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Resource Nationalism in Africa - The Next Wave? Trends in Investor-State Disputes in the Energy and Natural Resources Sector in Africa

by S. Noury, L. Bruton and A. Pan

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Resource Nationalism in Africa - The Next Wave? Trends in Investor-State Disputes in the Energy and Natural Resources Sector in Africa

By Sylvia Noury, Leilah Bruton and Annie Pan, Freshfields Bruckhaus Deringer LLP¹

Abstract

This article examines the prevailing trends in investor-state disputes in the energy and natural resources sector in Africa. In particular, it explores the variety of measures that governments have deployed over the last decade to maximise their title to, returns on, or profit from, their nation's natural resources, and the impact that has had on foreign investors. The authors will draw in particular upon their experiences of disputes in Nigeria, Egypt, Algeria, Uganda, Mozambique and South Africa to highlight three main trends in resource nationalism on the continent, namely (1) the unilateral re-interpretation and violation of contractual terms (in particular, the erosion of previously agreed terms when energy and natural resource projects transition from exploration to production), (2) the introduction of adverse tax measures (such as retroactive windfall profits taxes and capital gains tax charges on offshore transactions) and (3) the implementation of 'indigenisation' or 'local content' legislation (including black economic empowerment policies). The article concludes with reflections on the types of disputes that may arise in the future in the energy and natural resources sector in Africa.

Introduction and Overview

"The state will now own all the diamonds in the country [...] [c]ompanies that have been mining diamonds have robbed us of our wealth. That is why we have now said the state must have a monopoly."

Robert Mugabe, President of Zimbabwe, March 2016

One of the principal risks facing investors in the energy and natural resources (**ENR**) sector in Africa is resource nationalism – that is, the risk that the state will assert or re-assert control over its natural resources and thereby renege on rights it had previously granted to investors.

Resource nationalism can come in many forms. Zimbabwe's approach reflects an 'old school' nationalism harking back to previous outright expropriations prevalent in the 1960s and 1970s in Africa, in countries such as Zambia and Libya, and more recently, certain oil rich countries in Latin America, particularly Venezuela.

But today, Zimbabwe aside, resource nationalism in Africa tends to manifest itself through more sophisticated or creeping measures, such as the unilateral re-interpretation of previously agreed contractual terms, the imposition of adverse tax measures, or the introduction of

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‘indigenisation’ (or ‘local content’) legislation. These measures appear to be inspired more by the approach of countries such as Ecuador and India, who have issued legislation imposing targeted taxes (windfall petroleum taxes and capital gains taxes on offshore transactions, respectively) to seek to capture a share of what are perceived to be undue profits on the part of foreign investors.

Whilst measures to nationalise or otherwise reap enhanced rewards from the nation’s natural resources often accompany a change of government – acting on the incentive to discredit the previous regime and appeal to the populist vote – they can also be driven by significant changes in commodity prices. When prices are high, governments may seek to improve upon deals previously struck with investors by capturing a greater share of the profit. When prices are low, governments dependent on export revenues may struggle to balance budgets and similarly turn to investors in an effort to extract greater value from the resources they are developing or operating.

The nature and scope of ‘nationalist’ measures in the ENR sector in Africa thus varies from state to state. In this article, we examine the rise of three trends in particular (outlined immediately below) by reference to six jurisdictions of which we have first-hand experience: Nigeria, Egypt, Algeria, Uganda, Mozambique and South Africa. In our closing remarks, we draw some conclusions from the disputes that have arisen in these jurisdictions and make certain observations on potential future trends for investor-state disputes in the ENR sector in Africa.

First Trend: Unilateral re-interpretation or violation of contract terms

A substantial number of investor-state disputes in the ENR sector in Africa are taking place in the contractual (rather than investment treaty) arbitration space – arising under long-term contracts like production sharing contracts (*PSCs*) or joint venture agreements between private investors and state-owned energy companies or the state itself. This is symptomatic of the dispute resolution mechanisms of those contracts, which, unlike many contracts in Latin America (for example), provide for arbitration, often seated outside the region. These long-term contracts seek to guarantee certain rights and obligations to foreign investors *vis-à-vis* the state or state-owned energy company; however, such rights are susceptible to unilateral re-interpretation, and at times outright violation, by the state. This is particularly apparent in the context of maturing energy projects where the balance of power has shifted away from the investor and towards the state as the project in question transitions from exploration and development to production and sale. Recent disputes arising in particular in the oil sector in Nigeria and the gas sector in Egypt demonstrate the erosive approach to contractual rights and obligations that host states have adopted, as we explore in greater detail below.

In addition to unilaterally re-interpreting or violating existing contractual terms, certain states have also begun to demonstrate a less investor-friendly approach in their new contracts, notably by turning away from international arbitration as a means of resolving disputes with investors. In Nigeria, the state has always incorporated domestic dispute resolution in its *PSCs*. In Egypt and Uganda, however, where the state has historically been more willing to agree to international arbitration in contracts with foreign investors, governments are increasingly following Nigeria’s lead in insisting that investors submit to local arbitration instead. For its part, South Africa has terminated a number of bilateral investment treaties in recent years, and introduced legislation providing for mediation or domestic litigation by way of dispute resolution of investor-state disputes.

Second Trend: Adverse tax measures

Another notable trend is states seeking to extract additional revenues from foreign investors by introducing increasingly sophisticated and creative tax measures.

In the Nigerian oil sector, changes in the methods of calculation of royalties and petroleum profits tax have prompted a series of disputes with foreign investors. Often, however, tax measures are less technical and more blatant. Indeed, some governments have publicly declared increased taxation in the energy sector to be a means of furthering national interests or ‘equalising’ the state’s and investors’ interests. Like Ecuador before it, Algeria has implemented a windfall profits tax in the oil sector.² In Mozambique, the Indian approach has been favoured with the state extending the jurisdiction of its tax authorities to offshore transactions involving the transfer of interests in its natural resources, accompanied by statements from government officials suggesting that the sale proceeds should be “shared” with the government.³ Uganda has taken a similar approach, ignoring contractual tax exemption and stabilisation clauses. In both Nigeria and Uganda, the state has also sought to block the resolution by arbitration of disputes arising from its tax measures, by taking the position (upheld by its own courts and tribunals) that tax matters are non-arbitrable and/or tax exemptions were granted *ultra vires*. More broadly, tax authorities in African states appear to be cooperating more to enforce tax measures against foreign investors in order to, as described by South Africa, better guard against “illicit flows and abusive practices” by foreign nationals.⁴ Uganda, for instance, has been pushing for increased tax harmonisation between East African states in a bid to minimise tax evasion in the region.⁵

Third Trend: Indigenisation or local content legislation

A third recent regional trend is the rise of local content legislation, which seeks to increase the participation of local, indigenous or historically disadvantaged groups in various sectors of the economy. This involves the introduction of requirements that ENR businesses procure goods and services locally, employ local staff or – in its strongest form – be owned locally, at least in part. While some African countries have imposed broad brush indigenisation and local content laws that apply to the economy as a whole, others have targeted the ENR sector in particular, driven by the principle that a country’s natural resources should benefit all segments of society – its fruits should not be concentrated in the hands of the government or an elite few.

South Africa is currently considering whether to implement more demanding ‘black empowerment’ rules in the mining sector, including changes to black ownership requirements that would represent a considerable shift of the goalposts. Other countries such as Zimbabwe and Namibia are also implementing similar empowerment legislation, which imposes indigenous ownership requirements thereby impelling existing (foreign) owners of natural resource rights to divest those interests.⁶

² ‘Algeria agrees oil windfall tax’, *BBC*, 15 October 2006.

³ ‘Eni Seen Paying Mozambique \$538 Million or More on Capital Gains’, *Bloomberg*, 2 April 2013.

⁴ Budget Speech, Pravin Gordhan, Minister of Finance, 24 February 2016.

⁵ ‘Will Uganda’s tax harmonization efforts pay off?’, *Trademark East Africa*, 29 May 2015.

⁶ ‘Zimbabwe to press ahead with controversial indigenisation scheme’, *Financial Times*, 8 February 2016; ‘Namibia aims to pass new mining empowerment laws by April 2017-minister’, *Reuters*, 11 February 2016.

We examine these three trends through the lens of six African jurisdictions and comment on further regional trends below.

Nigeria⁷

ENR assets

Nigeria's predominant natural resource is oil. While the country possesses significant natural gas reserves, these remain largely untapped. The mining sector also remains largely underdeveloped. The country's oil industry, however, is one of the most mature energy industries on the African continent. Oil was first discovered in 1956 in Nigeria and commercial production started shortly thereafter in 1958. Today, Nigeria is the largest oil producer in Africa, despite suffering from periodic supply disruptions due to frequent attacks on oil infrastructure by local groups seeking a share of the oil wealth and political governance issues such as corruption.⁸

Recent disputes in the oil sector

Having one of the most developed oil industries in Africa means that Nigeria also has one of the longest histories of investor-state disputes in the ENR sector on the continent. At the crux of most of those disputes have been the periodic efforts by the Nigerian state to increase its share of profits arising out of the country's oil resources beyond the initial bargains struck. To this end, the measures employed by the Nigerian government have ranged from the forced renegotiation of contractual terms to the re-interpretation of or retreat from previously agreed terms (or pre-existing legislation) to the government's benefit.

In recent years, for example, a raft of investor-state disputes in Nigeria's oil sector have arisen out of disagreements between international oil companies and the country's state oil company, the Nigerian National Petroleum Corporation (*NNPC*), on the commercial terms of long-term PSCs in the transition from exploration to production activities. The PSCs signed in the 1993 bid round for blocks in the deepwater of the Niger Delta region have been particularly contentious. The terms of those PSCs were designed to reflect the high investment risk assumed by the investors at the outset, including both the costs and challenges of deepwater exploration in the region at the time. When these projects moved from high risk exploration activities to low or medium risk production activities, however, the NNPC sought to extract further value from the bargains struck. These PSCs provided for submission of any disputes to domestic-seated arbitration under the Nigerian Arbitration Act.

