. RENEWAL (Nov. 20, 2022), <https://www.un.org/africarenewal/magazine/november-2022/horn-africa-extreme-drought-deepens-hunger-region-facing-conflict>.

<sup>24</sup> *Arbitration Insider*, *supra* note 4; see generally Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

awareness and doing their part to reduce their environmental footprint. Whilst this section will start with a general overview of what arbitral institutions are doing to limit their carbon footprint, it will end by going into detail on measures the ICC, the London Court of International Arbitration (hereinafter “LCIA”), the Arbitration Institute of the Stockholm Chamber of Commerce (hereinafter “SCC”), and the Hong Kong International Arbitration Centre (hereinafter “HKIAC”) have adopted. If arbitral institutions are in fact not doing enough, then Section C will consider what measures arbitral institutions could adopt to limit their environmental impact significantly, and effectively to do their part with regard to climate change. Finally, the authors will conclude in Part III that the current environmental situation requires not just individuals, but also businesses and arbitral institutions to adopt measures to reduce their carbon footprint and that such measures must be implemented now due to the imminence of climate change. Whilst there may not be a single solution to this global problem, “the climate crisis calls for creative and user-friendly solutions that would not only help us act more sustainably but would allow arbitration to retain its special role in dispute resolution and could save users time and money.”<sup>25</sup>

## II. THE ENVIRONMENTAL PILLAR IN THE PRACTICE OF ARBITRAL INSTITUTIONS

### *A. Importance of Environmental Pillar*

Climate change is a dilemma that must be addressed now.<sup>26</sup> Alongside the global natural disasters resulting from climate change, such as the deadly wildfires which happened or currently are happening in Australia,<sup>27</sup> the US,<sup>28</sup>

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<sup>25</sup> Stephan Wilske & Zelda Bank, *Is There an (Emerging) Ethical Rule in International Arbitration to Strive for More Climate Friendly Proceedings?*, 14(2) CONTEMP. ASIA ARB. J. 155, 159 (2021).

<sup>26</sup> Brian Roewe, *Pope Francis, in Earth Day Messages, Warns ‘We Are at the Edge’ on Climate Change*, EARTHBEAT (Apr. 22, 2021), <https://www.ncronline.org/news/earthbeat/pope-francis-earth-day-messages-warns-we-are-edge-climate-change> (Pope Francis stated in a pre-recorded video for Earth Day Live: “Both the global catastrophes, Covid and climate change, prove that we do not have time to wait.”); Barack Obama *COP26 Climate Speech Transcript*, REV (Nov. 8, 2021), [http://www.rev.com/blog/transcripts/barack-obama-cop26-climate-speech-transcript](https://www.rev.com/blog/transcripts/barack-obama-cop26-climate-speech-transcript) (Obama stated: “We have not done nearly enough to address this crisis. We are going to have to do more. Whether that happens or not to a large degree is going to depend on you.”); Wilske & Bank, *supra* note 25, at 177.

<sup>27</sup> Graham Readfearn, *Australia’s Bushfire Season Has Grown by Almost a Month in 40 Years, Study Finds*, THE GUARDIAN (June 30, 2022), <https://www.theguardian.com/australia-news/2022/jul/01/australias-bushfire-season-has-grown-by-almost-a-month-in-40-years-study-finds>.

<sup>28</sup> Brian Bushard, *California Wildfire Kills Two: Among the First Wildfire Deaths of 2022*, FORBES (Aug. 1, 2022, 12:43 PM), <https://www.forbes.com/sites/brianbushard/2022/08/01/california-wildfire-kills-two-among-the-first-wildfire-deaths-of-2022/?sh=51c01abf2c05>.

Europe,<sup>29</sup> China,<sup>30</sup> Kazakhstan<sup>31</sup> and Algeria,<sup>32</sup> catastrophic floods<sup>33</sup> or the global rise of temperatures,<sup>34</sup> the imminent issue of climate change and its growing importance is also evident within the legal sphere.

Unfortunately, there is still denial among high-ranking politicians, including the former Brazilian President Jair Bolsonaro,<sup>35</sup> that climate change is an issue.<sup>36</sup> Nevertheless, apart from those in denial, there is a certain consensus that States are part of the problem of climate change and therefore have to do their part to diminish their adverse contribution. This consensus can be seen through the ratification of the United Nations Framework Convention on Climate Change<sup>37</sup> and the Paris Agreement,<sup>38</sup> which have been subsequently ratified by 199<sup>39</sup> and 195<sup>40</sup> States, showing consensus among them that it is necessary to fight climate change.

Both national and international case law further attests to climate change being a life-threatening issue against which action needs to be taken now. For example, in the Dutch pioneer case *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v. Stichting Urgenda*, it

<sup>29</sup> Jon Henley, *Wildfires in Europe Burn Area Equivalent to One-Fifth of Belgium*, THE GUARDIAN (Aug. 15, 2022), <https://www.theguardian.com/world/2022/aug/15/wildfires-europe-burn-area-equivalent-one-fifth-belgium>.

<sup>30</sup> Zach Rosenthal, *Forest Fires Burn Twice as Many Trees as Two Decades Ago, Report Finds*, THE WASH. POST (Aug. 24, 2022, 1:36 PM), <https://www.washingtonpost.com/climate-environment/2022/08/24/forest-fires-trees-burn/>.

<sup>31</sup> *Wildfire Scorches Tens of Thousands of Acres in Kazakhstan; 2,000 Displaced*, BUS. STANDARD (Sept. 4, 2022, 12:36 PM), [https://www.business-standard.com/article/international/wildfire-scorches-tens-of-thousands-of-acres-in-kazakhstan-2-000-displaced-122090400056\\_1.html](https://www.business-standard.com/article/international/wildfire-scorches-tens-of-thousands-of-acres-in-kazakhstan-2-000-displaced-122090400056_1.html).

