Journal of Conflict Management & Sustainable Development

Volume 9 Issue 1 2022 ISBN 978-9966-046-15-4

Resolving Oil and Gas Disputes in an Integrating Africa: An Appraisal of the Role of Regional Arbitration Centres

By: ***Wilfred A. Mutubwa*** [*]
&
Eunice Njeri Ng'ang'a[*]

Abstract

This paper will explore the nature of disputes in the realm of oil and gas in Africa. It will look into the recent continental and sub-regional developments in a bid to establish regional integration. Additionally, it will test the limits of intra-African trade and dispute resolution and the imperatives for the African regional courts and arbitration centres. In conclusion, it will offer an analysis of the common reliefs in oil and gas arbitration and highlight the leading cases in oil and gas in international arbitration from an African context.

Keywords: oil, gas, African regional courts, dispute resolution, arbitration centres.

1. Introduction

This Paper identifies and critically discusses the nature of disputes in the oil and gas sector in Africa. Central to this conversation is identifying the recent continental and sub-regional developments in establishing regional integration. The extractives sector cases account for 16 per cent of known investment disputes.[1] Africa, the world's second-largest and second most-populous continent, is endowed with significant oil and natural gas deposits

[*] ***OGW LL.D C.Arb FCIArb Advocate Accredited Mediator. This Article is based on a lecture as visiting Lecturer at the Strathmore University Law School LL.M program, 2021.***

[*] ***Lecturer and Registrar, Mount Kenya University, Parklands Nairobi.***

[1] UNCTAD, Investment Dispute Settlement Navigator, https://investmentpolicy.unctad.org/investment-dispute-settlement (last accessed 2 June 2022). The count excludes disputes involving downstream and support activities.

that are critical to its economic development and sustainability ambitions. There are eight regional economic communities in Africa: the Arab Maghreb Union (AMU), the Community of Sahel-Saharan States (CEN-SAD), the Common Market for Eastern and Southern Africa and the Community of Sahel–Saharan States (COMESA), the Eastern African Community (EAC), the Economic Community of Central African States (ECCAS), the Economic Community of West African States and Economic Community of Central African States (ECOWAS), the Intergovernmental Authority on Development (IGAD), and the Southern African Development Community (SADC).[2] The significance of Africa cannot be underestimated since it accounts for 7.8% of the global oil production.[3] Additionally, Africa is in control of roughly 8.9 per cent of global oil exports.[4] Africa plays host to four of the world's top thirty oil-producing countries: Nigeria, Angola, Algeria, and Egypt.[5] Nigeria is the continent's top oil producer, followed by Algeria and Angola.[6] Africa also has significant natural gas reserves, accounting for 6.9 percent of the world's proven gas reserves. Nigeria has by far the most proven gas reserves in the region, followed by Algeria, Senegal, Mozambique, and Egypt.[7]

2. Nature of Disputes in the realm of oil and gas in Africa

i. State-Investor Disputes

These refer to the disputes between governments and International Oil Companies concerning oil extraction, development, and production

[2] Poorva Karkare and Bruce Byiers, 'Making Sense Of Regional Integration In Africa - ECDPM' (*ECDPM*, 2019) https://ecdpm.org/talking-points/making-sense-of-regional-integration-in-africa/ accessed 10 June 2022.
[3] BP Statistical Review of World Energy 2021, 70th Edition, *https://www.bp.com/content/dam/bp/business-sites/en/global/corporate/pdfs/energy-economics/statistical-review/bp-stats-review-2021-full-report.pdf* (last accessed 10 June 2022), p. 18
[4] Ibid p.32
[5] Ibid p.20
[6] Ibid. p.18
[7] Matthew Goosen, 'Top 10 African Countries Sitting On The Most Natural Gas' (Energy Capital & Power, 2021) https://energycapitalpower.com/top-ten-african-countries-sitting-on-the-most-natural-gas/ accessed 10 June 2022.

agreements. The primary cause of such disputes is legislation that seeks to change or interfere with the value of the project as previously evaluated. The oil industry is very sensitive to the fiscal and legislative framework which affects the commercial viability of previously evaluated projects.[8] Due to such matters, investors emphasize the importance of the legislative framework. Tax regulations and their stability in investment decision-making. The possibility and occurrence of state-investor disputes are incensed by the large amounts of money or property involved in the dealings. Moreover, the acquisition and disposal of interests in these projects either through the disposal of subsidiaries or direct asset sales may also cause conflicts between states and investors.

African states contributed to 135 cases out of the 613 reported cases to the ICSID Convention and Additional Facility Rules. 45% of these cases concerned states` consent in the BITs. Out of these cases, fifty-six involved investor-state disputes over oil and gas with African states contributing to twelve cases. African states continue to experience more investor-state disputes over oil and gas.[9]

ii. State-State Disputes

State to state disputes over oil and gas are not frequent but they occur. They primarily occur where the petroleum fields overlap international borders either offshore on onshore. The offshore disputes arise over who has sovereign power over the Exclusive Economic Zone.[10] Similarly, state-to-state disputes may be caused by differences over the transport fees charged through the cross-border oil and gas pipelines.[11] Further, terrorist attacks in one state may force the state to breach its agreements with another state or act in contrast to the terms of the agreement thus leading to disputes. For instance, the threats registered by the Al Shabaab terrorists in the Turkana

[8] Cristal Advocates, `Dispute Resolution in the Oils and Gas Industry: The Case of Uganda` (2019)
[9] Ignacio Torterola and Bethel Kassa, `Investor-State Disputes in Africa` (13 March 2020) Available at <*https://nairobilawmonthly.com/index.php/2020/03/13/investor-state-disputes-in-africa/*> Accessed on 27 May 2022.
[10] Ibid (n1)
[11] Ibid

region of Kenya led to Uganda cutting their financial support that facilitated the pipeline oil transport through the northern parts of Kenya to Lamu port at the coast.

iii. Community-State Disputes

Whereas the exploration of natural resources in a state ought to be beneficial and of various perks to the nationals of the state, African states have experienced an otherwise situation. Disputes over oil and gas occur between states and communities within states due to cultural and environmental concerns. A good illustration was evidenced upon the launching of oil extraction in Kenya, which was operated by Tullow Oil and Total international oil companies. A lot of tension existed between the local communities and the state, specifically the two abovementioned companies. Most of these local communities, who are pastoralists raised claims over land and land rights.

