Oil, Land and Corruption: *The Unholy Trinity*

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A. Introduction

Petroleum is by far the most widely traded commodity in the world. Exploration, extraction, refining and transportation are very expensive undertakings for which investors demand a fair return and security for their investment. Governments and local communities expect to reap the benefits.

Land is a very emotive subject in Kenya and in many African countries for various reasons: most economic activities on the continent are land-based, indigenous communities have cultural or religious attachment to land and some communities have decades-old grievances on land.

Land is a major input to the oil and gas industry. The legal definition of land includes anything below the ground, the sea and under the sea. Prospecting and extraction are done on land. Rigs, platforms, pipelines and storage facilities are all built on land.

Corruption is an old story in Africa. From the pre-colonial period when community leaders traded their subjects in exchange of beads and tobacco to modern governments secretly disenfranchising their people. It goes without saying that the hands of the foreign investors, their governments and host governments are not clean, since bribery is a 2-way traffic with a giver and a receiver. Of course, the foreign companies are more discreet than a traffic policeman on a Nigerian or Kenyan road.

Many foreign countries have introduced laws to rein in companies registered there from engaging in corrupt practices abroad. However, they are hard pressed by the companies to turn a blind eye in order to keep the companies and countries "competitive" abroad.

Perhaps the simplest illustration of what corruption does to Africa is the KenRen case. Kenya obtained loans to set up a fertiliser factory in 1970s. It turned out that the machines that were installed had been scrapped abroad after their economic life expired and could not perform. Kenya went to international arbitration. It won. It was ordered not to pay the fraudulent suppliers or the financiers. Kundos to the Kenyan civil servants who stood their ground. Who can believe that as we speak Kenya has repaid the suppliers and the loans? It annoys me for not getting annoyed enough.
A more recent example is more hilarious than annoying. James McComirk sold to Kenya police gadgets he claimed could detect drugs, suspicious persons and

explosives and that they could work from the air or underwater and could identify objects up to a kilometre underground. "I never had any negative results from customers," he told an English court recently.

A British court has found that the devices were fake and put McCormirk to prison. However, the Kenya police insists that the bomb detectors it purchased from that conman in 2004 were genuine and were still in use in 2014!

In reality, McCormick's device was based on $20 golf ball finders which he had purchased from the US and which had no working electronics. He sold them for up to $62,000 each.

African governments play multiple roles. They are the signatories of Bilateral Investment Treaties (BITs), grantors of petroleum prospecting licences, various concessions, industry regulators and equity holders in the oil and gas sector. Corruption at any stage could undermine national interests.

Kenya has excellent procurement laws, but corruption has rendered them useless. They are, at most, a minor nuisance. How will the government procure the services, skills, finances and the other resources it requires in order to play its various roles?

B. Land Disputes – An African Perspective

Land is an emotive subject in Kenya and in most of Africa. I will touch on just a few areas to illustrate how the existing and potential land disputes could affect the exploration and extraction of oil.

Displacement of property owners from ancestral lands is a particularly controversial subject. Many Africans have spiritual attachment to the land, especially if parents and ancestors are buried there. Never mind that the burial of dead bodies in the ground is fairly modern, even un-African. Or that many settled African communities were, traditionally, on the move in the long run. Such communities are most unwilling to move from their ancestral land. They would be culturally and spiritually disconnected if they did. They will not even consider compensation in order to move elsewhere. *Please discover your oil elsewhere!*

Historical injustices are historical claims on land ownership. An example would suffice. Much of the land in Upper Hill, the neighbourhood in which this conference is held, belonged to Kenya Railways Corporation until recently. Did Kenya Railways, or whatever the company was called then, compensate the ancestral owners of the land 125 years ago? If not, how can the injustice be remedied today? Discovery of oil on such land would definitely give rise to historical land claims, which would take years to resolve.

Squatting on land is a worldwide phenomenon. Furthermore, a landowner has got just one vote, which he might not even cast, while squatters thousands. Thus, even when a court orders squatters to vacate, the local dynamics guarantee that they stay put. In any case, the police and other enforcement agencies sympathise with the squatters.

Fake title documents are common in Kenya and parts of West Africa today. They look as good as the genuine ones. Some of the fake ones look more believable than the true ones. The problem is compounded by the fact that the underlying documents and survey maps held by the government registries have, in some cases, also been tampered with.

