

Managing Energy Disputes in Africa

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Abstract

Energy disputes are undesirable. Such disputes can adversely impact the viability and success of energy projects. As a result, there is need to effectively and efficiently manage energy disputes in order to foster the success of energy projects and ensure that the energy transition maintains its positive course. The paper argues a case for effective management of energy disputes in Africa. It posits that energy disputes are a threat to the energy transition and Sustainable Development in Africa. It examines the nature and causes of energy disputes in Africa. The paper further explores the efficacy of the current framework on managing energy disputes in Africa and proposes reforms towards effective management of energy related disputes in the Continent in order to foster energy justice and accelerate the energy transition.

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1.0 Introduction

Disputes in the energy industry are inevitable. It has been asserted that energy projects are, by their nature, often complex undertakings¹. They frequently involve new and innovative technologies, significant investment, and also a high degree of interface between multiple parties who may sometimes have different, and even competing, interests². This means that energy projects are often incredibly interesting and dynamic, but also may be exposed to a variety of risks and challenges such as disputes which can adversely impact project viability and success³. It has been argued that the nature of the energy industry has consistently thrown up disputes⁴. This has been attributed to the size and complexity of most energy and natural resource projects meaning that the stakes are normally high enough to fight over⁵. Further it has been observed that from the effects of the prolonged war in Ukraine, to the energy transition and other geopolitical tensions, the potential for energy-related disputes is on the rise worldwide⁶. According to the International Centre for Settlement of Investment Disputes (ICSID), the energy industry is the single largest user of international investment arbitration demonstrating a prevalence of disputes in the sector⁷.

Energy disputes can be attributed to various factors. It has been pointed out that energy companies usually operate in environments where projects generally involve a variety of public and private stakeholders, significant investment and programmes that sometimes

¹ Burges-Salmon., 'Energy Disputes Guide: Managing Risk and Avoiding Disputes in your Energy Project.' Available at <https://www.burges-salmon.com/energy-disputes-guide-managing-risk-and-avoiding-disputes-in-your-energy-project> (Accessed on 02/12/2023)

² Ibid

³ Ibid

⁴ Financier Worldwide Magazine., 'FORUM: Managing Energy and Natural Resources Industry Disputes.' Available at <https://www.financierworldwide.com/forum-managing-energy-and-natural-resources-industry-disputes> (Accessed on 02/12/2023)

⁵ Ibid

⁶ Clearly Gottlieb., 'Resolving Energy Disputes in Africa Through Arbitration and Alternative Dispute Resolution ('ADR').' Available at <https://content.clearlygottlieb.com/regions/africa-outlook/resolving-energy-disputes-in-africa-through-arbitration-and-alternative-dispute-resolution/index.html> (Accessed on 02/12/2023)

⁷ International Centre for Settlement of Investment Disputes., 'Annual Report: 2023.' Available at https://icsid.worldbank.org/sites/default/files/publications/ICSID_AR2023_ENGLISH_web_spread.pdf (Accessed on 02/12/2023)

span years⁸. Further, energy projects often involve the use of cutting-edge technology, have touch points within geographically and politically challenging jurisdictions, and form part of complex global supply chains⁹. As a result, it is therefore unsurprising that energy companies become involved in cross-border disputes¹⁰. Potential disputes in the energy sector include joint venture/contractual disputes, claims arising from weather conditions in renewable energy projects, construction related disputes, technology related disputes, investor/state disputes, and regulatory disputes¹¹.

Energy disputes are undesirable. Such disputes can adversely impact the viability and success of energy projects¹². As a result, it has been argued that there is need to effectively and efficiently manage energy disputes in order to foster the success of energy projects and ensure that the energy transition maintains its positive course¹³. The paper argues a case for effective management of energy disputes in Africa. It posits that energy disputes are a threat to the energy transition and Sustainable Development in Africa. It examines the nature and causes of energy disputes in Africa. The paper further explores the efficacy of the current framework on managing energy disputes in Africa and proposes reforms towards effective management of energy related disputes in the Continent in order to foster energy justice and accelerate the energy transition.

⁸ Ashurst., 'Managing and Resolving Cross-Border Disputes in the Energy Sector.' Available at <https://www.ashurst.com/en/insights/managing-and-resolving-cross-border-disputes-in-the-energy-sector/> (Accessed on 02/12/2023)

⁹ Ibid

¹⁰ Ibid

¹¹ McMahon. M., Shah. P., 'The Rise of Renewable Energy Disputes and Arbitration.' Available at <https://www.stewartslaw.com/news/rise-of-renewable-energy-disputes/> (Accessed on 02/12/2023)

¹² Burges-Salmon., 'Energy Disputes Guide: Managing Risk and Avoiding Disputes in your Energy Project.' Op Cit

¹³ Herbert Smith Freehills., 'Energy Transition and the Impact on Disputes.' Available at <https://www.herbertsmithfreehills.com/insights/2021-07/energy-transition-and-the-impact-on-disputes#:~:text=A%20ubiquitous%20feature%20of%20energy,some%20or%20all%20of%20them.> (Accessed on 02/12/2023)

2.0 Energy Disputes in Africa

Africa is a continent that is endowed with immense sources of energy including renewables such as wind, solar, hydro, bioenergy, ocean tidal waves, geothermal among other renewables¹⁴. It has been pointed out that the Continent is home to approximately eight per cent of the world's natural gas and 12 per cent of the world's oil reserves¹⁵. According to the International Energy Agency, oil and gas continue to dominate energy use in North Africa and coal dominates in South Africa, due to the local availability of low cost resources, while renewables are the dominant fuel category in Sub-Saharan Africa¹⁶.

