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Evaluation of Mediation as a Dispute Resolution Mechanism in Upstream Oil Contracts

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The oil industry, particularly in the upstream sector, due to its complex technical characteristics, large-scale investments, long-term projects, and the extensive involvement of political, economic, and environmental factors, is highly prone to diverse disputes among various stakeholders, including governments, investors, oil companies, and local communities. These disputes may arise from technical issues, changes in economic conditions, nationalization or expropriation, disagreements over the quality and quantity of production, or conflicts of social and environmental interests. In such a context, finding an efficient, rapid, and cost-effective mechanism for dispute resolution is an undeniable necessity.

Mediation, as one of the most important methods of Alternative Dispute Resolution (ADR), with its flexible and participatory nature, provides a framework for constructive dialogue and negotiation between the parties, enabling them to reach creative, practical, and mutually beneficial solutions without the imposition of a binding judgment. This study, using a descriptive-analytical method and examining documents, laws, contractual practices, and case studies in the oil and gas sector, evaluates the effectiveness of mediation in upstream oil contracts. The findings indicate that mediation, due to its confidentiality, preservation of commercial relationships, reduction of operational disruptions, significant savings in time and costs, and the possibility of offering solutions tailored to the specific circumstances of each dispute, has considerable advantages compared to litigation and even arbitration. Furthermore, flexibility in the selection of mediators, determination of rules, and the venue of sessions, along with its focus on future-oriented solutions, makes this method more compatible with the needs of the oil industry. As a result, it is recommended that in drafting upstream oil contracts, the inclusion of binding or incentivizing clauses for referring disputes to mediation prior to other dispute resolution methods be considered as a key strategy, in order to prevent the escalation of severe conflicts and enhance the efficiency and sustainability of contractual relationships.

Keywords: *Mediation, Alternative Dispute Resolution (ADR), Upstream Oil Contracts.*

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1. Introduction

The oil and gas industry, particularly in the upstream sector, is regarded as one of the most complex and high-risk economic arenas in the world, encompassing features such as large-scale investments, sophisticated technologies, multilayered supply chains, and the long life cycle of projects (Martin, 2011). This industry is not only influenced by technical and engineering factors but also by critical economic,

political, legal, and environmental variables (Alramahi, 2011). Sudden changes in the global energy market, fluctuations in oil prices, political developments in host states, regulatory reforms, and social and environmental pressures are among the key drivers that frequently give rise to disputes during the implementation of upstream oil contracts (Anthony Connerty, 2002).

Disputes in this sector manifest in diverse forms. They may include boundary disputes between states over shared reservoirs, conflicts between investors and governments stemming from unilateral alterations to contractual terms or the nationalization of resources, disagreements between oil companies engaged in joint ventures or service contracts, and even disputes between corporations and individuals arising from environmental damages or industrial accidents (Mills & Karim, 2010). If not effectively managed, these conflicts can lead to project delays or suspensions, the imposition of enormous costs, and the breakdown of long-term commercial relationships (Maniruzzaman, 2003).

While dispute resolution through the traditional judicial system possesses legitimacy and a legal foundation, it is fraught with challenges. Lengthy proceedings, high litigation costs, the lack of judicial expertise in the technicalities of the petroleum industry, the public nature of hearings and lack of confidentiality, and the adversarial character of litigation discourage parties from pursuing this avenue (McManus, 2013). In contrast, Alternative Dispute Resolution (ADR) methods—particularly mediation—have gained prominence due to their flexibility, confidentiality, and capacity to focus on shared interests (Shade, 1995).

The core objective of ADR is to settle disputes in a more cost-effective and expedited manner while simultaneously preserving long-term relationships among parties (Martin, 2011). ADR mechanisms are widely recommended to reduce the volume of litigation and to offer a cheaper, less adversarial, more informal, and simpler form of justice (Alramahi, 2011). In modern ADR systems, the principle of voluntariness prevails; parties deliberately enter into structured negotiations or refer their disputes to a third party for evaluation and/or facilitation of settlement (A. Connerty, 2002).

Judiciaries, in an effort to alleviate backlogs in court dockets, have also recognized the importance and efficiency of ADR and frequently encourage its application (Maniruzzaman, 2003). Instead of adopting a "winner-takes-all" approach, ADR systems emphasize broader access to justice, improved efficiency, and reduced court delays (Kariuki et al., 2019). Considering the multidimensional nature of the oil and gas industry, structured negotiations, easy access to justice, and the swift resolution of disputes constitute principal hallmarks of ADR.

Mediation is a non-binding process in which a neutral third party (mediator), through facilitation and negotiation techniques, guides the parties toward achieving a mutually acceptable solution (Fuller, 1971). The major advantage of mediation in upstream oil contracts lies in its ability to reduce time and cost, preserve commercial relations, and prevent escalation of disputes. It also allows parties to devise creative, tailor-made solutions appropriate to the specific circumstances of each project—solutions that may extend beyond the scope of judicial or arbitral awards (Leeson & Johnston, 2018).

From a contractual perspective, many modern international oil and gas agreements incorporate multi-tiered dispute resolution clauses, in which mediation is expressly required as a preliminary step before arbitration or litigation (Wilson & Blackmore, 2013b). This approach not only facilitates dispute settlement but also increases the likelihood of achieving durable solutions and reducing both operational and legal expenses by creating opportunities for dialogue.

