Nairobi Centre for International Arbitration
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ALTERNATIVE DISPUTE RESOLUTION JOURNAL

Volume 4 Number 4 2024 ISBN No. 978-9914-40-777-8

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Design, Typesetting, Print:
JIJO Media Ltd.
P.O Box 66650-800,
Nairobi, Kenya
Tel: +254 712 877398
Email: hello@jijomedia.co.ke
www.jijomedia.co.ke

Published by;
Nairobi Centre for International Arbitration
Co-Operative Bank House, 8th Floor
Haile Selassie Avenue
P.O Box 548-00200,
Nairobi, Kenya
Tel +254 771 293055
Email: info@ncia.or.ke
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EDITORIAL TEAM

Volume 4 **Number 4** **2024** **ISBN No. 978-9914-40-777-8**

EDITOR'S NOTE

Welcome to Volume 4 of the NCIA Journal. As we survey the intricate and evolving field of Alternative Dispute Resolution (ADR), we should not forget its crucial role in enhancing equitable solutions in an increasingly interconnected world. This publication assembles a collection of articles that discourse the pressing issues facing ADR today, reflecting a broad realm of perspectives and insights.

Environmental and climate-related disputes have emerged as critical challenges in contemporary society. The urgency of these issues calls for innovative dispute resolution strategies that can address the intricate interplay of law, policy, and community interests. The articles reflect a growing recognition of ADR's role in facilitating constructive dialogue around these pressing matters.

Within the rapidly growing technological landscape, the convergence of ADR and technology is particularly significant. Developments in digital tools provide new avenues for efficiency and accessibility but also present challenges that necessitate careful consideration. Our authors engage with these complexities, offering valuable perspectives on how to harness technology while safeguarding fundamental principles of ADR.

In addition, the contributions in this publication emphasize the importance of ethical considerations in all aspects of ADR. As ADR practitioners traverse the challenges of dispute resolution, maintaining ethical integrity is inevitable. The articles herein provoke thoughtful reflection on how ethical principles guide our practices and ensure that justice is served.

As we grapple with global issues, the significance of human rights in ADR cannot be ignored. ADR mechanisms have the potential to protect and promote human rights, specifically in contexts where traditional legal systems may fall short. This theme resonates throughout the contributions, reminding us of the broader impact of our work.

Investor-state arbitration remains a dynamic area of exploration, particularly as it intersects with the influence of sovereign wealth funds. As we navigate the complexities of global investment, the implications of these relationships are explored in depth, highlighting the need for transparent and equitable resolutions.

Through this diverse collection of articles, we seek to foster a rich dialogue that engages scholars, practitioners, and policymakers. Each contribution adds a unique voice to the continuing conversation on how ADR can adapt and flourish in response to contemporary challenges.

NCIA extends heartfelt gratitude to our authors for their dedication and insights, as well as to our peer reviewers for their invaluable contributions, the Editorial board, scholars and NCIA board of Directors who have made it possible to publish this journal. Their collective efforts ensure that we continue to uphold the high standards of scholarship that our readers expect.

Mercy M. Deche
Editor
November 2024

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Dr, Kariuki Muigua is a distinguished law scholar, an accomplished mediator and arbitrator with a Ph.D in law from the University of Nairobi and widespread training and experience in both international and national commercial arbitration and mediation. Dr, Muigua is a fellow of the Chartered institute of Arbitrators (CIArb) Kenyan Chapter and a Chartered Arbitrator. He also serves as a member of the National Environment Tribunal and is the Chartered Institute of Arbitrators (CIArb-UK0 Regional Trustee for Africa. He is an Advocate of the High Court of Kenya of over 30years standing and practicing at Kariuki Muigua & Co. Advocate, where he is also Senior advocate. His research interest include environmental and natural resources law, governance, access to justice, human rights and constitutionalism, conflict resolution, international commercial arbitration, the nexus between environmental law and human rights, land and natural resources rights, economic law and policy of government regarding environmental and economics. Dr. Muigua teaches law at the Centre for Advanced Studies in Environmental Law and Policy (CASELAP), Wangari Maathai Institute for peace and Environmental Studies (WMI) and the School of Law, University of Nairobi. Dr. Muigua can be reached through *muigua@kmco.co.ke* or *admin@kmco.co.ke*.

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Ikoha Muhindi is a Principal Associate in the Dispute Resolution department at ALN Kenya | Anjarwalla & Khanna. He has carved a niche as a skilled litigator, representing clients in high stakes local and cross border disputes at the High Court of Kenya, the East African Court of Justice and the Court of Appeal. This growing reputation has earned him recognition, including three consecutive nominations times for the Nairobi Legal Awards - Young Lawyer of the Year Award. He was the finalist in the 2023 edition of the awards. Ikoha's prowess has also been recognized internally. He has achieved the rank of 'Role Model' twice, the highest accolade for associates at his firm. Ikoha serves on the East Africa Law Society's Trade and Regional Integration Committee, representing a coalition of seven bar associations and civil society organizations. He is also a member of the High Court Commercial and Tax Bar Bench Committee, Employment and Labour Relations Court Bar Bench Committee, and High Court Judicial Review Bar Bench Committee. In these roles, he advocates for the rights of Kenyans, most prominently before the Parliamentary Committee on the Finance Bill in 2022 and 2023. In addition to his legal work, Ikoha was the youngest Chairperson of his firm's Corporate Social Responsibility Committee from 2019 to 2021, leading initiatives that aided over 2,500 individuals affected by the COVID-19 pandemic and natural disasters. He currently chairs the Anchor event committee, focusing on disaster relief. Ikoha is dedicated to the rule of law and access to justice, volunteering for pro-bono cases to assist victims of injustice. He is also the Vice-Chairperson of the "He Matters" Committee, which promotes mental health awareness among male employees at his firm.

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UTILIZING ALTERNATIVE DISPUTE RESOLUTION IN CLIMATE CHANGE DISPUTES

*Prof. Kariuki Muigua**

Abstract

Climate change is a major threat to Sustainable Development in both developing and developed countries. It is the most pressing challenge currently facing humanity. In addition to its adverse environmental, social, and economic impacts, climate change is causing many disputes. Such disputes can affect the achievement of climate goals at levels. Effective management of climate change disputes is therefore crucial in strengthening the response towards climate change and delivering climate justice. This paper critically discusses the viability of Alternative Dispute Resolution (ADR) mechanisms in managing climate change disputes. It argues that ADR mechanisms are ideal in managing climate change related disputes and need to be widely embraced. The paper examines the nature and causes of climate change disputes. It also explores the suitability of ADR processes in handling such disputes and points out the key advantages of ADR techniques towards this end. The paper further discusses some of the concerns that may arise in applying ADR techniques in climate change disputes. Further, it offers suggestions towards utilizing ADR mechanisms for effective management of climate change disputes.

1. Introduction

Climate change continues to be a major global challenge that is affecting both developed and developing countries in their efforts towards realization of the Sustainable Development agenda[1]. It has been described as the most defining challenge of our time[2]. Climate change alongside pollution and biodiversity loss have been identified as the triple planetary crisis which is a term that refers the three main interlinked issues that humanity currently faces[3].

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1 Muigua. K., 'Achieving Sustainable Development, Peace and Environmental Security.' Glenwood Publishers Limited, 2021

2 United Nations Department of Economic and Social Affairs., 'Forum on Climate Change and Science and Technology Innovation.' online at https://www.un.org/en/desa/forum-climate-change-andscience-andtechnology-innovation (Visited March 21, 2024

3 United Nations Climate Change., 'What is the Triple Planetary Crisis?' online at https://unfccc.int/news/what-is-the-triple-planetary-crisis (Visited March 21, 2024)

It has been noted that climate change is now affecting every country on every continent[4]. According to the United Nations, climate change is disrupting national economies and affecting lives, costing people, communities and countries dearly today and even more tomorrow[5]. The impacts of climate change such as intense droughts, water scarcity, severe fires, rising sea levels, flooding, melting polar ice, catastrophic storms and declining biodiversity are being witnessed across the world[6]. Climate change therefore presents a major threat to long-term growth and prosperity, and it has a direct impact on the economic and social wellbeing of all countries[7]. It has been noted that if left unchecked, climate change will undo a lot of the development progress made over the past years and will also provoke mass migrations that will lead to instability and wars[8]. Responding to climate change has therefore become a top policy agenda, at local, national, and global levels[9]. The United Nations *2030 Agenda for Sustainable Development*[10] acknowledges that climate change is one of the greatest challenges of our time and its adverse impacts undermine the ability of all countries to achieve sustainable development. Sustainable Development Goal (SDG) urges all countries to take urgent action to combat climate change and its impacts[11].

In addition to its adverse environmental, social, and economic impacts, climate change is causing many disputes[12]. It has been noted that climate change disputes can affect the achievement of climate goals at levels[13]. Effective management of climate change disputes has been identified as crucial in strengthening the response towards climate change and delivering climate justice[14].

This paper critically discusses the viability of Alternative Dispute Resolution (ADR) mechanisms in managing climate change disputes. It argues that ADR mechanisms are ideal in managing climate change related disputes and need to be widely embraced. The paper examines the nature and causes of climate change disputes. It also explores the suitability of ADR processes in handling such disputes and points out the key advantages of ADR techniques towards this end. The paper further discusses some of the concerns that may arise in applying ADR techniques in climate change disputes. Further, it offers suggestions towards utilizing ADR mechanisms for effective

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4 United Nations., 'Climate Action.' online at https://www.un.org/sustainabledevelopment/climateaction/ (Visited March 21, 2024)

5 *Ibid*

6 United Nations., 'What is Climate Change?' online at https://www.un.org/en/climatechange/whatis-climate-change (Visited March 21, 2024)

7 *Ibid*

8 United Nations., 'Goal 13: Take Urgent Action to Combat Climate Change and its Impacts.' online at https://www.un.org/sustainabledevelopment/climate-change/ (Visited March 21, 2024)

9 United Nations Department of Economic and Social Affairs., 'Forum on Climate Change and Science and Technology Innovation.' online at https://www.un.org/en/desa/forum-climate-changeandscience-and-technology-innovation (Accessed on March 21, 2024)

10 United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., online at https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainabl e%20Development%20web.pdf (Visited March 21, 2024)

11 *Ibid*

12 United Nations Environment Programme., 'Climate Litigation More than Doubles in Five Years, now a Key Tool in Delivering Climate Justice' online at https://www.unep.org/news-and-stories/press-release/climate-litigation-more-doubles-five-years-now-key-tool-delivering (Visited March 21, 2024)

13 *Ibid*

14 *Ibid*

management of climate change disputes.

2. Climate Change Disputes: Causes and Effects

It has been noted that climate change disputes are consistently rising throughout the world[15]. With states increasingly implementing measures to combat the adverse impacts of climate change, it has been asserted that such measures may collide with aspirations for economic growth and social progress[16]. This results in disagreements among various stakeholders including the state, citizens, and the private sector a situation that could trigger disputes[17]. It has been noted that climate change disputes fall into various categories including cases seeking to enforce human rights enshrined in international law and national constitutions[18]; challenges to domestic non-enforcement of climate-related laws and policies[19]; litigants seeking to keep fossil fuels in the ground[20]; advocates for greater climate disclosures and an end to greenwashing[21]; claims addressing corporate liability and responsibility for climate harms[22]; and claims addressing failures to adapt to the impacts of climate change[23].

Further, it has been opined that climate change is a threat multiplier which can increase human security issues such as food and water scarcity while also leading to (violent) conflict in climate-vulnerable regions and countries[24]. This is as a result of the fact that climate change's negative repercussions, such as water scarcity, crop failure, food insecurity, economic shocks, migration, and displacement, can exacerbate the risk of conflict and violence[25]. It has been noted that as the global population continues to rise, the global demand for natural resources continues to grow, and the impacts of climate change begin to materialize, the competition over natural resources is set to intensify, a situation that could spiral into more natural resource-based conflicts and disputes[26]. Population growth and environmental degradation are intensifying competition over already scarce resources, such as land and water, and climate change threatens to increase such competition even further a situation that could spiral into conflicts and disputes[27].

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15 Burianski. M., & Kuhnle. F. P., 'A New Wave of African Climate Change Disputes on the Horizon' online at https://www.whitecase.com/insight-our-thinking/africa-focus-winter-2023-climate-change#:~:text=Disputes%20could%20involve%20liability%20and,and%20enforced%2C%20and%20investment%20disputes. (Visited March 21, 2024)

16 *Ibid*

17 *Ibid*

18 United Nations Environment Programme., 'Climate Litigation More than Doubles in Five Years, now a Key Tool in Delivering Climate Justice' Op Cit

19 *Ibid*

20 *Ibid*

21 *Ibid*

22 *Ibid*

23 *Ibid*

24 Froese. R.., & Janpeter. S, 'The Nexus of Climate Change, Land Use, and Conflicts' (2019)

25 *Ibid*

26 United Nations Environment Programme., 'Environmental Cooperation and Peacebuilding.' online at https://www.unep.org/topics/fresh-water/disasters-and-climatechange/environmentsecurity/environmentalcooperationand#:~:text=International%20law%2C%20environment%20and%20conflict,and%20reliance% 20on%2 0conflict%20resources (Visited March 21, 2024)

27 *Ibid*

There has been a growing number of climate change disputes concerning climate change commitments by governments[28]. It has been observed that there is a huge gap between the level of greenhouse gas reductions the world needs to achieve in order to meet its temperature targets, and the actions that governments are actually taking to lower emissions[29]. This inevitably results in disputes with individuals or organizations seeking legal channels to hold governments accountable for their climate change commitments[30]. It has been noted that there have been a rise of legal disputes challenging government decisions based on a project's inconsistency with the goals of the Paris Agreement or a country's net-zero commitments[31]. With governments increasingly implementing net-zero carbon targets and companies establishing their own carbon-neutral or carbon-negative pledges, climate change related disputes are growing throughout the world[32]. These disputes focus on issues such as infrastructure projects and whether these projects are aligned with the Paris Agreement[33], contribution by companies towards the effects of climate change, and commercial disputes arising out of climate change events such as insurance claims and claims related to potential force majeure events[34].

In addition, there has been a rise of climate change disputes involving corporations[35]. According to UNEP, the growing awareness of climate change in recent years has also spurred legal action against corporations which include cases seeking to hold fossil fuel companies and other greenhouse gas emitters responsible for climate harm[36]. The growth of Environmental, Social, and Governance (ESG) has also resulted in ESG disputes against corporations on various issues including climate change[37]. ESG integrates environmental factors including environmental sustainability and climate change concerns such as climate resilience and low carbon development; social tenets such as improving social welfare and fostering inclusive participation with stakeholders; and governance factors including fostering good governance practices internally and externally in order to realize sustainability[38]. It has been noted that a company's performance on various ESG tenets including impacts or misconduct related to climate and human rights can be a source of disputes[39]. Indeed, it has been pointed out that there has been growth of ESG suits on issues such as climate change[40].

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28 United Nations Environment Programme., 'Climate Litigation More than Doubles in Five Years, now a Key Tool in Delivering Climate Justice' Op Cit

29 *Ibid*

30 *Ibid*

31 *Ibid*

32 Latham & Watkins LLP., 'ESG Litigation Roadmap.' online at https://www.lw.com/admin/upload/SiteAttachments/ESG-Litigation-Roadmap.pdf (Visited March 22, 2024)

33 *Ibid*

34 *Ibid*

35 United Nations Environment Programme., 'Climate Litigation More than Doubles in Five Years, now a Key Tool in Delivering Climate Justice' Op Cit

36 *Ibid*

37 African Development Bank Group., 'Environmental, Social and Governance (ESG).' online at https://www.afdb.org/en/topics-and-sectors/topics/environmental-social-and-governance-esg (Visited March 22, 2024)

38 *Ibid*

39 Hackett. D et al., 'Growing ESG Risks: The Rise of Litigation.' online at https://www.bakermckenzie.com/-/media/files/insight/publications/2020/10/growing_esg_risks_the_rise_of_litigation.pdf (Visited March 22, 2024)

40 *Ibid*

Such disputes usually involve themes such as climate rights, domestic enforcement, keeping fossil fuels in the ground, corporate accountability and responsibility, failure to adapt and the implications of adaptation, climate disclosures and greenwashing[41].

It has been noted that organizations are increasingly facing direct litigation risks including suits challenging investors' mismanagement of climate and biodiversity-related risk, breaches of fiduciary duty, greenwashing, or financing environmental and human rights-related harms[42]. ESG is therefore a key contributor to climate change disputes.

There has also been a growth of climate change disputes in Africa[43]. It has been noted that Africa's heavy reliance on fossil fuels for economic growth, set against the backdrop of strict environmental regulations and emissions-reduction targets, creates a perfect storm of factors that could increase climate change-related disputes in Africa[44]. Africa faces exponential collateral damage from the effects of climate change posing systemic risks to its economies, infrastructure investments, water and food systems, public health, agriculture, and livelihoods, threatening to undo its modest development gains and slip into higher levels of extreme poverty[45]. Increasing temperatures and sea levels, changing precipitation patterns and more extreme weather are threatening human health and safety, food and water security and socio-economic development in Africa[46]. It has been observed that climate change is having a growing impact on the African continent, hitting the most vulnerable hardest, and contributing to food insecurity, population displacement and stress on water resources[47]. Cases of devastating floods, invasion of desert locusts and severe droughts are vivid examples of the impacts of climate change on the continent[48]. As a result of the impacts of climate change in Africa, states have undertaken various measures to respond to the problem including increasing renewable energy generation in Africa, embracing environmentally sound technologies, decarbonizing key sectors including transport, industry, and infrastructure, and investments in carbon markets[49]. It has been noted that these measures may trigger climate change disputes in Africa: On the one hand, if states fail to adopt and implement these measures effectively, individuals or interest groups may sue these states to force them to act[50]. Further, if adopted, these measures may contrast with these states' attempts to grow their economies also contributing to disputes[51].

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41 *Ibid*

42 Grogan-Fenn. J., 'Investors Face Direct Risk from Climate Litigation' online at https://www.esginvestor.net/investors-face-direct-risk-from-climate-litigation/#:~:text=Released%20last%20week%2C%20Baker%20McKenzie's,as%20a%20key%20client%20concern. (Visited March 22, 2024)

43 Burianski. M., & Kuhnle. F. P., 'A New Wave of African Climate Change Disputes on the Horizon' online at https://www.whitecase.com/insight-our-thinking/africa-focus-winter-2023-climate-change#:~:text=Disputes%20could%20involve%20liability%20and,and%20enforced%2C%20and%20investment%20disputes. (Visited March 22, 2024)

44 *Ibid*

45 African Development Bank Group., 'Climate Change in Africa.' online at https://www.afdb.org/en/cop25/climate-change-africa (Visited March 22, 2024)

46 United Nations Framework Convention on Climate Change., 'Climate Change is an Increasing Threat to Africa.' online at https://unfccc.int/news/climate-change-is-an-increasing-threat-to-africa (Visited March 22, 2024)

47 *Ibid*

48 *Ibid*

49 Burianski. M., & Kuhnle. F. P., 'A New Wave of African Climate Change Disputes on the Horizon' Op Cit

50 *Ibid*

51 *Ibid*

Climate change disputes are undesirable and can affect peace and security[52]. It has been pointed out that in many of the countries that are most vulnerable to climate change, fragility and conflict have weakened coping mechanisms, people are dependent on natural resources for their livelihoods, and stark inequalities exist between men and women, or between culturally defined or identity-based groups[53]. Climate change disputes can also hinder the achievement of climate goals at levels[54]. Effective management of climate change disputes has been identified as crucial in strengthening the response towards climate change and delivering climate justice[55]. It has been noted that climate change results in disputes and problems that are not easily addressed by existing legal principles and frameworks[56]. This is because: climate change is a polycentric problem[57]; the assessment of future climate impacts must deal with uncertainty[58]; climate change is a socio-political controversial issue[59]; and addressing climate change requires recognizing a dynamic physical environment[60]. It is therefore necessary to embrace ADR mechanisms for effective management of climate change disputes.

3. Suitability of Alternative Dispute Resolution (ADR) Processes in Climate Change Disputes

Alternative Dispute Resolution (ADR) entails a set of mechanisms that are utilized to manage disputes without resort to adversarial litigation[61]. It has been noted that ADR covers all dispute management methods other than court proceedings[62]. ADR processes may be linked to but function outside formal court litigation processes[63]. These techniques include negotiation, mediation, arbitration, conciliation, adjudication, expert determination, early neutral evaluation, and Traditional Dispute Resolution Mechanisms (TDRMs) among others[64].

There has been recognition of ADR mechanisms at the global and national levels. At the global level, ADR processes are provided for under the *Charter of the United Nations*[65]. The Charter provides that parties to a dispute shall first of all seek a solution by *negotiation*, *enquiry*, *mediation*, *conciliation*, *arbitration*, judicial settlement, resort to regional agencies or arrangements, or other peaceful means

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52 United Nations Department of Political and Peacebuilding Affairs., 'The Implications of Climate Change for Mediation and Peace Processes' online at https://peacemaker.un.org/sites/peacemaker.un.org/files/DPPAPracticeNote-TheImplicationsofClimateChangeforMediationandPeaceProcesses.pdf (Visited March 22, 2024)

53 *Ibid*

54 United Nations Environment Programme., 'Climate Litigation More than Doubles in Five Years, now a Key Tool in Delivering Climate Justice' Op Cit

55 *Ibid*

56 Fisher. E., Scotford. E., & Barritt. E., 'The Legally Disruptive Nature of Climate Change' online at https://core.ac.uk/reader/77063250 (Visited March 22, 2024)

57 *Ibid*

58 *Ibid*

59 *Ibid*

60 *Ibid*

61 Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

62 Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief*, No. 16 of 2011

63 *Ibid*

64 Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

65 United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

of their own choice (Emphasis added)[66]. At a national level, the *Constitution of Kenya*[67] embraces ADR mechanisms. It mandates courts and tribunals to promote ADR mechanisms including reconciliation, mediation, arbitration and TDRMs[68].

It has been argued that there is need to consider ADR mechanisms as 'Appropriate' and not 'Alternative' in the access to justice discourse[69]. This is because the term 'Alternative' connotes that ADR processes are subordinate to formal justice systems[70]. However, ADR mechanisms are ideal in enhancing access to justice and are increasingly becoming preferable that formal court processes in enhancing access to justice[71]. They contain certain key attributes including informality, party autonomy, privacy, confidentiality, flexibility and the ability to promote expeditious and cost-effective management of disputes which makes them a viable tool of enhancing access to justice[72]. ADR mechanisms have been practiced in Africa for many centuries and were the first point of call whenever a dispute arose[73]. ADR techniques fitted comfortably within traditional concepts of African justice, particularly its core value of reconciliation[74]. It is therefore necessary to consider ADR as 'Appropriate' and not 'Alternative' in the access to justice debate.

The appropriateness of ADR makes these mechanisms suitable in managing a wide range of disputes including those related to climate change. It has been noted that disputes related to climate change may increase in future due to: actions of commercial entities giving rise to groups or affected individuals having rights of action[75]; climate change inaction – failure by states to take measures in response to climate change, giving rise to potential inter-state and investor-state disputes, and claims by groups of concerned citizens; climate change action– taking response measures, giving rise to potential inter-state and investor-state disputes[76]; dilution or revocation of responsive measures by states, giving rise to potential renewable energy treaty arbitrations[77]; commercial contract enforcement – private sector is central to climate change mitigation, and there may be an increase commercial contracts relating to climate change mitigation and adaptation[78]; and compliance with climate change commitments under the Paris Agreement[79]. ADR mechanisms provide a suitable platform for managing these disputes. It has been pointed out that in light of climate change concerns and the need to transition towards green

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66 *Ibid*

67 Constitution of Kenya., 2010., Government Printer, Nairobi

68 *Ibid*, article 159 (2) (c)

69 Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution' online at https://kmco.co.ke/wp-content/uploads/2023/06/Reframing-Conflict-Management-in-the-East-African-Community-Moving-from-Alternative-to-Appropriate-Dispute-Resolution-1.pdf (Visited March 22, 2024)

70 *Ibid*

71 *Ibid*

72 Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

73 Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2nd Edition, 2017

74 Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

75 Muigua. K., 'The Viability of Arbitration in management of Climate Change Related Disputes in Kenya' online at https://kmco.co.ke/wp-content/uploads/2022/04/The-Viability-of-Arbitration-in-management-of-Climate-Change-Related-Disputes-in-Kenya-11th-April-2022.pdf (Visited March 22, 2024)

76 *Ibid*

77 *Ibid*

78 *Ibid*

79 *Ibid*

economies, ADR mechanisms will be increasingly useful in managing environmental and sustainability disputes such as those concerning renewable energy, carbon reduction, waste management, electrification, sustainable transport and infrastructure among others[80].

It has been argued that ADR may be preferable in managing climate change disputes due to several factors such as actual or perceived partiality by courts[81]. Courts in many countries have been accused of lack of independence and impartiality which is a major challenge in accessing justice[82]. ADR mechanisms such as mediation and arbitration on the other hand allow parties to select independent, impartial, and neutral third parties to facilitate the dispute management process[83]. This makes them ideal in enhancing access to justice in climate change disputes towards climate justice[84].

Another key factor that makes ADR mechanisms preferable over formal court processes in managing climate change disputes is the lack of judicial expertise regarding complex climate change science[85]. This can be a significant deterrent in access to justice in climate change disputes since parties may not have confidence in the competence of courts in relation to scientific and technical issues on climate change[86]. However, ADR mechanisms such as arbitration allows parties to select a third party with requisite knowledge and experience in such matters to promote effective management of their dispute[87].

ADR mechanisms such as mediation can also aid parties in coming up with creative and mutually acceptable outcomes. It has been noted that mediation permits parties to devise 'win-win' solutions outside of the usual judicial remedies, in a way that promotes ownership over the dispute and its outcome and preserves the parties' relationships[88]. In addition, it has been contended that even where disputes cannot be entirely resolved, mediation can narrow the issue for judicial attention and encourage parties to assess their options realistically[89]. Attributes of mediation including voluntary participation and agreement, confidentiality of exchanges among parties, the search of mutually satisfactory solutions have been identified as well

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80 World Intellectual Property Organization., 'WIPO Alternative Dispute Resolution for Green Technology and Sustainability.' online at https://www.wipo.int/amc/en/center/specificsectors/greentechnology-sustainability/ (Visited March 22, 2024)

81 Hong Kong International Arbitration Centre., 'Beyond the Litigation Narrative: The Place and Roles of ADR in Climate change Disputes' online at https://www.hkiac.org/content/beyond-litigation-narrative-place-and-roles-adr-climate-change-disputes (Visited March 22, 2024)

82 *Ibid*

83 Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

84 Hong Kong International Arbitration Centre., 'Beyond the Litigation Narrative: The Place and Roles of ADR in Climate change Disputes' Op Cit

85 *Ibid*

86 *Ibid*

87 Muigua. K., 'The Viability of Arbitration in management of Climate Change Related Disputes in Kenya' online at http://kmco.co.ke/wp-content/uploads/2022/04/The-Viability-of-Arbitrationinmanagement-of-Climate-Change-Related-Disputes-in-Kenya-11th-April-2022.pd (Visited March 22, 2024)

88 Hong Kong International Arbitration Centre., 'Beyond the Litigation Narrative: The Place and Roles of ADR in Climate change Disputes' Op Cit

89 *Ibid*

suited for the multi-party complex context of climate change disputes[90]. Mediation is perfectly suited for climate change disputes such as those concerning energy transition and renewable energy projects where it is desirable to preserve relationships and complete projects to realize access to clean and affordable energy for all[91].

Further, ADR processes including mediation and negotiation can promote collaborative approaches to managing disputes[92]. Collaborative conflict management refers to the use of a wide range of informal approaches where competing or opposing stakeholder groups work together to reach an agreement on a controversial issue[93]. It is a powerful approach towards managing disputes built on cooperation, open communication, and finding win-win outcomes[94]. It has been noted that in climate change disputes, mediation can encourage collaboration by encouraging parties and other stakeholders to focus on localized, tangible effects of climate change[95]. It also fosters the participation of women and marginalized groups, who face particular climate risks, as well as environmental defenders and, where applicable, indigenous people, whose expertise can help identify key issues and priorities towards formulating acceptable outcomes[96].

Finally, ADR processes are ideal in managing climate change disputes especially those that are transnational in nature[97]. It has been observed that environmental conflicts may involve parties from different nationalities since the effects of issues such as pollution and climate change may spread across different states[98]. Such disputes cannot be managed by national courts due to jurisdictional concerns[99]. ADR mechanisms such as arbitration and mediation can promote management of such disputes since they apply across multiple jurisdictions and further guarantee enforcement of decisions[100].

Despite their efficacy, ADR mechanisms suffer from certain drawbacks that may hinder their suitability in managing climate change disputes. For example, it has been noted that mediation suffer from enforceability challenges creates concerns about the enforcement of outcomes[101]. Further, lack of urgent protection measures such as injunctions may limit the efficacy of ADR mechanisms such as mediation especially where there is need for such orders to protect the environment from imminent harm[102].

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90 Kaufman. S., 'Mediation in Environmental Disputes.' online at https://www.eolss.net/samplechapters/c14/E1-40-03-03.pdf (Visited March 22, 2024)

91 Muigua. K., 'Attaining Environmental Justice through Alternative Dispute Resolution' online at https://kmco.co.ke/wp-content/uploads/2023/07/Attaining-Environmental-Justice-through-Alternative-Dispute-Resolution.pdf (Visited March 22, 2024)

92 Muigua. K., 'Applying Collaborative Approaches towards Conflict Management' online at https://kmco.co.ke/wp-content/uploads/2024/03/Applying-Collaborative-Approaches-towards-Conflict-Management-.pdf (Visited March 22, 2024)

93 Food and Agriculture Organization., 'Collaborative Conflict Management for Enhanced National Forest Programmes (NFPs)' online at https://www.fao.org/3/i2604e/i2604e00.pdf (Visited March 22, 2024)

94 *Ibid*

95 United Nations Department of Political and Peacebuilding Affairs., 'The Implications of Climate Change for Mediation and Peace Processes' Op Cit

96 *Ibid*

97 Muigua. K., 'The Viability of Arbitration in management of Climate Change Related Disputes in Kenya' Op Cit

98 Elborough. L., 'International Climate Change Litigation: Limitations and Possibilities for International Adjudication and Arbitration in Addressing the Challenge of Climate Change.' online at http://www.nzlii.org/nz/journals/NZJlEnvLaw/2017/5.pdf (Visited March 22, 2024)

99 *Ibid*

100 *Ibid*

101 Muigua. K., 'Attaining Environmental Justice through Alternative Dispute Resolution' Op Cit

102 *Ibid*

In addition, the use of arbitration may result in delays and costs especially in instances of court interference[103]. Further, it has been noted that since arbitration is a settlement mechanism, it may not effectively address the underlying issues in a dispute and can also severe relationships[104]. It is necessary to consider these factors and address them accordingly in order to enhance the role of ADR in managing climate change disputes.

4. Way Forward

There is need to utilize ADR mechanisms to foster the effective management of climate change disputes. Mechanisms such as mediation are appropriate and can foster a collaborative approach towards managing climate change disputes by involving all stakeholders[105]. It also can preserve relationships which is essential in climate change disputes such as those involving energy transition[106]. Another key ADR mechanism that is viable in managing climate change disputes is arbitration. It enables parties to select experts in technical and scientific aspects of climate change and is also suitable for transnational climate change disputes[107]. It is therefore necessary to embrace these among other ADR mechanisms for promoting the effective management of climate change disputes.

In addition, it is imperative to enhance the capacity of ADR mechanisms of ADR processes in order to enhance their suitability in managing climate change disputes[108]. This can be achieved by strengthening the legal and institutional framework on ADR at all levels including national levels in order to enhance the uptake of these processes in climate change disputes[109]. The legal framework on ADR can be strengthened through the enactment sound legal and policy frameworks on ADR that promotes the legitimization of these processes while preserving their key attributes[110]. The institutional framework on ADR towards this end can be enhanced through the development of rules and/or expertise specific to the management of climate change disputes by ADR institutions especially arbitral institutions[111]. ADR institutions should also consider offering specialized training in climate change dispute management to build human capacity.

Finally, there is an urgent need to combat climate change[112]. It is an undesirable phenomenon that affects realization of the Sustainable Development agenda across the world by affecting the sustainability of the planet's ecosystems, the stability of

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103 *Ibid*

104 Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

105 United Nations Department of Political and Peacebuilding Affairs., 'The Implications of Climate Change for Mediation and Peace Processes' Op Cit

106 Muigua. K., 'Attaining Environmental Justice through Alternative Dispute Resolution' Op Cit

107 Muigua. K., 'The Viability of Arbitration in management of Climate Change Related Disputes in Kenya' Op Cit

108 Muigua. K., 'Environmental Conflict Management Institutions and Approaches.' online at https://shorturl.at/yIqWj (Visited March 22, 2024)

109 *Ibid*

110 Muigua. K., 'Legitimizing Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.' online at https://shorturl.at/MP9d3 (Visited March 22, 2024)

111 International Chamber of Commerce., 'Resolving Climate Change Related Disputes through Arbitration and ADR' online at https://shorturl.at/guDy8 (Accessed on March 22, 2024)

112 Muigua. K., 'Taking Urgent Action to Combat Climate Change' online at https://shorturl.at/9iGXF (Visited March 22, 2024)

the global economy and the future of humankind[113]. It is also resulting in disputes[114].

It has been noted that climate change related disputes come with many implications across all sectors of economy from environmental, political, economic and even social[115]. Combating climate change is therefore a vital strategy in managing disputes related to this undesirable event[116]. It has been noted that putting in place measures meant to address climate change disputes is part of the mitigation and adaptation approaches to address climate change since while mitigation and adaptation policies have different goals and opportunities for implementation, many drivers of mitigation and adaptation are common, and solutions can be interrelated[117]. Combating climate change and effective management of climate change disputes are therefore mutually compatible goals.

5. Conclusion

Climate change is resulting in adverse environmental, economic, and social impacts which are affecting both developed and developing countries in their efforts towards realization of the Sustainable Development agenda[118]. Climate change is also causing many disputes[119]. These disputes involve various stakeholders including the state, citizens, and the private sector[120]. These disputes occur in various forms including natural resource- based conflicts causes or worsened by climate change, disputes in relation to climate change commitments and policies by states, and disputes involving corporations[121]. Climate change disputes are undesirable and can hinder the achievement of climate goals at levels[122]. Effective management of climate change disputes is therefore key in enhancing the global response towards climate change[123]. Litigation is not ideal in managing climate change disputes due to concerns over expertise, independence, impartiality, delays, costs, and jurisdiction in transnational disputes[124]. It is therefore necessary to embrace ADR mechanisms for effective management of climate change disputes[125]. There is need to enhance the legal, institutional, and human capacity of ADR towards this end[126]. Further, it is vital for all countries to take urgent action to combat climate change[127]. Utilizing ADR in climate change disputes is a key measure that should be embraced globally in order to strengthen the response towards climate change.

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113 Climate Change., 'Meaning, Definition, Causes, Examples and Consequences.' online at https://shorturl.at/yzuXn (Visited March 22, 2024)

114 United Nations Environment Programme., 'Climate Litigation More than Doubles in Five Years, now a Key Tool in Delivering Climate Justice' Op Cit

115 Muigua. K., 'The Viability of Arbitration in management of Climate Change Related Disputes in Kenya' Op Cit

116 United Nations Environment Programme., 'Climate Litigation More than Doubles in Five Years, now a Key Tool in Delivering Climate Justice' Op Cit

117 Muigua. K., 'The Viability of Arbitration in management of Climate Change Related Disputes in Kenya' Op Cit

118 Muigua. K., 'Achieving Sustainable Development, Peace and Environmental Security.' Op Cit

119 United Nations Environment Programme., 'Climate Litigation More than Doubles in Five Years, now a Key Tool in Delivering Climate Justice' Op Cit

120 Burianski. M., & Kuhnle. F. P., 'A New Wave of African Climate Change Disputes on the Horizon' Op Cit

121 *Ibid*

122 United Nations Environment Programme., 'Climate Litigation More than Doubles in Five Years, now a Key Tool in Delivering Climate Justice' Op Cit

123 *Ibid*

124 Hong Kong International Arbitration Centre., 'Beyond the Litigation Narrative: The Place and Roles of ADR in Climate change Disputes' Op Cit

125 *Ibid*

126 *Ibid*

127 Muigua. K., 'Taking Urgent Action to Combat Climate Change' Op Cit

ADVANCING CLIMATE JUSTICE: EMBRACING ARBITRATION IN CLIMATE CHANGE DISPUTES WITHIN THE EAST AFRICAN COMMUNITY.

