MEDIATION MATTERS

Resolving ESG Conflicts Before They Become Crises

An article on ESG dispute resolution in Kenya

> *ESG disputes are rarely just about money. They tend to be about trust, proof, relationships and accountability — and the people they affect are often wider than the people who signed the contract.*

When one party says "we complied" and another says "show us the evidence," the conversation has already moved beyond the contract. When a community says "we were not consulted" or a lender says "you missed the sustainability target," the issue is not only what the agreement requires. It is whether the process was credible, whether the data can be verified, and whether the relationship can survive the disagreement.

These are the kinds of disputes that are beginning to appear as ESG moves from policy statements into real business decisions. Once sustainability obligations begin to affect financing, supply chains, infrastructure, community rights and carbon markets, the stakes shift — and the tools used to resolve disagreements must shift too.

1. Why ESG Disputes Are Different

A conventional commercial dispute is usually built around a single question: who owes what to whom? The facts may be complicated, the contracts may be long, but the frame is familiar. Obligations, breach, remedy.

An ESG dispute tends to ask a wider set of questions. Who was affected — and were all of those people at the table? Who carries responsibility for verifying the data? Who absorbs the cost of compliance, and at which point in the supply chain? What does the obligation actually require when applied to real operations, not just a policy document? And if things have gone wrong, how does the relationship — between a business and its lender, between a company and a community, between a regulator and an industry — continue to function?

This is what makes ESG disputes structurally different. The facts are often technical: carbon measurements, forest-cover data, packaging-compliance records, emissions baselines, climate-risk disclosures. The consequences are often public, not private: a project may stall, a community may protest, a supply chain may fracture, investors may lose confidence. And the outcome of winning a legal argument may, paradoxically, not be enough — a party can succeed in court and still lose the project, the market access, or the trust required to continue operating.

That is the essential insight behind mediation in ESG contexts. Legal rights matter and must be enforced. But in many ESG disputes, the most durable solution is one that is agreed rather than imposed — one that addresses not only the legal question but the practical problem of how parties will continue working together, under mounting regulatory and market pressure, in the future.

2. Where ESG Disputes Are Emerging

Finance: when sustainability targets affect the cost of money

Kenya's planned sustainability-linked financing arrangements offer a useful illustration of how ESG obligations can generate financial disputes. Under that model, the terms of financing — including the cost of borrowing — may improve or deteriorate depending on whether agreed sustainability targets are met. The proposed targets include limiting the loss of natural forest cover and increasing access to electricity among the rural population.

In principle, this alignment of financial incentives with environmental outcomes is precisely what sustainability-linked finance is designed to achieve. In practice, it creates a new category of dispute. What happens when one party says the target was achieved and another questions the data? How is forest-cover loss actually measured, and by whom? Were the measurement methods agreed in advance? If an external event — a drought, a policy change, a delay in implementation — affected performance, is that relevant, and who decides?

At that point, what began as a financing arrangement becomes a dispute about climate data, national credibility, public finance and verification methodology. Mediation offers a way to bring lenders, government counterparties, verification experts and technical advisers to the table before that disagreement becomes a formal dispute — not to avoid accountability, but to understand the facts early, agree on what the numbers actually show, and determine what should follow before positions harden and costs escalate.

> *The lesson is not that sustainability-linked finance is risky. It is that dispute-resolution mechanisms need to be designed into the arrangement from the beginning, with clear provisions about how data is verified, by whom, and what process applies when the parties disagree.*

Supply chains: when everyone agrees on the goal but disagrees on the burden

Consider the logistics of a supermarket delivery. A lorry arrives in the early morning carrying sealed, factory-packaged goods — milk, cooking oil, detergent, bottled water. The supermarket's receiving staff check the cartons, log the delivery and place the goods on the shelves. They did not manufacture the products. They did not design the packaging. They have no ability to inspect or alter the contents.

Under Kenya’s Extended Producer Responsibility framework, producers are expected to take responsibility for the products and packaging they place in the market, including the waste generated after consumers have used them. That principle is both sound and necessary — plastic waste is a significant problem, and a clear framework of responsibility is needed. The dispute between supermarket chains and NEMA, however, reveals a tension that is not about whether the environmental goal matters. It is about where the compliance checkpoint should sit — with the producer, the retailer, the regulator, or through a shared system that everyone can actually use. Retailers argue that they are the final link in a chain that begins with the manufacturer and runs through distributors, importers and wholesalers before it reaches the shop floor. Requiring retailers to verify whether each producer has complied with EPR obligations — before stocking their products — effectively turns the supermarket's delivery bay into a regulatory checkpoint, without giving retailers the information or systems to perform that function in practice.

