

Rethinking the Integration of Alternative Dispute Resolution into the Operations of the Petroleum Upstream Regulatory Authority in Tanzania

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Abstract:

Disputes in Tanzania's upstream petroleum sector are high in value, technically complex and often involve foreign investors, yet Part XI of the Petroleum Act vests their settlement in the Petroleum Upstream Regulatory Authority (PURA) without expressly institutionalising Alternative Dispute Resolution (ADR). This article identifies and examines the challenges hindering the integration of ADR mechanisms into PURA's operations. Using a doctrinal methodology, the article analyses the Petroleum Act, the Natural Wealth and Resources legislation, the Arbitration Act, and the Civil Procedure Code. The article identifies several challenges including the Petroleum Act's silence on ADR and the limited institutional capacity and ADR expertise within PURA. The article argues that these challenges do not only reinforce one another, but that they differ in the remedy they require. The article recommends an express statutory pathway for ADR in the dispute settlement system of PURA.

Keywords: Alternative Dispute Resolution, Natural Wealth, Petroleum Upstream Regulatory Authority, Tanzania.

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1. INTRODUCTION

Upstream petroleum activities generate disputes that are high in value, technically demanding and tied to long-term investment, and the manner in which they are resolved bears directly on investor confidence and regulatory credibility. In Tanzania, Part XI of the Petroleum Act vests primary dispute settlement in the Petroleum Upstream Regulatory Authority (PURA), which also licenses, monitors and enforces compliance against the parties who appear before it.¹

Alternative Dispute Resolution (ADR), principally negotiation, mediation and arbitration, is widely regarded as better suited to disputes of this kind than formal adjudication because it is flexible, confidential and capable of preserving commercial relationships.² Part XI, however, does not expressly institutionalise any such pathway. It does not enable parties to elect arbitration or mediation, does not require ADR clauses in petroleum agreements and does not prescribe procedural rules for PURA's own proceedings.³

This article identifies and examines the challenges hindering the integration of ADR mechanisms into PURA's operations. It argues that five challenges are at work: the Petroleum Act's silence on ADR, limited institutional capacity and expertise, the restrictive effect of the Natural Wealth and Resources legislation, low awareness of and confidence in ADR, and institutional resistance. These challenges reinforce one another but call for different remedies, and the distinction determines how reform should be sequenced.

2. LEGAL MATERIALS AND METHODS

This article adopts a doctrinal methodology. It analyses the Petroleum Act, the Natural Wealth and Resources legislation, the Arbitration Act, the Civil Procedure Code, the Fair Competition Act, the Constitution and some international instruments that bear on petroleum dispute resolution. These sources are supplemented by Tanzanian literature on ADR. The primary and secondary sources of materials are used to assess the extent of incorporation or absorption of ADR into the dispute settlement process of the upstream petroleum sector.

¹ The Petroleum Act [CAP 392 R.E. 2023], ss. 242-247.

² See generally Mwaikambo, J. (2015). *Alternative dispute resolution in public sector institutions: Enhancing efficiency and stakeholder participation*. University of Dar es Salaam Press; Tuna, M. O. (2022). *Alternative dispute resolution in energy industries*. Routledge.

³ The Petroleum Act [CAP 392 R.E. 2023], Part XI.

3. RESULTS AND DISCUSSION

Regulatory adjudication and the dual mandate of PURA

Regulatory adjudication is the determination of disputes by the same authority that regulates the sector in which they arise. Its justification is expertise and proximity to the regulated industry, which belong to the logic of the regulatory state.⁴ Its difficulty is institutional impartiality: an authority that licenses and supervises regulated parties is also asked to decide disputes arising from that supervision, and the due process standard of an unbiased decision-maker and a fair hearing does not disappear because the decision-maker is an administrative body.⁵

PURA occupies precisely this position. It exercises technical regulatory functions and, under Part XI, the power to determine disputes and issue binding decrees and orders.⁶ The dual mandate matters for ADR because a neutral third party, whether mediator or arbitrator, presupposes a degree of separation between the dispute resolver and the interests in contest.

Alternative dispute resolution: negotiation, mediation, and arbitration

Negotiation is a bilateral process in which the parties seek their own settlement. Mediation involves a neutral third party who facilitates a voluntary settlement without imposing an outcome. Arbitration is a consensual process in which an arbitrator appointed by the parties renders a binding award.⁷ Their value in the petroleum sector lies in speed, confidentiality, party control over the procedure and access to technically qualified neutrals.