Given the particular features of the upstream oil sector and the risks arising from disputes in this field, examining the role of mediation and analyzing its advantages, challenges, and requirements provides valuable guidance for contract drafters, legal advisors, and industry decision-makers. The aim of this study is to offer a comprehensive analysis of the position of mediation in managing disputes under upstream oil contracts and to propose practical strategies for enhancing its effectiveness in practice.

2. Alternative Dispute Resolution Mechanisms (ADR)

The international petroleum industry, along with its associated construction projects, is considered "one of the industries with the highest rate of disputes globally" and "represents the largest cluster of state disputes and international claims" (Alramahi, 2011; Martin, 2011). Disputes generally arise when "a matter occurs that was neither foreseen nor addressed in the original agreement

between the parties" (Alramahi, 2011). Since it is virtually impossible for contracting parties to anticipate all potential disputes—largely because "circumstances, economies, governments, and parties invariably change over the long course of an international petroleum project"—disputes remain inevitable (Martin, 2011).

In the international petroleum industry, four principal categories of disputes are observed:

1. **Disputes between states:** These predominantly concern boundaries, often involving oil fields "that straddle international frontiers, most of which lie offshore" (Martin, 2011). Notable examples include disputes between Libya and Malta, Cyprus and Turkey, and Iran and Qatar.
2. **Disputes between investors and governments:** Such disputes may arise when states "significantly alter the terms of the original contract or nationalize or expropriate an investment" (Alramahi, 2011; Martin, 2011).
3. **Disputes between oil companies:** These usually occur among companies engaged in joint ventures or "between operators and service contractors" (Martin, 2011). "This type of dispute constitutes a substantial proportion of oil company cases" (Martin, 2011; Mills & Karim, 2010). Examples include disagreements over product quality and quantity, jurisdictional conflicts, and disputes relating to equipment (Anthony Connerty, 2002).
4. **Disputes between individuals and oil companies:** These disputes may arise when individuals claim damages against oil companies or suffer adverse effects on their livelihoods from accidents linked to corporate operations. Illustrative examples include disasters caused by PT Lapindo Brantas in Indonesia and by BP in Mexico (Martin, 2009).

Overall, disputes in international petroleum projects constitute a "substantial risk" and can impose costs amounting to millions of pounds on oil companies (Alramahi, 2011; Martin, 2011). Hence, the inclusion of dispute resolution mechanisms in petroleum contracts is an undeniable necessity. These mechanisms serve as alternatives to traditional litigation and are commonly recognized under the umbrella of "Alternative Dispute Resolution." Even in the absence of such contractual provisions, under the Pre-Action Protocol of the United Kingdom, parties are expected to explore ADR before initiating formal litigation, and courts retain discretion to refer ongoing cases to ADR (Civil Procedural Rules, 1998).

2.1. Expert Determination

At the next stage, Expert Determination (ED) is raised, under which the parties appoint a third-party specialist in the subject matter of the dispute to determine the outcome (Kendall et al., 2008). The expert is usually selected based on the nature of the dispute, and the parties may stipulate the method by which the expert makes a determination and insist that the reasoning or basis of the decision be disclosed (Roberts, 2004).

The parties may voluntarily agree that the expert's decision is binding or merely advisory. If the expert's determination is declared final and binding, it is deemed part of the contract and may also be enforceable in court, provided that no fraud or manifest error has occurred ("Shell (UK) Limited v Enterprise Oil PLC," ; "Total Gas Marketing Limited v ARCO British Limited,").

This ADR mechanism is suitable and effective where disputes are of a technical or commercial nature (Anthony Connerty, 2002). Hence, it is often used in combination with other ADR mechanisms that deal with non-technical issues. In the oil industry, ED is usually employed for re-determinations and to resolve specific issues provided for in the contract ("Total Gas Marketing Limited v ARCO British Limited,"). An example of an ED clause is found in Article 37.3 of the Model Producing Oil Field Technical Service Contract of Iraq (Model Producing Oil Field Technical Service, 2009).

2.2. Mediation

Mediation is also an ADR mechanism defined as negotiation facilitated by a neutral and impartial third party (the mediator), who assists the parties in reaching an objective settlement (Shade, 1995). The success of this method requires the parties to set aside their disputes and be willing to compromise (McManus, 2013; Schwebel, 2007).

A mediator need not be an expert in the subject matter of the dispute and "has no power to impose a solution," although the parties may appoint mediators with

technical knowledge of the petroleum industry (McManus, 2013).

Typically, the mediator follows a four-stage process:

- Inviting the parties to the negotiation table and encouraging them to put aside the emotional aspects of the dispute (McManus, 2013).
- Assisting the negotiation process through "shuttle diplomacy," identifying obstacles to agreement, and ultimately facilitating settlement.
- Providing neutral support to the parties by focusing on their real interests rather than their contractual or legal rights (Hunter, 2000).
- Offering practical recommendations that may help in reaching an amicable settlement (Maggiolo, 1985; Marks, 1990).

In oil and gas disputes, parties are accustomed to maintaining control over their affairs and therefore prefer to participate in mediation rather than leaving decisions to a judge or arbitrator. Traditionally, courts refrained from enforcing mediation agreements because of their uncertainty, and mediation is not legally binding unless an agreement is signed by the parties (Civil Procedural Rules, 1998). For this reason, mediation is often employed as a filtering mechanism before resorting to other ADR methods, as seen in international petroleum contracts in jurisdictions such as Thailand, Indonesia, China, and Bangladesh.

