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Energy Arbitration in Africa

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The energy sector is a critical element in Africa's economic development. It includes traditional resources such as oil, gas and coal as well as a growing emphasis on renewable sources of energy.[1] Historically and today, the African energy sector has been dominated by the petroleum industry. According to 2015 estimates, 57 per cent of Africa's export earnings are derived from hydrocarbon revenues and Africa accounts for over 11 per cent of global oil production over the past decade.[2] As discussed below, the energy sector has generated a significant number of disputes that have been resolved through international arbitration, and this number appears to be increasing.

Energy resources and developments vary by region in Africa. Oil and gas reserves are concentrated in north and west Africa (Nigeria, Angola and Algeria are the continent's largest oil and gas producers).[3] A number of countries export natural gas by ship in liquefied form (LNG) or by pipeline.[4] Coal reserves are mostly found in the southern part of the continent (South Africa holds over 90 per cent of the proven reserves and accounts for virtually all of the continent's production). While Africa has abundant potential for renewable energies, these resources are not yet developed. To date, major hydropower projects have been concentrated in Malawi, Zambia and Lesotho; there have been large-scale wind generation projects in Morocco, Egypt and South Africa; and geothermal power projects in the East African Great Rift Valley in Kenya, Uganda, Ethiopia and Tanzania.

Historically, political instability, challenging environmental conditions and economic volatility have meant that fewer exploration projects have taken place in Africa than other resource-rich places. That has been changing, however, and increased global competition has brought new participants and investments into the African energy sector. Significant resource discoveries are giving rise to complicated, costly and risky energy investment projects. For example, oil discoveries in the Gulf of Guinea have created investment opportunities with new producer states such as Sierra Leone and Liberia.[5] Exploration companies are also moving into countries such as Somalia, which were until recently considered too risky due to conflict and political instability. Although the oil and gas industry continues to attract the most foreign investment, there have been increased investments in renewable energy. Investment in renewables is expected to continue to increase given the amount of currently untapped renewable resources and its potential to help solve the energy crisis in sub-Saharan Africa, where nearly 600 million people are without access to electricity.[6]

It is impossible to generalise about arbitration trends in Africa, even by region. However, along with foreign investment, interest in arbitration in Africa is growing across the continent; many jurisdictions have taken the key steps of ratifying the New York Convention and adopting modern arbitration legislation, and several are developing arbitral institutions. Disputes involving large-scale energy projects in Africa have typically been resolved through international commercial and investor-state arbitration. This article provides an overview of these arbitrations, and some of the recent trends in commercial and treaty cases.

Government control of natural resources and the contractual model

Because of the wide variety of projects and participants, African energy projects involve a broad and diverse range of commercial agreements. Natural resources are usually owned by the state, which means that energy projects often involve a licence from the government (for example, for access to a defined geographic block) and require contractual arrangements between a government (or a state-owned entity, such as a national petroleum company) and a private company (or a group of companies). Many projects also involve the creation of joint ventures to share the risks and costs associated with such large-scale endeavours, or to meet regulatory requirements.

For oil and gas projects, many governments initially entered into concession agreements with international oil companies (IOCs).[7] These agreements typically granted the IOC long-term exploration and development rights over large areas with complete control over the management of development and no obligation to produce. Today, the most common contractual form is a production sharing agreement (PSA). A PSA typically outlines the exploration and production rights and obligations between the parties and how the resource will be shared if discovered in commercial quantities. Host states prefer PSAs because they usually afford the government lower financial risk exposure and enable it to participate in the management of the project.[8]

In the PSA model, the IOC may be acting on behalf of a consortium of companies that will enter into a joint operating agreement (JOA) to define their respective rights and obligations in the project. Consortium members may be party to study and bid agreements and a number of other agreements with respect to the evaluation and acquisition phases of the project. Depending on how a project develops, there may be additional contracts for exploration, drilling, transportation and marketing of the oil or gas. Such arrangements may also involve farm-in and farm-out agreements, under which third parties acquire an interest under a JOA in return for financial compensation or the provision of exploration, drilling or other services. Most large projects necessarily involve other contracts as well. For example, there may be contracts with local and foreign companies to act as consultants, for the supply of goods and services, and the construction or use of facilities and equipment (including surveying and drilling equipment).

