NALULE, V.R. and BADAJIDE, N.A. 2022. Protecting natural gas investments: trends in investment treaties and investors projections in Africa. In: *Olawuyi, D.S. and Pereira, E.G. (eds.) The Palgrave handbook of natural gas and global energy transitions.* Cham: Palgrave Macmillan [online], chapter 19, pages 461-481. Available from: https://doi.org/10.1007/978-3-030-91566-7_19

Protecting natural gas investments: trends in investment treaties and investors projections in Africa.

NALULE, V.R. and BADAJIDE, N.A.

2022

Protecting Natural Gas Investments: Trends in investment treaties & investors projections in Africa

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Abstract

Natural gas is increasingly gaining prominence in Africa's energy landscape. It has now surpassed coal to become the leading electricity generation fuel providing roughly 40% of Africa's electricity generation requirements. Consequently, investments in natural gas have been escalating on the African continent. This has necessitated the various international, regional, and national initiatives and mechanisms to protect these investments from both legal and socio-political risks. Given the long-term nature of oil and gas projects, investors often insist on contractual and treaty mechanisms for protecting their investments from economic, legal, and geopolitical risks. Whereas various investments in the African energy sector have been witnessed in different countries, this chapter will focus on natural gas investments. The chapter analyses the various investment protection mechanisms for natural gas investments, especially taking cognisance of the various transition risks associated with the ongoing global move to transition to low carbon energy systems, which is characterised by laws and policies which are likely to change the energy business structure globally. The chapter draws examples from different African countries with respect to investment treaties and national mechanisms for protecting natural gas investments.

1. Introduction

Energy investments have been escalating on the African continent. This has necessitated the various international, regional, and national initiatives and mechanisms to protect these investments. Given the long-term nature of oil and gas projects, investors often insist on contractual and treaty mechanisms for protecting their investments. Whereas there are various investments in the African energy sector that have been witnessed in different countries, this chapter will focus on natural gas investments.

Natural gas is increasingly gaining prominence in the Africa's energy landscape. The once so-called unwanted by-product or associated product of crude oil production has now surpassed coal to become the leading electricity generation fuel providing roughly 40% of Africa's electricity generation requirements.[1] This remarkable development stretches back to the last few years with ample gas resources availability, new reserves discoveries, growing application in diverse sectors (especially for domestic, commercial, and industrial purposes) and expansion of critical infrastructures to link gas suppliers to end users. Africa50 attributed the increasing significance of this liquid fuel to the continent's rapidly expanding population, urbanization growth, thriving economic outlook and mounting improvement in energy, healthcare, and education delivery to citizens.[2]

Crucially, the signing of Paris Agreement and recognition of natural gas as a cleaner and most eco-friendly of the three major fossil fuels[3] gives natural gas a well-deserved attention as a veritable option to achieve emission reduction targets, while also providing investment opportunities and fostering societal gains. Other key drivers of increasing importance of natural gas in Africa include high quality product, low-price environment, regulatory reforms coupled with technological breakthroughs that now make the whole supply chain comprising of gas liquefaction, shipping, storage, re-gasification, etc. commercially viable.

Against this backdrop, this chapter provides a succinct overview of Africa's gas reserves together with consumption, production, and exports outlook in recent past. Being central to this chapter, it offers insight to the historic investment trends (with the impact of COVID-19),

[1] British Petroleum (BP), 2020. Statistical Review of World Energy 2020
[2] Africa50, 2018. Investing in Natural Gas for Africans: Doing Good and Doing Well, A report by Energy Future Initiative
[3] IPCC (Intergovernmental Panel on Climate Change), 2014. Summary for policymakers. In Climate Change 2014: Mitigation of Climate Change. Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change. Cambridge University Press, pp. 1–31

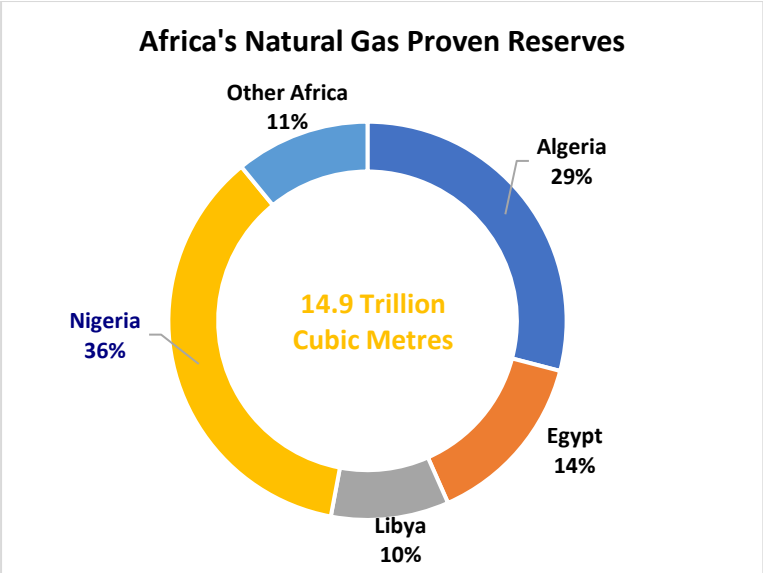
ongoing and completed projects, and host of other issues posing threats to the region's gas investments and overall energy security landscape. The chapter further reviews the various mechanisms of promoting and protecting natural gas investments in Africa.