Compensation and basis for compensation. Open market value is the accepted standard. However, land that is not titled and land in places where market transactions are rare present problems. Also where the prices of recorded transactions have been stated conservatively "for tax purposes".

The government is now computerising the land registries. However, that will not help much unless the documents are "vetted" first. Hasty computerisation of the registries is not the solution - with computers, "garbage in, garbage out".

Kenyans and foreigners have lost money due to fake titles and registry problems. Among the Kenyans with pending court cases are the Former President Mwai Kibaki and Former Prime Minister Raila Odinga. The two prominent Kenyans, with all the state machinery working for them for about 10 years and access to the best lawyers in town, could not escape the fraudsters. Their cases are in court.

Another prominent Kenyan with a land dispute was the late Mutula Kilonzo, a thorough lawyer with a 1st Class Honours in Law from the University of Dar-es-salaam. Fraudsters apparently sub-divided part of his land in Machakos and sold it to third parties. His case is also in court.

There is no accurate record of land cases in Kenya, considering that many cases on physical assault and murder are fuelled by land disputes.

Land is a very local matter. Foreign consultants have cannot navigate local waters without the input of local advocates and valuers. At the same time, the local consultants have limited expertise in oil and gas. There is scope for strategic alliances, partnerships and other forms of cooperation between local and foreign consultants.

The Second Scramble for Africa is on. For example, 2.5m ha(6.2m acres) of land in Ethiopia, Ghana, Madagascar, Mali and Sudan was leased to foreign companies between 2004 and early 2009 (Cotula L. and Others, *Land Grab or Development Opportunity?*). Subsequent estimates suggest that much more land in Africa is under the control of foreigners mainly through leases of up to 99 years. That has many implications. For gas and oil, it means that the parties in legal possession of the land are not African people or their governments but speculators in the Middle East, China, Europe and America - probably in that order.

The speculators have not, so far, shown serious interest in farming. In any case, leases for 20-25 years are more than adequate for agriculture. Do they know something we don't about where oil and other mineral lie?

Other issues like environmental pollution, communities sharing in the profits, disputes between the central and local governments, the prospect of inter-county boundary disputes etc. have been well documented and will not be discussed in this paper.