A court may ultimately resolve the legal question of where the duty lies. But even a court ruling will not, on its own, answer the practical questions: What does a verified producer register look like, and who maintains it? What documentation must suppliers provide at the point of delivery? How much adjustment time is realistic for businesses that source from dozens of suppliers? What happens to goods already in the distribution chain?

This is territory where structured dialogue — whether through formal mediation or a regulator-convened process — can do something a legal ruling cannot. It can bring NEMA, producers and retailers to the table to design a system that actually works in practice: clear supplier warranties, a live compliance register, realistic implementation timelines, phased enforcement and documentation standards that supermarket staff can reasonably apply. The parties may not be fighting the environmental goal at all. They may simply be fighting over how the burden of achieving it is allocated.

Infrastructure and governance: when public trust becomes project risk

Some ESG disputes begin before a single stone is laid.

A project may look straightforward on paper: credible investors, competent engineers and real economic benefit. But governance can still become a project risk. Kenya's proposed PPP regulations, developed partly in response to the cancelled Adani-linked infrastructure deals and wider concerns around unsolicited PPPs, capture one version of this. Companies pursuing unsolicited public-private partnerships would be required to disclose their litigation history, governance structure, debarment record and anti-corruption declarations. The concern is simple: a project can fail before construction begins if the selection process itself looks opaque or captured by undisclosed interests.

But trust doesn't only break down in boardrooms and procurement files. It breaks down on the ground, too.

Kenya's nuclear power discussions in Siaya show the other half of the picture. Whatever the technical merits of the project, communities near Lake Victoria are asking questions no engineering specification can answer: were we properly informed? Was consultation real, or a formality? What happens to our fishing grounds, our water, our land? When people feel consultation was rushed or one-sided, conflict follows — even where the sponsor believes it followed the required process.

Mediation cannot rehabilitate a flawed procurement process, and it cannot certify a plant as safe — those are matters for regulators and engineers. What it can do is create a structured, neutral space where concerns are actually surfaced and answered: investors and regulators explaining what safeguards exist, communities asking direct questions and getting direct answers, and both sides working through what monitoring, benefit-sharing or disclosure should look like in practice.

The pattern holds whether the trust gap is about who selected the developer or whether the affected community was heard. Once public confidence fractures, a technically sound project can still become a dispute — and disputes born of broken trust are far harder to resolve once they've become public controversies.

> *In infrastructure, ESG is not only about the environment. Governance and transparency are load-bearing elements of the same structure. Once public confidence fractures, even a technically strong project can become a dispute — and disputes of that kind are far harder to resolve after they have become public controversies.*

Carbon markets: when everyone wants the same credit

Carbon markets may become one of the most technically complex sources of ESG disputes in Kenya's near future. The country is developing a local carbon exchange, which should in principle create an organised, regulated market in which carbon credits can be bought and sold with greater transparency and security. The opportunity is significant: a functioning domestic carbon market could attract climate-oriented investment, support emissions-reduction projects, and generate new income streams for businesses and communities operating in the space.

But Kenya has also placed limits on the volume of carbon credits that may be transferred internationally before 2030. The rationale is sound — the country must not sell more emission reductions abroad than it can afford if it is to meet its own national climate commitments. The difficulty is that these constraints create a direct tension with the expectations of the project developers and international buyers who invested on the assumption that credits would be freely transferable.

A project developer who structured an investment around the anticipated value of internationally transferable credits may face a very different commercial reality if government authorisation is withheld or delayed. An international buyer who contracted for credits may find that delivery is not possible on the agreed terms. Government, for its part, faces the task of managing competing obligations — to investors, to the market, and to Kenya's own climate targets. Communities whose land or resources are part of the underlying carbon project may reasonably ask what benefit actually flows back to them, and whether the complexity of the market reflects their interests at all.

This is not a simple contractual dispute between a buyer and a seller. It is a multi-party problem involving investment expectations, national policy, regulatory authority, community rights and market integrity. Mediation — or a structured multi-stakeholder dialogue facilitated by a neutral — can help parties work through the key questions before formal dispute mechanisms are triggered: What authorisations are actually available? What happens to agreed pricing if international transfer is delayed? How should benefit-sharing be structured? And what does each party need in order to maintain confidence in the market as a whole?