<sup>32</sup> Cora Engelbrecht & Massinissa Benlakehal, *Fast-Spreading Wildfires Kill at Least 37 People in Algeria*, THE N.Y. TIMES (Aug. 18, 2022), <https://www.nytimes.com/2022/08/18/world/africa/alg-eria-wildfires.html>.

<sup>33</sup> See Davies, *supra* note 23.

<sup>34</sup> See Kirby, *supra* note 23; Andersson & Faulkner, *supra* note 23.

<sup>35</sup> Jair Messias Bolsonaro (born 21 March 1955) is a Brazilian politician and retired military officer who served as the 38th president of Brazil from 2019 until 2022. During his presidency, he rolled back protections for indigenous groups in the Amazon rainforest and facilitated its deforestation. See *Jair Bolsonaro*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Jair\\_Bolsonaro](https://en.wikipedia.org/wiki/Jair_Bolsonaro) (last visited May 6, 2023).

<sup>36</sup> Ishaan Tharoor, *Bolsonaro, Trump and the Nationalists Ignoring Climate Disaster*, THE WASH. POST (Aug. 23, 2019, 12:59 AM), <https://www.washingtonpost.com/world/2019/08/23/bolsonaro-trump-nationalists-ignoring-climate-disaster/>.

<sup>37</sup> The United Nations Framework Convention on Climate Change was adopted at the Earth Summit in Rio de Janeiro in 1992. The goals of the United Nations Framework Convention on Climate Change limit average global temperature increases. *History of the Convention*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE [hereinafter UNFCCC], <https://unfccc.int/process/the-convention/history-of-the-convention> (last visited Sept. 27, 2022).

<sup>38</sup> The Paris Agreement was adopted by 196 Parties at the 21st Conference of the Parties (COP 21) in Paris, on 12 December 2015. The Paris Agreement's goals are to limit global warming. *The Paris Agreement*, UNFCCC, <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement> (last visited Sept. 27, 2022).

<sup>39</sup> *Status of Ratification of the Convention*, UNFCCC, <https://unfccc.int/process-and-meetings/the-convention/status-of-ratification/status-of-ratification-of-the-convention> (last visited Apr. 14, 2023).

<sup>40</sup> *Paris Agreement — Status of Ratification*, UNFCCC, <https://unfccc.int/process/the-paris-agreement/status-of-ratification> (last visited Apr. 14, 2023).

was held that States can be held individually responsible for their contribution to climate change if they fail to comply with their positive obligations, which in this case was the reduction of greenhouse gas emissions.<sup>41</sup> The imminence of climate change is also evident by further climate change litigation.<sup>42</sup> For instance, the German Constitutional Court held in *Neubauer, et al. v. Germany*<sup>43</sup> that to comply with its obligations under the Paris Agreement, Germany must amend its German legislature to comply with the fundamental rights set out in the Basic Law.<sup>44</sup> The Basic Law was violated as the Federal Climate Protection Act<sup>45</sup> only provided for a reduction of 55% of greenhouse gas emissions from 1990 by 2030 and this was considered not to be sufficient by the German Constitutional Court.<sup>46</sup>

Moreover, the Intergovernmental Panel on Climate Change (hereinafter “IPCC”), a body of the United Nations that assesses the science related to climate change,<sup>47</sup> has issued reports with regard to climate change. Specifically, the AR6 WGIII report, the sixth assessment report of working group III—working group III deals with the mitigation of climate change—attests to the continuous rising of greenhouse gas (GHG) emissions and reflects the ever-growing importance to act against climate change immediately.<sup>48</sup>

Furthermore, in July 2022, the United Nations General Assembly declared access to a clean and healthy environment a universal human right. This historic resolution manifests both the importance and the imminence of environmental issues and climate change.<sup>49</sup>

The question is why does this matter to arbitral institutions? Arbitral institutions contribute to climate change, just like any other actors on earth.

<sup>41</sup> HR 20 December 2019, ECLI:NL:HR:2019:2007 (The State of Netherlands (Ministry of Economic Affairs and Climate Policy)/Stichting Urgenda) (Neth.).

<sup>42</sup> See generally *Careme v. France*, App. No. 7189/21 (June 7, 2022), <https://hudoc.echr.coe.int/eng?i=003-7353639-10043718>; *Duarte Angostinho and Others v. Portugal and Others*, App. No. 39371/20 (Nov. 13, 2020), <https://hudoc.echr.coe.int/fre?i=002-13724>; *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, App. No. 53600/20 (Mar. 29, 2023), <https://hudoc.echr.coe.int/fre?i=002-13649>; *Friends of the Irish Env’t v. Gov’t of Ir. et al.* [2019] IEHC 747 (H. Ct.) (Ir.).

<sup>43</sup> BVerfG, 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20, Mar. 24, 2021, [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2021/03/rs20210324\\_1\\_bvr265618.html;jsessionid=A626703B60830519AB8650C25A5F163F.internet982](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2021/03/rs20210324_1_bvr265618.html;jsessionid=A626703B60830519AB8650C25A5F163F.internet982).

<sup>44</sup> See Grundgesetz [GG] [Basic Law], translation at [http://www.gesetze-im-internet.de/english\\_gg/index.html](http://www.gesetze-im-internet.de/english_gg/index.html).

<sup>45</sup> See Bundes-Klimaschutzgesetz [Federal Climate Protection Act], Dec. 12, 2019 BGBl I at 2513 (last amended by Gesetz [G], Aug. 18, 2021), BGBl I at 3905 (Ger.), [https://www.gesetze-im-internet.de/englisch\\_ksg/index.html](https://www.gesetze-im-internet.de/englisch_ksg/index.html).

<sup>46</sup> Markus Burianski & Federico Parise Kuhnle, *Reshaping Climate Change Law*, WHITE & CASE (July 14, 2021), <https://www.whitecase.com/publications/alert/reshaping-climate-change-law>.