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Abstract

In the wake of escalating climate change challenges, the East African Community (EAC) faces a growing volume of climate change related disputes. Traditionally, these have been handled through litigation, a process often hampered by prolonged durations and complex legal intricacies. As we navigate the multifaceted landscape of climate change impacts, the necessity for more efficient and effective dispute-resolution mechanisms becomes increasingly apparent. This paper explores the viability of arbitration as a strategic option to address these challenges within the EAC. By examining successful strategies and innovative approaches, this article aims to contribute to policy discussions, practical applications, and further research, ultimately promoting environmental justice and resilience within the EAC.

1. Introduction

In the recent past, there has been a global surge in climate change-related litigation, with lawsuits often filed in domestic and international courts under the banner of human rights violations.[1] As the complexities of these disputes multiply, they often stretch the capabilities of both local and international judicial systems, leading to protracted legal battles.

This paper argues for the integration of Alternative Dispute Resolution (ADR), with a specific focus on arbitration, as a necessary complement to the existing judicial mechanisms within the EAC. Despite its current underutilization in EAC in resolving climate change-related disputes, arbitration offers distinct advantages such as procedural efficiency, enhanced confidentiality, and the facilitation of specialized

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1 United Nations Environment Programme, *Global climate litigation report: 2020 status review*, (2023), online at https://wedocs.unep.org/bitstream/handle/20.500.11822/43008/global_climate_litigation_report_2023.pdf?sequence=3 (Visited April 17, 2024)

expertise in complex environmental matters, rendering it particularly suitable for the nature of climate change disputes.

The second section of this paper identifies the shortfalls of litigation in resolving climate change-related disputes by examining several cases adjudicated or are currently being adjudicated by the East African Court of Justice (EACJ) and selected EAC member state's domestic courts and tribunals. The third section of the paper assesses the suitability of arbitration for resolving climate change-related disputes within the EAC. This includes determining the range of climate change-related disputes that can be referred to arbitration, examining specific instances where arbitration has effectively settled such disputes in other countries, and outlining the benefits associated with arbitration in addressing climate change-related conflicts. The last section of the research makes recommendations for the adoption of arbitration to resolve climate-related disputes.

2. Climate change disputes

Climate change is an existential threat that permeates every corner of the globe, impacting all forms of life with intensifying heat waves and extreme weather events such as floods, which have recently afflicted both the EAC and the wider world. Despite concerted international efforts to implement effective climate policies and curb global warming below 1.5°C, progress remains insufficient.[2] In response, litigation has emerged as a potent tool for holding governments and corporations accountable, spurring a significant surge in climate lawsuits aimed at catalyzing more ambitious climate action and fostering environmental justice.

The multifaceted nature of climate change disputes encompasses not only conflicts directly caused by climate impacts but also those arising from initiatives to combat, mitigate or adapt to these effects. In 2023, a report by the United Nations Environmental Programme (UNEP) found that climate litigation had become increasingly essential in advancing climate action and justice.[3] This report highlighted a significant rise in the total number of climate change cases worldwide, from 884 in 2017 to 2,180 by 2022.[4] Out of these, 16 cases were filed in Africa, with 3 filed in the EAC (2 in Kenya and 1 at the East African Court of Justice).[5]

The UNEP report categorizes the rising trend of climate litigation into six main groups: lawsuits alleging human rights violations due to inadequate climate actions, legal challenges against weak enforcement of climate policies by governments, actions aimed at restricting fossil fuel extraction to mitigate climate impact, demands for corporate transparency over climate impacts to ensure informed public and shareholder decisions, litigation imposing liability for damages resulting from climate-

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2 Secretariat UNFCC, *Technical dialogue of the first global stocktake. Synthesis report by the co-facilitators on the technical dialogue*, (8 September 2023) online at https://unfccc.int/documents/631600 (Visited April 17, 2024)

3 United Nations Environment Programme, *Global climate litigation report: 2020 status review*, (2023), online at https://wedocs.unep.org/bitstream/handle/20.500.11822/43008/global_climate_litigation_report_2023.pdf?sequence=3 (Visited April 17, 2024)

4 *Ibid*

5 *Ibid*

related harm, and legal actions advocating for enhanced adaptation measures to cope with the inevitable consequences of climate change.

This section examines the landscape of climate change litigation in EAC, beginning with an exploration of the legal framework – both national and international-governing climate change related disputes within EAC. This initial inquiry delves into the national and international legal instruments that are in place, establishing a foundational understanding of the legal architecture. The paper then addresses the nuances of specific climate-related litigation disputes that have been filed at both domestic and international levels within the EAC.

2.1 The legal framework governing climate change within EA

2.1.1 The United Nations Framework Convention on Climate Change

The United Nations Framework Convention on Climate Change (UNFCCC) was adopted on 9 May 1992, and entered into force on 21 March 1994.[6] All the EAC member states have ratified the UNFCCC.[7] The UNFCCC's main goal is the "*the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system*."[8] While the UNFCCC does not set specific emission reduction goals for individual countries, it mandates them to track and report their greenhouse gas emissions and to regularly submit national communications detailing their climate change actions.[9] The UNFCCC also commits high-income nations to bolster climate action in developing countries through financial aid and technology sharing. [10] Funding for developing countries is provided through the Global Environment Facility (GEF) and the Global Climate Fund (GCF).[11]

Article 14 (2) of the UNFCCC provides an avenue for the resolution of disputes either through (a) the International Court of Justice, and/or (b) through arbitration, provided that there is mutual consent from the parties involved to settle any disagreements concerning the interpretation or application of the UNFCCC via arbitration, thereby bypassing the need for any additional agreement.[12]

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6 United Nations Climate Change, *Status of Ratification of the Convention*, online at https://unfccc.int/process-and-meetings/the-convention/status-of-ratification-of-the-convention (Visited April 29, 2024)

7 United Nations Climate Change, *Parties to the United Nations Framework Convention on Climate Change*, online at https://unfccc.int/process/parties-non-party-stakeholders/parties-convention-and-observer-states (Visited April 29, 2024)

8 United Nations Framework Convention on Climate Change, (9 May 1992) (1771 U.N.T.S. 107), online at https://unfccc.int/resource/docs/convkp/conveng.pdf (Visited April 17, 2024)

9 Article 4 (1) and (2) *Ibid*

10 Article 4 (3) *Ibid*

11 Global Environment facility, online at https://www.thegef.org/who-we-are/organization (Visited April 18, 2024); Global Climate Fund, online at https://www.greenclimate.fund/about/timeline (Visited April 18, 2024)

12 United Nations Framework Convention on Climate Change, (9 May 1992) (1771 U.N.T.S. 107), online at https://unfccc.int/resource/docs/convkp/conveng.pdf (Visited April 17, 2024)

2.1.2 The Paris Agreement

The Paris Agreement, which entered into force in 2016, established a groundbreaking goal for curbing global temperature rise. It aims to hold the increase of global temperatures well below 2°C compared to pre-industrial levels, while ideally striving to limit it to an even more ambitious target of 1.5°C.[13] All the EAC member states have ratified the Paris Agreement.[14] The Paris Agreement mandates countries to set and communicate to others, their own carbon emittance reduction targets.

The Paris Agreement also provides for regular stocktaking by all participating countries.[15] This involves assessing progress made collectively towards the international climate goals, as well as each nation's individual targets. The Paris Agreement goes beyond setting goals. It also establishes a financial responsibility for developed countries. The developed countries are required to provide resources to developing countries to enable them to reduce greenhouse gas emissions, build resilience to climate change impacts, and enhance adaptation capabilities.[16] Funding is provided through the Global Climate Fund (GCF).[17]

The Paris Agreement also embraces the dispute resolution methods of the UNFCCC, enabling the settling of disputes regarding the interpretation or application of the Convention through arbitration, provided both parties consent to this approach.[18]

2.1.3 The Treaty for the Establishment of the East African Community (EAC Treaty)

The Treaty for the Establishment of the East African Community (EAC Treaty) does not have express clauses addressing climate change. However, the EAC Treaty's places emphasis on sustainable development goals which can be interpreted as implicitly requiring measures to prevent and mitigate the impacts of climate change. This is evident under Article 5(3) of the EAC Treaty wherein the Community is required to ensure "*the attainment of sustainable growth and development of the Partner States*" and "*the promotion of sustainable utilization of the natural resources of the Partner States and the taking of measures that would effectively protect the natural environment of the Partner States.*"[19] Article 8(1) (c) of the EAC Treaty further provides that the Partner States are to "*coordinate through the institution of the Community, their economic and other policies to the extent necessary to achieve the objectives of the Community*."

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13 Article 2 Paris Agreement, (12 December 2015) (T.I.A.S. No. 16-1104), online at https://unfccc.int/sites/default/files/resource/parisagreement_publication.pdf (Visited April 17, 2024)

14 United Nations Treaty Collection, *Status of ratification of the Paris Agreement*, online at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en (Visited April 29, 2024)

15 Article 4 Paris Agreement, (12 December 2015) (T.I.A.S. No. 16-1104), online at https://unfccc.int/sites/default/files/resource/parisagreement_publication.pdf (Visited April 17, 2024)

16 Article 9 *ibid*

17 *Global Climate Fund* online at https://www.greenclimate.fund/about/timeline (Visited April 18, 2024)

18 Paris Agreement, (12 December 2015) (T.I.A.S. No. 16-1104), online at https://unfccc.int/sites/default/files/resource/parisagreement_publication.pdf (Visited April 17, 2024)

19 Treaty for the Establishment of the East African Community, (30 November 1999) (EAC Treaty), online at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2487/download (Visited April 17, 2024)

Furthermore, Article 111 of the EAC Treaty provides that "the Partner States recognize that development activities may have negative impacts on the environment leading to the degradation of the environment and depletion of natural resources and that a clean and healthy environment is a prerequisite for sustainable development."[20]

The EACJ is the judicial organ of the EAC whose jurisdiction, roles and composition are set out Chapter Eight of the EAC Treaty. The court is divided into a First Instance Division and an Appellate Division.[21] This provision facilitates the court's role in overseeing legal disputes that extend beyond traditional litigation, enhancing its capacity to handle a range of conflicts within the EAC. Article 32 of the Treaty empowers the EACJ to function as an arbitration tribunal in instances where parties to a commercial contract or agreement include an arbitration clause in the contract specifically conferring jurisdiction on the EACJ.[22]

2.1.4 National Legislation

In Kenya, the Constitution of Kenya, 2010 (Article 42) explicitly enshrines every person's right to a clean and healthy environment and mandates environmental protection for the benefit of present and future generations.[23] Additionally, it provides for sustainable use of resources.[24] This constitutional guarantee serves as a robust foundation, explicitly prohibiting any form of environmental exploitation that could harm both current and future generations, and implicitly establishing a duty to prevent and mitigate the effects of climate change.

Building on this constitutional foundation, Kenya enacted a climate change legislation, the Climate Change Act, 2016 (the CCA).[25] The CCA establishes a comprehensive framework for tackling climate change with its core aim being to develop and regulate mechanisms that bolster Kenya's resilience and promote low-carbon development strategies, ultimately contributing to sustainable national growth.[26] The CCA establishes a National Climate Change Council to coordinate national climate policies, mandates a National Climate Change Action Plan for prevention and mitigation efforts, and tasks the National Environmental Management Authority with monitoring compliance with these initiatives.[27]

Further, the CCA regulates carbon credit markets and creates a carbon registry. Notably, Section 23E of the CCA promotes community involvement by requiring land-based projects carried out under the CCA to have community development agreement outlining relationships and obligations between a developer and the local

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20 *Ibid*
21 Article 23(2) *ibid*
22 *Ibid*
23 The Constitution of Kenya 2010, online at http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010 (Visited April 17, 2024)
24 Article 10, 60 and 69 *Ibid*
25 Climate Change Act. online at http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20387A (Visited April 17, 2024)
26 *Ibid*
27 *Ibid*

communities, including a built-in dispute resolution mechanism. Notably, the CCA prioritizes ADR as the first step for resolving any disputes arising from its provisions.[28]

Uganda's National Climate Change Act, 2021, exhibits parallels with Kenya's approach. Both statutes mandate the creation of a National Climate Change Action Plan, outlining the nation's mitigation strategies.[29] However, the Ugandan Act takes a more granular approach by requiring the development of district-specific action plans.[30] This fosters a potentially more localized and context-sensitive strategy for addressing climate challenges. Notably, while Kenya's legislation emphasizes ADR mechanisms, the Ugandan Act lacks such explicit language. Section 26 of the Ugandan statute promotes litigation as the primary means of resolving climate related disputes.[31]

2.2 Climate Change Litigation in the EAC

There has been an uptick in climate change litigation both at the domestic courts and at the EACJ as illustrated below.

2.2.1 EACJ

The EACJ has adjudicated on a few cases related to sustainable development and, indirectly, climate change. A notable case is *African Network for Animal Welfare (ANAW) v The Attorney General of Tanzania*, where ANAW filed a reference to prevent the Government of Tanzania from constructing a bitumen road across the northern wilderness of the Serengeti National Park.[32] The First Instance Division of the EACJ ultimately issued a permanent injunction against the Attorney General of Tanzania, preventing the implementation of the road construction plan, subject to its right to undertake such other programmes or initiate policies in the future which would not have a negative impact on the environment and ecosystem in the Serengeti. The Court ruled that the proposed project would threaten the environmental integrity and ecosystem of the Serengeti, emphasizing that such development should not compromise sustainable development principles. The Appellate Division of the EACJ upheld the decision of the First Instance Division.[33]

In its judgment, the EACJ underscored the unequivocal and binding obligation of the United Republic of Tanzania to protect and conserve the environment. It highlighted the potential extensive environmental and socio-economic repercussions of the proposed superhighway, not only on local communities but also on the region's economic and ecological stability. This case illustrates the EACJ's commitment to

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28 *Ibid*

29 National Climate Change Act, 2021, online at https://ulii.org/akn/ug/act/2021/nn/eng@2021-12-31 (Visited April 21, 2024)

30 Section 8 *Ibid*

31 Section 26 *Ibid*

32 *African Network for Animal Welfare (ANAW) v. The Attorney General of the United Republic of Tanzania* Reference No. 9 Of 2010 online at https://www.eacj.org//wp-content/uploads/2014/06/Judgement-Ref.-No.9-of-2010-Final.pdf (Visited April 29, 2024)

33 *The Attorney General of the United Republic of Tanzania V. African Network for Animal Welfare* Appeal No. 3 of 2014, online at https://www.eacj.org//wp-content/uploads/2015/08/APPEAL-NO-3-OF-2014-FINAL-31ST-JULY-205-Anwaw.pdf (Visited April 29, 2024)

ensuring that development projects do not lead to environmental degradation, thereby protecting the Serengeti ecosystem for future generations while considering developmental imperatives suggested by the parties involved.

In another significant case, Centre *for Food and Adequate Living Rights (CEFROHT) & 3 Others v. The Attorney General of the Republic of Uganda, The Attorney General of United Republic of Tanzania and The Secretary General of the East African Community*, several Civil Society Organizations (CSOs) challenged the construction of the East African Crude Oil Pipeline (EACOP), intended to transport crude oil from the oilfields around Lake Albert in Uganda to the Port of Tanga in Tanzania for export. [34] The Applicants raised serious environmental and climate concerns, arguing that the pipeline's operation would greatly intensify the global climate crisis by contributing an annual carbon footprint exceeding 34 million tons.[35] Furthermore, the Applicants expressed concern over the pipeline path traversing through ecologically sensitive areas, specifically the Lake Victoria Basin. This vast freshwater ecosystem and Africa's largest, serves as a vital source of water and food for over forty million people.[36] The Applicants contended that the pipeline would severely harm the livelihoods, biodiversity, climate change resilience, and socio-economic well-being of communities living near its path.

In response, the Government of Uganda, supported by the Government of Tanzania and the Secretary General of the EAC, filed a preliminary objection. They argued for the dismissal of the case based on procedural grounds, stating that the lawsuit was not filed within the required two months of signing the construction agreements, as mandated by Article 30(2) of the Treaty for the Establishment of the East African Community[37]. This legal maneuver highlights the complexities and challenges of addressing significant environmental and climate issues within the framework of regional legal stipulations and procedural prerequisites.

On 29 November 2023, the First Instance Division of the EACJ issued a ruling that upheld the preliminary objection. The EACJ agreed with the Respondents' position that the reference was filed beyond a two-month period after the signing of the agreement for the construction of the pipeline and therefore dismissed the reference. The CSOs appealed the decision to the Appellate Division of the EACJ and the appeal is currently ongoing.[38]

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34 Centre for Food and Adequate Living Rights (CEFROHT) & 3 Others *v.* The Attorney General of the Republic of Uganda, The Attorney General of United Republic of Tanzania and The Secretary General of the East African Community, Reference No. 39 Of 2020, online at https://www.eacj.org/wp-content/uploads/2023/11/Reference-No.-39-of-2020.pdf (Visited April 21, 2024)

35 *Stop EACOP* online at https://www.stopeacop.net/why-stop-eacop#:~:text=EACOP%20will%20increase%20the%20severity,Africa%20to%20commercial%20oil%20exploitation. (Visited April 21, 2024)

36 Centre for Food and Adequate Living Rights (CEFROHT) & 3 Others *v.* The Attorney General of the Republic of Uganda, The Attorney General of United Republic of Tanzania and The Secretary General of the East African Community, Reference No. 39 Of 2020, online at https://www.eacj.org/wp-content/uploads/2023/11/Reference-No.-39-of-2020.pdf (Visited April 21, 2024)

37 *Ibid*

38 The East African, EACJ to rule on lower chamber hearing oil pipeline project case, (2024), online at https://www.theeastafrican.co.ke/tea/news/east-africa/eacj-to-hear-case-challenging-construction-of-eacop-4532322 (Visited April 21, 2024)

This case exemplifies the shortcomings of traditional litigation in handling intricate climate change disputes. The lawsuit was dismissed on a technicality before the EACJ could even consider the core environmental arguments. While this instance affected civil society organizations (CSOs), future occurrences could impact international investors involved in high-value climate change mitigation ventures such as wind farms, hydropower plants, and solar farms. Multibillion-dollar disputes could be dismissed on procedural grounds, posing significant risks to investors.

In another pertinent case, *Environment Shield Limited & Another v. The Attorney General of the Republic of Uganda* serves illustrates ongoing legal challenges related to climate change within the EAC.[39] This ongoing case centers on the approval of a large-scale sugarcane plantation project adjacent to the Bungoma Forest Reserve, which the applicants argue violates environmental regulations and disregards the potential repercussions of climate change.[40] The Applicants also allege that the large-scale project, encompassing 9.24 square miles, will have detrimental environmental impacts, including water pollution in nearby rivers and streams. They further argue that this approval constitutes a breach of core principles of good governance, accountability, and the rule of law. The destruction of the Bungoma Forest Reserve, a vital carbon sink, will significantly reduce the area's capacity to absorb atmospheric carbon dioxide.[41] This will lead to a rise in greenhouse gas concentrations, exacerbating climate change. Despite the ongoing case, portions of the forest have already been cleared. Furthermore, the plantation developers are accused of violating the terms of their license by clearing protected areas of the forest.[42]

2.2.2 Domestic Courts

This section explores the burgeoning trend of utilizing litigation to resolve climate change disputes within EAC. While this approach has gained traction, we will also critically analyze the inherent shortcomings of litigation in effectively addressing the complexities of climate change disputes.

The *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another* [2019] eKLR, stands as a landmark decision within the realm of climate change litigation in EAC and showcases the effective use of litigation to solve climate change-related disputes.[43] This case centered on the proposed construction of a coal-fired power plant in Lamu, a project valued at over 200 billion Kenyan shillings and projected to generate 1,050 megawatts of electricity. The project, spearheaded by a consortium of Kenyan and foreign companies, faced staunch opposition from environmental groups.

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39 *Environment Shield Limited & Another v. The Attorney General of the Republic of Uganda*, online at https://www.eacj.org/?cases=reference-no-35-of-2020-the-environment-shield-limited-another-v-the-attorney-general-of-the-republic-of-uganda (Visited April 21, 2024)

40 *Ibid*

41 The Guardian, *A shame for the world': Uganda's fragile forest ecosystem destroyed for sugar*, (2020) online at https://www.theguardian.com/global-development/2020/jun/18/a-shame-for-the-world-ugandas-fragile-forest-ecosystem-destroyed-for-sugar (Visited April 21, 2024)

42 New Vision, *Hoima Sugar Ordered to Restore Depleted Part of Bungoma Forest*, (2022), online at https://www.newvision.co.ug/category/news/hoima-sugar-ordered-to-restore-depleted-part-NV_144476 (Visited April 21, 2024)

43 Save Lamu & five others v National Environmental Management Authority (NEMA) & another [2019] eKLR online at http://kenyalaw.org/caselaw/cases/view/176697/ (Visited April 21, 2024)

The crux of the opposition's arguments revolved around the potential environmental ramifications of the project. They argued that the plant's proximity to a UNESCO World Heritage Site posed significant environmental threats. Furthermore, they contended that the project's reliance on coal would exacerbate climate change, thereby constituting a violation of Kenya's commitments under the Paris Agreement.[44] The project's developers (Respondents) countered these arguments by highlighting that the Climate Change Act, which enshrined Kenya's obligations under the Paris Agreement, was not yet in effect when the project's feasibility study was conducted. The National Environmental Tribunal, however, dismissed the Respondent's defence. The Tribunal emphatically asserted the mandatory requirement for all such projects to comply with the Climate Change Act. While the developers attempted to justify their oversight by citing the Act's enactment during the study phase, the Tribunal remained resolute. Their decision underscored the paramount importance of integrating climate change considerations into similar infrastructure projects. The Tribunal ruled that strict adherence to all relevant environmental legislation, including the Climate Change Act, is non-negotiable.[45]

Climate change disputes encompass a wide range of issues, extending beyond the direct consequences of a changing climate. These disputes also involve disagreements surrounding efforts to mitigate those consequences, often involving "green energy" projects. The case *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 4 others; Aaron Iltele Lesianntam & 4 others (Interested Parties)* [2021] eKLR is an illustrative example of a dispute emanating from efforts to mitigate climate change.[46] The ongoing legal battle between Marsabit County residents and the Kenyan government over the Lake Turkana Wind Farm exemplifies the complexities of such disputes. This project, hailed by the government as a cornerstone of its clean energy ambitions and a symbol of Vision 2030, stands as Africa's largest wind farm, boasting 365 turbines with a combined capacity of 310 megawatts (MW).[47]

However, the project's path has been fraught with legal challenges. Five years before its inauguration in 2019, affected communities filed a lawsuit against the government, alleging irregularities in the allocation of 150,000 acres of communal land in the Sarima area of Loiyangalani District. This land was designated for Lake Turkana Wind Power Limited to develop the wind farm project.

In 2021, a 3 Judge bench determined that the allocation of the land to the Lake Turkana Wind Farm Project was irregular. The Court did not revoke the wind farm's title but gave the Respondents one year to regularize the transfer of land from the community to the wind farm.[48]

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44 *Ibid*

45 *Ibid*

46 *Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 4 others; Aaron Iltele Lesianntam & 4 others (Interested Parties) [2021] eKLR*, online at http://kenyalaw.org/caselaw/cases/view/221137/ (Visited April 21, 2024)

47 *Ibid*

48 *Ibid*

The Ugandan case, *Tsama William and Others v. Uganda's Attorney General and Others* sheds light on the complex interplay between climate change, natural disasters, and human rights.[49] The lawsuit was filed in 2020, by victims of recurring landslides in Uganda's Bududa district (applicants) against the government of Uganda. The lawsuit stems from multiple landslides that occurred in Bududa district's Bushika sub-county in 2019. These landslides displaced the applicants from their homes, tragically claimed twenty lives, and caused significant property and environmental damage. The applicants argue that the Bududa district, situated in the Mt. Elgon region of eastern Uganda, is highly susceptible to landslides. They point to various government documents as supporting evidence, demonstrating the Respondents' full awareness of this recurring issue, further exacerbated by climate change.

The core of the Applicants' case rests on the alleged failure of the Respondents to fulfil their positive obligations under national and international legal frameworks concerning climate change and disaster management. They contend that the Respondents neglected to establish an effective mechanism for addressing landslides in Bududa district, thereby violating the applicants' fundamental rights. The Applicants express concern about the likelihood of future landslides in Bududa district, citing factors like changing rainfall patterns and increased extreme weather events linked to climate change and environmental degradation. They emphasize the urgency of relocating and resettling affected residents to avoid further loss of life, property damage, and human rights violations. The Applicants sought several reliefs including monetary compensation totaling Ugandan Shillings 6,800,000,000 (approximately USD 1,870,000) for loss of life, threats to life, property destruction, and infringement of other fundamental rights.[50]

In *Mbabazi and Others v. The Attorney General and National Environmental Management Authority*, four Ugandan citizens and an NGO filed a lawsuit against the government (represented by the Attorney General) and the National Environment Management Authority (NEMA).[51] The core of the plaintiffs' arguments centered on the concept of public trust. They contended that the Ugandan Constitution establishes the government as a public trustee for the nation's natural resources, including the atmosphere (Article 237). This position, they argued, imposes a duty on the government to preserve these resources for the benefit of both present and future generations (Articles 39 and 237). The lawsuit linked instances of damage and loss of life from extreme weather events to the government's inaction on climate change.[52] The plaintiffs further argued that neglecting immediate action would exacerbate current climatic patterns, leading to prolonged droughts, floods, hurricanes, and crop failures, ultimately culminating in a humanitarian crisis for present and future generations.

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49 *Tsama William and Others v. Uganda's Attorney General and Others Miscellaneous Cause No. 024 of 2020*, online at https://climatecasechart.com/non-us-case/tsama-william-and-others-v-ugandas-attorney-general-and-others/ (Visited April 21, 2024)

50 *Ibid*

51 *Mbabazi and Others v. The Attorney General and National Environmental Management Authority* Civil Suit No. 283 of 2012, online at https://climatecasechart.com/non-us-case/mbabazi-et-al-v-attorney-general-et-al/ (Visited April 21, 2024)

52 *Ibid*

While the High Court did not issue a final decision on the substantive claims, it did order a 90-day mediation process between the parties following a preliminary hearing. Although the case remains unresolved, it serves as a significant example of the judiciary's role in facilitating collaborative solutions and the potential for ADR to provide more expedient and potentially conciliatory resolutions in complex climate change related disputes.

2.3 Inadequacies of climate-related litigation

The current judicial landscape in EAC often presents a challenge for climate change disputes due to a lack of specialized courts and a shortage of judges with expertise in climate-related disputes. Most courts oversee a broad spectrum of legal matters. Even in jurisdictions like Kenya with a dedicated Environmental and Land Court (ELC), the docket primarily revolves around land occupation, ownership and use disputes.

Further, the topic of climate change has taken the forefront in the last decade thus meaning that very few Judges and legal professionals have specialized in dealing with and/or understanding climate change related law matters. This lack of specialization presents a significant obstacle to the effective adjudication of climate-related disputes. Without a deep understanding of the complexities involved, courts may struggle to reach optimal or equitable outcomes. Addressing this gap in expertise is crucial for enhancing the judiciary's capacity to tackle climate change issues effectively within the EAC.

Compounding the limitations of judicial expertise is the persistent issue of court congestion in East Africa. The sheer volume of cases can lead to protracted litigation, as exemplified by the Ugandan case of *Mbabazi et al. v. The Attorney General and National Environmental Management Authority*, which remains unresolved twelve years later.[53]

The urgency of climate change action stands in stark contrast to the glacial pace of traditional litigation. With countries facing mounting pressure to implement mitigation strategies swiftly, protracted disputes impede the timely execution of these critical measures. For instance, a prolonged land dispute surrounding a proposed carbon-credit-financed wind farm could lead the sponsor to shift investment elsewhere (and dissuade prospective foreign investors from setting up in the EAC), leaving the residents of the EAC region without the potential benefits of the project as well as foreign direct investment.

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53 *Mbabazi and Others v. The Attorney General and National Environmental Management Authority Civil Suit No. 283 of 2012*, online at https://climatecasechart.com/non-us-case/mbabazi-et-al-v-attorney-general-et-al/ (Visited April 21, 2024)

Additionally, the reliance on litigation to resolve climate change disputes can be hampered by procedural hurdles, as exemplified by CEFROHT case (supra).[54] Litigation procedures can be complex, and parties may use technicalities to stall or avoid addressing the core issues of the case. This is a significant drawback of litigation, as climate change issues often require timely and decisive action.

3. Arbitration as a tool to resolve climate change-related disputes.

Internationally, arbitration has been successfully used to resolve climate change-related disputes. For example, the Permanent Court of Arbitration (PCA), has administered at least nine commercial arbitrations involving climate change disputes.[55] A 2019 report by the International Chamber of Commerce (ICC) revealed a surge in disputes linked to climate change. This rise was observed by the ICC and other major arbitration bodies over the preceding five years.[56]

The limitations highlighted above regarding traditional litigation in handling climate change disputes necessitate exploring ADR mechanisms. While arbitration is a prominent method for resolving international disputes across various domains, it is important to analyze its specific applicability and potential within the context of climate change disputes within the EAC.

3.1 The scope of climate change disputes which can be resolved through arbitration.

Disputes pertaining to climate change that are amenable to arbitration can be grouped into three primary categories.[57] The first category encompasses disagreements stemming from specific contracts related to meeting climate change commitments.[58] These contracts can involve either transitioning to a low-carbon economy, adapting to the impacts of climate change, or mitigating its effects.[59]

Tackling climate change demands significant financial resources, with private investment playing a crucial role. The Lake Turkana Wind Power (LTWP) Project exemplifies a successful private-sector initiative aimed at carbon emissions reduction.[60]

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54 *Centre for Food and Adequate Living Rights (CEFROHT) & 3 Others v. The Attorney General of the Republic of Uganda, The Attorney General of United Republic of Tanzania and The Secretary General of the East African Community*, Reference No. 39 Of 2020, online at https://www.eacj.org/wp-content/uploads/2023/11/Reference-No.-39-of-2020.pdf (Visited April 21, 2024)

55 Salonen, Olivia, *Greening Arbitration and Climate Change Disputes–The Role of Arbitration in the Global Battle against Climate Change*, (Master's thesis, Itä-Suomen yliopisto, 2024), online at https://erepo.uef.fi/bitstream/handle/123456789/31394/urn_nbn_fi_uef-20240122.pdf?sequence=1&isAllowed=y#:~:text=tered%20by%20the%20PCA.193%20Even%20though%20most,%E2%80%9Ca%20commercial%20contract%20dispute%20involving%20Asian%20hydroelectric (Visited April 19, 2024)

56 International Chamber of Commerce, Commission on Arbitration and ADR, *Resolving Climate Change Related Disputes through Arbitration and ADR* (2019), online at https://iccwbo.org/wp-content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf (Visited April 18, 2024)

57 *Ibid*

58 *Ibid*

59 *Ibid*

60 Sofie Nørager, et al, "Unfolding the Green Economy: The Case of Lake Turkana Wind Power Project." *The Interdisciplinary Journal of International Studies* 10, no. 1 (2020): 13, online at https://journals.aau.dk/index.php/ijis/article/view/6355/5545 (Visited April 29, 2024)

East African governments are increasingly turning to private funding for climate change initiatives, but potential disputes arising from these deals pose a significant challenge. Effective mechanisms for resolving such disagreements are crucial. While tackling climate change requires urgency, lengthy litigation processes could significantly delay these crucial projects. Furthermore, the private sector might be hesitant to engage in multi-million or multi-billion-dollar deals if the potential exists for disputes to be aired publicly.

The dispute between Core Carbon and Rosgazifikatsiya and Centregasservice which was referred to arbitration illustrates the potential use of arbitration to resolve a dispute stemming from a contract aimed at meeting climate change commitments.[61] In the case, a Danish company, Carbon Core, won a significant arbitration case against two Russian entities, Rosgazifikatsiya and Centregasservice. The dispute stemmed from climate change emission reduction projects undertaken by Core Carbon in Russia. Core Carbon invested heavily to repair leaky gas pipelines, achieving substantial reductions in methane emissions.[62] Under the Kyoto Protocol, these reductions entitled them to carbon credits (ERUs) for trading. However, Rosgazifikatsiya and Centregasservice refused to register the projects, preventing Core Carbon from earning the credits. After years of failed attempts to resolve the issue, Core Carbon took the case to arbitration. The arbitral tribunal ruled in their favour, awarding them over $150 million in damages and legal costs.

The second category of climate change disputes stems from existing contracts, where unforeseen circumstances related to climate change disrupt performance.[63] This can involve disagreements over fulfilling obligations due to new climate-related laws and regulations, or disputes arising directly from the physical impacts of climate change, such as extreme weather events or rising sea levels, hindering a party's ability to meet contractual terms.

Incorporating arbitration clauses into agreements can provide an efficient way to resolve such disputes. This is particularly important given the ever-evolving legal landscape. As countries strive to meet their Paris Agreement commitments, new regulations may arise that increase production costs or hinder service delivery, potentially leading to disagreements between contracting parties. Having a mechanism for resolving such disputes efficiently is crucial for maintaining a predictable and stable business environment.

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61 Salonen, Olivia, *Greening Arbitration and Climate Change Disputes–The Role of Arbitration in the Global Battle against Climate Change*, (Master's thesis, Itä-Suomen yliopisto, 2024), online at https://erepo.uef.fi/bitstream/handle/123456789/31394/urn_nbn_fi_uef-20240122.pdf?sequence=1&isAllowed=y#:~:text=tered%20by%20the%20PCA.193%20Even%20though%20most,%E2%80%9Ca%20commercial%20contract%20dispute%20involving%20Asian%20hydroelectric (Visited April 19, 2024)

62 Quinn Emanuel Urquhart and Sullivan, LLP, *December 2014: International Arbitration Victory*, online at https://www.quinnemanuel.com/media/916115/qe-december-2014-newsletter.pdf (Visited 21 April 2024)

63 International Chamber of Commerce, Commission on Arbitration and ADR, *Resolving Climate Change Related Disputes through Arbitration and ADR*, (2019), online at https://iccwbo.org/wp-content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf (Visited April 18, 2024)

A prime example of a dispute emanating from regulatory and policy changes is the Permanent Court of Arbitration (PCA) case of *PV Investors v. Spain*.[64] This dispute stemmed from changes implemented by the Spanish government in its renewable energy sector policies and regulations. These changes included a 7% tax on power generation revenue and a reduction in subsidies for renewable energy producers.[65] The Claimants, who were foreign investors who had financed renewable energy projects in Spain (the Claimants) argued that these policy shifts violated the Energy Charter Treaty (ECT). They claimed the changes negatively impacted on their investments. The tribunal partially ruled in favour of the Claimants, awarding them approximately ninety-nine million euros. The decision centered on Spain's failure to uphold the "fair and equitable treatment" (FET) clause of the ECT.[66] In other terms, Spain had not provided the "reasonable rate of return" on investments that the earlier regulatory framework had promised.

Other examples include *Tennant Energy, LLC v. Government of Canada*[67], *Mesa Power Group LLC v. Government of Canada*[68] and *Windstream Energy LLC v. Government of Canada*[69] which involved claims stemming from the Provincial Government of Ontario's modifications to its Feed-in Tariff (FIT) program, designed to financially support renewable energy projects. In each case, the Claimants claimed that the changes unfairly disadvantaged their investments in wind farms. They argued these changes violated provisions of the North American Free Trade Agreement (NAFTA) that protect foreign investors from unfair treatment by host governments.

The first two categories of climate change disputes can be addressed through pre-emptive measures like incorporating arbitration clauses into contracts. These clauses establish a framework for resolving future disagreements efficiently without resorting to lengthy court battles. The third category, however, involves disputes where no prior agreement on dispute resolution exists.[70] In such instances, the parties may choose to enter into a submission agreement after the dispute arises, formally agreeing to settle their dispute through arbitration. This option provides flexibility for resolving unforeseen conflicts outside the traditional court system.