Integration, as used in this article, means more than the theoretical availability of these processes. It means a statutory or institutional pathway through which a dispute before PURA can be referred to them, together with the capacity to administer that referral.⁸

⁴ Majone, G. (1994). The rise of the regulatory state in Europe. *West European Politics*, 17(3), 77-101.

⁵ Mashaw, J. L. (1985). *Due process in the administrative state*. Yale University Press.

⁶ The Petroleum Act [CAP 392 R.E. 2023], ss. 242 and 243.

⁷ See generally Redfern, A., Hunter, M., Blackaby, N., & Partasides, C. (2022). *Redfern and Hunter on international arbitration* (7th ed.). Oxford University Press.

⁸ See generally Kweka, P. (2020). *Legal frameworks for alternative dispute resolution in Tanzania: Sectoral perspectives*. Mkuki na Nyota Publishers.

THE LEGAL FRAMEWORK GOVERNING PETROLEUM DISPUTE RESOLUTION IN TANZANIA

The Petroleum Act

Part XI of the Petroleum Act is the principal source of PURA's dispute resolution authority. Section 242 vests primary dispute settlement in PURA, section 243 provides for the enforcement of its decrees and orders, section 244 creates an appeal to the Fair Competition Tribunal, section 245 excludes the jurisdiction of ordinary courts in matters within PURA's mandate, and section 247 extends the model to downstream regulated activities.⁹ The result is a regulator-centred system with a limited appellate pathway and no express place for arbitration or mediation.

The natural wealth and resources legislation

The Natural Wealth and Resources (Permanent Sovereignty) Act declares Tanzania's natural wealth and resources permanently sovereign and subjects disputes arising from their exploitation to Tanzanian law and to resolution through Tanzanian institutions, thereby significantly restricting submission of such disputes to foreign arbitration.¹⁰ The companion Act enables review and renegotiation of agreements containing unconscionable terms.¹¹ Together they reflect legitimate sovereign objectives, but they narrow the dispute resolution options open to petroleum investors.

The Arbitration Act and the Civil Procedure Code

The Arbitration Act is the general statute on domestic and international arbitration, modelled on the UNCITRAL Model Law, and it supplies the foundation on which petroleum parties may arbitrate where they have agreed to do so in their agreements.¹² The Petroleum Act does not connect with it, and how the two regimes interact is left unaddressed.

The Civil Procedure Code, by contrast, positively obliges courts to explore negotiation, conciliation, mediation or arbitration at a pre-trial stage before the matter proceeds to trial.¹³ That obligation is confined to courts, but it shows how Tanzanian legislation builds ADR into an adjudicative process and offers a template for doing so in PURA's.

Constitutional, international and regional instruments

The Constitution does not use the term ADR, but article 13 guarantees equality before the law and a fair hearing, and article 107A requires justice to be dispensed without undue

⁹ The Petroleum Act [CAP 392 R.E. 2023], ss. 242-245 and 247.

¹⁰ The Natural Wealth and Resources (Permanent Sovereignty) Act [CAP 449 R.E. 2023].

¹¹ The Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act [CAP 450 R.E. 2023].

¹² The Arbitration Act [CAP 15 R.E. 2023]; The UNCITRAL Model Law on International Commercial Arbitration, 1985 (as amended 2006).

¹³ The Civil Procedure Code [CAP 33 R.E. 2023], Order VIII.

delay and without being impeded by technicalities.¹⁴ Tanzania is bound by the New York Convention, which presupposes arbitral processes of integrity, and its arbitration law draws on the Model Law.¹⁵ Regionally, article 14 of the SADC Protocol on Finance and Investment encourages ADR in investment disputes, and article 32 of the East African Community Treaty gives the East African Court of Justice jurisdiction over disputes arising from arbitration clauses in Community contracts.¹⁶ Tanzania is not a party to the Energy Charter Treaty, yet its guarantee of access to international arbitration is an expectation of the investors on whom upstream development depends.¹⁷

THE INSTITUTIONAL FRAMEWORK

PURA and the Fair Competition Tribunal

PURA is the central institution. The Petroleum Act does not establish a separate adjudicative division within it, require separation of investigative and decision-making functions or mandate independent adjudicators.¹⁸ Its technical expertise and proximity to the sector are real advantages, which is why reform should build on PURA and not displace it.