Given the variety of agreements and parties involved in these projects, and their scale and complexity, a wide range of issues can arise between some or all of the parties. The likelihood of disputes is often also increased by the existence of political, environmental and security issues.[9] Some of the many disputes that have arisen include issues concerning non-payment of invoices and royalty fees; delays, disruptions and cancellations (including force majeure claims); shareholder and joint venture disputes; disputes about the scope and transfer of rights; and issues about price as well as price adjustment claims in long-term supply contracts. Many contracts include stabilisation clauses to address potential legislative or regulatory changes, and disputes also arise regarding the application of those clauses. There have also been disputes involving allegations of corruption, including as a defence to payment claims under consulting agreements relating to licence agreements or PSAs.

The use of international commercial arbitration in African energy contracts

Some disputes relating to energy contracts may be decided in local courts. However, when foreign parties are involved, these contracts generally provide that disputes will be resolved through international arbitration. Foreign investors almost always insist on arbitration under the rules of well-known international arbitral institutions. As a result, these agreements very often provide for arbitration pursuant to the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR) or UNCITRAL Rules. Foreign parties also typically seek to provide that any arbitral proceedings will take place outside of the host state and outside of Africa, with London, Paris and Switzerland being common seats for arbitrations relating to African energy projects.

It also is common for parties to agree that contracts relating to large-scale energy projects be governed by a foreign law, with English, New York, Texas or French law frequent choices. Thus, it is not unusual, for example, for a contract between a Spanish energy company and a Libyan service provider relating to a project in Libya to be subject to English law. At times, however, a state or state-owned party may insist that local law apply and a significant energy contract (and any resulting disputes) may therefore be subject to, for example, Nigerian, Algerian or Egyptian law.

The available data indicates that Africa-related arbitrations have increased significantly in the past decade, and that energy disputes, and in particular cases involving the oil and gas industry, account for a significant proportion of this increase. The number of Africa-related ICC arbitrations has more than doubled, from 72 cases in 2004 to 163 cases in 2014.[10] Disputes under the LCIA Rules have also increased, from two Africa-related cases in 2002 to 30 in 2013.[11]

While foreign participants in energy projects will generally try to avoid any possibility that disputes will be resolved in local courts by insisting on including arbitration agreements, and having the seat of arbitration outside Africa to avoid concerns about interference in the arbitral process by local courts, such agreements do not resolve all potential issues. There are ongoing concerns about the enforceability of foreign arbitral awards in many African jurisdictions. Only 33 out of 54 African states are signatories to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).[12] Moreover, many African countries do not have modern arbitration laws.[13]

This means that in almost half of African jurisdictions a party seeking to enforce a foreign arbitral award must depend on provisions of national law that may not be as favourable as in those countries that have ratified and implemented the New York Convention. Moreover, even in countries that have signed the New York Convention, there may be issues with regard to the implementing legislation, and the local courts may be inexperienced and unreliable (particularly where a party may be seeking to enforce an award against a state or state-owned entity). Nonetheless, international arbitration remains the only choice for most foreign investors in the African energy sector.

Investment treaty arbitration related to African energy projects

A number of disputes relating to energy projects have also been subject to arbitrations arising under investment treaties. African states are currently party to nearly 500 bilateral investment treaties (BITs)[14] that include protection for the investments of foreign investors and offer arbitration for resolution of disputes between foreign investors and host governments under the ICSID or other arbitral rules.[15] In addition to BITs, regional trade agreements such as the South African Development Community (SADC) Protocol on Finance and Investment, the Economic Community of West African States (ECOWAS) Supplementary Act on Foreign Investment and the Common Market for Eastern and Southern Africa (COMESA) Treaty can also provide similar investment protections to BITs.