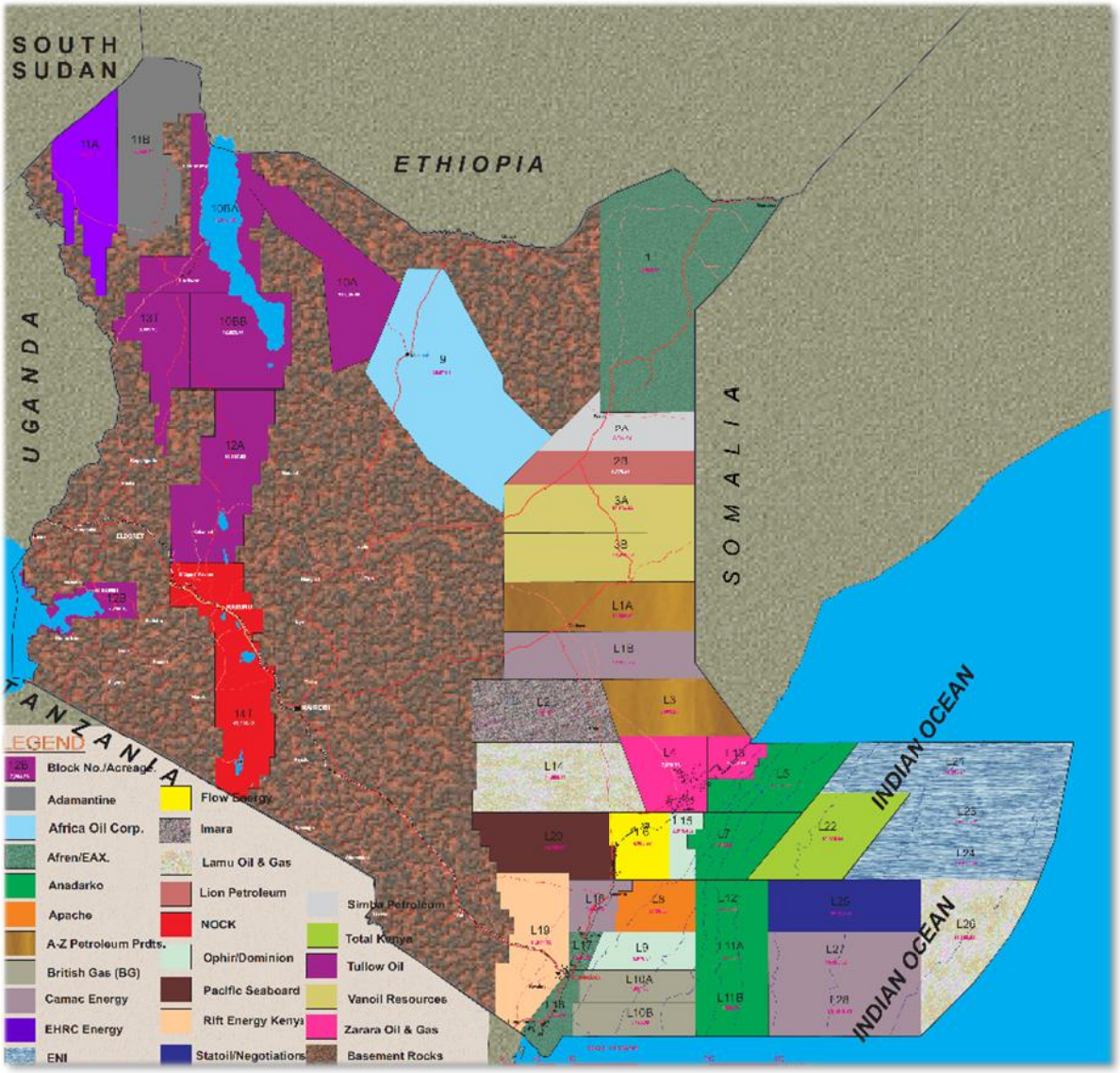
C. Disputes about National Boundaries

Discovery of oil revives old territorial disputes. Many of Africa's international boundaries have not been properly surveyed or agreed upon. Hardly any African country is free of boundary disputes.

The African Union, like OAU before it, recognises national boundaries at independence but that has not stopped members states from fighting over boundaries.

1. Kenya and Its Neighbours

Kenya has actual or potential border problems with Uganda, South Sudan and Somalia.



Map of Kenya (NOCK): Some of the exploration blocks are in areas with actual or potential territorial disputes.

2. Tanzania- Malawi Dispute

Map: The Tanzania-Malawi Border

Tanzania and Malawi are involved in a potentially explosive boundary dispute at Lake Malawi. It is an old dispute from the colonial period. What escalated the dispute recently? You guessed it. Malawi is carrying out exploration work in the lake and is claiming the lake right to the Tanzanian shore, while Tanzania insists that the boundary at the centre of the lake.

Tanzania has 2 very long lake frontages – along the Indian Ocean and along Lake Tanganyika. Malawi cannot understand what it considers Tanzania's unreasonable behaviour against a brotherly landlocked country. However, it claim is essentially based on historical records.

Tanzania does not accept the formula suggested by Malawi as it would, technically, mean that Tanzanians, who have been fishing in Lake Malawi for centuries, would be in foreign territory the minute they put their feet in the lake. Technically, Tanzanians would need a Malawi visa to swim in the lake! Tanzania, which has a large army and a navy, sees Malawi's exploration in the lake as a declaration of war.

The two countries submitted to mediation under Joaquim Chissano the former President of Mozambique and the chairman of the Forum of Former African Heads of State and Government.

Malawi now says it has evidence that the mediation process has been compromised and would like the matter referred to the International Court of Justice for arbitration. Is there another reason for refusing Chissano as mediator?

US President Obama's visit to Tanzania shortly will enhance Tanzania's diplomatic profile. Of course that will not count during the boundary arbitration.

Meanwhile, Tanzania would like the exploration halted until the the dispute is settled, but Malawi will hear none of it.

Another section of the Tanzania-Malawi border is marked by a river which changes its course seasonally. What would happen if oil was found there?