Africa Union's *Agenda 2063* identifies energy as the backbone of Africa's economic transformation¹⁷. Agenda 2063 seeks to enhance utilization of the Continent's energy sources, especially renewable energy in fostering economic growth and eradicating energy poverty¹⁸. It further seeks to promote environmentally sustainable and climate resilient economies and communities in Africa wherein renewable energy (including wind, solar, hydro, bioenergy, ocean tidal waves, geothermal and other renewables) will claim more than half of the energy consumption for households, businesses and organizations¹⁹. The International Energy Agency asserts that electricity will underpin Africa's economic future, with solar leading the way²⁰. It further posits that electricity is the backbone of Africa's new energy systems, powered increasingly by renewables²¹.

¹⁴ Africa Union., 'Agenda 2063: The Africa we Want.' Available at https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf (Accessed on 04/12/2023)

¹⁵ United Nations Environment Programme., 'Our Work in Africa.' Available at <https://www.unep.org/regions/africa/our-workafrica#:~:text=The%20continent%20has%2040%20percent,internal%20renewable%20fresh%20water%20so%20urce> (Accessed on 04/12/2023)

¹⁶ International Energy Agency., 'Africa Energy Outlook: 2022.' Available at <https://iea.blob.core.windows.net/assets/220b2862-33a6-47bd-81e9-00e586f4d384/AfricaEnergyOutlook2022.pdf> (Accessed on 04/12/2023)

¹⁷ Africa Union., 'Agenda 2063: The Africa we Want.' Op Cit

¹⁸ Ibid

¹⁹ Ibid

²⁰ International Energy Agency., 'Africa Energy Outlook: 2022.' Op Cit

²¹ Ibid

The need for energy transition has accelerated investments in energy in Africa towards enhancing access to energy²². Sustainable Development Goal (SDG) 7 under the United Nations 2030 Agenda for Sustainable Development seeks to ensure universal access to affordable, reliable, sustainable and modern energy for all²³. Access to energy in Africa is crucial not only for the attainment of health and education outcomes, but also for reducing the cost of doing business and for unlocking economic potential and creating jobs²⁴. However, access to energy in Africa still remains a major problem where majority of the population lack access to clean and affordable energy and depend on traditional fuels²⁵. It has been estimated that nearly 600 million people or an equivalent of 43 per cent of the Continent's population lack access to electricity²⁶. It has also been pointed out that Africa does poorly compared to other regions regarding access to clean cooking since a majority of its population relies on traditional biomass for preparing food²⁷. These problems have necessitated investments in energy in order to foster access to energy in Africa. Further, the International Energy Agency points out that problems in the energy sector including global energy crisis brought about by Russia's invasion of Ukraine, and climate change have underscored the urgency as well as the benefits of an accelerated scale up of cheaper and cleaner sources of energy in Africa²⁸.

²² Ibid

²³ United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Available at

<https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 04/12/2023)

²⁴ Africa Development Bank Group., 'Light Up and Power Africa - A New Deal on Energy for Africa.' Available at <https://www.afdb.org/en/the-high-5/light-up-and-power-africa-%E2%80%93-a-new-deal-on-energy-for-africa> (Accessed on 04/12/2023)

²⁵ United Nations Conference on Trade and Development., 'Commodities at a Glance: Special Issue on Access to Energy in Sub-Saharan Africa.' Available at <https://unctad.org/publication/commoditiesglance-special-issue-access-energy-sub-saharanafrica#:~:text=Access%20to%20energy%20is%20defined,be%20scaled%20up%20over%20time> (Accessed on 04/12/2023)

²⁶ International Energy Agency., 'Access to Electricity.' Available at <https://www.iea.org/reports/sdg7-data-and-projections/access-to-electricity> (Accessed on 04/12/2023)

²⁷ United Nations., 'Advancing SDG 7 in Africa.' Available at <https://sdgs.un.org/sites/default/files/2023-06/2023%20Advancing%20SDG7%20in%20the%20Africa062923.pdf> (Accessed on 04/12/2023)

²⁸ International Energy Agency., 'Africa Energy Outlook: 2022.' Op Cit

It has been asserted that the immense potential for growth in the energy sector in Africa, and the need to do so in line with the large and growing population's energy demand, makes it an attractive destination for global investment flow²⁹. Further, it has been correctly observed that the renewable energy resources with which Africa is endowed, in tandem with the recent initiatives to accelerate development of its energy requirements, has resulted in an increase in energy projects and, with that, the potential for a growing number of disputes coming from the energy sector in Africa³⁰. Despite the vast investment opportunities available in the energy sector in Africa, entrants into energy markets in Africa often face risks that pose huge threats to the economic viability of investments³¹. If not properly addressed and mitigated, such risks may result in complex and protracted legal disputes³².