While 45 countries in Africa are member states of the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), a number of prominent African countries, including Angola, which is a significant oil producer, are not party to the ICSID Convention.[16] Perhaps unsurprisingly given its economic importance, a significant number of Africa-related ICSID cases have involved energy issues and a large percentage of the ICSID cases involving energy issues have involved African countries.[17]

As with disputes arising in commercial arbitration, ICSID arbitrations dealing with the African energy sector have involved a wide variety of projects and disputes. Treaty claims involving energy projects in Africa have related to, among other things, the imposition of new tax regimes and associated breach of stabilisation provisions;[18] suspension and interruption of midstream LNG operations;[19] the transfer of oil and gas concession exploration and development rights to third parties;[20] unpaid invoices under power purchase agreements;[21] and the cancellation of contractual rights or licence revocations.[22]

There is very little information about whether African states have voluntarily complied with the treaty awards issued against them or, if not, whether these awards have been successfully enforced. Although the lack of public reports to the contrary suggests that most African states have complied with arbitral awards, there is an increasing amount of criticism of the investment treaty system and certain African countries have taken steps to withdraw from treaty obligations including by cancelling BITs.[23]

Current trends and potential disputes

There have been a number of developments in the African energy sector that have and will likely continue to be reflected in arbitrations.

'Resource nationalism'

So-called 'resource nationalism' (ie, political policy promoting greater state intervention in the resource sector with the aim of harnessing resource wealth for socio-economic development)[24] can lead to conflicts between governments and international companies.

Many arbitrations relating to the African energy sector arise in connection with state actions treating energy resources as sovereign resources central to economic development. This can result in claims, particularly under investment treaties, when, for example, energy resources are nationalised after a period of political unrest and disturbance or when a new government seeks to change the terms of contractual obligations.[25]

Local content regulations

A number of African governments have amended their energy legislation, regulations and bidding practices to include 'local content' requirements and are increasingly requiring compliance with these regulations.[26]

These 'local content' regulations intend that a percentage of the goods and services required at each stage of the value chain be locally supplied. For example, the Nigerian Oil and Gas Industry Content Development Act 2010 requires minimum thresholds for the use of local services and materials, preference for Nigerian companies, and promotes the transfer of skills to the Nigerian workforce.[27] In particular, such regulations are intended to ensure opportunities for local participation in bidding rounds, prioritise local suppliers, and provide local employment. Among other things, this may lead to an increase in operating costs for foreign investors.

There has been an increasing number of disputes involving compliance with such requirements, including efforts by local companies to rely on local content requirements in disputes with foreign companies relating to large-scale energy projects.[28]

Commodity price volatility

Price volatility in the oil and gas sector can also result in disputes, particularly where it threatens the commercial viability of projects. The recent fall in oil prices may give rise to an increased number of disputes in the African energy sector.[29] For African governments dependent on hydrocarbon revenues, low oil prices may increase the detrimental impact of an unfavourable arbitral award on the state's budget.

On the one hand, during periods of depressed commodity prices, African governments will want to see that levels of investment and activity on energy projects are maintained in order to secure levels of production. Governments may also take steps to cushion themselves against a sustained price fall, for example, by introducing new taxation regimes or renegotiating contractual arrangements to attempt to increase their take from project revenues.

IOCs, on the other hand, may take steps to reduce operating costs and capital expenditure, delaying or cancelling their most expensive and risky projects.[30] Disputes may arise under PSAs in relation to participants' commitment to ongoing exploration and development.[31] The downturn in commodity prices may also result in cash flow problems for participants in joint venture projects, leading to disputes about payments of invoices and cash calls.[32]

Conclusion

Foreign investment in the energy sector in Africa will only grow, particularly in light of new oil and gas discoveries and the possibility of harnessing renewable energy sources. Existing investments have led to a wide range of disputes and, given the risks associated with many new projects, including the ongoing socio-political pressure on resource-dependent African states and the current volatile pricing environment, it is likely that the substantial increase in commercial and treaty arbitrations seen in the past decade will continue.