The primary cause of conflict between communities and states over oils and gas is due to lack of transparency and trust, and excessive corruption by government officials. In most cases, the government compulsorily acquires land for the extraction of natural resources with a guarantee of compensating the displaced communities. However, some of these communities end up not being compensated or insufficiently compensated. As a result, and due to this violation of the communities` constitutional rights, conflicts arise between them and the state. Such conflicts lead to high-security threats, low productivity, and destruction of infrastructure and material damage.

Another cause of community-state conflicts is the widespread corruption of government officials especially when it comes to the implementation of government policies. It is a requirement to submit duly and well-conducted environmental assessment reports indicating how the side effects of the extraction of natural resources will be handled. Corruption leads to wrong assessments and thus poor and incompetent reports. This means that the local communities will suffer adverse impacts of the extraction such as air pollution and health risks. It is such disasters that spike bitterness among communities leading them to wage conflicts against the state.

iv. Disputes over sharing of revenue between national and county governments

v. It is a common practice for disputes to arise between national and county governments over revenue from oil and gas extraction and investment. According to the Kenya Civil Society Platform On Oil and Gas, improper revenue management causes conflicts since oil explorations mostly occur in areas prone to ethnic rivalry and competition such as the Northern parts of Kenya.[12] The revenue sharing system between national and county governments in Kenya depends on the formula aiming at equitable distribution[13] as opposed to equal distribution of revenue. This is because certain factors such as poverty levels, population size among others determine the amount of revenue a particular county requires. For a long time, most county governments have complained about insufficient revenue allocation by the national government thus causing disputes. [14] Although this has proved to be true on certain circumstances, the other side of the coin presents a different situation. It is understood that Kenya lacks a detailed procedure on how the county governments ought to spend the oil and gas revenue allocated to them. This poses challenges such as embezzlement of the revenue and corruption at the county levels. This would mean that the revenue will have been misappropriated and finished without any constructive development thus dire need for extra allocation from the national government. Such demands highly likely cause disputes between the national and county government.

[12] Kenya Civil Society Platform on Oil and Gas, `Settling the Agenda for the Development of Kenya`s Oil and Gas Resources: the Perspectives of Civil Society (2014)
[13] Vellah Kigwiru, `The Challenges Facing The Oil and Gas Sector in Kenya and The Way Forward`
[14] Ibid

3. Recent Continental and Regional Developments

i. Application of Alternative Dispute Resolution Mechanisms

It suffices to say that most nationals and investors have lost confidence in the national courts. National courts are marred with a backlog of cases, and legal and procedural technicalities that cause unreasonable delays.[15] Instead of administering justice, the courts have furthered the infringement and violation of people`s rights. Similarly, the politicization of the national courts and corruption have interfered with judicial independence making the courts to be incompetent. Such flaws have led to the recognition and embrace of alternative dispute resolution mechanisms.

There are various alternative dispute resolution mechanisms including but not limited to arbitration, conciliation, mediation, negotiation, expert determination, and inquiry. These modes are recognized and engraved under the Charter of the United Nations as peaceful means of dispute resolution.[16] Africa is not a novice in matters of ADR. ADR has a long history and a track record in Africa, especially in Ghana, Ethiopia and Nigeria. The success of ADR in these countries has influenced other countries to embrace ADR in dispute resolution. Some forms of ADR give the disputants autonomy thus addressing concerns of common interest while trying to do away with power imbalance or positions that influence the outcome of the process.

ADR helps in bridging the gap between traditional forms of dispute resolution and the formal means of dispute resolution. This is essential owing to the fact that African countries never had formal means of dispute resolution before colonization. However, they had traditional means of dispute resolution, which form the greater part of the ADR. Further, ADR helps in building a stable justice system that ensures the prevention of violence and rebellion. It is to this end that Africa as a continent is embracing the use of ADR in conflict resolution, especially in commercial conflicts. [17]

[15] Ernest Uwazie, `Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability` (30 November 2011)
[16] The United Nations Charter, Article 33
[17] African Business, `China-Africa Arbitration bodies sidestep international courts` (9 March 2017) Available at https://african.business/2017/05/technology-

ii. The emergence of the Gas frontier in East Africa

A good number of international investors have ignored East Africa for a long time. Since the 1960s, Mozambique and Tanzania have been known for gas, however, most investors were primarily interested in oil and thus ignored these regions. However, in the early 2000s most companies started exploring the maritime borders of Tanzania and Mozambique after obtaining exploration blocks along the offshore Rovuma Basin. Later in that decade, the interest in oil and gas in these regions improved significantly due to the discovery of large amounts of natural gas enough to support LNG Projects.[18] These new developments have incensed the interest for further developments with plans of establishing LNG trains in Mozambique by 2022 and liquefaction plants in the same region come 2024. Similarly, the general exploration of entire Africa has improved immensely leading to major discoveries in South Africa in 2019, the offshores of Senegal, Mauritania, etc.[19]

iii. Establishing Cooperation on regional public goods

A new development has been the signing of the Africa Continental Free Trade Area (AfCFTA) in 2018 in an attempt to create a single market in Africa. Forty-four states have signed to the AfCFTA thus registering the largest number of multilateral integration since the WTO. The Africa Economic Outlook 2019 focuses on developing regional public goods through fostering cooperation. It seeks to concentrate on the areas of peace and security, hard infrastructure such as roads, railways, ports, and corridors, and soft infrastructures such as logistics markets for mining and energy.[20]

---

information/china-africa-arbitration-bodies-sidestep-international-courts/ Accessed on 3 June 2022.

[18] Philippe Copinschi, `New Gas Discoveries in sub-Saharan Africa: A Source of Development?` (21 February 2020) Available at *https://www.ispionline.it/en/pubblicazione/new-gas-discoveries-sub-saharan-africa-source-development-25097* Accessed on 1 June 2022.

