

The Viability of Arbitration in management of Climate Change Related Disputes in Kenya

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Abstract

Climate change has affected many areas of the society ranging from environmental, economic, political and even social aspects. It has also brought about disputes and conflicts that have been associated with climate change, both directly and indirectly, as it is seen as a conflict multiplier. This paper discusses the disputes related to climate change implications, and how the same can be addressed using arbitration as a dispute settlement mechanism. The author argues that arbitration has certain advantages over litigation which makes it more viable in addressing the disputes in question.

1. Introduction

Climate change is considered to be one of the greatest challenges facing mankind in this century and beyond.¹ Climate change and conflict have been linked by some observers in both industrialized and poor countries, although the connection is deemed to be indirect.² Climate change's effects on poverty, mental health, food security, and migration further complicate the link between climate change and war.³ As a result, the goals of the Conference of Parties Twenty Sixth session (COP 26), held in Glasgow from 31 October to 13 November 2021 included to: secure global net zero by mid-century and keep 1.5 degrees within reach; adapt to protect communities and natural habitats; mobilise finance; and

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¹ See Dervis, K., "Devastating for the World's Poor Climate Change Threatens the Development Gains Already Achieved," *UN Chronicle Online Edition*

< <https://www.unclearn.org/wp-content/uploads/library/undp30.pdf> > accessed 6 April 2022.

² 'Does Climate Change Cause Conflict?' (IGC, 2 June 2021) <<https://www.theigc.org/blog/does-climate-change-cause-conflict/>> accessed 6 April 2022.

³ Ibid.

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work together to deliver,⁴ where countries were expected to, *inter alia* accelerate action to tackle the climate crisis through collaboration between governments, businesses and civil society.⁵ Achieving these will naturally require some adjustments by countries' leadership and other stakeholders. Arguably, climate change comes with a lot of conflicts and/or disputes that need sustainable means of handling them.⁶

Over the years, there has been an appreciation of the impact that climate may have in economic results, as well as rising public concern about climate change.⁷ The term "climate" refers to observations of climatic factors such as temperature, rainfall, and water availability, as well as climate indices that serve as proxy measures for these variables.⁸ While climatic circumstances do not generate conflict on their own, they can modify the environment under which particular social interactions take place, potentially altering the risk of conflict.⁹ The environmental principle of polluter pays, which holds that polluters should be held accountable for destroying the environment, justifies the concept of resolving climate change disputes through restorative dispute management approaches.¹⁰ It is, however, worth noting that despite the constitutional provisions that seek to promote the use of Alternative Dispute Resolution (ADR) Mechanisms in the country, Kenya's *Climate Change Act 2016*¹¹ is silent on the role of ADR in addressing climate change related disputes and conflicts and only provides for the role of Environment and Land Court.¹²

This paper critically discusses the nature of climate change related conflicts and disputes, and how arbitration, both domestic and international, can be used to address the disputes,

⁴ 'COP26 Goals' (*UN Climate Change Conference (COP26) at the SEC – Glasgow 2021*) <<https://ukcop26.org/cop26-goals/>> accessed 5 April 2022.

⁵ Ibid.

⁶ See Vally Koubi, 'Climate Change and Conflict' (2019) 22 *Annual Review of Political Science* 343 <<https://www.annualreviews.org/doi/10.1146/annurev-polisci-050317-070830>> accessed 11 April 2022.

⁷ Marshall Burke, Solomon M Hsiang and Edward Miguel, 'Climate and Conflict' (2015) 7 *Annual Review of Economics* 577, 578 <<https://www.annualreviews.org/doi/10.1146/annurev-economics-080614-115430>> accessed 27 March 2022.

⁸ Marshall Burke, Solomon M Hsiang and Edward Miguel, 'Climate and Conflict' (2015) 7 *Annual Review of Economics* 577, 578 <<https://www.annualreviews.org/doi/10.1146/annurev-economics-080614-115430>> accessed 27 March 2022.

⁹ Ibid, 579.

¹⁰ K. Segerson, *Environment*, in *Encyclopedia of Energy, Natural Resource, and Environmental Economics* Volume 3, 2013.

¹¹ Climate Change Act, No. 11 of 2016, Laws of Kenya.

¹² Ibid, section 23.

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in the context of achieving sustainability in Kenya. It is worth noting that the discussion leans more towards management of the disputes as against conflicts. The paper, in justifying the use of arbitration, will discuss the differences between conflicts and disputes, and why the climate change related disputes are more suitable for arbitration than the conflicts.