A key example of the government renegeing on previous commercial bargains can be seen in the facts of the ICSID arbitration launched by Shell against Nigeria in 2007 in relation to an ultra-deep offshore prospecting licence in the Niger Delta, 'OPL 245' (the only dispute highlighted in this section that did not arise from the 1993 PSCs and therefore was not brought before a domestic-seated tribunal).⁹

⁷ The authors are grateful for the contributions of their colleagues at Templars to the following section.

⁸ 'Nigeria – International energy data and analysis', US Energy Information Administration, 23 May 2016.

⁹ *Shell Nigeria Ultra Deep Limited v Federal Republic of Nigeria* (ICSID Case No. ARB/07/18).

In 1998, the oil prospecting licence for OPL 245 was granted to Malabu Oil and Gas, a Nigerian company with close ties to the Oil Minister at the time.¹⁰ The state earned a signature bonus of US\$20 million. Lacking the financial resources and technical expertise required to explore the block, Malabu brought Shell on board as a partner to help fund and conduct exploration activities. Following the collection of some seismic data, the government decided that the block had been grossly undervalued, revoked the licence and put the block up again for competitive tenders. Shell won the tender process in 2002, outbidding rival international oil companies with an offer of a US\$210 million signature bonus for the government. Having been sidelined, Malabu complained that the bid round was unfair, and in 2006 Shell was ordered by the government to give up its interest in the block to Malabu.

In 2007, Shell brought a claim under the Netherlands-Nigeria bilateral investment treaty (*BIT*) in respect of the deprivation of its interests in the block. In 2011, the parties settled on terms which ceded the interests in the block to Shell, as well as Eni (who Malabu had brought on as a partner to help develop the block while the dispute had been ongoing) in return for the two companies agreeing to pay the government US\$1.1 billion plus the previous signature bonus of US\$210 million. The escalating sums offered by way of signature bonus are signs of a government that has found it difficult to resist leveraging its powers to extract greater value for the state when investors prove successful in discovering commercial reserves.

A less extreme example of the erosion of contractual terms is the dispute that arose between a consortium led by a Total subsidiary (which included subsidiaries of ExxonMobil, Chevron and Nexen) against NNPC in relation to its rights under another 1993 PSC relating to deep offshore oil prospecting licence ‘OPL 222’.¹¹

The dispute arose following the discovery of commercial quantities of hydrocarbons in the block when the Total consortium sought to convert its oil prospecting licence into an oil mining lease under the terms of the existing PSC. After several years of negotiations and the passage of new regulations, the government of Nigeria granted two oil mining leases to the consortium in respect of the block. The parties agreed that one lease would be governed by the terms of the existing PSC and the other lease would be governed by the terms of a separate PSC. However, after a change in government in 2007, which also led to changes in the management at NNPC, NNPC refused to execute the second PSC and subsequently sought to renegotiate its terms. During this period, NNPC also received an offer from a Chinese-led consortium in respect of the block.

In 2010, the Total consortium filed domestic arbitration proceedings against NNPC alleging that NNPC had breached the terms of the first PSC pursuant to which the parties had agreed to convert the oil prospecting licence into two mining leases. The consortium sought specific performance by NNPC of the obligation to enter into a second PSC, as well as an injunction restraining NNPC from entering into agreements with third parties in respect of the block.

In 2013, the tribunal ordered NNPC to perform the second PSC, thereby effectively ordering specific performance against a state-owned entity in respect of the state’s natural resources.¹² The tribunal also issued an injunction restraining NNPC from entering or seeking to enter into agreements on the block with third parties. The consortium subsequently sought to

¹⁰ ‘Shell and Eni’s misadventures in Nigeria’, Global Witness, 17 November 2015.

¹¹ *Total E&P Nigeria Limited, Chevron Petroleum Nigeria Limited, Nexen Petroleum Nigeria Limited and Esso Exploration and Production Nigeria (Offshore East) Limited v Nigerian National Petroleum Corporation*.

¹² *Id*, Partial Award, 12 December 2013, para 603.

enforce the award, while NNPC attempted to set aside the award in the Nigerian courts, proceedings that ultimately resulted in a settlement.¹³

The Total-led claim illustrates another common theme throughout African jurisdictions with relatively mature energy industries – that is, the tendency of the state to reopen discussions with investors when regulatory approvals are required to proceed with a project. In the case of OPL 222, the government redefined the terms on which the Total consortium could mine the block by insisting that the prospecting license be converted into two mining leases and that the second mining lease be governed by the terms of a new PSC.

In addition to seeking to improve the state's bargain by forcing renegotiations, Nigeria has also sought to erode prior contractual bargains by imposing sudden re-interpretations of existing undertakings in long-term PSCs and tax regulations. Around 2007, for instance, a change in NNPC's approach to tax credits applicable under its 1993 PSCs (among other issues) spawned a series of claims by international oil consortia in the following years.

In one highly publicised dispute, a consortium comprised of Exxon Mobil and Shell subsidiaries filed proceedings against NNPC in July 2009 in relation to the deep offshore Erha oil field.¹⁴

Following the entry into production of the Erha block in 2006, a dispute arose between the Exxon consortium and NNPC on the interpretation of the oil entitlement provisions in the PSC (which broadly allocated oil between the consortium and NNPC under a waterfall provision providing for the payment of royalties and taxes to the state and recovery of costs to the investor before allocating profit between the consortium and the state). Tensions came to a head in late 2007, when NNPC announced that its entitlement model showed that the consortium had overlifted some US\$415.7 million of crude oil, and that it would recover all outstanding taxes, royalties and profit oil due on an accelerated basis. NNPC then proceeded to unilaterally lift cargoes of crude oil from the Erha block by way of 'accelerated recovery'.

In July 2009, the consortium filed domestic arbitration proceedings against NNPC, claiming that it was in breach of the PSC by infringing on the consortium's right to determine lifting entitlements under the PSC (subject only to audit rights), and lifting more crude oil for taxes and royalty payments than permitted by the PSC. The consortium also claimed that NNPC habitually failed to file the petroleum profits tax returns prepared by the consortium in accordance with the PSC and replaced them with its own returns, and that it was entitled to relief under the stabilisation clause of the PSC in respect of certain changes to the implementation of existing tax rules introduced by the Nigerian Federal Inland Revenue Service (*FIRS*) in support of the NNPC's overlifting of crude oil.

In October 2011, the tribunal found in the consortium's favour, agreeing that the PSC indeed gave the consortium the right to determine lifting allocations and thus NNPC's lifting of oil in accordance with its own determinations was a breach of the PSC.¹⁵ The tribunal also found that NNPC had overlifted oil in breach of the provisions of the PSC relating to all three tranches of the waterfall provision prior to profit oil. The tribunal further held that the PSC did not give NNPC any right to alter or replace the consortium's tax returns with its own, and

¹³ 'Shell takes Nigerian oil award to New York', *Global Arbitration Review*, 27 May 2016.

¹⁴ *Esso Exploration and Production Nigeria Limited and Shell Nigeria Exploration and Production Company Limited v Nigerian National Petroleum Corporation*.

¹⁵ *Id*, Final Award, 24 October 2011, Part VII.

upheld the stabilisation claim, finding that the FIRS' amendments to its tax regulations adversely affected the consortium's rights. The award ordered NNPC to pay the consortium damages of just under US\$2 billion plus interest. In 2012 the award was subsequently set aside by the High Court in Abuja on the basis that tax matters were not arbitrable under Nigerian law.¹⁶ In July 2016, the Court of Appeal upheld the High Court's decision that the lifting dispute was non-arbitrable as it relates to tax. US enforcement proceedings remain pending.¹⁷

In a similar dispute, another consortium led by Shell brought domestic arbitration proceedings against NNPC in September 2009 for breach of the PSC for the deepwater Bonga oil field in the Niger Delta.¹⁸ A partial award was rendered by the tribunal in that case in May 2013, again finding, *inter alia*, that NNPC had overlifted substantial amounts of oil in breach of the consortium's entitlement to recover its costs and in excess of the state's entitlement to royalties and taxes under the PSC.¹⁹ The tribunal awarded the Shell consortium US\$1.4 billion for NNPC's cumulative breaches. In 2012, however, the parties were restrained from taking any steps in the arbitration after the High Court in Abuja held that tax matters were not arbitrable under Nigerian law. The consortium's appeal of the injunction, NNPC's subsequent application to set aside the arbitral award as well as parallel enforcement proceedings brought by the consortium in the US remain pending.²⁰

Other claims against NNPC relating to overlifting in breach of the state's allocation under 1993 PSCs have been brought by Statoil and Chevron and a consortium led by Eni, leading to additional arbitral awards against NNPC of US\$1 billion and US\$573 million respectively.²¹ Local challenges of NNPC's interpretation of certain tax issues relating to the 1993 PSCs have also resulted in decisions in favour of the international oil companies and have led to an audit of the 1993 PSCs by the Nigerian Tax Appeal Tribunal.

It is noteworthy that the majority of disputes that have been brought against Nigeria in recent years relate to actions taken against investors when oil prices were high (averaging some US\$70-80 per barrel). Political pressure on the government to extract so-called 'windfall' gains from international oil companies and the payoff to the state for doing so were notably high during these years.

Recent developments in the oil sector

Had the state's tendency towards resource nationalism been driven purely by soaring commodity prices, the drop in oil prices in mid-2014 might have signalled an easing of investor-state tensions in Nigeria's oil sector. However a sustained period of low oil prices since 2014 means that Nigeria has struggled to balance its budget having failed to diversify its economy and build up sufficient financial reserves during prior years when oil prices were

¹⁶ 'Nigerian oil fight heads to US', *Global Arbitration Review*, 13 November 2014.

¹⁷ 'Shell takes Nigerian oil award to New York', *Global Arbitration Review*, 27 May 2016.

¹⁸ *Shell Nigeria Exploration and Production Company Ltd, Esso Exploration and Production Nigeria (Deepwater) Ltd, Nigerian Agip Exploration Ltd and Total E & P Nigeria Ltd (formerly known as ELF Petroleum Nigeria Ltd) v Nigerian National Petroleum Corporation*.

¹⁹ *Id*, Partial Award, May 2013, Chapter XV.

²⁰ 'Shell takes Nigerian oil award to New York', *Global Arbitration Review*, 27 May 2016.