[19] Ibid

[20] Brookings, `The Africa Continental Free Trade Area: An opportunity to deepen cooperation on regional public goods` (4 March 2019) Available at *https://www.brookings.edu/blog/future-development/2019/03/04/the-africa-continental-free-trade-area-an-opportunity-to-deepen-cooperation-on-regional-public-goods/* Accessed on 1 June 2022.

Specifically, under mining, since most African states are moving towards a mineral-based industrialization era, there arises the need for coordination in the exploitation of minerals. This new law mandates the African Minerals Development Centre to assist in the development of a regional approach to track financial flows in extraction firms and in coordinating the fiscal regimes.[21]

iv. The Establishment of the Department of Economic Development, Trade, Industry and Mining under the AU

The African Union sought to redefine the scope and objectives of integration as registered in the African Integration Report 2021. Through the new report, the African Union establishes the Department of Economic, Trade, Industry and Mining to `` coordinate the development of continental policy, lead strategic partnerships for continental programs, and monitor, review, and evaluate progress in the implementation of continental policies in the areas of economic integration, monetary affairs, trade, industry, mining, oil, and gas, private sector development, investment, productive transformation, economic and trade agreements, and sustainable development. ``[22]

v. The Variation in Economic Outlook

Sub-Saharan Africa experienced an economic recovery in the 2nd half of 2021 with a positive progression from 3.7 percent in 2020 to 4.5 percent in 2021. Although this provided hopes of further improvement, these hopes were disabled by the Russia-Ukraine war, making Africa unable to respond properly. The war caused a surge in oil prices which impacted the fiscal balances of the importing countries.[23]

---

[21] Ibid

[22] African Union, `2021 African Integration Report. ``Putting Free Movement of Persons at the centre of Continental Integration`` ` (14 March 2022) Available at *https://au.int/en/newsevents/20220314/2021-african-integration-report-putting-free-movement-persons-centre-continental* Accessed on 1 June 2022.

[23] International Monetary Fund, `Regional Economic Outlook April 2022: A New Shock and Little Room to Maneuver` Available at *https://www.imf.org/en/Publications/REO/SSA/Issues/2022/04/28/regional-economic-outlook-for-sub-saharan-africa-april-2022* Accessed on 1 June 2022.

Due to the challenges in sustaining the global shocks caused by the Covid-19 pandemic and the Russia-Ukraine war, the IMF recommends the establishment of a decisive policy action that will improve economic diversification, bring out the potential of private sectors, and remedy the problems caused by climate change. In an attempt to achieve this end, the International Monetary Fund has thus developed the Integrated Policy Framework to assist states in coming up with relevant policy responses to global shocks as the Russia-Ukraine effect on oil and gas production in Africa. This policy toolkit focuses on the interacting role of monetary, macroprudential, exchange rate, and capital flow management regulations while focusing on the African states whose exchange rates are flexible.

vi. The Rise in Commercial Arbitration

In order to improve its presence and raise knowledge of the ICC's dispute settlement system in the region, the ICC Court of Arbitration established an Africa Commission in 2018.[24] In May 2021, the ICC also established a new position for Regional Director for Africa, who would work closely with the ICC Africa Commission to develop ICC activities and raise awareness of ICC dispute resolution services in Sub-Saharan Africa.[25] Given the ICC's initiatives in Africa, the number of African parties resolving their issues through ICC arbitration may increase, implying an increase in African energy conflicts Given the ICC's initiatives in Africa, the number of African parties resolving their issues through ICC arbitration may increase, implying an increase in African energy disputes. However, parties to energy contracts are not solely opting for ICC arbitration. Global energy and resource disputes constituted 26% of the caseload at the London Court of International Arbitration (LCIA) in 2020.[26]

[24] 'Africa Commission - ICC - International Chamber Of Commerce' (ICC - International Chamber of Commerce, 2022) https://iccwbo.org/dispute-resolution-services/africa-commission/ accessed 10 June 2022.
[25] 'Regional Director Role To Bolster ICC Reach In Africa - ICC - International Chamber Of Commerce' (ICC - International Chamber of Commerce, 2022) https://iccwbo.org/media-wall/news-speeches/regional-director-role-to-bolster-icc-reach-in-africa/ accessed 10 June 2022.
[26] 'LCIA News: Annual Casework Report 2020 And Changes To The LCIA Court And European Users' Council' (Lcia.org, 2022) https://www.lcia.org/News/lcia-

4. Limits of the intra-African Trade and Dispute Resolution

Africa as a continent has made significant steps towards the prevention of conflicts and dispute resolution. There are several regional courts, arbitration centres and dispute resolution systems that advocate for the stability of African countries and promoting safe and healthy investments. Most recognizable bodies include the East African Court of Justice, ECOWAS, COMESA, etc. Despite the efforts and track record, certain limits pose hurdles towards dispute resolution and the promotion of healthy trade relations in Africa. This part seeks to discuss some of the noticeable limits of the intra-African trade and dispute resolution.

Limits of the AfCFTA

The AfCFTA has a jurisdiction limited to state parties.[27] Similarly, a dispute is defined under Article 1 of the Protocol as ` a disagreement between State Parties regarding the interpretation and/or application of the (AfCFTA) Agreement in relation to their rights and obligations. ` The Protocol further limits the application of the AfCFTA to disputes between State Parties concerning their rights and duties as to the extent of the AfCFTA Agreement. An interpretation of this is taken to mean that private entities do not have the locus standi to invoke the jurisdiction of the AfCFTA DSM procedures in case of a cross-border commercial dispute. Although the Economic Community of West African States, Common Market for Eastern and Southern Africa, and the East African Court of Justice have a system of rules governing cross-border disputes among private entities, they have not managed to address the abovementioned challenge.[28]

news-annual-casework-report-2020-and-changes-to-the-lcia-c.aspx accessed 10 June 2022.