2.3. *Advantages and Challenges of ADR Compared to Litigation*

2.3.1. *Time and Cost*

One of the commonly cited advantages of ADR mechanisms is that they are often cheaper and faster than litigation (Maniruzzaman, 2003). During litigation, parties spend countless hours on witness testimony, document discovery, and trial preparation, and final judgments typically take years to be issued due to bureaucracy and the possibility of appeals, resulting in enormous legal and court costs. By contrast, ADR mechanisms are usually more cost-effective and faster to conclude, mainly because the grounds for appeal are limited (Rigas, 2015). For example, mediation requires "less than 5% of the cost" and "less than 15% of the time" compared to arbitration (Jagtiani, 2024).

Oil companies profit or lose by the second depending on production or non-production. Therefore, it is essential that disputes be resolved quickly and cost-effectively, as prolonged contractual disputes can result in losses of millions of pounds due to reduced profits and reputational harm (Alramahi, 2011). Hence, litigation is often unsuitable for resolving such disputes, and ADR is preferable.

However, it should be noted that arbitration may be just as costly and slow as litigation, due to the fees of arbitrators, translators, and consultants, as well as procedural delays. In institutional arbitration, the final award may also take months or even years to enforce (New York Convention, 1958).

2.3.2. *Privacy and Confidentiality*

Another major advantage of ADR mechanisms is that they operate privately and confidentially, whereas proceedings and filings in litigation, except in rare cases, become public (Roberts, 2004).

In the oil industry, disputes often involve trade secrets, intellectual property issues, advanced technological information, and other highly sensitive commercial matters. Confidentiality prevents competitors from exploiting such information or gaining access to contractual details that could provide them with an advantage in future tenders (Wilson & Blackmore, 2013a). Furthermore, if the market becomes aware that two companies are in conflict, this could damage their reputation, negatively affect investor relations, and reduce share prices (Manne, 1965).

For these reasons, litigation—where proceedings and judgments are publicly recorded—is inappropriate, while ADR provides a more suitable option as disputes are resolved away from media scrutiny, preserving privacy and confidentiality. Nevertheless, it should be considered that arbitration, while private, may become public if parties seek to challenge or enforce the award in court (A. Connerty, 2002).

One disadvantage of ADR's confidentiality is that no legal precedent is created by the outcome. Unlike litigation, ADR does not contribute to the development of law or general standards of fairness and justice.

ADR also allows parties to select an expert, mediator, and/or arbitrator with specialized knowledge of the specific petroleum dispute, unlike litigation, where judges are assigned and may lack relevant expertise

(Muigua, 2014). In addition, parties may choose the allocation of costs, the seat of arbitration or mediation, the language of proceedings, and the schedule of hearings—flexibilities unavailable in litigation (Maniruzzaman, 2003). By contrast, in court litigation, parties have no control over such factors and may suffer delays leading to rising costs.

Certain ADR methods offer greater flexibility than others. For example, in mediation, the parties themselves can propose solutions, something that arbitration does not permit (Fisher et al., 1991). On the other hand, institutional arbitration limits party flexibility, as they must comply with the procedural rules of the chosen institution.

2.3.3. *Preservation of Commercial Relationships and Minimal Disruption*

In addition, ADR mechanisms are highly useful for preserving and protecting commercial relationships between parties while creating minimal disruption to ongoing projects (Rigas, 2015). For example, in mediation, the absence of fault-finding and the collaborative experience of reaching a mutually agreed solution can help maintain, and in some cases even strengthen, the relationship that existed prior to the dispute (Fuller, 1971; Maniruzzaman, 2003).

By contrast, litigation creates a hostile environment, and regardless of the outcome, the business relationship between the parties may be destroyed "due to the bitterness generated," to the extent that parties may not be able to cooperate again even when it is in their interest (Maniruzzaman, 2003). Given that disruption to ongoing operations is "highly undesirable" in the oil sector, and since parties generally wish to continue their commercial ties after the resolution of a dispute, ADR mechanisms are especially appropriate for resolving petroleum-related conflicts (Rigas, 2015).

One of the fundamental shortcomings of litigation is that it often cannot provide the optimal solutions for both parties (Maniruzzaman, 2003). By contrast, ADR outcomes may better align with the interests of both parties because they are tailored, practical, and creative (Jagtiani, 2024). For instance, sometimes the best solution may involve revising the petroleum contract rather than awarding damages, which is typically the remedy provided by courts (Anthony Connerty, 2002).

However, it is argued that ADR may be less appropriate where punitive damages are necessary to deter future unlawful or reckless behavior. For example, in cases where an oil company violates environmental regulations, courts are better positioned to adjudicate and impose penalties for environmental harm. An illustrative case is the BP environmental disaster, where the company was fined $18.7 billion.

Moreover, litigation may not provide a clear forum for determining jurisdiction in petroleum disputes (Maniruzzaman, 2003). For example, if a dispute arises between a host government and an oil company, the company cannot always rely on foreign courts, since judges may harbor a degree of bias toward the host state, especially under political influence. The only effective way to address this problem and balance "political risks" is to include dispute resolution clauses in petroleum contracts that provide for mandatory arbitration and/or mediation (Cotula & Tienhaara, 2013).

It can also be argued that litigation may be more appropriate when disputes involve complex legal issues. Unlike arbitration, in litigation third parties may be joined to proceedings after they have commenced (Civil Procedural Rules, 1998). Additionally, when the sums at stake are very large, litigation may be the preferred option (Maniruzzaman, 2003).