> *In carbon markets, the credit is only as valuable as the trust that underpins the system behind it. That trust is not self-sustaining — it has to be built, maintained and, when it comes under pressure, actively protected.*

3. Why Mediation Fits ESG Disputes

Some ESG disputes must go before regulators, tribunals or courts. Where a regulator has exceeded its powers, a tender process has been unlawfully conducted, or environmental rules require enforcement, formal proceedings are the appropriate vehicle. Mediation does not displace those processes, and it should not be used to insulate bad decisions from proper scrutiny.

But many ESG disputes also involve something that a legal ruling, however correct, cannot supply on its own. The parties may need to agree on how compliance will be verified going forward. They may need to design a monitoring framework that communities can participate in. They may need to work out how the burden of adjustment is shared across a supply chain, or how the interests of multiple stakeholders — investors, regulators, communities, technical experts — can be reconciled in a workable outcome.

A court can determine who is legally in the right. It cannot tell parties how to continue working together, how to rebuild a relationship, or how to design a practical system for managing shared obligations. Mediation can do those things. And in ESG disputes — where the parties' ongoing relationship often matters as much as the legal outcome, and where the technical complexity of the facts may require expert input rather than legal argument — the fit is particularly close.

Mediation also allows for a more flexible set of outcomes. Phased compliance timelines, agreed verification methodologies, benefit-sharing arrangements, community monitoring protocols, revised reporting frameworks, multi-party technical consultations — these are the kinds of solutions that emerge from negotiated agreement but are rarely available as remedies in litigation. For ESG disputes, which are often as much about the future as the past, that flexibility is a material advantage.

4. What Businesses Should Build In Early

The most important time to think about ESG dispute resolution is before the dispute arises. By the time positions have hardened, legal letters have been exchanged and reputations are at stake, the cost of resolution — in time, money and relationships — is already higher than it needed to be.

Businesses can take several practical steps to reduce that cost. The first is precision in commitments. If an ESG obligation has been assumed — whether under a financing agreement, a supplier contract, a regulatory permit or a public statement — the obligation should be defined with enough specificity to be verifiable. Vague language about "best efforts" or "sustainable practices" may satisfy a communications team but will not resolve a dispute when the parties disagree about what was actually required.

The second is records. ESG disputes are frequently disputes about evidence — whether data was collected, how it was measured, whether the right methodology was applied, and whether performance can be independently confirmed. The businesses best placed to defend their position are those that built a records and verification system before anyone asked for one.

The third is process. Contracts, permits and project documents should include clear, tiered provisions for what happens when a concern arises: an initial engagement requirement, an escalation mechanism, a mediation clause with defined timelines, and — where the subject matter requires it — provision for expert determination of technical questions that the parties cannot resolve between themselves. These are not complicated clauses. They are simple infrastructure for managing disagreement, and they are far easier to agree before a dispute has begun than after it has.

> *The best ESG dispute-resolution clause is not only a provision about where parties go when they fight. It is a provision that creates a process for solving problems early — before the problem becomes a crisis, and before the relationship becomes a casualty.*

Conclusion: Mediate Before the Crisis

The most favourable moment to address an ESG dispute is before it becomes one. Before communities organise and mobilise. Before funders reassess their exposure. Before regulators intervene. Before a supplier relationship breaks down. Before a project that took years to develop stalls over a conflict that might have been resolved in weeks.

This urgency is only likely to grow. Kenya's sustainability-linked financing pipeline, its EPR enforcement framework, the proposed PPP transparency requirements, the ongoing community-consultation debates around large infrastructure, and the emerging domestic carbon exchange all reflect the same underlying trend: ESG obligations are becoming more specific, more measurable, more valuable — and, in consequence, more contested. As the financial and regulatory stakes attached to ESG compliance rise, the disputes that follow will be more sophisticated, more expensive and harder to contain.

The businesses and institutions that prepare for this now will not only ask what the law requires. They will also ask a more searching question: if trust breaks down — with a lender, a community, a regulator, a supply chain partner, or a market counterpart — how will we bring people back to the table, and what will it take to restore confidence in the process?

That is the question mediation is designed to answer. And in the ESG disputes that are coming, it may be the most important question of all.