2. Natural Gas resources and infrastructural developments in Africa: A panoramic overview

2.1. Africa's Natural Gas Reserves

Africa proven gas reserves stood at 14.9 trillion cubic metres (TCM) - 7.1% of global proven reserves, at the end of 2019, increasing by 1.8% from 2018 estimate of 14.7 TCM. Nigeria and Algeria were by far the biggest holders of Africa's gas reserves, which together accounted for almost two third of the continent's total natural gas deposits (Figure 1). Egypt and Libya were the next major contributors to Africa's gas reserves, whereas other countries (like Mozambique, Tanzania, South Africa, Senegal, and Mauritania) have recorded gigantic discoveries, which together accounted for more than 40% of global gas discoveries between 2011 and 2018.[4] With ongoing prospecting and explorations efforts across the continent, particularly in most East African countries, sizable discoveries are expected over the next ten years.

Figure 1: Breakdown of Africa's Natural Gas Proven Reserves



Source: BP Statistics, 2020

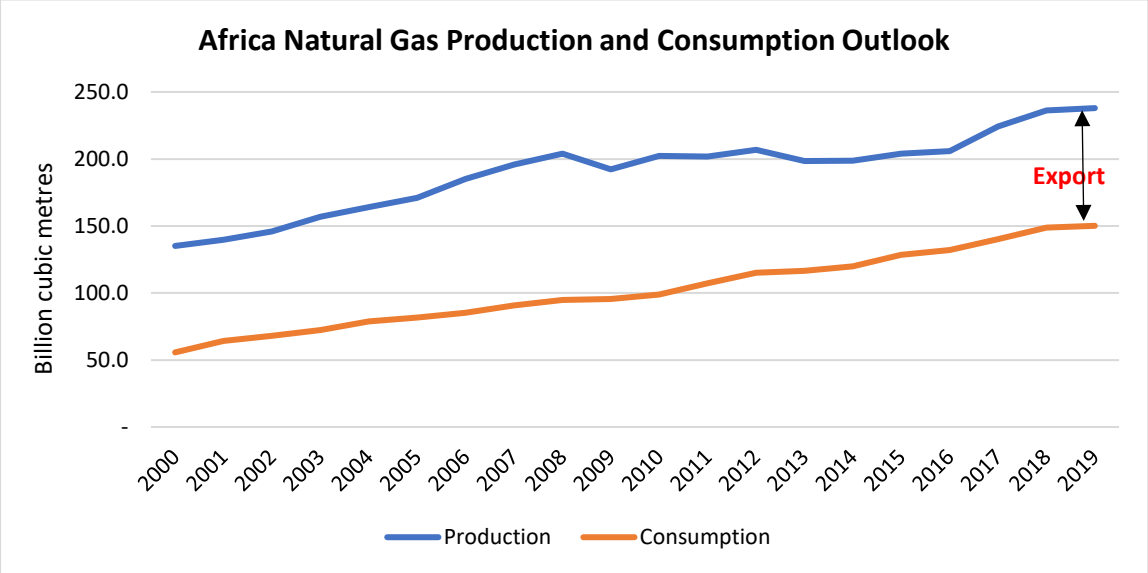
[4] See supra note 1

2.2 Africa's Natural Gas Production and Consumption Outlook

Production of natural gas in Africa grew by 0.7% to reach 237.9 billion cubic metres (bcm) in 2019, 18% of global production in the same year[5]. Bulk of the production came from Algeria, Egypt and Nigeria which accounted 36%, 27% and 21% respectively. Overall, the continent's natural gas production has increased significant over the last two decades, increasing by 76% between 2000 and 2019 (Figure 2). With this trend, Africa is expected to provide 20% of global natural gas needs by 2025.[6]

In 2019, Africa's gas consumption was 150.1 bcm, 3.8% of global total consumption. Gas consumption increased by 0.9% from the level at the end of 2018 with 4.6% average annual growth over the past ten years. IEA predicted that natural gas consumption growth in Africa could be doubled by 2040. Relatedly, the region's natural gas export volume has nearly doubled to reach 150 bcm in 2019, rising from 79.4 bcm in 2010.[7] This suggests that natural gas export constitutes an integral foreign exchange earner for hydrocarbon-rich countries in Africa

Figure 2: Africa Natural Gas Production and Consumption Outlook



Source: BP Statistics, 2020

[5] See supra note 1
[6] Africa Energy Chamber, 2020. Africa Energy Outlook 2021. Johannesburg, South Africa
[7] IEA (International Energy Agency), 2019. Africa Energy Outlook 2019. IEA, Paris

At the global LNG market, Africa is rapidly emerging a major player in terms of supply capacity and future market prospect. For instance, in 2019, as global liquefaction capacity reached 430.5 million Tons Per Year (TPY), Africa's LNG exports volume accounted for approximately 12% of global exports, contribution by countries as presented in Table 1. With rapid expansion in LNG export capacity and distribution infrastructure investment, the growth trend would be more vigorous (about 1.5%) over the next decade.[8]

Table 1: Synopsis of Africa's LNG Export, 2019

Country	**LNG Export Volume**
Algeria	12.2 million tons
Angola	4.4 million tons
Cameroon	1.3 million tons
Egypt	3.5 million tons
Equatorial Guinea	2.8 million tons
Nigeria	20.8 million tons

Source: LNG Industry Report (2020)

2.3 Natural Gas Price Market and Investment Market Implication

Historically, natural gas price has seen massive fluctuations and have consequently affected the sector's investment performance over the last decade as investors have more interest in their investment returns and long-term viability of the project. Indeed, natural gas price is characterised by volatility and sensitivity to global oil price fluctuations. For instance, with the dramatic crude oil price decline from over $107 per barrel in July 2014 to nearly $20 in March 2020, its price follows suit, dropping from $4.80 per one million British Thermal Units (MMBtu) in June 2014 to about $1.60/ MMBtu in March 2020, denoting a 70% price decline.