<sup>47</sup> *About the IPCC*, IPCC, <https://www.ipcc.ch/about/> (last visited July 19, 2022).

<sup>48</sup> *IPCC Sixth Assessment Report*, IPCC, <https://www.ipcc.ch/report/ar6/wg3/> (last visited July 8, 2022).

<sup>49</sup> UN General Assembly Declares Access to Clean and Healthy Environment a Universal Human Right, U.N. (July 28, 2022), <https://news.un.org/en/story/2022/07/1123482>.

The frequent travelling and a large amount of paper use add to the worsening of climate change.<sup>50</sup> The Campaign for Greener Arbitrations even found that around 20,000 trees would be needed to offset carbon emissions arising from a medium-sized arbitration, which is three times the number of trees in Hyde Park.<sup>51</sup> One of the biggest issues is that of long-haul flights. Long-haul flights contribute to over three quarters of the carbon emissions arising from arbitrations.<sup>52</sup> This shows that arbitral institutions are in fact part of the problem regarding climate change. So why not take responsibility and be part of the solution?

### ***B. Current Arbitral Institution Practices to Limit Adverse Environmental Impact***

Some arbitral institutions have adopted measures to limit their global environmental footprint. In this respect, several arbitral institutions have taken the initiative to recognize the environmental phenomenon we are experiencing and have put in place measures with the aim of being part of the solution, rather than part of the problem.

*1. General Measures Taken by Several Institutions* — Some institutions such as the Chartered Institute of Arbitrators (hereinafter “CIArb”) and the HKIAC, are members of the Campaign for Greener Arbitrations.<sup>53</sup> This Campaign includes several environmental initiatives arbitral institutions are encouraged to take to lessen their negative impact on the environment.<sup>54</sup> Members of the campaign are further motivated to sign the Green Pledge, launched by Lucy Greenwood in 2019, which aims for greener arbitration by all the actors part of proceedings.<sup>55</sup> The Green Pledge, although not binding, encourages arbitration practitioners to limit unnecessary travel, avoid

<sup>50</sup> Stephan Wilske, *The Impact of COVID-19 on International Arbitration—Hiccup or Turning Point?*, 13(1) CONTEMP. ASIA ARB. J. 7, 29 (2020).

<sup>51</sup> *Inside Arbitration: Towards Greener Arbitrations Achieving Greater Environmental Sustainability in the Way We Conduct Arbitrations: An Update*, HERBERT SMITH FREEHILLS (Feb. 25, 2021), <https://www.herbertsmithfreehills.com/latest-thinking/inside-arbitration-towards-greener-arbitrations-achieving-greater-environmental-0>.

<sup>52</sup> *A Significant Impact*, CAMPAIGN FOR GREENER ARB., <https://www.greenerarbitrations.com/impact> (last visited May 11, 2023).

<sup>53</sup> *Supporters of the Green Pledge*, CAMPAIGN FOR GREENER ARB., <https://www.greenerarbitrations.com/institutional-supporters> (last visited May 11, 2023) [hereinafter Institutional-supporters]; Jessica Evans, *Green Arbitrations: Reducing the Environmental Impact of Arbitral Proceedings*, BURGES SALMON (May 4, 2021), <https://blog.burges-salmon.com/post/102gwxy/green-arbitrations-reducing-the-environmental-impact-of-arbitral-proceedings>.

<sup>54</sup> *About the Campaign*, CAMPAIGN FOR GREENER ARB., <https://www.greenerarbitrations.com/about> (last visited July 12, 2022).

<sup>55</sup> *LCIA and CIArb London Joint Webinar*, *supra* note 6.

printing, to encourage electronic correspondence and more to limit their environmental footprint.<sup>56</sup>

Some might find it surprising that the LCIA and the ICC are not listed under the institutional supporters of the Green Pledge. However, this does not mean that—as explained later—they are not taking measures to limit their carbon footprint. Nevertheless, numerous other arbitral institutions support the Green Pledge including the American Arbitration Association (AAA), the SCC, the HKIAC, the Vienna International Arbitral Centre (VIAC) and the New York International Arbitration Center (NYIAC).<sup>57</sup> Smaller arbitral institutions that have signed the Pledge include the International Center of Arbitration from Peru, the International Arbitration Centre of the British Virgin Islands and the Vancouver International Arbitration Centre amongst others.<sup>58</sup> This shows that, in fact, arbitrators and arbitral institutions are aware of the environmental impact arbitrations have and that there is a need for arbitral institutions to implement measures to lessen their carbon footprint. However, whether individual institutions have actually implemented the ideas of the Green Pledge and taken action to limit their impact on climate change is questionable.

The Campaign for Greener Arbitrations has also launched six Protocols for each of the actors of arbitration, including the Green Protocol for Arbitral Institutions.<sup>59</sup> These Protocols serve as a guide to different actors of arbitrations to help them understand the impact of their actions.<sup>60</sup> The six Protocols all encourage lighter resource consumption, such as through using more electronic correspondence instead of paper and reducing travel by having virtual conferences instead of face-to-face ones.<sup>61</sup> The Green Protocol for Arbitral Institutions specifically suggests sustainability measures arbitral institutions can take to minimize their impact on the environment, such as through using green energy, reducing energy consumption and minimizing printing and the use of paper, encouraging recycling, limiting the use of single-use items/eliminate plastic, partner with “green” organisations, demonstrate travel responsibility, incentivise their staff through schemes that encourage greener behaviors and consider

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<sup>56</sup> *The Green Pledge*, CAMPAIGN FOR GREENER ARB., <https://www.greenerarbitrations.com/sign-green-pledge> (last visited July 12, 2022).

<sup>57</sup> Institutional supporters, *supra* note 53.