D. Alternative Dispute Resolution (ADR) Procedures

ADR refers to the various procedures used to resolve disputes *out of court and without violence.*

The ADR procedures most commonly used in resolving disputes involving land, national boundaries and oil are the same: negotiation, mediation, adjudication and arbitration.

In the gas and oil sector, disputes arise regarding land rights, rent, insurance, sale of goods, construction, finance, joint ventures, etc.

(i) Negotiation and Mediation

Parties are continually settling their disputes by negotiation, which could be quite casual or protracted, depending on the issues and the sums involved. They communicate directly without the intervention of a third party. No dispute should ever be taken to third parties before the disputants attempt to settle it themselves by negotiation, whether this is provided for in the contract or not.

Mediation is "facilitated negotiation". A third party gets involved to facilitate discussion. The disputants remain in control of the process since the mediator does not, generally, provide solutions. The parties themselves hammer out an agreement, which when signed becomes binding to both parties. The downside is that either party could walk away and terminate the process at any stage. Yet, amazingly, up to 80% of disputes referred to mediation are settled fully.

Negotiation and mediation are ideal methods for resolving disputes between parties who have an on-going relationship, for example a government and its concessionaire or an oil company and its distributors or among the shareholders of a company.

Furthermore, the outcome of mediation is easily accepted and enforced by both parties as they have contributed to it.

Kenya owes its existence after the 2007/8 problems to mediation. The dispute between SPLM and Sudan was settled by mediation.

(ii) Adjudication and Dispute Adjudication Boards (DABs)

Adjudication is commonly used in drilling contracts, construction of refineries, pipelines, storage facilities and filling stations. The consequences of stoppage are so serious that parties would rather get an interim relief in a hurry and deal with the matter more substantively later should the need arise.

An adjudicator must resolve a dispute under very tight time limitation, typically 28 days. This means he cannot be thorough or hold lengthy hearings. Thus adjudication is also called “rough justice”.

Parties who opt for adjudication acknowledge that its outcome is binding unless challenge through arbitration or litigation is successful. A party that challenges the decision of an adjudicator is required to first comply with the subject decision in the interim. It is a “pay now, argue later” regime.

An adjudicator is like a referee in a fast moving sport. He makes a decision in a split second. The parties comply, pending a formal challenge by a board, which might take days or weeks to listen to the evidence from the parties and write a written and reasoned decision.

FIDIC contracts, which are the world standard especially in large engineering and construction projects, also provide for adjudication. The World Bank and other donor agencies that fund large infrastructural projects demand that the contracts must provide for adjudication.

Disputes in large engineering and construction projects are adjudicated by DABs, which are involved in the project from the commencement, even before any disputes arise. Such boards are able to adjudicate disputes quickly because they are already familiar with the project from day one. Such a board is typically made up of three people – one appointed by either party and a third one, the chairman, appointed by the two. The cost ends up being reasonable in relation to the size of the project and compared to the losses that work stoppage for even a few days would cause.

(iii) Arbitration

Arbitration is a court-like procedure of resolving disputes. The parties appoint an arbitrator who listens to both sides and makes a final and binding decision, which is called an “award”. It is the most thorough ADR mechanism available but it takes time and could be expensive if parties do not adopt simple, cost-effective procedures.

An arbitrator’s award is generally final and binding. Courts enforce an award as if it was a court decision. There are very few grounds for challenging an award – for example if the arbitrator has breached the rules of natural justice (no man shall be a judge in his own cause, giving each party an opportunity to present its case, etc).

Because of the sums at stake in oil and gas disputes, the arbitration tribunals are typically made up of 3 people. None of the arbitrators is from the nationalities involved in the dispute. This is meant to avoid the effect of national sentiments or nationality

bias.

The arbitrations are administered by international arbitration institutions like the International Centre for Dispute Resolution (AAA), International Centre for Settlement of Disputes (ICSID), International Chamber of Commerce (ICC), Stockholm Chamber of Commerce or London Court of International Arbitration (LCIA).

African initiatives include the Cairo Regional International Centre for Arbitration, Mauritius International Arbitration Centre, Kigali International Arbitration Centre and the new kid on the block: Nairobi Centre for International Arbitration. Arbitration centres are also found in North America, Nigeria, South Africa, China and elsewhere.