The advent of shale gas in the United States has perhaps makes the global gas market more competitive, thereby driving prices marginally lower. The shale revolution has not only blocked Africa access to its former major importing destination (the US market), but also now needs to compete with this leading exporter in the global gas market. Beyond US shale gas, the spread of coronavirus (COVID-19) pandemic coupled with OPEC's overproduction cutbacks, further plunged the natural gas price to a historically low level. Overall, the gas Africa's sector

[8] Africa Energy Chamber, 2020

has been affected by the lower commodity prices, not just those companies that invest in upstream activities, but the shipping, marketing and service providers have been adversely affected by decline demand with repeated cargo cancellations in 2020 at several regional markets thus resulting in a lower-than-expected revenue for most companies.

2.4 Gas Investments in Africa: Trend and Impediments

With huge resources endowment and relatively low-price environment, Africa continues to attract investment from both local and foreign investors. United Nations Development Programme (UNDP) stressed that international public financial inflows into the continent to support gas energy reached US$ 21.4 billion in 2017, a two-fold increase from 2010.[9] Similarly, United Nations Environment Programme (UNEP) puts the overall energy investment in Africa at $8-9.2 billion per year.[10] Pwc Oil and Gas Review reiterated that Africa remains a hotspot for upcoming deals in the gas sector of countries like Nigeria, Mozambique, Tanzania, and Senegal (including the Nigeria NLNG's Train 7 project, Mozambique's Rovuma LNG project, Mozambique LNG Project, Tanzania LNG Liquefaction Plant, BP/Kosmos' Tortue LNG project offshore Senegal etc.).[11] This series of completed or upcoming megaprojects attest to the continent's gas infrastructure and capacity expansion in the last decade with the trend expected to continue through 2030.

Nonetheless, the gas industry investment landscape in Africa has been historically disrupted by falls in global oil prices, especially since that of 2014 when brent crude prices – a principal benchmark in Africa – fell from around $107 per barrel in 2014 to $65 a barrel in 2018[12]. With this, the Africa Report expounded that capital investment, CAPEX for drilling in West Africa alone plummeted by roughly 60% from $50 billion per year in 2014 to around $20 billion in 2018[13]. Whilst the industry recovers slightly in 2019, COVID-19 pandemic wrought havoc on the sector in 2020. International and indigenous oil & gas companies responded to this unprecedented crisis by cutting their capital and operational expenditures, resulting in the delay

[9] UNDP, 2020. Accelerating SDG7 Achievement in the Time of COVID-19, United Nations Department
[10] UNEP, 2017. Atlas of Africa Energy Resources. United Nations Environment Programme, Nairobi, Kenya
[11] See, PWc Oil and Gas Review (2020). Oil and Gas Review: Energizing a New Tomorrow https://www.pwc.co.za/en/assets/pdf/africa-oil-and-gas-review-2020.pdf (Accessed:15 January 2021)
[12] Supra note 1
[13] The Africa Report, 2019. Financing Africa's gas future is a big undertaking, at: https://www.theafricareport.com/18899/financing-africas-gas-future-is-a-big-undertaking/ (Accessed:10 January 2021)

or outrightly cancellation of some planned projects across Africa. In its latest report, the PwC's Africa oil and gas review[14] captured some of these projects as follows:

Table 2: Major Gas Projects in Africa Facing Delay or Cancellation

Company	Country/Project Name	Nature of Setback
BP	Mauritania - The Greater Torture Megaproject,	Commercial production rescheduled for 2023
Aker Energy	Ghana - The Pecan oil field	Development has been put on hold
Shell	Nigeria - The Bonga Southwest Aparo	FID could be deferred to 2021/2022
Total	Angola	Development phase suspended
	Uganda – Tilenga Project on Lake Albert	FID could be deferred until 2020/21
Total and Chevron	Angola- Rig Contract with Valaris Plc	Cancelled
Tullow Oil	Ghana - Maersk Venture	Drillship to be terminated 19 months earlier
	Kenya – South Lokichar project	FID and commercial production could be deferred to 2021/2022

Source: Pwc Oil and Gas Review (2020)

Although there are various ways of remedying the situation, one obvious solution is to ensure that African countries embrace all mechanisms for attracting the scarce investments in the natural gas sector. In this respect, the next section discusses protection of natural gas investments.

[14] See supra note 11

3. Protection of Natural Gas Investments: Role of bilateral, regional and multilateral energy investment treaties

3.1. Protection of Natural Gas Investments

Energy investments including natural gas are very expensive ventures requiring large amounts of capital. Natural gas is becoming increasingly important as a source of energy in this energy transition era. Although considered as a fossil fuel, compared to coal and oil, gas produces less GHG emissions than the rest.

Natural gas development is generally characterized by huge investments outlay, long lead time (between initial investment and generation of positive cashflow), commodity price volatility, fiscal and tax systems complexity coupled with varying degree of risks and uncertainties.[15] Compared to other regions, Africa gas investment climate is affected by several factors including challenging economic and operating conditions, inadequate infrastructure, environmental degradation (from prolonged gas flaring), regulatory uncertainty and political instability which has impeded the spate of development over the last decades.[16] Despite these challenges, Africa remains a strategically important investment destination and major player in global natural gas and LNG market (supplying approximately 12% of global LNG exports as of 2019)[17] - a position enhanced by its gigantic gas resources endowment, growing utilization and technologies uptake and construction of infrastructures for transportation and distribution.