2. Nature of Climate Change Related Conflicts and Disputes

Climate is described as a region's averaged temperature and precipitation patterns, as well as their range of fluctuation, across time.¹³ "Climate change" is defined by the UNFCCC as "a change in climate that is ascribed directly or indirectly to human activity that modifies the composition of the global atmosphere and is in addition to natural climate variability seen over comparable time periods."¹⁴ Kenya's *Climate Change Act 2016* defines "climate change" to mean 'a change in the climate system which is caused by significant changes in the concentration of greenhouse gases as a consequence of human activities and which is in addition to natural climate change that has been observed during a considerable period'.¹⁵ Climate change mitigation is one of the key environmental goals of the United Nations' 2030 Agenda for Sustainable Development Goals (SDGs)¹⁶, as encapsulated in Sustainable Development Goal 13, which aims to help countries attain resilience and adaptability.¹⁷

There is no universally accepted definition of a climate change-related dispute.¹⁸ Some authors have observed that climate change is a "threat multiplier," which can increase

¹³ '15.1: Global Climate Change' (*Geosciences LibreTexts*, 26 December 2019) <[https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_\(Johnson_Affolter_Inkenbrandt_and_Mosher\)/15%3A_Global_Climate_Change/15.01%3A_Global_Climate_Change](https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_(Johnson_Affolter_Inkenbrandt_and_Mosher)/15%3A_Global_Climate_Change/15.01%3A_Global_Climate_Change)> accessed 20 March 2022.

¹⁴ Article 1(2), UN General Assembly, *United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly*, 20 January 1994, A/RES/48/189.

¹⁵ Section 2, Climate Change Act, No. 11 of 2016, laws of Kenya.

¹⁶ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

¹⁷ *Ibid*, SDG 13.

¹⁸ C. Mark Baker, Cara Dowling, Dylan McKimmie, Tamlyn Mills, Kevin O'Gorman, Holly Stebbing, Martin Valasek, "What are climate change and sustainability disputes? Key arbitration examples (Part 1 contractual disputes)", in James Rogers, London; Cara Dowling, Vancouver (eds), *International arbitration report*, Norton Rose Fulbright – Issue 16 – June 2021, p. 40. < <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/publications/international-arbitration-report-issue-16.pdf?revision=40c8a703-6e1d-413c-8c7e-ac1201697383&revision=40c8a703-6e1d-413c-8c7e-ac1201697383> > accessed 30 March 2022.

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human security issues such as food and water scarcity while also leading to (violent) conflict in climate-vulnerable countries.¹⁹ 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 violence²⁰. Environmental conflicts and disputes can be divided into two categories: first, access to environmental resources as a source of livelihood and as a foundation for economic activity, and second, conflicts over what are known as "side effects" of economic activity, such as biodiversity loss and pollution.²¹

3. Approaches to Management of Disputes and Conflicts

There are numerous techniques for preventing conflicts, resolving conflicts, settling disputes, and transforming conflicts.²² The choice of mechanism chosen depends on whether one is dealing with conflicts or disputes, as both have different causes and underlying issues.²³

3.1. Conflicts

Conflicts are concerns of non-negotiable ideals. The parties share these wants and ideals. Needs or values are inherent in all human beings and are at the foundation of conflict, whereas interests and issues are surface-level and are not at the root of conflict.²⁴ They're limitless. Conflicts develop as a result of the conflicting parties' non-negotiable wants or

¹⁹ Froese, Rebecca, and Janpeter Schilling, "The Nexus of Climate Change, Land Use, and Conflicts." (2019).

²⁰ 'Tackling the Intersecting Challenges of Climate Change, Fragility and Conflict' <<https://blogs.worldbank.org/dev4peace/tackling-intersecting-challenges-climate-change-fragility-and-conflict>> accessed 30 March 2022.

²¹ Arild Vatn, *Environmental Governance: Institutions, Policies and Actions* (Paperback edition, Edward Elgar Publishing 2016) 2.

²² Corissajoy, 'Settlement, Resolution, Management, and Transformation: An Explanation of Terms' (Beyond Intractability, 29 June 2016) <https://www.beyondintractability.org/essay/meaning_resolution> accessed 6 April 2022.

²³ See K. Muigua, *Resolving conflicts through mediation in Kenya*, Glenwood Publishers, Nairobi, 2nd Ed., 2017, Chapter Four.

²⁴ Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *Journal of Peace Research*, Vol.32, No. 2 (May, 1995), pp.152-153.

