TOWARDS ADOPTING AN APPROPRIATE DISPUTE RESOLUTION MECHANISM TO PROMOTE INVESTMENTS TO ENHANCE ENERGY ACCESS IN AFRICA

By

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Introduction

The attraction of Foreign Direct Investment (FDI) globally and in Africa in particular depends largely on the legal framework for investment and the availability of appropriate dispute resolution mechanisms. The competitiveness and profitability of such investment are also dependent on the availability and accessibility of energy. Unfortunately, the availability and accessibility of energy in Africa have been a major challenge.

It is instructive to ask why we should worry about the legal framework for accessing energy in Africa and resolving disputes arising therefrom. In the *World Energy Outlook, 2015*[1], it was clearly stated that energy is a critical enabler; that every advanced economy has required secure access to modern sources of energy to underpin its development and growing prosperity; and that in developing countries, access to affordable and reliable energy services is fundamental to reducing poverty and improving health, increasing productivity, enhancing competitiveness and promoting economic growth. Specifically, access to energy is essential for the provision of clean water, sanitation and healthcare and provides great benefits to development through the provision of reliable and efficient lighting, cooking, mechanical power, transport and communication.[2]

Accessibility and financing are closely connected. In 2013, it was estimated that globally $13.1 billion in capital investment was directed to improving access to electricity and clean cooking facilities and that the bulk of this went to the power sector,

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[1] Published by the International Energy Agency available at <www.worldenergyoutlook.org> accessed 30 September, 2016. The World Energy Outlook for 2016 was released on 16 November, 2016 available at <http://www.worldenergyoutlook.org/publications/weo-2016/> accessed 25 November, 2016.

[2] See World Energy Outlook, "Modern Energy for All: Why it Matters", available at <http://www.worldenergyoutlook.org/resources/energydevelopment/modernenergyforallwhyitmatters/> accessed 10 October, 2016.

either to increase generation capacity or to extend transmission and distribution networks. The capital comes to the energy sector from a variety of sources: self-financing by the energy investor; allocation from the state budget or external borrowing including opening the sector to private participation. The need for capital and expertise has made public-private partnership (PPP) an important area of focus. The African Energy Leaders Group, launched in January 2015, is working towards universal energy access through PPPs and commercially viable regional power pools while the Sustainable Energy for All (SE4All) is working with countries to develop an energy investment prospectus, often including PPPs.[3] On 25 September, 2015, the Sustainable Development Goals (SDGs) were adopted. It would seem that the thrust of SE4All has been subsumed by the SDGs especially Goal 7 that provides for affordable and clean energy.[4] Achieving these goals will require substantial investment in energy. Such investments can also be carried out by way of PPPs.

From the *Executive Summary to the World Energy Outlook 2016*, it is clear that

> *… a cumulative $44 trillion in investment is needed in global energy supply in our main scenario, 60% of which goes to oil, gas and coal extraction and supply, including power plants using these fuels, and nearly 20% to renewable energies. An extra $23 trillion is required for improvements in energy efficiency.*[5]

Lastly in *The African Energy Outlook*, more than 620 million people in sub-Saharan Africa (two-thirds of the population) live without electricity and nearly 730 million people rely on dangerous, inefficient forms of cooking. The use of solid biomass outweighs that of all other fuels combined and average electricity consumption per capita is not enough to power a single 50-watt light bulb continuously.[6]

In all these especially in considering the volume of investment requirement, law is central. Any development initiative in the energy sector will not only consider the legal framework for attracting such investment but the dispute resolution mechanisms that are available on the African continent. Conventionally, the dispute resolution usually offered is litigation through the courts. However, it has become clear that no foreign investor would like to be restricted to fora like litigation without other alternatives.

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[3] See World Energy Outlook, "Financing Energy Access" available at <http://www.worldenergyoutlook.org/resources/energydevelopment/energyforallfinancingaccessforthepoor/> accessed 10 October, 2016. See also Sustainable Energy for All available at <http://www.se4all.org/our-vision_our-objectives_renewable-energy> accessed 10 October, 2016 and the United Nations Sustainable Development Goal (SDG) [Goal 7 – Ensure access to affordable, reliable, sustainable and modern energy for all] available at <http://www.un.org/sustainabledevelopment/sustainable-development-goals/> accessed 10 October, 2016.

[4] See Sustainable Development Goals available at <www.undp.org/content/undp/en/home/sustainable-development-goals.html> accessed 27 November, 2016.

[5] See the Executive Summary, page 2 available at <https://www.iea.org/publications/freepublications/publication/WorldEnergyOutlook2016ExecutiveSummaryEnglish.pdf> accessed 25 November, 2016.

[6] See Focus on Africa available at <http://www.worldenergyoutlook.org/resources/energydevelopment/africafocus> accessed 10 October, 2016.

In this Chapter, therefore, we will not only examine the role that law plays in the enablement and empowerment of the world's energy poor with a particular focus on Africa, we will also examine the various dispute resolution mechanisms and recommend the use of arbitration. Accordingly we will examine the legal framework for arbitration in African States to determine whether the arbitration laws enhance or impede access to energy and whether the arbitration laws and other instruments are stimulants for inward investment into the energy. In the area of international investment law, given the advantages of arbitration over litigation, the chapter concludes by recommending the proper negotiation of investment agreements (contracts and treaties) and resolution of disputes by arbitration.

Dispute Resolution Mechanisms

One of the first things investors would want to check before becoming involved in any cross-border project is whether the country's legal and regulatory environment is favourable to such project.[7] This is because a contractual document cannot unilaterally modify or override the provisions of a law or the country's constitution.

The Foreign Investment Advisory Service (FIAS),[8] a joint facility of the World Bank, Multilateral Investment Guarantee Agency (MIGA) and the International Finance Corporation (IFC) helps developing and transition-economy governments design initiatives to attract foreign direct investors. FIAS found growing concerns and frustration among governments and investors about the difficulties in successfully implementing private infrastructure projects. Delays in project start-ups, contract cancellations, and legal disputes have frequently overshadowed success stories and efficiency gains.

Some governments found it difficult to structure and design these new types of investments, being unfamiliar with the complicated nature of project finance transactions especially in the energy sector. Supported by a proper legal infrastructure and strong policy framework, private sector financing and operation of infrastructure facilities can result in significant efficiency gains while alleviating budgetary pressures. African countries must therefore take advantage of this facility.

In all these relationships and initiatives, disputes are bound to arise. There are different types of dispute resolution mechanisms. Generally, dispute resolution mechanisms are broadly divided into two: adjudicatory and consensual. Thus the dispute resolution mechanisms adopted in resolving disputes range from adjudicative processes in which a determination is made by a third party (e.g. judge, arbitrator[9] and

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[7] See *Alternative Dispute Resolution Services in West Africa: A Guide for Investors: Commercial Law Development Program, 2003*: <cldp@doc.gov> accessed 10 October, 2016.

[8] See http://www.worldbank.org/en/topic/competitiveness/brief/facility-for-investment-climate-advisory-services-fias accessed on 31 January 2017.