The emerging boom in investments and strategic partnership amongst stakeholders (at local, regional, and global levels) raises a fundamental question of availability of investor protections and how to structure their investment to meet stringent requirements to resolve disputes. As diversely defined in investment treaties, the term 'investment' usually encompasses 'all types of asset' or 'all forms of investment', comprising of shares, bonds, concession contracts, property rights (real and contractual), IP rights, amongst others.[18] Crucially, the above issues,

[15] Bhattacharyya, S. C., 2011. Energy Economics: Concepts, Issues, Markets and Governance, Business & Economics, Springer Science & Business Media
[16] Supra note 2
[17] See, LNG Industry, 2020. Amazing achievements during turbulent times, available at: http://publications.lngindustry.com/flip/lng-industry/2020/July/j7lg1.html#1 (Accessed:15 January 2021)
[18] Carswell, C. J. and Winnington-Ingram, L. M., 2020. Investment treaty arbitration: Trends in different industry sectors, Corporate Disputes Magazine, 1-6

which are largely considered by investors constitutes key challenges that Africa gas industry should manage to attract significant levels of Foreign Direct Investment (FDI).

Further, energy resources are unequally distributed across the globe and this has necessitated the trans-national character in the extraction and utilisation of these resources including the establishment of energy infrastructure. Energy infrastructure is crucial as it enables both producing and consuming countries to benefit from various energy resources.[19] Critical energy infrastructure includes utilities associated with energy transport and management such as: electricity generation and transmission; oil and gas production and pipeline systems; LNG facilities; coal transport trains; management technology such as advanced electricity metering and distribution systems; modern power plant control systems and smart building technologies.[20]

Establishment of such infrastructure requires large capital, and this therefore necessitates various mechanisms of protecting such huge investments. The table below spotlights some of the natural gas infrastructure.

Table 3: Outline of Key Energy Infrastructure

Country/countries	**Energy Infrastructure Type**	**Details**
Nigeria, Benin, Togo and Ghana	West African Gas Pipeline (WAGP)	WAGP, based on the Treaty of the West African Gas Pipeline Project, was established with the main purpose of constructing a 600 km pipeline. The pipeline is owned and operated by West African Gas Pipeline Company Limited (WAPCo), with a regulatory body based in Abuja, the West African Gas Pipeline Authority. The pipeline is anticipated to reduce overall production costs of electricity generation using fossil fuels, improve energy access

[19] See, Goldthau, A., 2014. Rethinking the governance of energy infrastructure: Scale, decentralization and polycentrism. Energy Research & Social Science, 1, pp.134-140.
[20] Nalule, V.R., 2019. Regional Cooperation in the Establishment of Regional Energy Infrastructure. In Energy Poverty and Access Challenges in Sub-Saharan Africa (pp. 143-168). Palgrave Macmillan, Cham.

		and reduce gas flaring which is associated with environmental pollution.
Tanzania	US$30 billion **LNG Liquefaction Plant**	Plans were made for the construction of an LNG liquefaction facility spanning 5,119 acres in Likong'o Village, outside the town of Lindi. Key players include Equinor, Shell, ExxonMobil, Ophir Energy and Pavilion Energy
Mozambique	**Rovuma LNG Liquefaction Plant**	The project is estimated to cost US**$22.4 billion**
Mozambique	**Mozambique LNG Project**	Estimated at a cost of US**$15 billion. Key players include** Total, Mitsui & Co, ONGC, ENH, Bharat PetroResources, PTTEP and Oil India Ltd. Total is leading the project after taking over Anadarko's 26.5% interest in September 2019.
Tanzania	**US$30 billion LNG Liquefaction Plant**	Plans were made for the construction of an LNG liquefaction facility spanning 5,119 acres in Likong'o Village, outside the town of Lindi. Key players include Equinor, Shell, ExxonMobil, Ophir Energy and Pavilion Energy