<sup>58</sup> *Id.*

<sup>59</sup> *LCIA and CIArb London Joint Webinar*, *supra* note 6.

<sup>60</sup> *Arbitration Insider*, *supra* note 4.

<sup>61</sup> Stephan Wilske et al., *Entwicklungen in der internationalen Schiedsgerichtsbarkeit im Jahr 2021 und Ausblick auf 2022 [Developments in International Arbitration in the Year of 2021 and Prospect of 2022]*, 2022(3) SCHIEDSVZ [ARB. VZ] 111, 113 (Ger.).

offsetting any residual emissions caused by their conduct, including through travel.<sup>62</sup>

Individual arbitral institutions have undertaken measures to comply with the guidelines of both the Green Pledge and the Protocols,<sup>63</sup> however some arbitral institutions have been rather silent. Unfortunately, the Chinese Arbitration Association has still not announced the implementation of measures to go green.<sup>64</sup>

*2. ICC and LCIA Practices to Limit Carbon Footprint* — As previously mentioned, the ICC is not part of the Green Pledge. However, it nevertheless takes action to limit its adverse impact on the environment. The ICC—the world business organization, which the International Court of Arbitration is a part of—has a Commission called the ICC Global Environment and Energy Commission in place which develops “*policy recommendations and tools to address major global environmental and energy issues . . .*”.<sup>65</sup> The ICC has also advocated for the Paris Agreement and the United Nations Sustainable Development Goals, and has thereby tried to ensure that policy frameworks concerning the environment are implemented.<sup>66</sup> The ICC has further issued a Centenary Declaration in 2019, recognizing the climate emergency in support of the IPCC Reports on Climate Change.<sup>67</sup> Moreover, the ICC is advocating for individual businesses to become more climate-friendly, such as through the Chambers Climate Coalition, where around 2,100 business are members. This coalition aims to offer its members real-world solutions based on the targets of the Paris Agreement.<sup>68</sup> Through all the aforementioned practices the ICC is trying to encourage others to limit their carbon footprint. This indeed is commendable, however, what is the ICC doing to reduce its own carbon footprint?

As a result of the increased use of digitalization and electronic correspondence, arbitral institutions including the ICC having implemented rules and practices to reduce the use of paper. For instance, the LCIA, ICSID

<sup>62</sup> See generally *Green Protocol for Arbitral Institutions*, CAMPAIGN FOR GREENER ARB., <https://www.greenerarbitrations.com/green-protocols/arbitration-institutions> (last visited July 12, 2022).

<sup>63</sup> See as a recent example the Finland Arbitration Institute [hereinafter FAI] which proclaims in connection with the *Helsinki International Arbitration Day* on 12 May 2023 organized by the FAI: “*In line with the Finland Chamber of Commerce’s Climate Commitment, we are committed to achieving carbon neutrality by 2035. We monitor the carbon footprint of our events, strive to reduce carbon emissions and offset the environmental effects of holding events.*”

<sup>64</sup> Wilske & Bank, *supra* note 25, at 170; *About CAAI*, CAA INT’L ARB. CTR., <http://www.caai-arbitration.org/default.aspx> (last visited May 6, 2023).

<sup>65</sup> *Policy Commissions*, ICC, <https://iccwbo.org/policy-commission/#block-accordion-8> (last visited July 20, 2022).

<sup>66</sup> *Climate Action*, ICC, <https://iccwbo.org/global-insights/sustainability-and-climate-action/> (last visited July 20, 2022).

<sup>67</sup> *Id.*

<sup>68</sup> *Making Climate Action Everyone’s Business*, THE CHAMBERS CLIMATE COAL., <https://www.chambers4climate.iccwbo.org/> (last visited July 20, 2022).

and ICC now use electronic filing by default. The ICC and ICSID released statements concerning their conversion to using electronic filings as a default practice,<sup>69</sup> whilst the LCIA incorporated this change within their arbitration rules, specifically in Article 4 of the LCIA Rules, which states:

*The Claimant shall submit the Request under Article 1.3 and the Respondent the Response under Article 2.3 in electronic form, either by email or other electronic means including via any electronic filing system operated by the LCIA. Prior written approval should be sought from the Registrar, acting on behalf of the LCIA Court, to submit the Request or the Response by any alternative method.<sup>70</sup>*

The default system of electronic filings shows that it is more time-consuming and costly for parties to opt out of the default and use other methods due to the necessity to request such other methods first. Thus, this encourages parties to use electronic filing, the more climate-change-friendly option.

The ICC Arbitration Rules 2021 also include changes concerning the acknowledgement of using electronic means of communication for the Request for Arbitration and Answer, and the possibility for the arbitral tribunal to choose whether to hold hearings remotely.<sup>71</sup>

The ICC Arbitration Rules 2021 go even further and include the option of virtual hearings in Article 26(1): “The arbitral tribunal may decide, after consulting the parties, and on the basis of the relevant facts and circumstances of the case, that any hearing will be conducted by physical attendance or remotely by videoconference, telephone or other appropriate means of communication.”<sup>72</sup> The LCIA, has an equivalent rule in Article 19, which provides that hearings may be held by videoconference.<sup>73</sup> The LCIA rules go even further and allow for awards to be signed electronically, facilitating this process especially if arbitrators are located in a different

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<sup>69</sup> See generally *ICSID Makes Electronic Filing Its Default Procedure*, ICSID (Mar. 13, 2020), <https://icsid.worldbank.org/news-and-events/news-releases/icsid-makes-electronic-filing-its-default-procedure>; *ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic*, ICC (Apr. 9, 2020), <https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/icc-guidance-note-on-possible-measures-aimed-at-mitigating-the-effects-of-the-covid-19-pandemic/>.

<sup>70</sup> The London Court of International Arbitration Rules art. 4 (2020), [https://www.lcia.org/Dispute\\_Resolution\\_Services/lcia-arbitration-rules-2020.aspx](https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx).