The case of *Anderson, et al. v. Pacific Gas & Electric (PG&E)* presents a noteworthy example of arbitration being used to resolve a dispute even in the absence of a formal

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

65 *Ibid*

66 *Ibid*

67 *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, online at https://www.italaw.com/sites/default/files/case-documents/italaw170830.pdf (Visited April 18, 2024)

68 *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17 (Award 23 March 2016) online at https://pcacases.com/web/sendAttach/1675 (Visited April 19, 2024)

69 *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, online at https://www.italaw.com/sites/default/files/case-documents/italaw7875.pdf (Visited April 19, 2024)

70 *Ibid*

l contract between the parties. [71] In this case, over 600 residents of a Californian town alleged that a gas and electric company (PG&E) had contaminated their water supply with a carcinogen for decades, rendering it toxic.[72] Initially, the residents filed a class-action lawsuit against PG&E. However, the parties agreed to submit the dispute to arbitration. This decision demonstrates the flexibility of arbitration as a dispute resolution mechanism, applicable even beyond pre-existing contractual agreements. The arbitration process resulted in a verdict holding the company liable for its actions. The arbitrators further mandated PG&E to compensate the residents for the damages they had incurred.[73]

The recent case between the South Sudanese government and Hope for Humanity Africa (HHA) at the EACJ showcases the potential of ADR mechanisms in resolving environmental disputes, even in the absence of formal contracts.[74] On 19 June 2021, instead of proceeding with a full court hearing, the EACJ opted for mediation. This approach can be particularly beneficial in environmental disputes, where fostering cooperation and finding common ground is crucial for long-term solutions.

The three categories discussed above primarily focused on contractual and non-contractual disputes arising from climate change impacts. The Paris Agreement and the UNFCCC, however, establish a separate framework for resolving disputes between countries concerning their implementation and interpretation of the Treaties. Article 14(2) of the UNFCCC allows Parties to invoke arbitration as a means of dispute resolution. Article 24 of the Paris Convention adopts the UNFCCC's dispute resolution mechanisms. However, there is an important caveat. For a dispute between two countries to be submitted to arbitration under Article 14(2) of the UNFCCC, both countries must have explicitly declared their acceptance of arbitration as a dispute resolution option. As of today, only three countries – the Netherlands, Solomon Islands, and Tuvalu – have made such declarations.[75]

3.2 Advantages of settlement through arbitration.

Climate change litigation faces inherent limitations. Arbitration offers a compelling supplement for resolving such disputes. Firstly, arbitration's flexibility empowers parties to select arbitrators with specialized climate change expertise. This ensures a profound understanding of the intricate scientific and legal issues at stake, potentially leading to more informed and nuanced decisions.

Secondly, arbitration proceedings can be tailored to the specific requirements of each case. This adaptability fosters a more efficient resolution process compared to the potentially rigid formalities of traditional litigation. Additionally, third-party funding options, often more readily available in arbitration, can enhance access to justice for

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71 Fan Kun, "Expansion of arbitral subject matter: new topics and new areas of law." The Evolution and Future of International Arbitration, Kluwer Law International (2016) page 303, online athttps://shorturl.at/ln5eq (Visited April 19, 2024)

72 *Ibid*

73 *Ibid*

74 EAC, Government of South Sudan allowed to settle Case with Litigant through Mediation as alternative dispute resolution mechanism, (2021), online at https://shorturl.at/kzgFx (Visited April 21, 2024)

75 United Nations, Declarations by Parties, online at https://shorturl.at/FozrP (Visited April 18, 2024)

parties with limited financial resources.

Thirdly, multinational corporations and actors from diverse jurisdictions frequently participate in the international carbon credit market, creating a potential need for transnational dispute resolution mechanisms. Arbitration offers a singular, streamlined process to address such disputes, eliminating the need for potentially cumbersome and duplicative litigation across multiple jurisdictions. This efficiency is further bolstered by the widespread ratification of the New York Convention, which ensures international recognition and enforcement of arbitral awards.[76] Arbitration provides a more expeditious and internationally compatible forum for resolving complex climate change disputes.
Finally, timeliness is paramount in the fight against climate change. Arbitration offers a significant advantage in this regard by expediting the resolution process compared to traditional litigation. Climate change disputes can be settled through a single, private arbitration proceeding, as opposed to potentially protracted public court proceedings susceptible to backlogs and delay tactics. Furthermore, the confidential nature of arbitration can be attractive to some parties involved in climate change disputes.

4. Recommendations

As nations intensify efforts to combat climate change, a corresponding rise in climate-related disputes is inevitable. Significant policy shifts often trigger such disputes. This article proposes the adoption of arbitration as one of the primary mechanisms for resolving these disputes within the EAC region.

To encourage the use of arbitration, climate policymakers at both national and EAC levels should strategically involve arbitration expertise in the policymaking process. For example, during the development of guidelines for community-level agreements addressing land-use conflicts arising from climate change policies under the Climate Change Act, Kenyan authorities should consult with arbitrators and arbitration bodies. This collaboration can lead to the incorporation of policies that facilitate the effective referral of disputes to arbitration.

Furthermore, fostering collaboration between arbitration institutions, legal professional associations, and stakeholders engaged in climate change mitigation is crucial. Joint efforts to raise public awareness regarding arbitration as a viable alternative for resolving climate disputes would significantly benefit the region.

Additionally, arbitration bodies should establish training programs specifically designed for arbitrators and legal practitioners, focusing on the intricacies of climate change-related disputes. This initiative would cultivate a pool of experts within the EAC region, equipped to oversee these complex disputes effectively. By building such expertise, arbitration can become a more attractive option for disputing parties seeking efficient and specialized resolution.

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76 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (10 June 1958) (330 U.N.T.S. 3), online at https://www.newyorkconvention.org/english (Visited April 21, 2024)

EAC arbitration bodies can emulate the successful practice of the Permanent Court of Arbitration's (PCA) Specialist Panels (PCSs) by establishing a dedicated list of arbitrators with proven expertise in climate change law and science.[77] This would provide disputing parties with the assurance of a qualified tribunal to handle their complex cases.

A proactive approach is necessary to equip the EAC region with robust mechanisms for resolving climate change disputes. Integrating arbitration expertise into policymaking, raising public awareness of arbitration as an alternative dispute resolution method, and fostering specialized training for legal professionals all contribute to building a more efficient and effective framework for addressing these increasingly prevalent disputes.

5. Conclusion

The rise of climate change disputes in the EAC calls for effective resolution mechanisms. Arbitration, with its speed and ability to leverage expert arbitrators, offers a compelling supplement to traditional litigation. To address this growing need, EAC policymakers and member states should consider incorporating arbitration into their climate change policies and even include arbitrators in the policymaking process itself. This focus on ADR, particularly arbitration, can equip the EAC and its member states to efficiently navigate the complexities of climate change disputes.

77 PAC, *Panels of Arbitrators and Experts for Environmental Disputes*, online at https://pca-cpa.org/en/about/panels/panels-of-arbitrators-and-experts-for-environmental-disputes/ (Visited April 21, 2024)

INVESTIGATING THE POTENTIAL OF BLOCKCHAIN TECHNOLOGY FOR COMBATING CORRUPTION IN CONSTRUCTION DISPUTES: AN AFRICAN OUTLOOK

By Shalom Bright Omondi & Nyamboga George Nyanaro***

Abstract

This study explores the potential of applying blockchain technology to construction contract arbitration in Africa. By utilizing decentralized record-keeping and smart contract execution, the blockchain can streamline arbitration proceedings, ensure the integrity of agreements, and provide transparent documentation of the process. However, the adoption of blockchain technology also faces challenges such as technical complexity, regulatory hurdles, and financial constraints, particularly in the African context. This study aims to address the scarcity of research in this area and to investigate the benefits, challenges, and opportunities associated with implementing blockchain in the arbitration of construction disputes. Specifically, this research examines the technical, legal, regulatory, and financial aspects to provide insights into the feasibility and implications of blockchain adoption in African construction arbitration.

1. Introduction

Corruption erodes trust; weakens democracy; hampers economic development; and reinforces inequality, poverty, and social division.[1] However, this is not a novel phenomenon. Two thousand years ago, it was discussed in a book called *Arthashastra* by an Indian king.[2] It was also highlighted by Dante, several centuries ago, who placed bribers in the deepest part of hell which reflected the Middle Ages' contempt for corrupt persons, and the American constitution made reference to bribery as one of the crimes which could lead to a president's impeachment.[3] However, this does

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1 U Myint, 'Corruption: Causes, Consequences and Cures' (2000) 7(2) Asia-Pacific Development Journal 33

2 Vito Tanzi, 'Corruption Around the World: Causes, Consequences, Scope, and Cures' (IMF Working Paper, Fiscal Affairs Department, May 1998)

3 *Ibid*

not have much of an effect on corruption over the millennia. There is a growing worldwide concern over the rate of corruption at present, and the general belief that corruption is universal and present in all countries.[4] It has not only permeated the political arena in a negative light but has also ruined the careers of public individuals, destroying the reputations of well-known organizations and tarnished firms and businesses.[5]

Transparency International in its bribe payer index ranked construction as first in regards to giving and receiving bribes.[6] This is worse when it comes to the construction industry in Africa, where corruption has ravaged many infrastructure development programs and is currently affecting the quality of project performance negatively.[7] In recent times, technology use has been advocated within the construction sector to streamline projects, reduce time, prevent disputes, and mitigate corruption for the purpose of socio-economic development of countries.[8] Appropriate technological use, such as blockchain technology integration, can increase accountability and remove loopholes in corrupt practices.[9] This study argues for the inclusion of blockchain technology to combat corruption in construction disputes and effectively control the spread of corruption within the construction industry in Africa.

2. Construction Industry

2.1 Brief Background on Construction Projects

A construction project undergoes various stages of completion. These include initiation, planning, execution, control, closing, and monitoring stages.[10] The success of a project can be determined by its delivery, and the ability of a project manager to meet these requirements under project delivery can determine success.[11] The success of contractor organization in construction also mainly depends on how properly an individual project is implemented. For construction projects, this determination of success can be bundled into different factors, such as project objectives related to time, cost, quality, safety, and environmental conservation.[12] The complexity of

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4 U Myint, 'Corruption: Causes, Consequences and Cures' (2000) 7(2) Asia-Pacific Development Journal 33

5 *Ibid*

6 Transparency International UK, 'Global Construction Sector: Most Corrupt', (Transparency International, 2008) online at <https://www.transparency.org.uk/global-construction-sector-most-corrupt> (Visited April 18, 2024)Top of Form

7 Chinedu C. Adindu et al, "Issues of Corruption in Construction Projects and Infrastructure Development in Nigeria – An Empirical Approach," in *Proceedings of the DII-2019 Conference: Infrastructure Development and Investment Strategies for Africa: Innovation in Infrastructure Development and Investment - Is Africa Ready for Change?* (Livingstone, Zambia: Publisher, 2019), DII-2019-021.

8 Alhaji Razak Jaiyeola, 'Deploying Emerging Technology to Fight Corruption,' (IFAC), online at <https://www.ifac.org/knowledge-gateway/building-trust-ethics/discussion/deploying-emerging-technology-fight-corruption> (Visited April 18, 2024)

9 I. F. Azmi & A. A. Nugroho, 'Anti-corruption system 4.0: The adoption of blockchain technology in the public sector' (2023) 9(1) *Integritas: Jurnal Antikorupsi* 93–108 online at <https://doi.org/10.32697/integritas.v9i1.985> (Visited April 18, 2024)

10 Chinedu C. Adindu , Ikechukwu A. Diugwu , Saheed O. Yusuf , Musa A. Musa, 'Issues of Corruption in Construction Projects and Infrastructure Development in Nigeria – An Empirical Approach' (DII-2019 Conference, Livingstone, Zambia, 25-26 July 2019), online at <http://repository.futminna.edu.ng:8080/jspui/bitstream/123456789/12030/1/DII%202019-021_Issues%20of%20Corruption%20in%20Construction%20Projects%20and%20Infrastructure%20Development%20in%20Nigeria%20%E2%80%93%20An%20Empirical%20Approach_Full%20Paper.pdf> (Visited April 24, 2024)

11 *Ibid*

12 Nikolić, Marin, and Anita Cerić, 'Classification of Key Elements of Construction Project Complexity from the Contractor Perspective' (2022) 12 Buildings 696, online at https://doi.org/10.3390/buildings12050696Top of Form (Visited April 24, 2024)

the project can act as a major hindrance to the success of a construction project.[13] Therefore, it is important for the project to be streamlined to avoid incidents of corruption from breaking out through the project.

2.2 Corruption in Construction Industry in Africa: A Third World Perspective

According to Van Der Walt *et al.* (1998), corruption and bribery exist for three reasons: historical, social, and economic.[14] From a historic and social standpoint, it is recognized that the selfish nature of humans gives rise to a culture of corruption and bribery, while economically, it is recognized that economic principles create a climate for corruption and bribery.[15] In this regard, limited resources and low wages may force people to become corrupt to make a living.[16] When it comes to the construction industry, there is no secret that the sectors revolving around infrastructure and construction are riddled with corruption.[17]

The susceptibility of third-world countries to corruption has been widely documented.[18] Projects mainly involve a multitude of players, including clients, consultants, engineers, architects, financiers, insurers, contractors, and subcontractors.[19] The government's role is closely intertwined with that of the sector. According to previous studies, governments play a large role in the investment of infrastructure services worldwide, accounting for more than 78 percent of investment.[20] Therefore, it comes as no surprise when governments are tied to corruption incidents in third-world countries. This is especially worse in African countries, for instance, Kenya was ranked as the third most corrupt country in 2016 (Omondi, 2016).[21] Other instances of corruption in the African construction industry are mentioned below.

2.3 Construction Industry in Nigeria

The construction market in Nigeria is expected to grow by 3.2% between 2022 and 2026, with construction projects mainly driven by the government and private investors.[22] In Nigeria, the government is responsible for the construction of roads, bridges, dredged waterways, ports, and bridges.[23] However, with economic growth, there is a risk of corruption in Nigeria's construction industry.

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13 *Ibid*

14 Charles Injess Martin Chiocha, "Corruption and Its Effects on the Development of Construction Industry in Malawi" (Treatise submitted in partial fulfilment of the requirements for the degree of Magister Scientiae in Built Environment, Nelson Mandela Metropolitan University, January 2009).

15 *Ibid*

16 *Ibid*

17 The Royal Institution of Chartered Surveyors, 'The Cost of Corruption in Construction' (RICS, 2017) online at <https://www.rics.org/news-insights/wbef/the-cost-of-corruption-in-construction> (Visited April 17, 2024)

18 Charles Kenny, 'Construction, Corruption, and Developing Countries' (June 2007). (World Bank Policy Research Working Paper 4271, 2007, online at <https://documents1.worldbank.org/curated/en/571281468137721953/pdf/wps4271.pdf> (Visited April 21, 2024)Top of Form

19 *Ibid*

20 *Ibid*

21 Adeline M. Dindi, G. Munala, A. Alkizim, P. Kivaa, and C. Gichure, "Ethics as a Solution to Corruption: A Case Study of the Construction Industry in Kenya" (2018) 12(2) Africa Habitat Review Journal online at <http://journals.uonbi.ac.ke/index.php/afr/index > (Visited April 21, 2024)

22 ITA, 'Nigeria Construction Sector - Country Commercial Guides' (ITA, 2023), online at <https://www.trade.gov/country-commercial-guides/nigeria-construction-sector> (Visited April 24, 2024)Top of Form

23 *Ibid*

According to previous research, Nigerian construction projects are susceptible to corruption for the early onset and are present during various milestones of the project, covering the precontract and post-contract stages.[24] This not only hampers trust, but also severely impacts project performance. Furthermore, findings conducted by the Nigerian Federal University of Technology revealed that contract embezzlement, fraud, and cost cutting ranked most severely in terms of impact on project performance.[25] In another study conducted by Rufus Giwa Polytechnic in Owo, Nigeria, they concluded that some major causes of corruption in construction projects included godfathers (managers who have an established relationship with politicians) in contract awards, hiding corrupt acts, and greed.[26] The study further highlighted other issues such as poor professional ethics, mediocre work, lack of transparency, lack of supervision, and close relationships between stakeholders, as well as others.

2.4 Construction Industry in Kenya

Kenya has a well-established construction industry that helps maintain the country through its economic development.[27] According to the Kenya National Bureau of Statistics (KNBS), real estate and construction industries have played an essential role in contributing to the country's economic growth.[28] The construction industry has experienced a boom in demand in Kenya. This is mainly due to a lack of inadequate infrastructure and population growth. Consequently, the demand for construction projects has led to an increase in subcontractors in the following years in Kenya. The most popular form of contracting in Kenya is where consultants build the design, and contractors hire subcontractors to help build the design.[29]

2.5 Legal Framework in Kenya

The construction industry is mainly regulated by the National Construction Authority Act[30] which is mainly responsible for regulating, streamlining and building capacity within the construction industry.[31] It achieves regulation through the registration of contractors, project registration, accreditation of workers, and researching matters relating to the construction sector.[32] Furthermore, the National Construction Authority

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24 Chinedu C. Adindu , Ikechukwu A. Diugwu , Saheed O. Yusuf , Musa A. Musa, 'Issues of Corruption in Construction Projects and Infrastructure Development in Nigeria – An Empirical Approach' (DII-2019 Conference, Livingstone, Zambia, 25-26 July 2019) online at <http://repository.futminna.edu.ng:8080/jspui/bitstream/123456789/12030/1/DII%202019-021_Issues%20of%20Corruption%20in%20Construction%20Projects%20and%20Infrastructure%20Development%20in%20Nigeria%20%E2%80%93%20An%20Empirical%20Approach_Full%20Paper.pdf> (Visited April 24, 2024)

25 *Ibid*

26 Olaiya Omobolanle Grace, Olowolayemo Oluwaseun Ebenezer, Alabi Olumuyiwa Michael, Sogbon, Odunwole Bosede Olumayowa 'Corruption in Construction Projects: A Case Study of Ondo State, Nigeria' (May 2023) Volume 6 Issue 11 IRE Journals 785

27 Competition Authority of Kenya, 'The Construction Industry Analysis of the State of Competition' (CAK, 2017) online at <https://www.cak.go.ke/sites/default/files/Construction%20Industry%20in%20Kenya.pdf> (Visited April 25, 2024)

28 *Ibid*

29 *Ibid*

30 No. 41 of 2011

31 John Nduire, 'Key Roles of the NCA', (Construction in Kenya, 2024) online at <https://www.constructionkenya.com/2619/functions-of-nca/> (Visited April 25, 2024)

32 *Ibid*

Regulations[33] give authority the power to regulate, promote quality assurance, and undertake research in the industry.[34] These regulations monitor the registration of contactors, joint ventures, identification of construction works and projects, and certification and accreditation of skilled workers.[35]

2.6 Corruption in Construction Industry in Kenya

One of the challenges faced by the National Construction Authority (NCA) in enforcing its regulations is corruption within the Kenyan construction sector. According to studies conducted on the construction industry in Kenya, the prevalence of corruption was evident in both SME and large contractors, which showed flaws in the NCA registration process.[36] This flaw not only facilitated the entry of unqualified subcontractors, but also compromised industry standards.[37] It is therefore clear that there is a need for a cost-effective solution that can be implemented quickly and enforced to reduce such incidences in Kenya.

3. Blockchain Technology

3.1 Understanding Blockchain Technology

The purpose of this section is not to delve into the nitty gritty details of blockchain, but rather to explore its functions and breakdown of its use, in order to lay down a foundation for how it can be utilized within construction disputes for the purpose of prevention.

Blockchain is essentially a distributed record database or public ledger of all transactions or digital events shared among participating parties.[38] Satoshi Nakamoto, when referring to blockchain, regarded it as thus: *The network is robust in its unstructured simplicity. The nodes work simultaneously, with little coordination.*[39] When considering its particular utilization, the only way a transaction can be verified is if it is approved by a majority of individuals in the system.[40] With blockchain technology, it is nearly impossible to delete one's history because it contains a secured and verifiable record for each transaction.[41] A blockchain is sometimes referred to as a distributed ledger in that data in blockchain is stored within 'blocks' which contain its header.[42] This header usually includes information, such as the time the block was created and

33 (2014)

34 Competition Authority of Kenya, 'The Construction Industry Analysis of the State of Competition' (CAK, 2017), online at <https://www.cak.go.ke/sites/default/files/Construction%20Industry%20in%20Kenya.pdf> (Visited April 25, 2024)

35 *Ibid*

36 Esther Njoki Gacheru, Stephen Onyango Diang'a, 'Regulating Building Contractors in Kenya and Challenges of Enforcing the National Construction Authority Mandate' (2015) 5(1), International Journal of Soft Computing and Engineering 127

37 *Ibid*

38 Michael Crosby, Nachiappan, Pradhan Pattanayak, Sanjeev Verma, and Vignesh Kalyanaraman, 'Blockchain Technology: Beyond Bitcoin' (Sutardja Center for Entrepreneurship & Technology, Technical Report, October 16, 2015), online at<https://scet.berkeley.edu/wp-content/uploads/BlockchainPaper.pdf> (Visited April 20, 2024)

39 Deloitte UK, 'What is Blockchain?' (2016), online at <https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/Innovation/deloitte-uk-what-is-blockchain-2016.pdf> (Visited April 20, 2024)

40 *Ibid*

41 *Ibid*

42 Deloitte UK, 'What is Blockchain?' (2016), online at <https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/Innovation/deloitte-uk-what-is-blockchain-2016.pdf> (Visited April 20, 2024)

a link back to the previous block.[43] Second, this block contains another essential element regarded as its content.[44] Within this content of the block lies a validated list of digital and instruction statements, such as the parties to the transactions, the transactions made, and their amounts.

In 2008, the blockchain idea was merged with several other technologies to create modern cryptocurrencies, with Bitcoin being the first such blockchain-based cryptocurrency.[45] Furthermore, within the Bitcoin blockchain, information representing digital cash is attached to the digital address.[46] This allowed Bitcoin users not only to transfer rights to another individual, but also to transfer them publicly. It is important to remember that cryptocurrencies are a by-product of blockchain, and that blockchains can exist independently of cryptocurrency.[47] Gupta (2015) identified the five core elements that constitute the major elements of blockchain to include a distributed database, peer-to-peer transactions, transparency with pseudonymity, immutability or records, and computational logic.[48]

3.2 Features of Blockchain Technology

Some of the features of blockchain include privacy, security, anonymity, decentralization, and transparency which make it important to users in a variety of ways.[49]

4. Blockchain Integration in Construction Industry

Blockchain has the capacity to revolutionize multiple industries through its use as a means of supporting a collaborative environment and a way of managing a trusted, traceable, and automated contract execution.[50] Blockchain can also store digital contracts at its interface for automatic contract execution. One great example where blockchain can be utilized is through the application of Smart Contracts.

4.1 Smart-Contract

Smart Contracts are computational programs that consist of computer code.[51] They can execute themselves after certain conditions are satisfied within the system. Therefore, it is an automated function that changes how a contract is enforced and is essential for reducing not only legal costs but also transactions.[52] Contracts are

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43 *Ibid*

44 *Ibid*

45 Dylan Yaga, Peter Mell, Nik Roby, and Karen Scarfone, *Blockchain Technology Overview* National Institute of Standards and Technology Internal Report (October 2018)

46 *Ibid*

47 Shamima Mukta 'Blockchain Technology: An Overview' (Researchgate, 2018.) online at <https://www.researchgate.net/publication/368879391_Blockchain_Technology_An_Overview> (Visited April 20, 2024)

48 *Ibid*

49 *Ibid*

50 Giulia Pattini, Giuseppe Martino Di Giuda, Lavinia Chiara Tagliabue 'BLOCKCHAIN APPLICATION FOR CONTRACT SCHEMES IN THE CONSTRUCTION INDUSTRY.' (2020). Proceedings of International Structural Engineering and Construction.7(1). AAE-21.

51 *Ibid*

52 *Ibid*

generally classified into three forms: paper, electronic, and smart contracts. While paper contracts were often the most utilized, they reflected past innovation. Electronic contracts are a combination of information technology and contracts that arose due to the technological wave of the 21st century.[53] Smart contracts are a more advanced form of contracts that have the advantage of being able to perform and execute automatically after the fulfilment of certain conditions.[54] A smart contract combines both human and computer languages for utilization. The contract is presented in two forms, plain text and full text, which are generally in human language, and outline the terms and conditions of the contract.[55] Then, there is a contract code which is written in computer language, which is important because it allows parties to exchange information quickly and precisely.[56]

4.2 Implementation of Blockchain in Construction Contracts: Blockchain Based-Building Information Modelling (BIM)

Generally, the idea behind this process is to shift the language of the contract from human to computer, abandon the old methods of disputing ill-interpreted clauses by the parties, and instead promote transparency in the project through blockchain-based smart contracts.

In this method, smart contracts are combined into construction clauses during the lifetime of a project. According to Patttini, Giuda, and Tagliabue (*et al 2020*), a plausible implementation process for smart contracts in construction projects can occur in the following stages:

i. Design Stage

First, in the design stages, the smart contract can be used to manage payments to design teams, and payments are made after a project has been verified with the BIM Model.[57]

ii. Tendering Stage

In the tendering stage of a construction project, tender documents can be placed within a Smart Contract by a client, and interested parties can place their tender offers. In this way, everything is transparent and fair, without corruption occurring between colluding parties. The Smart contract will then be able to probe and determine the best tender offer, depending on its configuration set by the client.[58]

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53 Tian Mao, Junhua Chen 'Smart Contract in Blockchain' (2023) 5 AHIS 868, online at <https://doi.org/10.2991/978-94-6463-030-5_86> (Visited April 26, 2024)

54 *Ibid*

55 *Ibid*

56 *Ibid*

57 Giulia Pattini, Giuseppe Martino Di Giuda, Lavinia Chiara Tagliabue 'BLOCKCHAIN APPLICATION FOR CONTRACT SCHEMES IN THE CONSTRUCTION INDUSTRY.' (2020). Proceedings of International Structural Engineering and Construction.7(1). AAE-21.

58 *Ibid*

iii. Construction Stage

Once the contracts are completed, the information stored in the blockchain allows the smart contract to make immediate payments.[59] For example, when an engineer certifies work in real life, the smart contract can be triggered and enforced, but only after its conditions are fulfilled and met.[60] The amount owing to a contractor is based on the engineers' updates and then transferred through a blockchain.[61]

iv. Maintenance Stage

In this stage, the information related to the maintenance activities of building systems is recorded, and then the configured smart contracts can read this and provide immediate payment.[62]

4.3 Challenges

Although Smart Contracts present a good way to facilitate and reduce corruption within construction contracts, some of the challenges are that the current existing framework is flawed in smart contract use.[63] Second, because it is technological, certain issues may arise in construction contracts, especially in African countries, where technological use is still low. It may prompt parties to search for alternatives that are easier to implement than an innovative process that lacks adequate infrastructure. There may also be challenges of code defects and writing errors that can create more difficulty in understanding and executing the contracts.[64] However, even with these challenges, blockchain technology can still be implemented in the construction process because it mitigates some of the issues that arise in construction projects or contracts by ensuring trust and transparency in the process.[65]

5. Blockchain in the Arbitration Process

The construction industry has seen a significant interest in blockchain technology, which has the potential to revolutionize various aspects of the industry, including the arbitration process.[66] Despite previous research on the use of blockchain technology in supply chain and contract management, there is a lack of research on its integration

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59 *Ibid*

60 Kamel, M.A., Bakhoum, E.S. & Marzouk, M.M. 'A framework for smart construction contracts using BIM and blockchain' (2023). *Sci Rep* **13**, 10217, online at <https://doi.org/10.1038/s41598-023-37353-0> (Visited April 26, 2024)

61 *Ibid*

62 Giulia Pattini, Giuseppe Martino Di Giuda, Lavinia Chiara Tagliabue 'BLOCKCHAIN APPLICATION FOR CONTRACT SCHEMES IN THE CONSTRUCTION INDUSTRY.' (2020). Proceedings of International Structural Engineering and Construction.7(1). AAE-21.

63 Y. Hirai 'Defining the ethereum virtual machine for interactive theorem provers' (2017) International Conference on Financial Cryptography and Data Security. Springer, Cham, 520

64 *Ibid*

65 Giulia Pattini, Giuseppe Martino Di Giuda, Lavinia Chiara Tagliabue 'BLOCKCHAIN APPLICATION FOR CONTRACT SCHEMES IN THE CONSTRUCTION INDUSTRY.' (2020). Proceedings of International Structural Engineering and Construction.7(1). AAE-21.

66 Milad Baghalzadeh Shishehgarkhaneh, Robert C Moehler and Sina Fard Moradinia, 'Blockchain in the Construction Industry between 2016 and 2022: A Review, Bibliometric, and Network Analysis' (2023) 6 Smart cities 819, online at <https://www.mdpi.com/2624-6511/6/2/40> (Visited April 25, 2024)

in the arbitration process in Africa.[67] This section of the study aims to address this knowledge gap by investigating the potential benefits of integrating blockchain technology into the construction contract arbitration process in Africa. By exploring how blockchain technology can be integrated into the arbitration process to improve efficiency, transparency, and security, this study examined the potential benefits of blockchain integration in Africa.[68] It can be hypothesized that the integration of blockchain technology in the arbitration process has the potential to improve efficiency, transparency, and security compared to traditional arbitration processes.

5.1 Integration of blockchain technology in construction contract arbitration in Africa.

Blockchain technology has the potential to revolutionize arbitration proceedings in Africa by enhancing efficiency, security, and transparency. The decentralized record-keeping of blockchain technology ensures the integrity and security of arbitration proceedings by creating an immutable ledger for all communications.[69] For instance, Smart Contract Execution Logs can be used in blockchain-based arbitration systems, wherein smart contracts can automatically execute certain aspects of a process.[70] When parties agree on arbitration terms, the smart contract records this agreement on the blockchain, providing a tamper-proof record of consent.[71]

Evidence Submission can also be timestamped and linked to the previous entry, creating a chronological chain of custody that is easily auditable and verifiable, preventing post-submission tampering or disputes over the validity of evidence.[72] The public witness of Proceedings is another vital application, whereby blockchain can allow for a 'public witnessing' feature where each step of the arbitration process is recorded and can be observed by authorized parties in real time.[73] This could include recording witness testimonies, submitting documents, and even the final award decision.[74] Thus, by integrating blockchain into arbitration proceedings, the process gains a level of security and trustworthiness that traditional systems struggle to match, leading to wider acceptance and use of arbitration as a dispute resolution method, particularly in cross-border disputes, where trust in foreign legal systems may be limited.

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67 *Ibid*.

68 Murathan Saygili, Isa Emre Mert and Onur Behzat Tokdemir, 'A Decentralized Structure to Reduce and Resolve Construction Disputes in a Hybrid Blockchain Network' (2022) 134 Automation in construction 104056, online at <https://www.sciencedirect.com/science/article/abs/pii/S0926580521005070> (Visited April 25, 2024)

69 Hamed Taherdoost, 'Blockchain and Machine Learning: A Critical Review on Security' (2023) 14 Information 295, online at <https://www.mdpi.com/2078-2489/14/5/295> (Visited April 23, 2024)

70 'A Look at the Use of Blockchain Technology in the Arbitration Process' (*Purdueglobalallawschool.edu* 19 May 2023), online at <https://www.purdueglobalallawschool.edu/blog/news/blockchain-arbitration> (Visited April 25, 2024)

71 Maxime Chevalier, 'From Smart Contract Litigation to Blockchain Arbitration, a New Decentralized Approach Leading towards the Blockchain Arbitral Order' (2021) 12 Journal of international dispute settlement 558, online at<https://tinyurl.com/55zhrtzy (Visited April 25, 2024)

72 Tommaso D'Anna and others, 'The Chain of Custody in the Era of Modern Forensics: From the Classic Procedures for Gathering Evidence to the New Challenges Related to Digital Data' (2023) 11 Healthcare 634 online at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10000967/> (Visited April 25, 2024)

73 (Chevalier n6).

74 *Ibid*.

Smart contracts within arbitration processes can greatly benefit from the integration of blockchain technology as they expedite the enforcement procedure.[75] These contracts are automatically executed and have the terms of the agreement directly coded into them, thereby eliminating the need for traditional legal formalities and potential court interventions.[76] The use of blockchain technology ensures transparency and immutability, creating a transparent and unalterable record of the contract and its execution, which guarantees that the award is carried out precisely, as intended.[77] Furthermore, smart contracts on the blockchain can be recognized and enforced internationally, thereby overcoming the jurisdictional issues commonly encountered in arbitration.[78] This streamlines the dispute resolution process, allowing for a quick and efficient resolution of any disagreements that may arise during the enforcement procedure.

Blockchain technology is increasingly being recognized for its potential to improve the efficiency and reliability of arbitration case management. Utilizing the blockchain's decentralized approach, arbitration proceedings can benefit from the automatic execution of arbitral awards, as noted by Chavalier. In addition, Jessica Lee's insights into Brown Rudnick reveal that blockchain can automate various aspects of the arbitral process, such as scheduling and notifications.[79] According to Gabuthy, blockchain-based dispute resolution can efficiently handle new types of disputes, which traditional methods may struggle with. This advocacy extends to automating tasks, such as document submission, evidence exchange, scheduling of hearings, and notifications, thereby reducing the administrative burden on arbitrators.[80] The immutable nature of blockchain ensures that records cannot be tampered with, thereby increasing the reliability of the case management process.[81] Therefore, the integration of blockchain into arbitration proceedings in Africa could lead to a more efficient and reliable arbitration process, allowing arbitrators to dedicate more time to the substantive issues at hand, ultimately improving the quality of arbitration as a method of dispute resolution.

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75 Shantanu Pachahara, Chandan Maheshwari and Research Scholar, 'Dispute Resolution on Blockchain: An Opportunity to Increase Efficiency of Business Dispute Resolution? Chandan MAHESHWARI' 1-18, online at <http://www.csq.ro/wp-content/uploads/5-S.-PACHAHARA-C.-MAHESHWARI.pdf> (Visited August 7, 2023)

76 *Ibid*.

77 Lu Zhou and Yuekuan Zhou, 'Blockchain Technologies for Automatic, Secure, and Tamper-Proof Energy Trading' [2024] Elsevier eBooks 159, online at <https://www.sciencedirect.com/topics/computer-science/smart-contract#:~:text=A%20smart%20contract%20is%20a,a%20contract%20or%20an%20agreement> (Visited April 25, 2024)

78 Anna Riikka Koulu, 'Blockchains and Online Dispute Resolution: Smart Contracts as an Alternative to Enforcement' (2016) 13 SCRIPT-ed 40, online at <https://script-ed.org/article/blockchains-and-online-dispute-resolution-smart-contracts-as-an-alternative-to-enforcement/> (Visited April 19, 2024)

79 Georgantzidou Maria, 'Arbitra'on of Disputes Involving Smart Contracts and Blockchain Technology' (*LLM Thesis, International Hellenic University*, 2023) Chapter Four and Five, online at <https://repository.ihu.edu.gr/xmlui/bitstream/handle/11544/30227/1104210006%20%20Dissertation%20FINAL.pdf?sequence=1> (Visited April 25, 2024)

80 Gabrielle Kaufmann-Kohler and Thomas Schultz, 'The Use of Information Technology in Arbitration' (2005) Chapter 5, online at <https://lk-k.com/wp-content/uploads/The-Use-of-Information-Technology-in-Arbitration.pdf> (Visited April 25, 20024)

81 Yannick Gabuthy, 'Blockchain-Based Dispute Resolution: Insights and Challenges' (2023) 14 Games 34, online at <https://www.mdpi.com/2073-4336/14/3/34> (Visited April 20, 2024)

5.2 Bitcoin in combating corruption in construction contracts arbitration; challenges and opportunities

Although blockchain technology has the potential to revolutionize industrial construction contract arbitration,[82] it encounters various challenges and limitations, particularly when applied in Africa. Social, regulatory and technical obstacles hinder the integration of this technology into the arbitration process.[83] This section discusses these challenges and analyses them according to their technical, legal, and regulatory characteristics.

5.3 Technical challenges facing construct contract arbitration; Africa in focus

Technical challenges in construction contract arbitration, particularly in the African context, refer to the specific difficulties associated with the arbitration process owing to the unique technicalities of construction disputes and the particularities of the African legal and infrastructural environment.[84] These challenges may include the intricacy of construction contracts, the need for specialized knowledge to comprehend technical aspects of disputes,[85] and integration of arbitration mechanisms within diverse legal systems across African countries. Notably, while arbitration is preferred for its potential to save time and money compared to litigation, the technical nature of construction disputes often necessitates expert testimony and in-depth understanding of construction practices,[86] which can complicate the arbitration process.