It is estimated that Africa will see the largest growth in energy-related disputes, driven by an increase in exploration activities in many countries across the continent³³. In addition, it has been observed that given the heavy presence of foreign investors in the African energy sector, energy disputes are likely to arise under both contractual instruments (such as concession agreements) and investment treaties³⁴. Additionally, energy disputes in Africa may arise in respect of compliance with requirements under concessions and local laws such as the decommissioning of oil fields in a safe, environmentally-friendly manner³⁵. The potential for Africa to be a hive of activity for

²⁹ Global Arbitration Review., 'Energy Arbitration in Africa.' Available at <https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitration-review/2022/article/energy-arbitration-in-africa> (Accessed on 06/12/2023)

³⁰ Ibid

³¹ Nalule. V., Olawuyi. D., 'Introduction to International Energy Arbitration Disputes in Africa.' *The Palgrave Handbook of Arbitration in the African Energy and Mining Sectors*. Palgrave Studies in Energy Transitions. Palgrave Macmillan, Cham. Available at https://doi.org/10.1007/978-3-030-96183-1_1-1 (Accessed on 06/12/2023)

³² Ibid

³³ Clearly Gottlieb., 'Resolving Energy Disputes in Africa Through Arbitration and Alternative Dispute Resolution ('ADR').' Op Cit

³⁴ Ibid

³⁵ Ibid

energy-related disputes is ultimately a consequence of its leading position in global energy production, both in the oil & gas and renewable energy sectors³⁶.

There is need for effective management of energy disputes in Africa. Such disputes can adversely impact the viability and success of energy projects in Africa³⁷. Consequently, it is imperative to effectively and efficiently manage energy disputes in Africa in order to foster the success of energy projects and ensure that the energy transition maintains its positive course³⁸.

3.0 Management of Energy Disputes in Africa: Opportunities and Challenges

The need for effective management of energy disputes at the global stage is envisaged under the *Energy Charter Treaty*³⁹. The Charter stipulates that energy disputes between an investor and a contracting state shall be settled amicably⁴⁰. In the absence of amicable settlement of disputes, the Charter provides for the settlement of energy disputes through other mechanisms including courts and administrative tribunals of the contracting party to the dispute, international arbitration and conciliation⁴¹. In relation to energy disputes between contracting parties, the Charter provides that such disputes shall be managed through diplomatic channels and where such channels fail, then the dispute shall be managed through an ad hoc arbitral tribunal⁴². The Energy Charter Treaty therefore sets out mechanisms for management of energy disputes including amicable settlement, use of courts and tribunals, international arbitration, conciliation and diplomacy⁴³.

³⁶ Ibid

³⁷ Burges-Salmon., 'Energy Disputes Guide: Managing Risk and Avoiding Disputes in your Energy Project.' Op Cit

³⁸ Herbert Smith Freehills., 'Energy Transition and the Impact on Disputes.' Op Cit

³⁹ The Energy Charter Treaty., Available at <https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf> (Accessed on 06/12/2023)

⁴⁰ Ibid, Article 26 (1)

⁴¹ Ibid, Articles 26 (2) (a) & 3 (a)

⁴² Ibid, Article 27

⁴³ Ibid

Arbitration has been identified as the predominant method of dispute resolution for energy-related disputes on the African continent⁴⁴. It has been observed that over the past decades, arbitration has emerged as a key mechanism for dispute resolution in Africa's growing energy industry⁴⁵. This is due to the fact that arbitration has developed into the preferred mode of management of disputes especially those that are transnational in nature⁴⁶. It has been correctly observed that in the face of globalization, the need for effective and reliable mechanisms for management of commercial disputes as well as other general disputes involving parties from different jurisdictions has not only become desirable but also invaluable⁴⁷. At the international level, arbitration has a transnational applicability and guarantees neutrality in the determination of disputes by addressing differences that may arise as a result of multiple legal systems⁴⁸. Further, arbitration also guarantees enforcement of decisions through the *New York Convention* which provides a harmonized legal framework for the recognition and enforcement of foreign awards in arbitration⁴⁹.