<sup>71</sup> The International Chamber of Commerce Rules of Arbitration art. 26(1) (2021) [hereinafter ICC Arbitration Rules 2021], <https://iccwbo.org/content/uploads/sites/3/2020/12/icc-2021-arbitration-rules-2014-mediation-rules-english-version.pdf>.

<sup>72</sup> *Id.* art. 26.

<sup>73</sup> LCIA Rules, *supra* note 70, art. 19.

place in the world.<sup>74</sup> The ICC Arbitration Rules 2021 in comparison does not have such a provision in place.<sup>75</sup>

*3. SCC Practices to Limit Its Carbon Footprint* — On top of encouraging electronic communication, the SCC, a truly international (but also pioneering) arbitral institution, has gone even further. The SCC has launched the SCC Platform, an electronic case management platform, in 2019, where almost all of the correspondence from and to the SCC is handled.<sup>76</sup> This enables both the institution and its users to handle cases electronically.

The SCC has also undertaken other measures to limit their carbon footprint. For instance, in addition to signing the Green Pledge, the SCC has included carbon offsetting in their guidelines for arbitrators,<sup>77</sup> demonstrating that in fact the SCC is aware of the global environmental problem we are facing and that it is trying to do its part to limit its negative adverse impact on the environment. Specifically, the guidelines express that arbitral institutions will reimburse “standard costs of climate compensating for the flights” for arbitrators.<sup>78</sup> Considering flights are one of the largest contributors to the carbon footprint of arbitral institutions, this encourages the arbitral tribunals to use flights with a lower carbon footprint, as they will be reimbursed. The SCC even went one step further and is now part of the Europe Subcommittee for Greener Arbitrations, through which the SCC and the other participants intend to promote the Green Pledge and the Protocols both regionally and internationally to raise more awareness of climate change within arbitration.<sup>79</sup> This makes the SCC one of the few institutions that are not only concerned with its own contribution to climate change, but also encourages other arbitral institutions to limit their adverse contribution to the environment.

*4. HKIAC Practices to Limit Its Carbon Footprint* — Whilst it seems like the HKIAC is doing a lot, and for sure it is doing more than other arbitral institutions, it is not as active as the SCC. Nevertheless, the HKIAC has also implemented a few measures to limit their adverse impact on the environment. The HKIAC divided its environmental contribution into three areas: case management, business development and events, and internal operations.<sup>80</sup> On top of signing the Green Pledge, the HKIAC has taken action with regards to its case management by having institutional rules that expressly allow for electronic filings and also offer for an online repository

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<sup>74</sup> *Id.*

<sup>75</sup> ICC Arbitration Rules, *supra* note 71.

<sup>76</sup> *Arbitration Insider*, *supra* note 4.

<sup>77</sup> ARB. INST. OF THE STOCKHOLM CHAMBER OF COM., GUIDELINES FOR ARBITRATORS 11 (2020), [https://sccarbitrationinstitute.se/sites/default/files/202211/scc\\_guidelines\\_for\\_arbitrators.pdf](https://sccarbitrationinstitute.se/sites/default/files/202211/scc_guidelines_for_arbitrators.pdf).

<sup>78</sup> *Arbitration Insider*, *supra* note 4.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

for storing documents.<sup>81</sup> The HKIAC also encourages the use of technology and does not limit hearings to in person hearings only, but instead invites tribunals to use electronic meetings and provide for virtual hearing services.<sup>82</sup> With regards to business development and events, the HKIAC has used to eliminate paper documents and plastic single use items, as well as switching to online signing up and payment for the events.<sup>83</sup> Finally, with regards to the HKIAC's internal operations, a green ambassador has been appointed, whose role it is to implement small day to day changes such as recycling, powering down computers and having in place broader events that one can participate in if not too busy with case administration, such as beach cleanups,<sup>84</sup> the latter actively being certainly helpful for the environment, but certainly not the core business purpose of arbitral institutions. Taking into account the measures the HKIAC has adopted until now to limit its adverse environmental impact, the authors of this article believe that the measures adopted are still basic measures common around the globe. Arbitral institutions need to go further than limiting the use of paper and giving users the option of electronic filing. Allowing for electronic filings does not actually encourage or incentivize users to switch from using paper to using technology if they are used to a hard copy system. Instead, the HKIAC—like other arbitral institutions—should have rules like the LCIA to make electronic filing the default rule, and not simply an option.

It is evident that most arbitral institutions are aware of the global climate change problem, however some are doing more than others by taking responsibility for their actions. This leaves certain arbitral institutions, which are only doing the bare minimum, but not enough, in terms of limiting and decreasing their carbon footprint.

### **C. What Additional Measures Can Be Taken by Arbitral Institutions?**

Whilst most of the arbitral institutions have recognized that they need to limit their contribution to climate change, some have until now failed to do so. Even those aware of their responsibility to take action are not doing enough due to the imminence of climate change. Again, we need to act now if we want to make a change. To do so, arbitral institutions need more than guidance on what not to do.