Varying levels of arbitration development in African countries and the need for more nations to adopt international arbitration initiatives pose additional challenges.[87] Specific regions, including Sub-Saharan Africa, lack familiarity or opposition towards alternative dispute resolution methods, such as online dispute resolution (ODR), despite their potential to provide efficient solutions for intricate disputes.[88] Africa's diverse developmental structures warrant a unified international dispute resolution mechanism that can accommodate various construction contract arbitration disputes (emphasis of the authors).

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82 Meria Utama and Irsan Irsan, 'General Overview on Selecting and Drafting Construction Contract Disputes Resolution' (2018) 2 Sriwijaya Law Review 152, online at <http://journal.fh.unsri.ac.*id*/index.php/sriwijayalawreview/article/view/129/84> (Visited April 15, 2024)

83 Jennifer Li and Mohamad Kassem, 'Applications of Distributed Ledger Technology (DLT) and Blockchain-Enabled Smart Contracts in Construction' (2021) 132 Automation in construction 103955 online at <https://www.sciencedirect.com/science/article/abs/pii/S0926580521004064?via%3Dihub> (Visited April 15, 2024)

84 Andreas J Roquette and Tom Christopher Prostler, *International Construction Disputes (Beck/Hart/Nomos Printing Press, Muchen, Germany* 2022) 35-80, online at <https://www.bloomsburycollections.com/monograph?docid=b-9781509957286> (Visited April 15, 2024)

85 Amila NKK Gamage and Suresh Kumar, 'Review of Alternative Dispute Resolution Methods in Construction Projects' (2024) 9 Saudi Journal of Engineering and Technology 75-87, online at <https://saudijournals.com/media/articles/SJEAT_92_75-87.pdf> (Visited April 16, 2024)

86 Wesam S Alaloul, Mohammed W Hasaniyah and Bassam A. Tayeh, 'A Comprehensive Review of Disputes Prevention and Resolution in Construction Projects' (2019) 270 MATEC Web of Conferences.

87 K. Hayati, Y. Latief and AJ Santos, 'Development of Construction Dispute Resolution Process through Arbitration (Indonesian National Board of Arbitration (BANI)' (2019) 674 IOP conference series. Materials science and engineering, online at <https://iopscience.iop.org/article/10.1088/1757-899X/674/1/012028> (Visited April 16, 2024)

88 Oladiran Ajayi, 'Investments in Sub Saharan Africa: The Role of International Arbitration in Dispute Settlement' (2009) 6 Revista Brasileira de Arbitragem The Abstract Section, online at <https://kluwerlawonline.com/journalarticle/Revista+Brasileira+de+Arbitragem/6.23/RBA2009042> (Visited April 16, 2024)

The complexity of scalability in construction contract arbitration varies significantly in the African context, reflecting its various dimensions.[89] This refers to the ability of arbitration to handle larger, more intricate disputes that may emerge from construction contracts as economies expand and projects darker.[90] Economic growth in Africa has attracted investors, resulting in an increase in the number of construction projects and disputes. Nevertheless, the issue of scalability in arbitration is apparent, as parties may struggle to fulfil contractual obligations owing to recurring economic downturns, leading to conflicts that may exceed the capabilities of current arbitration mechanisms.[91]

Despite having international arbitration structures in countries like Nigeria and Angola, more African nations need to create similar structures and collaborate in international arbitration efforts.[92]Construction projects' complexity, including multiple parties and technical details, can strain arbitration, especially when mechanisms are not robust enough to handle intricate cases or high volumes of disputes.[93] Furthermore, Africa's construction industry is still evolving and its legal frameworks may not be as advanced as those in other regions, leading to inefficient arbitration proceedings.[94]

The challenge of achieving interoperability between different blockchain systems in the context of construction contract arbitration in Africa is significant. This is because these systems are designed to operate independently, which can complicate their integration into the arbitration processes.[95] In Africa, where economic growth inevitably causes investment and contractual-related disagreements, the importance of efficient dispute resolution methods, particularly arbitration, cannot be overstated.[96] However, the integration of blockchain technology into arbitration processes is not a simple task because of the technical complexities arising from merging different blockchain platforms.

It is intriguing to note that although blockchain technology is widely acclaimed for its capacity to minimize conflicts through the use of smart contracts, disputes are still likely to emerge in practical applications.[97] Arbitration is the most suitable mechanism

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89 Edwin and Henry, 'Disputes and Dispute Resolution Systems in Sino-Foreign Joint Venture Construction Projects in China' (2005) 131 Journal of professional issues in engineering education and practice 141, online at <https://ascelibrary.org/doi/10.1061/%28ASCE%291052-3928%282005%29131%3A2%28141%29> (Visited April 16, 2024)

90 *Ibid* Abstract and challenges facing arbitration.

91 *Ibid*.

92 Fadia Fitriyanti and Wahyu Widodo, 'The Effectiveness of Dispute Resolution in Construction Services outside of the Court' [2019] Social Science Research Network Abstract, online at <https://papers.ssrn.com/sol3/papers.cfm?abstract_*id*=3487167> (Visited April 16, 2024)

93 *Ibid*.

94 Amila NKK Gamage and Suresh Kumar, 'Review of Alternative Dispute Resolution Methods in Construction Projects' (2024) 9 Saudi Journal of Engineering and Technology 75.

95 Guzman Llambias and others, 'Gateway-Based Interoperability for Distributed Ledger Technology' (2023) 26 CLEI Electronic Journal Section 2.4 on blockchain interoperability solutions, online at <https://clei.org/cleiej/index.php/cleiej/article/view/590> (Visited April 16, 2024)

96 KN Pankov, 'Testing, Verification and Validation of Distributed Ledger Systems' [2020] Systems of Signals Generating and Processing in the Field of on Board Communications Abstract and discussion sections online at <https://ieeexplore.ieee.org/document/9078541> (Visited April 17, 2024)

97 A Saxena and Bang Han Chiu, 'BOFUS and CLARITY: Streamlining Blockchain Architecture and Assessment for Advanced Standardization and Interoperability in Distributed Ledger Technologies' (2023) 6 Frontiers in blockchain Section 10 on the advantages and disadvantages, online at <https://www.frontiersin.org/articles/10.3389/fbloc.2023.1235088/full> (Visited April 17, 2024)

for resolution of construction contract disputes.[98] The use of decentralized arbitration platforms, such as Kleros, introduces a novel approach to resolving disputes that could potentially enhance the arbitration process by reducing costs and time and fostering trust among stakeholders.[99] Although the literature does not explicitly discuss the effectiveness of such platforms in the African construction industry, it is still possible to further explore this topic and provide insights that contribute to the existing knowledge base.[100]

Blockchain technology is considered a potential solution to enhance arbitration in construction contracts. However, the issue of interoperability between various blockchain systems poses a significant challenge, particularly in Africa, hindering seamless integration.[101] According to the literature, although decentralized blockchain arbitration platforms may be advantageous, additional research is required to understand their potential in Africa's construction industry. Furthermore, it is emphasized that more countries should establish systems for international arbitration and support international arbitration initiatives.[102] To fully realize the potential of blockchain technology in transforming arbitration in construction contracts, practical challenges and the development of interoperability solutions must be addressed.

Proof-of-work blockchain networks are energy-intensive because of their enhanced security.[103] Justifiably, blockchain networks, particularly PoW consensus mechanisms, have garnered attention for substantial energy consumption.[104]Bitcoin-like cryptocurrencies use PoW, requiring significant computational power for transaction authentication and network safety in conducting an energy-intensive mining.[105] Energy-intensive mining involves solving complex mathematical problems by adding new blocks to the blockchain.[106] While critics often target PoW's high energy consumption, proponents argue that mining can potentially promote renewable energy adoption and grid decarbonization by offering flexible load-response services.[107] PoW's energy-intensive nature can be used to support renewable energy integration,[108] thereby contributing to net decarbonization (emphasis).

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98 Dirk Wiegandt, 'Blockchain and Smart Contracts and the Role of Arbitration' (2022) 39 Journal of International Arbitration Abstract section online at <https://kluwerlawonline.com/journalarticle/Journal+of+International+Arbitration/39.5/JOIA2022029> (Visited April 17, 2024)

99 Aleksei Gudkov, 'Crowd Arbitration: Blockchain Dispute Resolution' (2020) 3 Legal issues in the digital age 59, online at <https://lida.hse.ru/article/view/11780> (Visited April 17, 2024)

100 *Ibid*.

101 Christopher Amoah and van, 'THE IMPACT of PROJECT COST MANAGEMENT on CONTRACTUAL DISPUTES in SOUTH AFRICA' (2022) 5 Journal of natural and applied sciences 56 online at <https://journals.unza.zm/index.php/JONAS/article/view/714> (Visited April 18, 2024)

102 Marianna Riabova and Paul Reaidy, 'Blockchain Arbitration' [2023] Advances in logistics, operations, and management science book series 113, online at <https://www.igi-global.com/gateway/chapter/324627> (Visited April 18, 2024)

103 Zahra Boreiri and Alireza Norouzi Azad, 'A Novel Consensus Protocol in Blockchain Network Based on Proof of Activity Protocol and Game Theory' [2022] 8th International Conference on Web Research (ICWR) Abstract section, online at <https://ieeexplore.ieee.org/document/9786224> (Visited April 16, 2024)

104 Moritz Platt and others, 'The Energy Footprint of Blockchain Consensus Mechanisms beyond Proof-of-Work' [2021] IEEE 21st International Conference on Software Quality, Reliability and Security Companion (QRS-C) Introductory section, online at <https://arxiv.org/abs/2109.03667> (Visited April 16, 2024)

105 *Ibid*.

106 Ronghua Xu and Yu Chen, 'Fairledger: A Fair Proof-of-Sequential-Work Based Lightweight Distributed Ledger for IoT Networks', online at <https://ieeexplore.ieee.org/document/9881850> (Visited April 18, 2024)

107 Federico Matteo Benčić and Ivana Podnar Žarko, 'Distributed Ledger Technology: Blockchain Compared to Directed Acyclic Graph' (arXiv.org2018) Introduction section, online at <https://arxiv.org/abs/1804.10013> (Visited April 18, 2024)

108 Xiaoyang Shi and others, 'Confronting the Carbon-Footprint Challenge of Blockchain' (ACS Publications Environmental Science & Technology2023) Abstract,,, online at <https://pubs.acs.org/doi/10.1021/acs.est.2c05165> (Visited April 19, 2024)

As discussed, it could be hypothetically argued that while it is true that Proof of Work (PoW)-based blockchain networks are known for their high energy consumption, which raises concerns about environmental sustainability, there is also a nuanced argument that mining activities could indirectly support renewable energy initiatives.[109] Despite the current state of affairs, there is a pressing need for energy-efficient consensus mechanisms.[110] Alternative protocols, such as proof-of-stake (PoS) and Byzantine fault-tolerant (BFT) systems, present promising solutions for decreasing the energy consumption associated with blockchain technology.[111] The sustainability of technology benefits would indirectly yet substantially benefit from this research in the field of dispute resolution, where it challenges or limits amicable and sustainable resolution (authors' emphasis).

6. Data privacy; A niggling concern

Public blockchain data privacy poses considerable challenges, particularly for construction contract arbitration in Africa.[112] Transparent transactions can conflict with arbitration confidentiality requirements.[113]Furthermore, blockchain's decentralized nature offers security, but it also hinders privacy enforcement due to the absence of a central authority for data access management and oversight.[114] Therefore, adopting privacy by design is crucial for meeting the regional and international data protection standards.

Notably, while blockchain technology is widely acclaimed for its capacity to transform a range of industries, including dispute resolution using smart contracts, it also presents new types of disputes, such as those related to the interpretation or implementation of smart contracts.[115] Disputes may need arbitration, which typically relies on confidentiality, a principle seemingly at odds with blockchains' public nature.[116]Technologies like zero-knowledge proofs and homomorphic encryption can potentially resolve these contradictions by verifying transactions without disclosing sensitive data.[117] However, such addition faces a challenge of implementation considering the enormous human, technical, and financial resources that would need to be invested in actualizing the operationalization of technologies.

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109 'Towards Environmental-Adaptive and Performance-Resilient Consensus in Distributed Ledger Technology | Proceedings of the 21st International Middleware Conference Doctoral Symposium' (ACM Conferences 2020) Recommendations sections, online at <https://dl.acm.org/doi/10.1145/3429351.3431740> (Visited April 16, 2024)

110 *Ibid*.

111 *Ibid*.

112 Ebrima Faal, 'Blockchain Could Revolutionize Public Procurement and Combat Corruption in Africa' (Africa at LSE 27 September 2023), online at <https://blogs.lse.ac.uk/africaatlse/2023/09/27/blockchain-could-revolutionise-public-procurement-and-combat-corruption-in-africa/> (Visited April 17, 2024)

113 Vijay Ramalingam and others, 'Distributed Computing in Blockchain Technology' [2021] EAI/Springer Innovations in Communication and Computing 51, online at <https://link.springer.com/chapter/10.1007/978-3-030-70501-5_4> (Visited April 18, 2024)

114 Dan Wang, Jindong Zhao and Yingjie Wang, 'A Survey on Privacy Protection of Blockchain: The Technology and Application' (2020) 8 IEEE access 108766, online at <https://ieeexplore.ieee.org/document/9093015> (Visited April 18, 2024)

115 Dirk Wiegandt, 'Blockchain and Smart Contracts and the Role of Arbitration' (2022) 39 Journal of International Arbitration 675-680, online at <https://kluwerlawonline.com/journalarticle/Journal+of+International+Arbitration/39.5/JOIA2022029> (Visited April 17, 2024)

116 Marianna Riabova and Paul Reaidy, 'Blockchain Arbitration' [2023] Advances in logistics, operations, and management science book series 113, online at <https://www.igi-global.com/gateway/chapter/324627> (Visited April 20, 2024)

117 Shagun Sharma and others, 'Is Blockchain Technology Secure to Work On?' [2021] Advances in data mining and database management book series 66, online at <https://www.igi-global.com/gateway/chapter/277319> (Visited April 19, 2024)

Ensuring that blockchain adheres to regulatory standards in African construction contract arbitration poses a significant challenge.[118] Blockchain technology, which boasts immutability, transparency, and decentralization as its core features, holds immense promise in revolutionizing the management of contracts and resolving disputes.[119] However, incorporating blockchain technology into legal and regulatory frameworks is a difficult task as it often transcends conventional legal concepts and requires amending existing laws.[120] Additionally, harmonized regulations may hinder blockchain implementation in African construction contract arbitration owing to varying regulatory environments.[121] The complex nature of regulations and the need for comprehensive guidelines to address challenges such as big data and liabilities slows down the adoption of blockchain technology.[122] The immutability of blockchain presents privacy compliance challenges, necessitating technologies such as the data block matrix, which reconciles its integrity with the data revision or deletion requirements.[123] To ensure the successful implementation of blockchain technology in construction contract arbitration in Africa, a supportive regulatory framework must be developed.[124] In conclusion, recognizing the necessity for regulatory adjustments and the possibility of blockchain transforming arbitration procedures highlights the significance of adopting a refined strategy for incorporating this technology into the African legal sphere.

The immutable encrypted design of a blockchain may not be entirely secure from risks.[125] The potential of blockchain in construction contract arbitration lies in enhancing security and privacy; however, it also presents challenges and vulnerabilities.[126] Construction contract arbitration in Africa requires the secure storage of sensitive data, and the blockchain's potential to prevent unauthorised

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118 Kevin Werbach, 'Trust, but Verify: Why the Blockchain Needs the Law' (2018) 33 Berkeley Technology Law Journal 487, online at https://shorturl.at/7hqLY(Visited April, 16 2024)

119 Ahmed Abdelghany, 'Navigating the Complexity of Construction Contracts and the Value of Blockchain Technology: A Systems Dynamics Perspective - Review Paper' (2024) 3 International journal of automation and digital transformation 44, online at <https://emiratesscholar.com/directory/index.php/ijadt/article/view/201> (Visited April 18, 2024); Dirk Wiegandt, 'Blockchain and Smart Contracts and the Role of Arbitration' (2022) 39 Journal of International Arbitration Abstract Section, online at <https://kluwerlawonline.com/journalarticle/Journal+of+International+Arbitration/39.5/JOIA2022029> (Visited April 19, 2024)

120 Muthukkumarasamy Thuvarakan, 'Regulatory Changes for Redesigned Securities Markets with Distributed Ledger Technology' (2020) 35 Knowledge engineering review Abstract, online at <https://www.cambridge.org/core/journals/knowledge-engineering-review/article/abs/regulatory-changes-for-redesigned-securities-markets-with-distributed-ledger-technology/004AE686DBFE4F87EE608EFE118B2E87> (Visited April 19, 2024)

121 'Blockchain Adoption in Africa Trends in Market Activity and Policy Development' (The Organization for Economic Cooperation and Development, 2023) pp. 4-16, online at <https://www.oecd.org/finance/blockchain/Blockchain-adoption-in-Africa-background-note.pdf> (Visited April 19, 2024)

122 None Hakimah Yaacob, 'Legal Issues in Distributed Ledger Technology (DLT) & Blockchain in Brunei Darussalam' (2021) 1 Islamic economics international refereed journal 1, online at <https://unissa.edu.bn/journal/index.php/ieco/article/view/390> (Visited April 18, 2024)

123 Jennifer Li and Mohamad Kassem, 'Applications of Distributed Ledger Technology (DLT) and Blockchain-Enabled Smart Contracts in Construction' (2021) 132 Automation in construction 103955 online at <https://www.sciencedirect.com/science/article/abs/pii/S0926580521004064?via%3Dihub> (Visited April 18, 2024)

124 *Ibid*.

125 Marek R Ogiela and Michal Majcher, 'Security of Distributed Ledger Solutions Based on Blockchain Technologies' [2018] IEEE Abstract, online at <https://ieeexplore.ieee.org/document/8432358> (Visited April 19, 2024)

126 Elena Baninemeh, Slinger Jansen and Katsiaryna Labunets, 'A Security Risk Assessment Method for Distributed Ledger Technology (DLT) Based Applications: Three Industry Case Studies' (*arXiv.org* 2024) Conclusion, online at <https://arxiv.org/abs/2401.12358> (Visited April 19, 2024)

access and breach is significant.[127] Technology-specific challenges including scalability, privacy concerns, and smart contract vulnerabilities must also be considered.[128] The blockchain's framework for construction contract arbitration in Africa has potential vulnerabilities that can be exploited, undermining the process. Therefore, it is not a perfect solution.[129] Addressing infallibility in technology necessitates careful design, effective key management, and thorough understanding of the associated risks. Implementing safeguards against potential threats is crucial to preserving the integrity of the arbitration process.[130] Thus, blockchain technology can improve the security of construction contract arbitrations. However, stakeholders must remain alert and proactive in protecting themselves against emerging security risks.

Blockchain technology can pose significant financial barriers, especially in sectors where financial constraints are manifest[131] such as the construction industry in Africa. Blockchain infrastructure requires a significant initial investment, encompassing hardware and software. Additionally, ongoing expenses, such as maintenance, updates, and personnel training, contribute to overall financial strain.[132] The foregoing status quo implies that, although blockchain technology is expected to increase transparency and efficiency, its implementation in the construction industry is complicated by socio-cognitive and institutional barriers. These include the need for a change in mindset and establishment of new regulations.[133] Another scholar's reasoning is to explore the prospects of third-party funding in fully actualising blockchain technologies (emphasis).

The construction industry's complex supply chains and stakeholder collaboration challenges can amplify costs.[134] Blockchain technology's potential in construction is limited by high implementation costs, especially in Africa.[135]Financial requirements, along with societal and organizational obstacles, hinder construction industry stakeholders from justifying the cost of implementing blockchain technology.[136] An illustrative case lies in the fact that the limited resources and unquantifiable benefits

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127 Anusha Thakur, 'A Comprehensive Study of the Trends and Analysis of Distributed Ledger Technology and Blockchain Technology in the Healthcare Industry' (2022) 5 Frontiers in blockchain, online at <https://www.frontiersin.org/articles/10.3389/fbloc.2022.844834/full> Visited April 18, 2024)

128 Sai Srujan Gutlapalli, 'Commercial Applications of Blockchain and Distributed Ledger Technology' (2016) 4 Engineering international 89, online at <https://abc.us.org/ojs/index.php/ei/article/view/653> (Visited April 17, 2024)

129 Elena Baninemeh, Slinger Jansen and Katsiaryna Labunets, 'A Security Risk Assessment Method for Distributed Ledger Technology (DLT) Based Applications: Three Industry Case Studies' (*arXiv.org* 2024) Conclusion, online at <https://arxiv.org/abs/2401.12358> (Visited April 19, 2024)

130 Ali Sunyaev, *Distributed Ledger Technology* [*Springer eBooks* 2020] 265, online at <https://link.springer.com/chapter/10.1007/978-3-030-34957-8_9> (Visited April 19, 2024)

131 Latifa Albshaier, Seetah Almarri and Hafizur Rahman, 'A Review of Blockchain's Role in E-Commerce Transactions: Open Challenges, and Future Research Directions' (2024) 13 Computers 27, online at <https://www.mdpi.com/2073-431X/13/1/27> (Visited April 19, 2024)

132 Mahsa Sadeghi, Amin Mahmoudi and Xiaopeng Deng, 'Adopting Distributed Ledger Technology (DLT) for the Sustainable Construction Industry: Evaluating the Barriers Using Ordinal Priority Approach (OPA)' [2021] Research Square (Research Square), online at <https://www.researchsquare.com/article/rs-566565/v1> (Visited April 18, 2024)

133 David Lesley, Stephanie Giamporcaro and George Kuk, 'Distributed Ledger Technology Affordances for Financing Sustainable Development | Academy of Management Proceedings' (*Academy of Management Proceedings* 2020) Abstract, online at <https://journals.aom.org/doi/10.5465/AMBPP.2020.19508abstract> (Visited April 19, 2024)

134 Gopal Ojha and others, 'Distributed Ledger Technology: Use Cases, Design, and Implementation Issues' [2022] Blockchain technologies 115, online at <https://link.springer.com/chapter/10.1007/978-981-19-1960-2_7> (Visited April 19, 2024)

135 Mahsa Sadeghi, Amin Mahmoudi and Xiaopeng Deng, 'Adopting Distributed Ledger Technology for the Sustainable Construction Industry: Evaluating the Barriers Using Ordinal Priority Approach' (2021) 29 Environmental science and pollution research international 10495, online at <https://link.springer.com/article/10.1007/s11356-021-16376-y>(Visited April 19, 2024)

136 *Ibid*.

of blockchain make its immediate impact unclear.

7. Issues of Jurisdiction and Continental Regulatory Gaps

Blockchain contracts, also known as smart contracts, are self-executing contracts in which the terms of the agreement are written directly into the code. While they offer the potential for transparency and efficiency, their formal legal recognition, particularly in the context of African construction contract arbitration, is not well-established.[137] Evidently, legal frameworks within many African jurisdictions may not yet fully accommodate the novel characteristics of blockchain contracts, such as their self-executing nature and reliance on blockchain technology for record-keeping.[138] Interestingly, despite the lack of formal legal recognition, the inherent features of blockchain contracts such as immutability and transparency could be beneficial in the construction industry, which often faces issues related to corruption and fraud.[139] However, the integration of smart contracts into existing legal systems poses challenges, including the need for laws that recognize the language used in smart contracts and transactions recorded on the blockchain.

The decentralized nature of blockchain arbitration may necessitate a new legal order, termed "*Lex Cryptographia*", as it may not align with conventional international arbitration frameworks.[140] Although blockchain contracts have the potential to revolutionise the construction industry by providing more transparent and efficient means of contracting, their lack of formal legal recognition in African jurisdictions (save for a few jurisdictions) presents a significant barrier to their adoption in construction contract arbitration.[141] Thus, regulations must be adjusted to accommodate the use of smart contracts in arbitration processes in order to maximize the potential of blockchain technology.[142]This may entail combining blockchain contracts' advantages with conventional legal procedures, thereby creating a hybrid solution conforming to majority of the African states legal systems (emphasis).

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137 Ghassan Adhab Atiyah, Nazura Abdul Manap and Nadia Abd, 'Legitimacy of Smart Contracts Written in Encrypted Code on Blockchain Technology under Current Contract Law: A Comparative Study' (2023) 31 Intellectual discourse/Intellectual Discourse Abstract section, online at <https://journals.iium.edu.my/intdiscourse/index.php/id/article/view/1922> (Visited April 19, 2024)

138 Maxime Chevalier, 'From Smart Contract Litigation to Blockchain Arbitration, a New Decentralized Approach Leading towards the Blockchain Arbitral Order' (2021) 12 Journal of international dispute settlement 558, online at <https://academic.oup.com/jids/articleabstract/12/4/558/6414874?redirectedFrom=fulltext> (Visited April 19, 2024)

139 Notland, Jørgen Svennevik, Notland, Jakob Svennevik and Donn Morrison, 'The Minimum Hybrid Contract (MHC): Combining Legal and Blockchain Smart Contracts' (*arXiv.org* 2020), online at <https://arxiv.org/abs/2002.06850> (Visited April 19, 2024

140 Chevalier (n57) Abstract section.

141 Ibrahim Shehata, 'Smart Contracts & International Arbitration' [2018] Social Science Research Network Abstract, page 5-17, online at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3290026> (Visited April 19, 2024)

142 Ekaterina P Rusakova and Evgenia E Frolova, 'Digital Disputes in the New Legal Reality' (2022) 26 Vestnik Rossijskogo universiteta družby narodov. Seriâ Ûridičeskie nauki 695-704, online at <https://journals.rudn.ru/law/article/view/31837> (Visited April 19, 2024)

8. Complexity of construction arbitration contracts

Construction contracts with arbitration clauses are complex because of numerous stakeholders and extensive documentation.[143] Smart contracts, which are self-executing agreements with their programmed terms, bring an extra layer of complexity to the construction business despite their potential to simplify operations.[144] Additionally, the adoption of smart contracts in African construction practices faces challenges, owing to the prevalence of corruption.[145] African international construction contracts are frequently marred by corruption, making arbitration a pressing issue requiring immediate attention to maintain trust, confidence, and the ability to enforce future rules.[146] The pernicious nature of corruption demands the arbitration community to take proactive measures to combat it, such as how medical research can fight cancer.[147] Preserving the integrity of the arbitration system and ensuring its impartiality is paramount.
Construction projects are inherently complex and dynamic, which may limit the effectiveness of smart contracts in addressing all aspects of construction contracts.[148] This is because smart contracts lack flexibility, hindering the management of construction contract changes, disputes, and unforeseen circumstances.[149] Moreover, corruption in African arbitration adds another layer of complexity.[150] Smart contracts are aimed at establishing trust and transparency. Corruption can undermine these goals by circumventing automated processes and negating the benefits of smart contracts.[151]

Advantages of smart contracts include improved efficiency and transparency. However, their implementation in the construction industry in Africa is complicated by the intricate nature of construction contracts and the corruption prevalent in the region.[152] The effective implementation of smart contracts in this context is contingent on addressing these challenges and establishing adequate dispute resolution mechanisms to navigate the nuances of the construction contracts and arbitration processes.

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143 OA Ige and others, 'Effectiveness of Alternative Dispute Resolution Strategies in Construction Contracts' [2022] AIP conference proceedings Analysis on complexities that face construction arbitration contracts, online at <https://pubs.aip.org/aip/acp/article-abstract/2437/1/020135/2823306/Effectiveness-of-alternative-dispute-resolution?redirectedFrom=fulltext> (Visited April 19, 2024)

144 Shehata (n60) Abstract section

145 Jean D' and Amour Osiri, 'EFFECTIVENESS of ALTERNATIVE DISPUTE RESOLUTION METHODS in the RWANDAN CONSTRUCTION INDUSTRY' (2021) Chapter Four; Data Analysis and Findings, online at <http://ir.jkuat.ac.ke/bitstream/handle/123456789/5762/OSIRI%2C%20JD%27A%20-%20MCPM%202021.pdf?sequence=1&isAllowed=y> (Visited April 19, 2024)

146 Hilary Christina Bell, 'Minimizing Construction Disputes in Africa by Managing Region-Specific Risk in Mining and Energy Infrastructure Projects' [2023] Springer eBooks 1, online at <https://link.springer.com/referenceworkentry/10.1007/978-3-030-96183-1_7-1> (Visited April 19, 2024)

147 *Ibid*.

148 *Ibid*.

149 Wiegandt (n17) Conclusion.

150 *Ibid*.

151 Marina Kasatkina, 'Dispute Resolution Mechanism for Smart Contracts' (2022) 16 Masaryk University Journal of Law and Technology 143, online at <https://journals.muni.cz/mujlt/article/view/18580> (Visited April 19, 2024)

152 Ige (n62) section discussing the efficacy of the universally recognized alternative forms of dispute resolution.

9. Future of Blockchain Integration into African-Based Construction Contracts Arbitration

The potential of blockchain to enhance transparency is a significant factor that could drive its adoption in various sectors, including African construction arbitration.[153] The immutable and decentralized nature of blockchain technology ensures that records cannot be altered retroactively, which can increase trust in the arbitration process by providing transparent and tamper-proof records of all transactions and interactions.[154] Although blockchain is often associated with cryptocurrencies, its applications extend far beyond the construction sector. For instance, smart contracts, which are self-executing contracts with terms directly written in the code, can automate and enforce agreements in construction projects, potentially reducing disputes and the need for arbitration.[155] However, it is important to note that the adoption of blockchain in African construction arbitration may face challenges, such as the need for technological infrastructure and expertise, as well as legal and regulatory frameworks to support its implementation.[156]

Amidst the strengths, weaknesses, opportunities, and threats facing arbitration such as corruption, blockchain technology has the potential to significantly enhance transparency in African construction arbitration, which could drive its adoption.[157] The use of smart contracts and the immutable nature of blockchain records can provide clear and indisputable evidence for disputes, thereby improving the arbitration process.[158] However, the successful implementation of blockchain in this context will require addressing infrastructural, expert, and regulatory challenges (emphasis).

10. Conclusion

This study examined the potential of blockchain technology to tackle corruption in construction disputes in Africa. The implementation of blockchain has been demonstrated to enhance efficiency, transparency, and security in arbitration proceedings. However, the effective integration of blockchain faces challenges, such as technical complexity, regulatory hurdles, and financial constraints, particularly in the African context. These challenges have been justified by the underlying technical, legal, regulatory, and financial aspects of blockchain adoption in African arbitration. Recognising the scarcity of African literature, and particularly insufficient empirical study on this topic, this study has acknowledged the need to address this research gap and investigate the benefits, challenges, and opportunities associated with implementing blockchain in the arbitration of construction disputes in Africa.

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153 Aaron Thegeya, 'The Context the Economics of Blockchain within Africa' (2022) online at <https://aercafrica.org/old-website/wp-content/uploads/2022/02/DG007.pdf> (Visited April 19, 2024

154 Sai Srujan Gutlapalli, 'Commercial Applications of Blockchain and Distributed Ledger Technology' (2016) 4 Engineering international 89, online at <https://abc.us.org/ojs/index.php/ei/article/view/653> (Visited April 19, 2024)

155 Li and Kassem(n42) Discussion section.

156 Gopal Ojha and others, 'Distributed Ledger Technology: Use Cases, Design, and Implementation Issues' [2022] Blockchain technologies 115, online at <https://link.springer.com/chapter/10.1007/978-981-19-1960-2_7> (Visited April 20, 2024)

157 Nazir Ullah and others, 'Modeling Cost Saving and Innovativeness for Blockchain Technology Adoption by Energy Management' (2020) 13 Energies 4783, online at <https://www.mdpi.com/1996-1073/13/18/4783> (Visited April 19, 2024)

158 *Ibid*.

ETHICAL CONSIDERATIONS FOR COUNSEL AND THE ENFORCEMENT OF ETHICS IN INTERNATIONAL ARBITRATION

*Beth Kemunto Michoma**

ABSTRACT

International trade has long been recognized as a vital engine of economic prosperity for nations, corporations, and individuals through the exchange of goods and services. A notable driver of this trade is the provision of legal services. The legal sector, once restricted by national boundaries, has evolved to allow practitioners to operate across various jurisdictions. One of the key areas that has gained international prominence is arbitration. The rise in global disputes has positioned international arbitration as an essential mechanism for conflict resolution.

This trend is evident, as legal counsels are increasingly sought to serve as arbitrators, party representatives, and experts in international arbitral proceedings. While this expansion of roles is encouraging, it also raises significant ethical concerns regarding the responsibilities of counsels in the realm of international arbitration.

Counsel involved in international arbitration face a complex dilemma regarding the ethical standards and conduct expected of them in a global context. While ethical standards for Counsels practicing within their licensed jurisdictions remain consistent, new complexities emerge concerning their responsibilities and obligations in international arbitration. It is imperative to establish a balance in adhering to ethical obligations to ensure the smooth conduct of arbitral proceedings.

This paper explores the ethical considerations for Counsels in international arbitration, highlights examples of conflicting ethical norms, examines the challenges of applying national ethical obligations to international arbitration, and proposes solutions for resolving these conflicts as well as enforcing ethical obligations in this domain.

Keywords: *International Trade, International Disputes, Ethical Consideration for Counsel, Ethics in international Arbitration*

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1. Introduction

International trade has long been recognized as a significant driver of economic prosperity for nations, corporations, and individuals.[1] Despite the numerous benefits derived from international trade, there has been a simultaneous increase in international disputes. These disputes, whether involving individuals, companies, or states, become notably complex when they transcend borders, necessitating a decision from the parties involved regarding the preferred method of resolving the disputes at hand. This decision typically revolves around choosing between litigation through court systems or arbitration as provided for in the contracts or agreements.

In cases where parties opt for arbitration, they must acknowledge the unique nature of their international dispute and the potential for engaging in international arbitration. International arbitration, which encompasses interstate arbitration, investor-state arbitration, and international commercial arbitration, has emerged as the favored mechanism for resolving international disputes.[2]

It is essential to recognize that international arbitration introduces a broader spectrum of parties, legal counsels, experts, and arbitrators. For instance, an international arbitration conducted in Paris, France, as the arbitration seat and place of arbitration may involve parties from diverse jurisdictions, such as a company registered in Kenya and another in the United Kingdom. The panel of arbitrators, whether selected by the parties or an institution, might also represent diverse jurisdictions, and the Counsels involved may hail from various countries. This diversity, while welcomed, does not consider the ethical challenges arising from international arbitration and the strain on Counsels to comply with their ethical obligations.

Counsels engaged in international arbitration encounter a perplexing dilemma regarding the ethical standards and conduct expected of them within the global arena. The lack of clarity regarding their ethical responsibilities may result in ethical conflicts that impede arbitration processes and create a conducive environment for ethical misconduct.

Despite extensive discussions in conferences and literature on the topic of ethics in international arbitration, there remains a notable absence of substantive progress in establishing regulatory frameworks governing the ethical conduct of Counsels and arbitrators in international arbitration.

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1 Binos, Mary Ann Joy and Vigonte, Florinda G. and Abante, Marmelo V, "International Trade: Impact in Economic Growth" (May 28, 2023) online at (http://dx.doi.org/10.2139/ssrn.4461422) (Visited April 30, 2024)

2 Queen Mary University of London and White & Case LLP, '2021 International Arbitration Survey: Adapting arbitration to a changing world', online at (https://www.qmul.ac.uk/arbitration/research/2021-international-arbitration-survey/)(Visited April 30, 2024)

2. Ethical Considerations for Counsels in International Arbitration

The legal profession is one governed by ethics and the close regulation of conduct. Ethics in the legal profession, comprises a collection of principles and standards that regulate Counsels in their conduct, decision-making processes, and engagements with clients, colleagues, and the judicial system. The significance of ethics within the legal realm cannot be emphasized enough, as it plays a vital role in upholding the integrity of the legal profession and fostering trust within the public sphere.[3]

Every lawyer granted a license to practice law, inherently embraces the ethical standards and code of conduct specific to the jurisdiction of their licensure. Upon being called to the Bar, lawyers typically pledge an oath or affirmation, acknowledging their role as officers of the court. Furthermore, individual Bar Associations or Societies establish their own code of conduct that lawyers must abide by.

The code of conduct serves not only as a guide for Counsels to adhere to specific standards of conduct in the practice of law, but also outlines enforcement protocols and potential repercussions for violations. This clarity, ensures, that Counsels operating within a specific jurisdiction understands the ramifications of non-compliance.

