Investment Regime Reforms and the threats of joining the ECT

June 2021
Even though Nigeria has been on the receiving end of relatively few investment treaty lawsuits from investors at international arbitration tribunals, it has joined the growing number of countries that are critical of the current international arbitration system. The Nigerian government has recently initiated a reform process of its international investment agreements. In 2016, it developed a new model for its future bilateral investment treaties, which includes some innovative features but maintains the much criticised Investor State Dispute Settlement (ISDS) process.

NIGERIA’S INVESTMENT PROTECTION REGIME

As of May 2021, **Nigeria has 15 bilateral investment agreements (BITs) in force**. Most of these BITs have been signed with European countries: Germany, Sweden, Finland, Romania, Spain, Italy, Switzerland, Serbia, the Netherlands, France and the United Kingdom. Other BITs are with China, Taiwan and South Korea. The only African country Nigeria has a BIT in force with is South Africa.

**GRAPH 1 • BITs IN FORCE ACCORDING TO CONTINENT**

Source: UNCTAD policy Hub

![Graph showing share of BITs by continent: Europe 73%, Asia 20%, Africa 7%](image)

Besides these existing BITs, Nigeria has also actively negotiated and signed more - between 2011 and 2016 Nigeria signed 7 new BITs - none are yet in force. However, since 2016, it seems, the country has not signed any more BITs.

**TABLE 1 • BITs SIGNED DURING THE LAST DECADE**

<table>
<thead>
<tr>
<th>YEAR</th>
<th>BITs signed with</th>
</tr>
</thead>
<tbody>
<tr>
<td>2016</td>
<td>Morocco, Singapore, United Arab Emirates</td>
</tr>
<tr>
<td>2014</td>
<td>Canada</td>
</tr>
<tr>
<td>2013</td>
<td>Austria</td>
</tr>
<tr>
<td>2011</td>
<td>Kuwait, Turkey</td>
</tr>
</tbody>
</table>

Source: UNCTAD policy Hub

Free Trade Agreements signed by Nigeria do not include a chapter on investment protection with the ISDS mechanism in place.
REFORMS OF NIGERIA’S INTERNATIONAL INVESTMENT TREATIES

The Nigerian government has recently embarked on a reform process of its International Investment Agreements. In 2016, the government approved a new model BIT. In 2020 it announced that it would modernise the existing stock of old treaties. Once finalized, all BITs signed between 1990 and 2001 will be revised according to the new model BIT, meaning that Nigeria will re-negotiate 12 out of the 15 BITs it currently has in force.

The aim of the reform process is to establish a new model BIT which complies with “global standards on labour, human rights, environment, corporate social responsibilities” and provides safeguards to Investor-State dispute settlement (ISDS) provisions, Patience Okala, Director of the Legal Department, Nigeria Investment Promotion Commission (NIPC).

A key motivation behind this reform is wanting to avoid further ISDS claims that could cost the State billions of dollars, like in the case of the contract-based claim of UK firm Process and Industrial Development (P&ID) relating to a gas facility contract where Nigeria was ordered to pay $9.6 billion in compensation to the company.

THE NIGERIA-MOROCCO BIT

In 2016, Nigeria signed a BIT with Morocco based on the new model BIT it had developed. This BIT is often cited as an example of a balanced “new generation” investment treaty because it aims to strike a better balance between the private and public interests at stake. The treaty includes some key differences from the “old generation” treaties:

- it excludes portfolio investment.
- it restricts the definition of what is considered an investor.
- Even though the treaty includes most standards of investment protection included in traditional BITs, some are articulated in a more limited manner, which could restrict the possibility for investors to sue.

For example, the provisions on

- National Treatment - which apply in like circumstances)
- Fair and Equitable Treatment - which attempt to restrict the interpretation of this clause to issues related to denial of justice. This is important since Fair and Equitable Treatment has been invoked repeatedly by investors and interpreted very broadly by arbitrators
- Full Protection and Security - which refers to policy protection and links it to customary international law.

The most novel feature of the treaty, however, is that it imposes obligations upon the investor, requiring them to comply with environmental and social impact assessments, to apply the precautionary principle and to uphold human rights and international labour standards, among others. However, the State cannot sue the investor at an international arbitration tribunal in the case of violation of these obligations.

The BIT also attempts to restrict the scope of investors to sue at international arbitration tribunals. Before initiating an arbitral procedure, the dispute of the Parties must first be assessed by a Joint Committee, which is formed under the BIT. If the dispute is not solved by the Committee, the investor is required to exhaust domestic remedies before resorting to international arbitration.
The BIT does not contain a sunset clause, thus it can be terminated at any time without being applicable after its termination.