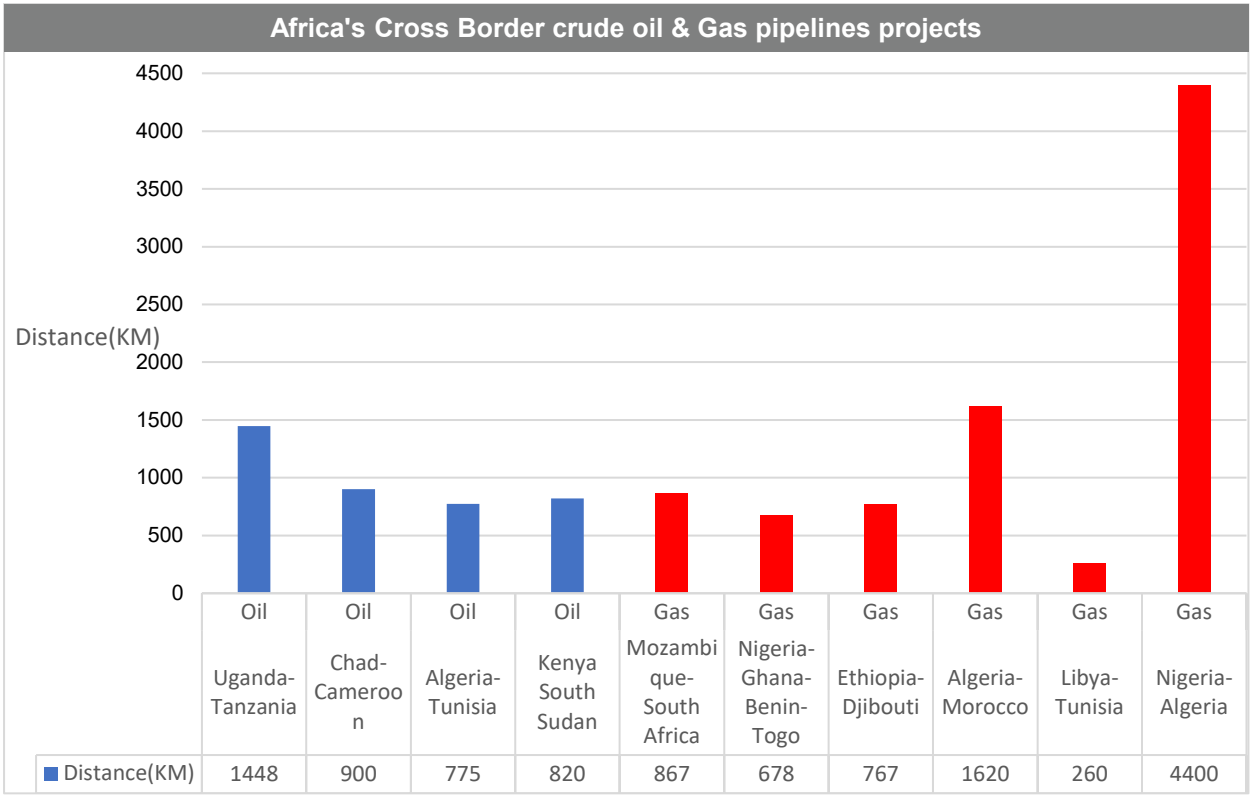
Source: Nalule (2021)

As highlighted in the table above, natural gas investments including infrastructural developments require huge amounts of capital. The establishment of such natural gas infrastructure, therefore, requires an assurance that the investments will be protected in the long run.

Another issue in Africa's gas infrastructure development effort is that break-even for pipeline and large-scale LNG transportation which is typified to be achievable at about 3,000 km. This constitutes a major challenge as majority of natural gas infrastructure are typically small-medium sized and covers relatively short distances which inhibit the financial viability of most

projects. Apart from the Nigeria's West African Gas Pipeline (WAGP) project and handful sub-regional projects, long-distanced infrastructure in Africa is scanty. This predominance of small-medium infrastructure (economics of scale) creates investment uncertainty and financing difficulties.

Figure 3: Overview of Africa's Cross Border Oil & Gas Pipeline Projects



Source: Africa Energy Chamber (2020)

As transforming the continent's huge resources in the ground to commercial value requires substantial investment, the Africa Oil & Power estimated that Africa's gas sector will require $721 billion gas infrastructure investment between 2013 and 2035[21]. In a similar vein, The Africa Report projected that about $80bn worth of investment in LNG projects will be required over the next decade, plus another $20bn for pipeline infrastructure development and $8bn for gas-to-power projects[22]. To this end, the United Nations (UNDP) asserted that current rate of investment in energy infrastructure, including gas-to-power is still low, and predicted that, if

[21] Africa Oil & Power, 2018. Funding Africa's Oil and Gas Megaprojects, at: https://www.africaoilandpower.com/2018/08/20/funding-africas-giants/ (Accessed:10 January 2021)
[22] Supra note 13

not accelerated, the region will lag far behind by about 50 years in achieving universal energy access goal by 2030[23].

Whilst the share of natural gas in the Africa's primary energy supply reached 15% in 2019, estimates from IEA suggest that biofuels and waste remain the dominant fuel used by citizens to meet their primary energy needs, which accounted for largest chunk (45%). Of crucial concern also is the slow pace of investment in clean cooking fuels and small-scale gas-power plants, which are especially needed in underserved African communities, comprising of 730 million and over 600 million people that lack access to clean facilities and electricity respectively.[24]

Equally importantly, technological advancement and growing deployment of natural gas areas such as electricity generation, domestic utilization, and industrial growth pursuit within the continent is shaping the trend of infrastructure investment patterns compared to observed historical trends. Added to this is the changing dynamics in the energy and environmental policy landscapes across Africa which has been fostering not only its pipeline and LNG exports, but overall energy security and investment regime. Consequently, protection of natural gas investments is key on the African continent. The next section therefore discusses the various mechanisms of protecting natural gas investments.

Taking stock of the above, there are various mechanisms that have been embraced by both host governments and energy (gas) companies, which are aimed at protecting natural gas investments. These mechanisms can be categorised into three including national, regional and multi-lateral investment protection mechanisms. These are briefly discussed below:

3.2. Protection at the national level

At the national level, host governments often offer contractual protection mechanisms (for instance through stabilization clauses) or legal mechanisms (for instance through the national laws). The different types of investment protection at the national level are discussed below:

3.2.1. Stabilization clauses

[23] Supra note 9
[24] Supra note 7

Energy investments are very expensive ventures requiring large amount of capital which is often beyond the reach of host governments. In this respect, host governments must attract the participation of international companies with the resources and expertise to help them exploit and market their energy resources.[25]

Often, developing countries (especially those which are considered politically unstable), present greater risks for energy investors. In order to mitigate some of these risks and protect their investments, energy investors often negotiate to have stabilization clauses inserted into the agreements.[26] Before a discussion on stabilization clauses, it is important to understand what exactly 'Stabilization' means. Professor Peter Cameron in his book, 'International Energy Investment Law: The Pursuit of Stability', asserts:

In the context of an international energy contract, the term stabilization applies to all of the mechanisms, contractual or otherwise, which aim to preserve over the life of the contract the benefit of specific economic and legal conditions which the parties considered to be appropriate at the time they entered into the contract.[27]

A stabilization clause is, therefore, a contractual risk-mitigating device to protect investments from variations in the legal environment.[28] This would include risks deriving from a possible exercise of host state sovereignty such as: expropriation, the obsolescence bargain, or any other change which the government might utilize in order to impose new requirements on investors.[29] Stabilization mechanisms can be in different forms. Some are provided for in a law (for instance foreign investment laws). However, the common form of stabilization clause is found in petroleum agreements or it may be 'contractualized' by way of a law referencing the petroleum contract.[30]

Below is an example of a contractual stabilization clause, which although found in the Petroleum Sharing Agreement (PSA), it also has the same effect of protecting natural gas investments:

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[25] Nalule, V. R., 2018. Energy poverty and access challenges in sub-Saharan Africa: The role of regionalism. Springer.
[26] Nalule, V.R., 2021. Land Access in the Perspective of the African Energy Sector. In Land Law and the Extractive Industries: Challenges and Opportunities in Africa. Hart Publishers.

[27] Cameron, P., 2010. International energy investment law: the pursuit of stability. OUP Catalogue. Page 69
[28] Olawuyi, D.S., 2018. Extractives Industry Law in Africa. Springer International Publishing.
[29] Mansour, M. and Nakhle, C., 2016. Fiscal stabilization in oil and gas contracts–evidence and implications.
[30] Nalule,V.R., 2021. Land Law and the Extractive Industries: Challenges and Opportunities in Africa. Hart Publishing.

Egypt stabilization clauses:[31]

"In case of changes in existing legislation or regulations applicable to the conduct of Exploration, Development and production of Petroleum, which take place after the Effective Date, and which significantly affect the economic interest of this Agreement to the detriment of CONTRACTOR or which imposes on CONTRACTOR an obligation to remit to the ARE (Arab Republic of Egypt) the proceeds from sales of CONTRACTOR's Petroleum, CONTRACTOR shall notify EGPC (the NOC) of the subject legislative or regulatory measure. In such case, the Parties shall negotiate possible modifications to this Agreement designed to restore the economic balance thereof which existed on the Effective Date.

The Parties shall use their best efforts to agree on amendments to this Agreement within ninety (90) days from aforesaid notice. These amendments to this Agreement shall not in any event diminish or increase the rights or obligations of CONTRACTOR as these were agreed on the Effective Date. Failing agreement between the Parties during the period referred to above in this Article XIX, the dispute may be submitted to arbitration, as provided in Article XXIV of this Agreement.[32]

Depending on the type of a stabilization clause (including the wording), energy companies may seek protection against unilateral modifications to the contract and against taking the rights of the investor.[33] Basically, these clauses target risks that have the impact of causing losses to the investors. Such risks include direct expropriation; a gradual loss of investment value by a series of measures over time (creeping expropriation); or the loss of anticipate future opportunities.[34] Stabilization clauses are in essence contractual assurance of negotiated terms against future legal or regulatory chances. This is achieved by providing legal and fiscal stability.

Fiscal stabilization clauses relate to government revenue: taxes, royalties, duties to mention but a few. Legal stabilization clauses on the other hand, cover laws and regulations of a non-fiscal character, such as the statutes that govern operations at the project site on a day-to-day basis

[31] Concession Agreement for Petroleum Exploration & Exploitation between Egypt & The Egyptian General Petroleum Corporation & Dover Investments Ltd (East Wadi Araba Area Gulf of Suez) (2002). Source: Cameron, P., 2010. International energy investment law: the pursuit of stability. OUP Catalogue. Page 77

[32] This is an example the type of stabilisation clauses which are referred to as 'Rebalancing of benefits'.

[33] Nalule,V.R., 2021. Land Law and the Extractive Industries: Challenges and Opportunities in Africa. Hart Publishing.

[34] Cameron, P., 2010. International energy investment law: the pursuit of stability. OUP Catalogue.

(mining laws, labour laws, environmental laws, etc.).[35] The different types of stabilisation clauses are discussed below:

1) **Freezing clauses**

In the legal profession, these are also referred to as stabilization clause *stricto sensu*. Freezing clauses are to the effect that, the governing laws – general and special – applicable to operations under a contract between a company and a sovereign state should be those of the state at the time the contract was executed.

2) **Economic equilibrium/ Economic stabilisation clauses**

These seek to re-establish the economic position-the economic equilibrium- of the contract following changes in law which have an economic impact on the bargain struck between the host state and its contractual partner.

3) **Rebalancing of benefits:**

These clauses are similar to economic equilibrium. They basically envisage automatic adjustments or renegotiation of contract terms in the event the specified circumstances occur.

4) **Hybrid clauses**

These seek to combine the unambiguous nature of freezing clauses with provisions commonly found in economic equilibrium clauses.

5) **Allocation of burden clauses**

These seek to allocate the fiscal and related burdens created by a unilateral change in the law. It is common for the resultant burden to be borne by the National Oil Company or the State.

6) Prohibition on unilateral changes

This is also referred to as an 'intangibility clause'. It prohibits unilateral changes to the investment agreement and requires the consent of both parties before any changes may be made. Unlike the freezing clauses which freeze the law, this type of clause only freezes the contract.