[9] See generally David St John Sutton, Judith Gill and Matthew Gearing, *Russell on Arbitration* (24th edn, Sweet & Maxwell 2015); Paul Idornigie, *Commercial Arbitration Law and Practice in Nigeria* (Lawlords Publications 2015); Nigel Blackaby and Constantine Partasides, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015); C A Candide-Johnson and Olasupo Shasore, *Commercial Arbitration Law and International Practice in Nigeria* (LexisNexis 2012); J Olakunle Orojo and M Ayodele Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria* (Mbeyi & Associates (Nigeria) Ltd 1999); Tackaberry, J and Marriott A: Berstein's *Handbook of*

expert determination) to consensual processes in which a neutral third party assists the parties in reaching a resolution which is agreed rather than imposed (e.g. mediation, conciliation,[10] facilitation, med-arb, expert appraisal, dispute resolution board).[11] The consensual processes are usually referred to as Alternative Dispute Resolution (ADR).[12] Over time all these methods have achieved varying degrees of success. However, we must be able to establish a nexus between a dispute and a process so as to determine which process fits a particular dispute.[13]

Appropriate Dispute Resolution Mechanism

In this Chapter, we are concerned with adopting appropriate dispute resolution mechanism to promote investments to enhance energy access in Africa. Where there is domestic dispute, resolving it with entities incorporated or registered in the same jurisdiction generally creates no problem. However, when a dispute has a foreign element – either in terms of the nationality, domicile, place of business, applicable law or jurisdiction, problems usually arise. For instance, if there is a dispute between a Ghanaian and an English entity, which law applies? Should it be English Law or Ghanaian law? If this issue is resolved and the matter is to be resolved by a court, the next question is which court has jurisdiction? English courts or Ghanaian courts? Although there are conflict rules designed to resolve these issues, no foreign investor would like to enter into a contract regulated by a foreign law and submit a dispute to the jurisdiction of that foreign court.

Increasingly, therefore, the preferred forum for the resolution of commercial (including investment) disputes is arbitration. An arbitration can be domestic and international.[14]

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*Arbitration and Dispute Resolution Practic*e (4th edn, Sweet & Maxwell 2003), and E Akpata. *The Nigerian Arbitration Law in Focus* (West African Book Publishers Ltd 1997).

[10] The expressions "mediation" and "conciliation" are often used interchangeably and the processes are difficult to distinguish in practice. The term "mediation" has become more popular in recent years though UNCITRAL uses the term "conciliation". See Art 1.3 of the UNCITRAL Model Law on International Conciliation available at < https://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf> accessed 10 October, 2016.

[11] See Dispute Review Board and Other Standing Neutrals available at <http://www.cpradr.org/Portals/0/Resources/ADR%20Tools/Tools/CPR%20Dispute%20Review%20Boards%20&%20Other%20Standing%20Neutrals%20Constructiontitle.pdf> accessed 30 September, 2016. See also Tackaberry and Marriott (n 9) 596 where the concept of Dispute Resolution Board is extensively discussed.

[12] Alternative Dispute Resolution (ADR) has been given different meaning and construction. According to the learned authors of *Russell on Arbitration*, "Alternative dispute resolution (ADR) is regarded by English practitioners as any system of dispute resolution which is non-binding. Used in this context, 'non-binding' means that the parties are under no obligation to comply with any decision or determination resulting from the process, if indeed there is one". See Sutton, Gill and Gearing (n 9) 44 and Blackaby and Partasides (n 9) 40.

[13] See generally Henry Brown and Alan Marriott, *ADR Principles and Practice* (3rd edn, Sweet & Maxwell 2011); Susan Blake, Julie Browne and Stuart Sime, *A Practical Approach to Alternative Dispute Resolution* (2nd edn, OUP 2011); Karl Mackie and Others, *The ADR Practice Guide: Commercial Disputes Resolution* (3rd edn, Tottel Publishing 2009) and J Macfarlane (ed) *Rethinking Disputes: The Mediation Alternative* (Cavendish Publishing Ltd 1997). See also P O Idornigie, 'The Relationship Between Arbitral and Court Proceedings in Nigeria'', *Journal of International Arbitration' Vol 19, Issue 5, 2002;* P O Idornigie 'Anchoring Commercial Arbitration on Fundamental Principles', *The Arbitrator & Mediator*, (Australia) Vol.23, No. 1, April 2004; and P O Idornigie 'The Principle of Arbitrability Revisited', *Journal of International Arbitration* Vol. 21, Issue 3, 2004.

[14] See Art 1(3) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985 as adopted in 2006. See also section 57(2) of the Nigerian Arbitration and Conciliation Act, Cap A18, Laws of the Federation of Nigeria, 2004 and Art 1(3), Schedule 1 to the South African International Arbitration Bill, 2013.

If an energy dispute is domestic, the appropriate dispute resolution mechanism may be litigation through the courts or arbitration. However, for pure commercial disputes including energy disputes, the most appropriate forum is arbitration and not litigation because of the peculiar nature of arbitration.

According to Blackaby and Partasides[15]

> *Disputes between states belong to the realm of public international law. However, where the state enters into a commercial agreement with a private party, either by itself or through a state entity, any disputes are likely to be referred either to the courts of the state or to international arbitration. The private party to such contract will almost certainly prefer to submit to arbitration as a 'neutral' process, rather than to the courts of the state with which it is in dispute.*

Thus where a dispute is international, the most appropriate forum is arbitration. To ensure that arbitration is effective and efficient, there must be appropriate arbitral institutions to support the process. There are several arbitral institutions with their institutional rules regulating arbitration[16]. Arbitral proceedings in which one of the parties is a state or state entity often take place under these rules. However, there are two institutions that are usually concerned only with disputes in which one of the parties is a state or state entity – The International Centre for the Settlement of Investment Disputes (ICSID) in Washington[17] and the Permanent Court of Arbitration (PCA) at The Hague.[18]

Historically, disputes between foreign investors and host states were resolved under customary international law. The foreign investors could not ventilate their grievances directly but sent petitions to their home governments to prosecute the claims on their behalf. In other words, the foreign investors had no direct recourse against the host states. However, with the conclusion of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States in 1965, all these changed. The 1965 Washington Convention provides facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of Other

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[15] Blackaby and Partasides (n 9) 53

[16] See the London Court of International Arbitration, Arbitration Rules of 2014; the International Chamber of Commerce, Arbitration Rules of 2012; the International Centre for Dispute Resolution (a division of the American Arbitration Association), International Dispute Resolution Procedures, 2014; the World Intellectual Property Organisation, WIPO Arbitration Rules, 2014; the Stockholm Chamber of Commerce, Arbitration Rules, 2010; the Vienna International Arbitration Centre, Arbitration Rules, 2013; the Singapore International Arbitration Centre, Arbitration Rules, 2013; the Arbitration Foundation of Southern African, Arbitration Rules and Clauses, 2014; the Institute of Arbitrators & Mediators, Arbitration Rules, 2014; the ADR Institute of Canadian (ADRIC) Arbitration Rules, 2014; the UNCITRAL Arbitration Rules, 2010; the London Maritime Arbitrators Association, The LMAA Terms 2012; and the Court of Arbitration for Sports, Court of Arbitration for Sport Rules, 2012. See also Emilia Onyema (ed) *The Transformation of Arbitration in Africa: The Role of Arbitration Institutions* (Kluwer Law International B.V. 2016).

