

17 September 2024

Key contacts



Adewale Atake, SAN
Partner and Head,
Dispute Resolution
adewale.atake@templars-law.com



Munachiso Michael
Senior Associate
Dispute Resolution
munachi.michael@templars-law.com

TEMPLARS ThoughtLab

Bracing Up for A Surge in Climate Change Related Disputes in Africa: The Suitability of Arbitration

Introduction

The global effect of Climate Change has resulted in severe weather changes with extreme effects on African countries¹, despite their limited contribution to global warming.² The impact of climate change on African countries has increased the need for African leaders to follow the footsteps of the 2016 Paris Agreement³ and formulate policies to regulate energy transition from the use of fossil-based fuels in producing energy to renewable and more sustainable sources of energy. To this end, companies, investors and businesses are invariably institutionalizing new objectives that aim to reduce greenhouse gas emissions and meet carbon neutral targets. This trend is most noticeable in the energy, natural resources and transport sectors and has not only created new business opportunities but has invariably increased the risk of energy transition/climate change disputes.

In resolving these types of disputes, international arbitration has been the forefront dispute resolution mechanism for several reasons, ranging from confidentiality to preservation of commercial relations to utilization of experts to enforcement of awards. This article discusses potential disputes that could result from the implementation of climate change policies and the role arbitration can play as the dispute resolution mechanism of choice for such disputes in Africa.

¹ <https://unfccc.int/news/climate-change-is-an-increasing-threat-to-africa>

² <https://www.uneca.org/stories/17-out-of-the-20-countries-most-threatened-by-climate-change-are-in-africa%2C-but-there-are>

³ <https://unfccc.int/process-and-meetings/the-paris-agreement>

Formulation of Climate Change Policies by African Countries

The Kigali Communiqué titled “Ensuring a Just and Equitable Energy Transition in Africa,” was signed in May 2022 by high-level representatives from several African countries⁴. The aim of the Communiqué is to address development gaps, and to put Africa on a pathway to economic prosperity and Net-Zero, in alignment with the Paris Agreement on climate change.⁵ At the conclusion of the Africa Climate Summit in 2023, African leaders adopted the Nairobi Declaration which discussed how to mobilize financing to adapt to increasingly extreme weather, conserve natural resources and develop renewable energy. They proposed a range of new global taxes to fund climate change action, including demanding for a global carbon taxation regime on fossil fuel trade, maritime transport and aviation.⁶

More African countries have taken the initiative and are intentionally taking steps towards reducing energy related greenhouse gas emissions through various forms of decarbonization.⁷ Nigeria became the first African country to develop a detailed Energy Transition Plan (ETP)⁸. The ETP is designed to tackle energy poverty and climate change and deliver net zero by 2060. The five key sectors of focus are Power, Transport, Oil and Gas, Clean Cooking and Industry.⁹

Climate Change Disruptions likely to Result in Dispute

As with every major change, there is the likelihood of disruptions to the old order. The energy transition and climate change drive are no different. Several foreseeable disputes that could arise from this disruption include:

Regulatory changes by States: As States pass new regulations to address the climate change crisis, the consequent regulatory changes can clash with investor protections under investment treaties. For example, the Energy Charter Treaty (ECT) is unclear as to whether a protected investment is fossil fuel or “clean” in nature. It basically does not differentiate between fossil fuel and renewable energy; therefore, it offers investors protection on any type of energy whether fossil or renewable and this continues to cause confusion for countries seeking to implement energy transition initiatives. There has been a wave of investor claims against states such as Spain¹⁰ and Italy¹¹ under the Energy Charter Treaty following changes to those States’ renewable energy regulatory frameworks.¹²

Decommissioning Obligations – This is an integral part of the energy transition journey. For oil and gas companies, energy transition entails repurposing and retiring infrastructure assets that in many cases have been operated for decades. In transitioning from fossil fuels to renewables, ageing oil and gas assets are transferred from major oil and gas operators to smaller operators. Decade long commercial relationships concerning the

⁴ The Democratic Republic of Congo, Ghana, Kenya, Malawi, Morocco, Nigeria, Rwanda, Senegal, Uganda and Zimbabwe

⁵ <https://www.mininfra.gov.rw/updates/news-details/kigali-communicue-outlines-principles-for-a-just-and-equitable-energy-transition>

⁶ <https://www.weforum.org/agenda/2023/09/africa-climate-nairobi-declaration-taxes/>

⁷ Nigeria enacted a Climate Change Act 2021

⁸ <https://energytransition.gov.ng/>

⁹ <https://www.seforall.org/our-work/initiatives-projects/energy-transition-plans/nigeria>

¹⁰ Masdar Solar & Wind Cooperatif U.A. v. Spain ICSID Case No. ARB/14/1; 9REN Holding v. Spain ICSID Case No. ARB/15/15

¹¹ Rockhopper Italia SPA, Rockhopper Mediterranean Ltd and Rockhopper Exploration Plc. v. Italian Republic ICSID Case No. ARB/17/14 – This case relates to the Italian government’s ban on oil and gas exploration within 12 miles of the Italian coastline, Rockhopper claimed compensation both for funds spent and for anticipated profits over Italy’s alleged breaches of the ECT and the application of public international law. The tribunal found that Italy had committed an unlawful expropriation and awarded the company damages of EUR184 million.