The above is just a few examples of stabilization clauses. Moving forward, there is no guarantee that these clauses will mitigate the political risks. Nevertheless, they have the capacity to limit

[35] Nalule, V.R., 2021. Land Access in the Perspective of the African Energy Sector. In Land Law and the Extractive Industries: Challenges and Opportunities in Africa. Hart Publishers.

the scale of economic loss that results. Consequently, investors often use these clauses to deter host governments from embracing major changes in their laws and fiscal regime. Regardless of the form the stabilization mechanism takes, the stabilization clause must be properly entered into by the state; and it must be enforceable in the domestic law of the host state. The next sub-section discusses investment protection under national laws.

3.2.2. Investment protection under national laws

Most countries provide for general investment protection mechanisms in their national constitutions, and investment laws. Some of these laws are briefly outlined below:

A. South African example

In South Africa, as an alternative to Bilateral Investment Treaties (BIT) protections, the country enacted the Promotion and Protection of Investment Act, 2015. This Act contains different provisions aimed at protecting both national and foreign investments.

The main purpose of this Act is provided for under Section 4, which states that:

The purpose of this Act is to— (a) protect investment in accordance with and subject to the Constitution, in a manner which balances the public interest and the rights and obligations of investors; (b) affirm the Republic's sovereign right to regulate investments in the public interest; and (c) confirm the Bill of Rights in the Constitution and the laws that apply to all investors and their investments in the Republic.[36]

The above provision clearly illustrates the need to protect all types of investments in South Africa. The next example is focused on protection of natural gas investments.

B. Nigerian example

Protection for natural gas investments is provided for under, Nigeria LNG (Fiscal Incentives, Guarantees and Assurances) Act 1990, as amended in 1993.

Section 9 provides for Guarantees and assurances to Nigeria LNG limited and its shareholders. The section states that:

[36] Section 4 of Act No. 22 of 2015: Protection of Investment Act, 2015

"The Federal Government of Nigeria (in this Act referred to as "the Government") in recognition of the magnitude of, and in consideration of the investments which shall have to be

made in order to prosecute the venture described in the shareholders' contract dated 19th May, 1989 between the Nigerian National Petroleum Corporation, Shell Gas B.Y., CLEAG Limited and Agip International B.Y., as amended, from time to time (such shareholders' contract, as so amended in this Act referred to as "the contract") hereby grants to the Company,

its successors and to each of the shareholders, from time to time (in their capacity as such), the guarantees, assurances and undertakings following hereunder. These guarantees, assurances and undertakings shall have effect from the date hereof, and so long as the Company, or any successor thereto, is in existence and carrying on the business of liquefying and selling liquefied natural gas and natural gas liquids within and/or outside the Federal Republic of Nigeria.

The guarantees and assurances are as follows–

1. The Government shall do nothing to render invalid unenforceable rights and obligations arising under the contract and the other contracts and arrangements contemplated in the contract, to the extent that such rights and obligations are not illegal in Nigeria and do not offend against Nigerian public policy and provided that such contracts have been kept validly subsisting by the parties thereto, it being understood that such other contracts or arrangements will not be deemed to be illegal or contrary to Nigerian public policy for the sole reason that

the requisite government actions referred to in clause 6 hereof have not been effected.

2. The venture shall be subject to the fiscal regime contained in the provisions of this Act. Such fiscal regime shall not be amended in any way, except with the prior written agreement of the Government, the Company and each of the Company's shareholders……"

The above provision offers stabilization protection to natural gas investors. The next section discusses other avenues for protecting natural gas investments.

3.3. Other avenues of protecting investments

Besides the stabilization clauses and national laws discussed above, there are other avenues for protecting energy investments. These include International Investment Agreements (IIAs), which comprises of Bilateral Investment Treaties (BITs); Multilateral Investment Treaties (MITs); and Free Trade Agreements (FTAs).[37] This section will focus on the BITs.

3.3.1 Bilateral Investment Treaties (BITs)

BITs are agreements between two countries protecting investments made by investors from one contracting state in the territory of the other contracting state. The purpose of BITs is to stimulate foreign investments by reducing political risk. However, BITs have become unpopular in some African countries. For instance, at the beginning of October 2012, South Africa cancelled its BITs with Belgium–Luxembourg, Spain, Germany, Switzerland, the Netherlands, and Denmark. Following the review of the BITs, the South African cabinet also decided to refrain from entering BITs in the future.

Nevertheless, it is worth outlining some of the BITs that directly impact (have impacted) energy investments. These are spotlighted in the table below:

Table 4: Examples of Bilateral Energy Agreements

Parties	Treaty
Government of the Republic of Turkey and the Government of the Republic of Azerbajian	Intergovernmental Agreement concerning the Trans Anatolian Natural Gas Pipeline System. Signed on 2012-06-26
Government of the Republic of Austria and the Government of the Russia Federation	Agreement on Cooperation in the Construction and Operation of the Natural Gas Pipeline on the Territory of the Republic of Austria. Signed on 2010-04-24
The Government of the Republic of Slovenia and the Government of the Russian Federation	Agreement on Cooperation in Construction and Operation of the Gas Pipeline on the

[37] Leal-Arcas, R. and Nalule, V., 2019. Multilateral and Bilateral Energy Investment Treaties. Handbook of International Investment Law and Policy, pp.1-13.

Parties	Treaty
	Territory of the Republic of Slovenia. Signed on on 2009-11-14

Source: Leal-Arcas, R. and Nalule, V., 2019. Multilateral and Bilateral Energy Investment Treaties. *Handbook of International Investment Law and Policy*, pp.1-13.