[17] The 1965 Washington Convention available at <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf> accessed 30 September, 2016.

[18] See the Official Website of the PCA available at <http://www.pca-cpa.org> accessed 12 April, 2017.

Contracting States.[19] With the 1965 Washington Convention, foreign investors who are nationals of Contracting States have direct recourse against host states by way of conciliation and arbitration.

Onyema captured the situation thus:

> *Africa as a continent is resource and mineral rich and an active capital importing member of the international community. Africa has also seen a growth and resurgence in intra-Africa investments by African investors with full participation by large- and medium-sized African enterprises. It is obvious that disputes arise from such flow of commercial transactions within and across borders. The more such transactions increase in numbers the greater the probability of more disputes arising. The probability of disputes arising from such transactions being resolved before domestic courts is very low for the usual reasons such as distrust and lack of confidence in the local courts. . . . . The use of arbitration as a tried and tested mechanism for the resolution of such disputes is not in question, whether within the continent or globally.*[20]

There are three broad ways of invoking the jurisdiction of ICSID, namely, through the instrumentality of a Bilateral Investment Treaty (BIT), under a contract or by means of a statute. According to Salacuse[21]

> *Upon examining this complex structure of rules applicable to individual international investments, one sees that it is composed of three linked legal frameworks: (1) the national legal framework consisting of the national laws and regulatory systems of the states having jurisdiction over the investment transaction and the related investors; (2) the contractual legal framework composed of the various agreements negotiated by the parties to govern the investment; and (3) the international framework, the complex of treaties, customary international laws, and international institutions that the nations of the world have agreed, either bilaterally or multilaterally, to put in place to regulate international investment. One of the principal factors that distinguish each of the legal frameworks is the differing basic sources from which they are derived.*

On the other hand, the Permanent Court of Arbitration (PCA) established the Convention for the Pacific Settlement of International Disputes. Some inter-state disputes were settled by arbitration between private parties and states.[22] Though the PCA is not a court but an administrative body, it has a list of potential arbitrators, acts as an appointing authority for the appointment of arbitrators under the UNCITRAL

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[19] As at May 2016, there are 153 Contracting States available at https://icsid.worldbank.org/.../List%20of%20Contracting%20States%20and%20Other... Accessed on 12 April, 2017.

[20] Emilia Onyema (ed) *The Transformation of Arbitration in Africa: The Role of Arbitral Institutions* (Kluwer Law International B.V. 2016) 1

[21] Jeswald W Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capita*l (OUP 2012) 35

[22] See *Radio Corporation of America v China* (1941) 8 ILR 26.

Arbitration Rules and administers arbitrations in disputes involving private parties and a state.[23]

Although the main options for resolving disputes are litigation and arbitration, in the case of foreign investment especially investments in the energy sector, the preferred forum for the resolution of disputes is arbitration. Usually in such disputes a state party is involved and investors will not like to use the courts of a state party. Investors may not perceive state courts as neutrals and therefore, resort to arbitration under the ICSID Convention. In *National Gas S.A.E. (Claimant) v Arab Republic of Egypt (Respondent)*,[24] the arbitral proceedings concern a claim submitted by the Claimant to ICSID on the basis of (i) Treaty between the Arab Republic of Egypt and the United Arab Emirates on the Encouragement, Protection and Guarantee of Investments signed on 11 May 1997 and (ii) the ICSID Convention. The claim relates to the alleged expropriation "through denial of justice and abuse of process" of (i) the Claimant's right to arbitrate and (ii) the award rendered under the auspices of the Cairo Regional Centre for International Commercial Arbitration in relation to a contractual dispute between the Claimant and the Egyptian General Petroleum Corporation arising out of the Concession Agreement entered into by the Claimant and Egyptian General Petroleum Corporation. In the arbitral proceedings, there were jurisdictional challenges. Two of them were that the arbitral tribunal lacked jurisdiction because local remedies had not been exhausted (jurisdiction *ratione temporis*) and that the Claimant was not a juridical person that has been registered or established in accordance with the law in force in a region of a Contracting Party or controlled by a Contracting Party (*ratione personae*).[25] After reviewing all relevant authorities and examining the provisions of Art 25(2)(b) of the ICSID Convention, the Tribunal held that it had no jurisdiction over the Claimant's claim in the arbitration. Since the Tribunal had no jurisdiction over the claim of the Claimant, the second objection, that is, exhaustion of local remedies was not considered.

Legal Framework for Arbitration in African States

Other than the Convention for the Pacific Settlement of International Disputes, the two main instruments regulating international commercial arbitration are the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[26] and the 1965 Washington Convention.[27] In addition, there is the UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in

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[23] Id

[24] (ICSID Case No. ARB/11/7), Award of 3 April, 2014. Available at <www.italaw.com/cases/2494> accessed 12 April, 2017.

[25] See also Art 25(1) of the ICSID Convention.

[26] Available at <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html> accessed 12 October, 2016 ("the 1958 New York Convention"). 34 African countries have ratified the Convention. They include Algeria, Benin, Botswana, Central African Republic, Egypt, Gabon, Ghana, Kenya, Morocco, Nigeria, South Africa, Tanzania, Uganda, Zambia and Zimbabwe. Available at <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> accessed 12 October, 2016.

[27] Available at <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf> accessed 30 September, 2016 ("the 1965 Washington Convention"). 43 African countries have ratified this Convention. They include Algeria, Benin, Botswana, Central African Republic, Egypt, Gabon, Ghana, Kenya, Morocco, Nigeria, Tanzania, Uganda, Zambia and Zimbabwe.

2006.[28] Unlike the 1958 New York Convention and 1965 Washington Convention, only Egypt, Kenya, Madagascar, Mauritius, Nigeria, Rwanda, Tunisia, Uganda, Zambia and Zimbabwe have adopted the UNCITRAL Model Law.[29] In 2005, The Gambia passed the Alternative Dispute Resolution (ADR) Act while in 2010, Ghana also passed the ADR Act. In the case of South Africa, there is the Arbitration Act of 1965 combined with the Recognition and Enforcement of Foreign Arbitral Awards Act of 1977 and the Protection of Businesses Act of 1978. However, South Africa is yet to adopt the UNCITRAL Model Law. Since 1998, South Africa has had the International Arbitration Bill which was prepared by the South African Law Commission. The Commission recommended the inclusion and application of the UNCITRAL Model Law 1985. This Bill was reviewed in 2013 by the South African Law Commission to take into account the modifications to the UNCITRAL Model Law in 2006. Unfortunately, this Bill has not been passed into law. The consequence is that in South Africa, it is the Arbitration Act of 1965 that is in force.