Arbitration also has a number of attributes including privacy, confidentiality, party autonomy and the ability to foster expeditious and cost effective management of disputes⁵⁰. These features make arbitration a viable mechanisms for managing disputes. The need for expeditious management of energy disputes is of paramount importance. It has been pointed out that disputes in the energy sector can take a very long time to be

⁴⁴ Clearly Gottlieb., 'Resolving Energy Disputes in Africa Through Arbitration and Alternative Dispute Resolution ('ADR').' Op Cit

⁴⁵ Nalule. V., Olawuyi. D., 'Introduction to International Energy Arbitration Disputes in Africa.' Op Cit

⁴⁶ Muigua. K., 'Promoting International Commercial Arbitration in Africa.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/PROMOTING-INTERNATIONAL-COMMERCIALARBITRATION-IN-AFRICA.pdf> (Accessed on 06/12/2023)

⁴⁷ Ibid

⁴⁸ Moses, 'The Principles and Practice of International Commercial Arbitration' 2nd Edition, 2017, Cambridge University Press

⁴⁹ United Nations Commission on International Trade Law., 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards.' (New York, 1958)

⁵⁰ Muigua. K., 'Settling Disputes through Arbitration in Kenya.' Glenwood Publishers Limited, 4th Edition, 2022

resolved, during which there may be significant disruptions to energy supply⁵¹. Parties therefore have a particular interest in resolving disputes swiftly. For example, according to the International Chamber of Commerce (ICC), half of all emergency arbitrator proceedings under the ICC rules concern disputes in the infrastructure/energy sectors⁵². International Commercial Arbitration has thus been widely embraced as the preferred mechanism of managing global commercial disputes including energy disputes. It has been pointed out that foreign investors' preference for arbitration may be explained by arbitration's flexibility, the ability to provide for confidentiality and the ability to enlist specialist, commercial-minded arbitrators to determine the dispute, and its ability to provide for a neutral forum in complex energy disputes involving international parties, particularly when compared to litigation before domestic courts⁵³.

As a result of its advantages, there has been prevalence of arbitration in African energy projects⁵⁴. For example, it has been observed that the growing renewable energy sector in Africa is embracing arbitration in managing disputes due to several reasons which include the confidentiality of arbitration proceedings and awards which preserves the information and data behind the new technologies at the heart of renewable energy projects; finality and enforceability of arbitral awards under the New York Convention; ability to provide a neutral and final dispute resolution forum since renewable energy projects often involve joint ventures between investors or contractors from several jurisdictions; the flexibility of parties in choosing a panel of arbitrators that have the most relevant technical expertise in the subject matter; the ability to consolidate cases in multi-party arbitration either under the terms of an arbitration clause or under the rules of an arbitral institution thus avoiding the risk of competing tribunals and

⁵¹ Clearly Gottlieb., 'Resolving Energy Disputes in Africa Through Arbitration and Alternative Dispute Resolution ('ADR').' Op Cit

⁵² Ibid

⁵³ Clearly Gottlieb., 'Resolving Energy Disputes in Africa Through Arbitration and Alternative Dispute Resolution ('ADR').' Op Cit

⁵⁴ Ibid

inconsistent awards; and the ability to protect investors under investor/state arbitration⁵⁵.

Arbitration of energy disputes is envisaged in energy projects under the 2013 Tanzanian Model *Product Sharing Agreement (PSA)*⁵⁶. The PSA seeks to ensure that petroleum operations including exploration activities are conducted in an ethical, efficient, safe, transparent and accountable manner on the basis of the best international environmental, social and economic sustainability principles in order to achieve optimal long-term petroleum resource exploitation for maximum value creation for equitable benefit and welfare of the people of the United Republic of Tanzania⁵⁷. It provides for management of disputes between investors and the Republic of Tanzania through negotiations and in the event such negotiations fail, then such disputes shall be managed through arbitration⁵⁸. The PSA envisages arbitration of energy disputes in Tanzania under the auspices of the International Chamber of Commerce (ICC)⁵⁹. In addition, the Ugandan Model Production Sharing Agreement also envisages the use of arbitration in managing energy disputes related to the exploration, development and production of petroleum⁶⁰. It stipulates that a dispute arising under the Agreement which cannot be settled amicably within one hundred and twenty (120) days, shall be referred to arbitration in accordance with the United Nations Commission for International Trade Law (UNCITRAL) Arbitration Rules⁶¹. Further, the Standard Power Purchase Agreement of Kenya provides

⁵⁵ McMahan. M., Shah. P., 'The Rise of Renewable Energy Disputes and Arbitration.' Op Cit

⁵⁶ Republic of Tanzania., 'Model Product Sharing Agreement, 2013.' Available at <https://www.resourcecontracts.org/contract/ocds-591adf-8006566420/download/pdf> (Accessed on 06/12/2023)

⁵⁷ Ibid

⁵⁸ Ibid

⁵⁹ Ibid

⁶⁰ Republic of Uganda., 'Model Production Sharing Agreement.' Available at <https://www.unoc.co.ug/wp-content/uploads/2018/06/MPSA.pdf> (Accessed on 06/12/2023)

⁶¹ Ibid, Article 24

for final settlement of disputes through arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce⁶².