²¹ *Ibid*.

high.²² The cash-strapped government has indicated that it will (again) look towards foreign investors to sustain its coffers.

In September 2015, NNPC announced that it had plans to renegotiate its existing PSCs to boost revenues for the government, citing the fact that “some of the contracts were negotiated over 20 years ago” and “have since been overtaken by new realities in the industry”.²³ To this end, according to some observers, the state may take advantage of a provision in the Deep Offshore and Inland Basin Production Sharing Contracts Act, which permits it to adjust the revenue sharing formula in PSCs when the price of oil exceeds US\$20 per barrel.²⁴ The government has never exercised that power in the past and, interestingly, no provision exists in the law for adjustment where prices fall below US\$20 per barrel. Thus if the government does attempt to alter the terms of existing PSCs, its measures may well engage stabilisation clauses designed to protect investors from the adverse effects of such changes in law or policy.

The government has also suggested that it is re-evaluating its deals with joint venture partners. The Finance Minister recently announced that the government may seek to plug its budget gap by withholding some US\$5 billion budgeted by the country to finance its share of costs in joint ventures with international oil companies, thus forcing foreign investors to make up part of the shortfall by way of “forced loans” to the government.²⁵ In March 2016, NNPC reportedly wrote to its joint venture partners proposing to pay the oil companies up to US\$10 billion in disputed arrears and to hold talks to resolve pending disputes.²⁶ Although the letter pledged to resolve such disputes by May 2016, no agreements have yet been announced.²⁷

The government’s funding shortfall is only one element of the uncertainty plaguing Nigeria’s oil sector today. Proposed legislative and regulatory reforms further destabilise the investment environment. Various drafts of the Petroleum Industry Bill, which originally sought to unify the country’s many oil laws into a single piece of legislation, have been debated by the country’s national assembly for over eight years. Proposed changes to the tax regime, including royalty rate rises, have been particularly controversial with many international oil companies. The latest draft has hived off the fiscal and licensing provisions in the hope of getting the regulatory element of the bill passed first.²⁸ This part of the bill plans to establish an independent regulatory agency to administer and oversee the oil sector and break NNPC up into a partially privatised National Petroleum Company (which will manage all joint ventures) and a Nigeria Petroleum Assets Management Company (which will manage all PSCs and service agreements). The two other parts of the former Petroleum Industry Bill (which cover fiscal and licensing matters) remain in the works. Thus the effects of any reform of the sector’s fiscal and licensing regime on foreign investors – and, as such, disputes that may arise from such changes under contracts or treaties – are yet to be seen.

In sum, the potential for investor-state disputes arising out of Nigeria’s oil sector looks unlikely to abate in the coming years. Moreover, the state’s obligations to make good on

²² ‘Nigeria’s dollar crunch adds to fuel crisis’, *Financial Times*, 7 April 2016.

²³ ‘Cash-strapped Nigeria to renegotiate contracts with oil majors’, *Financial Times*, 15 September 2015.

²⁴ ‘Renegotiation of Nigeria’s Production Sharing Contracts’, Templars, 2015.

²⁵ ‘Nigeria seeks ‘cheapest possible money’ to finance infrastructure’, *Financial Times*, 10 April 2016.

²⁶ ‘Nigeria oil output forecasts drop sharply’, *Financial Times*, 24 April 2016.

²⁷ ‘Nigeria president shakes up state oil group’, *Financial Times*, 4 July 2016.

²⁸ ‘Exclusive - Nigeria targets sale of 40 percent of new state oil firm: draft bill’, *Reuters*, 7 April 2016.

arbitral awards rendered in relation to the country's 1993 PSCs remain outstanding, with enforcement proceedings in several cases still pending (although there are indications within the market that NNPC is considering reaching a settlement with the international oil companies to dispose of such awards). We may expect, however, future disputes to become more challenging for investors to bring under newer model PSCs. While PSCs granted in the 1993 bid round contained relatively investor-friendly terms, such as 30-year contract periods, 100% cost recovery, provisions for investment tax credits and strong stabilisation clauses, later PSCs include shorter contract periods, caps on cost recovery, provisions for investment tax allowances in the place of credits and weaker stabilisation clauses. Domestic-seated arbitration clauses have remained. It remains to be seen whether or not Nigeria's introduction of less investor-friendly terms in its post-1993 PSCs will enable it to curtail its liability in future investment disputes.

Egypt²⁹

ENR assets

Whilst possessing a sizeable oil industry, Egypt's ENR sector is dominated by natural gas. The country is the second largest natural gas producer in Africa (behind Algeria) and, as of 2015, possessed the fourth largest natural gas reserves on the continent (even before Eni's recent discovery of the super-giant Zohr field containing some 850 billion cubic meters of natural gas).³⁰ Egypt began commercial production of oil at the beginning of the twentieth century and natural gas in the 1970s. In recent years, the country retains a mix of assets at different stages of development, from exploration to production.

Recent disputes in the gas sector

Despite substantial resource endowments and a relatively long track record of production, recent macroeconomic pressures combined with the economic and social upheaval of the Arab Spring have raised tensions between the government and investors in the country's ENR sector. Once an energy exporter, in recent years Egypt has become a net importer because of declining production volumes and increasing domestic energy consumption (the latter fuelled by generous government energy subsidies). Additionally, since the Arab Spring, the social and economic instability caused by regime change has caused economic growth to slow, the government's budget deficit to rise and foreign currency reserves to plummet.

As in Nigeria, the government has turned to foreign investors in the energy sector to plug the gap, notably by means of the large-scale diversion of export-destined natural gas by the Egyptian General Petroleum Corporation (*EGPC*) and the Egyptian Natural Gas Holding Company (*EGAS*) to the domestic grid. These diversions, together with Egypt's failure to pay for much of the gas diverted, have sparked a series of disputes between international oil and gas majors, on the one hand, and EGPC and/or EGAS, on the other, in relation to the breach of contractual allocations or supply guarantees the latter had previously agreed.

²⁹ The authors are grateful for the contributions of their colleagues at Shahid Law to the following section.

³⁰ 'Egypt – International energy data and analysis', US Energy Information Administration, 2 June 2015. See also 'Giant gas field discovery in Egypt likely to impact global gas markets', McKinsey Energy Insights, September 2015.

The most high profile of such disputes is the case brought by East Mediterranean Gas (*EMG*) and its shareholders against EGPC and EGAS in relation to the Arish-Ashkelon pipeline, the so-called 'Peace pipeline' running from Egypt to Israel under the Mediterranean Sea.³¹

The Peace pipeline had its roots in the Camp David Accords and the resulting 1979 Peace Treaty between Egypt and Israel, wherein Egypt, agreed, *inter alia*, to supply Israel with gas. Accordingly, in 2005, Egypt (through ECPC and EGAS) entered into an agreement with EMG, an Egyptian company backed by Egyptian and Israeli investors, whereby EMG would build and operate the pipeline between Egypt and Israel and on-sell the natural gas to Israeli purchasers. The main downstream purchaser of gas in Israel was to be Israel Electric Corporation (*IEC*). Thus the Egyptian state entities and EMG also entered into an umbrella tripartite agreement with IEC, wherein EGPC and EGAS reiterated their supply obligations under the upstream supply agreement with EMG and extended those supply guarantees to IEC.

In the following years, EMG built the Peace pipeline and, in January 2008, began to transport gas from Egypt to Israel. In that time, investors from the United States, Thailand, Germany and other countries purchased significant interests in EMG in reliance on the assurances of the Egyptian government's commitment to the project.

EMG's operations got off to a difficult start, with the government immediately limiting gas supply until EMG agreed to double the base price for its gas and prolong the period for ramping up to full volumes. Once EMG's upstream and downstream gas supply contracts were amended in 2009 to reflect the price increase imposed by the government and the prolonged ramp up period, supply reached near-normal levels.

In January 2011 however, with the beginning of the Arab Spring, Egypt-Israel relations began to deteriorate. Growing domestic demand for energy in Egypt, combined with gas sector mismanagement, put pressure on the Egyptian state to meet domestic energy demand instead of supplying Israel. Moreover, since February 2011, the Egyptian side of the pipeline has been repeatedly attacked by Sinai-based militant groups, causing severe interruptions to gas supplies. Consequently, EGPC and EGAS withheld gas, failed to promptly repair and secure the pipeline, diverted gas to the local market, put pressure on EMG to agree further price increases and quantity reductions under the supply agreement and threatened to terminate the contract.

Between late 2011 and early 2012, EMG initiated ICC arbitration in Geneva against EGPC and EGAS to prevent them from terminating the upstream gas supply contract between EMG, ECPC and EGAS.³² When EGPC and EGAS received approval from government officials to carry out that termination, EGPC and EGAS initiated a second arbitration in Cairo (requesting a declaration that it had not repudiated the contract),³³ and EMG's shareholders

³¹ 'Israel wins gas supply claim against Egypt', *Global Arbitration Review*, 7 December 2015.

³² *East Mediterranean Gas SAE v Egyptian General Petroleum Corporation, Egyptian Natural Gas Holding Company and Israel Electric Corporation Ltd* (ICC Case No. 18215/GZ/MHM).