Prior to 1985, there were outdated and inadequate provisions in the laws regulating arbitration in various states. There were also disparities between national laws. Uncertainty about the national laws with the inherent risk of frustration hampered the efficient functioning of the international arbitral process. To address this state of affairs, the UNCITRAL Model Law was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June, 1985 and the General Assembly on 11 December, 1985 recommended "t*hat all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice*."[30] Since 1985, eighty (80) jurisdictions have adopted the UNCITRAL Model Law.[31]

Most African countries have old laws on arbitration. In other words, they are yet to adopt the UNCITRAL Model Law. The countries in this category include Algeria, Angola, Benin, Botswana, Cape Verde, Central African Republic, Egypt, Equatorial Guinea, Ethiopia, Gambia, Ivory Coast, Malawi, Morocco, Niger, Tanzania, Togo and Tunisia.[32] In West Africa, there is the Organization for the Harmonization of Business Law in Africa (OHADA).[33] Out of the sixteen independent states in the Region, nine are members of OHADA. The law and practice of arbitration in the nine States is regulated by the OHADA Uniform Act on Arbitration 1999.[34]

In assessing how arbitration can be developed in Africa as a means of attracting investment in the energy sector, it is imperative that we should also look at arbitral institutions. Generally, there are arbitral institutions in Africa.[35] The Asian-African Legal Consultative Organisation (AALCO), originally known as the Asian Legal

[28] Available at <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html> accessed 12 October, 2016.
[29] Hereinafter referred to as "the UNCITRAL Model Law".
[30] See UN General Assembly Resolution No. 40/72 of 11 December, 1985 (n 28).
[31] Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (3rd edn, Sweet & Maxwell 2010) 13.
[32] See Lise Bosman (ed), *Arbitration in Africa: A Practitioner's Guide* (Kluwer Law International, 2013) 469
[33] Available at <http://www.ohada.org/index.php/en/> accessed 12 October, 2016.
[34] See Emilia Onyema, 'International Arbitration in the West African States' in Lise Bosman (ed) (fn 32) 99
[35] See Onyema (n 20) 185 where 71 arbitral institutions are listed.

Consultative Committee (ALCC) was constituted on 15 November, 1956.[36] The AALCO serves as an advisory body in the area of international law especially in arbitration. AALCO has five Regional Centres for International Commercial Arbitration located in Cairo, Kuala Lumpur, Lagos and Tehran.[37]

It is also imperative to determine how this legal infrastructure supports or impede energy access in Africa. In the case of countries that have adopted the UNCITRAL Model Law or are influenced by the UNCITRAL Model Law, the OHADA countries and countries that are state parties to the 1958 New York Convention and 1965 Washington Convention, the legal regimes in those countries will enhance energy access. However, for countries with outdated laws on arbitration, they may impede energy access.

Although the legal regime for arbitration in Africa is not sector specific and does not relate to the energy sector specifically, the general framework is ideal for the resolution of energy disputes. This is consistent with the practice in other regions. In the *ICSID Caseload – Statistics (Issue 2016-1)*[38], in the distribution of cases by economic sector, the oil, gas and mining sector has 26% while electric power and other energy has 17% - cumulatively the two sectors have the highest number of cases (43%).[39] The state of arbitration law and practice in Africa will generally enhance the resolution of energy disputes.

International Investment Agreements (IIAs) or Treaties with Investment Provisions (TIPs)

Over the years, countries have sourced foreign direct investment by entering into International Investment Agreements (IIAs). Such agreements are now referred to Treaties with Investment Provisions (TIPs).[40] A treaty with investment provisions is a treaty involving two or more countries designed to protect and establish rules for cross-border investments. In other words, it helps protect investors in one country who own assets held in another country. Countries that agree to a TIP make a commitment to apply the standards outlined in the agreement to foreign investments held inside their own borders.[41]

TIPs further define procedures for the resolution of disputes should these commitments not be met. The TIP universe has over 3,304 agreements out of which

[36] Available at <http://www.aalco.int/Scripts/default.asp> accessed 12 October, 2016.

[37] The Lagos Regional Centre was established vide the Lagos Regional Centre for International Commercial Arbitration Act, 1999, now Cap R05, Laws of the Federation of Nigeria, 2004. Also available at <http://www.rcicalagos.org/> accessed 12 October, 2016.

[38] Available at <https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202016-1%20(English)%20final.pdf> accessed 20 March, 2017. Even in 2016, the electric power and other energy sectors have remained dominant. See also the *ICSID Annual Report for 2016* available at <https://openknowledge.worldbank.org/handle/10986/25124> page 33 accessed 20 March, 2017

[39] Ibid at 12

[40] See World Investment Report, 2016 102 available at <http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf> accessed 12 April, 2017

[41] See International Investment Agreements Negotiators Handbook: APEC/UNCTAD Modules, December 2012 available at <www.unctag.org> accessed 27 November, 2016.

2,946 are Bilateral Investment Treaties (BITs).[42] Thus the most common types of TIPs are BITs, Preferential and Trade and Investment Agreements (PTIAs). International Taxation Agreements and Double Taxation Treaties (DTTs) are also considered as TIPs, as taxation commonly has an important impact on foreign investment.

BITs deal primarily with the admission, treatment and protection of foreign investment. They usually cover investments by enterprises or individuals of one country in the territory of its treaty partner. Preferential Trade and Investment Agreements are treaties among countries on cooperation in economic and trade areas. Usually they cover a broader set of issues and are concluded at bilateral or regional levels. In order to classify as IIAs, PTIAs must include, among others, specific provisions on foreign investment. International taxation agreements deal primarily with the issue of double taxation in international financial activities (e.g., regulating taxes on income, assets or financial transactions). They are commonly concluded bilaterally, though some agreements also involve a larger number of countries. However, for purposes of this chapter, we will focus on BITs to determine how African countries can benefit from such mechanisms in the energy sector.

The following statistics are critical:[43]

i) African States have entered into about 769 BITs.
ii) The purpose and contents of the BITs are generally the same – in terms of dispute resolution, they adopt the investor-state-dispute-system (ISDS) although South Africa is moving away from ISDS now.
iii) 44 out of the 54 African States have signed and ratified the ICSID Convention; 4 have signed but not ratified, and 6 have neither signed nor ratified the Convention.
iv) 29 out of the 44 have been involved in ICSID proceedings.
v) The disputes usually arise from an investment contract, investment legislation or a BIT.[44]
vi) Africa accounts for 28% of the ICSID Members and 23% of ICSID proceedings, but African arbitrators and/or conciliators account for less than 1% of the appointments.
vii) Egypt has the highest number of BITs in Africa (100), followed by Morocco (61), Tunisia (54), Algeria (46), South Africa (46), Mauritius (36), Libya (32), Zimbabwe (30). Nigeria is ranked 14 with 22 BITs.

Thus Africa is a major player in this area. Yet, the Africa region appears to be an object and not a subject of international law. This is attributable to how the BITS have

[42] See World Investment Report (n 40) 101.

[43] Karel Daele 'Investment Arbitration Involving African States' in Lise Bosman (ed) (n 32) 403.