Arbitration of energy disputes in Africa often takes the form of investment arbitration often taking the form of investor/state arbitration and commercial arbitration⁶³. In the context of investor/state arbitration, it is estimated that there are over five hundred Bilateral Investment Treaties (BITs) between foreign investors and African countries including almost fifty intra-African BITs in force, alongside more than thirty multilateral treaties with investment protections, including the COMESA (Common Market for Eastern and Southern Africa) Treaty (1993); the OIC (Organisation of Islamic Cooperation) Investment Agreement (1981); the Economic Community of the Western African States (ECOWAS) Supplementary Act for Common Investment Rules for the Community (2008) and the Common Investment Code (2019); as well as the Arab League of States' Arab Investment Agreement (1980) covering investments in various sectors including energy⁶⁴. Against this backdrop, there have been a number of Africa-related ICSID cases involving energy disputes. In its 2023 annual report, ICSID notes that North Africa and Sub Saharan Africa accounted for 9% each of the cases registered in Financial Year 2023 with most of the cases involving the oil, gas, and mining industries as well as electric power and other energy sources⁶⁵.

For commercial arbitration, there has been an increase in energy disputes involving parties from Africa before international arbitration centres including the International Chamber of Commerce and the London Court of International Arbitration⁶⁶. In addition,

⁶² Republic of Kenya., 'Standard Power Purchase Agreement.' Available at https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/Kenya_ppa_ppfull.pdf (Accessed on 06/12/2023)

⁶³ Global Arbitration Review., 'Energy Arbitration in Africa.' Op Cit

⁶⁴ White & Case., 'Investment Treaty Protection: How to Safeguard Foreign Investments in Africa.' Available at [https://www.whitecase.com/insight-our-thinking/africa-focus-winter-2022-investment-treatyprotection#:~:text=As%20of%20October%202022%2C%20there%20were%20525%20BITs%20with%20African,OIC%20\(Organisation%20of%20Islamic%20Cooperation\)](https://www.whitecase.com/insight-our-thinking/africa-focus-winter-2022-investment-treatyprotection#:~:text=As%20of%20October%202022%2C%20there%20were%20525%20BITs%20with%20African,OIC%20(Organisation%20of%20Islamic%20Cooperation)) (Accessed on 06/12/2023)

⁶⁵ International Centre for Settlement of Investment Disputes., 'Annual Report: 2023.' Op Cit

⁶⁶ Global Arbitration Review., 'Energy Arbitration in Africa.' Op Cit

there are a number of regional arbitration centres gaining prominence in Africa such as the Cairo Regional Centre for International Commercial Arbitration (CRCICA), the Arbitration Foundation of Southern Africa (AFSA), Lagos Court of Arbitration (LCA), the Kigali International Arbitration Centre (KIAC), the Nairobi Centre for International Arbitration (NCIA), the Mediation and Arbitration Centre (MARC) in Mauritius, and the Casablanca International Mediation and Arbitration Centre (CIMAC) which have been vital in fostering energy arbitration in Africa⁶⁷.

Other Alternative Dispute Resolution (ADR) mechanisms including negotiation and mediation have also been proposed as viable in managing energy disputes. It has rightly been asserted that commercial relationships in the energy sector are often long term and frequently operate across projects, borders and cultures⁶⁸. This creates incentives for players in the energy sector including energy companies to look at alternatives to more formal dispute resolution mechanisms such as litigation or arbitration⁶⁹. Alternative Dispute Resolution (ADR) provides parties with the opportunity to manage and resolve disputes before they escalate, which can not only save time and costs but can also preserve critical business relationships⁷⁰. ADR mechanisms possess key attributes including informality, privacy, confidentiality, flexibility and the ability to promote expeditious and cost-effective management of disputes which makes them a viable tool of enhancing access to justice⁷¹. In addition, these mechanisms have the ability to foster long term solutions by addressing the root causes of conflicts⁷². These mechanisms are therefore viable in managing energy disputes. For example, it has been observed that

⁶⁷ Ibid

⁶⁸ Ashurst., 'Managing and Resolving Cross-Border Disputes in the Energy Sector.' Op Cit

⁶⁹ Ibid

⁷⁰ Ibid

⁷¹ Muigua. K., 'Fusion of Mediation and Other ADR Mechanisms with Modern Dispute Resolution in Kenya: Prospects and Challenges.' Available at <http://kmco.co.ke/wpcontent/uploads/2022/11/Fusion-of-Mediation-and-Other-ADR-Mechanisms-with-Modern-DisputeResolution-in-Kenya-Prospects-and-Challenges.pdf> (Accessed on 06/12/2023)

⁷² Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

negotiation features at some stage in almost every dispute in the energy sector⁷³. In most occasions, it is the first process in a dispute resolution journey, either because is mandated by a dispute resolution clause or because it is instigated by the parties at the time the dispute arises⁷⁴. It has been asserted that negotiation in energy disputes is most effective either at the time the dispute first arises, before the parties have formed entrenched views on the matter, or following a mediation or other structured ADR process⁷⁵.