Arbitration practice in Kenya is governed by the Arbitration Act of 1995, which was amended in 2009. It is a cut-and-paste job of a modern, standardised arbitration law prepared by the United Nations for use worldwide. Uganda and Rwanda arbitration laws are also from that source. Tanzanian arbitration law is different but serves the same purpose.

Each ADR procedure could be used on its own. However, it is quite common for parties to use several mechanisms in the same dispute. Parties use negotiation once a dispute arises and continue to negotiate during and after adjudication or arbitration. Indeed, a good arbitrator encourages parties to reach amicable settlement at any time during the proceedings. Most international arbitration rules in use now allow mediation, which is faster and less expensive.

The different dispute resolution procedures offer varying levels of privacy, party control, speed, cost and flexibility. The parties also get the chance to have the dispute resolved by a person who has the relevant technical skills.

ADR has been referred to as “designer justice” due to the fact that the parties themselves can determine the power of the dispute resolver, the venue, choose their dispute resolver, language and the procedure to be followed in the proceedings. Such flexibility is not available in court.

Articles published in www.ngotho.co.ke discuss each ADR in depth, what determines the choice of the specific procedure and how the various mechanisms can be used in the same contract.

E. The Two Regimes of International Commercial Arbitrations

International commercial arbitrations are either treaty or contract based.

1. Treaty-Based Arbitrations

A **bilateral investment treaty (BIT)** is an agreement establishing the terms and conditions for private investment by nationals and companies of one state in another state. This type of investment is called foreign direct investment (FDI). BITs are established through trade pacts between governments. BITs provide for the resolution of disputes through ADR, whether the specific contracts have arbitration clauses or not.

NGOs have spoken against the use of BITs, stating that they are mostly designed to

protect the foreign investors and do not take into account obligations and standards to protect the environment, labour rights, social provisions or natural resources. Moreover when such clauses are agreed upon the formulation is legally very open-ended and unpredictable. (Wikipedia)

Typical Standards of Investor Protection in BITs

1. No expropriation without compensation
2. Fair and equitable treatment (FET)
3. No discrimination vis-a-vis national companies
4. National treatment
5. Most-favoured nation (MFN)

The world's first BIT was signed on November 25, 1959 between Pakistan and Germany. There are currently more than 2700 BITs in force, involving most countries in the world. Influential capital exporting states usually negotiate BITs on the basis of their own "model" texts (such as the US model BIT).

Kenya has BITs with Burundi, China, France, Germany, Iran, Italy, Libya, Netherlands, Switzerland and United Kingdom. Uganda has BITs with 18 countries, Tanzania with 14, Rwanda 7 and Burundi 8.

Some of the arbitrations involving African countries pending at ICSID currently are:

Claimant	**Respondent**	**Subject Matter**	**Date filed**
Tullow Uganda Operations Pty Ltd	Republic of Uganda	Petroleum exploration, development and production	2012
Sudapet Company Ltd	Republic of South Sudan	Exploration and production of hydrocarbons	2012
Republic of Equatorial Guinea	Energy Corporation & Others	Oil and Gas enterprise	
Hess Equatorial Guinea Inc and Tullow Equatorial Guinea Ltd	Republic of Equatorial Guinea	Hydrocarbon concession	15th May 2012
RSM Production Corporation Ltd	Republic of Cameroon	Hydrocarbons exploration and exploitation concession	19th Sept. 2011
Natural Gas S. A. E.	Republic of Egypt	Gas pipelines construction and	

		operation	
Benhard von Pezold & Others	Republic of Zimbabwe	Commercial farms	8th July 2010

Note that:

(i) African countries are usually the respondents, rarely the claimants

(ii) Neither the old, fairly developed countries like Egypt nor newer ones like South Sudan are spared.

Murphy Exploration Vs Ecuador is a good sample of ICSID cases. The parties entered a contract in 1987 for the exploration and exploitation of hydrocarbons. Ecuador introduced new legislation in 1993 and 2006 requiring that 50% of “etra-ordinary profit” from hydrocarbons should go to the government. A 2007 decree gave Ecuador 99% of the “extra-ordinary profit”. Ecuador applied the legislation retrospectively and demanded payment.