[44] See Salacuse (n 21) 35 and Idornigie (n 9) 335. See also section 26 of the Nigerian Investment Promotion Commission Act, Cap N117, Laws of the Federation of Nigeria, 2004; Ghana Investment Promotion Act (GIPA) 1994; South African International Arbitration Act, and Ugandan Arbitration and Conciliation Act of 2000. In *Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal Republic of Nigeria* (ICSID Case No. ARB/13/20) [Decision on Jurisdiction: 29 October, 2014] held that statutory provisions like section 26 of the Nigerian Investment Promotion Commission Act (NIPC Act) make standing offers to investors making a claim under the NIPC Act. See also *Southern Pacific Properties (Middle East) Ltd v. Arab Republic of Egypt* (Decision on Jurisdiction), ICSID Case No. ARB/84/3 (14 April, 1988) where an Egyptian Law with a similar provision was held to be a standing offer to investors.

been negotiated and disputes arising therefrom resolved. How can this trend in the statistics which are not in favour of Africa be reversed? It is our view that the Southern African Development Community (SADC) Model BIT Template, July 2012,[45] and the Protocol should be adopted by African states in the negotiation or re-negotiation of future BITS.

The SADC Template is recommended because it comprehensively addresses various key issues including transparency in investor-state arbitration. The SADC Template provides for the following:

i. Common Obligation against Corruption[46]
ii. Compliance with Domestic Law[47]
iii. Provision of Information[48]
iv. Environmental and Social Impact Assessment[49]
v. Minimum Standards for Human Rights, Environment and Labour[50]
vi. Corporate Governance Standards[51]
vii. Investor Liability[52]
viii. Transparency of Contracts and Payments[53]
ix. Right of States to Regulate[54]
x. Right to Pursue Development Goals[55]
xii. Transparency of Investment Information[56]

As a continent, Africa Union should consider the resolution of investment disputes in national courts or tribunals and not strictly under ISDS. Similarly the regional blocks like SADC and Organisation of West African States (ECOWAS) should consider Regional Investment Treaties (RITs) or TIPs where provision is made for the exhaustion of local remedies before resorting to ISDS. ISDS is a mechanism included in TIPs to ensure that commitments that countries have made to one another to protect mutual investments are respected. If an investor considers that these basic rules have been breached, the TIPs provide the possibility for investors to bring the matter before specialized investment tribunals set up under international rules on arbitration. Most ISDS cases concern administrative acts by the executive branches of governments affecting foreign investors, such as the cancellation of licences or permits, land zoning or breaches of contract.[57]

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[45] Available at <http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf> accessed 27 November, 2016. See also the 2012 United States Model Bilateral Investment Treaty available at <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> accessed on 27 November, 2016.

[46] Art 10 of the SADC Template

[47] Art 11 ibid

[48] Art 12 ibid

[49] Art 13 ibid

[50] Art 15 ibid

[51] Art 16 ibid

[52] Art 17 ibid

[53] Art 18 ibid

[54] Art 20 ibid

[55] Art 21 ibid

[56] Art 24 ibid

[57] See *S.A.R.L. Benvenuti and Bonfant v People's Republic of Congo* (ICSID Case No. ARB/77/2), Award of 8 August, 1980 (dealing with setting product price at loss by Governmental Decree; *AGIP Spa v The Government of the*

For the purpose of this Chapter, the right of states to regulate and pursue development goals is critical. This right is recognised in international instruments like the General Assembly Resolution of 1962 on Permanent Sovereignty over Natural Resources and the Charter of Economic Rights and Duties of States, 1974. The older BITs negotiated and executed by African states did not provide for these rights. In accordance with customary international law and other general principles of international law, the host State has the right to take other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development and with other legitimate social and economic policy objectives. The inclusion of such provisions in the BITs confirm that the BIT does not alter the host state's basic right to regulate but without eliminating all the effects of the investor protections. Similarly, a host state may be granted preferential treatment in accordance with its domestic legislation to any enterprise so qualifying under the domestic law in order to achieve national or sub-national development goals. By taking advantage of such provisions, African states will be able to achieve the SDGs, in particular that of access to sustainable energy.

In the context of dispute settlement, Article 28, Part 5 of the SADC Template deals with state-state-dispute settlement (SSDS) while Article 29 deals with investor-state dispute settlement (ISDS).[58] As has been stated, quite unlike the provisions in other BITs where state-state dispute settlement essentially deals with the application and interpretation of the BIT, Article 28 of the SADC Template contemplates state-state dispute in relation to interpretation and application of the BIT and claim for damages for alleged breach of the BIT on behalf of an investor or investment. Thus the SADC Template now provides for actual resolution of the investment disputes under certain conditions in addition to the traditional role of confining state-state arbitration to the interpretation and application of the BIT'.[59] One of such conditions is the exhaustion of local remedies.

The current movement is from ISDS to SSDS or Investment Court System or national courts and tribunals. There are several criticisms against ISDS including the appointment of private individuals as arbitrators to preside over sovereign rights. In the negotiations between the United States and the European Union on the Transatlantic Trade and Investment Partnership (TTIP), in place of ISDS, the European Union is proposing a permanent Investment Court with an appellate system.

Popular Republic of Congo (ICSID Case No. ARB/77/1), Award of 30 November, 1979 (dealing with violation of stabilization clause) and *Liberian Eastern Timber Corporation ("LETCO") v The Government of the Republic of Liberia* (ICSID Case No. ARB/83/2), Award of 31 March, 1986 (dealing with discrimination).

[58] See also Chapter 11 of the North American Free Trade Agreement (NAFTA) available at <www.naftanow.org> accessed 12 April, 2017.

[59] See Arts 28.4 and 44 of the SADC Model BIT Template, 2012 and the IISD Model Agreement, 2006. For example, Art 28.4 of the SADC Template provides that: A State Party may not submit a claim to arbitration seeking damages for an alleged breach of this Agreement on behalf of an Investor or Investment (a) unless the Investor or Investment, as appropriate, has first submitted a claim before the domestic courts of the Host State for the purpose of pursuing local remedies, after the exhaustion of any administrative remedies, relating to the measure underlying the claim under this Agreement, and a resolution has not been reached within a reasonable period of time from its submission to a local court of the Host State, or (b) unless the claimant State Party demonstrates to the tribunal established under this Article that there are no reasonably available domestic legal remedies capable of providing effective relief for the dispute concerning the underlying measure, or that the legal remedies provide no reasonable possibility of such relief in a reasonable period of time.

This raises its own issues of the appointment of arbitrators by public authorities. The general concern is the independence and impartiality of arbitrators. In 2011, the Australian Government announced that it would discontinue the practice of seeking inclusion of ISDS in trade agreements with developing countries.[60] In 2014, several members of the United States House of Representatives expressed opposition to include ISDS in the TTIP.[61] South Africa has started to withdraw from treaties with ISDS clauses, India is also considering such a position, Indonesia plans to let treaties with ISDS clauses lapse when they need renewal while Brazil has refused any treaty with ISDS clauses.[62] The critical question is whether SSDS is better than ISDS? Secondly, is there any middle ground between SSDS and ISDS? Will foreign investors subject themselves to domestic dispute resolution mechanism only? Time will tell.