³³ *Egyptian General Petroleum Corporation and Egyptian Natural Gas Holding Company v East Mediterranean Gas SAE* (CRCICA Case No. 829/2012).

began two BIT arbitrations against the state under the Poland-Egypt, US-Egypt and Germany-Egypt BITs.³⁴

The ICC arbitration resulted in an award of US\$324 million to EMG and US\$1.7 billion to IEC for wrongful termination of the tripartite agreement.³⁵ Three arbitrations remain pending, including the two BIT claims with some US\$1.1 billion and US\$880 million at stake, and the domestic arbitration that EGPC and EGAS began, in which some US\$3.6 billion remains at stake.³⁶

Since 2011, a series of similar disputes have arisen out of EGPC's diversions of natural gas supplies, earmarked for processing into liquefied natural gas for export, to the domestic market.³⁷ This led to the shutdown of the country's two liquefaction plants at Damietta and Idku, the former resulting in parallel ICC and ICSID arbitrations.³⁸

As a result of these diversions to the domestic market, EGPC and EGAS have accumulated billions of dollars' worth of arrears owed to international oil companies (such as BG, BP, Eni and Edison), which the state has struggled to pay as a result of the country's foreign currency shortages.³⁹ As of December 2015, the arrears stood at US\$3 billion,⁴⁰ down from a peak of US\$7 billion in 2014.⁴¹

Recent developments in the ENR sector

At the heart of the government's troubles lies the Egyptian economy, which the government has been struggling to revive in the face of its energy crisis.⁴² In the past few years, the government has made several economic reforms directed toward encouraging investment back into the country, reducing the budget deficit and addressing the foreign exchange imbalance. In January 2015, for instance, President Abdel-Fattah promised in a speech to the World Economic Forum in Davos that the government would "tackle obstacles that hinder investment" and "settle investment disputes".⁴³ In 2014 and more recently in 2016, the government introduced cuts to energy subsidies, allowing it to slash its budget deficit.⁴⁴ The slump in oil prices since mid-2014, the bane of many other African countries, has in Egypt relieved some pressure on the Egyptian government budget since the price of energy imports is lower. In March 2016, the country devalued its currency by 13% and adopted a flexible (albeit still overvalued) exchange rate, a move that has been lauded as it should ease access to foreign currency and boost the economy.⁴⁵ Most recently in August 2016, the country

³⁴ *Ampal-American Israel Corporation, EGI-Fund, EGI-Series, BSS-EMG and David Fisher v Arab Republic of Egypt* (ICSID Case No. ARB/12/11); *Yosef Maiman, Merhav (mnf), Merhav-Ampal Group, Merhav-Ampal Energy Holdings v Arab Republic of Egypt* (PCA Case No. 2012/26).

³⁵ 'Fernandez-Armesto-chaired ICC tribunal finds \$2 billion damages in Egyptian gas case, with other claims – including treaty cases – still pending', *IAReporter*, 7 December 2015.

³⁶ *Ampal-American Israel Corporation and others v Arab Republic of Egypt* (ICSID Case No. ARB/12/11), Decision on Jurisdiction, 1 February 2016, Annex II.

³⁷ 'Egypt: natural gas in abundance but every day brings power cuts', *Financial Times*, 18 December 2013.

³⁸ 'Assignment spells success for Egyptian gas supplier', *Global Arbitration Review*, 2 June 2016.

³⁹ 'Energy groups rethink commitment to Egypt', *Financial Times*, 26 August 2013.

⁴⁰ 'BG Egypt halts some development wells over price dispute -source', *Reuters*, 22 March 2016.

⁴¹ 'Egypt puts hopes in 'supergiant' gasfield', *Financial Times*, 18 April 2016.

⁴² 'Egypt reduces budget deficit with cuts to fuel subsidies', *Financial Times*, 9 November 2015.

⁴³ 'Gearing up on investment', *Al Ahram*, 29 January 2015.

⁴⁴ 'Egypt to cut fuel subsidies as government seeks to reduce deficit', *Reuters*, 9 April 2016.

⁴⁵ 'Egypt moves to relieve dollar shortage with devaluation', *Financial Times*, 14 March 2016.

secured a US\$12 billion IMF loan designed to cushion the country's foreign reserves ahead of any further devaluation.⁴⁶

These developments should in principle facilitate Egypt to pay its debts and restore investor confidence, but so far, foreign investors have yet to see many tangible benefits. Despite the President's promises in January 2015, few of the country's investment disputes have been settled, with the majority still pending. On the arrears front, as of July 2016, the country still owed US\$1.1 billion to BG alone, after the government failed to make payment of US\$400 million that it promised to pay by June 2016.⁴⁷ With no set schedule for satisfying its commitments and the government failing to make good on specific promises to repay, the number of disputes arising out of Egypt's struggling energy sector looks set to continue in the medium term.

Adding to the uncertainty, the government has tabled a number of reforms to Egypt's regulatory framework in the energy sector in recent years. As in Nigeria, one such reform envisages the creation of an independent regulatory agency to oversee gas activities in Egypt, the Gas Regulatory Affairs Authority, with the aim of creating a more competitive and liberal gas market.

Another reform proposed is a shift toward the direct taxation of oil and gas contractors operating in the country.⁴⁸ Under the terms of the country's existing PSCs, EGPC and EGAS are responsible for the collection of royalties and taxes from the contractor and the onward payment of such taxes to the Egyptian tax authority. The new regime would potentially see direct payment to the Egyptian tax authority. How this change would be implemented and whether it would infringe on entrenched rights in existing PSCs (which currently contain oil allocations assuming the payment of tax by EGPC and EGAS) remains to be seen.

Another reform entails broadening the application of the 'assignment bonus' regime. At present, a contractor must pay an 'assignment bonus' when it assigns its direct interests under a concession to another entity. In recent months, the government has proposed that such an 'assignment bonus' should equally be paid in the event of an indirect change of control in those interests. This proposal resembles the imposition of capital gains tax on indirect transfers of ENR assets seen in Mozambique and Uganda (discussed below). It is not yet clear whether the government will impose such charges retrospectively or against previously granted exemptions (as Uganda sought to).

In addition to the uncertainty surrounding future regulation of the oil and gas sector, Egypt looks to be adopting a substantially less friendly approach to foreign investors in other sectors. In recent negotiations with foreign investors in the renewable energy sector, for instance, the government has insisted that future investor-state disputes be resolved through domestic arbitration before the Cairo Regional Centre for International Commercial Arbitration rather than in international arbitration.⁴⁹ International lenders have already reacted strongly to this insistence on domestic arbitration, with many withdrawing funding over the stalemate. Investors have reacted more pragmatically, instead offering to concede to

⁴⁶ 'Egypt wins \$12bn IMF loan to boost economy', *Financial Times*, 12 August 2016.

⁴⁷ 'Arrears to Shell, BG grow to USD 1.1 bn on continued failure to make good on payments -Source', *Enterprise*, 13 July 2016.

⁴⁸ 'Finance ministry considers amending oil sector tax treatment', *Enterprise*, 12 July 2016.

⁴⁹ 'Feed-in tariff investors present three alternatives to gov't, including accommodating domestic arbitration', *Enterprise*, 14 July 2016.

a price decrease in exchange for the government accepting international arbitration clauses and various other guarantees (primarily relating to convertibility). It is evident that investors consider that Egypt's poor track record of making good on its promises (contractual or otherwise) means that further disputes are very likely to arise. Access to international arbitration thus remains crucial, to avoid lengthy local litigation arising from domestic-seated arbitration as amply demonstrated in Nigeria.

Algeria⁵⁰

ENR assets

Algeria, like Nigeria and Egypt, is a well-established energy producer and exporter. It began producing oil in 1958 and, as one of the three largest oil producers in Africa, now pumps nearly 1.7 million barrels of oil per day.⁵¹ The country also possesses substantial natural gas reserves and is the continent's largest natural gas producer today. Like Nigeria and Egypt, the country's vast oil and gas resources have made the country a highly energy-dependent economy and, despite efforts to diversify, the government still derives some 95% of export earnings and 60% of its budget revenues from the ENR sector.

Recent disputes in the oil and gas sector

Algeria's measures against investors in the ENR sector follow the lead of measures taken by certain oil-dependent countries in Latin America, particularly Ecuador. The most obvious example of this is Algeria's introduction of a windfall profits tax on oil revenues earned by international oil companies.⁵² In 2007, when the new tax was introduced, oil prices were high and the country's production volumes were projected to increase over the medium term. The tax, which was triggered when the price of oil exceeded US\$30 per barrel, was described by many as a move by the country to exercise more control over its energy reserves and capture a greater share of profits during periods of high oil prices.

Algeria's introduction of this windfall profits tax followed swiftly on the heels of Ecuador's Law 42 which was introduced in 2006 and initially imposed a windfall profits tax of 50% on "non agreed or unforeseen surpluses from oil selling prices", with that rate increasing to 99% in 2007. Algeria's windfall profits tax rate was more reasonable, with a sliding tax rate of 5-50% depending on production volume, among other things. But like in Ecuador, the tax was retroactive, being specifically introduced in order to apply to oil allocations in existing PSCs which the government acknowledged "did not really have a way to capture [...] windfall profits".⁵³ Perhaps unsurprisingly, Algeria also followed the lead of Ecuador in terms of the series of arbitrations launched by foreign investors against it as a result.

In February 2009, Anadarko, together with joint venture partner Maersk, commenced UNCITRAL arbitration in Geneva against Algeria's state-owned oil company, Sonatrach, alleging that the new tax breached the stabilisation clause in its PSC and thus the state oil

⁵⁰ The authors are grateful for the contributions of their colleagues at Bennani & Associés to the following section.

⁵¹ 'Algeria – International energy data and analysis', US Energy Information Administration, 11 March 2016.

⁵² 'Algeria agrees oil windfall tax', *BBC*, 15 October 2006.

⁵³ 'Algeria working on windfall profits tax', *Oil and Gas Journal*, 13 July 2006.

company had to bear the additional tax burden.⁵⁴ Anadarko and Maersk sought some US\$11 billion in compensation.⁵⁵ This was followed several months later by an ICSID claim that Maersk began against Algeria under the Netherlands-Algeria BIT, seeking US\$3.6 billion, in relation to the same underlying dispute. After proceeding to final hearings in both arbitrations, however, the parties settled the dispute in March 2012.⁵⁶ Anadarko and Maersk agreed to pay the tax on windfall profits, while Sonatrach agreed to deliver additional volumes of oil to the investors, increase the investors' share of oil production under the PSC, and extend the term of the PSC from 20 to 25 years.

