

Utilizing Alternative Dispute Resolution in Climate Change Disputes

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Utilizing Alternative Dispute Resolution in Climate Change Disputes

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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.

1.0 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 agenda¹. It has been described as the most defining challenge of our time². Climate change alongside pollution and biodiversity loss have been identified as the

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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.' Available at <https://www.un.org/en/desa/forum-climate-change-and-science-and-technology-innovation> (Accessed on 21/03/2024)

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triple planetary crisis which is a term that refers the three main interlinked issues that humanity currently faces³.

It has been noted that climate change is now affecting every country on every continent⁴. According to the United Nations, climate change is disrupting national economies and affecting lives, costing people, communities and countries dearly today and even more tomorrow⁵. 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 world⁶. 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 countries⁷. 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 wars⁸. Responding to climate change has therefore become a top policy agenda, at local, national, and global levels⁹. The United Nations *2030 Agenda for Sustainable Development*¹⁰ acknowledges that climate change is one of the greatest challenge of our time and its adverse impacts undermine the ability of all countries to achieve sustainable

³ United Nations Climate Change., 'What is the Triple Planetary Crisis?' Available at <https://unfccc.int/news/what-is-the-triple-planetary-crisis> (Accessed on 21/03/2024)

⁴ United Nations., 'Climate Action.' Available at <https://www.un.org/sustainabledevelopment/climateaction/> (Accessed on 21/03/2024)

⁵ Ibid

⁶ United Nations., 'What is Climate Change?' Available at <https://www.un.org/en/climatechange/whatis-climate-change> (Accessed on 21/03/2024)

⁷ Ibid

⁸ United Nations., 'Goal 13: Take Urgent Action to Combat Climate Change and its Impacts.' Available at <https://www.un.org/sustainabledevelopment/climate-change/> (Accessed on 21/03/2024)

⁹ United Nations Department of Economic and Social Affairs., 'Forum on Climate Change and Science and Technology Innovation.' Available at <https://www.un.org/en/desa/forum-climate-changeandscience-and-technology-innovation> (Accessed on 21/03/2024)

¹⁰ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 21/03/2024)

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development. Sustainable Development Goal (SDG) urges all countries to take urgent action to combat climate change and its impacts¹¹.

In addition to its adverse environmental, social, and economic impacts, climate change is causing many disputes¹². It has been noted that climate change disputes can affect the achievement of climate goals at levels¹³. Effective management of climate change disputes has been identified as crucial in strengthening the response towards climate change and delivering climate justice¹⁴.

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.

2.0 Climate Change Disputes: Causes and Effects

It has been noted that climate change disputes are consistently rising throughout the world¹⁵. With states increasingly implementing measures to combat the adverse impacts of climate change, it has been asserted that such measures may collide with aspirations

¹¹ Ibid

¹² United Nations Environment Programme., 'Climate Litigation More than Doubles in Five Years, now a Key Tool in Delivering Climate Justice' Available at <https://www.unep.org/news-and-stories/press-release/climate-litigation-more-doubles-five-years-now-key-tool-delivering> (Accessed on 21/03/2024)

¹³ Ibid

¹⁴ Ibid

¹⁵ Burianski. M., & Kuhnle. F. P., 'A New Wave of African Climate Change Disputes on the Horizon' Available 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.> (Accessed on 22/03/2024)

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for economic growth and social progress¹⁶. This results in disagreements among various stakeholders including the state, citizens, and the private sector a situation that could trigger disputes¹⁷. 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 constitutions¹⁸; challenges to domestic non-enforcement of climate-related laws and policies¹⁹; litigants seeking to keep fossil fuels in the ground²⁰; advocates for greater climate disclosures and an end to greenwashing²¹; claims addressing corporate liability and responsibility for climate harms²²; and claims addressing failures to adapt to the impacts of climate change²³.

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 countries²⁴. 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 violence²⁵. 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 disputes²⁶.

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.' Available at <https://www.unep.org/topics/fresh-water/disasters-and-climatechange/environmentsecurity/environmentalcooperationand#:~:text=International%20law%2C%20environment%20and%20conflict,and%20reliance%20on%20conflict%20resources> (Accessed on 22/03/2024)

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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 disputes²⁷.

There has been a growing number of climate change disputes concerning climate change commitments by governments²⁸. 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 emissions²⁹. This inevitably results in disputes with individuals or organizations seeking legal channels to hold governments accountable for their climate change commitments³⁰. 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 commitments³¹. 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 world³². These disputes focus on issues such as infrastructure projects and whether these projects are aligned with the Paris Agreement³³, 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 events³⁴.