While the Nigeria-Morocco BIT was celebrated as one of the “most innovative and balanced BITs ever concluded”¹¹, the treaty still leaves plenty of room for investors to continue suing States and does not resolve the main structural injustice inherent in the international arbitration system. It still allows only investors to access arbitration tribunals, whereas states and affected communities or individuals do not have the same option to address their grievances.

**NIGERIA IN LINE TO JOIN THE ENERGY CHARTER TREATY**

Although Nigeria has been critically revisiting its BITs, in recent years, the government has also been actively engaging in the process to join one of the most outdated investment treaties that exists: the Energy Charter Treaty (ECT). This international agreement from the mid-1990s, ratified by 53 countries stretching from Western Europe through Central Asia to Japan, plus the EU, grants corporations in the energy sector the right to sue states at international investment tribunals for billions of dollars. For example, if a government decides to stop new oil or gas pipelines, it can be sued by a corporation negatively impacted by this decision, under this treaty.¹²

The ECT is currently the investment agreement used most frequently by investors to sue states. Until the end of 2020, 135 ISDS claims had been brought against states under the ECT.¹³ This represents almost 12% of all known ISDS claims registered by UNCTAD.¹⁴ Nigeria has already completed the first three steps of accession to the ECT. By the end of 2019 it had handed in all necessary reports and was nearing the ratification stage of accession.¹⁵ This process was put on hold while the ‘modernization’ of the agreement is ongoing. Despite the obvious risk of facing multiple ISDS claims associated with becoming an official member of the ECT, according to the Energy Charter Secretariat, the National Energy Summit of Nigeria in April 2021 showed that “substantial enthusiasm continues to exist within Nigeria for the country to ultimately join the ECT.”¹⁶

**ISDS CLAIMS AGAINST NIGERIA**

Until May 2021, the Nigerian state had received three ISDS claims based on bilateral investment treaties and five other claims based on contracts and the 1995 Nigerian Investment Law. All cases are linked to the exploitation and selling of oil or gas.

The investment treaty cases are all based on the BIT between Nigeria and the Netherlands, and have been filed by energy multinationals Shell and Eni.
# SUMMARY OF INVESTOR LAWSUITS AT INTERNATIONAL ARBITRATION TRIBUNALS

<table>
<thead>
<tr>
<th>Case name</th>
<th>Year of initiation</th>
<th>Origin of investor</th>
<th>International Investment Agreement used</th>
<th>Administering Institution</th>
<th>Case number</th>
<th>Result</th>
<th>Amount claimed by investor</th>
<th>Amount of award or settlement</th>
<th>Economic sector</th>
</tr>
</thead>
<tbody>
<tr>
<td>Shell Nigeria Ultra Deep Limited v. Federal Republic of Nigeria</td>
<td>2007</td>
<td>Netherlands</td>
<td>BIT Netherlands - Nigeria 1992</td>
<td>ICSID</td>
<td>ICSID Case No. ARB/07/18</td>
<td>Settled</td>
<td>$1.8 billion</td>
<td>In a settlement, Shell and Eni paid more than $1 billion, and were granted the exploration licence</td>
<td>Oil, Gas &amp; Mining</td>
</tr>
</tbody>
</table>

## OTHER INSTRUMENTS WITH INVESTMENT PROTECTION

<table>
<thead>
<tr>
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<th>International Agreement used</th>
<th>Administering Institution</th>
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<th>Amount claimed by investor</th>
<th>Amount of award or settlement</th>
<th>Economic sector</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sunrise Power and Transmission Company v Nigeria</td>
<td>2017</td>
<td>Nigeria</td>
<td>Contract</td>
<td>International Chamber of Commerce (ICC)</td>
<td>n.i.</td>
<td>Settled</td>
<td>$2.3 billion</td>
<td>$200 million</td>
<td>Construction of dams (Mambilla project)</td>
</tr>
<tr>
<td>Process &amp; Industrial Developments Ltd v Nigeria</td>
<td>2012</td>
<td>British Virgin Islands</td>
<td>Contract</td>
<td>Commercial Court in London</td>
<td>n.i.</td>
<td>Decided in favour of the investor</td>
<td>No information</td>
<td>$6.6 billion (With interest said to be accruing at the rate of $1.3 million per day, the award is now worth approximately $10 billion$)$^2$</td>
<td>Oil, Gas &amp; Mining</td>
</tr>
<tr>
<td>Guadalupe Gas Products Corporation v. Nigeria</td>
<td>1978</td>
<td>US</td>
<td>Contract</td>
<td>ICSID</td>
<td>ICSID Case No. ARB/78/1</td>
<td>Settled</td>
<td>No information</td>
<td>No information</td>
<td>Oil, Gas &amp; Mining</td>
</tr>
</tbody>
</table>
DESCRIPTION OF INVESTMENT TREATY CASES