However, globalization has not only reshaped economic structures and opened borders, but it has also fundamentally transformed the roles and responsibilities of Counsels. With the advent of globalization, Counsels may be authorized to practice in multiple jurisdictions, and they might appear in Courts and tribunals beyond their licensed jurisdiction.

The evolution of the Counsel's role on the global stage becomes apparent in addressing international disputes, whether in courts or arbitration settings. While the ethical standards for Counsel practicing within their licensed jurisdiction remain consistent, complexities arise concerning their responsibilities and obligations in international arbitration.

Counsel involved in international arbitration may encounter challenges when the ethical standards of their jurisdiction clash with client expectations, especially in cases where there is a conflict with the arbitrator's directives. Additionally, there are concerns regarding the jurisdiction of Bar Associations or Societies to address ethical violations by Counsel that occur outside their geographical scope. In the realm of international arbitration, particularly in cases with diverse parties, and noting the arbitrator's responsibility to ensure fairness during proceedings discussing ethical considerations is paramount for the parties.

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3 Justyna Stadniczeńko, '*The Importance Of Ethics In The Legal Profession (Selected Issues)*', 2021, online at, (https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://bsawp.edu.pl/wp-content/uploads/2021/09/Stadniczenko_2021_1.pdf&ved=2ahUKEwiZlvvz4OeFAxUjVfEDHfI-AiMQFnoECBgQAQ&usg=AOvVaw1VvlIIgDBOTWETj0yQbRCr)(Visited April 30, 2024)

It is important to note, that as per Professor Catherine Rogers;

> *"International arbitration dwells in an ethical no-man's land. Often by design, arbitration is set in a jurisdiction where neither party's counsel is licensed. The extraterritorial effect of national ethical codes is usually murky. There is no supra-national authority to oversee attorney conduct in this setting, and local bar associations rarely if ever extend their reach so far…… specialized ethical norms for attorneys in international arbitration are nowhere recorded. Where ethical regulations should be, there is only an abyss."*[4]

The challenge of ethics for Counsels in international arbitration is the inability to have an international ethical standard for all and the lack of a sanction mechanism.

2.2 Jurisdictional Rules of Ethics and Conduct and Conflict in International Arbitration

It would be fair to assume that the jurisdictional ethical obligations of Counsels apply in international arbitration.[5] However, it is also, essential to acknowledge that due to globalization and cross border practice, Counsels may be licensed in multiple jurisdictions and may also practice in various jurisdictions where they are not licensed. The multifaceted roles of Counsels in a globalized world raises the question of which ethical standards take precedence and must be adhered to.

In International Arbitration, Counsels representing parties may hail from diverse jurisdictions, each governed by distinct and occasionally conflicting ethical obligations. For example, Counsel for a party to the arbitral proceedings may originate from common law or civil law systems, each with varying stances on duties such as disclosure or communication with witnesses. This ethical divergence can significantly impact arbitration proceedings, potentially leading to delay or non-compliance with arbitrators' directives due to Counsel's ethical obligations.

When Counsels representing opposing parties come from different jurisdictions, the clash of ethical rules becomes significantly more pronounced. Should an arbitrator issue a directive, Counsels may find themselves at a crossroads, compelled to navigate between their ethical duties and the client's best interests. Regardless of the decision made, counsel's choice may lead to a disciplinary hearing.

2.2.1 Examples of Conflicting Ethical Norms in International Arbitration

The ethical conflict between Counsels from different Bar Associations in different countries is quite apparent in two instances, where there are disclosure requirements and communication with witnesses.

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4 Prof. Catherine Rogers, 'Developing a Code of Conduct for International Arbitration.', Michigan Journal of International Law, Vol. 23, No. 341, 2002, online at (https://papers.ssrn.com/sol3/papers.cfm?abstract_*id*=2748786#)(Visited September 24, 2024)

5 IBA Taskforce on Counsel Conduct in Arbitration, Sept 2010, online at https://www.ibanet.org/unit/Dispute+Resolution+Section/committee/Arbitration+Committee/3010) (Visited April 30, 2024)

Document Disclosure Requirements

The ethical obligation surrounding document disclosure presents a notable disparity between legal practitioners licensed in common law systems and those in civil law systems. Common law systems typically adhere to the practice of document discovery, allowing disputing parties access to information held by each other or third parties through discovery proceedings.[6] In contrast, civil law systems generally do not afford such a right.

Within the common law framework, document disclosure is viewed as a means to uncover the truth and ultimately serve justice. Conversely, in civil law traditions, plaintiffs are expected to amass all pertinent evidence before initiating legal action.

When an arbitrator mandates document disclosure, the divergent approaches to evidence access create a dilemma for Counsels from civil law jurisdictions. They must decide whether to comply with the directive, potentially breaching ethical standards, or refuse, thereby disrupting the arbitral process.

For instance, a German Lawyer was convicted in the United Kingdom for refusal to make a disclosure required by the British proceeds of crime Legislation because the directive would have conflicted with the ethical obligation to confidentiality. If the attorney had made the disclosure, it would have resulted in disciplinary proceedings.[7]

Communication with witnesses

In numerous common law jurisdictions such as Kenya, it is imperative to highlight that the failure of Counsels to communicate and prepare witnesses without coaching them constitutes an ethical breach. Conversely, in many civil law jurisdictions like Germany and Belgium, any form of communication with witnesses before their testimony is viewed as an ethical violation.

In the context of international arbitration involving Counsels from common law and civil law systems, representing parties, the preparation of a witness before testimony could prompt concerns regarding ethical misconduct by Counsels from the common law jurisdiction, as challenged by counterparts from civil law backgrounds. Counsels licensed to practice in the common law jurisdiction will typically contest any allegations of ethical impropriety. Such situations may cast doubt on the perceived "unfair advantage" in arbitration proceedings for clients represented by Counsels held to less stringent standards.

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6 Yves Derains. "Towards Greater Efficiency in Document Production before Arbitral Tribunals – A Continental Viewpoint." Special Supplement 2006: Document Production in International Arbitration (International Chamber of Commerce (ICC), 2006), online (https://jusmundi.com/en/document/publication/en-towards-greater-efficiency-in-document-production-before-arbitral-tribunals-a-continental-viewpoint) (Visited September 24, 2024)

7 Hans-Jurgen Hellwig, "At the Intersection of Legal Ethics and Globalization:" (2008), International Conflicts of Law in Lawyer Regulation, PG 399 27, Penn St. Int'l L. Rev. 395. online at https://elibrary.law.psu.edu/psilr/vol27/iss2/6/ (Visited September 24, 2024)

3. Proposed Solutions for Ethical Considerations in International Arbitration.

Having observed that the ethical responsibilities mandated for legal practitioners within a specific jurisdiction may not align adequately with the demands of international arbitration, it becomes essential to propose solutions to address this ethical dilemma.

Firstly, parties and Counsels may accede to the ethical standards of the seat of arbitration. Secondly parties and Counsels may choose to incorporate guidelines on ethical conduct in international arbitration into their proceedings. Thirdly, the Bar Association may choose to develop rules of ethics for international arbitration within their jurisdictions.

3.1 Adoption of Ethical Rules of the seat of arbitration

Considering the conflicting ethical norms evident in international arbitration, it is imperative to find a middle ground to facilitate smooth proceedings. Several practical approaches have been suggested to reconcile the ethical responsibilities of Counsels in international arbitration.

One of the practical approaches is for Counsels to adhere to the ethical norms of the seat of arbitration. The seat of arbitration has been defined as the "*jurisdiction in which an arbitration is deemed legally to take place, and the award issued, regardless of the geographical location of the tribunal and/or any hearings*".[8] This approach would seem unproblematic as it would ensure that Counsel for the parties would be subject to ethical obligations of the seat of arbitration. However, it is not as easy as it seems theoretically.

In the event that parties to the arbitration hail from Kenya and the United Kingdom and have chosen by agreement that the seat of arbitration shall be Spain and Counsels to the parties' hail from Tanzania, France and Uganda, the situation creates a melting pot of absurdity. It would be difficult for the parties to recognize that their choice of seat of arbitration would have an impact on the ethical obligations of their Counsels to the detriment of dispensing with their advantage during resolution of the dispute.

Further, the notion of Counsels being bound by the ethical obligations of the arbitral seat becomes convoluted where ethical infractions are committed before the start of arbitral proceedings. Would then Counsels be liable for sanction for ethical infractions committed before the start of proceedings? The answer at the first instance would be in the negative. However, every

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8 Definition of seat of Arbitration, online at https://www.lexisnexis.co.uk/legal/glossary/seat-of-arbitration, (Visited April 30, 2024)

party to an international arbitration and their representatives are bound by the general principle of good faith.

In the case of *Inceysa Vallisotelana SL v Republic of Elsavador*, where "Inceysa initiated ICSID arbitration against El Salvador in July 2003, alleging numerous violations of the 1995 investment treaty between Spain and El Salvador (the "Treaty"), as well as breach of contract and violation of El Salvador's 1999 Investment Law.[9] The case arose from a decision by El Salvador's Ministry for the Environment and Natural Resources (known as "MARN") not to proceed with a concession contract it had signed with Inceysa in November 2000 following a public bidding process, that would have allowed Inceysa to serve for ten years as one of two authorized providers of vehicle inspection services in El Salvador.

Inceysa alleged that MARN's decision not to proceed with the concession, and its commencement of proceedings in the Salvadoran courts to terminate the concession contract, violated several provisions of the Treaty, including provisions providing for "fair and equitable treatment" and "protection" and prohibiting expropriation absent prompt, adequate and effective compensation. Inceysa claimed damages exceeding $120 million for alleged violations of these Treaty provisions, and for the alleged related violation of the national investment law and breach of contract." The Republic of Elsavador objected to the jurisdiction of ICSID and advanced the case that Inceysa had obtained the concession contract through fraud. The Tribunal found in favor of the Republic of Elsavador and upheld the state's objection to its jurisdiction.

Key to the matter at hand, the Tribunal pronounced itself on the principle of good faith. The tribunal stated that the general principle of good faith was a "*supreme principle which governs legal relations in all their aspects and content*."
Where counsel must abide by the ethical responsibilities of the seat of arbitration, adherence to the principle of good faith stands as the primary deterrent for Counsels who opt not to comply with these obligations before the arbitration commences.

In the case of *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, where "the claimant, Cementownia, claimed that it had purchased shares in two Turkish electric utility companies,[10] Çukurova Elecktrik AS (CEAS) and Kepez Elektrik Türk AS (Kepez), from Kemal Uzan in May 2003. On 12 June 2003,

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9 *Inceysa Vallisotelana SL v Republic of Elsavador*, (2006), ICSID Case No. ARB/03/26
10 *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2

concession agreements held by CEAS and Kepez were terminated by Turkey. The claimant commenced arbitration proceedings against Turkey pursuant to the Additional Facility Rules, alleging breach of Articles 10(1) and 13 of Part III of the Energy Charter Treaty (ECT). During the proceedings, it became evident that the claimant could not substantiate its status as an investor for the purposes of the ECT. Both parties asked the tribunal to dismiss the claim on jurisdictional grounds. The bases for their requests were different, however. Turkey argued that the claim was manifestly ill-founded, and had been asserted using inauthentic documents, and should therefore be dismissed on the merits with prejudice, and that an order for costs should be made. The claimant accepted that it was unable to produce share certificates substantiating its status as investor but proposed that the tribunal dismiss the case without prejudice."

The Tribunal dismissed the case and found that the claimant had falsified documents. The tribunal held that the Claimant's conduct was improper and did not meet the standards of good faith. It is important to note that in the case the improper conduct occurred before the proceedings began. Therefore, it is crucial for both parties and Counsels to consistently adhere to the ethical standards of the arbitration seat when parties and Counsels have mutually consented for these obligations to be binding.

3.2 Adoption of soft law instruments on Ethics in International Arbitration

The term "soft law" refers to agreements, principles, and declarations that lack legal enforceability. These soft law instruments are primarily prevalent in the realm of international affairs. Soft law instruments on ethics for Counsels in international arbitration are essentially guidelines that can only impose binding obligations on Counsels if integrated and endorsed within the proceedings. Among the primary soft law instruments concerning ethics in international arbitration are the *International Bar Association Guidelines on party representation in international arbitration*.

The IBA Guidelines on Party Representation in International Arbitration, "are inspired by the principle that party representatives should act with integrity and honesty and should not engage in activities designed to produce unnecessary delay or expense, including tactics aimed at obstructing the arbitration proceedings."[11]

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11 The IBA Guidelines on Party Representation in International Arbitration, online at https://www.ibanet.org/MediaHandler?*id*=6F0C57D7-E7A0-43AF-B76E-714D9FE74D7F (Visited September 24, 2024)

The IBA recognizes that the guidelines are not meant to displace ethical provisions of national Bar Associations and societies but act as a supplement in international arbitration. It is important to note that the guidelines may only come in force where parties by agreement adopt them or the arbitral tribunal in consultation with the parties wishes to rely on them.

The key distinguishing principles of the guidelines are that they offer solutions to a myriad of ethical issues in international arbitration. For instance, Guidelines 4-6 touch on Party representation, Guidelines 7-8 touches on communication with arbitrators, Guidelines 9-11 are on submissions to the arbitral tribunal, Guidelines 12-17 expound on information exchange and disclosure, Guidelines 18-25 are on witnesses and experts and Guidelines 26-27 expound on the remedies for misconduct.

All the guidelines tag ethical obligations on Counsels. However. Guideline 26-27 is key on enforcement of ethical obligations and the power of an arbitral tribunal to deal with any ethical violations and reads as follows:

"Remedies for Misconduct

26. If the Arbitral Tribunal, after giving the Parties notice and a reasonable opportunity to be heard, finds that a Party Representative has committed Misconduct, the Arbitral Tribunal, as appropriate, may:

(a) Admonish the Party Representative;
(b) Draw appropriate inferences in assessing the evidence relied upon, or the legal arguments advanced by, the Party Representative;
(c) consider the Party Representative's Misconduct in apportioning the costs of the arbitration, indicating, if appropriate, how and in what amount the Party Representative's Misconduct leads the Tribunal to a different apportionment of costs;
(d) Take any other appropriate measure to preserve the fairness and integrity of the proceedings.

27. In addressing issues of Misconduct, the Arbitral Tribunal should take into account:

(a) The need to preserve the integrity and fairness of the arbitral proceedings and the enforceability of the award.
(b) The potential impact of a ruling regarding Misconduct on the rights of the Parties.
(c) The nature and gravity of the Misconduct, including the extent to which the misconduct affects the conduct of the proceedings;
(d) The good faith of the Party Representative;
(e) Relevant considerations of privilege and confidentiality; and
(f) The extent to which the Party represented by the Party Representative knew of, condoned, directed, or participated in, the Misconduct."

Unlike all the ethical codes on conduct that leave the discretion to enforcement on the national Bar Associations whose reach is limited, the guidelines give express authority to arbitrators to curb ethical breaches.

The incorporation of soft law instruments on ethics may be the best alternative to ensuring that Counsels and parties have a say in what rules govern their arbitral proceedings. Such soft laws as the IBA guidelines may be the best in ensuring certainty.

3.3 Developments of Ethical Standards for International Arbitration by Bar Associations

Bar Associations of the 21st Century are increasingly collaborating with each other on matters of mutual benefits within their Sphere. For instance, the Bar Associations of Kenya, Uganda, Tanganyika, Zanzibar, Rwanda, Burundi and South Sudan collaborate frequently through the East Africa Law Society. In Europe the Council of Bars and Law Societies of Europe (CCBE) advances the views of European lawyers and its membership consists of the bar associations and law societies of 46 countries from the European Union, the European Economic Area, and wider Europe. These institutions are tasked with ensuring that the core values of the profession are adhered to.

Currently, the CCBE has authored a Code of Conduct for European Lawyers which aims to establish common rules which apply to all lawyers in relation to their cross- border practice.[12] These ethical standards go a long way in dictating ethics in international arbitration for European lawyers.

Therefore, it is critical that the East Africa law Society and other collective bar associations begin the conversation on setting principles of ethics for Counsels in international arbitration, in East Africa and Africa.

It is important to note that the parties to an international arbitration value certainty and any upheaval to the arbitral process due to the conflicting ethical obligations of Counsels may be off-putting.

3.4 Universal Code of Ethics for Counsel in International Arbitration

The establishment of a code of conduct for legal counsel in international arbitrations would enhance the integrity and predictability of the international arbitration process. Moreover, it would create a fairer environment for practitioners from diverse legal backgrounds and jurisdictions.

If a code of conduct for Counsels in international arbitration is developed the issues of conflict of ethics would not crop up. However, the process to develop such a code raises substantial issues. For instance, would the code be binding on Counsels even though at times it may conflict with the national code of conduct Counsels is expected to adhere to, what would be the process of developing the code? Would

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12 Code of conduct For European Lawyers, online https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/EN_DEONTO_2021_Model_Code.pdf (Visited September 24, 2024)

it be by way of negotiation between common law and civil law jurisdictions, would the code be binding? And lastly how would the code be enforced and what sanctions would be proffered.

All these questions are rather taxing and perhaps are the reason so far why no universal code of conduct for Counsels in international arbitration has been developed. However, the issue of ethics for Counsels in international arbitration persists and thus it is prudent to confront the issues.

4. Enforcement of Ethics in International Arbitration

Licensed Counsels practicing law are bound by the ethical standards and code of conduct specific to their jurisdiction and are subject to oversight by the Bar Association, which handles sanctions for any ethical violations.

Yet, enforcing ethical standards poses challenges when Counsels operate on a global scale. In such cases, breaches of ethics may go unnoticed by local Bar Associations unless the parties involved report the misconduct. This situation often allows Counsels to evade accountability. To address this issue in international arbitration, two potential approaches emerge. First, national Bar Associations could collaborate with international tribunals to identify and assess unethical behavior and apply sanctions. Second, the Arbitral Tribunal could play a role in enforcing ethical obligations *suo moto* or at the request of parties to the proceedings.

The collaboration between national Bar Associations and international tribunals may not be farfetched as it requires an understanding between the bodies. However, the second option requiring arbitral tribunals to sanction ethical violations is where there are challenges.

4.1 Enforcement of Ethics by the Arbitral Tribunal

In international arbitration, there is a widely acknowledged principle that an arbitral tribunal possesses an inherent authority and responsibility to uphold the equity and integrity of the arbitration process and the enforceability of the award.[13] This inherent authority is accepted in almost all institutional rules, be it the Singapore International Arbitration Centre (SIAC)[14], ICSID[15], the LCIA[16], NCIA[17] or the ICC[18]. Moreover, an arbitral tribunal possesses inherent jurisdiction to employ powers essential for ensuring the effective operation of the tribunal. The critical inquiry pertains to whether this authority extends to enforcing ethical standards and grants the tribunal the ability to impose sanctions. Historically, tribunals lacked such powers;

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13 Mika Savola , fai-arbitral-tribunals-decision-concerning-disqualification-counsel-arbitral-proceedings, online at https://arbitrationblog.kluwerarbitration.com/2018/03/06/fai-arbitral-tribunals-decision-concerning-disqualification-counsel-arbitral-proceedings/ (Visited April 30, 2024)

14 SIAC Rules 2016, Art. 19(1)

15 ICSID Convention, Regulations and Rules, Art. 44

16 LCIA Arbitration Rules 2020, Art. 19

17 Nairobi Centre for International Arbitration (Arbitration) Rules, 2015, Rule 14

18 ICC Arbitration Rules, Art. 22

however, this notion has since evolved.

Currently, there is an acceptance that a tribunal may enforce ethics and further have a right to issue sanctions, such as order the disqualification of Counsels.

The turning point was in the case of *Hrvatska Elektroprivreda, d.d. v. Republic of Slovenia*, the arbitral tribunal made a ruling to disqualify the British barrister Mr. David Mildon QC of Essex Court Chambers London engaged by the Respondent.[19] The barrister had joined the Respondent's legal team after the tribunal was formed and his involvement was disclosed merely ten days before the final hearing. Significantly, the barrister shared membership in the same Chambers as the tribunal's president. The decision was grounded in the fundamental principle of upholding the integrity and permanence of properly constituted tribunals. The tribunal emphasized that altering the composition of a legal team post-constitution poses a risk to the tribunal's credibility and lawful standing.

The case of *Hrvatska Elektroprivreda, d.d. v. Republic of Slovenia* largely accepted the enforcement of ethics by the Arbitral Tribunal. Further, In the case of *The Rompetrol Group N.V. v. Romania*, where" the Claimant's counsel, Salans & Associates (Salans), currently Dentons, Paris office, informed the Centre that the legal representation of the Claimant would from then on be in the hands of Mr. Barton Legum and two of his colleagues at the firm.[20] The Respondent wrote to the Tribunal, stating that Mr. Legum and the Member of the Tribunal appointed by the Claimant had until recently been members of the same law firm, and demanded that the Claimant make "full disclosure of all relations, past and present, between both Mr. Legum and any other member of the firm of Claimant's counsel with the member of the Tribunal in question thereby citing conflict. The Tribunal found no basis to disqualify the Counsel as there was no indication that the preservation of the integrity of the proceedings required the Tribunal to consider doing so.

In a further case of *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*.[21] The Respondent's counsel raised concerns regarding the claimant's counsel's representation, citing a conflict of interest stemming from Mr. Schwartz's previous representation of the Respondent in a related proceeding that allowed him to gain confidential information.

The committee in deciding on the matter of conflict of interest, stated as follows:

> *"This material is valuable to the extent that it reveals common general principles which may guide the Committee. But none of it directly binds the Committee, as an international tribunal. Accordingly, the Committee's consideration of*

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19 Hrvatska Elektroprivreda, d. d. *v.* Republic of Slovenia (ICSID Case No. ARB/05/24, May 6, 2008

20 *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, online at https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/227/rompetrol-v-romania (Visited September 24, 2024)

21 Fraport AG Frankfurt Airport Services Worldwide *v.* The Republic of the Philippines, ICSID Case No. ARB/03/25, online at https://jusmundi.com/en/document/decision/en-fraport-ag-frankfurt-airport-services-worldwide-v-republic-of-the-philippines-i-decision-on-application-for-disqualification-of-counsel-thursday-18th-september-2008#decision_1231 (Visited April 30, 2024)

the matter is not, and should not be, based upon a nice reading of any code of professional ethics applicable in any particular national jurisdiction. Such codes may vary in their detailed application. Rather, the Committee must consider what general principles are plainly indispensable for the fair conduct of the proceedings."

The Committee encountered no difficulty in identifying both the authority and obligation to address the conflict issue that emerged due to its commitment to impartially and equitably handle the involved parties, guided by overarching ethical principles rather than a particular national code.
The tribunal made the decision not to disqualify Mr. Schwartz as there was "*no real risk of prejudice to the current proceeding*".

The three cases emphasize that a tribunal can adjudicate ethical violations and ensure enforcement, only when the ethical violations impede the tribunal's proceedings to the extent that it compromises equity and fairness in the process.

5. Conclusion

In conclusion of the exploration into the intricate world of ethics in international arbitration, it is evident that this terrain is fraught with complexities and challenges. The globalization of legal practice, coupled with the diversity inherent in international arbitration proceedings, has underscored a critical need for clarity and consensus on ethical standards that govern counsel's conduct across jurisdictions.

The discussions on jurisdictional ethical conflicts, the potential for adopting soft law instruments, and the proposition of developing universal ethical codes underscore a collective endeavor towards enhancing the integrity and fairness of international arbitration. These proposed solutions, while varied in approach, all aim at establishing a harmonious framework that respects the diversity of legal traditions yet provides a common ground for ethical conduct.

Furthermore, the role of arbitral tribunals in enforcing ethical standards has emerged as a pivotal mechanism for upholding the principles of fairness and integrity that are foundational to the arbitration process. The precedents set by cases such as *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia and others*, illustrate the evolving jurisprudence that empowers tribunals to address ethical misconduct, ensuring the equitable administration of justice.

As the international arbitration community continues to grapple with these ethical dilemmas, the dialogue between Bar Associations, Arbitral institutions, tribunals, and the parties involved in arbitration must persist. The journey towards a more ethically cohesive and transparent arbitration process is ongoing, and it requires the collective efforts of all stakeholders to navigate the ethical "no-man's land" that Professor Catherine Rogers aptly described.

In this journey, the commitment to fairness, integrity, and the principle of good faith stands as the beacon guiding the path forward. By fostering an environment of ethical awareness and accountability, the international arbitration sphere can continue to serve as an effective and respected mechanism for dispute resolution on the global stage.

As we ponder on the future of ethics in international arbitration, it remains clear that the quest for ethical clarity and consistency is not just a professional obligation but a moral imperative. The integrity of the arbitration process, and by extension the broader legal profession, hinges on our collective ability to address these challenges head-on, ensuring that justice is administered fairly and equitably across the diverse tapestry of international law.

ALTERNATIVE DISPUTE RESOLUTION IN ENVIRONMENTAL AND CLIMATE CHANGE DISPUTES

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Abstract

Climate change disputes are progressive in nature and attaining sustainable development includes effective resolution of these disputes as they arise. While climate change disputes are predominantly complex often involving multiple stakeholders with varying interests, traditional litigation is limited when it comes to resolving such disputes. This is because it prioritizes adversarial arguments to win a dispute rather than upholding a consensus for mutual benefit and agreement of all stakeholders involved in a dispute. Alternative Dispute Resolution (here in referred to as ADR) presents an enabling environment for resolution of disputes in a more collaborative way. This paper suggests that ADR is relevant in resolving climate change disputes and can be used to complement litigation structures to uphold sustainable development. It discusses the role of ADR in resolving climate change disputes while emphasizing the limitations of ADR. This paper acknowledges the limitations of relying on ADR in resolving such disputes and concludes by recommending working practices for proper resolution of environmental and climate change disputes to realize sustainable development.

1. Introduction

As countries pursue economic growth through industrialization, environmental sustainability becomes more complex and even more desirable, with this more disputes emerge. Notably these disputes revolve around resource extraction conflicts, pollution, land use conflict and community displacements. Sustainable development is therefore essential to create a balance of human development and environmental conservation. Sustainable development was elaborated by the Brundtland report as "*development that meets the needs of the present without compromising the ability of future generations to meet their own needs*"[1]. Policies have been put in place to realize a balance between economic growth, environmental protection, and social inclusion. However, they introduce even more complex matters that potentially escalate the already existing environmental disputes. Commercial disputes with a climate change related genesis are increasingly likely to be brought by businesses as

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1 Rachel Emas, The Concept of Sustainable Development; Definition and defining principles, Pg.1 (Florida International University 2015) online at https://sustainabledevelopment.un.org (Visited April 14, 2024)

they adjust to increasing regulation of emissions following the entry into force of the Paris Agreement.[2] The Paris Agreement, an international treaty aimed at mitigating global warming or regulation of emissions, has increased awareness and regulatory matters on carbon emissions and environmental impact. The emergence of efforts such as the Paris agreement has increased awareness and movement towards environmental sustainability. The efforts of this agreement, however, further expand potential conflicts in this field, particularly those on regulations and enforcement of climate change and environmental disputes. Disputes in the context of asset divestment, new renewable energy investments, carbon trading and pricing, and increasingly stringent environmental representations and warranties are some of the issues that are emerging[3]. With realizing economic growth, environmental disputes are inevitable and therefore must be dealt with effectively.

Effective handling of environmental sustainability dictates proper avenues to present disputes on climate change and accessible forms of resolution of climate change disputes.

ADR are forms of resolving disputes without resorting to litigation.[4] These forms of resolution include arbitration, mediation, and conciliation. They are potentially collaborative measures where parties to a dispute engage for a resolution outside of court and the strict legal principles involved in litigation. These methods can be tailored to reach a compromise on the varying interests of stakeholders often involved in climate disputes. Resolutions made are more inclined to preserve relationships among the stakeholders. International arbitration is frequently the dispute resolution mechanism of choice for cross-border transactions, particularly where a party is a state or state-owned entity or an emerging market is involved, as is often the case in the energy sector. Given the scope of climate risk, it is evident that more disputes with climate-related elements will be decided by commercial arbitration.[5]ADR appears to provide flat reachable ground for the resolution of disputes in a manner often involving all stakeholders however it is still prone to limitations. Litigation which has faced a lot of criticism in resolution of climate change disputes also has some strong advantages such as a proper means of resolution which can be relied upon for its predictability. ADR practices may be more reachable for resolution of disputes than litigation. Additionally, the financial barriers associated with litigating environmental disputes can be overcome with the help of dispute resolution agreements to streamline the resolution process and ensure fairness and efficiency[6].

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2 ICC Arbitration and ADR Commission Report on Resolving Climate Change Related Disputes through Arbitration and ADR, pg.16, (ICC - International Chamber of Commerce 26 November 2019), online at http://www.iccwbo.org/climate-change-disputes-report,(Visited April 20, 2024).

3 *Id*. pg.16

4 Legal Information Institute, Alternative Dispute Resolution, online at https://www.law.cornell.edu/wex/alternative_dispute_resolution (Visited April 24, 2023).

5 Mark Baker, et al, 'Climate-Related Disputes Adaptation and Innovation, Pg16, (Norton Rose Fulbright – issue 11 – 2018), online at https://www.nortonrosefulbright.com/ (Visited April 20, 2024).

6 ICC Arbitration and ADR Commission Report on Resolving Climate Change Related Disputes through Arbitration and ADR, pg.11, (*ICC - International Chamber of Commerce*26 November 2019), online at http://www.iccwbo.org/climate-change-disputes-report, (Visited April 20, 2024).

In their nature, climate disputes are sensitive and fast growing. They involve multiple stakeholders, often with conflicting interests in resource use and long-term sustainability. Litigation as an adversarial form of resolving disputes, is often confined to strict rules that may not facilitate mutual agreement and an all-inclusive stakeholder involvement in the dispute resolution process. It is characterized by strict protocols which may be time consuming, and its remedies often focus on individual gains rather than fostering mutual benefits. On the other hand, ADR is a more flexible route to dispute resolution which involves dialogue between disputing parties, affording each party the opportunity to understand the other's claim and thereby reaching a mutually agreeable and beneficial solution. As arbitration is a consensual, contractual process, parties also have greater flexibility to tailor the arbitral procedure to their specific needs.[7]

This paper highlights the progressive existence of environmental and climate change disputes which is among other things driven by the constant need for economic growth and therefore sustainable development. In the circumstances, it is important to focus on a working solution to the growing disputes to realize sustainable development. The paper emphasizes that ADR is viable to resolve environmental disputes, however, it has its limitations and challenges, it asserts that ADR must be exercised with caution to complement the litigation system of resolving disputes. It suggests that ADR can effectively resolve environmental disputes only if it is well structured.

2. Environmental and Climate Change Disputes

The environment can be termed as the natural surroundings which determine the survival of living things and how they operate. It is an integral part of human existence and must be protected and conserved to avoid harmful climate change. Climate change disputes result from matters of harmfully affecting the environment and failing to abide by the established rules on maintaining or conserving the environment.

According to the Paris agreement, climate change disputes are broad involving legal conflicts that are likely to arise due to effects of climate change and climate change policy like the United Nations Framework Convention on Climate Change (UNFCC) and Paris Agreement.[8] The definition of climate change suggests that all disagreements arising from climate change, its effects and attempts to mitigate or regulate climate change cause climate change disputes. These disputes are one of the biggest imperatives of our time and, as the IPCC Special Report on Global Warming of 1.5°C published in 2018 states it will "require rapid and far-reaching transitions of energy, land, urban and infrastructure (including transport and buildings) and

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7 James Rogers, Matthew Buckle and Cara Dowling, Energy, Technology and Arbitration Pg.32 (Norton Rose Fulbright – issue 11 – 2018), online at https://www.nortonrosefulbright.com/ (Visited April 20, 2024).

8 ICC Arbitration and ADR Commission Report on Resolving Climate Change Related Disputes through Arbitration and ADR, pg.8, (ICC - International Chamber of Commerce 26 November 2019,) online at http://www.iccwbo.org/climate-change-disputes-report (Visited April 20, 2024)

industrial systems" to avoid the worst effects of climate change.[9] The need to avoid the worst effects of climate change will necessarily give rise to new investment and contracts, and accordingly contractual obligations and other legal disputes. Such disputes may arise out of or in relation to;

i. Contracts relating to the implementation of energy or other systems transition, mitigation or adaptation in line with the Paris Agreement commitments (for the avoidance of doubt, the Paris Agreement is between state parties and the commitments thereunder apply to state parties and not to non-state parties unless they have been incorporated into domestic regulation);

ii. Contracts without any specific climate related purpose or subject-matter but where a dispute involves or gives rise to a climate or related environmental issue; and

iii. Submission or other specific agreements concluded to resolve existing climate change or related environmental disputes, potentially involving impacted groups or populations. Each of these categories of disputes requires a valid and binding dispute resolution agreement between all parties[10]

Analysis of the above shows that the scope for disputes on climate change is complex, wide, and progressive. Disputes based on the effects of climate change also require critical expertise for clear determination for instance there may be scientific uncertainties on when the effect on climate happened and what actions caused it. This requires technical and expert analysis to locate the actual effect on climate change, who or what caused it and how they caused it.

Additionally, given the fact that the environment is a basis for the well-being of all living things on earth, more than one party or even species of life are at risk of being affected if it is mishandled. Due to its nature and importance, there are various stakeholders involved in environmental well-being and therefore more parties to disputes arising therefrom, for instance whereas an investors' interest lies in resource exploitation. Other stakeholders such as environmentalists may be concerned about the adverse effect of exploiting this resource on the environment, there may also be stakeholders like host communities who are concerned about co existing with the resource exploitation project vis-à-vis their right to property. Different interests mean different goals of resolution, moreover, some stakeholders may never get the chance to advocate for their interests owing to the lack of financial resources to litigate. The diversity of stakeholders' interests, each advocating for their own, poses great challenge because there must be a middle ground resolution.

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9 The IPCC Special Report. "Global Warming of 1.5°C" (Oct. 2018), at p. 15. Online at https://www.ipcc.ch/Sr1 (Visited April 20, 2024)

10 ICC Arbitration and ADR Commission Report on Resolving Climate Change Related Disputes through Arbitration and ADR, pg.8, (*ICC - International Chamber of Commerce*26 November 2019), online at http://www.iccwbo.org/climate-change-disputes-report,(Visited April 20, 2024).

In these circumstances, dialogue, negotiations or mediations would help realize other points of view and therefore a mutually beneficial resolution can be reached. This, however, does not undermine the fact of hardship in finding a one size fits all solution. Climate related disputes are public interest disputes and often require a lot of attention. The fact that these disputes involve multiple stakeholders with different interests makes decision making a complex thing that needs to be approached with thoughtful consideration of all parties involved.

Additionally, the rapid transition towards renewable energies required in energy, land, urban and industrial systems to combat climate change sparks new investments, contracts and legal issues related to the environment. The complexity is further heightened by the diverse sectors involved, such as renewable energy, finance, technology, oil and gas, transport, insurance, and construction.[11] This kind of development has effects on host communities as investors focus on resource utilization. Consensual and relative exploitation is required of stakeholders, and this can only be achieved by methods like negotiations or mediations. It appears that from development, stakeholders must be ready to go through ADR forms to benefit mutually. Additionally, the uncertainty surrounding future emission rights and credits adds another layer of complexity to climate change disputes.[12]With every development in the climate change efforts, comes an inevitable potential of disputes all of which require a maintenance of relationships.

3. ADR in resolution of environmental disputes

ADR methods have since time immemorial been present and they have been applied to resolve a wide range of disputes among humans however they are only being formalized recently due to recent developments.

Mediation, a form of ADR made significant strides in resolving the environmental dispute on the Snoqualmie River conflict of 1974[13]. The dispute was about the construction of a flood control dam over the Snoqualmie river. Whereas farmers and residents were in support of the construction justifying that it was relevant to protect them from periodic floods of the river, environmentalists and some citizen groups on the other hand opposed the construction due to concerns over the pristine wilderness of the Snoqualmie river. The conflict was resolved by a negotiation which saw a compromise among the various stakeholders, the various stakeholders presented their respective concerns and a compromise leading to the construction of a smaller dam on a portion of the river to provide some protection from the floods while also addressing environmental concerns.

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11 ICC Arbitration and ADR Commission Report on Resolving Climate Change Related Disputes through Arbitration and ADR, pg.55, (*ICC - International Chamber of Commerce*26 November 2019), online at http://www.iccwbo.org/climate-change-disputes-report, (Visited April 20. 2024).