[27] AfCFTA, Article 20

[28] Eurallyah Akinyi, `Conflict of Laws and Intra-African Commercial Disputes: To What Extent Does (Lack of) A Harmonized Pan-African Conflict of Laws Regime Support the AfCFTA Liberalization Agenda?` (12 December 2021) Available at https://www.afronomicslaw.org/category/analysis/conflict-laws-and-intra-african-commercial-disputes-what-extent-does-lack Accessed on 9 June 2022.

In the same regard, Emilia Onyema wonders whether African states can espouse claims of their citizens suppose these citizens suffer a loss due to the measures of the dispute resolution system.[29] It is worth noting that states may always raise diplomatic protection for their citizens and the WTO DSM does not prohibit this. Can African states use the DSM engraved in the AfCFTA to bring claims for their citizens? Whereas this is possible, most of such disputes fall under the category of commercial disputes, which necessitate the establishment of a system of pan-African Conflict of Laws.[30]

Implementation Shortcomings

Most African states face a lot of trivialities in implementing policies. For instance, scholars argue that FTA implementation disputes arise especially in transnational disputes, which are expensive and marred with procedural technicalities. Such challenges are highly likely to cause uncertainty for investments and trading relations.[31] It is to this end that Eurallya suggests that it is imperative for the CFTA to employ adequate modes of dispute prevention and resolution such as the use of ADR without necessarily duplicating the modes under the WTO.[32] She states that such mechanisms should be expeditious, efficient, quick to respond to the disputants, cost affordable and easy to use.[33]

Inadequate Representation of Africa in International Investment Arbitration

The 2017 Africa-Special Focus ICSID Caseload provides that Africa is only represented by an African state`s Attorney General and limited witnesses.[34] This presents various challenges such as the making of assumptions and inclinations among the arbitrators. Similarly, the competence and performance of African representatives are affected by discomfort in the new environment, language barrier, and unfamiliar attitudes of strange

[29] Ibid
[30] Ibid
[31] 2016 UNCTAD Report
[32] Ibid (n24)
[33] Ibid
[34] ICSID, `The ICSID Caseload Statistics: Special Focus Africa` (2017)

counsels.[35] Similarly, African countries have found themselves bound by inexplicable contracts concluded with foreigners. This is because the African public officials signing the contracts do not understand the technical complexities involved in the contractual terms. [36]This presents a danger of the African Officials being declared incompetent and negligent by Western arbitrators in case of disputes arising out of the contracts.[37]

5. The imperatives for the African courts and administration centres

Establishment of Pan-African Conflict of Laws

Conflict of laws facilitates the evaluation of the relationship of a country`s legal system with other countries legal systems since it has municipal and international constituents.[38] The exclusion of Africa from critical discussions on such matters has contributed to the stagnation of the development of private international law. Factors such as global transportation, technological advancement, investment and, international trade promote the development of conflict of laws. The isolation of Africa from these factors has huddled the development of a pan-African conflict of laws as Oppong states.

Despite the promulgation of the AfCFTA, Africa still lacks a multilateral treaty that deals specifically with matters of conflict of laws. However, it has a good number of bilateral treaties regulating the enforcement of foreign courts` pronouncements. This does not however dilute the fact that conflict of laws has significant effects on certain African REC treaties.[39]

[35] Won Kidane, `The Culture of Investment Arbitration: An African Perspective` (2019) 34 ICSID Rev 411, 420.
[36] Ibid
[37] Ibid
[38] Eurallyah Akinyi, `Conflict of Laws and Intra-African Commercial Disputes: To What Extent Does (Lack of) A Harmonized Pan-African Conflict of Laws Regime Support the AfCFTA Liberalization Agenda?` (12 December 2021) Available at https://www.afronomicslaw.org/category/analysis/conflict-laws-and-intra-african-commercial-disputes-what-extent-does-lack Accessed on 9 June 2022.
[39] Ibid

The rise of intra-African commercial disputes such as the Republic of *Mauritius v Polytol Paints and Adhesives Manufacturers Co. Ltd* calls for the development of the pan-African conflict of laws.[40]

Preference to Arbitration in Dispute Resolution

As investments in Africa continue to rise, it is understood that conflicts will arise thus the need for a stronger framework for dispute resolution. A recent report indicates an improved preference for arbitration over litigation and other modes of dispute resolution. The report by Herbert states that investments continue to improve despite the impacts of the Covid pandemic and that there are high chances for the use of arbitration in future in Africa.[41] For a long time, states and investor companies have preferred negotiation and commercial settlements over arbitration during conflicts thus utilizing the established avenues. However, the increase in foreign investment in the continent has elevated the formal means of dispute resolution, specifically arbitration.

Similarly, Laurence Franc-Menget states ``Even where litigation or arbitration takes place outside Africa, onshore litigation may still be required when seeking to enforce an international judgment or arbitral award against assets held in African jurisdiction, or when dealing with local regulators. ``[42] Arbitration and other alternative dispute resolution mechanisms are obtaining wide recognition due to the challenges faced with litigation such as delays and technicalities. Although all the 54 countries in Africa use arbitration, South Africa, Ghana, Ethiopia and Tanzania have embraced it more and established more reforms to increase its efficiency.[43]

[40] Ibid
[41] ICLG, `African arbitration centres on the rise` (25 March 2022) Available at https://www.google.com/url?sa=t&source=web&rct=j&url=https://iclg.com/alb/17761-african-arbitration-centres-on-the-rise/amp&ved=2ahUKEwjxNGtt574AhXNwQIHHcFrnoECAQQAQ&usg=AOvVaw0PUIgOiGwt1HZ2oITe09Vj Accessed on 7 June 2022.
[42] Ibid
[43] Ibid

Enforcement of Intra-African Cross Border Arbitral Awards

There needs to be a reconsideration of the enforcement of intra-African cross border awards. 38 countries in Africa are members of the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards, 1958. This Convention facilitates the enforcement of awards given in another Convention state or one Convention state. However, African states have no equivalent body for the enforcement of judgments by foreign courts.[44] Therefore, should an African state obtain an arbitral award it will be difficult to enforce it in another African state? Could it be a time to embrace the enforcement value of national courts' pronouncements over cross-border arbitral awards?