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values not being met. As a result, if all requirements are addressed, the outcome is non-zero-sum, resulting in integrative and innovative solutions rather than a zero-sum answer.²⁵

A conflict usually involves at least two parties that disagree over the allocation of material or symbolic resources or who believe their underlying cultural values and beliefs are irreconcilable. Conflicts may also arise as a result of society's social and political makeup and structure, according to some theories.²⁶ This supports the viewpoint that conflict must be addressed on two levels: psychologically to overcome 'blocks' to positive communication and ontologically to discover the 'true' causes of conflict.²⁷

Conflicts are usually resolved because they are about fundamental values, hence the term "conflict resolution." Resolution is the mutual development of a valid relationship in which each party's demands are met. It is the mutual construction of a conflict because conflict is dynamic, interactive, and ever-changing with different stages of escalation and de-escalation such as formation, escalation, crisis, and endurance, improvement and de-escalation, settlement or resolution, and finally reconstruction and reconciliation through political processes such as negotiation and mediation. As a result, conflict resolution is stated to probe into the roots or underlying causes of conflict and relationships, with the goal of resolving them completely.²⁸

3.2. Disputes

When conflicts are not or cannot be adequately managed, disputes arise.²⁹ It's about an issue or a situation that interests you. Needs are not negotiable, divisible, or finite, while interests are. They aren't negotiable due to their intrinsic nature. They are not transferable or divisible. Needs are also inexhaustible, which means that the more security I have, the

²⁵ Fetherston, A.B., "From Conflict Resolution to Transformative Peacebuilding: Reflections from Croatia", *Centre for Conflict Resolution-Department of Peace Studies: Working Paper 4* (April, 2000), pp. 2-4.

²⁶ See Serge, L, et al, "Conflict Management Processes for Land-related conflict", *A Consultancy Report by the Pacific Islands Forum Secretariat*, available at www.forumsec.org, [Accessed on 04/06/2012].

²⁷ Fetherston, A.B., "From Conflict Resolution to Transformative Peacebuilding: Reflections from Croatia", op.cit.

²⁸ Cloke, K., "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005.

²⁹ Fenn, P., "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, *Workbook on Mediation*, (CIArb, London, 2002), pp.12-13.

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less security you have. When two or more persons or groups believe their rights, interests, or aims are incompatible, they communicate their perspective to the other person or group, which can lead to a dispute. Similarly, conflicts can arise from societal power imbalances, rights, or interests. These issues or interests can be discussed and even bargained over.³⁰

Because a dispute can be based on interests, rights, or power, the approaches to resolving it vary. Negotiation and mediation are the best ways to resolve an interest-based dispute. If the issue is about rights, the best response is litigation; if the issue is about power, the best response is the use of force, threats, and violence, such as that used by the police and the army. Understanding the roots or grounds of a dispute is critical because if it is not addressed appropriately, the likelihood of escalatory responses grows, which can lead to violence and long-term societal fission.

It's worth noting that tensions tend to repeat in specific sorts of disputes, such as those concerning natural resource use and access. The recurrence of a disagreement over time could be a sign of a much deeper conflict in which people or organizations are involved.

In such circumstances, the responses used must take into account the greater context of the dispute's interests, rights, and power imbalances. As a result, answers must be tailored to the various levels of the conflict. Some solutions could be aimed at resolving the specific conflict, such as through adjudication processes like courts and arbitration.

Other intervention techniques might seek to address the dispute's underlying causes, which are frequently considerably broader. This can be done, for example, through political negotiations or mediation involving the entire community or perhaps a number of communities, with the goal of airing complaints and injustices seen by various groups in

³⁰ Fetherston, A.B., "From Conflict Resolution to Transformative Peacebuilding: Reflections from Croatia", op.cit; Mwangiru, M., *The Water's Edge: Mediation of Violent Electoral Conflict in Kenya*, op.cit, pp.36-38.

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the region. Other intervention techniques might attempt to rebuild or restore the community's broken or damaged ties as a result of disagreements or conflicts.³¹

Interests or concerns are only surface-level; they do not address the conflict's basic or primary causes. As a result, conflicts can be resolved, thus the term "conflict resolution." A settlement, according to eminent conflict management specialists, is an agreement on the dispute's issue(s), which frequently entails a compromise. A settlement aims to appease the opposing party without addressing the dispute's root causes. As a result, adjudicatory, legal, or coercive processes like courts and arbitration can be used to settle disputes.

When it comes to disputes about interests rather than values, coercive means such as litigation and arbitration are useful.³²

4. Arbitration Process and management of Disputes

Arbitration is a mechanism for settling disputes that usually occurs in private, pursuant to an agreement between two or more parties, under which the parties agree to be bound by the arbitrator's decision based on law, or, if so agreed, other considerations, following a full hearing and such decision is enforceable at law.³³ Arbitration restricts appeals against decisions, which benefits the arbitral process' efficiency, and the arbitrator's award is final and binding on the parties save in the most glaring instances of incompetent arbitrating.³⁴

As previously stated, adjudicatory, coercive, or legal procedures can be used to settle disputes, whereas non-legal, non-adjudicatory, or non-coercive approaches can be used to resolve conflicts. The key power- and rights-based mechanisms include litigation and arbitration. They're mechanisms for settling disputes. The parties in a disagreement have little or no autonomy, and the means for settling disputes are coercive. Legal tools like as courts, police, and the army, among others, are used to enforce a settlement.