12 *Id*. pg.8,

13 Michelle Ryan, 'Alternative Dispute Resolution in Environmental Cases: Friend or Foe? Pg.11' (1997) 10 Tulane Environmental Law Journal 397, online at https://www.jstor.org/stable/43292160 (Visited April 29, 2024).

The 1960s witnessed the Storm King controversy[14], a conflict that involved a proposal by the Consolidated Edison (Con Ed), on building a hydro-electric power plant near Storm King Mountain in the Hudson River valley. The proposal was opposed by environmental groups who were concerned about the potential environmental impact on the scenic beauty and ecological integrity of the area. The dispute resulted in three court cases over a period of ten years. The dispute was still unresolved even though litigation had ended. In 1979 mediation was attempted as a last resort to see the conclusion of the dispute and save costs spent in litigation, the parties selected Russell Train, president of the World Wildlife Fund and a former EPA administrator, as the mediator and after over a year of intense "haggling and bargaining" a consensus was reached. Con Ed agreed to forfeit its Storm King license and to turn the site over to an interstate park commission. Con Ed and the other utility companies also agreed to methods that would decrease the impact on the river's aquatic life.

The above cases elaborate that ADR forms of mediation and negotiation are seen as speedier and less costly than litigation, where traditional litigation methods took over ten years, mediation was completed in a little over one year and in this sense, mediation was seen to be less costly compared to litigation on appeals. The matters also exhibited that mediation allows for greater and more effective public participation than is possible through traditional litigation and lobbying techniques.[15]

Environmental and climate change disputes have always been resolved with the ADR forms. However, they are progressing rapidly due to the movements on sustainable development measures and strides to induce environmental awareness. The movement towards conservation of the environment has sparked the growth of climate change disputes. Due to the intersection between economic growth and environmental disputes, the ICC arbitration has realized several climate change disputes. Adaptation of climate change mitigation efforts has led to the increasing need to resolve environmental claims therefore leading to an increased use of the ICC Arbitration and ADR.[16] Environmental Social and Governance concerns have also become prominent in investor-state arbitration with arbitral tribunals having to determine issues relating to climate change, corruption and human rights[17].

ADR has been gradually incorporated into the environmental sustainability efforts, for example, the Vienna Convention for Protection of the Ozone Layer provides for settlement of disputes by way of negotiation or other peaceful means, and if this fails, the parties can submit to arbitration. Where arbitration has failed, they may then seek resolution from International Court of Justice for settlement.[18] This is clear acknowledgment of the relevance of resolving disputes through means other than litigation.

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14 Michelle Ryan, Alternative Dispute Resolution in Environmental Cases: Friend or Foe? Pg.4 (1997) 10 Tulane Environmental Law Journal 397, online at https://www.jstor.org/stable/43292160 (Visited April 29, 2024).

15 *Ibid*.

16 ICC Arbitration and ADR Commission Report on Resolving Climate Change Related Disputes through Arbitration and ADR, pg.13, (*ICC - International Chamber of Commerce*26 November 2019), online at http://www.iccwbo.org/climate-change-disputes-report (Visited April 20, 2024).

17 Alison Ross, We need talk about ESG, online at https://globalarbitrationreview.com/we-need-talk-about-esg (Visited April 4, 2024)

18 Vienna Convention for the Protection of the Ozone Layer, UN, Vienna Austria 1985, (entered into force 22 September 1988) art 11.

ADR was included in the 2015 Paris Agreement also known as the Paris Climate Change Agreement. The UN in Paris together with 195 countries participated in a climate change conference where they negotiated a framework for reducing emissions and take common action on climate change.[19] The agreement represents international concern to mitigate climate change. Limiting global warming and achieving long term carbon neutrality were some of the aspects emphasized at the agreement. The agreement exhibited a consensus on the need for environmental sustainability amongst various stakeholders.

4. Benefits of ADR over litigation

The existence of conflict is inevitable, however, resolution of the same conflict may either leave the parties at crossroads or leave them at a middle ground where each party is mutually benefiting from the situation at hand. Litigation is a clear adversarial scene where parties focus on winning their case with arguments often backed by law. There is no preservation of relationships while solving disputes in litigation. The environment being a part of a whole existence affects numerous living species at once and one way or another, stakeholders involved in an environmental dispute usually must co-exist in harmony for them to benefit from it mutually. This is where ADR comes in. Known for its flexibility, ADR benefits stem from the fact that resolution of disputes potentially preserves relationships of parties to a dispute. This is because the various stakeholders usually reach mutual agreement free from the strict lines of the law. This is a desired outcome in that stakeholders do not have to be at war with each other, rather remain relational and collaborate with each other to come to a mutually beneficial resolution to environment related disputes. It is work made easy for everyone, for instance, the investor is comfortable to facilitate extraction of a resource from a community that is receptive.

ADR is particularly preferred over traditional litigation because of its accommodative nature where the resolution process is flexible and relaxed, it affords a wide range of resolutions for parties to choose from. Unlike litigation which operates under strictly provided laws, ADR is based on cooperation and therefore options for resolution are limitless.

Among others, ADR is advantageous because arbitral awards are enforceable anywhere in the world. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention")[20] enables cross border recognition and enforcement of arbitral awards. Litigation on the other hand may be limited by matters of jurisdiction where judgements that are subject of a cross border, environmental dispute, may face enforcement challenges.

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19 UN Chief hails new climate change agreement as "monumental triumph", UN Sustainable development goals 12 December 2015 online at https://www.un.org/sustainabledevelopment/blog/2015/ (Visited April 14, 2024).

20 Convention on the Recognition and Enforcement of Foreign Arbitral awards, UN, New York 1958, entered into force in 1959.

Litigation is often limited by high costs of seeking legal remedies for instance where some parties to a dispute lack financial means to cover legal expenses.[21] ADR methods can be used to mitigate risks of environmental and climate change through mediations and negotiations which may effectively resolve conflict without parties necessarily paying to realize a resolution in specific circumstances, such as when a local group is impacted by investments like new forestry areas or renewable energy projects, to prevent multiple court proceedings and provide enforceability within a more efficient timeframe.[22] ADR also comparably takes a shorter time to resolve conflicts compared to litigation which has to adhere to strict protocols and timelines saves time in the dispute resolution process by thereby reducing the cost of resolving the dispute.

The single most important feature of arbitrating climate change related disputes is the ability to ensure that appropriate expertise is available to the parties and the tribunal in addition to understanding of disputes and their resolution techniques. Appropriate expertise and skills may be provided in various ways including through: (i) arbitrators with appropriate expertise; (ii) party-appointed experts; (iii) tribunal appointed experts; and/or (iv) expert determination (such as pursuant to the ICC Expert Rules).[23] Environmental conflicts are complex in that they require technical expertise to bring specialized knowledge and understanding of technical and scientific aspects, such expertise is easily attainable in ADR mechanisms. The flexible and open nature of the proceedings facilitate quick resolution of complex environmental issues. ADR is also high handed in presenting neutral ground for resolution of disputes, arbitration can offer to climate change disputes accessibility of the tribunal, expertise, and flexibility as to where an arbitration is hosted.[24]

ADR is confidential and private in that its processes can help resolve confidential and sensitive environmental disputes where stakeholders require a more private resolution. In contrast to the public nature of climate litigation, arbitration is inherently private in that only the disputing parties and tribunals (with few exceptions) can participate in proceedings, access pleadings and evidence, attend hearings and see the final awards.[25]

Resolution of disputes by ADR methods avails remedies to various stakeholders without limiting them to the privity of a contract. Additionally, ADR avails stakeholders with flexible and attainable remedies to disputes. For instance, where an individual has a claim against a country, ADR methods such as negotiations would provide proper ground for a roundtable discussion to resolve a dispute as compared to litigation where the parties may be limited by jurisdiction and other litigation principles, from reaching a remedy. It is therefore agreeable that the international

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21 ICC Arbitration and ADR Commission Report on Resolving Climate Change Related Disputes through Arbitration and ADR, pg.49, (*ICC - International Chamber of Commerce* 26 November 2019), online at http://www.iccwbo.org/climate-change-disputes-report (Visited April 20, 2024).

22 *id*, pg.11,

23 ICC Arbitration and ADR Commission Report on Resolving Climate Change Related Disputes through Arbitration and ADR, pg.19, (*ICC - International Chamber of Commerce*26 November 2019), online at http://www.iccwbo.org/climate-change-disputes-report (Visited April 20, 2024).

24 *id*, *pg.11*.

25 Maryam Golnaraghi, et al, 'Climate Change Litigation – Insights into the Evolving Global Landscape', Pg.31 (The Geneva Association21 November 2023), online at https://www.genevaassociation.org/ (Visited April 20, 2024).

dimension of climate change and the likely presence of states or state entities as parties make international arbitration a suitable forum for the resolution of a variety of such disputes.[26]

5. Challenges of relying on ADR

ADR has proven beneficial in dealing with climate change disputes. However, like any other system, it is prone to limitations, must be maintained, and reformed to stay relevant in the resolution of climate change disputes. ADR must be exercised with caution as it has loopholes that make it easy to aid injustice. This is an expense that we as humans cannot afford because the environment is the most important source of livelihood for all living things. Highlighted below are some pointers to the risks of relying on ADR.

Confidentiality in ADR cases is both a blessing and a curse because it makes it difficult to track developments and make criticisms. Environmental disputes usually have adverse effects on the population. It is therefore scary to leave such controversial matters to a sitting of a few people to decide the outcomes. By contrast, litigation principles are clear, and uniform therefore is more secure than looking to an uncertain decision by a few chosen members to decide for all.

ADR presents inconsistencies in the resolution process of disputes. "The confidential nature of ADR in commercial disputes and state-to state arbitration means they are difficult to examine and quantify, and they are not included in the climate litigation databases……"[27] Unlike litigation where the outcomes can be predicted from precedents and legal interpretations, ADR methods present unique resolutions often tailored to the parties to a dispute. This means that there is no guaranteed or uniform resolution to disputes. The private nature of ADR processes thereby trumps any potential to create precedents that may affect and potentially improve community welfare, as well as wider national interests and public policy.[28] Uniformity, in the resolution process limits the room for exploitation since decision makers are bound by predecessors.

Additionally, there is an existing potential for power imbalances which can disadvantage some stakeholders within the ADR process such as negotiation. The resolution process is likely to be manipulated by the stakeholders with higher negotiation power since they have both the knowledge and the money over stakeholders such as host communities which may be ignorant about their negotiation powers. Negotiations between companies and local community groups face a likelihood of unfairness and impaired negotiating power based on expertise. Negotiations may be coercive since some stakeholders may have more knowledge and financial influence than others.

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26 ICC Arbitration and ADR Commission Report on Resolving Climate Change Related Disputes through Arbitration and ADR, pg.17, (*ICC - International Chamber of Commerce* 26 November 2019), online at http://www.iccwbo.org/climate-change-disputes-report (Visited April 20, 2024).

27 Maryam Golnaragh, et al, Climate Change Litigation – Insights into the Evolving Global Landscape, Pg.31 (The Geneva Association21 November 2023), online at https://www.genevaassociation.org/ (Visited April 20, 2024).

28 Deborah Lockhart and Christian Santos, Alternative Dispute Resolution in Environmental Disputes, online at https://disputescentre.com.au/alternative-dispute-resolution-in-environmental-disputes/#_ftnref4 (Visited April 20, 2024).

The informality of ADR methods may expose citizen groups to exploitation, there are no procedures to safeguard the vulnerable as in courtroom litigation where systems are developed as a means of ensuring due process and the protection of parties. These assurances are not available in mediation, unless expressly determined by the parties.[29] The lack of clear lines makes it easy for some stakeholder interests to be overlooked at the expense others.

The wide scope of environmental cases poses a challenge to the costs of parties involved. These cases often require technical experts to determine, the general process of resolution is likely to be costly and moreover not all stake holders involved may be able to foster the same process. Additionally, the uncertainty of who will bear the costs may also be a challenge. This challenge, however, can be remedied by express ADR agreements where parties agree on how costs will be paid.

Furthermore, there are currently no federal or state standards that apply to environmental mediations or mediators. Thus, the moral, legal, and economic pressures that ensure accountability in other fields are lacking in environmental ADR.[30] The environmental scene is wide and ever changing, general rules and instruments may not be able to sufficiently protect us from the adverse effects of climate change.

Court proceedings resolve in a judgment which concludes a dispute whereas ADR methods such as mediations may not always end in conclusion of a dispute. The parties are at a risk of wasting resources yet remain with an unresolved conflict thereby causing need to further to litigation which in this case defeats the purpose of ADR.[31]

Parties may be limited from appealing ADR outcomes, they are bound and cannot challenge the same however, court judgments can be challenged. In the context of environmental disputes, implications of resolving such disputes are far reaching and must be exercised with caution.

ADR remedies often focus on monetary settlements, which limits their effectiveness in urgent ecological concerns. ADR resolutions for environmental disputes can be challenged by public policy considerations for prioritizing private resolutions over broader societal interests. This can undermine the outcomes of ADR in addressing environmental harm since these processes typically emphasize compromise rather than urgent ecological remedies. Consequently, this focus can undermine statutory protections and the public interest in environmental governance, highlighting the need for more robust mechanisms that align private resolutions with public policy objectives.

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29 Michelle Ryan, 'Alternative Dispute Resolution in Environmental Cases: Friend or Foe? Pg.17' (1997) 10 Tulane Environmental Law Journal 397online at https://www.jstor.org/stable/43292160 (Visited April 29, 2024).

30 *Id*

31 Deborah Lockhart and Christian Santos, Alternative Dispute Resolution in Environmental Disputes, online at https://disputescentre.com.au/alternative-dispute-resolution-in-environmental-disputes/#_ftnref14 (Visited April 14, 2024).

6. Recommendations of effective ADR practices

In consideration of the above discussion, it is clear ADR is relevant in the movement to sustainable development however it needs to be tailored to match the complexities of environmental and climate change disputes. It is therefore imperative to make recommendations on some of the practices that can be incorporated into ADR to increase its effectiveness to the resolution of climate change and environmental disputes.

Transparency is key, alternative dispute resolution methods are opened to manipulation and criticism because the proceedings are not undergoing any streamlined form of scrutiny for uniformity. Environmental and climate change disputes are dynamic and ever revolving kind of disputes, there is need for proper transparency in the resolution of prior disputes to shape the ground for future resolution. This transparency, however, must be balanced between the need for privacy in handling such disputes and the general profitability of exposing resolution of such disputes.

There is a need to create specific regulatory bodies at regional and national levels to balance the private nature of ADR methods together with principles of accountability and fairness. These bodies should be able to audit the movements of ADR specifically in resolving climate change disputes since they are sensitive matters often leading to adverse effects.

Resolution of disputes by ADR should be confined to sustainable outcomes. Every resolution made should be tailored to emphasizing environmental sustainability. The risk of resolutions being made in favour of selective parties with power and influence can be checked by clear auditing of the resolutions made and how they are reached. The process can be checked by vigorous post-resolution follow-up and monitoring to ensure that the points agreed upon are for the benefit of the environment. This kind of process will ensure that every decision is made in consideration of sustainable development, focusing on solutions that promote long-term environmental well-being.

Involving ADR requires that parties to a dispute submit or agree to the processes of it. Submission agreements are a valuable tool as they clarify who will bear cost, the jurisdiction and other matters that may need clarification. Submission agreements are also recommended in matters where disputes arise because these will contain details of the dispute and the issues between the parties, and record that it is being referred to arbitration.[32] In the confines of a submission agreement, parties to an environmental dispute shall be protected from further disputes and time will be saved, allowing parties to focus on the resolution alone.

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32 ICC Arbitration and ADR Commission Report on Resolving Climate Change Related Disputes through Arbitration and ADR, pg.14, (*ICC - International Chamber of Commerce* 26 November 2019), online at http://www.iccwbo.org/climate-change-disputes-report (Visited April 20, 2024).

ADR in its nature is a form of mitigating risk. It will serve sustainable development sufficiently if it is involved at initial stages. Policy makers ought to emphasize the use of ADR forms like negotiations and mediations, at initial stages of disputes, to explore the possibility of resolution with minimal resources. Early engagement before a dispute escalates increases the chances of resolution and saves time that would otherwise be spent in litigation.

Education on environmental well-being should be given and made accessible to populations such that they are in a better position to make decisions on matters that affect them. This will solve the issue of impaired negotiation power. Additionally, stakeholders will be encouraged to participate actively in resolution of such disputes if they are more aware of what is at stake. Additionally, training and capacity building will also increase the number of environmental experts to participate in negotiations, mediations, and arbitrations for resolution.

7. Conclusion

ADR is contributing to the resolution of climate change disputes. Its collaborative and flexible nature has proved to be ideal for the resolution of such disputes as compared to litigation. It should be noted however that ADR's uncertainty of outcomes on resolutions is some form of limitation in resolving environmental conflicts since they are sensitive matters that require caution of decision making. It is therefore safe to say that the role of ADR does not undermine that of litigation in the resolution of disputes, rather it complements it. Both forms of resolving disputes are relevant, however, they need to be maintained to fit the growing need for sustainable development. Given the complexities of environmental disputes, both modes of resolving disputes can effectively resolve climate change disputes leading to sustainable development.

THE DUE DILIGENCE DILEMMA: A CRITICAL ANALYSIS OF AAPL V. SRI LANKA AND THE OBJECTIVE OF DUE DILIGENCE STANDARD

Leah Field

Abstract

Included in the vast majority of Bilateral Investment Treaties (BITs), a Full Protection and Security (FPS) clause obligates a host state to protect foreign investments located in its territory from harm. The FPS clause is a duty of conduct, not result. It does not impose strict liability upon a state whenever foreign investments are harmed, rather, it imposes an obligation for the host state to exercise due diligence in the protection of foreign investments. In other words, a state will only be held liable for an FPS violation if it fails to exercise due diligence in its protection of foreign investments. Among arbitral tribunals, there is disagreement as to what the proper content of the FPS due diligence standard is. The current predominant standard, the objective due diligence standard, holds all states to the same international minimum standard of due diligence, regardless of a state's circumstances and capacity. A minority of tribunals instead implement a subjective due diligence standard, which considers a state's resources, capacity, and circumstances in setting the host state's required level of due diligence. This article will argue that the subjective due diligence standard is the only interpretation of FPS due diligence that is logically consistent and faithful to the customary meaning of due diligence in international law. Longstanding jurisprudence and customary international law confirm that the due diligence standard was conceptualized as an inherently contextual standard, under which a tribunal must consider a host state's circumstances and capacity. The objective due diligence standard has only gained prominence since the 1990s and completely contradicts the customary and logical meaning of due diligence. Therefore, this article will argue that arbitral tribunals must cease this misinterpretation of the due diligence standard and adopt the subjective due diligence standard to bolster the legitimacy of investor-state arbitration, comply with the customary meaning of the FPS clause, and achieve just results for states with a limited capacity to protect investments.

1. Introduction

Full Protection and Security (FPS) clauses are included in most modern bilateral investment treaties (BITs).[1] Today, FPS claims are one of the most common types of claims brought by investors against states in investor-state dispute settlement.[2] As such, it matters a great deal what standard an arbitral tribunal adopts in its evaluation of alleged FPS clause breaches. While the FPS clause has historically been evaluated with a subjective due diligence standard, since the 1990s the objective due diligence standard has become predominant among arbitral tribunals.[3] This article will argue that modern arbitral tribunals' abandonment of the subjective due diligence standard in favor of a purely objective due diligence for FPS clause analyses has led to unjust and erroneous results and caused significant harm to developing host states enmeshed in conflict.

An FPS clause creates an obligation for the host state to protect the property of foreign investors located within its territory.[4] This includes a duty for the host state to refrain from itself damaging investment property, as well as a duty to affirmatively protect foreign investments from damage inflicted by third-party actors.[5] The host state's duty to protect investments from third-party damage is particularly salient in cases of civil war, insurrection, and other types of civil unrest where government resources are strained and non-state actors are likely to inflict harm on infrastructure.[6] Consequently, FPS violation claims for failure to protect investments from third-party damage disproportionately affect developing countries in which both civil unrest and lack of government resources are common.[7]

There is a general consensus in international investment law that an FPS clause imposes a due diligence standard upon host states in their protection of foreign investments.[8] To satisfy the FPS due diligence standard, states must "take such measures as may be reasonably necessary to ensure the protection and security of covered investments."[9]

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1 Arne Fuchs & Maximilian Pika, Full Protection and Security (FPS), Jus Mundi (June 3, 2022), online at https://jusmundi.com/en/document/wiki/en-full-protection-and-security-fps; Helge Elisabeth Zeitler, The Guarantee of "Full Protection and Security" in Investment Treaties Regarding Harm Caused by Private Actors, 3 Stockholm Int'l Arb. Rev. 1, 1 (2005).

2 Michael Darowski & Romilly Holland, Civil Unrest and Investor-State Claims in the Telecommunications Sector, Global Arbitration Review (Oct. 17, 2023) online at https://globalarbitrationreview.com/guide/the-guide-telecoms-arbitrations/second-edition/article/civil-unrest-and-investor-state-claims-in-the-telecommunications-sector.

3 Zeitler, supra note 1, at 1; see also Robert Howse & Amin R. Yacoub, Litigating Terror in The Sinai After The Egyptian Spring Revolution: Should States Be Liable to Foreign Investors for Failure to Prevent Terrorist Attacks?, 43 Michigan J. Int'l L. 595, 596-7 (2022) ("Until recently, arbitrators have generally rejected expansive readings of FPS clauses.").

4 *See, e.g.*, Fuchs & Pika, *supra* note 1.

5 Id. See also El Paso Energy Co. *v.* Argentina, ICSID Case No. ARB/03/15, Award, 1 (Oct. 31, 2011, ¶ 522) (stating that the FPS clause due diligence obligation applies in "those cases in which the acts challenged may not in themselves be attributed to the Government, but to a third party.") The term 'third parties' includes any actor other than the host state itself. This can include non-state actors (usually insurgent groups), other states, or private individuals. See Nartnirun Junngam, The Full Protection and Security Standard in International Investment Law: What and Who is Investment Fully[?] Protected and Secured From? Univ. Bus. L. Rev. 1, 73 (2018).

6 *See* Junngam, *supra* note 5, at 94.

7 Online at https://unctad.org/system/files/official-document/iteiit20054_en.pdf

8 United Nations Conference on Trade and Development, *Investor-State Disputes Arising from Investment Treaties: A Review*, UNCTAD/ITE/IIT/2005/4, 40 (2005) online at https://unctad.org/system/files/official-document/iteiit20054_en.pdf.

9 Mahnaz Malik, The Full Protection and Security Standard Comes of Age: Yet Another Challenge for States in Investment Treaty Arbitration?, international institute for sustainable development 3 (Nov. 2011), online at https://www.iisd.org/system/files/publications/full_protection.pdf.

In other words, a host state will only be held liable under the FPS clause if it failed to exercise due diligence with regard to investment protection.[10]

However, disagreement persists as to the substance of this due diligence standard.[11] Since the 1990s, the majority of arbitral tribunals have held that the due diligence standard is a purely objective standard of care.[12] Under this objective due diligence standard, due diligence constitutes "the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances."[13] To avoid liability under an objective due diligence standard, a host state must provide investments with a standard minimum level of protection, regardless of the state's circumstances, resources, or capacity.[14]

A minority of modern arbitral institutions have held that the due diligence standard should be a subjective standard of care.[15] Under a subjective due diligence standard, due diligence constitutes the measures of prevention "which the state can reasonably afford to give as per its means and as per the circumstances and conditions of each specific case."[16] Under this standard, a tribunal will consider not simply whether the host state met the international minimum standard of protection, but whether the host state was capable of meeting the minimum standard in light of its circumstances and resources.[17]

This article will argue that the subjective due diligence standard is the proper standard to be applied to FPS clauses. What constitutes due diligence is not expressly defined anywhere in international law because scholars recognize that the content of due diligence is inherently contextual.[18] The same set of governmental actions may satisfy the due diligence standard in one context and fail to satisfy the due diligence standard in another.[19] Indeed, throughout history courts and tribunals have reiterated that the content of due diligence "differs according to the circumstances."[20] Thus, the due diligence standard must remain flexible and take into account a state's circumstances and resources.[21]

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10 *Id.*

11 *See, e.g.*, Malik, supra note 9, at 10; *Asian Agric. Prods. Ltd. v. Sri Lanka* (hereafter AAPL), ICSID Case No. ARB/87/3, Final Award, ¶77 (June 27, 1990); Omar Moussly, *Same Concept, Different Interpretation: The Full Protection and Security Standard in Practice*, Kluwer Arbitration Blog (Oct. 27, 2019), http://arbitrationblog.kluwerarbitration.com/2019/10/27/same-concept-different-interpretation-the-full-protection-and-security-standard-in-practice/ Chin Leng Lim, Jean Ho & Martins Paparinskis, International Investment Law and Arbitration: Commentary, Awards, and Other Materials 279 (1st ed. 2018); Zeitler, *supra* note 1, at 10-11. The alternative to due diligence, a strict liability standard, has been widely dismissed by arbitral institutions, but a small minority of scholars believes strict liability should be the standard. *See* Alexander Lorz, *Protection and Security (Including the NAFTA Approach)*, *in* International Investment Law 764, 781.

12 *See* Fuchs & Pika, *supra* note 1.

13 AAPL, *supra* note 5, at 558.

14 *See* Junngam, *supra* note 5, at 32-33; United Nations Conference on Trade and Development, *supra* note 8 at 41 (An FPS duty to protect applies "without special regard for [a state's] resources available to do so.").

15 See Junngam, supra note 5, at 33.

16 Nitish Monebhurrun, Diligentia Quam in Suis as a Technique for a Contextual Application of the Full Protection and Security Standard: Considering the Level of Development of Host States in International Investment Law, 28 Afr. J. Int'l & Comp. L. 596, 605 (2020); see also British Property in Spanish Morocco (Spain *v.* United Kingdom), Award (1 May 1925), 11 Recueil des Sentences arbitrales, p. 644, para. 4.

17 Monebhurrun, *supra* note 16.

18 *Id.* at 598.

19 *See id.*

20 AAPL, *supra* note 5, at 560 (quoting *British Property in Spanish Morocco*).

21 See Federica Violi, The Function of the Triad 'Territory', 'Jurisdiction', and 'Control' in Due Diligence Obligations, in Due Diligence in the International Legal Order, 77 (Heike Krieger, Anne Peters, & Leonhard Kreuzer eds. 2020).

As such, this article argues that to comport with the logical and historically understood meaning of due diligence, arbitral tribunals must take into account the host state's circumstances and capacity when assessing FPS clause violations for damage inflicted by third parties. These circumstances should include the level of conflict or emergency in the host state, the host state's effective control over its territory, the host state's available resources at the time the damage occurred, and any other facts relevant to the host state's capacity to protect the investments.

Unfortunately, the majority of modern arbitral tribunals incorrectly assert that the due diligence standard is a purely objective standard.[22] These tribunals ignore the inherent subjective elements of the due diligence standard and instead apply a universal minimum standard to all states, regardless of whether those states have different capacities.[23] In practice, this leads tribunals to impose a strict liability standard upon states with limited capacities, the exact result that the due diligence standard was designed to avoid.[24] The article concludes that arbitral tribunals must properly implement the due diligence standard by implementing a subjective due diligence standard which accounts for the host state's capacity and circumstances. By doing so, tribunals will refute the criticism that investor-state arbitration is biased toward investors, achieve just results for host states that are legitimately unable to protect investments, and fulfill the intended purpose of the FPS clause.

2. Background

2.1 The Origin of the FPS Due Diligence Standard

The due diligence standard is used in many different areas of international law, including human rights law, environmental law, tax law, and more.[25] In investment treaty law, host states' due diligence obligation derives from the international minimum standard of treatment.[26] The international minimum standard of treatment first emerged as a definitive norm of customary international law in the 18th century; its purpose is to ensure that aliens in a host state receive the same treatment and protection as nationals of the host state "by providing for a minimum set of principles which States, regardless of their domestic legislation and practices, must respect when dealing with foreign nationals and their property."[27] One of the earliest cases establishing due diligence as an element of the international minimum standard was *Neer v. United Mexican States*.[28] As articulated by the *Neer* tribunal,

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22 Monebhurrun, supra note 16.

23 *Id*.

24 *Id*.

25 Anne Peters, Heike Krieger, & Leonhard Kreuzer, Due Diligence: The Risky Risk Management Tool in International Law, 9 Cambridge Int'l L. J. 121, 124 (2020).

26 *Id*.

27 Orsat Miljenić, Full Protection and Security Standard in International Investment Law, 3-4 Pravni Vjesnik God. 35, 42 (Apr. 26, 2019) https://hrcak.srce.hr/file/336589.

28 LFH Neer and Pauline Neer (United States of America *v.* Mexico), United States-Mexico Claims Commission, Award (15 November 1926), IV Recueil des sentences arbitrales, p. 61, para. 3.

> *"…the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of government action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."*[29]

In other words, to show that it met the international minimum standard of treatment, a host state had to show that it took reasonable governmental actions to protect aliens.[30] Today, this showing of reasonable government actions is known as due diligence.[31] The international minimum standard of treatment and the due diligence standard are one and the same; "*a host state would be violating the international minimum standard if it does not act with due diligence*" and vice versa.[32]

The FPS clause, as a codification of the international minimum standard, incorporates the due diligence standard into BITs.[33] Today, the application of the due diligence standard to FPS clauses is a result of *jurisprudence constante* across many arbitral awards.[34]

2.2 The Substance of the FPS Due Diligence Standard

To determine the content of the FPS due diligence standard, tribunals must look to State practice and judicial or arbitral case law or other sources of general or customary international law.[35] As the following section will demonstrate, legal scholarship, arbitral case law, and customary international law have long recognized the content of the FPS due diligence standard is inherently contextual.

Scholars have debated the content and substance of due diligence since the 18th century.[36] From the very beginning, due diligence eluded definition.[37] The difficulty in strictly defining due diligence was described by Professor Ian Brownlie, as follows:

> *"There is general agreement among writers that the rule of non-responsibility cannot apply where the government concerned has failed to show due diligence. However, the decisions of tribunals and the other sources offer no definition of 'due diligence'. Obviously no very dogmatic definition would be appropriate, since what is involved is a standard which will vary according to the circumstances."*[38]

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29 *Id*.

30 Aniruddha Rajput, Due Diligence in International Investment Law, in Due Diligence in the International Legal Order, 274 (Heike Krieger, Anne Peters, & Leonhard Kreuzer eds. 2020).

31 *Id*.

32 *Id*. at 275.

33 *See* Monebhurrun, *supra* note 16, at 598-9 ("Due diligence is… the cornerstone of the full protection and security standard.").

34 Rajput, supra note 30, at 277.

35 Zeitler, *supra* note 1, at 5.

36 Giulio Bartolini, The Historical Roots of the Due Diligence Standard, in Due Diligence in the International Legal Order, 33 (Heike Krieger, Anne Peters, & Leonhard Kreuzer eds. 2020).

37 *See id.*

38 J. Baloro, Aspects of the Law on the Responsibility of a Host State for Injuries to Foreign Investment During Internal Armed Conflicts: The ICSID Award in Asian Agricultural Products Limited *v.* Republic of Sri Lanka, 18 S. Afr. Y.B. Int'l L. 105, 114 (1993); Ian Brownlie, Principles of Public International Law, 452-3 (3rd ed. 1979).

The substance of due diligence is impossible to strictly define because it is necessarily contextual.[39] Indeed, the due diligence standard was widely acknowledged as a contextual standard throughout the 19th and 20th centuries; "it is fundamentally a question of the manner in which the government acted and whether it was sufficient *in the circumstances*."[40] Federico Sclopus, in one arbitral decision, eloquently explained the contextual nature of the due diligence standard, and the consequent difficulty in defining its content: "due diligence itself does not mean anything. What is due diligence for a man or a government is no longer as such with another man and another more powerful state."[41] At the League of Nation Conference on Codification in 1930, scholar Charles de Visscher commented that the conference had tried in vain to define the substance of the due diligence obligation.[42] Other legal scholars acknowledged the impossibility of precisely defining due diligence, but favored instead a determination of due diligence via comparison with other cases "to judge according to the circumstances in any particular situation."[43]

As applied to investment-treaty dispute settlement, scholars have long acknowledged the need to account for context when determining a host state's requisite level of due diligence under its FPS obligation.[44] In 1888, US Secretary of State Thomas F. Bayard described the need to contextualize host state due diligence as follows:

> *"I have had to show how custom depends on conditions; so that the degree of diligence customary and reasonable in a newly and sparsely settled region of a country where the police force is weak and scattered, where armed forces cannot be maintained and where custom throws on the individual, in a large degree, not merely the preservation of order but the vindication of supposed rights, is very different from the degree of diligence customary in a center of population under a well- organized police, and in which armed forces could be promptly summoned in support of the law."*[45]

Commenting on Bayard's views in 1979, Professor Ian Brownlie noted that "*there is good reason to believe that [Bayard's] exposition represents the law as it remains today*."[46] Based on his extensive study of the question of State responsibility for injuries caused to foreign nationals during an insurrection or a civil war, British jurist Lord Arnold McNair adduced several key legal principles on the topic.[47] One of McNair's principles was that a state on whose territory an insurrection occurs is not responsible for loss or damage sustained by a foreigner" unless the state acted with negligence, and this analysis "is a variable test, dependent on the circumstances of the insurrection."[48]

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39 *See* Baloro, *supra* note 37, at 115; *see also* Miljenić, *supra* note 27, at 55 (…it can be concluded that the greatest challenge in arbitration practice is to determine the scope of [the due diligence] standard…").

40 Rajput, *supra* note 30, at 274 (emphasis added).

41 Bartolini, *supra* note 35, at 33.

42 *Id*.

43 Clyde Eagleton, Clyde Eagleton, The Responsibility of States in International Law, 22 Am. Pol. Sci. Rev. 1004 (1928); Bartolini, supra note 35, at 33.

44 Rajput, *supra* note 30, at 274.

45 Baloro, supra note 37, at 114.

46 Brownlie, supra note 37, at 452-3.

47 Baloro, supra note 37, at 114.

48 *Id*.; McNair International Law Opinions: Selected and Annotated vol. 2, 238-73(1956).

Through case law, the same preference for the consideration of host state circumstances within the due diligence standard continued.[49] In *Spanish Zone of Morocco*, arbitrator Max Huber held that the State is only required to exercise the degree of surveillance corresponding to the means at its disposal.[50] In *Sambiaggo*, the umpire ruled that Venezuela was not liable for damage caused to Italian investors' property by revolutionaries because, given the state of conflict at the time, Venezuela had acted with due diligence commensurate with its capacity.[51] Scholars of the time period affirmed that these rulings constitute the ordinary rule of international law.[52]

A small number of cases did push back against the subjective due diligence standard. In the *Montijo* case, the umpire opined:

> *"It is true that Panama did not have the means to protect the investments, as it did not have at its disposal sufficient forces… for such a task; but the lack of forces leaves the obligation intact…If the state promises protection…it must provide for the means to make it effective."*[53]

Similarly, the commission in the *Mead* case stated that "there are of course limits to the extent to which a state] can justify a failure effectively to deal with lawlessness."[54] Nevertheless, these cases represent the historical minority opinion with regards to due diligence and do not represent current customary international law.[55] As determined by the tribunal in *ADF Group v. United States*, at least as of 2003, the objective due diligence standard has not yet "been brought into the corpus of present day customary international law."[56]

The contextual aspect of a state's due diligence obligation has been reiterated across fields of international law.[57] The International Court of Justice affirmed that the due diligence standard for states is contextual.[58] On this point the Court stated:

> *"The notion of 'due diligence', which calls for an assessment in concertos, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide."*[59]

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49 Bartolini, supra note 35, at 35.
50 *Id.*
51 Sambiaggio case, Italy-Venezuela Claims Commission (1903), Recueil des sentences arbitrales, vol. X, p. 524.
52 Lester Bernhardt Orfield, Equity as a Concept of International Law (continued), 18 Kentucky L. J. 116, 125 (1930).
53 *Id.* at 36-7.
54 *Id.* at 37.
55 *Id.*
56 *ADF v. United States*, p. 279.
57 Peters et. al., supra note 25, at 121.
58 *Id.*
59 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Decision (26 February 2007), ICJ Rec. (2007), para. 430.