As illustrated in the table above, BITs can be general or specific to an energy project (in this case natural gas projects). However, in the absence of the BITs, a State can still rely on the MITs and National laws to protect investors. Some of the examples of MITs in the energy sector include the Energy Charter Treaty. There are also regional energy protocols focused on protecting energy investments. For instance, in West Africa, the 2003 ECOWAS Energy Protocol has the same impact as the Energy Charter Treaty.

Article 10 (1) of the ECOWAS Energy Protocol specifically provides for investment promotion and protection. It states that:

"Each Contracting Party shall, in accordance with the provisions of this Protocol, encourage and create stable, equitable, favorable and transparent conditions for Investors to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favorable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or with respect to an Investment."

The provision above emphasises fair and equitable treatment of all investments; and investment protection and security. The ECOWAS Energy Protocol, just like the BITs and MITs, recognises arbitration as one of the ways to resolve energy disputes. Arbitration clauses are also often featured in the gas agreements and other energy contracts. The next sub-section briefly discusses arbitration clauses as a way of protecting or resolving energy disputes.

3.3.2. Multilateral Energy Investment Treaties: The Energy Charter Treaty

The Energy Charter Treaty (ECT) is one of the unique multilateral instruments found in the energy sector. The origins of the ECT need to be understood in the European countries' interest to trade with countries in the East following the collapse of the Soviet Union in 1991. Although the ECT initially covered a limited scope of countries, recent developments have seen the expansion of the principles of the ECT to various regions including Asia, Africa, and Latin America. This expansion was made possible following the adoption of the International Energy Charter (IEC). Basically, the IEC is a political declaration on energy cooperation which does not bear any legal or financial obligation and has been adopted and signed by over 80 countries and organisations including, among others, the US, China, Burundi, Uganda, Chad, ECOWAS, EAC and the EU.

In contrast, the ECT is a legally binding text providing rules regarding the areas of investments, trade and transit and energy efficiency. It provides dispute resolution mechanisms, while explicitly recognising and protecting national sovereignty over natural resources.[38] The purpose of the ECT as provided for in its provisions is to promote cooperation in the field of energy.[39] For more than a decade, the ECT has attracted a lot of literature from different scholars and this can be attributed to its unique focus on the energy sector, one which is at the heart of every country's economic development.[40]

The ECT was modernised in 2015 hence adopting the 2015 IEC which seeks to expand the principle of the ECT to all countries globally. In this respect, the IEC is a global instrument promoting globalism in the energy sector, specifically given its provisions on energy investment protection, energy infrastructure and dispute resolution.[41] The IEC and ECT will not be discussed in detail in this short sub-section. However, what is key here is the influence

[38] Article 18 of the ECT provides for national sovereignty over energy resources. The ECT and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects were signed in December 1994 and entered into force in April 1998.

[39] See, Article 2 of the Energy Charter Treaty.

[40] Some of the literature on the ECT include: Konoplyanik, A. and Walde, T., 2006. Energy Charter Treaty and its role in international energy. J. Energy Nat. Resources L., 24, p.523; Walde, T. ed., 1996. The Energy Charter Treaty: An East-West gateway for investment and trade (Vol. 10). Kluwer Law International; Hobér, K., 2010. Investment arbitration and the energy charter treaty. Journal of International Dispute Settlement, 1(1), pp.153-190; Taheri, S. and Sharify, S.K., 2016. An analysis of the method of dispute settlement in Energy Charter Treaty compared with World Trade Organization. Journal of Fundamental and Applied Sciences, 8(2S), pp.3669-3687.

[41] Nalule, V.R., 2019. Regionalism in Addressing Energy Access Challenges. In Energy Poverty and Access Challenges in Sub-Saharan Africa (pp. 41-89). Palgrave Macmillan, Cham.

of international instruments in shaping the energy sector globally. The next section will discuss the arbitration clauses.

3.3.3. Arbitration clauses

Arbitration is an alternative dispute resolution mechanism that provides a final and binding outcome. The parties agree to present their dispute to an arbitrator or a panel of arbitrators (tribunal).

Energy investments are capital intensive, as such they attract international investors who often prefer resolving any future disputes through international arbitration. In this respect, international arbitration is key in resolving cross-border disputes. In recent years, African countries have significantly contributed to the cases decided under international arbitration. For instance, according to the 2019 records, for the London Court of International Arbitration (LCIA), African parties were involved in slightly more than 10 percent of the cases (up from 8 percent in 2018).[42] This is therefore proof that African countries are embracing international arbitration.

4. Conclusion

From the foregoing, it can be inferred that domestic markets for natural gas in Africa are expanding, given growing use for cooking, power generation and in some industrial settings. However, investment and financing for natural gas projects in Africa remain low and uneven, and COVID-19 pandemic further puts strain on gas projects. Given this narrative, measures to safeguard and promote investment in gas industry, and to quickly extend access to gas technologies, infrastructure and monetising options will be critical as the continent plans to recover from COVID-19 crisis. There are already various mechanisms of protecting natural gas investments as discussed in section 3 of this chapter, however, these need to be strengthened. Additionally, innovative multi-stakeholder partnerships are essential for the rapid gas development across Africa.

[42] LCIA, 2019 Annual Casework Report, available at file:///H:/Synced%20Folders/Downloads/20014%20LCIA%202019%20Casework%20Report%2028%20May.pdf, p. 11.

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