The Fair Competition Tribunal hears appeals from PURA's determinations under section 244 of the Act. The Petroleum Act does not define the grounds or standard of review, and, with the courts excluded by section 245, the Tribunal is effectively the only avenue of external review.¹⁹ The Tribunal must be distinguished from the Fair Competition Commission, which enforces competition and consumer rules and is not the appellate forum.

Arbitral institutions, the judiciary and the Ministry of Energy

The Tanzania Institute of Arbitrators trains, accredits and maintains a register of arbitrators and mediators, while the Tanzania International Arbitration Centre, established in 2019, offers arbitration, mediation and conciliation services to

¹⁴ The Constitution of the United Republic of Tanzania, 1977 [CAP 2 R.E. 2023], arts. 13 and 107A.

¹⁵ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention); The UNCITRAL Model Law on International Commercial Arbitration, 1985 (as amended 2006).

¹⁶ The Southern African Development Community, Protocol on Finance and Investment, 2006, art. 14; The Treaty for the Establishment of the East African Community, 1999, art. 32.

¹⁷ See generally Sornarajah, M. (2021). *The international law on foreign investment* (5th ed.). Cambridge University Press; Wälde, T. W. (2003). The settlement of international energy disputes. *Journal of World Energy Law & Business*, 1(2), 193-216.

¹⁸ The Petroleum Act [CAP 392 R.E. 2023], ss. 242-243.

¹⁹ The Petroleum Act [CAP 392 R.E. 2023], ss. 244-245; The Fair Competition Act [CAP 285 R.E. 2023].

international and domestic commercial parties. Both are resources for a reformed system, although neither is connected to PURA by the Petroleum Act.²⁰

The Commercial Division of the High Court enforces arbitral awards and may entertain challenges to PURA's procedures on constitutional grounds. The Ministry of Energy, as the ministry responsible for the sector, can initiate legislative reform, issue policy directions and coordinate institutional responses.

CHALLENGES HINDERING THE INTEGRATION OF ADR INTO PURA'S OPERATIONS

Part XI is functional as an administrative adjudicative scheme, but ADR has found little place in it. The challenges below explain why, and they operate together.²¹

Silence on ADR within the Petroleum Act

The Act's silence is the foundational challenge. Part XI contains no provision under which a party may elect mediation or arbitration, none requiring PURA to consider referral and none requiring ADR clauses in petroleum agreements.²² Without a statutory basis, a party that wants mediation has nothing to insist upon, and a willing PURA has no express authority on which to refer.

The comparison with the Civil Procedure Code is instructive. Courts are directed to explore ADR before trial, which fosters a routine consideration of settlement that PURA's process lacks.²³ Kenya makes the point from the other side: article 159(2)(c) of its Constitution directs courts and tribunals to promote ADR, and sector legislation requires the regulator to develop ADR procedures. An express hook, and not informal practice, determines whether ADR is meaningfully available.²⁴

Silence also shapes private drafting. Because the sector statute does not signal that ADR is a preferred or contemplated pathway, agreements may omit arbitration clauses even though the Arbitration Act would permit them, and conventions of this kind change slowly without a legislative signal.²⁵

Limited institutional capacity and ADR expertise

Referral to ADR requires infrastructure that Part XI does not provide: staff trained in facilitation and screening, guidelines for assessing whether a dispute is suited to ADR,

²⁰ See generally Mushi, G., & Kamugisha, A. (2023). Institutional capacity and the effectiveness of ADR in Tanzania. *Tanzanian Legal Perspectives*, 5(2), 34-50; Yesaya, J. (2024). Arbitration in Tanzania: Legal framework and practice. SSRN.

²¹ See generally Nyanda, R. (2018). *Regulatory governance and dispute resolution in East Africa: Challenges and opportunities*. East African Academic Publishers.

²² The Petroleum Act [CAP 392 R.E. 2023], Part XI.

²³ The Civil Procedure Code [CAP 33 R.E. 2023], Order VIII.

²⁴ The Constitution of Kenya, 2010, art. 159(2)(c); Muigua (2020), above n 5.