In practice, examples of petroleum disputes resolved through litigation include *Amoco v. Teesside Gas Transportation* and *BHP v. Dalmine SpA*.

Overall, ADR mechanisms enjoy significant advantages and are generally considered more suitable than litigation. These methods are often more cost- and time-efficient, flexible, minimally disruptive to operations, and capable of preserving existing relationships (Maniruzzaman, 2003). By contrast, "litigation is expensive and lengthy, lacks privacy and confidentiality, fails to preserve commercial relations, and lacks international enforceability" (Roberts, 2004).

Accordingly, it is vital for parties to include ADR mechanisms in their petroleum contracts. Nevertheless, this study demonstrates that there remains debate over the advantages and disadvantages of ADR compared to court litigation. It may be argued that even though ADR methods have certain shortcomings, their benefits relative to litigation render them the more appropriate mechanisms for resolving disputes in the oil industry.

3. Facilitating Features of Mediation

The key factors to be considered in deciding whether disputes arising under petroleum exploration and production agreements are amenable to consensual dispute resolution mechanisms such as mediation are discussed below. In analyzing these factors, mediation must be compared with both litigation and arbitration as dispute resolution mechanisms.

Two fundamental concepts frame this analysis.

First, negotiation is the common element that links litigation to mediation and other ADR processes. Without the existence of litigation as a background system for dispute resolution, mediation and other forms of ADR would likely not have developed (Marks, 1990). Since the threat of litigation often provides the incentive for parties to resolve disputes, parties must believe it is preferable to resolve disputes through negotiation rather than to have solutions imposed by the courts (Stevens et al., 2013).

Second, most parties genuinely wish to explore every possible avenue to reach an agreement and believe that mediation can facilitate a mutually acceptable outcome—even if direct negotiations between the parties have previously failed (International Bar Association, 2011).

3.1. Disputes Between Parties with Ongoing Relationships

When parties to a dispute have an ongoing relationship, mediation is generally a better method of resolution than litigation or arbitration (McManus, 2013). Numerous examples demonstrate that parties alienated by the bitterness of litigation are unable to cooperate in post-trial matters, even when such cooperation would serve their interests (Maniruzzaman, 2003). Litigation itself, regardless of the outcome, can weaken or destroy the relationship—something that often matters more in the long run than the specific result of the proceedings.

Mediation is "considerably gentler than litigation or arbitration and therefore less likely to disrupt existing relationships" (Shade, 1995). If parties are able to resolve their dispute through consensual negotiation, the pre-existing relationship is preserved. In some cases, the relationship may even be strengthened, as parties gain understanding and appreciation of each other's perspectives (Fuller, 1971). During mediation, each side usually secures part of what it seeks, and parties often reach a new level of mutual understanding and empathy. The mediation of a dispute may even serve as a model for addressing future conflicts.

In the oil and gas context, the particular nature of the relationship between lessor and lessee often provides greater incentives for consensual settlement. For instance, suppose O owns a 160-acre farm called *Blackacre*. O cultivates cotton and vegetables, typically earning between $40,000 and $50,000 in net annual profits. Assume O leases the land to E under an oil and gas lease, under which O receives a one-sixth royalty, and E drills two wells on *Blackacre*, each producing an average of 100 barrels of oil per day.

In this scenario:

1. Both O and E use *Blackacre*.
2. Both operate separate businesses on the land.
3. O shares in E's business through royalties.
4. There exists a significant economic disparity between the revenues and profits of E's business and those of O's.

Although these factors frequently generate disputes, they also provide powerful incentives for consensual settlement. The interests of O and E are so intertwined that both parties are likely to identify common ground and economic motivations for resolution.

Mediation does not assign fault. It avoids creating clear winners and losers. Instead, mediation "focuses on who will do what, when it will be done, and how the problem will be solved" (McManus, 2013). The absence of blame, combined with the experience of cooperative problem-solving, helps preserve the relationship—something litigation may destroy (Fuller, 1971).

3.2. Disputes Best Resolved Through Remedies Unavailable to Courts

In many cases, the best solutions for both parties involve measures that courts are unable to provide. This is particularly true in commercial disputes, and especially in oil and gas conflicts, where the optimal outcome is often contract renegotiation or amendment—something achievable through mediation but unavailable in arbitration or litigation (Cotula & Tienhaara, 2013).

With the assistance of a mediator, parties can often create a solution that generates value for both sides. This requires cooperation and is only possible through a consensual mechanism (Leeson & Johnston, 2018). Such

outcomes frequently involve complex trade-offs demanding flexibility, creativity, and skilled negotiation. Sometimes one party proposes a solution, which is then adjusted through subsequent negotiations until it is optimized (Leeson & Johnston, 2018).

Mediation offers a space for the application of negotiation and bargaining skills commonly used in the petroleum industry, which is particularly beneficial for resolving disputes between lessors and lessees (Leeson & Johnston, 2018). The mediator's facilitation of communication can reveal the true interests or hidden objectives of the parties—a vital element of the negotiation process. Resolving disputes through mediation thus more closely resembles conducting a deal in the oil business than appearing in court.

3.3. *Where Parties Wish to Retain Control Over Their Dispute*

In most lessor–lessee disputes, parties prefer to retain maximum control over the dispute resolution process rather than delegate this authority to a judge or arbitrator. Mediation gives the parties control over procedural details such as the time and place of sessions, cost allocation, procedural rules, and other arrangements. They may also propose practical and commercial solutions that are legally sound (Anthony Connerty, 2002).