²⁷ Ibid

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.' Available at <https://www.lw.com/admin/upload/SiteAttachments/ESG-Litigation-Roadmap.pdf> (Accessed on 22/03/2024)

³³ Ibid

³⁴ Ibid

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In addition, there has been a rise of climate change disputes involving corporations³⁵. 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 harm³⁶. The growth of Environmental, Social, and Governance (ESG) has also resulted in ESG disputes against corporations on various issues including climate change³⁷. 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 sustainability³⁸. 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 disputes³⁹. Indeed, it has been pointed out that there has been growth of ESG suits on issues such as climate change⁴⁰. 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 greenwashing⁴¹. 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

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).' Available at <https://www.afdb.org/en/topics-and-sectors/topics/environmental-social-and-governance-esg> (Accessed on 22/03/2024)

³⁸ Ibid

³⁹ Hackett. D et al., 'Growing ESG Risks: The Rise of Litigation.' Available at https://www.bakermckenzie.com/-/media/files/insight/publications/2020/10/growing_esg_risks_the_rise_of_litigation.pdf (Accessed on 22/03/2024)

⁴⁰ Ibid

⁴¹ Ibid

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duty, greenwashing, or financing environmental and human rights-related harms⁴². ESG is therefore a key contributor of climate change disputes.

There has also been a growth of climate change disputes in Africa⁴³. 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 Africa⁴⁴. 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 poverty⁴⁵. 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 Africa⁴⁶. 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 resources⁴⁷. Cases of devastating floods, invasion of desert locusts and severe droughts are vivid examples of the impacts of climate change on the continent⁴⁸. As a result of the impacts of climate change in Africa, states have undertaken various measures to respond to the problem including increasing renewable

⁴² Grogan-Fenn. J., 'Investors Face Direct Risk from Climate Litigation' Available 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>. (Accessed on 22/03/2024)

⁴³ Burianski. M., & Kuhnle. F. P., 'A New Wave of African Climate Change Disputes on the Horizon' Available 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>. (Accessed on 22/03/2024)

⁴⁴ Ibid

⁴⁵ African Development Bank Group., 'Climate Change in Africa.' Available at <https://www.afdb.org/en/cop25/climate-change-africa> (Accessed on 22/03/2024)

⁴⁶ United Nations Framework Convention on Climate Change., 'Climate Change is an Increasing Threat to Africa.' Available at <https://unfccc.int/news/climate-change-is-an-increasing-threat-to-africa> (Accessed on 22/03/2024)

⁴⁷ Ibid

⁴⁸ Ibid

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energy generation in Africa, embracing environmentally sound technologies, decarbonizing key sectors including transport, industry, and infrastructure, and investments in carbon markets⁴⁹. 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 act⁵⁰. Further, if adopted, these measures may contrast with these states' attempts to grow their economies also contributing to disputes⁵¹.

Climate change disputes are undesirable and can affect peace and security⁵². 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 groups⁵³. Climate change disputes can also hinder the achievement of climate goals at levels⁵⁴. Effective management of climate change disputes has been identified as crucial in strengthening the response towards climate change and delivering climate justice⁵⁵. It has been noted that climate change results in disputes and problems that are not easily addressed by existing legal principles and frameworks⁵⁶. This is because: climate change is a polycentric problem⁵⁷; the assessment of future climate impacts must deal with

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

⁵⁰ Ibid

⁵¹ Ibid

⁵² United Nations Department of Political and Peacebuilding Affairs., 'The Implications of Climate Change for Mediation and Peace Processes' Available at <https://peacemaker.un.org/sites/peacemaker.un.org/files/DPPAPracticeNote-TheImplicationsofClimateChangeforMediationandPeaceProcesses.pdf> (Accessed on 22/03/2024)

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' Available at <https://core.ac.uk/reader/77063250> (Accessed on 22/03/2024)

⁵⁷ Ibid

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uncertainty⁵⁸; climate change is a socio-political controversial issue⁵⁹; and addressing climate change requires recognising a dynamic physical environment⁶⁰. It is therefore necessary to embrace ADR mechanisms for effective management of climate change disputes.

3.0 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 litigation⁶¹. It has been noted that ADR covers all dispute management methods other than court proceedings⁶². ADR processes may be linked to but function outside formal court litigation processes⁶³. These techniques include negotiation, mediation, arbitration, conciliation, adjudication, expert determination, early neutral evaluation, and Traditional Dispute Resolution Mechanisms (TDRMs) among others⁶⁴.