State Versus State Dispute Settlement

Whereas the AfCFTA has tried to address the challenges experienced in this area, it is understood that a more detailed system would have sufficed. The EU has room for domestic courts to refer cases to the Court of Justice of the European Union for appeal while AfCFTA lacks this. Further, the EU allows private entities to seek enforcement of their rights under it while the AfCFTA lacks this direct effect principle. Other scholars have suggested that suppose the AfCFTA had a direct effect on national legal systems, it would have made obvious the need for major reforms on dispute settlement in investment matters.[45] Further, they contend that suppose the AfCFTA had a system like the EU, it would have dealt with any apprehension of protection of investors. They argue that the investor would have had an opportunity to file a suit in a domestic court of the host state, which would have in turn referred the matter to the AfCFTA system for a preliminary ruling.[46]

6. A critical analysis of the common reliefs in oil and gas arbitration

Investment treaties are agreements between nations that govern how each signatory state treats investments made by individuals or companies that are nationals of the other signatory state or states. They can be standalone

[44] New York Convention 1958, Articles I and II respectively
[45] Alex Ansong, `International Economic Law in Africa: Is the African Continent Free Trade Area A Viable Project? ` Available at https://srn.com/abstract=3285290
[46] R v. Secretary of State for Transport ECJ [1990]2 Lloyds Rep 351, [1990]3 CMLR 1, C-213/89

treaties or part of wider free-trade accords. They intend to stimulate cross-border investment by safeguarding international investments from political risk. They are categorized into two kinds: bilateral investment treaties (BITs), which are entered between two governments, and multilateral investment treaties (MITs), which are negotiated and agreed upon between more than two states (MITs).[47] The common reliefs in oil and gas arbitration are based on these.

The aim of some investment treaties making provisions obligating an investor to exhaust local remedies is to protect the sovereignty of the Host State. The principle of local exhaustion of remedies was originally underpinned in diplomatic protection, it was a compulsory condition that a home state of the investor could/would espouse a claim of its investor against the host state only after the exhaustion of local remedies*. This has changed over time with the formulation of the International Treaty of Arbitration. Some International Investment Agreements (IIAs) and contracts state the domestic courts as the exclusive forums for settling disputes. Such do not create pre-conditions to commencing international arbitration, they are exclusive forum choice clauses.[48]

Some treaties contain fork-in-the-road clauses that declare that once an investor selects a particular dispute resolution procedure, that choice precludes the investor from selecting any other dispute resolution procedure theoretically accessible under the treaty. It is expressed in the Latin maxim *una via electa non datur recursus ad alteram*, which means that once one path is selected, there is no turning back.[49] If a fork-in-the-road clause

[47] Nikos Lavranos, 'C. Mclachlan QC, L. Shore, M. Weiniger QC, International Investment Arbitration – Substantive Principles, 2Nd Ed. (Oxford University Press, 2017) Pp. 1–630, (Hardback)' (2017) 2 European Investment Law and Arbitration Review.
[48] Martin Dietrich Brauch, 'Exhaustion of Local Remedies in International Investment Law' IISD Best
Practices Series 33, 3.
[49] Christoph Schreuer, 'Travelling the BIT Route' [2004] The Journal of World Investment & Trade vii, 240

applies and the claimant seeks redress in a local court, the claimant will forfeit their ability to arbitrate in the same dispute.[50]

Common law remedies for breach of contracts are applicable in oil and gas arbitration. The remedy most claimed is Compensatory damages. Other remedies include specific performance and non-compensatory damages such as restitutory damages, nominal damages, exemplary damages and liquidated damages. Parties usually choose to stipulate the circumstances for recouping damages, as well as the categories and amounts of damages recoverable. [51] The applicable legal rules can be a national law or a convention, principles, or sets of rules – such as the Convention on Contracts for the International Sale of Goods (CISG)[52], UNIDROIT Principles,– that have been developed to reflect internationally accepted rules or principles or to achieve a compromise between various legal systems. Beyond national legislation, arbitral tribunals may take a transnational approach, resorting to general principles applicable to damages in international arbitration, such as a generally recognized responsibility to mitigate. However, such principles are not consistently identified or used.[53]

An investment tribunal may decline jurisdiction to consider a breach of contract action where the counterparty to the contract is a state-owned corporation or a state agency rather than the state itself.[54]

[50] Campbell McLachlan, Laurence Shore and Matthew Weiniger, International Investment Arbitration (Oxford University Press 2017)64.
[51] C T Salomon, P D Sharp, 'Chap 10: Damages in International Arbitration', in J Fellas and J H Carter (eds), *International Commercial Arbitration in New York* (2nd ed., OUP New York 2016) para. 10.1; N Blackaby, C Partasides and others, *Redfern and Hunter on International Arbitration* (6th ed. OUP, 2015) para. 9.40.
[52] See Chapter 3 on Damages principles under the Convention on Contracts for the International Sale of Goods.
[53] See, Chapter 5 on principles of reducing damages
[54] Paul Michael Blyschak, 'Arbitrating Overseas Oil and Gas Disputes: Breaches Of Contract Versus Breaches Of Treaty' (2010) 27 Journal of International Arbitration.

7. A highlight of the leading cases in oil and gas in international arbitration from an African perspective

The oil and gas industry is fundamentally divided into three segments; upstream, midstream and upstream. They are a representative of the four major activities necessary for the oil and gas industry which include producing, transporting, refining and selling at retail.[55] 'Upstream' refers to exploring for oil and gas reservoirs, drilling wells and producing hydrocarbons, also known as exploration and production. This is where exploration and development take place. It is the industry's largest segment.[56] The downstream section includes the refining, processing, distribution, and marketing of oil and gas products.[57] The transportation of oil and gas between the initial production and the end-user of the hydrocarbons is referred to as midstream.[58] These three categories are governed by different laws and are subject to different administrative and environmental standards.[59]

In the Nigerian setting, Dr Dayo Adaralegbe[60] outlines the various interests of various parties and how the occurrence of dispute is inevitable in the petroleum industry. He contends that the Sovereign State is principally interested in:

---

[55] Ernest E Smith, *International Petroleum Transactions* (2nd edn, Rocky Mountain Mineral Law Foundation 2000).