Most importantly, only the parties themselves retain ultimate authority to settle, and they may inform the mediator if they have reached an impasse. Mediation provides flexibility and opportunities for parties to craft their own solutions. This approach not only enables more active party participation but also places responsibility for resolution in their hands—even if this requires one or both parties to adjust their positions (Leeson & Johnston, 2018).

3.4. *Where Parties Desire a Forward-Looking Resolution*

"Mediation is a forward-looking process" (Leeson & Johnston, 2018). Unlike litigation and arbitration, which focus on the past to determine "who was right and who was wrong," mediation seeks solutions for the future that parties can live with.

Judicial processes are bound by factual findings about past events (Leeson & Johnston, 2018). Based on these findings, rights and obligations are determined, and legal remedies or contractual duties are imposed. By contrast, mediation does not concentrate on establishing what happened in the past. Its focus lies on shaping future conduct to resolve the underlying problems that gave rise to the dispute (Leeson & Johnston, 2018).

3.5. *Where Privacy and Confidentiality Are Important*

Whether mediation is initiated voluntarily by the parties or ordered by a court, it is a private process. What occurs in mediation is known only to the parties and their mediator (Leeson & Johnston, 2018). By contrast, in litigation, almost everything stated or submitted becomes part of the public record, except in rare circumstances (Civil Procedural Rules, 1998).

Mediation is also confidential. For example, statutory frameworks in many jurisdictions specify that communications and records relating to ADR proceedings are confidential. Such communications are not discoverable and are inadmissible in any judicial or administrative process. Neither the parties nor the neutral third party are required to testify or disclose confidential information. Moreover, the neutral mediator cannot reveal confidential information to either party without the express consent of the disclosing party (Muigua, 2014). The sole exception is that communications or records otherwise admissible outside mediation do not become confidential simply because they were used during the process.

Confidentiality has three main aspects: first, when one party provides information to the mediator in a private caucus and does not want it disclosed to the other side, they can be assured the mediator will not reveal it without consent. Second, the parties know that nothing said or done during mediation will later be used against them. Third, they know the mediator will not testify about what occurred or disclose process-related information to anyone, including family, colleagues, or the media (Allen & Monson, 2014).

The principle of confidentiality in mediation is based on the broader policy of encouraging parties to share information freely, which contributes to dispute resolution. Mediators also attach great importance to confidentiality, typically avoiding transcripts and resisting attempts to compel them to testify or disclose information (Fuller, 1971). Privacy and confidentiality are generally desirable in commercial disputes and especially critical in the oil and gas industry, where the

concept of "tight-holing" is applied to denote secrecy in operational and contractual matters (Wilson & Blackmore, 2013b).

3.6. *Where Parties Have Divergent Assessments of Law and/or Facts*

Unassisted bargaining often fails because parties have different interpretations of law or facts. Typically, parties base their settlement positions on their assessment of the likely outcome in litigation. In this context, perceptions may diverge, and it is common for each party to be overly optimistic about its chances of success. Effective mediation can lead to a more realistic assessment of law and facts, thereby increasing the likelihood of settlement (A. Connerty, 2002).

Mediators can facilitate information exchange, introduce new perspectives, identify the sources of divergent assessments, and highlight weaknesses in each party's case. These weaknesses are usually addressed in private and confidential caucus sessions with each side (Leeson & Johnston, 2018). Skilled mediators, through diplomacy, can compel parties to face realities, help them understand the opposing perspective, and temper unrealistic expectations.

Sometimes negotiations fail or never begin because of intense emotions or the fear that initiating talks may be perceived as a sign of weakness. In such situations, mediators can facilitate dialogue by providing a neutral and positive environment, enabling constructive expression of emotions, and ensuring that parties' concerns are acknowledged.

3.7. *Where Parties Wish to Minimize Time and Costs*

All parties seek to save time and costs. Mediation, in the vast majority of cases, achieves both. Studies show that mediations leading to settlement resolve disputes more quickly than litigation (The World Bank, 2017). These studies indicate that mediations typically conclude within weeks or months of commencement—whether initiated voluntarily under a mediation agreement or ordered by a court—while litigation often takes years before a final resolution (McManus, 2013).

Research also shows that both time and costs are significantly reduced through mediation (Maniruzzaman, 2003). On average, approximately 98% of civil litigation costs are lawyer's fees. Thus, the dispute resolution method requiring the least lawyer hours is the most cost-effective. Of course, mediators charge fees, and parties may still retain counsel, but mediation costs depend on duration, complexity, and attorney involvement. Nonetheless, empirical findings demonstrate that when mediation produces a settlement, overall costs are substantially lower than litigation, and even when settlement is not achieved, the costs are roughly comparable to cases where mediation was never attempted (Rigas, 2015).

3.8. *When Mediation Appears Preferable*

Although mediation is generally considered preferable to arbitration or litigation for resolving disputes between lessors and lessees, as with any general statement, this claim is subject to certain caveats and exceptions.

For example, mediation is inappropriate when one or both parties seek to establish a legal precedent. Victories in test cases, proving the validity of a particular legal issue, or creating judicial precedents cannot be achieved through mediation, because mediated agreements do not determine rights and wrongs and are not binding precedents for future disputes (McManus, 2013).