While the dispute resolution method of choice in contractual agreements for African energy projects will continue to be international arbitration, the nature and details of the arbitration agreements used in energy contracts may evolve as more investment in Africa comes from Asia and other places rather than western Europe and North America, and as African parties increasingly push to have disputes resolved locally; and to develop African arbitral institutions. For the near term, however, foreign investors will continue to insist on international arbitration outside of Africa and the significant number of cases being heard under the rules of arbitral institutions like the ICC and seated in places like London and Paris will continue.

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Notes

1 South Africa is currently the only country in Africa with a commercial nuclear power plant.

2 See KPMG Sector Report, Oil & Gas in Africa (2015) at pp.1-2, available at https://www.kpmg.com/Africa/en/IssuesAndInsights/Articles-Publications/General-Industries-Publications/Documents/Oil%20and%20Gas%20sector%20report%202015.pdf.

3 According to 2014 figures, Africa holds 7.6 per cent of the world's proven oil and gas reserves and accounted for 9.3 per cent of total global oil production. West African oil production is sourced primarily from the Niger Delta Basin, the majority of which lies in Nigerian waters. Natural gas production from Africa was 5.8 per cent of total global production, with Algeria the largest African gas producer. See BP Statistical Review of World Energy June 2015 at pp. 6-8, 20-22 available at www.bp.com/content/dam/bp/pdf/energy-economics/statistical-review-2015/bp-statistical-review-of-world-energy-2015-full-report.pdf.

4 For example, Nigeria, Algeria, Egypt, and Equatorial Guinea export LNG, Algeria and Libya export gas by pipeline to the Iberian Peninsula and Italy in Europe, and Mozambique and Nigeria export gas to other countries in Africa. See KPMG Sector Report, Oil & Gas in Africa (2015) at pp.6-7, available at https://www.kpmg.com/Africa/en/IssuesAndInsights/Articles-Publications/General-Industries-Publications/Documents/Oil%20and%20Gas%20sector%20report%202015.pdf.

5 Major natural gas discoveries in Mozambique (mainly in the offshore Rovuma Basin) and Tanzania have also attracted interest in significant new projects and investments.

6 See Mckinsey & Company, *Brighter Africa: The growth potential of the sub-Saharan electricity sector*, (February 2015) at p. 2. See also 'Working Group III of the Intergovernmental Panel on Climate Change', IPCC Special Report of the Intergovernmental Panel on Climate Change, (2011) (stating that the undeveloped hydropower potential in Africa may be as high as 95 per cent of total capacity).

7 See E Laryea, 'Contractual Arrangements for Resource Investment', in FN Botchway (ed.), *Natural Resource Investment and Africa's Development* at p. 109.

8 See E. Laryea, 'Contractual Arrangements for Resource Investment', in (ed. FN Botchway), *Natural Resource Investment and Africa's Development* (2011) at pp. 111-113, 121-123.

9 See eg, *National Oil Corp (NOC) v. Libyan Sun Oil Co*, First Award of 31 May 1985, 29 I.L.M. 565, 584 (1990), 16 Y.B. Com. Arb. 54, 57 (1991) (an ICC arbitration concerning, in part, the applicability of a force majeure clause within the parties' Exploration and Production Sharing Agreement to excuse the operator's failure to complete an exploration program. The US operator Sun Oil had declared force majeure following political tensions between the US and Libya, which led to the US government prohibiting persons using US

passports from travelling to Libya and issuing regulations prohibiting the export of certain technology).

10 See International Chamber of Commerce, '2014 ICC Dispute Resolution Statistics', ICC Dispute Resolution Bulletin 2015/No. 1 at p. 2.; The International Chamber of Commerce, '2004 Statistical Report', ICC International Court of Arbitration Bulletin, Vol 16/No.1 Spring 2005, at p. 6.