[56] See Diagram by the American Petroleum Institute, available at www.americanpetroleuminstitute.com/oil-and-natural-gas-overview/wells-to-consumer-interactive-diagram

[57] Ibid at footnote 12 above

[58] Ibid at footnote 12 above

[59] Claude Duval and others, *International Petroleum Exploration And Exploitation Agreements* (2nd edn, Barrows 2009).

[60] In a paper presented by Dr. Dayo Adaralegbe at IIPLEP OIL AND GAS WORKSHOP FOR NIIGERIAN JUDGES AND JUDICIAL OFFICERS ON 'Settlement of disputes arising from upstream oil and gas contract activities in Nigeria'. 16th-18th October, 2012.
https://webcache.googleusercontent.com/search?q=cache:9rG3NzOI1JgJ:https://www.international-arbitration-attorney.com/wp-content/uploads/dr-bayo-adaralegbell-m-dundee-ph-d-dundee-fciarbuk-feiuk-fcisukpartner-head-ene.pdf+&cd=1&hl=en&ct=clnk&gl=n
Accessed on June 3, 2022.

- revenue from the exploitation activities in terms of tax, royalties,
- bonuses and other government takes
- work program that all increases oil production and increase revenue
- local content development
- Technological transfer

Host communities on the other hand are fundamentally concerned in, compensation where it has to be relocated from the land because of exploitation, a right to first, the second and third generation of human rights and the protection against environmental degradation, oil pollution and gas flaring.[61] The foreign investor is solely interested in a legal system that gives recognition to its property rights to exploit. The causal agents of disputes include Economic change, infrastructural needs, technical assumptions, political expectations and attitudinal change, economic crises, foreign investors caught up with domestic disputes, government change, and economically or politically unviable projects.

Africa related arbitrations are on an upward trajectory in the past decade. Within the precinct of the International Chamber of Commerce (ICC), Africa related ICC arbitrations are increasing significantly. Remarkably in 2017, the ICC recorded an all-time high of 87 cases with 153 parties emanating from Sub-Saharan Africa.[62] Furthermore, there has been an increase in disputes under the London Court of International Arbitration (LCIA) rules

[61] Samuel O Idowu, Stephen Vertigans and Adriana Burlea Schiopoiu, *Corporate Social Responsibility In Times Of Crisis* (1st edn. Springer International Publishing 2017).

[62] See Preliminary statistics for 2017 released by the International Court of Arbitration of the International Chamber of Commerce (ICC), available at https://iccwbo.org/media-wall/news-speeches/icc-announces-2017-figures-confirming-global-reach-leading-position-complex-high-value-disputes . In 2016, the ICC had cases involving 188 parties from Africa. See International Chamber of Commerce, '2016 ICC Dispute Resolution Statistics', ICC Dispute Resolution Bulletin 2017/No. 2 at p. 2

from a mere two related Africa cases in 2002 to 8 percent of LCIA's new cases in 2016.[63] The African continent is deeply disadvantaged since many of its countries lack modern arbitration laws.[64] 42 out of Africa's 54 States are signatories to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention).[65] African countries are presently a party to more than five hundred bilateral investment treaties (BITs) of which 17 include the protection for the investments of foreign investors and offer arbitration for the resolution of disputes between warring foreign investors and host governments under the International Center for Settlement of Disputes (ICSID) and other arbitral rules.[66] In the realm of Africa related, ICSID cases involve energy issues and

[63] See London Court of International Arbitration, Director General's Report 2002, at p. 2, available at www.lcia.org/LCIA/reports.aspx and LCIA, Facts and Figures – 2016: A Robust Caseload, at p. 9,
available at http://www.lcia.org/LCIA/reports.aspx

[64] About half of African countries have adopted modern arbitration legislation based on a model law: 10 countries in Africa have arbitration legislation based on the UNCITRAL Model Law *(www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html)* and in Central and West Africa the 17 member states of the Organization for the Harmonization of Business Law in Africa (OHADA) have adopted the Uniform Act on Arbitration, which was revised in 2017, together with a new set of rules for the Common Court of Justice and Arbitration (see Armand Terrien, The New OHADA Arbitration and Mediation Framework: A Glass Half Full? (2018), available at http://arbitrationblog.kluwerarbitration.com/2018/02/18/new-ohada-arbitration-mediation-framework-glass-half-full/). However, other countries have backward-looking arbitration legislation. Examples are South Africa, Botswana, Namibia, Malawi, Lesotho and Swaziland which all retain arbitration statutes based on the now-repealed English Arbitration Act 1950. South Africa is expected to adopt a revised arbitration law soon, but the timing of that is not clear (see https://globalarbitrationreview.com/jurisdiction/1000205/south-africa).

[65] Battison A and Stebbing H, "Enforcement of Awards across Africa – 42 of Africa's 54 States Have Now Acceded to the New York Convention" (Inside Africa | Global law firm | Norton Rose Fulbright March 16, 2021)
https://www.nortonrosefulbright.com/en/inside-africa/blog/2021/03/enforcement-of-awards-across-africa--42-of-africas-54 states#:~:text=The%20New%20York%20Convention%20will,recent%20signatories%20prior%20to%20Malawi. accessed June 5, 2022

[66] A myriad of investment treaties provide for arbitration under the ICSID Arbitration Rules, and some provide for arbitration under other rules, most often the UNCITRAL, ICC or Stockholm Chamber of Commerce (SCC) rules.

a great percentage of cases involving energy issues are African countries related.[67]

Different Illustrations

Process and Industrial Developments Ltd. v. The Ministry of Petroleum Resources of the Federal Republic of Nigeria[68]

P&ID is an engineering and project management firm founded in 2006 by two Irish nationals to carry out an energy project in Nigeria. P&ID and Nigeria signed a 20-year natural gas supply and processing agreement in January 2010. Nigeria supplied P&ID with agreed-upon amounts of natural gas, which P&ID processed for use in Nigeria's national electric grid. In exchange, P&ID took valuable byproducts from the refining process for its own use. The agreement was "governed by and construed in accordance with the laws of the Federal Republic of Nigeria," disputes arising under the agreement were subject to arbitration under the rules of the Nigerian Arbitration and Conciliation Act, and the arbitration venue was London, England, unless the parties agreed otherwise.