Furthermore, there is no guarantee that mediation will resolve a dispute. If mediation fails, the dispute must then be resolved through arbitration or litigation. However, since the options of arbitration or litigation remain available if mediation fails, there is little or no risk in attempting mediation (A. Connerty, 2002).

4. Justification for Mediation as the Preferred Mechanism in the Extractive Industry

In many resource-rich countries, disputes over the details of mining and extractive contracts are common and often politically charged (Stevens et al., 2013). In recent years, a series of bitter conflicts have occurred, some of which have resulted in expropriations, lengthy litigation, or even project cancellations, thereby unsettling investors (Stevens et al., 2013). Mineral and oil production is increasingly located in regions with difficult environmental, geological, and political conditions, as easily accessible reserves decline. Challenges such as water scarcity and climate change, which disrupt weather patterns, introduce new risks for investors and producers. Mediation—through negotiations between parties with the assistance of a

neutral third party—can effectively resolve such disputes as they arise, since stakeholders in an extractive industry project are able to identify common interests and manage conflicting priorities.

According to Francis Kariuki, Geoffrey Kerecha, and James Kirwa, extractives-related disputes in Kenya stem from a range of factors, including: (1) land issues such as control, ownership, and compensation; (2) insufficient consultation with community members; (3) inequitable distribution of benefits in terms of employment, revenues, and business opportunities; and (4) security concerns, given that the Turkana region faces cattle raids and intercommunal violence (Kariuki et al., 2019). In the past, local communities relied on traditional dispute resolution mechanisms, such as arbitration sessions conducted by elders, to address communal conflicts like cattle raids. However, with the growth of extractive activities, additional stakeholders have become involved, and mediation can play a key role in crafting acceptable solutions for all parties.

The extractive industry value chain includes the granting of contracts, monitoring operations, collecting royalties and taxes, managing and allocating revenues, and implementing sustainable development policies (Kariuki et al., 2019). At each stage of this value chain, numerous stakeholders are engaged, including companies (both state-owned and private, such as international oil companies), government bodies, financial institutions, local communities, and NGOs. These actors have divergent interests, and at times these conflicts intensify disputes (Kariuki et al., 2019). As a result, the extractive industry faces significant challenges arising from inadequate public participation, insufficient information disclosure, and a persistent sense of exclusion (Kariuki et al., 2019).

In Kenya, county governments have also turned to ADR to address disputes stemming from the exploitation of natural resources. For instance, coal-related disputes in Kitui County date back to the early 2000s, following the confirmation of substantial deposits in Kitui and Mwingi Counties (Obiri, 2014). Although these disputes initially involved politicians, they gradually spread to local communities (Obiri, 2014). Key issues identified included inadequate compensation for displaced communities, insufficient local participation, poor land adjudication processes and lack of title deeds, unclear benefit-sharing formulas, inadequate communication with local communities, lack of training, and political divisions leading to conflicting interests at the county level (Obiri, 2014).

With respect to dispute resolution mechanisms, participants in a study conducted by the Security Research and Information Centre noted that extractive-related disputes are often handled by local administrators, Members of County Assembly (MCAs), and liaison committees (Musoi et al., 2018). The Kamba Council of Elders is also recognized as a leading authority in community mining affairs, and community members often place greater trust in local leadership than in other dispute resolution processes, which may heighten tensions between parties (Musoi et al., 2018).

5. Why Mediation Is Suitable for Addressing Disputes in the Extractive Industries

Sustainable development, as set forth in Principles 1–10 of the Rio Declaration, requires placing local communities at the center of the development process. Consequently, disputes are best managed through the participation and engagement of community members (UN, 2020). The Mining Law Committee of the International Bar Association has prepared a Model Mine Development Agreement intended to serve as a template for mining contracts (Cotula & Tienhaara, 2013). This contract is not directly enforceable between parties, but it provides sample clauses that negotiating parties may adopt. For example, Clause 16 stipulates that if an environmental dispute is not resolved through negotiations within 45 days, the dispute must be referred to an Environmental Management Board, and if the board is unable to resolve the matter within 90 days, the dispute may be referred to arbitration (International Bar Association, 2011). This demonstrates that the mining industry has already incorporated ADR mechanisms into its contractual practices. Mediation has increasingly attracted attention, although arbitration remains the most widely used mechanism.

Foreign Direct Investment (FDI) has been emphasized by policymakers and international development organizations as a tool for reducing inequality between rich and poor countries (Cotula & Tienhaara, 2013). In recent years, extensive debates have focused on the importance of investment for sustainable development—development that balances social, economic, and environmental considerations so that the

needs of the present are met without compromising the ability of future generations to meet theirs (Cotula & Tienhaara, 2013). With the expansion of extractive industries in Kenya, however, the impacts on local communities are often negative, particularly because adequate legal frameworks to manage disputes arising from extractive industry cycles remain lacking.

The life cycle of an oil and gas project spans upstream, midstream, and downstream phases, whereas mining involves several stages under the Mining Act of 2016, including preliminary exploration, exploration, feasibility studies, construction, and operations. These projects may benefit the national economy through injections of FDI, yet they expose indigenous populations to adverse consequences, such as the loss of ancestral lands through compulsory acquisition by the state (Cotula & Tienhaara, 2013). The ultimate goal of any petroleum or mining project should be to improve local livelihoods while also protecting the environment.