²⁵ The Arbitration Act [CAP 15 R.E. 2023].

and a roster of accredited neutrals with petroleum expertise. The Act creates none of these.²⁶

South Africa shows what such capacity looks like. Its National Energy Regulator maintains a dedicated dispute resolution unit with specific ADR rules, mandatory pre-hearing mediation screening and disclosure obligations for panel members, which the literature credits with reducing backlogs and shortening timelines. Capacity extends beyond PURA, for the pool of Tanzanian practitioners with petroleum experience is thin and the technical content of upstream disputes is demanding. Any capacity-building also carries a budgetary cost that competes with PURA's regulatory priorities, which favours phased reform.

The Restrictive effect of the natural wealth and resources legislation

The Permanent Sovereignty Act restricts submission of resource disputes to foreign arbitration, whereas international investors ordinarily treat access to neutral, internationally recognised arbitration as a baseline condition of investment.²⁷ The legislation was enacted to protect sovereign interests, and domestic institutions, if strengthened, can offer a credible alternative, so the divergence reflects a real tension between sovereignty-oriented resource governance and investor protection.²⁸

The tension has a further dimension. Treaties that predate the legislation may contain investor-state arbitration clauses that sit uneasily with the domestic restriction, leaving uncertain which prevails in a conflict.²⁹ It also lowers the practical value of Tanzania's New York Convention commitment for the largest petroleum disputes, since the Convention secures enforcement of awards only where arbitration was available in the first place.³⁰

Low awareness of and confidence in ADR options

ADR is available in principle through the Arbitration Act where parties have agreed to it, but that availability depends on knowledge of the option and trust in it. Where the sector statute is silent, the information and incentives that would produce informed use are absent.³¹

²⁶ The Petroleum Act [CAP 392 R.E. 2023], Part XI; Mushi & Kamugisha (2023).

²⁷ The Natural Wealth and Resources (Permanent Sovereignty) Act [CAP 449 R.E. 2023]; Sornarajah (2021).

²⁸ Wälde (2003).

²⁹ See generally Sornarajah (2021).

³⁰ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention).

³¹ See generally The Arbitration Act [CAP 15 R.E. 2023]; Kessie, E., & Asante, K. (2016). Alternative dispute resolution and access to justice in Africa. *African Journal of International and Comparative Law*, 24(1), 1-26.

Confidence is a related problem. ADR is relatively new in the petroleum sector, and with no track record of sector-specific ADR outcomes, parties reasonably prefer the familiar adjudicative route. Awareness and confidence are, however, among the cheapest challenges to address, through sensitisation led jointly by PURA and arbitral bodies.³²

Institutional and regulatory resistance to ADR

The fifth challenge is cultural. A regulator whose identity is built around enforcement and compliance may treat disputes as occasions to reinforce its authority and technical standards, and not as matters for negotiated settlement.³³ Adjudication is then a secondary function layered upon an enforcement institution, and not a professional discipline of its own.

This resistance can be understood as institutional caution grounded in PURA's duty to protect the public interest, and is not necessarily hostile to ADR, so it may diminish as ADR becomes familiar. These challenges are not independent. Silence removes incentive, absent capacity makes referral impracticable, and a regulatory culture without ADR sustains the silence.³⁴

THE CASE FOR TARGETED REFORM OF ADR IN PURA'S DISPUTE RESOLUTION

An express statutory pathway for ADR

The Kenyan experience supports amending Part XI to recognise ADR expressly, requiring PURA to consider referring suitable disputes to mediation or arbitration and clarifying the scope of the Tribunal's appellate jurisdiction. Tanzania's own Civil Procedure Code supplies a template, and the Constitution's commitments to a fair hearing and timely justice supply the constitutional foundation.³⁵

The ouster in section 245 should be narrowed. Tanzanian courts have held that statutory jurisdiction may be excluded only by explicit language, and, although those cases concerned contractual ousters, they offer a starting point for developing limits on blanket exclusion.³⁶

³² See generally Cappelletti, M., & Garth, B. (1978). Access to justice: The newest wave in the worldwide movement to make rights effective. *Buffalo Law Review*, 27(1), 181-292; Mwaikambo (2015).

³³ DiMaggio, P. J., & Powell, W. W. (1983). The iron cage revisited: Institutional isomorphism and collective rationality in organizational fields. *American Sociological Review*, 48(2), 147-160.