11 See London Court of International Arbitration, Registrar's Report 2013, at p.2, available at www.lcia.org/LCIA/reports.aspx; London Court of International Arbitration, Director General's Report 2002, at p.2, available at www.lcia.org/LCIA/reports.aspx. LCIA figures from 2013 indicate that 15 per cent of its Africa-related disputes were related to the oil and gas industry and an additional 7 per cent related to the broader energy and resources sector. See A Notaras and J Bartle, 'Arbitration in Africa: High Stakes and Big Claims in Resolving Disputes in Africa', in Legal Business (July/August 2015) at p.106, available at www.simmons-simmons.com/~/media/Files/Corporate/External%20publications%20pdfs/Africa%20Insight.pdf.

12 In west and central Africa, 17 countries are member states of the Organisation for the Harmonisation of Business Law in Africa (OHADA), which also provides a system for the enforcement of foreign arbitral awards.

13 Around half of African countries have adopted modern arbitration legislation based on a model law: 13 countries in Africa have arbitration legislation based on the UNCITRAL Model Law and the 17 OHADA member states have adopted the Uniform Act on Arbitration. However, other countries have outdated arbitration legislation. For example, South Africa, Botswana, Namibia, Malawi, Lesotho and Swaziland all retain arbitration statutes based on the now-repealed English Arbitration Act 1950.

14 See UNCTAD International Investment Agreements Navigator, available at http://investmentpolicyhub.unctad.org/IIA. The six North African countries, Egypt, Tunisia, Algeria, Morocco, Libya and Sudan, are party to approximately 200 BITs.

15 Many 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.

16 Angola has also signed only nine BITs (and only four of those are in force) and it is not a member of a regional investment treaty such as OHADA.

17 Of the 134 pending or concluded oil, gas and mining arbitrations registered at ICSID (the ICSID website records cases related to 'oil, gas and mining' as forming part of one economic sector), 38 involve an African party. By comparison, only five of the 91 electric power and energy sector cases involve an African party and four of those are related proceedings involving Tanzania and its state-owned electricity company. See https://icsid.worldbank.org/.

18 See, eg, *Texaco Overseas Petroleum Co et al v The Government of the Libyan Arab Republic*, Award, 17 I.L.M. 1 (1978); see also *AGIP Company v People's Republic of the Congo*, Award, 30 November 1979, 21 ILM 726 (1982); *Total E&P Uganda BV v Republic of Uganda* (ICSID Case No. ARB/15/11); *Tullow Uganda Operations Pty Ltd and Tullow Uganda Limited v Republic of Uganda* (ICSID Case No. ARB/13/25); *Total E&P Uganda BV v Republic of Uganda* (ICSID Case No. ARB/15/11).

19 See, eg, *Unión Fenosa Gas, SA v Arab Republic of Egypt* (ICSID Case No. ARB/14/4); see also *Ampal-American Israel Corporation and others v Arab Republic of Egypt* (ICSID Case No. ARB/12/11).

20 See, eg, *Shell Nigeria Ultra Deep Limited v Federal Republic of Nigeria* (ICSID Case No. ARB/07/18); see also *RSM Production Company v Republic of Cameroon* (ICSID Case No. ARB/13/14).

21 *Standard Chartered Bank v The United Republic of Tanzania* (ICSID Case No. ARB/10/12).

22 See, eg, *WalAm Energy Inc v Republic of Kenya* (ICSID Case No. ARB/15/17) (related to the revocation of a licence granted to the Canadian claimant to explore and develop geothermal resources at the Suswa Geothermal Concession in Kenya); see also the related cases of *African Petroleum Gambia Limited (Block A4) v Republic of the Gambia* (ICSID Case No. ARB/14/7) and *African Petroleum Gambia Limited (Block A1) v Republic of the Gambia* (ICSID Case No. ARB/14/6) (regarding the Gambia's revocations of an Australian IOC's two offshore oil licences on the basis that the licences violated the state's national petroleum law. Settlement was reached November 2014 when the Gambia reinstated the two licenses); *Togo Electricité and GDF-Suez Energie Services v Republic of Togo* (ICSID Case No. ARB/06/7) (related to the termination of an electricity concession).