On 20 May 2016, Total and Repsol instituted a third arbitration in Geneva in relation to Algeria's windfall profits tax against Sonatrach, similarly challenging the tax under the stabilisation clause in their PSC for the development and operation of the natural gas field at Tin Fouye Tabankort, and claiming some US\$400 million in compensation.⁵⁷

No tribunal has yet issued a public decision on whether Algeria's windfall profits tax complies with its existing contractual and treaty commitments. Rather, recent press reports indicate that Sonatrach has reached a number of agreements with several other foreign operators in the country (including ENI and BHP Billiton) to forego challenges to the windfall profits tax in exchange for increased cooperation in the country.⁵⁸

Recent developments in the oil and gas sector

Algeria has thus opted to settle its windfall profits tax disputes on a case by case basis, on terms that leave the tax in place, rather than potentially see the tax struck down by an international tribunal (as Ecuador's windfall profits tax has been) as a breach of the country's treaty or contract obligations. Despite these settlements, the country's uncompetitive tax regime has been heavily criticised for driving investment away from Algeria's oil and gas sector.⁵⁹ The industry is suffering a decline in production volumes as slow government approvals have caused delays in bringing new projects online.⁶⁰ Notwithstanding the introduction of some minor fiscal incentives designed to increase its existing production volumes, Algeria has struggled to attract foreign interest in further exploration and development projects on its terms in recent years. In the country's latest 2014 bid round, for instance, only four out of 31 blocks were awarded.

As the country grapples with declining production volumes and sluggish investment, it remains to be seen whether Algeria will move toward a more investor-friendly fiscal regime in the coming years and whether indeed it has the means to do so. Low oil prices may afford the government little opportunity to provide tax incentives (or refrain from increasing tax rates) as it copes with falling revenues.

There is also as yet no indication whether in the future Algeria will follow the lead of Nigeria in turning to more sophisticated creeping measures such as the renegotiation or manipulation of contractual terms in order to extract additional value from investors. Despite the country's

⁵⁴ 'Anadarko to Reserve for New Algeria Tax Expense', Anadarko Press Release, 5 February 2007.

⁵⁵ 'Algerian oil-tax gives rise to ICSID and contract claims', *Global Arbitration Review*, 24 August 2009.

⁵⁶ 'Anadarko and Maersk settle with Sonatrach', *Global Arbitration Review*, 15 March 2012.

⁵⁷ 'Total and Repsol take on Sonatrach', *Global Arbitration Review*, 2 July 2016.

⁵⁸ 'Algérie: Sonatrach bétonne ses contrats pétroliers', *Jeune Afrique*, 25 July 2016.

⁵⁹ 'Algeria — falling oil prices add to the risk of instability', *Financial Times*, 26 October 2015.

⁶⁰ 'Algeria – International energy data and analysis', US Energy Information Administration, 11 March 2016.

relatively mature energy industry, so far, the occurrence of such disputes in Algeria has been relatively less common. Algeria has also thus far not sought to ‘localise’ investor-state disputes by imposing domestic seated arbitrations on state contracts (like Nigeria). But, drawing from Egypt’s experience, it cannot be taken for granted that Algeria will continue to agree to international arbitration, particularly following the spate of recent disputes arising out of its domestic tax regime.

Uganda⁶¹

ENR assets

Oil is the primary natural resource asset in Uganda. The country also possesses a promising endowment of mineral resources, including commercial quantities of iron ore, phosphates, copper and limestone. However, large-scale development of the country’s mining industry has been impeded by infrastructure bottlenecks and policy uncertainty.⁶² In recent years, Uganda has focused on developing its oil sector. Although oil seepages along the country’s Lake Albert have been known to local communities for generations, Uganda did not discover commercial oil reserves until 2006. The first commercial discoveries are now being developed, with production licences recently being granted, or about to be granted, to CNOOC, Total and Tullow Oil in various fields in the Albertine Graben. A start-up date of 2021 for commercial production is estimated.

Recent disputes in the oil sector

Although oil has not begun to flow, Uganda has already been embroiled in a number of disputes over the terms of PSCs that it entered into in order to attract foreign investment into its fledgling oil sector at the exploration stage. These disputes, reflecting the trend of resource nationalism by taxation, have arisen out of the transfer of interests in certain PSCs relating to oil blocks in the Albertine Graben as the area moves from exploration to development and production activities.

The first dispute in the series arose between Heritage Oil and the Ugandan Revenue Authority (**URA**) out of the former’s US\$1.5 billion disposal of its interests in two PSCs (relating to the ‘EA1’ and ‘EA3A’ areas of the Albertine Graben) to Tullow in 2010.⁶³ The URA sought to charge capital gains tax (**CGT**) of over US\$400 million on the transaction on the basis that it involved the transfer of assets in Uganda.

Heritage challenged the taxability of its transaction before the Ugandan Tax Appeals Tribunal on the basis of the ambiguity of the relevant tax legislation.⁶⁴ Heritage argued that the sale took place outside Uganda, and that it had the benefit of a double tax treaty between Uganda and Mauritius (to where Heritage was re-domiciled shortly before the sale), which prevented a CGT charge arising in Uganda on that transaction.

⁶¹ The authors are grateful for the contributions of their colleagues at AF Mpanga to the following section.

⁶² ‘Putting Uganda on the global mining map’, *MINING.com*, 24 March 2015.

⁶³ ‘Heritage Oil Provides an Update on Ugandan Tax Dispute’, *Market Wired*, 24 November 2011.

⁶⁴ ‘How URA won \$404m oil tax case’, *The Observer*, 7 December 2011.

In November 2011, the Ugandan Tax Appeals Tribunal upheld the URA's assessment as a matter of Ugandan law.⁶⁵ Heritage, however, continued to challenge the tax charge in London-seated UNCITRAL proceedings commenced under its PSCs, arguing that the transaction was not taxable under Ugandan law and such taxation was in breach of stabilisation provisions in the PSCs designed to protect the investor from the adverse effects of changes in policy or law.

In April 2013, the tribunal issued a decision declining jurisdiction over the underlying matters of Ugandan tax,⁶⁶ and, in February 2015, an award on the merits of the remaining contractual claims dismissing Heritage's claim that the stabilisation clauses of the PSCs had been breached by the tax levy.⁶⁷

The dispute caused considerable domestic controversy, generating a widespread sense of injustice and suspicion of foreign investors. Local civil society groups and parliamentarians also questioned why the government was defending a case in London before an international arbitral tribunal when the matter had already been determined in the government's favour by the local Tax Appeals Tribunal.⁶⁸

Heritage's dispute with Uganda also echoes a broader trend of CGT measures taken by tax authorities around the world, the most famous being the US\$2 billion CGT claim made by India against Vodafone,⁶⁹ but examples of which are also found elsewhere in Africa, as outlined below.

While the Heritage dispute remained pending, the government became involved in a further tax dispute with Tullow.⁷⁰ Having acquired Heritage's interests in the 'EA1' and 'EA3A' PSCs, Tullow decided to farm down part of those interests, as well as part of its interest in a third PSC relating to the 'EA2' area of the Albertine Graben to Total and CNOOC in order to raise capital to move into the production phase. In anticipation of this transaction, in 2012, the URA issued CGT assessments against Tullow in relation to the transfer of its interests under all three PSCs totalling US\$473 million.

Unlike Heritage, Tullow did not dispute the fact that CGT arose in respect of its assignment of interests under the 'EA1' and 'EA3A' PSCs (although it did challenge the quantum of the CGT assessed).⁷¹ However, Tullow challenged the CGT assessed in respect of its assignment of interests in the 'EA2' PSC in its entirety. The 'EA2' PSC (in relation to which the URA had assessed some US\$340 million of CGT) provided that any assignment of an interest thereunder was exempt from tax – a clause that originated in the country's old 1993

⁶⁵ 'Heritage Oil Provides an Update on Ugandan Tax Dispute', *Market Wired*, 24 November 2011.

⁶⁶ 'Heritage Oil Update in Relation to Arbitration Proceedings Against Ugandan Government', *Market Wired*, 4 April 2013.

⁶⁷ 'Government wins Heritage Oil case', *Daily Monitor*, 26 February 2015. See also 'Uganda wins tax dispute with Heritage', *Global Arbitration Review*, 3 March 2015.

⁶⁸ 'Heritage Oil arbitration case in London deprives Ugandan citizens of right to information', *Global Witness*, 28 August 2012.

⁶⁹ India's tax assessment resulted in years of litigation and arbitration against India and a retrospective change in tax legislation to capture offshore transactions like Vodafone's. See 'Vodafone Starts International Arbitration against India in Tax Dispute', *The Wall Street Journal*, 7 May 2014.

⁷⁰ *Tullow Uganda Operations Pty Ltd and Tullow Uganda Limited v Republic of Uganda* (ICSID Case No. ARB/13/25).

⁷¹ 'Ugandan Tax Appeals Tribunal delivers ruling', Tullow Press Release, 16 July 2014.

model PSC which offered significant economic incentives to investors in order to attract investment into the country.

Tullow initially brought its challenge before the local Tax Appeals Tribunal. In parallel to the local challenge, it also commenced ICSID arbitration proceedings against Uganda in late 2013. In July 2014, the Tax Appeals Tribunal accepted that the ‘EA2’ PSC provided for an exemption from CGT on the assignment of interests thereunder, but ruled that the Minister of Energy and Mineral Development did not have the legal authority to grant this tax exemption and therefore the exemption was invalid. Following this decision, Tullow appealed to the Ugandan High Court. In June 2015, the parties settled the dispute, with Tullow agreeing to pay the government US\$250 million in CGT liability with respect to its assignment of interests in all three PSCs.⁷²

In 2012, Tullow filed another claim before ICSID against Uganda relating to the recovery of value added tax on imported machinery and other goods and services.⁷³ This was followed in 2015 by another ICSID claim by Total against Uganda in relation to the imposition of stamp duty on the acquisition of its interest in the ‘EA2’ PSC from Tullow, also on the basis of the clause exempting any assignments of interests under that PSC.⁷⁴ Both ICSID arbitrations remain pending.

Recent developments in the oil sector

Despite the number of international arbitration proceedings that have recently been filed against Uganda and project delays resulting from depressed oil prices, CNOOC, Total and Tullow are moving ahead with development plans.⁷⁵ However, the investment climate in Uganda remains difficult, as the country grapples with a slowdown in economic growth. The global crash in commodity prices has also added pressure to the country’s budget, which is already strained by heavy infrastructure commitments and ambitions to become a middle-income country by 2020. Further, the government’s plan for balancing the budget is to increase tax revenues rather than reign in spending. In June 2016, the Minister of Finance announced in the government’s 2016/17 Budget Speech that it would seek to increase domestic revenues primarily by “improving efficiency in tax administration” and the “enforcement of collections”, “enhanc[ing] compliance and eliminat[ing] tax avoidance and evasion”.⁷⁶

With commodity prices set to remain low for the medium term, and given the recent statements of the Minister of Finance, the Ugandan government may well see further tax measures as a means of clawing back value from investors, potentially resulting in further investor-state disputes.