Murphy referred the dispute to ICSID claiming that Ecuator had (a) violated the BIT with respect to Fair and Equitable treatment, (b) failed to protect Murphy’s investment (c) taken arbitrary means to Murphy’s detriment and (d) expropriated Murphy’s investment.

ICSID found that it had no jurisdiction and therefore did not make a decision on the merits.

The Iran-United States Claims Tribunal is perhaps the most successful model for arbitrating a large number of disputes between a country and hundreds of investors form another country. It was established after the Algiers declaration of 1981, following the 1979 hostage crisis. Each country appointed 3 arbitrators and the 6 appointed the remainder, making a total of 9.

Zimbabwe has been to several tribunals in land disputes. A tribunal under the Southern African Development Cooperation ordered Zimbabwe to compensate Mike Campbell and several other European farmers and pay interest to them for having confiscated their farms under a land reform programme to resettle Zimbabweans. Zimbabwe courts had, predictably, previously dismissed the farmers’ case.

2. Contract-Based Arbitrations

Contractual provisions apply when treaty-based arbitrations are not applicable.

There is no standard ADR clause for use in oil and gas contracts. A minimalist clause that “all disputes arising from this contract shall be resolved by an arbitrator appointed by the XYZ upon the request of either party” is not sufficient for oil and gas contracts

although it would be better than none.

Oil and gas contracts involving different nationalities and large sums of money require legal advice in order to cover the various angles. The ADR provisions run to several pages in the main contract and might be even in a separate contract. They specify the venue, seat of the arbitration, applicable laws, procedure for the appointment of arbitrators, the skills that the arbitrators must have, the arbitration rules that would apply, etc.

Unfortunately, the ADR clause rarely gets the attention it deserves. Parties are keen to negotiate the scope of works, completion, date, contract sum and the payment schedules. Neither party wants to be seen to be paying much attention to how disputes would be solved. The optimism and spirit at this early stage are not conducive to contemplation of even the possibility that disputes might arise. Therefore, the weaker party usually just accepts what the stronger party suggests in the ADR clause.

The ADR clause must be negotiated and interrogated as thoroughly as the critical provisions of the contract. Indeed, it is probably the most important clause because:

1. Some of the clauses presented have been cut-and-pasted from other contracts
2. It applies even after the contract has expired or been terminated!
3. It remains valid even if the rest of the contract is found to be invalid.
4. It provides a mechanism for resolving disputes arising from the “critical clauses” - price, completion dates, etc.
5. Courts respect the stated intention of parties to resolve their disputes privately.

What to Negotiate

1. Attempts amicable solution? Notice of a dispute? The ADR clauses within a contract should interact in a logical and practical manner.

A provision requiring the parties to attempt negotiation and/or mediation helps, as many of the disputes can be resolved amicably at low cost at an early stage.

2. Number of arbitrators – 1 or 3?

3. Qualifications of Arbitrators. Some parties specify the qualification the arbitrator must have in the primary profession and as an arbitrator.

4. Procedure for appointing the arbitrator(s)

5. Venue of hearings – parties should consider the cost of transport and accommodation in addition to the other logistics like visa requirements.

6. Seat of arbitration

7. Language – translation is expensive and cumbersome.

8. Confidentiality – Provide for this if the rules adopted do not specifically provide for it.

confidentiality

9. Applicable Rules – ICDR, ICC, ICSID, LCIA, KIAC, etc. Read the rules before signing the contract, not after the dispute has arisen.

10. Joinder of non-signatories, consolidation of related or similar disputes etc.

11. ADR clauses in the various contracts in a project need not be identical but there should be consistency and harmony among them.

Defective arbitration clauses are very frustrating and should never arise especially when both parties have engaged professional advisors early enough.

F. Oil and Gas – Affinity for ADR

Disputes arise from two broad scenarios. Firstly, when host governments shift goal posts regarding the level of rent/royalties payable, tax exemptions, the taxation applicable, expatriation of profits etc after the contracts have been signed. Such changes are sometimes triggered by change of regimes.

Secondly, some of the companies awarded the contracts have no capacity (or intention!) to assemble the capital, technology or expertise required for the undertaking.

Disputes in the oil and gas sector are particularly suitable for resolution through ADR for various reasons:

1. Foreigners abhor courts in host nations. No company wishes to have its case determined where its opponent has linguistic, legal or any other advantage. This had led to the development of very elaborate network of organisations that resolve international commercial disputes privately.