³¹ See Serge, L, et al, "Conflict Management Processes for Land-related conflict", *A Consultancy Report by the Pacific Islands Forum Secretariat*, op.cit.

³² Mwangiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, op. cit. pp. 109-114.

³³ Barnstein, R. *The Handbook of Arbitration Practice: General Principles (Part 2)* (Sweet & Maxwell, London, 1998), p. 313.

³⁴ Section 35-The Arbitration Act, 1995- Grounds of setting aside an arbitral award.

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Although the parties have considerable autonomy in choosing the venue and arbitrator in arbitration, one party will be offended when an award is made, despite the fact that the parties agree to be bound by the arbitrator's judgment at the outset. As a result, it becomes coercive because the parties must comply with the decision, diminishing its usefulness as a conflict resolution method but effective in settlement.³⁵

Arbitration is viewed as a viable alternative to state court litigation with the purpose of getting a legally binding and enforceable outcome from a panel of legal and industrial experts.³⁶ Arbitration has great attributes which include: parties can agree on an arbitrator to decide the subject; the arbitrator has experience in the field of dispute; anybody can represent a party in the dispute; adaptability; cost-effective; confidential; quick; and the outcome is binding. Thus, unlike court procedures, which are accessible to the public, commercial arbitration proceedings are private, thus parties that want to keep their trade secrets confidential may select commercial arbitration while still benefiting from the binding character of court verdicts.

5. Using Arbitration as a Tool for management of Climate Change Disputes: Challenges and Prospects

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; 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; dilution or revocation of responsive measures by states, giving rise to potential renewable energy treaty arbitrations; commercial contract enforcement – private sector is central to climate change mitigation, and there may be an increase

³⁵ Mwangiru, M., *The Water's Edge: Mediation of Violent Electoral Conflict in Kenya*, op.cit, pp.36-38.

³⁶ 'Arbitration in Africa | White & Case LLP' <<https://www.whitecase.com/publications/insight/arbitration-africa>> accessed 4 April 2022.

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commercial contracts relating to climate change mitigation and adaptation; coming into effect of the Paris Agreement, which may give rise to arbitration.³⁷

While discussing the role of arbitration in addressing climate change disputes, some commentators have highlighted the following disputes: 1. cases brought to either mandate or change climate-related policy or conduct; 2. cases brought to seek financial redress for damages associated with the effects of climate change; 3. contractual disputes arising out of the industry transitions which the energy sector and all major industries are currently undergoing; 4. contractual disputes resulting from climate-related weather events; 5. related disputes between foreign investors and host states; and 6. related disputes between states, and between other transnational actors, while observing that a key reason for selecting these categories is that the potential role for arbitration varies significantly depending on the category of dispute, with arbitration having a greater role (in practice and in potential) in categories 3 to 6.³⁸

Notably, Kenya's Environment and Land Court Act, 2011³⁹ provides for the jurisdiction of the Environment and Land Court as including power to hear and determine disputes relating to climate issues.⁴⁰ Also worth pointing out is the recognition of alternative means of dispute resolution and even affirming that where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court is mandated to stay proceedings until such condition is fulfilled.⁴¹ While it is to be

³⁷'Resolving Climate Change Disputes through Arbitration' (Pinsent Masons) <<https://www.pinsentmasons.com/out-law/analysis/resolving-climate-change-disputes-through-arbitration>> accessed 7 April 2022.

³⁸ C. Mark Baker, Cara Dowling, Dylan McKimmie, Tamlyn Mills, Kevin O'Gorman, Holly Stebbing, Martin Valasek, "What are climate change and sustainability disputes? Key arbitration examples (Part 1 contractual disputes)", in James Rogers, London; Cara Dowling, Vancouver (eds), *International arbitration report*, Norton Rose Fulbright – Issue 16 – June 2021, p. 41.

³⁹ Environment and Land Court Act, No. 19 of 2011, Laws of Kenya.

⁴⁰ *ibid*, section 13(2)(a).

⁴¹ 20. *Alternative dispute resolution*

(1) *Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2) (c) of the Constitution.*

(2) *Where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall stay proceedings until such condition is fulfilled.*

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acknowledged that the judges appointed to head environment and land courts are appointed on the basis of having relevant knowledge in the area, it must also be acknowledged that they may not always be well versed with all matters that come before them. It is during such times, either on court's own motion, with the agreement of or at the request of the parties, that the court may consider any other appropriate means of alternative dispute resolution including arbitration especially in respect of technical issues relating to climate change disputes.