¹² <https://www.nortonrosefulbright.com/en/knowledge/publications/af84f6b1/renewable-energy-project-disputes>

operation of shared infrastructure will need to be unravelled, bringing with it the risk of disputes.¹³

Investment Treaty Claims relating to Energy Transition: The traditional framework of investment treaties, designed in an era devoid of acute climate concerns, is ill-equipped to navigate the complexities of energy transition. Historically, bilateral investment treaties (BITs) offered broad protections to foreign investors without explicit consideration for environmental safeguards. This discrepancy has intensified as states grapple with the imperative to shift towards sustainable energy sources. As States transition from fossil fuels to renewables, we are beginning to see a wave of investment treaty claims- most of which relate to:

- i. Long term fossil fuel investments made in reliance on guarantees from the State, which the State now wishes to rethink due to the climate emergency; and
- ii. Renewables investments made in reliance on subsidies and other investment incentive schemes that have been subsequently amended or eliminated.¹⁴

Insurance claims: Climate change is best explained in the face of extreme weather-related events like floods, erosions, tsunamis, hurricanes etc. Reports by insurance companies around the world shows a significant increase in losses arising from extreme weather events. Weather-related issues continue to impact contracts and result in commercial disputes. Obvious examples are claims for force majeure, frustration or termination due to impact of weather-related events. Disputes relating to insurance arrangements have become more prevalent because of the effect of climate change.

Technology related disputes: While progress has been made in the renewable industry, much of it is still in its infancy. New technologies can be untested which increases the risk profile of parties where such technologies fail to perform to expectation. Parties may be faced with breach of contract, misrepresentation or even negligence claims.¹⁵ Also, as with any new technology, there may be disputes as to the ownership of intellectual property and licensing rights.

Funding/Financing obligations: There is projected to be an increase in financing disputes, whether that be financing of climate change projects, failure to meet technical specifications to achieve green or sustainability-linked financing or the appropriate use of sustainable finance or climate related funding.¹⁶ These disputes are likely to follow the current drive for green financing.¹⁷

Infrastructure and Construction requirements: The infrastructure involved in renewable energy projects can be huge in scope and capacity (for instance, offshore wind farms, large solar farms and hydro-electric dams). Therefore, as with any major infrastructure project, typical construction related disputes may arise, such as price volatility, delay claims, cost overruns, defect, claims relating to design and performance etc.

¹³ In the *Rockhopper Case* discussed above, the arbitral tribunal awarded EUR6.7million in decommissioning costs, plus interest to the Claimants.

¹⁴ For example, in *Frazer Solar GMBH v. The Kingdom of Lesotho*, a German renewable energy company, Frazer Solar GmbH, successfully pursued *ad hoc* arbitration against the African state of Lesotho after Lesotho refused to perform on a contract to develop a major solar and energy efficiency project with financing from the German government via development bank KfW. An award of EUR50million plus costs and interest was rendered in favour of Frazer Solar GmbH. - <https://www.frazersolarvlesotho.com/> On 12 January 2024, the South African High Court threw out the case filed by the Government of Lesotho to overturn Frazer Solar's arbitration award.

¹⁵ *Mt. Hojgaard A/S v. E.ON Climate and Renewables UK Robin Rigg East Ltd. and Anor.* (2017) UKSC 59 BLR 477

¹⁶ <https://www.nortonrosefulbright.com/en/knowledge/publications/9dd6b170/what-are-climate-change-and-sustainability-disputes>

¹⁷ *Westmoreland Coal Company v. Government of Canada* ICSID Case No. UNCT/20/3

Conflicts over carbon pricing mechanisms: Carbon pricing, a cornerstone of many climate change mitigation strategies, has unexpectedly emerged as a potent source of conflict. The divergence of carbon pricing policies across jurisdictions is a primary friction point, with some of such carbon adjustments potentially escalating into trade disputes, as exemplified by the European Union's Carbon Border Adjustment Mechanism (CBAM). Domestically, carbon pricing can ignite fierce political debates, particularly over its distributional impacts, potentially undermining political stability. The complex legal framework surrounding carbon pricing further complicates matters, inviting legal actions over issues such as emissions definitions, price calculations, and revenue distribution.

Why Arbitration to Resolve Climate Change Disputes?