African countries should provide for both SSDS and ISDS under certain conditions as in Art 28.4 of the SADC Template with several provisions on transparency and powers to regulate. In doing this, African countries should adopt the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration of 1 April, 2014,[63] and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration.[64] In addition, African States should ensure that there is provision for third party participation in arbitral proceedings.[65]

Another instrument that African states can use in negotiating BITS is the International Institute for Sustainable Development (IISD) Model International Agreement on Investment for Sustainable Development – Negotiators' Handbook, 2006.[66] The thrust of this instrument is to set a positive negotiating agenda for sustainable development. The publication provides both the text of the model agreement and a commentary on each article. There are several provisions on anti-corruption, corporate governance, corporate social responsibility, investor's civil liability, maintenance of environmental, labour and human rights standards and publication of information. More specifically, Art 46 of the Handbook deals with transparency. The IISD Negotiators' Handbook is undoubtedly a valuable tool for African countries.

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[60] See Trade Policy Statement available at <https://www.acci.asn.au/getattachment/b9d3cfae-fc0c-4c2a-a3df-3f58228daf6d/Gillard-Government-Trade-Policy-Statement.aspx> accessed 12 April, 2017.

[61] See Powerful Members of Congress Oppose Special Corporate Court Rights for European Firms available at <https://aflcio.org/Blog/Political-Action-Legislation/Powerful-Members-of-Congress-Oppose-Special-Corporate-Court-Rights-for-European-Firms> accessed 12 April, 2017. See also Stephen M Schwebel, 'The Outlook for the Continued Vitality, or lack thereof, of Investor-State-Arbitration' in *Arbitration International*, Vol 32, No 1, 2016 1

[62] See the Investor-State Dispute Settlement: The Arbitration Game: *The Economist*, October 11, 2014 available <http://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration> accessed 12 April, 2017

[63] The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration available at <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html> accessed 12 April, 2017

[64] The "Mauritius Convention" available at <http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2014Transparency_Convention.html> accessed 12 April, 2017

[65] OECD Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures, June 2005 available at <www.oecd.org/investment> accessed 12 April, 2017.

[66] Available at <https://.iisd.org/pdf/2005/investment-model-int-handbook.pdf> accessed 27 November, 2016

In negotiating either the commercial contracts or TIPs, African states should bear in mind the principle of attribution. Under Article 2 of the International Law Commission's Articles on State Responsibility,[67] there is an internationally wrongful act of a State when conduct consisting of an action or omission is attributable to the State under international law and constitutes a breach of an international obligation of the State.[68] In theory, the conduct of all human beings, corporations or collectivities linked to the State by nationality, habitual residence or incorporation might be attributed to the State, whether or not they have any connection with the government. In practice, the general rule is that the only conduct attributable to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, that is, as agents of the State.[69]

In an ICSID arbitration, there is usually an underlying contract. This gives rise to the possibility of parallel proceedings[70] or forum shopping. Where there are fork-in-the-road provisions,[71] the investors will carefully analyse the facts of the case to determine whether a contract claim should be pursued instead of a treaty claim.

Dispute Resolution Mechanisms in the BITs[72]

The BITs usually provide for different fora for dispute resolution. In a typical BIT, the dispute resolution clause can provide for the following:

i. Amicable settlement usually conducted during a given period
ii. The competent tribunal of the Contracting Party in whose territory the investment was made.
iii. Ad hoc Arbitration under UNCITRAL Arbitration Rules
iv. Arbitration under the Court of Arbitration of the International Chamber of Commerce (ICC)
v. Arbitration under ICSID
vi. Arbitration under a domestic tribunal
vii. Arbitration under a Regional Centre
viii. Arbitration under the Stockholm Chamber of Commerce.[73]

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[67] See James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press 2005) 91.

[68] See also Art 27 of the Vienna Convention on the Law of Treaties, 1969 and Art 3 of the ILC's Articles on State Responsibilities.

[69] I Brownlie *Systems of the Law of Nations: State Responsibility* (Part I) (Clarendon Press, 1983) 132-166

[70] See James J Fawlett (ed) *Declining Jurisdiction in Private International Law* (Clarendon Press, 2005). See also Paul Idornigie 'Declining Jurisdiction in International Commercial Arbitration' in Ekwenze S A M and Others (eds) *Demand for Justice* (Snap Press Ltd 2013) 167-186.

[71] A typical fork-in-the-road provision is found in Art 8 of the Chile model BIT which provides either for international arbitration under ICSID or litigation before the host state courts. Art 8(3) then provides that once the investor has submitted the dispute to the competent tribunal of the contracting party or before an international tribunal that decision is final.

[72] Lucy Reed, Jan Paulsson and Nigel Blackaby, *Guide to ICSID Arbitration* (2nd edn, Wolters Kluwer 2011), Christoph H Schreuer and Others, *The ICSID Convention: A Commentary*, (2nd edn, OUP 2009). See also Paul Idornigie, *Investment Treaty Arbitration and Emerging Markets: Issues, Prospects and Challenges*, Nigerian Institute of Advanced Legal Studies Inaugural Lectures Series, 2011 (NIALS Press, 2011) 38

[73] See Campbell McLaclan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (OUP 2008) 45

This is often described as a 'cafeteria style' that gives the investor a choice between a range of different dispute settlement fora, including the courts of the host state, and a number of arbitral tribunals. Some clauses will provide for exhaustive consideration of local remedies before resort to any international tribunal while others will provide for 'fork-in-the-road' clauses.

Other than a BIT, a commercial contract can also provide for arbitration either under the domestic arbitration rules or under the rules of an institutional arbitral body such as the ICC. Indeed section 53 of the Nigerian Arbitration and Conciliation, 1988[74] provides thus:

> *Notwithstanding the provisions of this Act, the parties to an international commercial agreement may agree in writing that disputes in relation to the agreement shall be referred to arbitration in accordance with the Arbitration Rules set out in Schedule 1 to this Act, the UNCITRAL Arbitration Rules or any other international arbitration rules acceptable to the parties.*

Accordingly, Article 9 of the Nigeria-Netherlands BIT provides thus:

> *Each Contracting State hereby consents to submit any legal dispute arising between that Contracting State and a national of the other Contracting Party concerning an investment of that national in the territory of the former Contracting Party to the International Centre for Settlement of Investment Disputes for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March, 1965. A legal person which is a national of one Contracting Party and which before such a dispute arises is controlled by nations of the other Contracting Party shall, in accordance with Article 25(2)(b) of the Convention, for the purposes of the Convention be treated as a national of the other Contracting Party.*

However, in arbitrating under ICSID, there can be procedural, jurisdictional[75], substantive and post-award issues to be addressed. Such issues include:

a) The Parties. In other words, who are the proper parties to the arbitral proceedings?
b) The existence of a Treaty – is there an investment treaty in force?
c) Are the protected Investors legal and natural persons or those that exercise control over legal and natural persons. There will be the need to determine whether the party is a state party to the ICSID Convention and the other a national of a state party and whether the national (legal or natural) is controlled by a national of a state party[76].
d) Protected Investments – these are usually defined in the treaty.[77]

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[74] Now Cap A18, Laws of the Federation of Nigeria, 2004

[75] See Katia Yannaca-Small (ed) *Arbitration under International Investment Agreements: A Guide to the Key Issues* (OUP 2010) page 189 dealing with the Practical Guide to the Key Jurisdictional Issues.