2. The on-going judicial reforms in Kenya and elsewhere on the continent will definitely make the courts more efficient and independent. However, the suggestion that disputants choose ADR merely to avoid delays does not stand close scrutiny. Developed countries with their efficient judiciaries are at the forefront in the use of ADR.

3. Nationalism and sovereignty would not allow a host country to even consider taking an oil dispute to a national court in another country. Indeed, some international arbitration rules provide that a national from the country involved or the country of a company cannot sit in the the tribunal.

4. Politicisation of large commercial disputes makes it impractical for hearings to be held in host countries. Foreigners and their witnesses face harassment and arrest on trumped up charges in the host countries. They might not even get visas to attend the hearings!

5. Some of the disputes are highly technical. Parties feel more comfortable when such are heard by people who have technical or specialist knowledge.

Specialisation among judges has gone a long way but there is no chance of bridging the technical gap that still exists in some of the matters.

6. "Loss of profits" for delayed or cancelled projects can be extremely high. National courts are known to be very conservative in making large awards against their governments.

7. ADR is faster than courts. The projects costs are high, typically in billions of dollars. Delays in settling disputes are very expensive, especially because the subject investments include a series of projects. Disputes and delays in one project tend to overflow to the other related projects.

8. ADR facilitates amicable settlement which is desirable when the parties have an on-going relationship.

9. There is no "world government" with proper or complete jurisdiction over contractual matters between investors and governments.

10. Both governments and the investors have much to hide. The fact that arbitration is confidential suits both sides. Confidentiality has been successfully challenged and can no longer be taken for granted. NGOs, communities and pressure groups can now given a hearing in international arbitrations even though they may not, strictly, be parties or signatories of the agreements.

11. Public policy worldwide favour the private, early and amicable resolution of disputes. In Kenya, new Constitution of Kenya, in section 159.2.(c), requires courts to be guided by the principle, among others, that "alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted". The Civil Procedure Rules have been revised, but they do not go far enough.

At the contract or treaty negotiation level, foreign governments and investors have a lot of legal, technical and financial resources.

On the other hand, African governments with gaping holes in the national budgets and restless populations come with limited resources. Why are Kenya, Uganda and Tanzania, who are in an economic community negotiating individually for exploration rights, even when they are dealing with the same exploration companies? Aren't they far much better of negotiating as a block and, at the very lest, comparing notes?

The African chiefs who "signed" the treaties a hundred-plus years ago did not consult their neighbours. There is no excuse for African states acting in isolation today. African states must find a way to develop common strategies and policies in order not to fall prey of crafty investors.

During the first scramble for Africa in the 19th century, King Leopold of Belgium and H M Stanley devised a simple approach in their acquisition of territory, "The treaties must be as brief as possible and in a couple of articles must grant us everything" (King Leopold's Ghost, Hochschild A, Macmillan Publishers. Oxford, 1999). Foreign companies and their governments have a game plan. Has Africa got one?

G. Some Relevant East African Court Decisions

Kenyan oil companies have been involved in arbitration with each other and with other parties over the years. It is difficult to know what happens since arbitration is a private matter. Fortunately or unfortunately, a few arbitration matters have ended up in court, putting on public record and giving the public a glimpse of that happens in private.

Kenya Shell and Kobil are on public record as having gone to arbitration in early 2000s over the termination of an agreement in which Shell was re-blending lubricants for Kobil. Justice Martha Koome found in a case pitting Kenol and Kobil against Kenya Petroleum Refineries (Case No 782, Milimani Commercial Courts) that there was in fact no dispute between the parties capable of being referred to arbitration.

Justice Azangalala also found there was no arbitrable dispute between Chevron Kenya Limited and Tamoil Kenya Limited (Milimani Commercial Courts, Case No 155 of 2007) with respect to an agreement entered into previously by Caltex Oil (Kenya) Limited and Mobil Oil Kenya Limited.

The Triton saga has precipitated several arbitrations in Kenya as the various parties sought to mitigate their losses.

The case of Total (U) Ltd v Buramba General Agencies (High Court of Uganda, Arbitration Application No. 3 of 1998) is about a breach of an oil transportation and distributorship agreement. Three arbitrators were appointed to resolve the dispute. The losing party applied to court for set aside the award alleging that one of the arbitrators was biased and that the sum awarded was unduly high.