A study by the Campaign for Greener Arbitrations has shown that by reducing long-haul travel by one return flight at each stage of the arbitration;

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

eliminating hard copy filings altogether; and getting rid of disposable coffee cups carbon emissions could be substantially reduced.<sup>85</sup>

*1. Going Paperless and Reducing the Use of Documents* — Most arbitral institutions have already implemented the idea of electronic filing and discourage the printing of hard copies.<sup>86</sup> In some institutions however, using electronic filing is not the default, but simply an option alongside using paper bundles. Instead, the arbitral institutions that have not yet done so, should implement the practice of electronic filing within their rules, to make it mandatory and not give the parties a choice. Electronic filing and the reduction of printing not only help the environment, but also result in being more cost effective for the parties.<sup>87</sup>

*2. Reduction of Document Production* — Filings could also be reduced through the reduction of document production. Document production can be a “*Wombat*”—“waste of money, brain and time”.<sup>88</sup> Arguably document production is unnecessary in some arbitrations, and if necessary, can be reduced. A reduction in document production was intended by the Rules on the Efficient Conduct of Proceedings in International Arbitration, the so-called Prague Rules,<sup>89</sup> i.e., rules on the guidance on taking of evidence in international arbitral proceedings. Whilst we already have the IBA Rules on the Taking of Evidence in International Arbitration, the Prague Rules were introduced as a stricter version.<sup>90</sup> For instance, due to the dissatisfaction with document production, specifically the time and cost this involves, the Prague Rules aim to limit document production by including clause 4.2, which establishes that the “arbitral tribunal and the parties are encouraged to avoid any form of document production, including e-discovery.”<sup>91</sup> Clause 4.5 states that the parties can only request specific documents and not a group of documents.<sup>92</sup> However, it is up to the parties whether they want to apply the Prague Rules.<sup>93</sup> Arbitral institutions themselves, could also include a

<sup>85</sup> *A Significant Impact*, CAMPAIGN FOR GREENER ARB., <https://www.greenerarbitrations.com/impact> (last visited May 11, 2023).

<sup>86</sup> See, e.g., VIAC’s new file sharing and collaboration software HighQ which allows paperless communication (but, unfortunately, it came with some hiccups at the very beginning).

<sup>87</sup> *LCIA and CIArb London Joint Webinar*, *supra* note 6.

<sup>88</sup> Jörg Risse, *Über Document Production – ein Wutausbruch! [About Document Production – an Outburst of Fury!]*, in USUS ATQUE SCIENTA, FESTSCHRIFT FÜR RODERICH C. THÜMEL ZUM 65. GEBURTSTAG AM 23. OKTOBER 2020 [LIBER AMICORUM FOR RODERICH C. THÜMEL ON THE 65TH BIRTHDAY ON 23 OCTOBER 2020] 709, 710 (2020) (Ger.).

<sup>89</sup> Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules), <https://prague.rules/> [hereinafter Prague Rules] (last visited July 20, 2022).

<sup>90</sup> Markus Altenkirch & Malika Boussihmad, *The Prague Rules – Inquisitorial Rules on Taking of Evidence in International Arbitration*, GLOB. ARB. NEWS (May 23, 2018), <https://globalarbitrationnews.com/the-prague-rules-inquisitorial-rules-on-the-taking-of-evidence-in-international-arbitration/#:~:text=Under%20the%20Prague%20Rules%2C%20document%20production%20will%20be,production%20of%20documents%2C%20including%20any%20form%20of%20e-discovery.>

<sup>91</sup> Prague Rules, *supra* note 89, cl. 4.2.

<sup>92</sup> *Id.* cl. 4.5.

<sup>93</sup> *Id.*

limitation of document production in their rules, with the benefit of saving money, time and brainpower. Even if documents are necessary, only specific documents on which the proceedings depend on should be submitted to avoid an influx of unnecessary information.

*3. A Reduction of Long-Haul Flights* — As mentioned previously, long-haul flights contribute the most to the carbon footprint of arbitral institutions. The reason for this is that there are so many people involved: three arbitrators, an administrative secretary, ten to twelve lawyers for each party in big cases, party representatives, witnesses, experts, assistants, service providers for technical equipment and more. Sometimes, travelling to proceedings is simply not worth it. One example is when there are witnesses who have to travel to give a one-word answer when examined.<sup>94</sup> There could be several measures to reduce long-haul flights. Firstly, through an increase in virtual hearings and meetings, secondly by employing arbitrators strategically, thirdly by reducing the number of arbitrators where appropriate, and fourthly by disincentivizing long-haul flights.

Nobody should believe that a week-long virtual hearing is *per se* climate-friendly (in light of the energy and electricity, as well as the technology needed). However, by holding more virtual hearings, the number of flights used per arbitration will automatically be reduced. Even if parties have a preference for face-to-face hearings, it could be a possibility to only have the crucial parts of the arbitral hearings (e.g., the taking of important witness evidence) in person, whilst the non-crucial parts (e.g., less significant procedural issues) could be held online.

By holding virtual hearings instead of having face to face arbitrations, the travelling time, the cost of flights, and the carbon footprint are significantly reduced. Although there are numerous advantages to virtual hearings, it has to be kept in mind that virtual hearings sometimes are not satisfactory: For instance, if the credibility of a party is questioned, then in person hearings are preferable. If the hearings are however short, and it takes more time to travel to the hearing than the hearing takes itself, then a virtual hearing might be preferable. Either way, the arbitral institutions could implement a clause into their rules that not only allows, but also encourages Parties—as a reminder—to always consider the option of virtual hearings. This could be explained to parties from a cost-saving perspective to incentivize the use of virtual hearings.

Another option is to employ arbitrators in a more strategic manner. For instance, one senior mediator who has signed the Green Pledge has chosen to be more discerning regarding mediations he chooses to do. If a mediation involves a lot of travel, and the parties do not want virtual proceedings, this specific mediator would suggest a mediator that lives closer to the parties.<sup>95</sup>

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<sup>94</sup> Wilske, *supra* note 3.

<sup>95</sup> LCIA and CIArb London Joint Webinar, *supra* note 6.

This could be adopted in arbitrations: Parties and legal representatives could suggest arbitrators with this thought in mind. If the parties cannot agree on arbitrators, arbitral institutions should suggest arbitrators that live closer to the parties. Additionally, this could be adopted by individual arbitrators, in that they only accept to arbitrate only in cases within a certain distance to them.