[76] Monique Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship Between International Law and Municipal Law* (Kluwer Law International 2010) 51 and McLachlan and Others (n 61) 131

[77] Sasson ibid at 27 and McLaclan and Others (n 73) 163

e) Cooling Off Periods – when a treaty provides for a cooling off period, that is, a period for negotiations before invoking the jurisdiction of ICSID, is it merely procedural or jurisdictional[78]?
f) Applicable Law – municipal law or international law and if international law, which law?
g) Contract or Treaty Claims – is the alleged breach a breach of contract or breach of treaty. Whereas the former is regulated by domestic law, the latter is regulated by international law.[79]
h) Substantive Rights[80] – fair and equitable treatment, full protection and security, no arbitrary or discriminatory measures impairing the investment, no expropriation without prompt, adequate and effective communication, national and 'most-favoured-nation treatment', free transfer of funds related to investment, observance of specific investment undertakings and compensation. The scope of these rights is generally contentious.[81]

Thus to invoke ICSID Convention, the jurisdictional requirements provided in Article 25 of the ICSID Convention[82] must be fulfilled. The scope of the jurisdiction for any investment treaty tribunal is necessarily circumscribed by the dispute settlement clause of the applicable investment treaty. It is the treaty provision that contains the state's consent[83] to submit a defined category of disputes (jurisdiction *ratione materiae*) with qualifying claimants (jurisdiction *ratione personae*) to arbitration[84]. In the case of the investor, it is the serving of the Request for Arbitration that gives the consent. Under Article 25, the investor will have to demonstrate that there is a legal dispute:[85]

i) arising directly out of an investment;

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[78] See McLaclan and Others (n 73) 40 and 50. See also *Bayindir v Pakistan* (Jurisdiction), ICSID Case No. ARB/03/29 (ICSID 2005) and *Enron v Argentine Republic* (Jurisdiction) ICSID Case No. ARB/01/3 (ICSID 2004) paras 82-88

[79] Sasson (n 76) 151, Bernardo M Cremades and David J A Cairns, 'Contract and Treaty Claims and Choice of Forum in Foreign Investment Disputes' in Bernardo M Cremades and Julian D M Lew (eds), *Parallel State and Arbitral Procedures in International Arbitration,* ICC Publishing, Paris, 2005 at 13 and McLachlan and Others (n 73) 99, El-Kosheri A S 'Contractual Claims and Treaty Claims within the ICSID Arbitration System' in Cremades and Lew (eds), ibid at 43

[80] McLachlan and others (n 73) 199

[81] See *CME Czech Republic BV (The Netherlands) v The Czech Republic*, Partial Award, September 13, 2001 available at <www.cetv-net.com/arbitration.asp> accessed 20 March, 2017, *Tecnicas Medioambientales TECHMED SA v Estados Unidos Mexicanos*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, and *SGS v Pakistan*, ICSID Case No. ARB/01/13, August 6, 2003 and *SGS v Philippines*, Decision on Jurisdiction, January 29, 2004 available at <www.worldbank.org/icsid/cases/awards.htm> accessed 20 March, 2017.

[82] See Schreuer (n 72) 71. See also Alexandrov S A The "Baby-boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as "Investors" and Jurisdiction Ratione Temporis, 4 *The Law and Practice of International Courts and Tribunals* 19 (2005) and Happ R and Rubins N *Digest of ICSID Awards and Decisions: 2003-2007* (OUP 2009) 330

[83] States can give their consent in three ways: by contract, domestic legislation and treaty. See A R Parra 'The Role of ICSID in the Settlement of Investment Disputes' (1999) 16(1) ICSID News 5. In Nigeria, the NIPC Act (s26) gives such consent (standing offer) by legislation where contracts and the various BITs also give such consent. See also Schreuer (n 72) 190.

[84] Jurisdiction *ratione temporis* refers to the application in time of the respective investment treaty. Normally a state can only be liable for the breach of an investment treaty if that treaty was in force at the time the state took action allegedly in violation of the treaty.

[85] Reed and others (n 72) 13.

ii) between a Contracting State and the national of another Contracting State[86]
iii) which the parties to the dispute consent in writing to submit to ICSID.

It is noteworthy that the ICSID Convention provides no definition of 'legal dispute' or 'investment'. All these can be ascertained from their definition in the BIT.[87] The existence of a dispute may be in doubt in several ways. An open question may not have matured into a dispute between the parties. Or a difference of opinion may not be sufficiently concrete to amount to a dispute that may be submitted to arbitration. There may have been a dispute that has since become moot. The International Court of Justice (ICJ) has defined a dispute as "a disagreement on a point of law or fact, a conflict of legal views or interests between parties". ICSID Tribunals have adopted similar descriptions of "disputes" often relying on the ICJ's definition.[88]

African countries should, therefore, ensure that the TIPs are properly negotiated and that when there is a dispute, the requirements of Article 25 of the ICSID Convention are met. Other than TIPs, statute and contracts can also provide for ICSID arbitration or arbitration under any other institutional rules. It would be useful for African countries to appoint African arbitrators instead of the practice where the disputes are in Africa and the arbitrators are outside Africa.

Recourse Against Arbitral Award

Generally, arbitral awards cannot be appealed against.[89] However, there are usually elaborate provisions in arbitration enactments and international instruments on challenging or setting aside an award. According to R Doak Bishop, James R Crawford and W Michael Reisman[90]

[86] See Art 1(a) of the Nigeria-Netherlands BIT that defines 'national' thus: term 'nationals' shall comprise with regard to either Contracting Party: i. natural persons having the nationality of that Contracting Party; ii. legal persons constituted under the law of that Contracting Party; iii. legal persons not constituted under the law of that Contracting Party but controlled, directly or indirectly, by natural persons as defined in (i) or by legal persons as defined in (ii) above.

[87] See Art 1(a) of the Nigeria-Netherlands BIT that defines an 'investment' thus: the term 'investments' shall comprise every kind of asset and more particularly, though not exclusively: i. movable and immovable property as well as any other rights in rem in respect of every kind of asset; ii. rights derived from shares, bonds and other kinds of interests in companies and joint ventures; iii. title to money, other assets or any performance having an economic value; iv. rights in the field of intellectual property (such as patents, copyrights, licences, trade marks and trade names), technical processes, goodwill and know-how; v. rights granted under public law, including rights to prospect, explore and extract natural resources.

