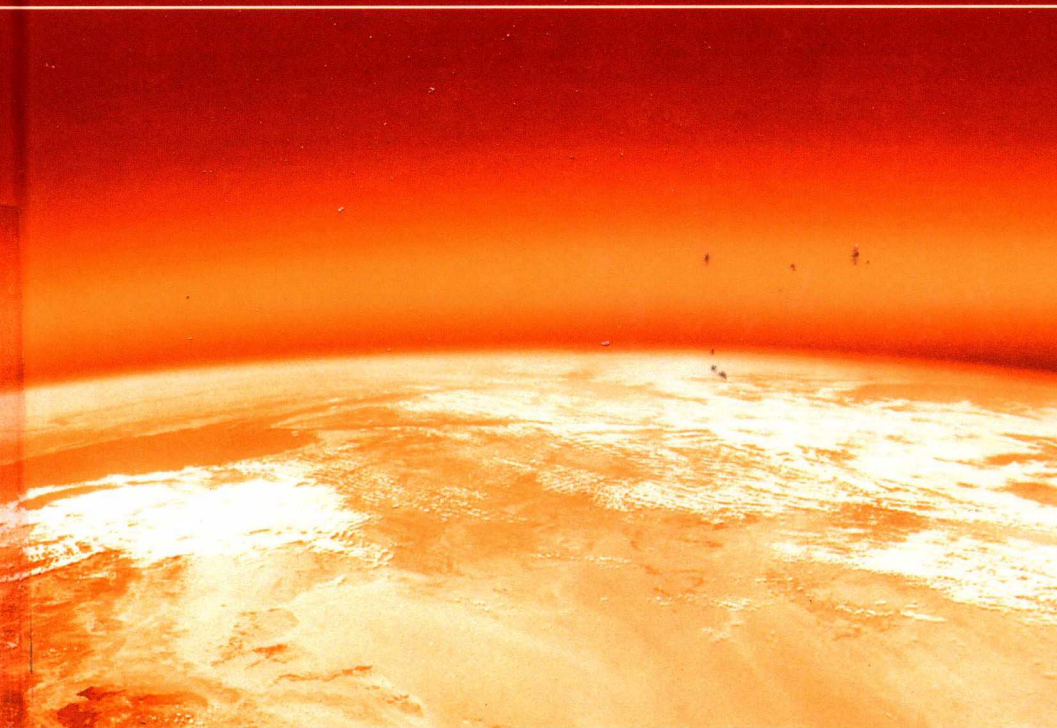
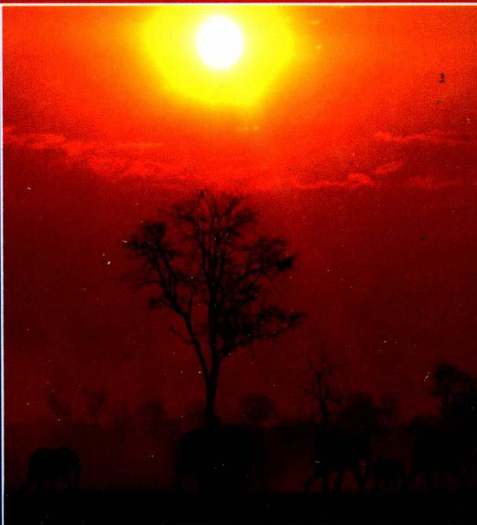




NATURAL RESOURCE INVESTMENT AND AFRICA'S DEVELOPMENT

Edited by Francis N. Botchway



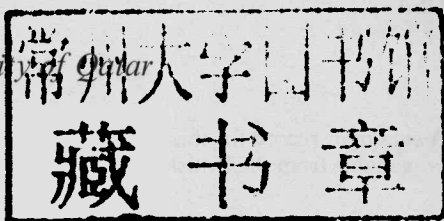
NEW HORIZONS IN ENVIRONMENTAL AND ENERGY LAW

Natural Resource Investment and Africa's Development

Edited by

Francis N. Botchway

Associate Professor, University of Qatar



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Natural Resource Investment and Africa's Development

NEW HORIZONS IN ENVIRONMENTAL AND ENERGY LAW

Series Editors: Kurt Deketelaere, *Professor of Law, University of Leuven, Belgium and University of Dundee, Scotland* and Zen Makuch, *Reader in Law, Barrister, Imperial College, London, UK*

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Natural Resource Investment and Africa's Development

Edited by Francis N. Botchway

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Preface

This work was motivated by the increasing demand for natural resources and the dearth of inspiring Africa-focused material on the subject. There is hardly any work anchored in law that deals with the governance, legislative, relational and contractual issues pertaining to resource exploitation in Africa. This book seeks to fill the apparent lacuna.

The chapters cover a wide spectrum of topics – from governance, through the need to create a workable constitutional and institutional arrangement for environmental protection and resources use, management, conservation, and responsible investment, to dispute resolution. These are topics that no comprehensive work on natural resource investment can avoid. They are dealt with by academics and researchers with a strong interest in helping to chart a course for Africa's development that is different from that which the continent has become associated with.

The methodology is both comparative and transnational, drawing on geographical, historical and sector-specific experiences to advance arguments. If this book contributes to transparency in governance, more judicious application of the returns of resource exploitation, improvement of the environment, and equitable investment arrangements, we will have satisfied our aspirations.