The provisions of *Climate Change Act 2016*⁴² acknowledge the role of courts in upholding rights relating to climate change and spells out the role of the court in the following words: "a person may, pursuant to Article 70 of the Constitution, apply to the Environment and Land Court, alleging that a person has acted in a manner that has or is likely to adversely affect efforts towards mitigation and adaptation to the effects of climate change".⁴³ In such applications, the court may make an order or give directions to: prevent, stop or discontinue an act or omission that is harmful to the environment; compel a public officer to take measures to prevent or discontinue an act or omission that is harmful to the environment; or provide compensation to a victim of a violation relating to climate change duties.⁴⁴

While this is a commendable step towards empowering local courts in discharging their mandate in promotion of sustainable development, parties may not always be both citizens of Kenya and where the violating party is a foreign investor, there may be need to invoke international commercial or investment arbitration. In addition, it must be noted that parties may invoke section 20 (2) of the Environment and Land Court Act 2011 which provides that '*where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall stay proceedings until such condition is fulfilled*'. Such parties may opt to have the dispute settled by expert arbitrators in the area of climate change disputes and only go back to court for declaratory rights and enforcement of the outcome(s).

⁴² Climate Change Act, No. 11 of 2016, Laws of Kenya.

⁴³ Section 23(1), Climate Change Act, 2016.

⁴⁴ Section 23(2), Climate Change Act, 2016.

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The advantages of arbitration highlighted above make it a viable alternative way of managing climate change related disputes as against litigation, while still ensuring that the outcome thereof can be enforced. Parties, even where they already filed a case before a court, may not always be willing to let out commercial secrets and may, therefore, wish to refer the matter to arbitration, court-annexed or otherwise.

The distinction between conflicts and disputes, as discussed above, is important in analyzing any disagreements that are attributable to climate change in a bid to decide the most viable mechanism of addressing them. Such analysis and management of disputes may require expertise in that particular area of law, namely environmental law and climate change. This is where arbitration becomes useful because, as already pointed out, parties in arbitration proceedings are allowed to pick the third party expert with the relevant experience and knowledge to help them settle the particular aspects of the dispute.

It has also been noted that local disputes over food and water supplies can spread to neighboring nations as people seek extra resources and safety, putting further strain on other countries' resources and perhaps escalating tensions.⁴⁵ In light of such possibilities, addressing such problems through local courts becomes impossible. However, in addition to the specialized expertise that is potentially available to parties through arbitration, there is also the advantage of the transnational nature of arbitration process unlike litigation, and the subsequent nature of ease of enforcement of arbitral awards across borders.

Article 14.1 of 1992 *United Nations Framework Convention on Climate Change* provides that 'in the case of a dispute between two or more Parties concerning the interpretation or application of the Convention, the Parties concerned should seek a settlement of the matter by discussion or any other peaceful measures of their own choice.' Article 14.2(b) envisages the use of arbitration in accordance with procedures to be adopted by the Conference of the Parties as soon as practicable, in an annex on arbitration. Article 19 of *Kyoto Protocol* also provides that "the provisions of Article 14 of the Convention on settlement of disputes shall apply mutatis mutandis to this Protocol". Similarly, Article 24 of the *Paris Agreement*, a legally binding international treaty which entered into force on

⁴⁵ UNESCO, 'Climate Change Raises Conflict Concerns' (UNESCO, 29 March 2018) <<https://en.unesco.org/courier/2018-2/climate-change-raises-conflict-concerns>> accessed 11 April 2022.

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4 November 2016, provides that “the provisions of Article 14 of the Convention on settlement of disputes shall apply mutatis mutandis to this Agreement”.

While legislators should make climate change policy, courts and arbitral tribunals also have a role to play, as climate change disputes are on the rise and will likely continue to do so in the future, and disagreements over the proper interpretation and application of climate change legislation may arise.⁴⁶

It has been observed that even where international dispute settlement mechanisms exist, they are deemed ineffective due to a lack of mandatory rules or enforcement procedures, so mechanisms like 'international adjudication are unlikely to provide effective relief, either in reducing emissions or compensating victims'.⁴⁷ Arbitration, on the other hand, has huge benefits over litigation in dealing with climate change disputes because arbitrators with the right mix of expertise can be picked, multiparty proceedings can be handled, and the New York Convention on the Enforcement of Arbitral Awards provides certainty pertaining award enforcement.⁴⁸ The Permanent Court of Arbitration (PCA) has been noted as a regular forum for dispute resolution under bilateral and multilateral treaties, contracts, and other instruments relating to natural resources and the environment, and provides specialized rules for arbitration and conciliation of these disputes.⁴⁹ Notably, PCA already has in place the *PCA Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources* (“Environmental Rules”), adopted in 2001⁵⁰, and the Rules are applicable where all parties have agreed in writing that a dispute that may arise or that has arisen between them shall be referred to arbitration under the Permanent

⁴⁶ ‘Resolving Climate Change Disputes through Arbitration’ (Pinsent Masons) <<https://www.pinsentmasons.com/out-law/analysis/resolving-climate-change-disputes-through-arbitration>> accessed 11 April 2022.