Here, the ICJ acknowledged the capacity of the state as an essential aspect of due diligence.[60] In international environmental law, a state's economic level is "one relevant factor for defining the risk management capacity of a State."[61]

Based on customary international law and arbitral case law, the due diligence standard in investment law, like the due diligence standard in other areas of international law, is contextual.[62] The substance of a state's due diligence obligation will naturally be commensurate with the state's capacity to provide protection.[63] In other words, if the due diligence standard requires that all states "attempt their best efforts to offer legal and physical protection to foreign investors, such efforts will necessarily and logically depend on their respective means."[64]

It was only with the decision of *AAPL v. Sri Lanka* in 1990 that the universal consensus of due diligence as a subjective standard in investment treaty law began to change. The *AAPL* tribunal for the first time adopted a purely objective due diligence standard when evaluating an FPS clause breach.[65] The *AAPL* decision had a domino effect on arbitral decisions since the 1990s up until today, spreading the popularity of the objective due diligence standard. Unfortunately, most post-AAPL arbitral tribunals reject the customary definition of due diligence in favor of a purely objective due diligence standard, i.e. a standard that expects all states to exercise the same substantive level of due diligence regardless of their capacities and contexts.[66] However, this type of due diligence standard is illogical, unrealistic, and contravenes the customary meaning of due diligence in international law.[67] To correctly implement the FPS due diligence standard, tribunals must adopt a subjective due diligence standard and take into account a host state's circumstances and capacity.[68]

The following section will provide a criticism of the *AAPL* tribunal's decision to adopt an objective due diligence standard in contravention of customary international law and the arbitral jurisprudence following it. It will show that the *AAPL* tribunal's reasoning failed to show any history or precedent in support of the objective due diligence standard in investment treaty law. Considering this, the *AAPL* tribunal's decision not only leads to erroneous results, but it creates a legitimate basis for accusations of pro-investor bias in investor-state dispute resolution.

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60 *Id.*
61 Peters et. al., supra note 25, at 121.
62 See Monebhurrun, supra note 16, at 600.
63 *Id.*
64 *Id.*
65 *Id.*
66 *Id.*
67 *Id;* see also Meriam Al-Rashid, Ulyana Bardyn, & Levon Golendukhin, Investment Claims Amid Civil Unrest: Questions of Attribution and Responsibility, 3 BCDR Int'l Arb. Rev. 181, 199 (2016).
68 *Id.*

3. The Due Diligence Standard in Modern Case Law

AAPL v. Sri Lanka

The first investment treaty award to analyze a BIT FPS clause was *Asian Agricultural Products Ltd (AAPL) v. Republic of Sri Lanka*.[69] *AAPL* is the seminal case in the application of the due diligence standard to BIT FPS clauses.[70] It is also noteworthy as one of the most frequently cited "detailed examinations by a modern arbitral tribunal of the law of state responsibility in the situation of an internal armed conflict."[71]

In *AAPL*, the claimant corporation Asian Agricultural Products Ltd. (AAPL) owned 48.2% of Serendib Seafoods Ltd. (Serendib), a Sri Lankan shrimp farming company.[72] In 1986, the area where Serendib's shrimp farm was located came under the control of Tamil Tiger rebels during an insurgency.[73] To quash the rebels, the Sri Lankan military performed a counter-insurgency operation in the area.[74] Over the course of the operation, most of the shrimp farm and its crops were destroyed, and twenty-one Serendib employees were killed.[75] AAPL commenced an arbitration in the International Centre for Settlement of Investment Disputes against Sri Lanka pursuant to the Sri Lanka-United Kingdom Bilateral Investment Treaty of 1980, alleging a breach of the treaty's FPS clause.[76]

AAPL first attempted to argue that the BIT's FPS clause imposed a strict liability standard on Sri Lanka with respect to its duty to protect investments.[77] The tribunal rejected this argument based on the history of the international minimum standard of protection within customary international law.[78] Instead, the tribunal affirmed that the FPS clause imposed a due diligence obligation upon Sri Lanka rather than a strict liability standard.[79] As an obligation of conduct and not result, the tribunal ruled that the due diligence standard did not make Sri Lanka automatically liable for all investment damages.[80]

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69 Omar Moussly, Same Concept, Different Interpretation: The Full Protection and Security Standard in Practice, Kluwer Arbitration Blog (Oct. 27, 2019) online at https://arbitrationblog.kluwerarbitration.com/2019/10/27/same-concept-different-interpretation-the-full-protection-and-security-standard-in-practice/

70 *Id*.

71 Baloro, supra note 37, at 114.

72 AAPL, *supra* note 11, at 548.

73 *Id*.

74 *Id*.

75 Id. at 551. The parties disputed whether and how much of the damage was caused by Sri Lankan Forces *vs*. caused by rebel forces. The tribunal concluded that it was impossible to determine whether the damage was primarily caused by the government or rebel forces.

76 *Id*. Article 2 of the BIT reads in relevant part: "Investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party." Using the renvoi technique, the Court ruled that the FPS international minimum standard of due diligence was imported onto Article 4(1) of the treaty. See also Baloro, supra note 37, at 114.

77 Sri Lanka-United Kingdom Bilateral Investment Treaty, Feb. 13, 1980.

78 AAPL, *supra* note 11, at 545 ("The Tribunal is of the opinion that the Claimant's construction of Article 2(2) as [a strict liability standard] cannot be justified under any of the canons of interpretation previously stated.").

79 *Id*.

80 *Id*.

However, while the tribunal agreed that due diligence rather than strict liability was the proper standard for the FPS clause, it disagreed with Sri Lanka's argument that the tribunal should apply a subjective due diligence standard.[81] Instead, the tribunal chose to apply an objective due diligence standard.[82]

In its opinion, the majority spent several pages justifying its adoption of the objective due diligence standard over the subjective due diligence standard.[83] Paradoxically, the majority began by describing the long history of support for a subjective due diligence standard in customary international law and investment treaty law jurisprudence.[84]

The tribunal quoted from arbitrator Max Huber's opinion in *Spanish Zone of Morocco*, noting that "the famous arbitrator indicated that the 'degree of vigilance' required in proving the necessary protection and security would differ according to the circumstances."[85] The tribunal further observed that "in the absence of any higher standard provided for by Treaty, the general international law standard was stated to reflect the 'degree of security reasonably expected.'"[86] The tribunal positively quoted legal scholar Ian Brownlie's research on state responsibility in international law: "after reviewing all categories of precedents, including more recent international judicial case-law, the learned Oxford University Professor noted the existence of 'a sliding scale of liability related to the standard of due diligence.'"[87]

Despite seeming to recognize the historical support of the subjective due diligence standard in "all categories of precedents," including both customary international law and investment tribunal jurisprudence, the majority then flatly rejected the subjective due diligence standard.[88] The tribunal asserted, with virtually no basis, that the recent trend in investment law was a movement away from a subjective due diligence standard and toward an objective due diligence standard.[89] According to the tribunal,

> *"A number of other contemporary international law authorities noticed the 'sliding scale', from the old 'subjective' criteria that takes into consideration the relatively limited existing possibilities of local authorities in a given context, towards an 'objective' standard of vigilance in assessing the required degree of protection and security with regard to what should be legitimately expected to be secured for foreign investors by a reasonably well organized modern State."*[90]

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81 *Id.*
82 *Id.*
83 *Id.*
84 *Id.*
85 *Id.* at 556.
86 *Id.*
87 *Id.* at 557-8 (quoting Brownlie, *supra* note 37, at 162 and 168).
88 *Id.* at 558.
89 *Id.*
90 *Id.*

Despite mentioning "a number of scholars," the tribunal only cited a single scholar in support of this assertion.[91] The tribunal quoted Professor Alwyn V. Freeman's 1955 article on state responsibility during times of conflict, in which Freeman stated that the due diligence standard requires "nothing more nor less than the reasonable measures of prevention which a *well a*dministered government could be expected to exercise under similar circumstances."[92] The tribunal offered no other cases or treatises in support of its view that the tide was changing in favor of the objective standard.[93] Thus, the *AAPL* tribunal's adoption of the objective due diligence standard in fact directly contradicted the predominant view in international law up until that point.[94]

Upon applying this objective due diligence standard, the *AAPL* tribunal concluded that Sri Lanka had failed to exercise due diligence with respect to AAPL's investments due to its failure to take certain protective acts.[95] First, Sri Lanka did not attempt to evacuate Serendib staff from the farm prior to engaging the rebels in combat.[96] Sri Lanka protested that it suspected Serendib employees were themselves supporting the rebels, but the tribunal held that Sri Lanka still had a duty to peacefully evacuate Serendib employees, regardless of their suspected sympathies.[97] Second, Sri Lanka failed to engage the rebels in any diplomatic measures before engaging in combat.[98] The fact that Sri Lanka did not even try to avoid violence with the rebels was evidence that Sri Lanka did not take all due steps to prevent damage to the investments.[99]

In a 2-1 decision, the tribunal concluded that Sri Lanka had not exercised due diligence because it did not take "all possible measures that could be reasonably expected to prevent the eventual occurrence of killings and property destruction."[100] The tribunal ultimately ordered Sri Lanka to pay AAPL US $54,972.40 in costs, plus 60% of the fees and expenses of the arbitrators.[101]

Dr. Samuel KB Asante, in his dissent, argued that Sri Lanka should not have been held liable and vehemently criticized the tribunal's adoption of an objective due diligence standard.[102] He pointed out the majority's contradictory history of the FPS due diligence standard, reinforcing that the due diligence standard in customary international law has always been contextual and based on host state circumstances.[103] In addition, Asante argued the majority failed "to appreciate the full implications of the formidable security situation and the grave national emergency that confronted

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91 *Id.*

92 Alwyn *V.* Freeman, Responsibility of States for Unlawful Acts of their Armed Forces, in Collected Courses of the Hague Academy of International Law (volume 8, 1955).

93 *Id.* at 558.

94 Baloro, *supra* note 37, at 114.

95 *Id*.

96 Surya P. Sharma, Interpretation of Bilateral Investment Treaties: The Case of Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka, 1 Asia Pac. L. Rev. 123, 127 (1992).

97 *Id*.

98 Sharma, supra note 90, at 127.

99 *Id*.

100 *Id*.

101 *Id*. at 128.

102 Asian Agric. Prods. Ltd. *v.* Sri Lanka, ICSID Case No. ARB/87/3, Dissent (June 27, 1990) (hereafter AAPL Dissent).

103 *Id*. at 583.

the Sri Lankan authorities" in their conflict with the Tamil Tigers.[104] He emphasized that the tribunal overlooked relevant context, such as the undisputed fact that there was "intense rebel activity… in the entire peninsula where the SSL farm was located" and the government did not control the entire area for many weeks leading up to the damage.[105] Asante was particularly perturbed by the majority's expectation that Sri Lanka exercise the level of due diligence of a 'well-administered' given the state of civil war in Sri Lanka and the government's lack of control of the farm area; as Asante noted, "when a host State is fighting for its very existence it is assumed that it has complied with the due diligence rule and is therefore not liable."[106]

As described above, the objective due diligence standard is a misapplication of the law because it transforms the due diligence standard into a strict liability standard. Through its weak and unsupported reasoning, this is exactly what the majority did in AAPL:

> *"The end result of this approach was expressly to denounce the claimant company's call for the imposition of strict or absolute liability on the Respondent, but effectively to apply the same standard through the back door. Thus, the tribunal, through its inconsistencies and illogicality in reasoning, succeeded in applying to the Respondent, not the customary international law standard of due diligence, but the strict or absolute standard and in the process rendered the government of Sri Lanka an all-weather insurer or guarantor of foreign investors operating in its territory."*[107]

Yet, since the *AAPL* decision, its adoption of the objective due diligence standard has been cited as the prevailing interpretation of the FPS due diligence standard in international law.[108] Consequently, most tribunals since the *AAPL* decision have adopted an objective due diligence standard, i.e. a standard that ignores the host state's capacity and circumstances.[109]

4. Cases Since AAPL v. Sri Lanka

4.1 The Objective Standard in Modern Case Law

The *AAPL* award set the stage for future arbitral tribunals to disregard a host state's circumstances in calculating due diligence.[110]

Since *AAPL*, other tribunals have continued to adopt a purely objective FPS due diligence standard with no consideration for host state capacity or circumstances.[111]

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104 Sharma, supra note 57, at 128.
105 AAPL Dissent, supra note 96, at 574.
106 *Id.* at 595.
107 Baloro, supra note 37, at 114.
108 *Id.*
109 *Id.*
110 A. S. Alexandrov, The Evolution of the Full Protection and Security Standard, in Building International Investment Law: The First 50 Years of ICSID, 321 (Meg Krinear ed. 2015).
111 *Id.*

Today, the objective due diligence standard has become the dominant interpretation of the FPS due diligence standard in modern investment treaty arbitration case law.[112] Many tribunals continue to cite Alwyn Freeman's quote as evidence for the objective due diligence standard, asserting that due diligence requires the minimum level of protection as would be provided by a well-administered state.[113] In *Glamis v. The United States of America*, the tribunal established due diligence as an unchanging floor, below which everything is a violation: "[the FPS standard] is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community. Although the circumstances of the case are of course relevant, *the standard is not meant to vary from state to state or investor to investor*."[114] In *AMT v. Zaire*, the tribunal adopted an objective due diligence standard and quite explicitly denied the consideration of host state capacity.[115] According to the tribunal, "Zaire [was] responsible for its inability to prevent the disastrous consequences of these events adversely affecting the investments of AMT which Zaire had the obligation to protect."[116] This is essentially the application of the strict liability standard; the tribunal punished Zaire for lacking the resources and capacity to protect AMT's investments.[117] In *Al Warraq v. Indonesia*, the tribunal stated that the host state has an obligation to provide a level of protection which "a well administered government could be reasonably expected to exercise in similar circumstances."[118]

Other tribunals have nominally adopt a subjective standard, purporting to consider the host state's circumstances, but in practice ignore relevant circumstances affecting the host state's capacity to provide protection.[119] This is exemplified by *Ampal-American Israel Corp. et al v. Egypt*, a case decided by the ICSID in 2017.[120] In this case, a pipeline delivering natural gas from Egypt to Israel was damaged multiple times by terrorist attacks during the Egyptian Revolution.[121] The Ampal-American Israel Corp., a company with majority ownership of the pipeline, filed suit under the US-Egypt BIT for 14 separate attacks that allegedly violated the FPS clause.[122] At the outset, the tribunal asserted its adoption of a subjective due diligence standard, stating that "the adequacy of the State's response should be assessed in the light of the scale of the disorder and the extent of its resources."[123] However, the only analysis of Egypt's circumstances and capacity in the award was the following two sentences:

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112 *Id.*

113 *See e.g. Hesham Talaat M. Al-Warraq v. The Republic of Indonesia, IIC 718 (2014), Ad Hoc Tribunal, para. 625 (UNCITRAL); AWG Group Ltd. v. The Argentine Republic, Final Award (2015), ICSID Case No. ARB/03/19, Ad Hoc Tribunal (UNCITRAL).*

114 *Glamis Gold, Ltd. v. The United States of America*, Award, IIC 380 (2009), Ad Hoc tribunal, para. 615 (UNCITRAL) (emphasis added).

115 *American Manufacturing and Trading v. Zaire*, ICSID Case no. ARB/93/1, Award (21 February 1997), para. 6.06.

116 *Id.*

117 *Id.*

118 Al Warraq, supra note 104.

119 *See Lauder v. Czech Republic;* NITISH MONEBHURRUN, In Lauder, the "tribunal acknowledged the Democratic Republic of Congo's lack of means but still upheld its material capacity to guarantee a level of protection which could be objectively expected from a developed and highly industrialised state."

120 Amin R, Yacoub, *The Case of Ampal v. Egypt: What are the Parameters of the Due Diligence Standard?* Cambridge Int'l L. J. (2018) http://cilj.co.uk/2018/11/16/the-case-of-ampal-v-egypt-what-are-the-parameters-of-the-due-diligence-standard/.

121 *Ampal-American Israel Corporation and ors v Egypt*, Decision on jurisdiction, ICSID Case No ARB/12/11, IIC 970 (2016).

122 *Id.*

123 *Id.*

> *"At the outset, the Tribunal acknowledges that the circumstances in the North Sinai Egypt were difficult in the wake of the Arab Spring Revolution. Armed militant groups took advantage of the political instability, security deterioration and general lawlessness that ensued in the North Sinai[273] to perpetrate the attacks on the Trans-Sinai Pipeline."*[124]

The tribunal went on to find that Egypt was not liable for the first attack because it was unexpected, but Egypt was liable for all of the following thirteen attacks because the state was then on notice that the pipeline required protection.[125] While the tribunal did discuss Egypt's *awareness* of the attacks as one circumstance of the incident, the tribunal did not conduct a full, meaningful evaluation of Egypt's *capacity* to respond to the attacks.[126] One fact that the court entirely neglected, for instance, was that at the time of the damage "the Camp David Accords limited Egypt to [only] 2,000 troops in the area."[127] Conflict was ongoing in other parts of the country at the time, and given this limited number of troops, protection may not have been available to be sent to the pipeline.

Perhaps Egypt was fully capable of sending troops to protect to the pipeline at the time despite the restrictions of conflict; that determination is fact-dependent.[128] But the fact that the tribunal did not engage at all in an analysis of Egypt's capacity to provide protection to the pipeline shows that the tribunal would have held Egypt liable whether or not Egypt actually had that capacity.[129] Effectively, the court implemented the objective due diligence standard, "an act of severe historical and political blindness."[130]

Ampal is a particularly disappointing outcome for countries battling terrorism; it "raises an alert to any developing country fighting terrorism, as it could be held liable under FPS if the investment was harmed, even if it had adopted adequate measures relevant to its capacity."[131] *Ampal* exemplifies the critique of the objective due diligence standard that it in fact imposes strict liability upon developing countries who do not have the capacity to take preventative security measures.[132] If arbitral institutions are serious in their assertion that FPS clauses do not impose strict liability, they must consider the host state's capacity and resources when interpreting the FPS clause and adopt the customary subjective due diligence standard.[133]

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124 *Id.*
125 *Id.*
126 *Id.; see also Kathryn Greenman & Ntina Tzouvala, International Investment Law and Repressive State Power: Rethinking a Relationship, International Institute for Sustainable Development (Apr. 2, 2023) online at* https://www.iisd.org/itn/en/2023/04/02/international-investment-law-and-repressive-state-power-rethinking-a-relationship/.
127 Greenman & Tzouvala, *supra* note 115.
128 *Id.*
129 *Id.*
130 Howse & Yacoub, supra note 3, at 598.
131 *Id.*
132 *Id.*
133 *Id.*

4.2 The Subjective Standard in Modern Case Law

Since *AAPL*, a minority of arbitral tribunals have continued to implement the customary subjective due diligence standard which considers a host state's capacity and circumstances when determining the substance of due diligence. The implementation of the subjective due diligence standard in modern case law is best reflected in the decision of *Pantechniki v. Albania.*

In *Pantechniki v. Albania*, the claimant, Pantechniki S.A. Contractors and Engineers (Pantechniki), was a Greek company that provided various construction services and had multiple projects in Albania.[134] In March 1997, Pantechniki's road work site in Bushtriza, Albania was destroyed and looted during the eruption of anti-government civil disturbances.[135] Pantechniki subsequently commenced arbitration against Albania alleging a breach of the Albania-Greece BIT's FPS clause for Albania's failure to protect the work site from the looters.[136] Pantechniki argued that an objective due diligence standard should apply to the treaty's FPS clause, and under such an objective standard Albania failed to exercise due diligence in protecting Pantechniki's investments because it did not take any precautionary measures to protect the Pantechniki worksite from rioters.[137] Albania argued that a subjective standard should apply to the FPS clause, which would consider the severity of the riots and the capacity and resources of the Albanian government at the time of the damage.[138] Under a subjective standard, Albania argued it did not violate the FPS clause because its public security forces were totally incapable of reaching the worksite in time to prevent damage.[139]

The tribunal in Pantechniki agreed with Albania that any FPS due diligence standard must take host state circumstance and capacity into account.[140] In his majority opinion, arbitrator Jan Paulsson quoted and adopted the reasoning used by scholars Andrew Newcombe and Luís Paradell Trius in their treatise on international investment treaty law:[141]

> *"Although the host state is required to exercise an objective minimum standard of due diligence, the standard of due diligence is that of a host state in the circumstances and with the resources of the state in question. This suggests that due diligence is a modified objective standard – the host state must exercise the level of due diligence of a host State in its particular circumstances. In practice, tribunals will likely consider the State's level of development and stability as relevant circumstances in determining whether there has been due diligence. An investor investing in an area with endemic civil strife and poor governance cannot have the same expectation of physical security as one*

134 *Pantechniki S.A. Contractors & Engineers v. Albania*, ICSID no. ARB/07/21, Award (30 July 2009).
135 *Id.*
136 *Id*.
137 *Id.*
138 *Id.*
139 *Id.*
140 *Id.*
141 *Id.* at 15.

investing in London, New York or Tokyo."[142]

The tribunal consequently concluded that Albania did not violate the FPS due diligence standard because "the police were *unable* to intervene" which is "crucially different from a *refusal* to intervene given the scale of the looting."[143]

Other tribunals have nominally implemented an objective due diligence standard, but in practice implement the subjective due diligence standard by considering the host state's circumstances and capacity in determining its level of due diligence.[144] This phenomenon can be seen in the case of *Mamidoil Jetoil v. Albania*.[145] The Greek claimant corporation, Mamidoil Jetoil Greek Petroleum Products Societe S.A. (Mamidoil), alleged that Albania had breached the Albania-Greece BIT's FPS clause by inflicting various restrictions on one of Mamidoil's construction projects.[146] In its FPS analysis, the tribunal declared that a state "has to exercise an objective minimum standard of due diligence that is linked to the circumstances within the State in question."[147] While declaring its support for an objective standard, the tribunal's articulation of the standard actually reflects a subjective standard: "[t]he tribunal refers to the minimum standard of due diligence to be objective but then puts it into the overall context of the situation in the state and introduces a subjective element."[148] The majority ultimately affirmed that a host state's level of development and stability is relevant to the tribunal's due diligence analysis and found that Albania had not breached the FPS clause.[149]

Several other tribunals have adopted the subjective due diligence standard as the Pantechniki tribunal did.[150] Unfortunately, these tribunals remain a minority in modern investment treaty arbitration.

4.3 The Rationale of the Subjective Standard

Custom and logic are not the only reasons why tribunals should adopt the subjective due diligence standard for FPS clauses. In addition, the subjective standard is the only standard that achieves just and realistic outcomes.

First, basic notions of justice dictate that a state should only be punished for acts that it is culpable for.[151] That is the very purpose of the due diligence standard, as an alternative to strict liability. The due diligence duty of states to protect investments has

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142 *Id*. at 20; see also Andrew Newcombe & Luís Paradell, Law and Practice of Investment Treaties: Standards of Treatment 310 (Kluwer Law International 2009).

143 Pantechniki, supra note 122, at 21.

144 *See Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. The Republic of Albania*, ICSID Case No. ARB/11/24, para 364 (March 2015).

145 *Id*.

146 *Id*.

147 *Id*.; see also Rajput, supra note 30, at 285-6.

148 Rajput, supra note 30, at 286.

149 *Id*.

150 *See Saluka Investments v. Czech Republic*, UNCITRAL, Partial Award (17 March 2006), para. 484; *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Award (3 September 2001), para. 308.

151 Howse & Yacoub, supra note 3, at 599.

been compared "by analogy… to that of a doctor who must put up all efforts to treat his or her patient without always being able to guarantee a complete recovery."[152] Taking this analogy further illustrates the fairness of the subjective due diligence standard. The application of a subjective due diligence standard does not mean that doctors with sub-standard qualifications or doctors who act with negligence will be exonerated of wrongdoing. Rather, it means that a fully certified, diligent doctor who (through no fault of her own) lacks the basic medical tools necessary to successfully conduct a surgery in a particular instance will not be culpable if that surgery's result is not satisfactory.[153] Like the doctor in the analogy, states are not culpable and should not be punished for a lack of capacity that is not within their control. Holding otherwise through the adoption of the objective standard creates "a shocking result from an international justice perspective."[154]

Opponents of a subjective due diligence standard that accounts for host state circumstance argue that any such standard exonerates host state negligence.[155] In the *Pantechniki* Award, arbitrator Jan Paulsson concisely summarized the arguments used against the subjective standard:

> *"…a relativistic standard would be none. International courts or tribunals would have to make ad hoc assessments based on their evaluation of the capacity of each state at a given moment of its development. International law would thus provide no incentive for a state to improve. It would in fact operate to the opposite effect: a state which devoted more resources to its judiciary would run the risk of graduating into a more exacting category."*[156]

In other words, a subjective due diligence standard would allow states to negligently fail to protect foreign investments without consequences, and would in fact encourage state negligence.[157] This is a false assumption and does not play out in the real world.[158] In reality, "accepting that the full protection and security standard must be construed in the light of local circumstances is in no way tantamount to condoning developing states' negligence vis-a-vis international investors."[159] The majority of developing states are under-resourced and unstable, not negligent.[160] Under a subjective standard, the host state still must show that it acted diligently and in good faith in relation to its circumstances, resources, and capacity.[161] The subjective standard is in no way a legal loophole to liability in cases where a host

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152 Monebhurrun, supra note 135, at 610.

153 Ruth Maclean & Simon Marks, 10 African Countries Have No Ventilators. That's Only Part of the Problem., NY Times (Apr. 18, 2020) online at https://www.nytimes.com/2020/04/18/world/africa/africa-coronavirus-ventilators.html; Heba Farouk Mahfouz & Loveday Morris, A Kitchen Table Amputation Without Anesthetic in Gaza is One of Many, Washington Post (Jan. 20, 2024) online at https://www.washingtonpost.com/world/2024/01/20/gaza-healthcare-crisis-amputation-anesthesia/; The Role of Medicine in Armed Conflict: Ethical and Professional Impacts, American Medical Association (July 15, 2022) online at https://www.ama-assn.org/delivering-care/ethics/role-medicine-armed-conflict-ethical-and-professional-impacts.

154 Howse & Yacoub, *supra* note 3, at 599.

155 Monebhurrum, *supra* note 135, at 610.

156 Pantechniki, *supra* note 122, at 14

157 *Id*.

158 Monebhurrum, supra note 135, at 610.

159 *Id*. at 611.

160 *Id* at 610.

161 *Id*.

state is actually culpable for damage to investments.[162]

Even with the implementation of the subjective due diligence standard, culpable states would still be held liable for damages. One can look, as an example, to *Wena Hotels v. Egypt*.[163] In *Wena*, an ICSID tribunal found Egypt liable under an FPS clause for failing to prevent the seizure of two British-owned hotels by Egyptian Hotels Company (EHC), a company affiliated with the Egyptian tourism authority.[164] The tribunal determined that "although Egypt was aware of EHC's intention to seize the hotels, its police force did nothing to protect the hotels and it did not immediately restore the hotels to the claimant's control."[165] In *Wena*, the tribunal held Egypt liable under the objective due diligence standard.[166] However, it is clear that the outcome of this case would have been the same if the subjective due diligence standard had been applied.[167] Under the subjective due diligence standard, the court would have considered whether Egypt was *capable* of protecting the Wena Hotels given its circumstances and resources.[168] In this case, it was undisputed that various police units were nearby the hotel both before and after the seizure, yet refused to take any steps to stop it and only investigated it after significant delay.[169] After the seizure, the Egyptian government refused to force EHC to return the hotels, "to punish EHC or its officials, or to withdraw the hotel's licenses so that EHC could not operate the hotels," all actions that the Minister of Tourism was expressly permitted to take under Egyptian law.[170] Given these facts, it is clear that Egypt was *capable* of providing protection to Wena Hotels but deliberately chose not to do so.[171] Therefore, Egypt would have still been held liable for failure to exercise due diligence in protecting the hotels under a subjective due diligence standard.

In addition, adopting the subjective due diligence standard can fend off accusations of bias toward investors in the arbitration system, a criticism which has plagued the arbitration system since its inception. Legitimacy is central to the strength of the investor-state arbitration system, and it has only gone downhill in recent decades. Indeed, various studies have provided "tentative evidence of systemic bias in the resolution of jurisdictional issues in investment treaty arbitration."[172] Critics have valid grounds for accusations that the investor-state arbitration system is biased in favor of investors, and the predominance of the objective due diligence standard is one such ground.[173] By adopting the subjective due diligence standard, arbitrators can mitigate these accusations of pro-investor bias in arbitration, and thereby strengthen the legitimacy of the investor-state arbitration system.

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162 *Id*.
163 *Id.*
164 *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Final Award (Oct. 31, 2005).
165 *Id*.
166 *Id*.
167 Yacoub, *supra* note 111.
168 *Id*.
169 *Id.*
170 Wena Hotels, supra note 147, at para 90.
171 *Id*.
172 Gus Van Harten, Pro-Investor or Pro-State Bias in Investment-Treaty Arbitration? Forthcoming Study Gives Cause for Concern, International Institute for Sustainable Development (Apr. 13, 2012) online at https://www.iisd.org/itn/en/2012/04/13/pro-investor-or-pro-state-bias-in-investment-treaty-arbitration-forthcoming-study-gives-cause-for-concern/.
173 Yacoub, *supra* note 111.

An objective due diligence standard is simply unreasonable and unrealistic. The idea that states must provide protection equal to the protection provided by a well-organized modern state "would imply that all states, independently of their level of development, must be similarly efficient in terms of judicial, political and administrative organization, the police force, and economic means and resources."[174] While these are all worthy goalposts for developing states, it is absurd to expect that a state in the midst of development can achieve the same standards as a well-developed state whenever it wants to. In addition, the massive awards made against developing states for FPS violations only further entrench them in a cycle of poverty and violence. Today, arbitral awards frequently amount to billions of dollars, which is an unpayable sum for many developing countries. As a result, the detrimental financial impacts of these arbitral awards can create a self-fulfilling prophecy. Developing host states are unable to protect foreign investments due to lack of resources. These states are then held liable to investors for billions of dollars for their failure to protect, which only exacerbates the host state's lack of resources. Ultimately, this cycle hurts both host states and investors.

The subjective due diligence standard reflects fundamental goals of justice, pragmatism, and legitimacy within the arbitration system, and arbitrators should accordingly adopt this standard for FPS clause analysis going forward.

5. Conclusion

An objective due diligence standard is an oxymoron. Any due diligence standard is, by nature, subjective; the presence or "absence of due diligence is a contextual conclusion based on an assessment of what is 'due' in the actual context."[175]

From the 18th century through the early 1990s, customary international law, legal scholarship, and investment treaty jurisprudence all affirmed that the due diligence standard is contextual and fluctuates based on a host state's circumstances and capacity.[176] The *AAPL* decision marked the beginning of a shift toward a purely objective due diligence standard, in contravention of due diligence's customary meaning. The *AAPL* tribunal recognized this history yet rejected it in favor of an objective standard. Today, the objective due diligence standard has become the predominant standard adopted by most arbitral tribunals. This misinterpretation of the due diligence standard has led to over-expansive liability for host states, especially as applied to developing countries that suffer from civil unrest and lack of resources. It has only affirmed criticisms of arbitration as an anti-state, pro-investor process and served to delegitimize arbitral decisions.

Consideration of circumstances is required to remain faithful to the customary meaning of the FPS due diligence standard. When circumstances are ignored, a tribunal transforms due diligence into strict liability. This is especially true in situations

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174 Monebhurrum, supra note 135, at 605.
175 Junngam, *supra* note 5, at 95.
176 *Id*.

of armed conflict and insurgency, when host state capacity is strained and unstable. If these dire circumstances are not given due consideration, "tribunals could easily hold a host state accountable under FPS for not providing adequate protection that it could never meet, converting the due diligence standard into a strict liability one."[177]

In the future, arbitral tribunals must correct this common misinterpretation and return to the customary subjective due diligence standard. Doing so will not only ensure just results for developing states with limited capacity but contribute to the rehabilitation of the arbitration system's legitimacy and reputation.

177 Amin R. Yacoub, Bridging the Gap between International Investment Law and Human Rights, 52 Hofstra L. Rev. 65, 86 (2022).

HARMONIZING HUMAN RIGHTS AND ALTERNATIVE DISPUTE RESOLUTION IN TANZANIA MAINLAND: A COMPREHENSIVE ANALYSIS.

By Martha Kanama Jackson G. Balazi** and Matunda Mpogole****

Abstract

This paper explores the intersection between human rights and alternative dispute resolution (ADR) mechanisms in mainland Tanzania, providing a comprehensive analysis of their harmonization. It examines the current state of human rights protections and the effectiveness of existing ADR frameworks within the Tanzanian legal system. Through critical evaluation, the study identifies potential conflicts between human rights principles and ADR processes. The findings suggest that while ADR offers accessible and culturally relevant methods for conflict resolution, its implementation must be aligned with international human rights standards to ensure fairness and justice. This paper concludes with recommendations for reforming ADR practices to enhance their compatibility with human rights and advocating for policies that promote equitable access to justice for all individuals in Tanzania.

Keywords: Alternative Dispute Resolution, Human rights, Integration, and Harmonization.

1. Introduction

In the realm of conflict resolution and justice, the interplay between human rights principles and Alternative Dispute Resolution (ADR) mechanisms stands at the forefront of the contemporary discourse.[1] The pursue of justice and the protection of individuals rights have long been regarded as fundamental pillar of Tanzania's justice system. However, the traditional adversarial legal system often falls short in providing timely, cost-effective, and holistic solutions to conflicts. In response to these limitations, ADR methods have gained prominence as valuable tools for settling dispute outside the court room.[2]

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1 Johnson. L., "Harmonizing Human rights in ADR: Challenges and Opportunities", Dar es Salaam, *Tanzania Law Review*, 17(3), 2020, p. 67-82.

2 Mashamba, C.J., *Guiding Notes on Conciliation* (2nd Ed), Dar es Salaam: Tanganyika Law Society, 2021, p. 9.

Delving into the intricate relationship between human rights and ADR, reveals that these two realms are not mutually exclusive but rather interconnected in complex ways, while ADR offer flexibility, informality and party autonomy[3] the potential exists for human rights considerations to be marginalized or overlooked.

In the pursuit of efficient dispute resolution, balancing the values and standards of human rights protection with the potential brought by ADR in the country requires a nuanced understanding of the inherent tensions and synergies between these frameworks.

This comprehensive analysis seeks to explore the challenges and opportunities in harmonizing human rights principles with ADR practices by examining key case studies, legal frameworks, and scholarly perspectives, The paper aims to shed light on the evolving landscape of conflict resolution and the quest for a more harmonious coexistence between human rights and ADR. Through this exploration, the analysis seeks to deepen the understanding of how these seemingly divergent systems can converge to uphold justice, fairness, and respect for human dignity in a rapid and developing country.

2. Theoretical framework

2.1 Definitions and explanation of human rights principles and their importance in conflict resolution.

ADR involves resolution of disputes outside the court system, where parties decide to settle the dispute outdoor the court amicably. Parties choose how to settle their dispute outside the court whether through mediation, arbitration or even negotiation.[4]
Human rights are moral principles, or norms, for certain canons of human conduct and are habitually protected as substantive rights in national, regional and international laws in the Constitution of the United Republic of Tanzania of 1977[5] and the Universal Declaration of Human Rights[6]. Human rights are rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status.

2.2 Principles of Human rights

- Interdependent and Indivisible, this is a principle which provides that no one is above the law, everyone is born free and equal[7], the pledge of one right facilitate guarantee of the other right the same applies deprivation of one right facilitate the violation of other rights.

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3 *Ibid*.
4 Mashamba, C.J., *Guiding Notes on Conciliation* (2nd Ed), Dar es Salaam: Tanganyika Law Society, 2021, p. 8.
5 [CAP 2 R.E. 2002]
6 Unversal Declaration of Human Rights (UDHR), 1948.
7 The Constitution of the United Republic of Tanzania of 1977 [CAP 2 R.E. 2002] Article 12(1).

- Inalienable, provides that human rights cannot be bought, inherited, earned or given to anyone, human right cannot be taken away, relinquished or replaced. No one has the right to deprive anyone of their rights.
- Human rights are a universal aspect and must be respected in the same manner worldwide. It is the trite principle that all States bear a duty to promote and protect human rights.

- Participation and inclusion dictate that everyone has the right to participate in decision-making processes which affect their rights. Individuals must be given the reasons for decisions are made and be informed of the decisions that affect them.