P&ID launched arbitration proceedings in London in August 2012, alleging that Nigeria failed to produce the agreed-upon quantity of natural gas to P&ID as well as to construct the requisite pipeline infrastructure. In July 2014, the arbitral tribunal first declared that it had jurisdiction over the dispute, and then, in July 2015, it determined that Nigeria had breached the agreement.

Nigeria sought relief in English courts, requesting that the arbitral tribunal's liability determination be overturned, but the High Court of Justice in London denied Nigeria's application in February 2016 on the grounds that Nigeria had filed it more than four months after the deadline and that an extension was not warranted. Soon after, Nigeria requested a set-aside order

[67] "ICSID Releases 2021 Caseload Statistics" (ICSID February 2, 2022) < https://icsid.worldbank.org/news-and-events/comunicados/icsid-releases-2021-caseload-statistics> accessed June 5, 2022
[68] [2019] EWHC 2541

in its courts, and the Federal High Court of Nigeria granted an order "setting aside and/or remitting for further consideration all or part of the arbitration Award" in May 2016. The set-aside ruling issued by the Nigerian court provided no reasons or explanation for its judgment.

Nonetheless, arbitration proceedings in London continued. After concluding that the Nigerian court lacked jurisdiction to overturn the responsibility judgment, the tribunal awarded P&ID roughly $6.6 billion in damages for lost earnings, plus interest. The arbitral award, with interest, is now worth more than $10 billion.

P&ID initially moved to enforce the award in England, and the English High Court of Justice ruled in August 2019 that the award was enforceable. In the meantime the, Nigeria had launched a criminal investigation into P&ID's procurement of the natural gas agreement and had applied to the High Court of Justice in December 2019 to extend the deadline for challenging the award based on what it described as new evidence of fraud in the arbitration and underlying contract negotiations. The request was granted by the English court because Nigeria had "developed a strong prima facie case" of P&ID's fraud and bribery in obtaining the agreement and during the arbitration processes. The English court has yet to overturn the arbitral ruling, and a trial on these matters is due to commence in January 2023.

Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. the Republic of Kenya, ICSID Case No. ARB/15/29[69]
This case type was an International Investment Agreement and the applicable arbitration rules were the ICSID Convention-Arbitration Rules. The Claimants' claims are dismissed with costs to the Respondent in the sum of US $3,226,429.21 plus the US $322,561.14 in ICSID costs. The claim arose out of the Government's allegedly unlawful revocation of the claimant's mining license, following the discovery of new rare earth deposits by the claimant. The investor-state arbitral tribunal established under a bilateral

[69] ICSID Case No. ARB/15/29. The claimants have since applied for annulment of the award.

investment treaty (BIT) held it lacked jurisdiction to hear a dispute concerning a mining project that the tribunal found did not comply with domestic environmental law. The area contains one of "the world's largest untapped niobium and rare earth resources," according to the claimants. The area is also home to abundant biodiversity and sacred sites for indigenous people, and it is protected as a forest reserve, a nature reserve, and a national monument under Kenyan legislation. The case's facts are intertwined with Kenyan election politics. The parties fought bitterly on the facts, and their examination accounted for a large chunk of the award. The claimants claimed that their investment was nationalized as a result of a "resource nationalism" strategy implemented during a government change. It was the contention of the respondent, among other things, that there was no protected investment in the first place because the mining license was obtained in violation of domestic law, and as such, it was void ab initio. The tribunal determined that the claimants bear the burden of demonstrating jurisdiction under the BIT and the ICSID Convention, including relevant facts that warrant jurisdiction. Furthermore, the tribunal ruled that in order for an investment to be protected on an international level, it must "be in substantial compliance with the significant legal requirement of the host state" and be made in good faith. Since the claimants were successful in demonstrating that they operated in good faith, the award did not hinge on this question.

The issue of compliance with domestic law, on the other hand, was fundamental to the tribunal's ruling. This case highlights the need to exhaust local remedies. The tribunal held that, under Kenyan law and the terms of the prospecting license, several conditions were to be satisfied before investors could obtain a valid mining license, including requirements arising out of the special protected status of Mrima Hill as a forest reserve, a nature reserve, and a national monument. The award is noteworthy because it established that international investment treaties only guarantee investments made in accordance with local law, even where there is no explicit legality requirement in the applicable BIT. In this regard, the judgement draws on and expands on a considerable body of arbitral precedent addressing legal compliance issues in the context of investor-state dispute settlement.

Nigeria Niger Delta Oil Spill Cases

The Niger Delta region is located on the west coast of Africa[70], in South-South Nigeria, at the mouth of the Gulf of Guinea. It has a population of 31 million[71] people and accounts for 7.5 percent of Nigeria's total land area.[72] To date, 1,182 exploration wells have been sunk in the delta basin, with approximately 400 oil and gas fields of various sizes identified. [73]This region encompasses over 800 oil-producing villages, a vast network of over 900 active oil wells, and several petroleum-related infrastructures.[74]