In the longer term, as Uganda transitions into full-fledged production, investors in the country’s oil sector will hope that they do not face further challenges such as the erosion of other contract terms in their existing PSCs, forced renegotiations or the delay or arbitrary

⁷² ‘Tullow settles Capital Gains Tax dispute in Uganda’, Tullow Press Release, 22 June 2015.

⁷³ *Tullow Uganda Operations Pty Ltd v Republic of Uganda* (ICSID Case No. ARB/12/34). See also ‘Tullow sues government in new tax dispute’, *Daily Monitor*, 17 December 2012.

⁷⁴ ‘Total Seeks Arbitration Over Uganda Tax Dispute’, *Reuters*, 31 March 2015.

⁷⁵ ‘Tullow slides amid oil and minerals rout’, *Financial Times*, 3 May 2016.

⁷⁶ ‘Budget Speech Financial Year 2016/17’, Ministry of Finance, Planning and Economic Development, 8 June 2016.

exercise of government discretion (as in Nigeria and Egypt). Already, the spate of recent international arbitration proceedings against the country has caused a mounting sense of distrust towards foreign investors within the government. In its more recent investment contracts, Uganda has sought to move towards imposing domestic seated arbitrations, following the lead of Nigeria and Egypt in turning away from international arbitration mechanisms, a substantial departure from the more investor-friendly provisions favoured in its early model PSCs.

Mozambique⁷⁷

ENR assets

Mozambique, like many eastern African countries, has yet to begin exploiting its natural resources endowment. Since 2010, however, the country has attracted attention from the oil and gas industry after the discovery of significant offshore reserves of natural gas. Mozambique is now estimated to hold the third largest natural gas reserves in Africa, although large-scale production is not expected to start before 2020.⁷⁸ The country's existing production of natural gas currently comes from two relatively small onshore fields. Aside from natural gas, Mozambique's resource potential lies mainly in coal, which dominates the mining sector but the development of which has faced a number of infrastructure-related challenges in recent years.

Recent disputes in the ENR sector

Despite its potential, Mozambique's ENR industry remains largely in the development phase. After a devastating civil war that ended in 1992, the government adopted investor-friendly policies in an effort to rebuild its economy. However, in recent years, the government has faced intense criticism for having granted rights to investors in the ENR sector on overly favourable terms. The country has also been engaged in a series of tax disputes with a number of foreign investors in relation to high value disposals of Mozambican mining and natural gas assets by those investors at the height of the commodities price cycle.

One of the most publicised of such disputes arose out of Rio Tinto's acquisition of Mozambique's Benga coal mines by way of a US\$3.7 billion public takeover of Riversdale Mining Limited in 2011.⁷⁹ Riversdale, an Australian company that was at the time listed on the Australian Stock Exchange, held the Mozambican interests as its main assets. Following the transaction, and no doubt conscious of the 'offshore' CGT assessments in neighbouring Uganda and (further afield) India, the Mozambican tax authority sought to assess CGT arising from the transaction from Rio Tinto, claiming that CGT was payable on the basis that the transaction involved the transfer of mining assets in Mozambique. The tax authority was said to be acting in response to criticisms from civil society groups that the government was forfeiting revenue generated by the disposal of the country's natural resource assets.

⁷⁷ The authors are grateful for the contributions of their colleagues at Henriques, Rocha & Associados to the following section.

⁷⁸ 'Mozambique – International energy data and analysis', US Energy Information Administration, April 2016.

⁷⁹ 'Mozambique Says in Talks With Rio Tinto Over Capital Gains Tax', *Bloomberg*, 26 March 2014.

Rio Tinto disputed the Mozambican tax authority's attempt to charge CGT on the acquisition. As the buyer in an offshore transaction involving no direct transfer of Mozambican assets, it had made no gain and thus expected no liability for Mozambican CGT.

In 2014, suffering from operational issues in the country and plunging coal prices, Rio Tinto sold its Mozambican coal assets to an Indian joint venture for a fraction of their acquisition price, exiting the country and in the process dealing "a blow to the country's ambition to become a major coal exporter".⁸⁰ Some commentators have suggested that the mining company's tax dispute with the government played a part in motivating its departure. Despite the company's departure from the country, however, the government continues to seek payment from Rio Tinto of the CGT it claims is owed on the Riversdale acquisition.⁸¹

Mozambique's experience with Rio Tinto is not an isolated event. Similar measures were taken against other investors in the country's natural gas sector, many of whom appear to have responded by settling such disputes with voluntary payments in order to continue operating in the country.⁸²

Shortly after Rio Tinto's acquisition of Riversdale, in March 2012, the Mozambican tax authority announced that it would impose CGT on the sale of Cove Energy, a London-based oil and gas exploration company which held an 8.5% stake in a block containing one of Mozambique's largest offshore gas discoveries.⁸³ Like Rio Tinto, Cove had expected no CGT to be payable in Mozambique since it was selling its own shares in an offshore transaction rather than disposing of individual assets in Mozambique. It was suggested, however, that the tax authority's announcement was a reaction to frustration from having failed to receive the CGT it claimed was generated from Rio Tinto's transaction.⁸⁴ Ultimately Cove agreed to pay 12.8% CGT on its own sale to Thailand's PTT.⁸⁵

A similar compromise was made in the context of an offshore transaction involving Eni's disposal of a 20% stake in an offshore block to CNPC in March 2013.⁸⁶ By selling its stake to the Chinese company through a subsidiary rather than transferring the asset directly Eni considered it was not liable to local CGT.⁸⁷ Following negotiations, however, Eni agreed to pay US\$400 million in CGT and provide financial backing for the construction of a local power plant.

Although Mozambique's tax measures have been blamed for the departure of Rio Tinto, it has been suggested that the country's intentions *vis-à-vis* foreign investors have been more transparent than other countries such as Uganda or India.⁸⁸ With the Cove transaction, for instance, the tax authority announced its intention to impose CGT prior to the closing of the sale. Moreover, Mozambique has implemented legislation to clarify its tax policy, notably a new Mining Tax Law (Law No. 28/2014) and a new Petroleum Tax Law (Law No. 27/2014) which expressly provide that all capital gains, arising from the direct or indirect transfer of

⁸⁰ 'Rio Tinto pulls plug on ill-fated Mozambique coal venture', *Reuters*, 30 July 2014.

⁸¹ 'Maputo seeks capital gains taxes from mining majors', *Mining Weekly*, 22 April 2016.

⁸² 'Mozambique Says in Talks With Rio Tinto Over Capital Gains Tax', *Bloomberg*, 26 March 2014.

⁸³ 'Cove Energy shares fall over tax threat', *Financial Times*, 2 March 2012.

⁸⁴ *Ibid.*

⁸⁵ 'Cove Energy clears up Mozambique tax question', *Money Week*, 10 April 2012.

⁸⁶ 'Eni Seen Paying Mozambique \$538 Million or More on Capital Gains', *Bloomberg*, 2 April 2013.

⁸⁷ 'Poverty-Stricken Mozambique Lays Down The Law On Italian Oil Giant Eni', *International Business Times*, 16 August 2013.

⁸⁸ 'Capital Gains Tax – The New Resource Nationalism?', Oil & Gas Council Expert Insight, 2012.

mining or oil rights, by entities with or without a permanent establishment in the country, are taxable at a fixed rate of 32%. The new tax laws further provide that the tax is due and payable by the seller but the purchaser and/or the Mozambique entity holding the mining rights have several and joint liability (thereby capturing the Rio Tinto scenario), putting an end to the ambiguity surrounding the country's tax code. Crucially, unlike in India, the government has not sought in its new legislation to impose the tax changes retroactively, perhaps in recognition of the country's constitutional prohibition on the retroactive application of the law. Thus these measures will only apply to transactions post-dating the new legislation.

Recent developments in the mining and natural gas sectors

Whilst the question of CGT arising on the acquisition of Mozambican ENR assets now appears settled, Mozambique's investment climate remains uncertain. As the country moves closer to production, the government's focus is shifting away from attracting investors and towards regulating existing projects, with more emphasis placed on protecting national interests and obtaining a good deal for the country in respect of its natural resources. In 2014, for instance, the government passed a new Petroleum Law (Law No. 21/2014), which made substantial changes to the legal framework of the country's oil and gas sector. The new law includes provisions requiring that at least 25% of the oil and gas produced in the national territory be destined for the domestic market and that oil and gas producers give preference to the government in relation to the acquisition of oil produced at negotiable prices for use in local industry. It also contains local content rules requiring that preference be granted to local suppliers and employment of Mozambican individuals in the oil industry. Mozambique may soon go further by implementing local ownership requirements (like South Africa's Black Economic Empowerment legislation discussed below) through the divestiture of shares held by foreign investors (existing legislation already requires concessionaires to reserve 5-20% of share capital for sale on the Mozambican stock market, preferably to Mozambican individuals).

Apart from the increase in regulation in the country's oil and gas sector, ENR investors in Mozambique also face a challenging economic environment. The country, like many other commodity-dependent economies, has suffered an economic slowdown as a result of low oil and coal prices in recent years. This has meant that investment decisions relating to its prized natural gas fields have suffered delays.⁸⁹ Adding to the uncertainty, the government recently revealed that state entities had borrowed some US\$1.4 billion in undisclosed loans, amounting to 10% of the country's gross domestic product.⁹⁰ The revelation shook investor confidence in the government and the International Monetary Fund responded by withdrawing funding, exacerbating the country's already yawning budget deficit and dwindling foreign reserves.

The decline in oil prices, political instability and other problems, together with the pressure on the government to ensure that local populations benefit from the development of the country's natural resources, may yet give rise to future disputes in the ENR sector. Thus far, the country has not been publicly involved in formal investor-state dispute proceedings on the international stage (having settled its CGT disputes before formal dispute resolution was

⁸⁹ 'Mozambique hit by commodity price fall', *Financial Times*, 12 November 2015. See also 'Anadarko Petroleum to take Africa decision in 2016', *Financial Times*, 7 December 2015.