- Accountability and rule of law state that no one is above the law,[8] if anyone breaches human rights must be accountable for the act done.

- Equality and non-discrimination, all rights are enjoyed equally, everyone is entitled to their rights without any kind of discrimination either on ground of sex, status, age, or even belief.[9] This principle aims to ensure no one is discriminated in either way.

2.3 Importance of Human rights principles in conflict resolution (ADR)

Human rights principles play a vital role in ADR seeking to uphold human rights standards recognized internationally and ensuring that the parties involved in a dispute resolution are treated equally and fairly, as provided by the law.[10] For instance, the right to a fair trial and hearing ensures that disputes are adjudged by a neutral and impartial third party.[11]

Human rights principles contribute to safeguarding the dignity and autonomy of individuals involved in a dispute settlement, guaranteeing that their interests and needs are protected and respected throughout the process.[12] This is vivid through the principle of participation and inclusion.

Integrating human rights into ADR contributes to the prevention and resolution of disputes amicably. Respecting human rights principles and standards fosters a culture of dialogue, mutual respect, and understanding among the disputants, therefore facilitates a constructive engagement amongst the parties.

To sum up what has been stated above, recognizing and upholding human rights principles and standards into ADR mechanisms is important in promoting access to justice, fairness, and respect for the rule of law.

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8 The Constitution of the United Republic of Tanzania of 1977 [CAP 2 R.E. 2002] Article 12(1).

9 International Covenant on Civil and Political Rights, 1966 Article 14(1).

10 The Constitution of the United Republic of Tanzania of 1977 [CAP 2 R.E. 2002] Article 13(1) & (2).

11 Dixon. R.A and Ginsburg. T., *Comparative Constitutional Law*, Chicago, Edward Elgar Publishing, 2012.

12 Menkel-Meadow. C., "The trouble with the adversary system in a post-modern, multicultural world, *Nevada Law Journal*, 2006, 145-188.

2.4 The intersection of human rights and ADR: highlighting potential conflicts and synergies.

The intersection between ADR and human rights raises essential questions about the relationship between the ADR mechanisms and the protection of fundamental rights of individuals. Recently, scholars and practitioners have debated on the potential conflicts and synergies between the two areas of law.[13] This part is relevant in the context of Tanzania mainland where the use of ADR mechanism is growing rapidly, and concerns about human right infringement persist.

Human right practitioners and scholars debate that ADR mechanisms lacks the procedural safeguard which is vital in protecting rights of individuals, particular the vulnerable and marginalized groups[14]. Their focal concern is on the potential for biasness, coercion and power imbalance in ADR processes, which may result to violations of due process and fair trial. Example in cases of discrimination at workplaces or domestic violence victims may undergo pressure to settle their claims during ADR process rather than seeking redress under normal court litigation, likely undermining their right to access justice for the harm suffered.

On the other side, ADR professionals and practitioners emphasize its potential to provide expedience, cost-effective, and accessible form of dispute resolution, making it beneficial in the country with limited resources and backlog of cases in the court of law. They argue that ADR mechanisms promote reconciliation, corroboration and party autonomy, allowing parties to craft their own style of proceeding and solutions to their dispute while preserving their relationship.[15] With this, ADR can serve as a complementary and preferable mechanism for resolving disputes while upholding the principle of fairness, equality, and respect for human dignity.[16]

The relationship between human rights and ADR in Tanzania mainland is complex and multifaceted, with challenges and opportunities for harmonization. By developing guidelines, training programs, and mechanisms to ensure that ADR processes are conducted in a manner that respects and protects human rights.

3. Historical perspective

3.1 Historical evolution of human rights and ADR framework

On 10th December 1948 the United Nations adopted the Universal declaration of Human rights (UNDHR)[17], the instrument has led to enactment of other instruments which identifies specific rights such as the International Covenant on Civil and

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13 Australian Human Rights Commission, "ADR: an essential tool for human rights", 2004 online at https://humanrights.gov.au (Visited February 7, 2024).

14 Paul. G., "Human Rights, ADR, and access to justice", *Journal of Human Rights Practice*, 10(2), 2018, p. 266.

15 Mashamba, C.J., *Guiding Notes on Conciliation* (2nd Ed), Dar es Salaam: Tanganyika Law Society, 2021, p. 9.

16 Van den Berg. J.W., "Human Rights and Alternative Dispute Resolution: Conflicting Discourse or Complementary Strategies, *Human Rights & International Legal Discourse*, 2(1), 2015, p. 116.

17 United Nations General Assembly. The Universal Declaration of Human Rights (UDHR). New York: United Nations General Assembly, 1948 online at https://www.un.org/en/about-us/universal-declaration-of-human-rights (Visited February 7, 2024)

Political Rights, Convention on the Elimination of all Forms of Racial Discrimination, and Convention on the Elimination of all Forms of Discrimination Against Women. These instruments are legally binding on member states.

In Tanzania during pre-colonial era basic rights and duties were protected at family level, and kinship. The human right concept was embodied in culture and religion, whereby moral codes were shared on how to respect human rights without any formal acknowledgement. Some of pre-colonial societies believe that everyone was born equal and has the right to as well as the right to property.

During the colonial era, the colonialist desires for raw material and cheap labor consequently violated the right of the national in the countries they settled. After the independence the foundation was therefore laid and a justification found for massive constitutional amendments of Tanzania. The new constitution that was introduced was known as the Independence Constitution, 1961. The independence Constitution was expected to carry a much heavier burden than Constitutions in the West had done. It was expected to create national unity out of diverse ethnic and religious communities, prevent oppression and promote equitable development, inculcate habits of tolerance and democracy, and ensure capacity for administration. The Bill of Rights was introduced into the Constitution, but it was found only in the Preamble to the Independence Constitution, 1961. Even the 1965 Interim constitution had the Bill of Rights only in its Preamble. The problem of reconciling the needs of social cohesion, national mobilization for economic development, maintaining public order, and protecting individual rights and freedoms was not achieved by the introduction of fundamental rights by way of a long Preamble to the Independence Constitution of 1961, which was not enforceable in a court of law anyway or the creation of the Permanent Commission of Enquiry in 1966 (Act No. 65 of 1966) in lieu of a Bill of Rights. In 1977, another Constitution was adopted. This Constitution of the United Republic of Tanzania, however, did not depart from its predecessor, the Interim Constitution of 1965 as the Bill of Rights was incorporated into the Constitution of the United Republic of Tanzania in 1984 following the fifth amendment of the Constitution of the United Republic of Tanzania. Under this constitutional amendment, Tanzania as a member of the United Nations acceded to the Universal Declaration of Human Rights without any reservation.

In 1994 ADR was introduced through Government Notice No. 422, which amended the First Schedule to the Civil Procedure Code Act (1966) as a result of the Mroso Committee's recommendation. The provisions of Order VIIIA[18] is said to be the main provisions which statutorily introduced ADR in the Tanzania civil justice system so as so bring flexibility to the technicalities of procedures in the traditional litigation system in the settlement of civil disputes which affected the justice system.[19]

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18 The Civil Procedure Code [CAP 33 R.E. 2019].

19 Global Justice Solutions, "Alternative Dispute Resolutions (ADR) Training Manual" (Dar es Salaam: Project for the Court of Appeal Tanzania, 2010).

3.2 Analysis of landmark cases or events that have shaped the relationship between human rights and ADR

This part is crucial in understanding the current landscape of these two dimensions in Tanzania mainland. Several cases and events have influenced and manifested the intersection between human rights and ADR in the country. Highlighting the need to harmonize these two aspects effectively.

A significant case that has impacted the relationship between human rights and ADR in Tanzania mainland is the case of *Legal and Human Rights Centre (LHRC & 2 others) V. The Attorney General of the United Republic of Tanzania*[20] where the LHRC challenged the government's decision to restrict the activities of civil society organizations, arguing that it violated their rights to freedom of association and expression. The case highlighted the importance of providing effective mechanisms for resolving disputes involving human rights violations through ADR as opposed to traditional litigation.

Another notable event that had a hand in shaping the relationship between human rights and ADR in Tanzania mainland is the establishment of the Tanzania Institute of Arbitrators (TIArb) in 1995. The institution has played a vital role in promoting ADR as an instrument for resolving disputes in the country, including those related to human rights violations. TIArb has provided training and accreditation for arbitrators, mediators, conciliators, and negotiators for the sole purpose of enhancing capacity building in resolving human rights disputes through ADR.

The adoption of the Legal Service Act in 2007 also marked a significant development in shaping the relationship between human rights and ADR in Tanzania mainland. This legislation mandated the provision of legal aid services to indigent persons, including providing an access to ADR mechanisms for resolving disputes[21]. Through incorporating human rights considerations into the provision of legal services and ADR processes, the Act aimed to ensure that all individuals have equitable access to justice and effective remedies for human rights violations.

Essentially, these landmark cases and events have shaped the relationship between human rights and ADR in Tanzania mainland by necessitating the importance of incorporating human rights considerations into ADR processes. Promoting the use of ADR mechanisms for resolving disputes related to human rights infringement and enhancing the capacity of ADR professionals in addressing human rights issues effectively. Moreover, it is of essence to continue harmonizing human rights and ADR in Tanzania mainland to ensure that all individuals have access to justice and effective remedies for human rights infringement.

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20 (Misc. Civil Cause no.77 0f 2005 [2005] TZHC 159 (1 December 2005).

21 Legal Service Act 2007, S. 25.

4. Legal framework

4.1 Examination of domestic legal framework and their implications for ADR.

4.1.1 Constitution of the United Republic of Tanzania.[22]

This is the supreme law of the state just like in any other country. In accordance with Article 107A (2)(d) of the Constitution it embodies ADR by virtue of requiring courts to be directed by ADR, encouraging the Court to advise parties as to need of mutual settlement without procedures for litigation. The Article outlines several principles to be observed when delivering decisions in civil and criminal matters in accordance with the law. One of these principles is to promote and enhance dispute resolution among the parties involved. Consequently, the Constitution of the country encourages the use of ADR as an effective means of resolving disputes.

4.1.2 The Civil Procedure Code[23]

The legal footing for ADR in Tanzania is administered by the Civil Procedure Code particularly, Order VIIIA, VIIIB and VIIIC. The order provides for a mandatory requirement to attend for ADR upon completion of pleading stage, the aim is to ensure that parties get the chance to settle their dispute before litigation procedures. The order provides for mode of ADR which includes mediation, arbitration, and conciliation though one may opt for other modes of solving dispute outside the court. This law is a roadmap as to handling of civil case, the law also provides for the need of ADR, and it provide for mandatory requirement to employ ADR in disputes settlement. In *Fahari Bottlers Ltd & Another vs. Registrar of Company & Another*[24], the court held that the requirement for a suit to be referred to mediation first before full trial begins is a mandatory one under the Civil Procedure Code. Apart from that, Section 96 of the Arbitration Act amended the Civil Procedure Code, whereby the act added section 10A which requires parties to take the *bona fide* steps to resolve disputes out of the court of law.

4.1.3 Arbitration Act.[25]

The Act addresses the arbitration process providing additional options of dispute resolution by way of adjudication and conciliation in both civil and criminal cases. It establishes the Tanzania Arbitration Center (TAC)[26] and its functions which include the conduct and management of arbitration, registration and conservation of list of accredited arbitrators, enforcement of the code of conduct and practice for arbitrators. In accordance with Section 78[27] the Act provide for foreign arbitral awards, their enforcement and recognition in Tanzania also modes and grounds to

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22 [CAP 2 R.E. 2002].
23 [CAP 33 R.E. 2019].
24 Civil Revision No. 1 of 1999, Court of Appeal Tanzania at Dar es Salaam (Unreported).
25 [CAP 15 R.E. 2020].
26 [CAP 15 R.E. 2020].
27 *Id*.

challenge the foreign award.

4.2 Legal frameworks that govern human rights and ADR practices in various jurisdiction.

Human rights and ADR practices are integral components of the legal framework within various jurisdictions. This part will explore on legal framework of three countries being South Africa, United Kingdom, and United States of America that govern human rights and ADR practices.

The South African legal framework governing human rights is envisaged in the Constitution, which guarantees the protection of fundamental rights and freedom. The country has a robust system of human rights institutions, such as the South African Human Rights Commission (SAHRC) which ensures the enforcement of human rights. ADR practices in South Africa include mediation, arbitration, and conciliation which are widely used in dispute resolution.[28]

In the United Kingdom (UK), human rights are protected under the Human Rights Act, which incorporates the European Convention on Human Rights into domestic law. This Act ensures that individuals have access to their human rights and can seek redress if their rights are infringed. In terms of ADR practices, the UK has a strong tradition of using mediation and arbitration to resolve disputes, with multiple institutions offering ADR services.[29]

In United States of America, the legal framework governing human rights is primarily based on the Constitution, federal laws, and state laws. The United States has established various human rights laws such as the Civil Rights Act, the Americans with Disabilities Act, and the Fair Housing Act, which protect individuals from discrimination and ensure their rights are well respected in the country. In terms of ADR practices, USA has a well-developed system that includes mediation, arbitration, and negotiation as alternative methods to resolve disputes without involving the courts of law.[30]

5. Challenges in harmonization

Harmonizing ADR processes with human rights standards is an important aspect which needs to be critically addressed to ensure that all individuals have access to justice and are protected from human rights violation[31]. The following is the identification of challenges and tensions in harmonizing human rights principles with ADR methods.

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28 Du Plessis. J., "A Comparative analysis of human rights and alternative dispute resolution in South Africa", Journal of Law and Conflict Resolution, 10(2), 2019, p. 81.

29 Bland. J., "Human rights and Alternative disputes resolution: An exploration", *Journal of Conflict Resolution*, 25(3), 2016, p. 49.

30 Effron. R., "Alternative dispute resolution meets human rights: Bridging the theoretical gap", *Harvard Negotiation Law Review*, 22(1), 2017, p. 120.

31 Smith, J., "The Role of Human Rights in ADR: A Comparative Analysis", *Journal of Dispute Resolution*, 45(2), 2019, p. 123.

By comparing the domestic legal frameworks governing human rights and ADR practices in South Africa, United Kingdom, and United States of America, it becomes evident that harmonizing human rights and ADR in Tanzania mainland is crucial in ensuring access to justice and resolving disputes amicably and effectively.

5.1 Lack of legal framework

Amongst the main challenges in harmonizing human rights and ADR in Tanzania mainland is the lack of comprehensive legal framework governing ADR processes. While the Arbitration Act[32] and the Civil Procedure Code[33], provide some guidance on ADR procedures like arbitration and mediation. There is no specific piece of legislation that addresses the intersection between human rights and ADR. This lack of clarity can lead to confusion and inconsistency in applying human rights standard in ADR proceedings.

5.2 Limited awareness and training

Limited awareness and training on human rights among ADR practitioners in the country, mediators and arbitrators may not have a deep understanding of human right principles and may inadvertently violate individuals' rights during the dispute resolution process. Without proper training and awareness raising, there is a risk that ADR mechanisms may perpetuate rather than alleviate human rights abuses.[34]

5.3 Cultural barriers

Cultural norms and practices can also present challenges in harmonizing human rights and ADR in Tanzania mainland. Traditional disputes resolution methods may not always align with international human rights standards, particularly in cases involving vulnerable groups such as women, children, and marginalized communities.[35] Balancing respect for cultural diversity with the protection of universal human rights can be a delicate task that requires having sensitive and cultural competence within the system.

5.4 Enforcement mechanism

Even when human rights are incorporated into ADR processes, the challenge lies in ensuring competence and enforcement of decisions. In Tanzania mainland, there may be limited mechanisms for monitoring and sanctioning ADR practitioners like mediators, conciliators, and arbitrators who violate human right standards. Without effective oversight and accountability mechanisms individuals may be left without recourse if their rights are violated during ADR proceedings.[36]

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32 [Cap 15 R.E. 2020].
33 [Cap 33 R.E. 2019].
34 Johnson. L., Harmonizing Human Rights in ADR: Challenges and Opportunities", *Tanzania Law Review*, 17(3), 2020, p. 68.
35 Taflan. R.M., and Aimee. S., *Cultural Competence in Alternative Dispute Resolution*, American Bar Association, 2014.
36 Johnson. L., Harmonizing Human Rights in ADR: Challenges and Opportunities", *Tanzania Law Review*, 17(3), 2020, p. 69.

5.5 Access to justice

A key challenge in harmonizing human rights and ADR in Tanzania mainland is ensuring equal access to justice for all, regardless of their socio-economic status or background. ADR processes may be perceived as more accessible and affordable than traditional court litigation, but there is a risk that disadvantages, and groups may be excluded from participating in ADR proceedings due to lack of information, resources, or representation.[37]

Harmonizing human rights and ADR in Tanzania mainland presents several challenges that need to be addressed to ensure that all individuals have access to justice and are protected from human right violation. By addressing the above challenges policy makers and practitioners can work toward developing a more inclusive and rights-respecting ADR system. By having a comprehensive and nuanced approach to harmonization, Tanzania mainland can strengthen its commitment to upholding human rights principles while promoting efficient and effective dispute resolution mechanism.

6. Potential conflicts between procedural fairness in ADR and substantives human rights protection.

The intersection of procedural fairness in Alternative Dispute Resolution (ADR) processes and substantive human rights protection raises important considerations for ensuring justice and accountability in dispute resolution mechanisms.[38] In Tanzania mainland, balancing the principles of procedural fairness with the protection of individuals' human rights poses potential conflicts that need to be carefully analyzed and addressed. This part will examine the potential conflicts and implications of balancing procedural fairness and substantive human rights protection in Tanzania mainland.

6.1 Impartiality and Neutrality

A vital requirement of procedural fairness in ADR processes is the requirement for mediators, arbitrators, and conciliators to maintain impartiality and neutrality. However, ensuring impartiality and neutrality can sometimes come into conflict with the protection of individuals' substantive human rights. E.g. if a mediator or arbitrator holds a biased opinion or lacks awareness of human rights principles, there will be a risk of unfair treatment or discrimination against the parties, thereby compromising the substantive rights of individuals.[39]

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37 Hudson. C., *The rule of Law and access to justice in Sub-Saharan Africa: Challenges and solutions*, Routledge, 2019.

38 Briskman. L.J., "ADR and Human Rights: Challenges and Opportunities", New York University Journal of International Law and politics, 45(1), 2012, p. 253.

39 Bismuth. R, et al, "Procedural Law and Human Rights", *The European Journal of Human Rights and Fundamental Freedoms*, 14(2), 2016, p. 169.

6.2 Confidentiality and Transparency

Another potential conflict between procedural fairness in ADR and substantive human rights arises in the tension between the principles of confidentiality and transparency in ADR proceedings. While confidentiality is an essential principle in fostering open and candid discussions between the parties, it conflicts with the requirement for transparency and accountability in safeguarding individuals' human rights. In cases where human rights violations occur during ADR processes, the principle of confidentiality may hinder the disclosure and redress of such violations, posing challenges for upholding substantive rights.[40]

6.3 Equality and Non-Discrimination

Procedural fairness in ADR requires equal treatment and non-discrimination of all parties involved in the dispute resolution process. However, ensuring equality and non-discrimination can be challenging in cases where individuals' human rights are at stake, particularly for marginalized or vulnerable groups. Without adequate safeguards and attention to human rights considerations, there is a risk that procedural fairness may inadvertently perpetuate systemic inequalities and violations of individuals' substantive human rights.[41]

6.4 Enforceability of Decisions

A crucial aspect of procedural fairness in ADR is the enforceability of decisions reached through collaborative and consensual means. However, conflicts may arise when decisions made in ADR processes do not adequately protect individuals' substantive human rights or fail to comply with international human rights standards. Ensuring that ADR decisions are not only procedurally fair but also reflect substantive human rights considerations requires a careful balance between autonomy and accountability in dispute resolution mechanisms.[42]

Potential conflicts between procedural fairness in ADR and substantive human rights protection highlight a complex interplay between procedural rules and substantive rights in the context of dispute resolution. By addressing the above discussed potential conflicts policymakers, practitioners, scholars, and stakeholders in Tanzania mainland can work towards developing a more holistic and rights-respecting approach to harmonizing human rights and ADR. Through enhancing awareness, training, and accountable mechanisms, Tanzania mainland can promote procedural fairness while upholding individuals' substantive human rights in ADR processes.

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40 Williams. G., "Procedural Fairness", Stanford Encyclopedia of Philosophy, 2019.

41 George, L.H., (Advocate), Interview by authors (12th March 2024, Eternal Legal Advisory & Consultants, Mbeya).

42 Hasty, J and Robert. L., ADR and the Substantive Law: Resolving Disputes beyond the Courtroom, American Bar Association, 2008.

7. Best practices and case studies

7.1 Successful integration of human rights consideration into ADR processes

The integration of human rights considerations into alternative dispute resolution (ADR) process is crucial for ensuring fair and just outcomes for all parties involved. In Tanzania mainland, where ADR mechanisms are increasingly being utilized to resolve disputes, it is important to examine how human rights principles can be effectively integrated into these processes. This part seeks to provide a comprehensive analysis of successful integration of human rights considerations into ADR processes in Tanzania mainland.

7.1.1 The Legal Framework

In order to have a successful integration of human rights consideration into ADR processes it is important to begin examining the legal framework governing ADR processes in Tanzania mainland, including relevant laws, regulations, and guidelines. Evaluate how these legal provisions accommodate human rights considerations and identify and gaps that need to be addressed.[43]

7.1.2 International Standard

For a successful integration of human rights consideration into ADR processes it is of essence to analyze the international human rights standards that apply to ADR processes, such as the Universal Declaration of Human Rights,[44] International Covenant on Civil and Political Rights[45], UN Guiding Principles on Business and Human Rights[46]. Discuss how these standards can be integrated into the Tanzania legal framework.

7.1.3 Institutional Mechanisms

Examining the role of government agencies, non-governmental organizations, and other stakeholders in promoting the integration of human rights into ADR processes in Tanzania mainland. Evaluate the effectiveness of existing institutional mechanisms and recommend improvements where necessary.[47]

7.1.4 Case Studies

For a successful integration of human rights considerations into ADR processes in Tanzania mainland, it is vital to provide case studies of successful integration of human rights considerations into ADR processes in the country. Also, analyze the factors that contributes the success of resolution of human right complaints, including the

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43 Tanzania Human Rights Commission, Annual Report, 2020.

44 Unversal Declaration of Human Rights (UDHR), 1948.

45 Vol. 999, Dec. 1966, p.171.

46 2011.

47 Kanyat. S., "The Role of NGOs in promoting Human Rights in Tanzania", *International Journal of Human Rights*, 10(2), 2018, 125.

involvement of trained mediators, effective communication strategies, and respect for the rights of vulnerable groups.[48]

7.1.5 Best Practices

Identifying best practices for integrating human rights considerations into ADR processes based on international experience and comparative analysis. Providing recommendations for policymakers, practitioners, and stakeholders on how to enhance the effectiveness of ADR mechanisms in Tanzania mainland.

A successful integration of human rights considerations into ADR processes in Tanzania mainland requires a multi-faceted approach that involves the legal framework, international standards, institutional mechanisms, case studies, and best practices. By addressing these key areas, Tanzania mainland can harmonize human rights and ADR to ensure fair and just outcomes for all parties involved in the disputes.[49]

7.2 Case studies highlighting effective harmonization of human rights and ADR in real-world contexts.

This part aims to examine case studies highlighting effective harmonization of human rights and ADR in real-world contexts, with a specific focus on Tanzania mainland.

7.2.1 The Access to justice program in Tanzania

A good example of effective harmonization of human rights and ADR in Tanzania is the access to justice program, which was established to improve access to justice for vulnerable groups, including women, children, and marginalized communities. Access to justice program integrates human rights principles into ADR processes, ensuring that all individuals have equal access to justice and are treated fairly and respectfully throughout the dispute resolution process. By providing training and capacity-building for ADR practitioners on human rights standards. Access to justice program has been successful in promoting a culture of respect for human rights in ADR practices in Tanzania.[50]

7.2.2 The Legal Aid and Human Rights Centre in Tanzania

Another vivid example of an effective harmonization of human rights and ADR in Tanzania is the work of the Legal Aid and Human Rights Centre (LAHRC), which provides legal aid services and advocacy for individuals whose human rights have been violated. LAHRC utilizes ADR mechanisms, such as mediation and Arbitration, to resolve disputes in a way that upholds human rights principles, such as equality, non-discrimination, and due process. By working closely with ADR practitioners and civil society organizations, LAHRC has been instrumental in promoting a human

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48 Smith. J., "Integrating Human Rights into Alternative Disputes Resolution: Lesson from South Africa", *Journal of Legal Studies*, 15(3), 2017, p. 47.

49 Kassim. N.O., Interview by authors (9th April 2024, Kinondoni District Court at Kinondoni Dar es Salaam).

50 Makani. N., Interview by authors (12th April 2024, Resident Magistrate Court of Kisutu at Kisutu Dar es Salaam).

rights-based approach to dispute resolution in Tanzania.[51]

The case studies discussed above demonstrate the importance of harmonizing human rights and ADR in real-world contexts, particularly in Tanzania mainland. By integrating human rights principles into ADR practices, organizations such as access to justice program and the Legal and Human rights center have been successful in promoting access to justice and upholding human rights standards in dispute resolution processes. Moreover, it is essential for policymakers, legal practitioners, and civil societies to continue working together to ensure that human rights are respected and protected in ADR practices in Tanzania mainland.

8. Ethical considerations

8.1 Exploration of ethical dilemmas and considerations in balancing human rights and ADR principles.

ADR mechanisms offer a more efficient and cost-effective means of resolving disputes compared to courts of law.[52] However, the use of ADR raises important ethical dilemmas and considerations, particular in balancing the principles human rights and ADR principles.

Ethical dilemmas and considerations in balancing Human rights and ADR principles
A key ethical dilemma in balancing human rights and ADR principles is the potential for ADR mechanisms to undermine the rights of vulnerable individuals such as women, children, and marginalized groups. ADR methods particularly mediation may perpetuate power imbalances, leading to a marginalization of certain groups and the infringement of their rights.[53]

Example: in cases of domestic violence or discrimination at workplaces, parties may be forced to participate in mediation against their will, leading to a lack of transparency and accountability in resolving these disputes. This raises an important ethical consideration regarding the protection of human rights and ensuring that vulnerable groups are not disadvantaged in ADR processes.

Another ethical dilemma arises from the potential for ADR processes to compromise the right to a fair trial. In some cases, parties in ADR processes may be pressured into accepting unfair settlement settlements or decisions in order to expedite the resolution of their disputes. This raises important ethical considerations regarding the integrity of ADR processes and the need to ensure that parties' rights are respected throughout the process.[54]

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51 Paschal. P., Interview by authors (16th April 2024, Legal and Human Rights Centre Dar es Salaam).

52 Mashamba, C.J., *Guiding Notes on Conciliation* (2nd Ed), Dar es Salaam: Tanganyika Law Society, 2021, p. 9.

53 Sussman. P., "Human rights and dispute resolution", *Dispute Resolution Journal*, 64(4), 2009, p.100.

54 Menkel-Meadow. C., "Rights and responsibilities in private dispute resolution, Negotiation Journal, 7(4), 1991, p.148.

8.2 Possible Solutions to the ethical dilemmas and consideration

In order to balance human rights and ADR principles in Tanzania mainland, it is essential to establish clear guidelines and safeguards that protect the rights of the parties involved in the ADR processes. This includes ensuring that the parties have the right to opt-out of ADR processes if they feel their rights are being compromised, as well as providing access to legal representation and support services for vulnerable groups involved in a dispute.

Also, ADR practitioners and lawyers in Tanzania mainland should undergo training in human rights principles and ethical conduct to ensure that they are well equipped to handle disputes in a fair and impartial mechanism. This will be helpful and reduce the risk of human rights violations in ADR mechanisms and ensure that parties' rights are respected throughout the resolution of their disputes.

8.2.1 Discussion on maintaining transparency, accountability, and fairness in harmonizing frameworks.

In the context of harmonizing human rights and alternative dispute resolution in Tanzania mainland, maintaining transparency, accountability, and fairness is vital in ensuring that the rights of all individuals are protected and upheld. Transparency is crucial in providing necessary information and access to legal processes for those seeking redress through alternative dispute resolution methods.

Accountability ensures that all those responsible for resolving disputes are held accountable for their actions and decisions. Ultimately promoting trust and confidence in the system.

Fairness is a basic principle in ensuring that all parties are treated equally and impartially during the dispute resolution process.

To achieve transparency, accountability, and fairness in the harmonization of human rights and alternative dispute resolution, it is essential for ADR mechanisms to be put in place to facilitate access to information, provide opportunities, and ensure that decisions are made based on clear and objective criteria. This will be possible by establishing clear guidelines and procedures for alternative dispute resolution processes, promoting dialogue and communication between parties, and allowing for independent review and oversight of decisions.[55]

Moreover, it is important to note that practitioners and stakeholders in the field of alternative disputes resolution be aware of and adhere to international human rights standards and norms. Which will include respecting the right to a fair trial, ensuring due process and procedural fairness, and upholding the principles of equality and non-discrimination as provided by the Constitution of the United Republic of

55 Mpinyagwa, N.O., (Advocate), Interview by authors (16 March 2024, Globen Legal Advisory & Consultants, Mbeya).

Tanzania.[56]

By maintaining transparency, accountability, and fairness in the harmonization of human rights and alternative disputes resolution, Tanzania mainland can ensure that individuals have access to effective and efficient mechanisms for resolving disputes amicably while upholding their fundamental rights and freedoms. Ultimately, this will contribute to the promotion of a just, peaceful, and inclusive society in which all individuals can access justice and uphold their human rights.[57]

9. Recommendation and Future Directions.

9.1 Proposal for enhancing the harmonization of human rights and ADR

To effectively harmonize human rights and ADR in Tanzania mainland, several strategies and recommendations should be implemented. The recommendations are crucial in ensuring that the rights of individuals are protected and promoted for the utilization of ADR mechanisms.

9.1.1 Strengthening Legal Frameworks

Amongst the ways to enhance the harmonization of human rights and ADR is ensuring that the legal framework governing ADR processes are consistent with international human rights standards. This can be achieved by amending the existing laws or drafting new pieces of legislations that explicitly incorporates human rights principles unto ADR procedures and mechanisms.[58]

9.1.2 Capacity building

Another vital aspect of harmonizing human rights and ADR processes is building the capacity of both legal practitioners and ADR professionals in the field to understand and apply human rights principles. This can be done through training programs, workshops, and seminars that focus on human rights and conflict mechanisms.[59]

9.1.3 Public Awareness and Education

It is also important to educate the public about the relationship between human rights and ADR mechanisms, the benefits of using ADR mechanisms to resolve conflicts/ complaints. This can be achieved through public awareness campaigns, outreach programs, and community dialogues and debates that emphasize the importance of upholding human rights through peaceful disputes resolution mechanisms.[60]

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56 1977 [CAP 2 R.E. 2002].

57 Kasanga, L., (Advocate), Interview by authors (17 March 2024, Globen Legal Advisory & Consultants, Mbeya).

58 Kazeke. A., "Integrating International Conventions into domestic law: The case of Tanzania", *Journal of African Law*, 60(1), 2016, p.124.

59 Fletcher. G., "The role of Alternative Dispute Resolution in human rights protection", *International Journal of Human Rights*, 20(4), 2016, p. 535.

60 Kazeke. A., "Integrating International Conventions into domestic law: The case of Tanzania", *Journal of African Law*, 60(1), 2016, p.125.

9.1.4 Collaboration and Coordination

Enhancing the harmonization of human rights and ADR mechanisms requires close collaboration and coordination between government agencies, legal practitioners, and stakeholders. This can be facilitated through the establishment of multi-stakeholders working groups or task forces that work together to develop policies and programs that promote the integration of human rights into ADR methods.[61]

Harmonization of human rights and ADR in Tanzania mainland requires a comprehensive approach that addresses legal framework, capacity building, public awareness, and collaboration among stakeholders. By implementing these strategies, the rights of individuals will be better protected and promoted using ADR mechanisms.

9.2 Suggestions for policy makers, practitioners and stakeholders to promote a more cohesive approach to conflict resolution.

To foster a more cohesive approach to conflict resolution that harmonizes human rights and ADR in Tanzania mainland policy makers, practitioners, and stakeholders should implement the following suggestions.

9.2.1 To Policy Maker

Incorporate human rights principles: To achieve a cohesive approach, policy makers should prioritize the inclusion of human rights principles in ADR laws and regulations to ensure that the rights of individuals are upheld during conflict resolution processes. Provision of support for training programs: policy makers should allocate resources for supporting training programs for legal practitioners and ADR professionals on human rights principles in conflict resolution, by enhancing their capacity to effectively address human rights issues.[62]

9.2.2 To practitioners

Adhere to human rights standards, practitioners should apply human rights standards in ADR practices ensuring that individuals' rights are respected and protected throughout the dispute resolution process.

Reciprocal Training, a collaborative effort between human rights practitioners and ADR professionals should be initiated through reciprocal training programs to enhance understanding and cooperation between ADR mechanisms and human rights principles.[63]

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61 Fletcher. G., "The role of Alternative Dispute Resolution in human rights protection", *International Journal of Human Rights*, 20(4), 2016, p. 534.

62 Ndunguru. P., "Integrating Human rights principles into Alternative Dispute Resolution Mechanisms: Insights for policy makers", Journal of Law and policy, 23(2), 2019, p.150.

63 Okoa. L., "Enhancing Human Rights in Conflict Resolution: The role of practitioners", *Conflict Resolution Quarterly*, 37(4), 2020, p. 435.

9.2.3 To stakeholders

Engage in dialogues, stakeholders, including the government agencies, legal practitioners, and the community members should engage in dialogues to promote awareness and importance of harmonizing human rights and ADR in conflict resolution mechanisms.
Foster collaboration, stakeholders should work collaboratively to develop and implement policies and programs that promote a holistic approach to conflict resolution that incorporates human rights principles into ADR processes.[64]

With implementation the above recommendations policy makers, practitioners, and stakeholders can work together to promote a more cohesive approach to conflict resolution that appropriately harmonizes human rights principles and ADR in Tanzania mainland.

10. Conclusion

10.1 Summary from the key finding and insights from the comprehensive analysis

The research paper highlights the importance of integrating human rights principles into ADR mechanisms to ensure fair and just outcomes for all parties involved. It also emphasizes the need for increased awareness and training on human rights issues among ADR practitioners and stakeholders in Tanzania mainland.

Moreover, the analysis demonstrates that while ADR mechanisms can be effective in resolving disputes efficiently, there is a risk of compromising human rights principles such as equality, non-discrimination, and access to justice. Therefore, there is a call for the development of guidelines and standards to guide the application of human rights and ADR mechanisms.

The research paper identifies the potential for harmonizing human rights principles and ADR in Tanzania mainland to improve the access of justice, promote equality, and uphold human rights standards in dispute resolution. It underscores the importance of integrating human rights principles into ADR practices to ensure a fair and just legal process/ conflict resolution for all Tanzanians.

10.2 Call to action for promoting the harmonization of human rights and ADR principles to advance justice, equity, and human dignity.

The comprehensive analysis of the harmonization of human rights and ADR in Tanzania mainland calls for urgent action to promote justice, equity, and human dignity in dispute resolution mechanisms. The research findings reveal the critical need for integrating human rights principles into ADR processes to ensure fair and just outcomes for all parties involved.

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64 Mwananchi. J., "Stakeholder Engagement in the harmonization of human rights and Alternative Dispute Resolution", *International Journal of Conflict Resolution*, 15(3), 2018, p.292.

To advance this cause, it is imperative for stakeholders, including the government, legal professionals, civil society organizations, and academicians to collaborate and develop guidelines and standards for harmonizing human rights principles and ADR mechanisms in Tanzania mainland. This includes robust training programs on human rights issues for ADR practitioners, as well as awareness campaigns to educate the public on their rights and entitlements in alternative dispute resolution.

Moreover, there is a need for legislative reforms to explicitly recognize the importance of human rights in ADR processes and to mandate adherence of human rights standards. This legal framework will help to ensure that ADR mechanisms like mediation and arbitration do uphold principles such as equality, non-discrimination, and access to justice.

To sum up, the call to action for promoting the harmonization of human rights and ADR is essential to create a just and equitable legal system in Tanzania mainland. By working together to integrate human rights principles into dispute resolution methods it will advance justice, equity, and human dignity for all Tanzanians in the country.

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ISBN 978-9914-40-777-8

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