23 For example, in October 2012, South Africa cancelled its BITs with Belgium–Luxembourg, Spain, Germany, Switzerland, the Netherlands and Denmark. As an alternative to BIT protections, South Africa published a draft Promotion and Protection of Investment Bill for public comment in October 2013. The bill was tabled in parliament in July 2015 and has yet to be enacted. If it becomes law, foreign investors will be required to submit disputes before national courts or relevant authorities. Egypt also amended its Investment Law No. 8/1997 in 2015, including by removing reference to investor-state treaty arbitration.

24 See P Stevens, J Kooroshy, G Lahn and B Lee, *Conflict and Coexistence in the Extractive Industries*, (Chatham House Report (November 2013)) at p. 22. Nationalist rhetoric has also become a prominent feature of resource-sector governance in South Africa and Zimbabwe. However, most African governments remain wary of deterring foreign direct investment. In Mozambique, Zambia and Guinea, for instance, government proposals for new ownership requirements or tax regimes have been scaled down or reversed under industry pressure. Id. at p. viii.

25 See, e.g., *Sudapet Company Limited v Republic of South Sudan* (ICSID Case No. ARB/12/26) (concerning the alleged seizure of the Claimants' equity interests in several joint ventures with IOCs).

26 Local content regulations have been codified as part of national petroleum laws in, for example, Nigeria, Kenya, Ghana, Mozambique and Angola and have been proposed in other countries.

27 See Nigerian Oil and Gas Industry Content Development Act 2010, available at www.eisourcebook.org/cms/January%202016/Nigerian%20Oil%20and%20Gas%20Industry%20Content%20Development%20Act%202010.pdf. The Nigerian Act states at Section 1(2) that '[a]ll regulatory authorities, operators, contractors, subcontractors, alliance partners and other entities involved in any project, operation, activity or transaction in the Nigerian oil and gas industry shall consider Nigerian content as an important element of their overall project development and management philosophy for project execution.' It also provides at Section 1(3) that '[c]ompliance with the provisions of this Act and promotion of Nigerian content development shall be a major criterion for award of licences, permits and any other interest in bidding for Oil exploration, production, transportation and development or any other operations in Nigerian Oil and Gas industry.'

28 See A Msimang and J Cull, 'Operators Must Carefully Navigate Nigerian Local Content Rules', Offshore Regulatory Perspectives, (December 2014) ('Local content obligations on operators across West Africa are becoming increasingly demanding and are having a major impact on the way oil companies do business there (and on the costs of doing business)').

29 Oil prices have collapsed from over US$100/barrel in late 2014 to a 12-year low of US$27/barrel in January 2016. Low oil prices are forecast for the next several years and gas prices are also forecast to decline.

30 Recent delays in Mozambique's LNG development projects may reflect the difficulty of continuing with exploration projects during a period of low commodity prices.

31 For example, in January 2016, Hyperdynamics Corporation, a US-based IOC with an offshore block in Guinea, brought arbitration proceedings under the AAA/ICDR rules against Tullow Guinea Ltd and Dana Petroleum Ltd. Hyperdynamics alleges that Tullow and Dana have breached the terms of the parties' JOA and PSC with Guinea by causing repeated delays in exploratory well drilling. See PR Newswire, 'Hyperdynamics Announces Partner Impasse and Failure by Tullow to Resume Petroleum Operations Offshore Guinea,' 5 January 2016, available at www.prnewswire.com/news-releases/hyperdynamics-announces-partner-impasse-and-failure-by-tullow-to-resume-petroleum-operations-offshore-guinea-300199730.html.

32 For example, according to press reports, there are potential arbitration proceedings between Nostra Terra Oil & Gas Co PLC and Independent Resources PLC against the North Petroleum International Company in Egypt following cash calls between joint venture participants in relation to the East Ghazalat oil field. See Joshua Warner, 'Nostra Terra, Independent Resources to Challenge Partner in Egypt,' Alliance News, 25 January, 2016, available at www.morningstar.co.uk/uk/news/AN_1453732183424816900/nostra-terra-independent-resources-to-challenge-partner-in-egypt.aspx.

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