³⁴ See generally Nyanda (2018).

³⁵ The Petroleum Act, 2019 (Kenya); The Energy Act, 2019 (Kenya); Muigua (2020).

³⁶ *Tanzania Electric Supply Company Limited (TANESCO) v Independent Power Tanzania Limited (IPTL)* [2000] T.L.R. 324 (Court of Appeal of Tanzania); *Scova Engineering S.p.A & Irtec S.p.A v Mtibwa Sugar Estates Limited and 3 Others*, Civil Appeal No. 133 of 2017 (Court of Appeal of Tanzania).

An ADR Unit and an accredited roster

Capacity can be built within PURA's existing mandate. A structurally separate dispute resolution unit modelled on NERSA, with screening, procedural guidelines and disclosure rules, would address the dual-mandate concern, and a roster of neutrals drawn from the Tanzania Institute of Arbitrators and the Tanzania International Arbitration Centre would address the shortage of qualified practitioners.³⁷

Tiered pathways and a calibrated amendment of the natural wealth and resources legislation

Norway differentiates disputes by category, reserving administrative determination, arbitration and judicial resolution for the matters each suits best. Tanzania cannot simply transplant that mature system, but its principle suggests a response to the restriction on arbitration: a narrowly drawn amendment permitting defined categories of commercial petroleum dispute to go to arbitration, while core sovereignty-protective disputes stay within Tanzanian institutions.³⁸

4. CONCLUSION AND RECOMMENDATIONS

The integration of ADR into PURA's operations is hindered less by hostility to ADR than by the structure around it. The Petroleum Act is silent on ADR, PURA lacks the capacity to administer referral, the Natural Wealth and Resources legislation narrows arbitration, awareness and confidence are low, and an enforcement-oriented culture sustains the status quo.

These challenges are mutually reinforcing, so piecemeal reform of one dimension is unlikely to succeed. They differ, however, in the remedy they require. The statutory silence and the restriction on arbitration need Parliament, while capacity, culture and awareness can largely be addressed administratively, which means progress need not await legislation.

Recommendations

Legislative reform: parliament and the ministry of energy

Parliament should amend Part XI of the Petroleum Act to institutionalise ADR as an available pathway, require PURA to consider referral of suitable disputes, narrow the blanket exclusion in section 245 and clarify the Tribunal's jurisdiction.³⁹ It should also consider a narrowly tailored amendment to the Permanent Sovereignty Act permitting defined categories of commercial petroleum dispute to be arbitrated.⁴⁰ The Ministry

³⁷ Dlamini (2017), above n 5; Mushi & Kamugisha (2023).

³⁸ Nordtveit (2015); Tuna (2022); The Natural Wealth and Resources (Permanent Sovereignty) Act [CAP 449 R.E. 2023].

³⁹ The Petroleum Act [CAP 392 R.E. 2023], ss. 244-245.

⁴⁰ The Natural Wealth and Resources (Permanent Sovereignty) Act [CAP 449 R.E. 2023].

should develop sector-specific ADR guidelines, review the practical effect of the Natural Wealth and Resources legislation and lead stakeholder sensitisation.⁴¹

Reform of the PURA

PURA should establish a structurally separate dispute resolution unit, publish codified procedural rules with timelines, disclosure requirements and rights of representation, and develop with the Tanzania Institute of Arbitrators a roster of accredited neutrals.⁴² Pending legislation, it should introduce voluntary pre-adjudication mediation screening where both parties consent, publish annual reports on its adjudicative function and publish reasoned determinations in redacted form.⁴³

Reform of the Fair Competition Tribunal and the judiciary

The Fair Competition Tribunal should issue practice directions on the standard of review of PURA's determinations and consider co-opting petroleum technical assessors in appropriate cases. The Judiciary should continue to develop the constitutional limits of jurisdiction-excluding provisions in light of article 13.⁴⁴

⁴¹ See generally Kweka (2020).

⁴² See generally Dlamini (2017); Mushi & Kamugisha (2023).

⁴³ The Petroleum Act [CAP 392 R.E. 2023], Part XI.

⁴⁴ The Fair Competition Act [CAP 285 R.E. 2023]; The Constitution of the United Republic of Tanzania, 1977 [CAP 2 R.E. 2023], art. 13.

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