Article 33 of the United Nations Charter outlines various conflict management mechanisms, including negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, recourse to regional arrangements, and other peaceful means chosen by the parties (Muigua, 2014). International investors seek to safeguard their commercial interests from arbitrary government interference by protecting property rights—particularly significant in natural resource and infrastructure projects, which are usually long-term and heavily reliant on state regulatory authority (Cotula & Tienhaara, 2013). Resorting to formal judicial processes, such as courts, often consumes significant time before a complaint is resolved. Because energy projects like oil and gas have fixed timelines for making final investment decisions, ADR mechanisms such as mediation offer an effective path for investors to secure their capital while also ensuring that local community views and participation are incorporated into dispute resolution.

During the life of a project, structural pressures frequently challenge the contractual relationship. For example, existing contracts may be affected by commodity price fluctuations, and renegotiations often occur during political transitions, especially when shifting from dictatorship to democracy. Another challenge is the shift in bargaining power: a company may initially hold substantial leverage due to financing and technical expertise, but by the end of the project, the balance of power may shift (Stevens et al., 2013). It is therefore essential to have mechanisms that can address complaints arising from such challenges, protect the interests of all stakeholders, and do so efficiently without leading to the collapse of relationships.

Disputes occur when the interests of two or more groups conflict. However, some grievances can also lead to positive change, especially when they are non-violent, as they become a critical part of social transformation and development. This is only possible if groups trust the governance structures and institutions necessary to manage disputes (United Nations Environment Programme, 2012). The exploitation of non-renewable natural resources, including oil and gas, has often been cited as a key driver in generating, exacerbating, or sustaining violent conflicts worldwide (United Nations Environment Programme, 2012). Yet through mediation, parties can reach agreements on outstanding issues and resolve disputes amicably.

Moreover, mediation as practiced within local communities is inherently conciliatory, as it helps stakeholders identify shared interests, maximize mutual gains, and collaboratively address common problems and challenges (Kariuki et al., 2019). These features are crucial, as they enable disputants to move beyond technical disagreements by gathering common information, identifying multiple overlapping interests, and ultimately producing a solution acceptable to all parties (Kariuki et al., 2019).

However, reliance on community-based mediation in ADR also raises concerns of gender inequity. In some local traditions, women are treated as subordinate and therefore may have their rights under a constitutional bill of rights curtailed (The Judiciary of Kenya, 2020). In certain cultural contexts, women cannot represent themselves in local fora and must instead be represented by a male of their choosing (The Judiciary of Kenya, 2020). Human rights provide the appropriate language and framework for redistributing justice in society, and in the context of a bill of rights, they constitute the most transformative tool for both society and the judiciary in advancing access to justice (The Judiciary of Kenya, 2020). Accordingly, under the framework of Alternative Justice Systems, respect for rights and freedoms entails limiting state interference with individuals' enjoyment of those rights and freedoms (The Judiciary of Kenya, 2020).

6. The Use of Mediation in Resolving Upstream Oil Contract Disputes

The oil and gas industry, particularly in the upstream sector, is highly exposed to disputes due to the magnitude of investment, technical complexities, long project cycles, and the broad impact of economic and political factors. Such disputes may arise from technical issues, changes in economic conditions, nationalization or expropriation, disagreements over production quality and quantity, or conflicts involving social and environmental interests. In this context, it is essential to use mechanisms that can resolve disputes rapidly, cost-effectively, and with minimal disruption to operations. Mediation, as an ADR mechanism with a flexible and participatory character, enables constructive dialogue and negotiation between parties and guides them toward creative, interest-based solutions without imposing a binding decision (Jagtiani, 2024).

The primary advantage of mediation in upstream oil contracts lies in preserving long-term commercial relationships and reducing the costs associated with project delays and litigation. In contrast to traditional litigation—which is often lengthy, costly, marked by judges' lack of technical expertise, and conducted in open sessions—mediation offers a confidential, flexible, and less adversarial process capable of addressing complex disputes in oil projects (Mohammed, 2023). Legally, upstream petroleum contracts frequently contain multi-tiered dispute resolution clauses, which provide for mediation as a preliminary step before arbitration or litigation. This mechanism gives parties the opportunity to resolve disputes amicably and on the basis of shared interests before resorting to binding judicial or arbitral proceedings (Clyde Co, 2025).

Moreover, mediation allows for tailored solutions that reflect the specific conditions of each project and the host country's legal environment. In many cases, upstream petroleum disputes are not purely contractual but are intertwined with political and social concerns, requiring flexible and forward-looking solutions—something that mediation can uniquely deliver (JusMundi, 2025). Given the importance of confidentiality in petroleum transactions and the need to protect sensitive commercial information, mediation offers the distinct advantage of resolving disputes away from public scrutiny, thereby safeguarding corporate reputations and commercial relationships (Youssef & Partners, 2023).

Despite these advantages, mediation also has limitations. First, mediated agreements are binding only if the parties formalize them in writing; otherwise, they carry limited enforceability. Second, the success of mediation depends on the willingness and good faith of the parties, and if they are unwilling to engage, the process may fail. Third, the absence of direct judicial oversight in enforcing mediated settlements can create challenges, necessitating complementary mechanisms to secure compliance (Jagtiani, 2024).

Nevertheless, international practice demonstrates that mediation in the oil and gas industry can mitigate severe conflicts, reduce costs, enhance project efficiency, and sustain contractual relationships. Therefore, it is recommended that upstream oil contracts include mandatory or incentivizing mediation clauses before arbitration or litigation, while also promoting specialized mediation institutions and training parties in mediation practices to enhance effectiveness (Clyde Co, 2025; Mohammed, 2023).