⁹⁰ 'Hidden loans leave once-promising Mozambique with heavy costs', *Financial Times*, 1 May 2016.

launched). Perhaps as a result, there has been no move (as seen in Nigeria, Egypt and Uganda) to impose domestic seated arbitration provisions. The 2014 Petroleum Law, for example, provides for investor-state dispute resolution under ICSID, the Additional Facility or other international arbitration rules. It remains to be seen whether, as the country eventually moves into production, its position hardens.

South Africa⁹¹

ENR assets

South Africa is a treasure trove of mineral resources, with nearly 75% of the world's platinum metals, 75% of manganese, 73% of chrome, 45% of vanadium and 41% of gold located in its territory. It is the world's largest producer of chrome, manganese, platinum, vanadium and vermiculite. The mining industry is thus the backbone of the country's economy. By contrast, South Africa's oil and gas resources are relatively undeveloped. Discoveries by exploration companies in the country's oil sector have been relatively modest. With the discovery of huge natural gas reserves in neighbouring Mozambique and Namibia, however, South Africa's natural gas industry is undergoing rapid development in the hope that the country may also possess large natural gas reserves.

Recent disputes in the mining sector

The structure of the mining industry – a relic of the country's history of colonialism and apartheid – is a highly politicised issue. Over the past two decades, one of the most high-profile changes to the industry has been in the area of 'indigenisation' or 'local content' policy. In order to address apartheid-era inequality, the state has advanced a policy to increase the participation of blacks and other historically disadvantaged groups in the mining industry, primarily through black economic empowerment (*BEE*) legislation and regulations.

The first wave of BEE amendments to the mining regime were enacted in 2004 as part of South Africa's post-apartheid reforms. These changes were principally embodied in the Mineral and Petroleum Resources Development Act No 28 (the *MPRDA*) and the Broad-Based Socio-Economic Empowerment Charter for South African Mining Industry (the *Mining Charter*).

The MPRDA established a new regime designed to redress historical inequities in the mining sector and to promote the efficient development of the industry. As part of the transition to this new regime, holders of existing 'old order' mining rights were entitled to have those rights converted into 'new order' MPRDA rights, providing they complied with the objectives of the MPRDA, which included promoting equitable access to the nation's mineral resources to all the people of South Africa, particularly those who were historically disadvantaged. The Mining Charter was a policy document aimed at increasing the participation of 'historically disadvantaged South Africans' (*HDSA*) – in effect, any South African who was not an able-bodied white male – in the mining industry. One of the Mining Charter's key provisions required that all mining companies achieve 26% HDSA ownership of mining assets by 2014.

⁹¹ The authors are grateful for the contributions of their colleagues at Bowman Gilfillan to the following section.

In 2006, a group of Italian investors and a Luxembourg corporation that they owned (led by Piero Foresti) commenced international arbitration against the government alleging that the MPRDA and the Mining Charter expropriated indirect interests they held in the South African granite-quarrying sector and otherwise violated BITs between South Africa and, respectively, Italy and Belgo-Luxembourg.⁹² In particular, the claimants complained that the ‘old order’ common law mineral rights leased or owned by their subsidiaries were expropriated when the MPRDA came into effect and that the requirement to sell equity to comply with HDSA ownership requirements constituted an expropriation of their investments, in breach of South Africa’s investment treaty obligations. They thus claimed US\$375 million in compensation.

South Africa refuted the claimants’ claim for expropriation of their common law mineral rights, noting that under the MPRDA, operating companies retained the same core entitlement to prospect for or mine granite on an exclusive basis. As for the claim for expropriation of the shareholdings to comply with the Mining Charter ownership requirements, South Africa maintained that the Charter was flexible and enabled the 26% ownership target to be met in a variety of ways, including through joint ventures, employee share ownership schemes, dedicated mining unit trusts and sale of mining assets. In any event, in view of the BEE ‘offset’ system, making use of credit for beneficiation in South Africa (which refers to the refinement into a useable product of an extracted mineral) mining companies could further reduce the ownership target well below 26%, because domestic beneficiation would result in employment for HDSAs and promote opportunities for businesses owned or managed by HDSAs.

South Africa also argued that even if an expropriation had occurred it was lawful under the BITs. It argued that increased participation of an under-represented group was a legitimate aim and that the MPRDA and Mining Charter were part of the country’s efforts to comply with its ongoing international law obligation to remedy the effects of decades of segregation and apartheid in the mining sector.

The tribunal did not ultimately rule on the merits of this politically sensitive dispute. In 2009, the claimants sought to withdraw their claims after they lodged their old order rights for conversion and the decision to convert them was made under the MPRDA and the Mining Charter, allowing them to continue their operations uninterrupted. In doing so, the claimants took advantage of the Mining Charter’s provision allowing for beneficiation activities to offset a certain percentage of the equity ownership requirements. The claimants secured a 21% beneficiation offset (that is, undertaking to beneficiate or process in South Africa 21% of the stone mined in South Africa), meaning they needed to achieve only 5% HDSA asset ownership.⁹³ Having received partial relief in respect of their claims, the claimants sought discontinuance of the arbitration. South Africa agreed to the discontinuance on the condition that it be in the form of an award dismissing the claims with *res judicata* effect. The tribunal ultimately rendered an award in 2010 formally dismissing the claims.

⁹² *Piero Foresti, Ida Laura de Carli and others v Republic of South Africa* (ICSID Case No. ARB(AF)/07/1).

⁹³ *Id.*, Award, 4 August 2010, para 79. See also ‘End of Piero Foresti show’, *Global Arbitration Review*, 1 September 2010.

Recent developments in the mining sector

Controversy over the requirements of South Africa's BEE regime has recently been rekindled, as the government seeks to impose even more stringent BEE requirements on the mining industry.

In 2013, the South African parliament passed a bill proposing certain amendments to the MPRDA. In 2015, President Jacob Zuma referred the bill back to parliament for failing to pass constitutional muster on the grounds that it sought to elevate the Mining Charter from its status as a policy document to legislation. The draft legislation remains under revision.

Meanwhile, in 2015, a dispute arose between the Chamber of Mines (representing the interests of the mining companies) and the Mining Department concerning (inter alia) whether the Mining Charter's 26% HDSA ownership target could be met by a one-off divestiture to HDSAs (in accordance with the 'once empowered, always empowered' principle) or whether the target represents a continuing obligation to maintain a minimum 26% HDSA ownership level in perpetuity.⁹⁴ Interpreting the 26% target as a continuing obligation would mean that many mining companies would have to enter into further rounds of divestitures in order to maintain HDSA ownership at 26% or more (e.g. if previously divested shares were subsequently transferred to a non-HDSA person). Doing so would be a dilutive and expensive exercise, in view of the fact that disposals to HDSA individuals historically involved discounts and special financing terms.⁹⁵ The position of the Mining Department that the 26% ownership requirement was a continuing one was thus challenged by the Chamber of Mines before the South African courts.

In April 2016, while these proceedings remained pending, the Mining Department (to the surprise of the mining industry) released a draft revision of the Mining Charter expressly stipulating that the 26% ownership requirement is a continuing obligation, and (inter alia) replacing the term 'HDSA' with 'black people' (a smaller target group), requiring BEE transactions to be structured differently (at considerable cost to mining companies), and raising the targets for blacks at all management levels.⁹⁶ The draft revised Charter also provides that such new requirements and targets are to be applied to existing mining rights, not just future rights. Unlike the two previous iterations of the Charter, these revisions were released by the Mining Department with no prior consultation with the industry.

Critics of the Mining Department have branded the proposed reforms as a retroactive application of the law and an attempt to circumvent the judicial process by introducing legislation in its favour while declaratory proceedings remain pending.⁹⁷

Negotiations between the mining industry and the Mining Department remain ongoing.⁹⁸ But if the proposed changes to the Mining Charter are passed (a final version of the revised Charter is expected later in 2016), it may well lead to further investment disputes between the mining industry and the South African government.

⁹⁴ 'Protecting historical BEE deals could be way forward for revised mining charter', *Business Day Live*, 22 June 2016.

⁹⁵ 'POINT OF ORDER: Mining BEE delivers the worst result possible', *Business Day Live*, 25 April 2016.

⁹⁶ 'Department blindsides miners with new charter', *Business Day Live*, 15 April 2016. See also 'Mining Charter changes worsen division', *Business Day Live*, 18 April 2016.

⁹⁷ 'EDITORIAL: Shafting the mining industry', *Business Day Live*, 19 April 2016.

⁹⁸ 'Mining Charter talks on track, says Zwane', *Business Day Live*, 19 May 2016.

Aside from the *Piero Foresti* case, South Africa has seen little in the way of investor-state disputes. This, however, may change, with the state looking to play an increasingly prominent role in the mining sector in the coming years. In January 2016, for instance, the government published a draft bill that proposes that the state-owned company African Exploration Mining and Finance Corporation acquires and develops permits and mining rights on behalf of the state. Additionally, pressures are mounting on the government to impose more stringent environmental legislation and regulation on the ENR sector, which could lead to environment-related controversies in the future.

Investors may however find it increasingly difficult to challenge South Africa's regulatory measures on the international stage. As in other African jurisdictions, South Africa is turning its back on international arbitration as a dispute resolution mechanism. The country's mining concessions already require that contractual disputes be submitted to local litigation, rather than arbitration. Furthermore, following the dismissal of the *Piero Foresti* claim discussed above, and in a move reflective of the reaction of Venezuela and other Latin American states to the BIT claims they faced in the ENR sector, South Africa carried out a review of all of its BITs and decided to terminate a substantial number. Instead, it has introduced the Protection of Investment Act 2015, which codifies investor protections and affords equal protection to domestic and foreign investors in South Africa.⁹⁹ The Act provides for mediation as the preferred remedy, to be followed by domestic litigation – not arbitration – as a secondary option.