The third option to limit flights is to make proceedings with single arbitrators a default, and only use three arbitrators if necessary. This does not necessarily presuppose worse quality of arbitrators. According to the LCIA and CIArb London Joint Webinar on Green ADR, around 50% of the cases are handled by single arbitrators as opposed to three arbitrator cases.<sup>96</sup> The SCC, however, has reported that in 2021, sixty cases were preceded by three arbitrators, whereas only thirty-seven cases were single arbitrator cases.<sup>97</sup> This shows that at least half, if not more, cases are cases in which three arbitrators sit together to make a decision. If, instead, single arbitrator cases would be the default, then—in situations where a physical hearing is necessary—flights per arbitration would be cut by more than half.<sup>98</sup>

Fourthly, long-haul flights could be disincentivized. This could be done through arbitral institutions imposing an administrative burden on the parties by obligating them to explain their reasoning for choosing in person hearings over virtual hearings. This would mean that parties would need approval subsequent to submitting their reasoning on why they chose in person hearings and would be a disincentive due to the extra amount of time and effort needed to receive approval for a face-to-face hearing. Another possible disincentive would be to not reimburse unnecessary expenses made by the parties, including unnecessary long-haul flights. Finally, arbitrators who do not behave in an environmentally-friendly way without good reasons, but in a rather selfish and wasteful manner should not expect cost reimbursement either.<sup>99</sup> This concept works, admittedly, only for institutional arbitrations where the arbitral institution is in control of cost reimbursement. Such a concept of internalizing environmental externalities should preferably be accompanied by guidelines on cost reimbursement for arbitrators to avoid bad surprises and, possibly, even make such a concept a selling point for arbitration users.

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<sup>96</sup> *Id.*

<sup>97</sup> *SCC Statistics 2021*, SCC ARB. INST., <https://sccinstitute.com/statistics/> (last visited July 14, 2022).

<sup>98</sup> Needless to mention that a single arbitrator could potentially produce more emissions than a panel of three if he or she disregards every suggestion proposed in this article, whereas a panel of three employs virtual hearings and electronic filings, for example.

<sup>99</sup> For a particularly egregious example of a chairman calling for a completely unnecessary hearing motivated by his wish to collect frequent flyer miles on a long-haul flight in order to save his status with his preferred airline, see Stephan Wilske & Chloë Edworthy, *The Essential Qualities of an Arbitrator — What Appointing Parties Must, Should and May Like to Consider*, 23 CROAT. ARB. Y.B. 101, 116 (n.68) (2016).

*4. Encouragement to Implement Environmentally Friendly Practices and Supervision of Environmentally Friendly Practices* — Once arbitral institutions implement better practices, these should be recognized, if by cost incentives or awards. Like law firms receiving awards for being the best in a certain practice area, arbitral institutions should receive awards for adopting practices, and doing more than necessary to help limit their carbon footprint. These awards could be given out as part of the usual rankings by institutions and journals by the Global Arbitration Review,<sup>100</sup> and this might incentivize institutions to adopt more measures as the publicity of the measures taken will reach the parties choosing arbitral institutions. Parties are increasingly forced by regulations or public pressure to worry about the environment and are themselves adopting more measures to limit their adverse environmental impact. Consequently, if they prefer to use arbitral institutions that implement more environmentally friendly practices, arbitral institutions are indirectly pushed to adopt such initiatives to keep users.<sup>101</sup>

Another way to encourage arbitral institutions to decrease their carbon footprint is with green swaps. Lucy Greenwood would like to implement her notion of green swaps to help arbitration actors visualize what making a change within their practice can do in terms of the impact this has on the environment.<sup>102</sup> An example would be if an arbitral tribunal decides to forego asking the Parties to prepare hard copy bundles for the hearing,<sup>103</sup> which—very often—they do not even use. This means that there is extra work for parties in printing, transporting them to hearing and disposing or transporting them back. Instead, the parties could use technology in having bundles online. The use of online instead of printed hard-copy bundles in turn will save X number of trees. The visualization of what impact this can have on the environment might encourage arbitrators and arbitral institutions to take more climate friendly measures.

Arbitral institutions could also be incentivized to implement more environmental-friendly measures if companies devote to ESG or are required to comply with ESG choose the most ESG-friendly arbitral institutions for their arbitration clauses. Therefore, if an arbitral institution does not actively do its part in limiting its environmental footprint, ESG companies will abstain from choosing them for their arbitral proceedings, and thus the arbitral institution will not receive cases concerning the ESG companies. As

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<sup>100</sup> See *Global Arbitration Review*'s website at: <https://globalarbitrationreview.com>. See, most recently, e.g., Tom Jones, *Diversity the Theme at GAR Awards*, GLOBAL ARB. REV. (Mar. 31, 2023), <https://globalarbitrationreview.com/article/diversity-the-theme-gar-awards> (reporting about the introduction of the Campaign for Greener Arbitration award, which went to the Africa Arbitration Academy for publishing a model bilateral investment treaty for states on the continent with a focus on sustainability).

<sup>101</sup> LCIA and CIarb London Joint Webinar, *supra* note 6.

<sup>102</sup> *Arbitration Insider*, *supra* note 4.

<sup>103</sup> Wilske, *supra* note 3.

there is a vivid competition among arbitral institutions,<sup>104</sup> ESG friendliness could be a distinguishing factor. Accordingly, it is only a matter of time until the first ratings or even rankings of arbitral institutions based on ESG friendliness will be available for compliance officers of ESG companies.

With regards to individual arbitrators, arbitral institutions could disincentivize arbitrators by reducing their fees/expenses if they do not implement environmental measures themselves.<sup>105</sup> At the same time, if arbitrators do implement environmentally friendly measures, they could be incentivized to continue to do so by receiving bonuses. Again, such a policy of using monetary tools to incentivize environmentally friendly behavior should be accompanied by the promulgation of explicit guidelines to safeguard transparency and promote the image of the arbitral institution.