⁴⁷ ‘LSE Law Review Blog’ <<https://blog.lselawreview.com/2022/03/commercial-arbitration-fight-against-climate-change-role-actually-play>> accessed 11 April 2022.

⁴⁸ ‘Resolving Climate Change Disputes through Arbitration’ (Pinsent Masons) <<https://www.pinsentmasons.com/out-law/analysis/resolving-climate-change-disputes-through-arbitration>> accessed 11 April 2022.

⁴⁹ ‘Environmental Dispute Resolution’ (*Permanent Court of Arbitration*, 2022) <<https://pca-cpa.org/en/services/arbitration-services/environmental-dispute-resolution/>> accessed 11 April 2022.

⁵⁰ ‘Environmental Dispute Resolution’ (*PCA Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources*, 2001) <https://docs.pca-cpa.org/2016/01/Optional-Rules-for-Arbitration-of-Disputes-Relating-to-the-Environment-and_or-Natural-Resources.pdf> accessed 11 April 2022.

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Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment.⁵¹

It is also worth noting that the PCA Environmental Rules provide for the establishment of a specialized list of arbitrators considered to have expertise in this area, establishment of a list of scientific and technical experts who may be appointed as expert witnesses pursuant to these Rules, and parties to a dispute are free to choose arbitrators, conciliators and expert witnesses from these Panels but with the understanding that the choice of arbitrators, conciliators or experts is not limited to the PCA Panels.⁵²

As a way of supporting and building capacity of States, States, international organizations, and private parties involved in the creation and administration of new, specialized environmental dispute settlement procedures can seek guidance and support from the PCA.⁵³ This is possible considering that the PCA is responsible for resolving disputes between States and non-State players that arise through a variety of bilateral and multilateral investment treaties, contracts, and other instruments.⁵⁴

Just like PCA has special rules for arbitration of environmental and natural resource related disputes, there may be a need, going forward, for both domestic and international institutions (both courts and arbitral institutions) to build capacity in terms of expertise and legal framework in preparation for the climate change related disputes ranging from energy, finance and technology sectors, as follows: Energy – in particular, the transition away from fossil fuels to renewables, and the growth especially of the solar and wind sectors; Finance – carbon trading and green certificates; and Technology – the drive for efficient power grids, as well as low emission energy and data storage.⁵⁵ The other areas that may need special attention have already been identified by the International Chamber

⁵¹ Article 1 (1), *PCA Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources*, 2001.

⁵² 'Panels of Arbitrators and Experts for Environmental Disputes' (*Permanent Court of Arbitration*, 2022) <<https://pca-cpa.org/en/about/structure/panels-of-arbitrators-and-experts-for-environmental-disputes/>> accessed 11 April 2022.

⁵³ 'Environmental Dispute Resolution' (*Permanent Court of Arbitration*, 2022) <<https://pca-cpa.org/en/services/arbitration-services/environmental-dispute-resolution/>> accessed 11 April 2022.

⁵⁴ *ibid.*

⁵⁵ 'Arbitrating climate change disputes | Actualités | DLA Piper Global Law Firm' (DLA Piper) <<https://www.dlapiper.com/fr/france/insights/publications/2020/01/arbitrating-climate-change-disputes/>> accessed 11 April 2022.

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of Commerce Commission on Environment and Energy task force on “Arbitration of Climate Change Related Disputes” (the “Task Force”) in their 2019 Report titled *Report on Resolving Climate Change Related Disputes through Arbitration and ADR* (the “Report”)⁵⁶ where they observed that a number of specific features of international arbitration that may assist in resolving climate change related disputes going forward include utilization and optimization of: use of and recourse to appropriate scientific and other expertise; existing measures and procedures for expediting early resolution of disputes or providing urgent interim or conservatory relief; integration of climate change commitments and principles of international law, including arising out of the UNFCCC and Paris Agreement; enhanced transparency of proceedings; potential third-party participation, including through amicus curiae briefs; and costs, including advances and allocation of costs, to promote fair, transparent and appropriate conduct of climate change related disputes.⁵⁷

As already observed, Kenya’s Climate Change Act, 2016 does not make reference to the use of ADR mechanisms, including arbitration in addressing disputes that arise therefrom. However, it makes reference to Environment and Land Court Act 2011 (ELC Act) which empowers Environment and Land Court to hear and determine disputes relating to climate issues. The ELC Act, however, gives these courts the power to resort to ADR mechanisms. There is a need for policy makers and other stakeholders to borrow a leaf from the PCA Environmental Rules and the recommendations from the 2019 ICC Task Force Report to consider coming up with special rules and panel of experts that may either address disputes requiring specialized knowledge such as those relating to climate change or those who may offer specialized guidance to courts while dealing with these disputes. Arbitral institutions such as Chartered Institute of Arbitrators and Nairobi Centre for International Arbitration, among others, should also be left behind in building specialized capacity along the same

⁵⁶ ‘ICC Arbitration and ADR Commission Report on Resolving Climate Change Related Disputes through Arbitration and ADR’ (ICC - International Chamber of Commerce) <<https://iccwbo.org/publication/icc-arbitration-and-adr-commission-report-on-resolving-climate-change-related-disputes-through-arbitration-and-adr/>> accessed 11 April 2022.