[88] See *Maffezini v Spain*, Decision on Jurisdiction, 5 ICSID Rep 387, 25 January, 2000.; *Tokios Tokeles v Ukraine,* Decision on Jurisdiction, 29 April, 2004, (2005) 20 ICSID Rev-FILJ 2005; *Siemens v Argentina*, Decision on Jurisdiction, 3 August, 2004, ICSID Case No ARB/02/8; *Luchetti v Peru*, ICSID Case No ARB/03/4, Award, 7 February, 2005; *Impregilo v Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April, 2005; *AES v Argentina*, ICSID Case No ARB/02/17, Decision on Jurisdiction, 26 April, 2005; *El Paso v Argentina*, ICSID Case No ARB/03/15, Decision on Jurisdiction, 27 April, 2006; *Suez at al v Argentina*, ICSID Case No ARB/03/17, Decision on Jurisdiction, 16 May, 2006; *MCI v Ecuador*, ICSID Case No ARB/03/6 Award, 31 July, 2007.

[89] See section 69 of the Arbitration Act, 1996 (UK).

[90] R Doak Bishop, James R Crawford and W Michael Reisman (eds), *Foreign Investment Disputes: Cases, Materials and Commentary* (2nd edn, Kluwer Law International 2014) 1215.

> National laws on arbitration, often equating awards with court decisions, provide a variety of recourse against arbitral awards, with varying and often long time-periods and with extensive list of grounds that differ widely in the various legal systems. The Model Law attempts to ameliorate this situation, which is of considerable concern to those involved in international commercial arbitration.[91]

According to Article 34(1) of the UNCITRAL Model Law, recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of Article 34. The grounds for setting aside are essentially the same as the grounds for refusal of recognition and enforcement.[92] The ICSID awards may not be challenged before national courts. This is so because ICSID is a self-contained legal system and independent of laws of the forum of the proceedings.[93] Instead, the ICSID Convention provides for interpretation, revision and annulment of an ICSID Award.[94]

Enforcement of Arbitral Awards

Arbitral awards can be enforced using national courts, the 1958 New York Convention and the 1965 Washington. The enforcement of international arbitral awards is one area where arbitration is preferable to litigation especially in states that are parties to the 1958 New York Convention. The Convention's principal aim is that foreign and non-domestic arbitral awards will not be discriminated against and it obliges Parties to ensure such awards are recognised and generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the Convention is to require courts of Parties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal.[95] However, there are limited instances under Article V of the Convention where a court may refuse to enforce the arbitral award.[96]

Thirty-four (34) African States are signatories to the 1958 New York Convention. Bearing in mind that Africa has fifty-four (54) states, enforcement of awards in non-member states may be a challenge. Article V of the 1958 New York Convention for restricted grounds under which recognition and enforcement of arbitral awards may be refused.[97] In the case of African countries that are not signatories to the 1958 New

[91] See also Art 34 of the UNCITRAL Model Law. See also sections 67-71 of the Arbitration Act, 1996 (UK) and section 48 of the Nigerian Arbitration and Conciliation Act, 2004.

[92] See also *Czech Republic v CME Czech Republic B.V.*, Judicial Review by the Svea Court of Appeal of 15 May, 2003, 9 ICSID Rep 439, 493-494, 497-499, 502-507 (2006)

[93] See Art 53 of the ICSID Convention.

[94] See Arts 50, 51 and 52 ibid. See also *Compania de Aguas Aconquija S.A and Vivendi Universal v Argentine Republic*, Decision on Annulment of 3 July, 2002, 6 ICSID Rep 340, 358-360, 362-371 (2004).

[95] See Art 1.1 of the 1958 New York Convention. See also <http://www.uncitral.org/uncittral-texts/arbitration/NYConvention.html> accessed 28 November, 2016.

[96] See Blackaby and Partasides (n 9) 605. The instances include where parties to the agreement are under some incapacity under the applicable law, or the agreement is invalid or where a party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case or the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties. They are essentially jurisdictional challenges.

[97] See R Doak Bishop, James R Crawford and W Michael Reisman (eds) (n 90) 1188-1189

York Convention they should adopt Article 35 of the UNCITRAL Model Law which provides that "*an arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and article 36*."[98]

Where an arbitration is conducted under the 1965 Washington Convention, the Convention specifically insulates awards from review under national laws at the recognition and enforcement stage, but it offers no such insulation when awards are to be executed against specific assets.[99] Article 54 of the Convention provides thus:

> *(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgement of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as it if were a final judgment of the courts of a constituent state.*

Accordingly, the Federal Government of Nigeria, for instance, after ratifying the Convention passed the International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act.[100] Consequently, national courts in Contracting States must recognize and enforce awards according to the Convention, that is, immediately without review or opportunity to set aside, but they may execute them according to their own national law. Accordingly Article 53 of the ICSID Convention provides that the award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in the ICSID Convention.

Concluding Remarks

Law is central to the availability and accessibility of energy in Africa. The huge investment required in this sector provides a test of the investment climate in Africa, the legal regime and the forum for dispute settlement. Similarly it is submitted that African states stand to benefit by adopting the SADC Template or that of IISD in negotiating BITs. This is so because these two instruments provide for sustainable development including that in the energy sector. They also provide for dispute resolution through clauses on state-to-state arbitration or investor-state arbitration. Where there is provision for investor-state arbitration (ISDS), provision should be made for transparency. Similarly the UNCITRAL and United Nations instruments on transparency should be adopted by African States and ensure that there is provision for third party participation in the arbitral process.

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[98] See section 66 of the Arbitration Act, 1996 (UK) and section 52 of the Nigerian Arbitration and Conciliation Act, 2004.

[99] See Arts 54(3) and 54 of the 1965 Washington Convention. Art 53(1) of the Washington Convention provides that the award shall be binding on the parties and shall not be subject to any appeal or any other remedy except those provided for in the Convention. The main remedy provided is annulment. See Art 52 of the Convention. See also Lucy and Others (n 60) 162 and 179.

[100] Cap I20, Laws of the Federation of Nigeria, 2004

African states that have not reformed their arbitral laws in line with that of the UNCITRAL Model Law on International Commercial Arbitration need to do so in order to enhance their investment appeal. Furthermore, ratification of the 1958 New York Convention and the 1965 Washington Convention is key to accessing the benefits of those instruments earlier discussed. In drafting commercial transactions especially the power purchase agreements, the dispute resolution mechanism should be that of arbitration.

Other than BITs, contracts can be negotiated that provide for arbitration either under the ICSID Convention or other mechanisms like that of the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules or other rules like that of the International Chamber of Commerce (ICC).

If Goal 7 of the SDGs is to be attained in Africa, investment in infrastructure is imperative. In the *World Energy Outlook 2016*, a cumulative sum of $44 trillion will be required globally for energy supply and an additional sum of $23 trillion in improvement in energy efficiency. To attract such investment in Africa, the legal climate must be appropriate in terms of the enabling laws and dispute resolution procedures.

Although the legal regime for arbitration in Africa is not sector specific and does not relate to the energy sector specifically, the general framework is ideal for the resolution of energy disputes. Consequently, the state of arbitration law and practice in Africa will generally enhance the resolution of energy disputes.