Once arbitral institutions have such measures in place, reporting requirements should be introduced.<sup>106</sup> This will mean that arbitral institutions will be required to report on a regular basis on how they are managing their contribution to ESG, what they are doing to reduce their carbon footprint, and if the methods used are successful.

As can be seen, arbitral institutions need to do more to limit their carbon footprints. To do so, they need solutions to implement within their rules. It would be a good start for all arbitral institutions to immediately prohibit the use of disposable coffee cups at their premises, eliminate mandatory hard copy filings and create incentives or eliminate legal impediments to reduce long-haul flights. Once arbitral institutions are both encouraged and supervised to limit their carbon footprint, arbitral proceedings will be less harmful to the environment, without losing their ability to solve international disputes in a fair, transparent, but also time- and cost-efficient manner.

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<sup>104</sup> See generally Stephan Wilske, *The Global Competition for the 'Best' Place of Arbitration for International Arbitrations — A More or Less Biased Review of the Usual Suspects and Recent Newcomers*, 1(1) CONTEMP. ASIA ARB. J. 21 (2008).

<sup>105</sup> For a general outline of the public policy behind such an approach, see RICHARD H. THALER & CASS R. SUNSTEIN, *NUUDGE — IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 188 (2009) (“[I]ncentive-based approaches are more efficient and more effective, and they also increase freedom of choice.”)

<sup>106</sup> *LCIA and CIArb London Joint Webinar*, *supra* note 6.

### III. CONCLUSION

State consensus coupled with the imminence of climate change shows that we need to take action now to try and limit the extent of the consequences of climate change. State consensus concerning climate change and the need for countries to comply with their international obligations in this regard was expressed in *The State of Netherlands (Ministry of Economic Affairs and Climate Policy) v. Stichting Urgenda*:

*There is a broad consensus within climate science and the international community that the longer reduction measures to achieve the envisaged final target are postponed, the more comprehensive and more expensive they will become. Postponement also creates a greater risk of an abrupt climate change occurring as the result of a tipping point being reached.*<sup>107</sup>

The need to take action regarding climate change is evident, as is the need for everyone including arbitral institutions to do their part. This is supported by Greta Thunberg,<sup>108</sup> who explained that it is necessary for individuals to take action due to the inaction of politicians.<sup>109</sup> The immediacy of climate change is further clear as multiple public figures including Stella McCartney,<sup>110</sup> who hopes for the future of fashion to be sustainable and has set up a foundation to raise money for the protection of the Leuser Ecosystem in Indonesia.<sup>111</sup>

Whilst reducing the carbon footprint might be a key concern amongst certain individuals, it is not the priority of the arbitral institutions. Of course, it is neither the arbitral institution's key concern nor job, as the arbitral institutions are there to set a framework and administer arbitrations in a way

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<sup>107</sup> *Netherlands v. Stichting Urgenda*, *supra* note 41.

<sup>108</sup> Greta Thunberg (born January 3, 2003) is a Swedish activist. She is known for her work against climate change, a popular example of youth activism. She started protesting on 20 August 2018, outside of the Swedish Parliament in Stockholm. In December 2018, she attended the UN Climate Change Conference. In the next month, she gave a speech on the World Economic Forum in Davos; see *Greta Thunberg*, WIKIPEDIA, [https://simple.wikipedia.org/wiki/Greta\\_Thunberg](https://simple.wikipedia.org/wiki/Greta_Thunberg) (last visited May 7, 2023).

<sup>109</sup> *Greta Thunberg Has Given Up on Politicians*, THE N.Y. TIMES (Oct. 27, 2021), <https://www.nytimes.com/video/opinion/100000008010161/greta-thunberg-climate-crisis.html> (Thunberg stated “[i]t’s up to you and me . . . No one else will do it for us.”).

<sup>110</sup> Stella Nina McCartney is an English fashion designer. McCartney is a supporter of animal rights and environmentalism, and is well known for her use of vegetarian and animal-free products in her work, see *Stella McCartney*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Stella\\_McCartney](https://en.wikipedia.org/wiki/Stella_McCartney) (last visited July 29, 2022).

<sup>111</sup> *The Value of Role Models in the Fight Against Climate Change: Who Inspires Environmental Advocacy?*, IBERDROLA, <https://www.iberdrola.com/social-commitment/environmental-figures>, (last visited July 20, 2022).

to enable arbitral tribunals to issue fair decisions and decide arbitrations. Nevertheless, due to the imminence of climate change and its effects, every individual needs to take action to limit their individual carbon footprint as much as possible. This can be done by implementing ESG measures, especially environmental measures. Whilst some arbitral institutions, like the SCC, are front-runners with regard to their strategies to reduce their adverse impact on the environment, others are not doing enough. Thus, these authors strongly encourage the arbitral institutions that have not done so to become more climate-friendly and reduce their carbon footprint further by taking the suggested measures such as going paperless, reducing document production, and limiting long-haul flights.

To conclude, the measures suggested in this article are by no means a solution to climate change. However, even small changes will make a difference in the long run if followed by many. These authors, therefore, finish this article by asking you, the arbitral institutions, to limit your carbon footprint and help make a change.

And certainly, it is appropriate to call upon all participants in international arbitration and remind them that even small changes will make a difference in the long run, if followed by many. Insofar one can only pay heed to the inspiring wisdom of the immortals of Rock ‘n’ Roll and contemporaneous philosophy, *The Rolling Stones*:

*Start me up  
Give it all you got  
You got to never, never, never stop!*<sup>112</sup>

And certainly, the Chinese proverb remains true:

“ 坐 而 言 不 如 起 而 行 ”. <sup>113</sup>

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<sup>112</sup> “*Start me up*” is a song by the English rock band *The Rolling Stones* from the 1981 album *Tattoo You*, written by the *Glimmer Twins*, i.e., Mick Jagger and Keith Richards.

<sup>113</sup> English translation: “Actions are louder than words.”

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