The ICC Task Force Report¹⁸ defines climate change disputes to include “any dispute arising out of or in relations to the effect of climate change and climate change policy, the United National Framework Convention on Climate Change (“UNFCCC”) and the Paris Agreement.” The International Centre for the Settlement of Investment Disputes (ICSID) reports that the preferred dispute resolution mechanism for disputes relating to climate change policies or renewable energy projects is arbitration, and most contracts and treaties governing these projects usually include clauses to that effect. The reason for this is not farfetched, some of which include:

The Nature of Arbitration Agreements

Arbitration agreements between parties for settlement of dispute are typically in the form of an arbitration clause in a contract or in the form of a separate arbitration agreement,¹⁹ or inter-state treaties. However, there exist the rare case of commencing arbitration through a Submission Agreement (or “compromis”). A submission agreement differs from a standard arbitration agreement because it is entered into only after a dispute has arisen or crystallised. Such agreements are rare, but not unprecedented.²⁰ Considering that climate change related disputes are often complex and multi-faceted, frequently involving public interests and therefore may benefit from the participation of additional third parties, such as affected citizens or populations, the use of a submission agreement could be more advantageous than using national courts.²¹

Adoption of Climate friendly practices in arbitration

Since the Covid-19 pandemic, the world has experienced a *paradigm shift* in the way inter-person meetings are conducted. Arbitration has experienced a rise in greener practices. For example, arbitral institutions have replaced voluminous paper filings with digital case management systems and email correspondence; use of videoconferencing for meetings and hearings, thus avoiding unnecessary travel, particularly flights, thereby reducing energy consumption and waste.

Appointment of expert arbitrators and use of expert witnesses

The use of expert witnesses and appointment of arbitrators with expertise and understanding of climate aspects of a dispute has become commonplace in arbitration. This guarantees that disputes are heard by persons who appreciate the unique proposition at play. Also, international arbitral institutions like International Chamber of Commerce (“ICC”) and United Nations Commission on International Trade Law

¹⁸ ICC Commission Report titled: “Resolving Climate Change Related Disputes through Arbitration and ADR” <https://iccwbo.org/wp-content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf>

¹⁹ Section 2 Arbitration and Mediation Act, 2023

²⁰ An example is the Sudan Comprehensive Peace Agreement where the Abyei Arbitration Agreement was entered into between the Sudan People’s Liberation Movement/Army and the Republic of Sudan to resolve an intra-state boundary dispute.

²¹ <https://iccwbo.org/wp-content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf>

(UNCITRAL) permit *amicus* submission of arguments from interested non-parties to the dispute. All of these make arbitration more attractive for the settlement of climate change related disputes.

Cross border recognition and enforcement of arbitral awards

Arbitral awards shall, irrespective of the country or state in which they are made, be recognised as binding, and on application in writing to the Court, be enforced by the Court.²² In addition to local legislations on recognition and enforcement of arbitral awards, signatory states to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards are bound to recognise and enforce any valid award made in any other State which has ratified or acceded to the Convention, provided the award has satisfied the basic conditions set down in the Convention.²³

In the recently popularized dispute between *Zhongshan Fucheng Industrial Investment Co. Ltd v. The Nigerian government*, a French court ordered the seizure of three Presidential jets belonging to the Federal Republic of Nigeria as part of efforts by the Chinese company to enforce a \$70million London-seated foreign arbitral award obtained against Nigeria.²⁴ This is a huge advantage arbitration has over judgments of national courts which may not be easily enforceable outside their respective jurisdictions.²⁵

Right of appeal: Unlike judgments of national courts, there is generally no right of appeal from an arbitral award and, save for limited recourse to have an award set aside or enforcement denied, the outcome is considered final. This finality can reduce the cost and time involved in resolving disputes.²⁶

Confidentiality: Parties tend to favour arbitration where confidentiality and privacy is important to the disputant parties (as is often the case with contracts involving technology and innovation). Companies insist on confidentiality because of the need to protect their unique inventions and intellectual property.

Conclusion

With climate change heralding the rise in new technologies, energy transition, government policies, opportunities and processes in the world and Africa specifically, the disputes arising therefrom are getting ever more complex and distinct. Parties are thus advised to consider dispute resolution mitigation and resolution strategies at the outset of their transaction to aid the achievement of their overriding objectives. A well drafted arbitration agreement is a key contractual risk allocation mechanism. As a neutral forum offering access to expert adjudicators, arbitration arguably plays a more prominent role as an avenue for resolving climate change disputes arising from contractual relationships or international investment treaty arrangements.

²² Section 57 Arbitration and Mediation Act, 2023

²³ Article IV(1) of the New York Convention provides that to obtain recognition and enforcement, the party applying for recognition and enforcement shall supply the duly authenticated original award or a duly certified copy and the original arbitration agreement or a duly certified copy.

²⁴ The Chinese company also applied to have the award enforced in England, United States, Belgium, British Virgin Islands and Quebec.

²⁵ Legal actions to enforce the Frazer Solar v. Lesotho arbitral award is underway in multiple jurisdictions including South Africa, Lesotho, UK, USA, Belgium and Mauritius. <https://www.frazersolarvlesotho.com/>

²⁶ <https://www.nortonrosefulbright.com/en/knowledge/publications/af84f6b1/renewable-energy-project-disputes>