Overall, mediation as both a legal and operational tool reduces the cost and time of dispute resolution, provides flexibility to adapt to the complexity of upstream oil contracts, and serves as an effective alternative to traditional mechanisms—especially in environments where business relationships, sensitive information, and long-term interests are of primary importance.

In Uganda, social tensions and conflicts emerged following the discovery of petroleum reserves in the Albertine Basin in 2006. These developments negatively impacted local communities, as disputes over land and resources arose from government and private sector exploitation of natural assets (Langer et al., 2020). Community expectations initially rose in anticipation of increased capital inflows from oil and gas development, but instead, competition over land intensified. Reports from the Bunyoro Albertine Civil Society Network for Environmental Protection revealed that three killings occurred between the Alur community and pastoralists over land use disagreements (Langer et al., 2020). This illustrates how grievances can escalate in the absence of adequate dispute resolution mechanisms.

Similarly, in Papua New Guinea, widespread evidence shows that land disputes intensified following the discovery of large-scale extractive industries. These

developments spurred rural-to-rural and rural-to-urban migration, sustained high population growth, and the expansion of small-scale cash crop farming (Allen & Monson, 2014). Left unaddressed, land disputes may evolve into interpersonal and group violence, and subsequently escalate into wider armed conflicts (Allen & Monson, 2014).

The Land Disputes Settlement Act (1975) regulates disputes arising from the use, ownership, and boundaries of customary land in Papua New Guinea. It established a system of land mediation intended to be "close to the people" and to provide a mechanism for utilizing traditional dispute resolution processes, implemented by government-approved land mediators (Allen & Monson, 2014). These mediators must possess in-depth local knowledge of customary land tenure systems, which vary significantly across regions. The Act also stipulates that if mediation fails, the aggrieved party may appeal to Local Land Courts and, if unsatisfied, to Provincial Land Courts. The courts emphasize arbitration but prioritize mediation and conciliation (Allen & Monson, 2014).

Furthermore, international oil companies (IOCs) and local communities have found that relying on local judicial systems for dispute resolution does not always produce satisfactory outcomes. Consequently, communities often resort to alternative avenues to voice their grievances, such as the "court of public opinion," supported by international NGOs, or by taking actions that disrupt company operations—such as road blockages or protests (Wilson & Blackmore, 2013b). An example occurred on 27 June 2018, when Turkana residents blocked oil trucks from the Ngamia 8 well in protest over employment issues, procurement opportunities, insecurity, and community shares of oil revenues (Etyang, 2018).

Accordingly, mediation has been proposed as an innovative approach to complement other dispute resolution methods, offering stakeholders solutions outside the rigid framework of traditional mechanisms. Such approaches provide speed, fairness, dialogue, and greater space for creative settlements (Wilson & Blackmore, 2013b). Prominent mediators emphasize that when dialogue focuses on sustainable solutions that meet the core interests of both parties, the likelihood of achieving win–win outcomes increases. This not only saves time and costs but also reduces the risk of future conflicts (Wilson & Blackmore, 2013b).

7. Conclusion

A comprehensive examination of mediation as a dispute resolution mechanism in upstream oil contracts shows that, due to its flexible and participatory nature, it can effectively serve as both an alternative and a complement to traditional methods such as litigation and arbitration. The upstream oil sector is inherently complex and multifaceted, combining technical risks, large-scale investments, long project cycles, and sensitivity to economic, political, and environmental factors. Under such conditions, disputes between governments, oil companies, investors, and local communities are inevitable, and poor management of these disputes can lead to project delays, increased costs, reduced efficiency, and the deterioration of long-term commercial relationships.

Mediation, through its non-binding approach and focus on negotiation and dialogue facilitation, provides a constructive avenue for resolving disputes in ways tailored to the specific context of each project. It allows parties to identify creative, practical, and mutually beneficial solutions often unavailable within the limited framework of arbitration or judicial proceedings. Confidentiality, preservation of business relationships, reduced operational disruption, cost and time savings, and enhanced party satisfaction are among its most significant advantages in this field.

The flexibility to select mediators, determine procedural rules, choose venues for sessions, and focus on forward-looking solutions aligns mediation with the particular requirements and challenges of the oil industry. Moreover, evidence from international oil and gas contracts indicates that incorporating mediation as an initial step in multi-tiered dispute resolution clauses significantly increases the likelihood of sustainable agreements, reduces the volume of litigation, and enhances operational efficiency. This approach not only prevents the escalation of conflicts but also strengthens trust and long-term cooperation between parties.

In light of these findings, it is recommended that upstream oil contracts include mandatory or incentivized clauses for referring disputes to mediation prior to arbitration or litigation. Adopting such a strategy can serve as an effective tool for managing legal and

operational risks, improving project productivity and sustainability, reducing legal and operational costs, and creating a safe and participatory environment for stakeholder engagement.

Ultimately, mediation is not merely an alternative dispute resolution method but also a preventive and strategic approach to managing upstream petroleum contracts. It plays a vital role in ensuring contractual stability, safeguarding investments, and supporting the continuity of industrial operations in this high-risk sector.

Authors' Contributions

Authors contributed equally to this article.

Declaration

In order to correct and improve the academic writing of our paper, we have used the language model ChatGPT.

Transparency Statement

Data are available for research purposes upon reasonable request to the corresponding author.

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