Justice James Ogoola, dismissed the application with costs and held, among other things, that the "court is not at all alarmed by the apparent largeness and volume of damages awarded by the arbitrators in this case." In Chevron Kenya Limited & Chevron Uganda Ltd v Daqare Transporters Lltd (High Court of Uganda, Misc. Application No. 490 of 2008), Justice Geoffrey Kiryabwire refused to set aside an arbitration award merely because one party complained that the award was "colossal and unconscionable".

In the first Ugandan case cited above, the judge observed that "it is self-evident that ...courts have adopted a decidedly benevolent attitude to the interpretation of arbitral awards". In both case, courts in Kenya and Rwanda would probably have reached the same decisions, given that the arbitration Acts in those countries are much the same.

In Gitonga Warugongo vs Total Kenya Limited (Court of Appeal, Case No 113 0f 1998), Justices Omolo, Tanui and Owuor were faced with the decision of a valuer who had over-stepped his mandate. The lease stipulated that an independent valuer would determine the rent payable by Total to Warugongo if the parties disagreed on what was payable at lease renewal. The right to renew was automatic. The only issue for the valuer to determine was rent. He established the market rent to be Ksh.167,000/= pm. However, he went further and recommended that the rent should be going up by 20% every 2 years. Total appealed against the automatic periodic rent increase arguing that the valuer did not have mandate to advise on that issue. The court of appeal ruled in Total's favour.

H. Enforcing Arbitration Awards – The New York Convention

158 countries have signed The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 which provides for the enforcement of an arbitration award given in a different state. For example, an arbitral award issued by a Uganda court against a Canadian company could be enforced in China.

Kenya, Uganda, Tanzania, Rwanda, Burundi, Ethiopia and South Sudan are signatories. Somalia is not. Most countries of the world are.

The Convention also lists the grounds under which a state may refuse to enforce an arbitral award – for example if the arbitrator exceeded his jurisdiction, public policy considerations in the state in where enforcement is sought.

The Convention has been very successful the last 55 years, such that the few problematic enforcements stick out. Awards against Argentina following its default on its $80 billion dollars of external debt in 2001 have been difficult to enforce as that economy literally collapsed. Franz Sedelmayer, a German, has been unable to enforce a 1997 against the Russian Federation due to diplomatic immunity and difficulties in identifying Russian assets abroad.

Many cases involving African governments at ICSID have either been settled amicably or lost due to jurisdictional challenges. Fortunately or unfortunately, that means there is little documentation of cases decided by arbitrators.

I. Conclusion – Is Sub-Sahara Africa Prepared for Oil and Gas Exploration and Extraction?

Lack of oil has in the past undermined development of determined sub-Saharan countries, which have been spending a large percentage of their foreign exchange reserves on petroleum imports mainly for use in fuel.

Production of oil and gas for local use and export would increase our total forex reserves, stabilise the balance of payments and diversify sources of foreign exchange. It might even contribute to the conservation of forests and the environment by reducing the use of charcoal and firewood.

Fortunately, we could learn very fast from the lessons learnt elsewhere. The challenges learnt by our brothers in Nigeria, Ghana, Zimbabwe, Uganda, North Africa and the Middle East are well documented for our reference. However, nothing and no one will stop us from learning the lessons slowly and painfully from scratch if we choose that option. The choice is ours. Nay, our leaders'.

Leaders like the juvenile Kenyan Members of Parliament, who earn about USD 12,000 including benefits per month each, have demonstrated that they are unsuitable to play the oversight role or to make the required legislation to ensure equity and transparency in the allocation of gains from oil.

The MPs started agitating for higher salaries on the first day at work and have done

nothing since then. They are conspiring to amend Kenya's brand-new constitution to facilitate a salary increase. I think they should be grateful to be likened to pigs. Kenyans are very charitable.

It will take exceptional leadership to balance the interests of the freeholders or leaseholders, shareholders and all the stakeholders. Otherwise, there will be endless confrontation between the machete-holders and baton-holders.

Land is an emotive subject. Combine that with oil and you have an explosion, even before corruption is added to the equation.

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