Shell Petroleum N.V. and The Shell Petroleum Development Company of Nigeria Limited v. Federal Republic of Nigeria (ICSID Case No. ARB/21/7)\(^{25}\)

A claim registered by the Dutch oil company Shell Petroleum in February 2021 using the 1992 Netherlands - Nigeria BIT. Although information on this claim is still scarce, it appears that it is related to an oil mining joint venture in the Niger Delta that has led to multiple lawsuits based on allegations of environmental contamination.\(^{26}\) In 2011, a United Nations report criticised Shell and the operators of the joint venture, Total (France), Agip (Italy) and the State-owned Nigerian National Petroleum Corporation, for being responsible for more than 50 years of environmental destruction in the Niger Delta. The report indicated that repairing the damage done could prove to be the world's most wide-ranging and long-term oil clean-up exercise ever, costing at least $1 billion and taking at least 30 years.\(^{27}\) Members of affected local communities have brought numerous claims against Shell before Nigerian courts over the last two decades, many of which were decided in favour of the communities. Yet, in most of the claims Shell has refused to pay and instead appealed the court decision. The company blames the environmental damage in the Niger Delta on criminal acts of others, such as sabotage, crude oil theft and illegal refining.\(^{28}\) The amount claimed by Shell is unknown.

Shell Nigeria Ultra Deep Limited v. Federal Republic of Nigeria (ICSID Case No. ARB/07/18)\(^{29}\)

2021 was not the first time the Dutch oil company Shell sued Nigeria before an arbitration tribunal. They did so for the first time in 2007, using the same BIT. The claim related to the reallocation of the license for the oil exploration field OPL245 by the government in 2006 to the Nigerian oil company Malabu Oil & Gas.\(^{30}\) According to media sources, Malabu was a company founded by former government officials (among them the then minister of petroleum, Dan Etete) and others to obtain part of the OPL245, one of the most important oil fields in Nigeria.\(^{31}\) In the same year the company was founded, 1998, it was given the license for exploration of OPL245. The oil field changed owners in 2002 when the license was granted to Shell and Eni. In 2007, the European companies registered the ISDS claim shortly after the license was again reallocated back to Malabu. Shell and Eni asked for $1.8 billion in compensation.\(^{32}\) The claim was withdrawn in 2011 because Shell and Eni reached a settlement with the Nigerian government, which included a reallocation of the license back to the European companies in exchange of a payment of $1.3 billion, of which $1.1 billion ended up with Malabu. According to media reports from 2012,\(^{33}\) and the current investigation of the Nigerian Economic and Financial Crimes Commission (EFCC), the settlement was achieved through fraud and bribery. Following the settlement, Shell and Eni paid the agreed amount to a federal government bank account at JP Morgan in London, from where it was transferred to Malabu, fuelling suspicion that the oil companies knew that the transaction was potentially corrupt, and wanted to avoid being directly linked to it.\(^{34}\) According to the official charges by the EFCC, the then Attorney General of the Federation and Minister for Justice, Mohammed Adoke, who mediated the 2011 settlement with the European companies, received a share of the deal in 2013, in the sum of 300 million Nigerian Naira (more than $1.8 million at that time).\(^{35}\) Leaked documents also indicate that Shell and Eni used the ISDS claim as leverage to obtain the 2011 settlement.\(^{36}\)
Eni International B.V., Eni Oil Holdings B.V. and Nigerian Agip Exploration Limited v. Federal Republic of Nigeria (ICSID Case No. ARB/20/41)\textsuperscript{37}

This claim, registered by three subsidiaries of the Italian oil company Eni in October 2020 using the 1992 Netherlands - Nigeria BIT, is directly related to the above-mentioned ISDS claim and the “purchase” of the oil prospecting license OPL245 by Eni and Royal Dutch Shell. Due to the strong suspicion that the 2011 settlement (which gave Eni and Shell the right to continue exploring OPL245) was achieved through corruption, the Nigerian government refuses to convert OPL245 into a mining license.

In fact, Nigeria has initiated civil proceedings against Eni, and is involved in a criminal proceeding at the courts of Milan, trying to recover the price the two oil companies paid for OPL245. This settlement money ended up in obscure accounts of Malabu and its director, former minister of petroleum Dan Etete, who has been charged with money laundering in France. Eni denies all charges related to corruption and bribery and is, for its part, alleging that Nigeria is using third party funding by US litigation funding firms Poplar Falls and Drumcliffe Partners to fund its claim, and thus arguing that the claims against Eni are driven by undisclosed financial interests.\textsuperscript{38}

The amount claimed by Eni is unknown.
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