In the long run, this suggests that foreign investors may be forced to resort to domestic procedures in South African courts in order to challenge future measures (as the Chamber of Mines is currently doing). In the short to medium term, however, most of South Africa's terminated BITs remain effective under sunset clauses for investments made prior to the date that termination took effect. The BIT with the United Kingdom, for example, provides for a sunset period of 20 years after the date of termination during which time such investments will continue to benefit from the substantive protections of the treaty. South Africa's BIT with the Netherlands similarly provides for a sunset period of 15 years.

We may therefore continue to see investors challenging South Africa's regulatory policies under these treaties in the coming years. Or, as some commentators have suggested, the country's recent reforms might simply prompt the exit of foreign investors from its already contracting mining industry, as low commodity prices and rising costs continue to precipitate job cuts, restructurings and mine closures.¹⁰⁰

Recent developments in other natural resource sectors

In response to the recent expansion in the natural gas industry, the government has proposed plans to separate out parts of its oil and gas rules from the mining rules in the MPRDA (which currently covers both mining and petroleum activities). It also published a draft Gas Bill for comment in 2013 which broadens the activities regulated by the Gas Act to liquefied natural gas and compressed natural gas and strengthens the monitoring and enforcement powers of the gas regulator.

⁹⁹ 'SA's new investment legislation slips in under the radar', *Eyewitness News*, 20 January 2016,.

¹⁰⁰ 'South Africa's economy contracts, raising prospect of recession', *Financial Times*, 8 June 2016. See also 'South African mining production drops (very) heavily', *Financial Times*, 12 May 2016.

The legislative framework of the oil and gas industry is complemented by the ‘Liquid Fuels Charter’, a policy document analogous to the Mining Charter for the purposes of BEE policy in the oil and gas sector. The Liquid Fuels Charter, however, dates back to 2000 and therefore does not reflect the latest BEE legislation.¹⁰¹ Should the Liquid Fuels Charter be amended to follow the controversial lead of the Mining Charter, similar BEE-related disputes arising in South Africa’s natural gas sector may emerge in the future.

Concluding Remarks

In this article, we have explored recent trends in disputes arising in the ENR sector in Africa. Specifically, we have focused on six jurisdictions in which a variety of measures adopted by the state authorities in recent years have generated a spate of investor-state disputes.

The first trend we have reviewed entails the unilateral re-interpretation, violation or replacement of contract terms, state conduct that is particularly prevalent in mature energy economies such as Nigeria and Egypt. The governments in these countries are today more concerned with maximising value from their producing assets than attracting foreign investment into the country to support high risk exploration and development activities.

But squeezing investors during a sustained period of low energy prices is a dangerous game to play and Nigeria and Egypt are already seeing the consequences. In both countries, investment inflows have tailed off, foreign reserves have plummeted and – crucially – production levels have begun to fall due to the lack of continued investment. In recent months, Nigeria and Egypt appear to have realised that they need to remain attractive to foreign investors in order to maintain production levels, with promises being made to negotiate with foreign investors in relation to reducing government arrears and resolving pending disputes. Whether economic conditions permit Nigeria and Egypt to make good on those promises and see through the reforms needed to restore investor confidence, however, remains an open question.

The experience of investors in Nigeria and Egypt in recent years may foreshadow the sort of disputes that could arise in East Africa in the coming years. Recent discoveries of vast energy reserves in Mozambique (natural gas), Uganda (oil), Kenya (oil) and Tanzania (natural gas) have driven an investment boom in the region over the past half-decade.¹⁰² The majority of the region’s projects remain in development at present, but there are early indications that these states may renege on their contractual obligations. Indeed, Uganda has been subject to several arbitration proceedings arising out of exploration-stage PSCs, suggesting that the government is already rowing back on promises made to attract investors.

The second trend we have established arises from the introduction of adverse tax measures, including Algeria’s windfall profits tax and Mozambique’s and Uganda’s CGT charges on offshore transactions or against previously granted tax waivers. Whilst a number of investors have challenged these taxes, few disputes have been publicly decided by tribunals thus far. Instead, most investors have chosen to pay some tax and settle the dispute – perhaps with a view to maintaining relations with the host state in which they intend to operate for some time.

¹⁰¹ ‘Liquid fuels charter audit findings disappointing – Minister’, *Engineering News*, 5 July 2012.

¹⁰² ‘East Africa oil, gas discoveries will lead to greater economic growth’, *Engineering News*, 29 July 2015.

We have observed that the imposition of government tax measures seems to correspond to a rise in commodity prices. Algeria's windfall profits tax was introduced between 2006 and 2007, when oil prices hovered around US\$70-80 per barrel. Likewise, Mozambique's dispute with Rio Tinto arose out of its acquisition of Riversdale in 2011, at the height of the commodities boom – and was probably also driven by the US\$3.7 billion price tag.¹⁰³ The transactions that gave rise to Mozambique's CGT assessments against Cove and Eni, as well as Uganda's tax disputes with Heritage, Tullow and Total, also all predated the collapse in oil prices that occurred in mid-2014.

That said, despite prevailing low commodity prices at present, there are indications that the trend of adverse tax measures continues. In 2014, for instance, Kenya's President Uhuru Kenyatta announced that the government intended to introduce both CGT (which had been suspended for several decades) and a windfall profits tax on oil and gas companies operating in the country, possibly in reaction to similar measures taken in Uganda, Mozambique and Algeria.¹⁰⁴ In 2015, Kenya re-introduced CGT of 30-37.5% on gains arising on sale of rights in the country's extractive sector.¹⁰⁵ It is not yet apparent whether the country will introduce a windfall profits tax, and if it does, whether this will apply retroactively or not.

In June 2016, Tanzania issued a CGT assessment of some US\$520 million against Shell in relation to the latter's US\$67 billion acquisition of BG on the basis that the transaction involved the transfer of interests in two natural gas blocks in Tanzania.¹⁰⁶ Shell is currently contesting the charge before the local tax tribunal. The Tanzanian government has frozen BG's bank accounts in country and suspended Shell and BG's applications for renewal of the exploration licenses in the two blocks until the dispute is resolved.¹⁰⁷

Thus, it can be concluded that the trend of squeezing the profitability of foreign investors in the ENR sector through aggressive taxation measures is on the rise, and investor-state disputes in this area are likely to increase.

The third type of trend we have observed is the implementation of indigenisation or local content rules. While South Africa's BEE legislation is the best known example of this, the country is by no means alone in indigenising the ownership of its natural resources, with Mozambique following suit.

Zimbabwe has passed even more aggressive indigenisation legislation mandating a higher local ownership level than South Africa of 51%. Its 2007 reforms require foreign mining companies to cede at least 51% of their ownership to employee and community share schemes and to the National Indigenisation and Economic Empowerment Board.¹⁰⁸ Since then, few of the proposals in the indigenisation policy have been implemented, with certain Chinese firms being exempted altogether as part of the country's 'look east' policy.¹⁰⁹ But recently the country has seen a renewed push to move forward with the implementation of the scheme, with the country's resources being described as "God-given".¹¹⁰ The government

¹⁰³ 'Rio Tinto closes dire chapter with \$50m Mozambique coal sale', *Financial Times*, 30 July 2014.

¹⁰⁴ 'Blow for Tullow as Kenya eyes windfall tax on oil companies', *Independent.ie*, 5 August 2014.

¹⁰⁵ 'Capital gains tax to slow activities in oil, gas exploration, says study', *Daily Nation*, 25 January 2015.

¹⁰⁶ 'Shell appeals to Tanzania tribunal over \$520m in capital gains tax claim', *The East African*, 18 June 2016.

¹⁰⁷ 'Taxman freezes BG Group's accounts in \$500m tax row', *The East African*, 9 July 2016.

¹⁰⁸ 'Indigenisation law: No mercy for mining companies', *Southern Eye*, 28 January 2015.

¹⁰⁹ 'Chinese firms exempt from indigenisation law', *New Zimbabwe*, 2 March 2011.

¹¹⁰ 'Zimbabwe to press ahead with controversial indigenisation scheme', *Financial Times*, 8 February 2016.

has even suggested that the imposition of a 99% local ownership requirement was not off the table, a move that has been described by commentators as “tantamount to robbery”.¹¹¹

Earlier this year, Namibia also proposed new mining empowerment legislation requiring that a 20% stake in mining firms be reserved for the black majority, and that at least five percent of a mining company be owned by Namibian nationals.¹¹²

These divestiture requirements may give rise to further disputes along the *Piero Foresti* line. Against the background of depressed commodity prices and infrastructure challenges that investors in Africa currently face, some commentators have suggested that foreign investors may see the imposition of such divestiture rules as good reason to withdraw from certain African jurisdictions altogether.¹¹³

The African continent possesses a wealth of natural resources and accordingly a wealth of opportunity for foreign investors. However, with this opportunity comes risk, as demonstrated by the case studies above. The recent trend of opportunistic resource nationalism measures has led to a significant increase in investor-state disputes in Africa. Indeed, the number of investor-state disputes in the region (where the ENR disputes dominate those in other sectors) is now comparable to that of Latin America – the regional recipient of the bulk of ICSID’s case load before 2010.¹¹⁴ And the trajectory of ICSID’s case load is not in Africa’s favour: in 2015, five cases were registered by ICSID involving a South American or Central American state party, compared to 10 cases involving an African state party.¹¹⁵

As foreign investors in the region increasingly turn to investor-state dispute mechanisms to enforce their contractual and treaty protections, the response of African states should be closely watched. The art for these states lies in striking the right balance, and not attempting to wring so much out of their resources today that they forfeit the investment they require to reap the benefit of those resources tomorrow.

¹¹¹ ‘Clarity, consistency elude indigenisation policy’, *Zimbabwe Independent*, 16 January 2015.

¹¹² ‘Namibia aims to pass new mining empowerment laws by April 2017-minister’, *Reuters*, 11 February 2016.

¹¹³ ‘White-businesses in panic as Namibia pushes empowerment bill’, *ENCA*, 29 July 2016.

¹¹⁴ As of April 30, 2016, ICSID had registered 563 cases under the ICSID Convention and Additional Facility Rules. 23% involved an African state party, 24% a South American state party, and 6% a Central American or Caribbean state party.

¹¹⁵ 2015 Annual Report, ICSID, 4 September 2015, p 12.