In addition, it has been argued that there is potential for the use of mediation in managing energy disputes in Africa since parties to long-term energy contracts may seek to agree mediated solutions rather than escalating their dispute to a judicial forum⁷⁶. Mediation can be used as a precursor to arbitration, with agreements or investment treaties frequently providing for multi-tiered dispute resolution processes facilitating escalation of disputes to arbitration in the event that mediation is unsuccessful⁷⁷. The viability of mediation in managing energy disputes in Africa is further enhanced by the United Nations Convention on International Settlement Agreements Resulting from Mediation (*'Singapore Convention'*), which promotes the use of international commercial mediation by harmonizing the regime for the enforcement of mediated settlements of disputes⁷⁸. It is therefore important to embrace mediation in the management of energy disputes particularly in cases where parties have a continuing relationship⁷⁹.

Finally, litigation can also be an effective mechanism in managing energy disputes in Africa. The viability of litigation in managing energy disputes in Africa is attributed to

⁷³ Ashurst., 'Managing and Resolving Cross-Border Disputes in the Energy Sector.' Op Cit

⁷⁴ Ibid

⁷⁵ Ibid

⁷⁶ Clearly Gottlieb., 'Resolving Energy Disputes in Africa Through Arbitration and Alternative Dispute Resolution ('ADR').' Op Cit

⁷⁷ Ibid

⁷⁸ United Nations: United Nations Commission on International Trade Law., 'Convention on International Settlement Agreements Resulting from Mediation.' United Nations, New York, 2019., Available at https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf (Accessed on 06/12/2023)

⁷⁹ Clearly Gottlieb., 'Resolving Energy Disputes in Africa Through Arbitration and Alternative Dispute Resolution ('ADR').' Op Cit

its emphasis on efficiency in granting interim and preventive measures in the form of interim injunctions, and other such measures designed to minimize disruptions to energy production and supply during the pendency of energy related disputes⁸⁰. Such measures of protection may not be easily obtained in other mechanisms including ADR processes such as arbitration and mediation.

From the foregoing, it is evident that there is a wide range of mechanisms available for managing of energy disputes in Africa including arbitration, negotiation, mediation and litigation. However, energy disputes often pose unique challenges that needs to be taken in consideration to ensure their effective management. For example, it has been pointed out that the industry has always had a political dimension and, by their very nature, energy or natural resources projects are capital intensive and involve long-term commitments⁸¹. Therefore whenever an energy dispute arises, there will often be a narrow line to tread, between standing up for commercial rights and maintaining good longer-term government relations⁸². In addition, it has been asserted that energy related disputes in Africa have historically involved unique challenges as a result of state ownership of energy assets and frequent collaboration between state-owned entities and foreign investors⁸³. Such challenges are likely to affect the nature of energy disputes in Africa and the course of the dispute management process⁸⁴.

Further, energy disputes often involve control and management of vital transboundary natural resources and could escalate into protracted legal battles that could threaten peace and sustainable management of natural resources⁸⁵. For example, the construction

⁸⁰ Clearly Gottlieb., 'Resolving Energy Disputes in Africa Through Arbitration and Alternative Dispute Resolution ('ADR').' Op Cit

⁸¹ Financier Worldwide Magazine., 'FORUM: Managing Energy and Natural Resources Industry Disputes.' Op Cit

⁸² Ibid

⁸³ Clearly Gottlieb., 'Resolving Energy Disputes in Africa Through Arbitration and Alternative Dispute Resolution ('ADR').' Op Cit

⁸⁴ Ibid

⁸⁵ Kaledzi. I., 'How Could Ethiopia's Dam Dispute Escalate?.' Available at <https://www.dw.com/en/how-could-ethiopias-dam-dispute-escalate/a-66798628> (Accessed on 06/12/2023)

of the Grand Ethiopia Renaissance Dam on the Blue Nile has resulted in a protracted dispute between Ethiopia and the two neighboring downstream countries of Egypt and Sudan which argue that the dam threatens to cut off their water supply⁸⁶. It has been argued that such conflicts in the energy sector if not properly managed could escalate into direct clashes between nations threatening peace and sustainability in Africa⁸⁷. It is therefore imperative to take these concerns into account in order to foster effective management of energy disputes in Africa.

There is also need to address the challenges facing dispute management processes in the energy sector including arbitration, mediation and litigation. For example, it has been pointed out that the practice of arbitration in Africa faces several challenges including inadequate legal and institutional framework, inadequate marketing, uncertainty in drafting arbitration clauses, interference by national courts, uncertainty of costs, perception of corruption and bias against Africa⁸⁸. Mediation on the other faces challenges such as enforceability of decisions due to its non-binding nature, the possibility of endless proceedings, lack of precedents and inability to grant urgent protection such as injunctions⁸⁹. Further, use of litigation in managing energy disputes could result in delays, costs and damaging of relationships which is an undesirable situation especially in long term energy projects⁹⁰.