⁵⁷ *Report on Resolving Climate Change Related Disputes through Arbitration and ADR*, p. 19.

lines. Climate change related disputes are unlikely to go away in the near future and stakeholders should, therefore, prepare adequately.

6. Conclusion

Climate change related disputes come with many implications across all sectors of economy from environmental, political, economic and even social, where they also come with disputes and conflicts. While different approaches to conflict management apply to conflicts and disputes due to the underlying issues therein, this paper has focused on disputes relating to climate change. As already pointed out by various commentators, this paper acknowledges that some of these disputes may be indirectly linked to climate change, which is seen as a multiplier of already existing causative factors. However, the settlement of these disputes may require specialized knowledge, may be of transnational nature and may require coercion in abiding by outcome. This paper argues that these features may not be met through litigation, hence the need to explore arbitration, both domestic and international, in addressing the said disputes.

Arguably, putting in place measures meant to address the related 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.⁵⁸ There is a need for local policy makers and conflict management institutions, including courts and arbitral institutions, to build capacity towards utilizing arbitration in management of climate change related disputes.

References

⁵⁸Grafakos, S., Pacteau, C., Delgado, M., Landauer, M., Lucon, O., and Driscoll, P. (2018), "Integrating mitigation and adaptation: Opportunities and challenges," In Rosenzweig, C., W. Solecki, P. Romero-Lankao, S. Mehrotra, S. Dhakal, and S. Ali Ibrahim (eds.), *Climate Change and Cities: Second Assessment Report of the Urban Climate Change Research Network*. Cambridge University Press, New York. 101–138, 102 < https://uccrn.ei.columbia.edu/sites/default/files/content/pubs/ARC3.2-PDF-Chapter-4-Mitigation-and-Adaptation-wecompress.com_.pdf> accessed 7 April 2022.

The Viability of Arbitration in management of Climate Change Related Disputes in Kenya

'15.1: Global Climate Change' (*Geosciences LibreTexts*, 26 December 2019)

<[https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_\(Johnson_Affolter_Inkenbrandt_and_Mosher\)/15%3A_Global_Climate_Change/15.01%3A_Global_Climate_Change](https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_(Johnson_Affolter_Inkenbrandt_and_Mosher)/15%3A_Global_Climate_Change/15.01%3A_Global_Climate_Change)> accessed 20 March 2022.

'Arbitrating climate change disputes | Actualités | DLA Piper Global Law Firm' (DLA Piper) <<https://www.dlapiper.com/fr/france/insights/publications/2020/01/arbitrating-climate-change-disputes/>> accessed 11 April 2022.

'Arbitration in Africa | White & Case LLP'

<<https://www.whitecase.com/publications/insight/arbitration-africa>> accessed 4 April 2022.

'COP26 Goals' (*UN Climate Change Conference (COP26) at the SEC – Glasgow 2021*)

<<https://ukcop26.org/cop26-goals/>> accessed 5 April 2022.

'Does Climate Change Cause Conflict?' (IGC, 2 June 2021)

<<https://www.theigc.org/blog/does-climate-change-cause-conflict/>> accessed 6 April 2022.

'ICC Arbitration and ADR Commission Report on Resolving Climate Change Related Disputes through Arbitration and ADR' (ICC - International Chamber of Commerce)

<<https://iccwbo.org/publication/icc-arbitration-and-adr-commission-report-on-resolving-climate-change-related-disputes-through-arbitration-and-adr/>> accessed 11 April 2022.

'LSE Law Review Blog' <<https://blog.lselawreview.com/2022/03/commercial-arbitration-fight-against-climate-change-role-actually-play>> accessed 11 April 2022.

'Resolving Climate Change Disputes through Arbitration' (Pinsent Masons)

<<https://www.pinsentmasons.com/out-law/analysis/resolving-climate-change-disputes-through-arbitration>> accessed 7 April 2022.

'Tackling the Intersecting Challenges of Climate Change, Fragility and Conflict'

<<https://blogs.worldbank.org/dev4peace/tackling-intersecting-challenges-climate-change-fragility-and-conflict>> accessed 30 March 2022.