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 of their own choice* (Emphasis added)⁶⁶. At a national level, the *Constitution of Kenya*⁶⁷ embraces ADR mechanisms. It mandates courts

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

⁶⁶ Ibid

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

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and tribunals to promote ADR mechanisms including reconciliation, mediation, arbitration and TDRMs⁶⁸.

It has been argued that there is need to consider ADR mechanisms as 'Appropriate' and not 'Alternative' in the access to justice discourse⁶⁹. This is because the term 'Alternative' connotes that ADR processes are subordinate to formal justice systems⁷⁰. However, ADR mechanisms are ideal in enhancing access to justice and are increasingly becoming more preferable than formal court processes in enhancing access to justice⁷¹. 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 justice⁷². ADR mechanisms have been practiced in Africa for many centuries and were the first point of call whenever a dispute arose⁷³. ADR techniques fitted comfortably within traditional concepts of African justice, particularly its core value of reconciliation⁷⁴. 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 action⁷⁵; climate change

⁶⁸ Ibid, article 159 (2) (c)

⁶⁹ Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution' Available 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> (Accessed on 22/03/2024)

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' Available at <https://kmco.co.ke/wp-content/uploads/2022/04/The-Viability-of-Arbitration-in->

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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 disputes⁷⁶; dilution or revocation of responsive measures by states, giving rise to potential renewable energy treaty arbitrations⁷⁷; 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 adaptation⁷⁸; and compliance with climate change commitments under the Paris Agreement⁷⁹. 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 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 others⁸⁰.

It has been argued that ADR may be more preferable in managing climate change disputes due to several factors such as actual or perceived partiality by courts⁸¹. Courts in many countries have been accused of lack of independence and impartiality which is a major challenge in accessing justice⁸². ADR mechanisms such as mediation and arbitration on the other hand allow parties to select independent, impartial, and neutral

[management-of-Climate-Change-Related-Disputes-in-Kenya-11th-April-2022.pdf](#) (Accessed on 22/03/2024)

⁷⁶ Ibid

⁷⁷ Ibid

⁷⁸ Ibid

⁷⁹ Ibid

⁸⁰ World Intellectual Property Organization., 'WIPO Alternative Dispute Resolution for Green Technology and Sustainability.' Available at <https://www.wipo.int/amc/en/center/specificsectors/greentechnology-sustainability/> (Accessed on 22/03/2024)

⁸¹ Hong Kong International Arbitration Centre., 'Beyond the Litigation Narrative: The Place and Roles of ADR in Climate change Disputes' Available at <https://www.hkiac.org/content/beyond-litigation-narrative-place-and-roles-adr-climate-change-disputes> (Accessed on 22/03/2024)

⁸² Ibid

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third parties to facilitate the dispute management process⁸³. This makes them ideal in enhancing access to justice in climate change disputes towards climate justice⁸⁴.

Another key factor that makes ADR mechanisms more preferable over formal court processes in managing climate change disputes is the lack of judicial expertise with regard to complex climate change science⁸⁵. 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 change⁸⁶. However, ADR mechanisms such as arbitration allows parties to select a third party with requisite knowledge and experience in such matters in order to promote effective management of their dispute⁸⁷.

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' relationships⁸⁸. 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 realistically⁸⁹. Attributes of mediation including voluntary participation and agreement, confidentiality of exchanges among parties, the search of mutually satisfactory solutions have been identified as well suited for the multi-party complex

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' Available 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> (Accessed on 22/03/2024)

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

⁸⁹ Ibid

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context of climate change disputes⁹⁰. 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 in order to realize access to clean and affordable energy for all⁹¹.

Further, ADR processes including mediation and negotiation can promote collaborative approaches to managing disputes⁹². 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 issue⁹³. It is a powerful approach towards managing disputes built on cooperation, open communication, and finding win-win outcomes⁹⁴. 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 change⁹⁵. 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 outcomes⁹⁶.

Finally, ADR processes are ideal in managing climate change disputes especially those that are transnational in nature⁹⁷. It has been observed that environmental conflicts may

⁹⁰ Kaufman. S., 'Mediation in Environmental Disputes.' Available at <https://www.eolss.net/samplechapters/c14/E1-40-03-03.pdf> (Accessed on 22/03/2024)

⁹¹ Muigua. K., 'Attaining Environmental Justice through Alternative Dispute Resolution' Available at <https://kmco.co.ke/wp-content/uploads/2023/07/Attaining-Environmental-Justice-through-Alternative-Dispute-Resolution.pdf> (Accessed on 22/03/2024)

⁹² Muigua. K., 'Applying Collaborative Approaches towards Conflict Management' Available at <https://kmco.co.ke/wp-content/uploads/2024/03/Applying-Collaborative-Approaches-towards-Conflict-Management.pdf> (Accessed on 22/03/2024)