It is imperative to address the foregoing concerns in order to enhance effective and efficient management of energy disputes in Africa.

⁸⁶ Ibid

⁸⁷ Ibid

⁸⁸ Muigua. K., 'Nurturing International Commercial Arbitration in Kenya.' Available at <https://kmco.co.ke/wp-content/uploads/2021/10/Nurturing-International-Commercial-Arbitration-in-Kenya.pdf> (Accessed on 06/12/2023)

⁸⁹ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

⁹⁰ Bird & Bird., 'A Need for Speed? The Possible Use of Expedited Dispute Resolution Procedures in the Energy Sector.' Available at <https://www.twobirds.com/en/insights/2016/uk/a-need-for-speed-the-possible-use-of-expedited-dispute-resolution-procedures> (Accessed on 06/12/2023)

4.0 Way Forward

There is need to embrace ADR mechanisms in the management of energy disputes in Africa. It has been pointed out that concerns with regard to time and cost relating to energy disputes call for swift and efficient dispute resolution in Africa, which will likely take the form of ADR methods, especially in the context of volatile economic and commercial contexts⁹¹. ADR mechanisms including arbitration and mediation are therefore appropriate in the management of energy disputes in Africa⁹². It has rightly been observed that ADR mechanisms have been practiced in Africa for many centuries⁹³. These techniques fit comfortably within traditional concepts of African justice, particularly its core values of reconciliation, peace and cohesion⁹⁴. ADR mechanisms provide parties with the opportunity to manage and resolve disputes before they escalate, which can not only save time and costs but can also preserve critical business relationships especially in long term energy projects⁹⁵. Parties should therefore embrace ADR mechanisms including negotiation, mediation and arbitration in order to foster effective management of energy disputes in Africa.

In the case of arbitration, it is essential to address inadequate legal and institutional framework, inadequate marketing, uncertainty in drafting arbitration clauses, interference by national courts, uncertainty of costs, perception of corruption and bias against Africa⁹⁶. This calls for strengthening the legal and institutional capacity on arbitration in Africa, drafting of effective arbitration clauses in energy contracts, marketing Africa as a hub for arbitration, capacity building for arbitrators through education and training, limiting court intervention in arbitration to a basic and necessary

⁹¹ Clearly Gottlieb., 'Resolving Energy Disputes in Africa Through Arbitration and Alternative Dispute Resolution ('ADR').' Op Cit

⁹² Ibid

⁹³ Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2nd Edition, 2017

⁹⁴ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief*, No. 16 of 2011

⁹⁵ Ashurst., 'Managing and Resolving Cross-Border Disputes in the Energy Sector.' Op Cit

⁹⁶ Muigua. K., 'Nurturing International Commercial Arbitration in Kenya.' Op Cit

minimum, and addressing the problem of corruption through good governance⁹⁷. It has also been suggested that there is need to establish a unified international arbitration court for energy disputes⁹⁸. It has been argued that there is a need for unification of the current international arbitration mechanisms since the different arbitration procedures, subject to different procedural and substantial rules, may result in problems concerning the enforcement of the arbitral awards in local jurisdictions⁹⁹. Establishment of a unified international arbitration court for energy disputes will ensure that the court has the widest jurisdiction to hear the energy disputes through the most suitable procedural and substantial rules for energy-specific disputes¹⁰⁰. This will also ensure predictable, transparent, and unified arbitration mechanism for management of energy disputes¹⁰¹.

It is also imperative for parties to embrace dispute avoidance. It has been asserted that conflict avoidance requires clear, concise, careful and proper planning of the strategy for the execution of projects¹⁰². It is also about adopting a proactive conflict avoidance approach such as risk analysis, clarity in the contract documentation or partnering¹⁰³. It is therefore vital for players in the energy sector in Africa including energy companies to avoid or minimise the chance of disputes arising in the first instance through measures such as ensuring clear and well-drafted contracts which include workable and not overly complicated dispute resolution provisions followed by effective project management from beginning to end¹⁰⁴.

⁹⁷ Ibid

⁹⁸ Ozcan, T., & Sareen, D., 'A New Suggestion For Resolution Of Energy Disputes Through A Unified International Arbitration Court For Energy Disputes.' Available at <https://www.mondaq.com/turkey/oil-gas--electricity/1031994/a-new-suggestion-for-resolution-of-energy-disputes-through-a-unified-international-arbitration-court-for-energy-disputes> (Accessed on 07/12/2023)

⁹⁹ Ibid

¹⁰⁰ Ibid

¹⁰¹ Ibid

¹⁰² Gould, N., 'Conflict Avoidance and Dispute Resolution.' Available at https://www.fenwickelliott.com/sites/default/files/nick_gould_-_conflict_avoidance_and_dispute_resolution.indd_.pdf (Accessed on 07/12/2023)