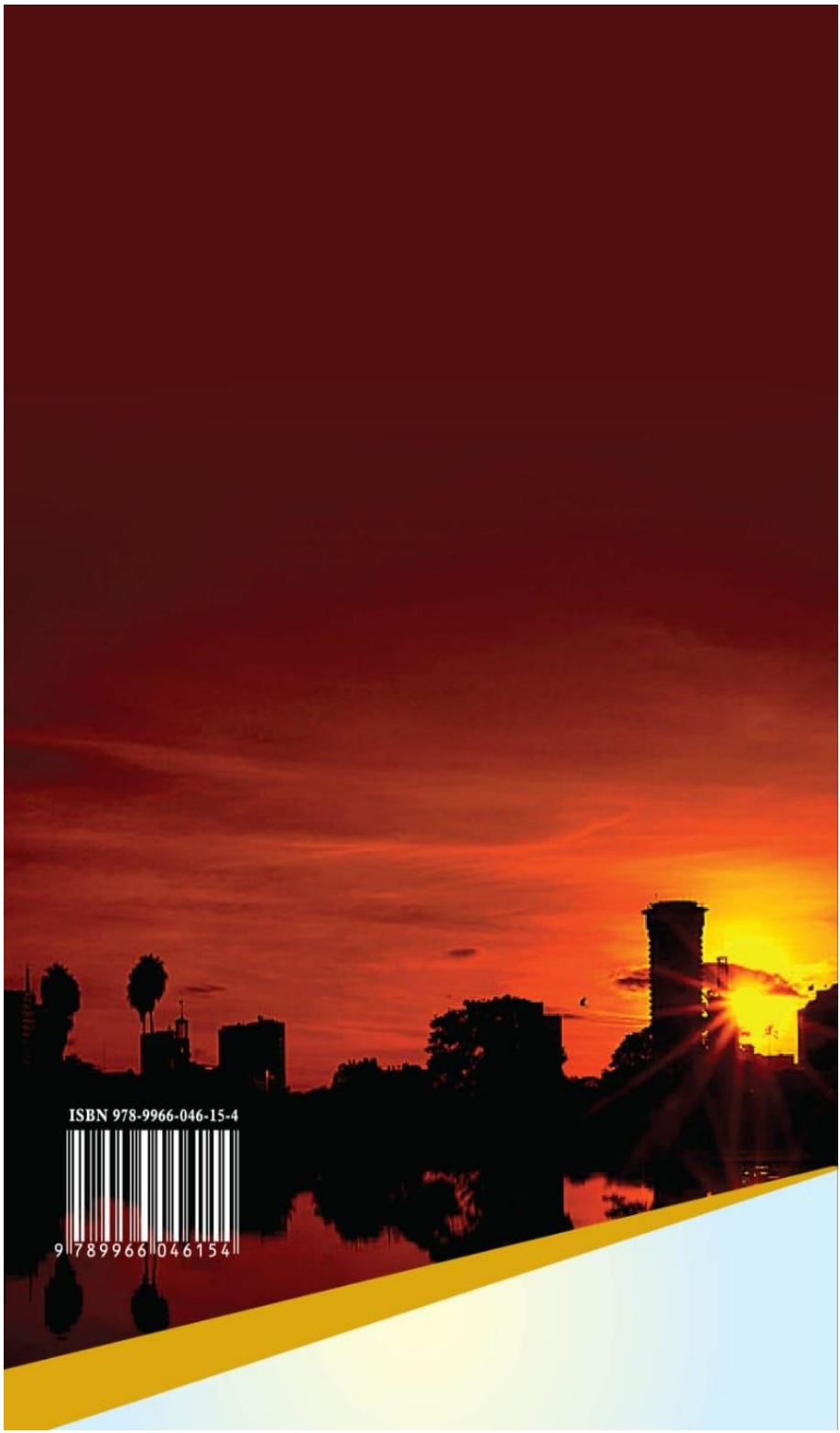
According to an Amnesty International report, Eni has reported 820 spills in the Niger Delta since 2014, resulting in the loss of 26,286 barrels (4.1 million litres). Shell has reported 1,010 spills since 2011, with 110,535 barrels or 17.5 million litres lost. That's around seven Olympic-sized swimming pools. These are enormous figures, but the truth may be considerably worse. [75]Not long ago shell admitted liability for two operational spills in Bodo.[76]

In a landmark ruling in 2021, The Hague Court of Appeal in the case of **Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shellf.**

[70] Doust H. Petroleum Geology of the Niger-Delta. Geological Society, London Special Publications. 1990
[71] E. M Young, Food and Development (Routledge 2012).
[72] Aniefiok E. Ite and others, 'Petroleum Exploration and Production: Past and Present Environmental Issues In The Nigeria'S Niger Delta' (2013) 1 American Journal of Environmental Protection.
[73] Obaje N, Geology and Mineral Resources of Nigeria (Springer 2009).
[74] Leo?C. Osuji and Chukwunedum?M. Onojake, 'Trace Heavy Metals Associated With Crude Oil: A Case Study Of Ebocha-8 Oil-Spill-Polluted Site In Niger Delta, Nigeria' (2004) 1 Chemistry & Biodiversity. P.p 1708-1715.
[75] Report AI, "Niger Delta Negligence - Amnesty International" (Amnesty International, March 16, 2018) *https://www.amnesty.org/en/latest/news/2018/03/niger-delta-oil-spillsdecoders/#:~:text=Since%202014%20Eni%20has%20reported,reality%20may%20be%20even%20worse*. accessed June 9, 2022
[76] John Vidal, 'Shell Faces Payouts In Nigerian Oil Spill Case' (*the Guardian*, 2022) https://www.theguardian.com/environment/2014/jun/20/shell-faces-payouts-nigerian-oil-spill-case accessed 9 June 2022.

[77]The action was brought by a group of Nigerians, with the backing of the Dutch NGO Milieudefensie, concerning three distinct oil leaks from Shell pipelines and wellheads near the Oruma, Goi, and Ikot Ada Udo villages in the Niger Delta. The claimants held Shell Nigeria and its parent company, Royal Dutch Shell, accountable for harm to their farmlands and fishing areas, claiming that the corporations were negligent in maintaining the pipelines, mitigating spills, and cleaning the contaminated environment thereafter. The Court of Appeal ruled in a groundbreaking decision that Shell Nigeria was strictly liable for the damage caused by two of the incidents (the Oruma and Goi cases), Shell will pay an unspecified amount in damages to the farmers, who claimed the leaks destroyed their livelihoods. Additionally, the corporation was forced to put leak detection equipment in its pipelines.

[77] Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell, District Court The Hague, Judgment of 26 May 2021.



ISBN 978-9966-046-15-4