⁹³ Food and Agriculture Organization., 'Collaborative Conflict Management for Enhanced National Forest Programmes (NFPs)' Available at <https://www.fao.org/3/i2604e/i2604e00.pdf> (Accessed on 22/03/2024)

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

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involve parties from different nationalities since the effects of issues such as pollution and climate change may spread across different states⁹⁸. Such disputes cannot be managed by national courts due to jurisdictional concerns⁹⁹. ADR mechanisms such as arbitration and mediation are able to promote management of such disputes since they apply across multiple jurisdictions and further guarantee enforcement of decisions¹⁰⁰.

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 outcomes¹⁰¹. 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 in order to protect the environment from imminent harm¹⁰². In addition, the use of arbitration may result in delays and costs especially in instances of court interference¹⁰³. 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 relationships¹⁰⁴. It is necessary to consider these factors and address them accordingly in order to enhance the role of ADR in managing climate change disputes.

4.0 Way Forward

There is need to utilize ADR mechanisms in order 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 stakeholders¹⁰⁵. It also has the ability to preserve relationships which is essential in

⁹⁸ Elborough. L., 'International Climate Change Litigation: Limitations and Possibilities for International Adjudication and Arbitration in Addressing the Challenge of Climate Change.' Available at <http://www.nzlii.org/nz/journals/NZJLEnvLaw/2017/5.pdf> (Accessed on 22/03/2024)

⁹⁹ Ibid

¹⁰⁰ Ibid

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

¹⁰² Ibid

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

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climate change disputes such as those involving energy transition¹⁰⁶. 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 disputes¹⁰⁷. It is therefore necessary to embrace these among other ADR mechanisms in order to promote 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 disputes¹⁰⁸. 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 disputes¹⁰⁹. 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 attributes¹¹⁰. 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 institutions¹¹¹. ADR institutions should also consider offering specialized training in climate change dispute management in order to build human capacity.

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.' Available at <https://kmco.co.ke/wp-content/uploads/2022/09/Environmental-Conflict-ManagementInstitutions-and-Approaches.pdf> (Accessed on 22/03/2024)

¹⁰⁹ Ibid

¹¹⁰ Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.' Available at <http://kmco.co.ke/wpcontent/uploads/2018/08/LEGITIMISINGALTERNATIVE-DISPUTE-RESOLUTIONMECHANISMS-IN-KENYA.pdf> (Accessed on 22/03/2024)

¹¹¹ International Chamber of Commerce., 'Resolving Climate Change Related Disputes through Arbitration and ADR' Available 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> (Accessed on 22/03/2024)

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Finally, there is an urgent need to combat climate change¹¹². 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 the global economy and the future of humankind¹¹³. It is also resulting in disputes¹¹⁴. It has been noted that climate change related disputes come with many implications across all sectors of economy from environmental, political, economic and even social¹¹⁵. Combating climate change is therefore a vital strategy in managing disputes related to this undesirable event¹¹⁶. 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 interrelated¹¹⁷. Combating climate change and effective management of climate change disputes are therefore mutually compatible goals.

5.0 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 agenda¹¹⁸. Climate change is also causing many disputes¹¹⁹. These disputes involve various stakeholders including the state,

¹¹² Muigua. K., 'Taking Urgent Action to Combat Climate Change' Available at <https://kmco.co.ke/wp-content/uploads/2023/09/Taking-Urgent-Action-to-Combat-Climate-Change.pdf> (Accessed on 22/03/2024)

¹¹³ Climate Change., 'Meaning, Definition, Causes, Examples and Consequences.' Available at <https://youmatter.world/en/definition/climate-change-meaning-definition-causes-and-consequences/> (Accessed on 22/03/2024)

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

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citizens, and the private sector¹²⁰. 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 corporations¹²¹. Climate change disputes are undesirable and can hinder the achievement of climate goals at levels¹²². Effective management of climate change disputes is therefore key in enhancing the global response towards climate change¹²³. Litigation is not ideal in managing climate change disputes due to concerns over expertise, independence, impartiality, delays, costs, and jurisdiction in transnational disputes¹²⁴. It is therefore necessary to embrace ADR mechanisms for effective management of climate change disputes¹²⁵. There is need to enhance the legal, institutional, and human capacity of ADR towards this end¹²⁶. Further, it is vital for all countries to take urgent action to combat climate change¹²⁷. Utilizing ADR in climate change disputes is a key measure that should be embraced globally in order to strengthen the response towards climate change.

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

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