¹⁰³ Ibid

¹⁰⁴ Financier Worldwide Magazine., 'FORUM: Managing Energy and Natural Resources Industry Disputes.' Op Cit

Finally, there is need for the energy sector in Africa to embrace Sustainable Development. The principle of Sustainable Development requires an integrated approach to development that takes into account environmental protection, economic development and social progress¹⁰⁵. Players in the energy sector in Africa especially multinational corporations in the oil and gas sector have on several occasions been accused of failing to adhere to the principles of Sustainable Development as evidenced by environmental concerns including the extinction of biodiversity, contamination and destruction of soil and air pollution as a result of oil spillages¹⁰⁶. Further, multinational corporations operating in Africa including those in the energy sector have been accused of gross human rights violations, such as killings, bad labour practices and land injustices¹⁰⁷. Such practices have had an impact on economic activities, social-cultural life and human health of the affected people thus hindering the attainment of Sustainable Development¹⁰⁸. This has also led to rise of disputes between host states and investors under investment treaty arbitration with host states seeking to enforce the tenets of Sustainable Development including environmental protection and human rights against multinational corporations¹⁰⁹. It is therefore imperative for energy companies including multinational corporations in Africa to embrace Sustainable Development by fostering social justice, environmental sustainability, alternative energy and clean technology efforts¹¹⁰. In addition, it has been asserted that it is important for African Countries to ensure that they review and negotiate appropriately with foreign countries in order to capture the tenets

¹⁰⁵ Fitzmaurice. M., 'The Principle of Sustainable Development in International Development Law.' International Sustainable Development Law., Vol 1

¹⁰⁶ Ajibade, L.T & Awomuti, A.A. 'Petroleum Exploitation or Human Exploitation? An Overview of Niger Delta Oil Producing Communities in Nigeria' *African Research Review* Vol. 3 (1), 2009. Pp. 111-124

¹⁰⁷ Makwana, R., 'Multinational Corporations (MNCs): Beyond the Profit Motive,' Share the World Resources, 3rd October 2006, available at

<http://www.stwr.org/multinationalcorporations/multinational-corporations-mnacs-beyond-theprofitmotive.html#legalrights> (Accessed on 07/12/2023)

¹⁰⁸ Ajibade, L.T & Awomuti, A.A. 'Petroleum Exploitation or Human Exploitation? An Overview of Niger Delta Oil Producing Communities in Nigeria' Op Cit

¹⁰⁹ Goh. N., 'ESG and Investment Arbitration: A Future with Cleaner Foreign Investment?' *The Journal of World Energy Law & Business.*, Volume 15, Issue 6, 2022

¹¹⁰ Oehmke. M & Opp. M., 'A Theory of Socially Responsible Investment.' Available at <https://www.runi.ac.il/media/rzcpiq4a/a-theory-of-s.pdf> (Accessed on 07/12/2023)

of Sustainable Development including Environmental, Social and Governance (ESG) clauses in BITs¹¹¹. The need for Sustainable Development in the energy sector in Africa is informed by global agendas including energy transition, environmental protection and confronting climate change¹¹².

5.0 Conclusion

Energy disputes in Africa are undesirable. Such disputes can adversely impact the viability and success of energy projects in Africa¹¹³. As a result, there is need to effectively and efficiently manage energy disputes in Africa in order to foster the success of energy projects and ensure that the energy transition maintains its positive course¹¹⁴. In order to effectively and efficiently embrace energy disputes in Africa, it is important to embrace ADR mechanisms including arbitration and mediation, address the challenges facing dispute management processes in the energy sector including arbitration, mediation and litigation, foster dispute avoidance and promote Sustainable Development¹¹⁵. There is need to effectively manage disputes in Africa in order to accelerate the energy transition towards Sustainable Development.

Effectively managing energy disputes in Africa is an imperative whose time is now.

¹¹¹ Muigua. K., 'Bilateral Investment Treaties and Environmental, Social and Governance in Africa.' Available at <https://kmco.co.ke/wp-content/uploads/2023/07/Bilateral-Investment-Treaties-and-Environmental-Social-and-Governance-in-Africa-1.pdf> (Accessed on 07/12/2023)

¹¹² Global Arbitration Review., 'Energy Arbitration in Africa.' Op Cit

¹¹³ Burges-Salmon., 'Energy Disputes Guide: Managing Risk and Avoiding Disputes in your Energy Project.' Op Cit

¹¹⁴ Herbert Smith Freehills., 'Energy Transition and the Impact on Disputes.' Op Cit

¹¹⁵ Clearly Gottlieb., 'Resolving Energy Disputes in Africa Through Arbitration and Alternative Dispute Resolution ('ADR').' Op Cit; Financier Worldwide Magazine., 'FORUM: Managing Energy and Natural Resources Industry Disputes.' Op Cit; and Goh. N., 'ESG and Investment Arbitration: A Future with Cleaner Foreign Investment?'

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