Arild Vatn, *Environmental Governance: Institutions, Policies and Actions* (Paperback edition, Edward Elgar Publishing 2016) 2.

Barnstein, R. *The Handbook of Arbitration Practice: General Principles (Part 2)* (Sweet & Maxwell, London, 1998).

The Viability of Arbitration in management of Climate Change Related Disputes in Kenya

Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *Journal of Peace Research*, Vol.32, No. 2 (May, 1995), pp.152-153.

C. Mark Baker, Cara Dowling, Dylan McKimmie, Tamlyn Mills, Kevin O’Gorman, Holly Stebbing, Martin Valasek, "What are climate change and sustainability disputes? Key arbitration examples (Part 1 contractual disputes)", in James Rogers, London; Cara Dowling, Vancouver (eds), *International arbitration report*, Norton Rose Fulbright – Issue 16 – June 2021.

Climate Change Act, No. 11 of 2016, Laws of Kenya.

Cloke, K., "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005.

Corissajoy, 'Settlement, Resolution, Management, and Transformation: An Explanation of Terms' (Beyond Intractability, 29 June 2016)
<https://www.beyondintractability.org/essay/meaning_resolution> accessed 6 April 2022.

Dervis, K., "Devastating for the World's Poor Climate Change Threatens the Development Gains Already Achieved," *UN Chronicle Online Edition* <<https://www.unclearn.org/wp-content/uploads/library/undp30.pdf>> accessed 6 April 2022.

Environment and Land Court Act, No. 19 of 2011, Laws of Kenya.

'Environmental Dispute Resolution' (*PCA Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources*, 2001) <https://docs.pca-cpa.org/2016/01/Optional-Rules-for-Arbitration-of-Disputes-Relating-to-the-Environment-and_or-Natural-Resources.pdf> accessed 11 April 2022.

'Environmental Dispute Resolution' (*Permanent Court of Arbitration*, 2022) <<https://pca-cpa.org/en/services/arbitration-services/environmental-dispute-resolution/>> accessed 11 April 2022.

Fenn, P., "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, *Workbook on Mediation*, (CIArb, London, 2002), pp.12-13.

Fetherston, A.B., "From Conflict Resolution to Transformative Peacebuilding: Reflections from Croatia", *Centre for Conflict Resolution-Department of Peace Studies: Working Paper 4* (April, 2000).

The Viability of Arbitration in management of Climate Change Related Disputes in Kenya

Froese, Rebecca, and Janpeter Schilling, "The Nexus of Climate Change, Land Use, and Conflicts." (2019).

Grafakos, S., Pacteau, C., Delgado, M., Landauer, M., Lucon, O., and Driscoll, P. (2018), "Integrating mitigation and adaptation: Opportunities and challenges," In Rosenzweig, C., W. Solecki, P. Romero-Lankao, S. Mehrotra, S. Dhakal, and S. Ali Ibrahim (eds.), *Climate Change and Cities: Second Assessment Report of the Urban Climate Change Research Network*. Cambridge University Press, New York. 101–138.

Loode, S., Nolan, A., Brown, A. and Clements, K., "Conflict Management Processes for Land-related conflict", *A Consultancy Report by the Pacific Islands Forum Secretariat*, available at www.forumsec.org, [Accessed on 04/06/2012].

Marshall Burke, Solomon M Hsiang and Edward Miguel, 'Climate and Conflict' (2015) 7 *Annual Review of Economics* 577, <<https://www.annualreviews.org/doi/10.1146/annurev-economics-080614-115430>> accessed 27 March 2022.

Muigua, K., *Resolving conflicts through mediation in Kenya*, Glenwood Publishers, Nairobi, 2nd Ed., 2017, Chapter Four.

'Panels of Arbitrators and Experts for Environmental Disputes' (*Permanent Court of Arbitration*, 2022) <<https://pca-cpa.org/en/about/structure/panels-of-arbitrators-and-experts-for-environmental-disputes/>> accessed 11 April 2022.

Permanent Court of Arbitration, PCA Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources, 2001.

Segerson, K., *Environment*, in *Encyclopedia of Energy, Natural Resource, and Environmental Economics*, Volume 3, 2013.

UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

UN General Assembly, *United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly*, 20 January 1994, A/RES/48/189.

UNESCO, 'Climate Change Raises Conflict Concerns' (UNESCO, 29 March 2018) <<https://en.unesco.org/courier/2018-2/climate-change-raises-conflict-concerns>> accessed 11 April 2022.

The Viability of Arbitration in management of Climate Change Related Disputes in Kenya

Vally Koubi, 'Climate Change and Conflict' (2019) 22 Annual Review of Political Science 343 <<https://www.annualreviews.org/doi/10.1146/annurev-polisci-050317-070830>> accessed 11 April 2022.