For that, we are very grateful to all the contributors for their in-depth work, the anonymous referees who reviewed each chapter and made very helpful comments, and of course the staff at Edward Elgar Publishing for their patience and painstaking and efficient work that made it possible for this book see the light of day.

The work is dedicated to all who work and believe that a different Africa – one that is institutionally strong, transparent, green and developed – is possible in our time.

Abbreviations

| | |
|-------|--|
| ACTA | Alien Tort Claims Act |
| AEC | African Economic Community |
| AMCEN | African Ministerial Conference on the Environment |
| AU | African Union |
| BEE | Black Economic Empowerment |
| BIT | Bilateral Investment Treaty |
| ECT | Energy Charter Treaty |
| EIA | Environmental Impact Assessment |
| EITI | Extractive Industries Transparency Initiative |
| ENMOD | Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques |
| EPA | Environmental Protection Agency |
| FSC | Financial Sector Charter |
| GNPC | Ghana National Petroleum Corporation |
| GRI | Global Reporting Initiative |
| ICCR | Interfaith Centre for Corporate Responsibility |
| ICSID | International Centre for the Settlement of Investment Disputes |
| IOC | International Oil Company |
| JSE | Johannesburg Securities Exchange |
| KPCS | Kimberley Process Certification Scheme |
| NEPAD | New Partnership for Africa's Development |
| NGO | Non-governmental Organisation |
| NIOC | National Iranian Oil Company |
| NNPC | Nigerian National Petroleum Corporation |
| OECD | Organisation for Economic Co-operation and Development |
| PSC | Production Sharing Contract |
| SAP | Structural Adjustment Programme |
| SRI | Socially Responsible Investment |
| UNPRI | United Nations Principles for Responsible Investment |

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Introduction

Francis N. Botchway

Africa has been the object of significant attention from important players in the natural resource business. As far back as the tenth century, Arab and African traders traded in gold and other resources.¹ This attracted European countries to the sources of these important trade items. On establishing that present-day Ghana was one of the main sources of gold production and trade, the Portuguese named the place *da mina*.² This was later changed to the Gold Coast by the British. Dutch, French, Scandinavian, German and other explorers followed on to the shores of South Africa, East and West Africa and elsewhere.³ Following periods of lull, interest in African resources heightened by the close of the nineteenth century. For example, from 1884 to 1901, more than 400 companies were listed on the London Stock Exchange to mine gold in the then Gold Coast.⁴ Foreign discoveries of diamond and other mineral resources in countries such as Botswana, Tanzania and Sierra Leone were much more recent, mainly in the post-Second World War period. The same can be said of the discovery and exploitation of fossil fuel resources. Shell d'Arcy discovered oil in commercial quantities in Nigeria in 1956. Oil was first discovered in Angola in 1955, but 1966 is seen as the watershed of Angola's oil endowment with the discovery of the massive Cabinda reserves.⁵

In the last two decades, there has been increased exploratory activity on the African continent. In 1991, exploratory activity in Equatorial Guinea led to the commercial discovery of oil.⁶ By 2008, the country had become Africa's third largest oil producer, after Nigeria and Angola.⁷ In 2000, a consortium of multinational companies (ExxonMobil, Petronas and Chevron), assisted by the World Bank, started a 3.7 billion dollar 640-mile oil pipeline project to transport oil from the Kome oil fields in Chad to the port of Kribi in Cameroon. In 2001, Australian and Chinese companies discovered oil in the Chinguetti region of Mauritania and by 2006 production and export had started. Tullow Oil, a UK-based company, has been very active in exploring fields in Africa. This has yielded great results with commercial discoveries in Uganda and Ghana in 2007/08 and important gas prospects in Namibia. There are other interesting exploratory

activities and some discoveries in Sao Tome and Principe, Sierra Leone and Ethiopia. Between 2000 and 2005, 25 percent of global oil discovery was recorded on the continent of Africa.⁸ There is great excitement about the resource potential of the continent.⁹ This is registered not only in the traditional resource items of gold, diamond, copper, bauxite, oil and gas, but also in resources needed for the new technological age. The Democratic Republic of Congo, South Africa, Botswana, Morocco, Rwanda, Sierra Leone, Zambia, Zimbabwe, Tanzania, Mozambique and Madagascar are all endowed with resources such as antimony, chromite, cobalt, nickel, emerald, palladium, platinum, tantalum, titanium, vanadium, zinc, uranium, lithium, rutile and ruby, among others. These resources are critical to the auto industry, energy, housing, agriculture and telecommunications businesses.¹⁰

The reasons for the excitement about the resource endowment of Africa are multi-faceted. The primary reason is the history of resource exploitation on the continent. The indigenous people in pre-colonial West Africa mined for gold using sluice and panning technologies.¹¹ They also used elementary forms of shaft to search for and exploit sub-surface levels. In Mashonaland (in modern-day Zimbabwe), gold mining was recorded to be of 'great antiquity', with mines producing large quantities of 'best quality' gold.¹² One small mine was said to have yielded more than 400,000 ounces of gold in the seventeenth century to a Portuguese explorer, and between 1890 and 1959 Southern Rhodesia yielded 34,709,288 ounces of gold, valued then at £226,579,570, to the British South Africa Company, which occupied Mashonaland at the time.¹³ There was widespread iron smelting and forging in sub-Saharan Africa dating back to 500 BC.¹⁴ Iron and steel making was particularly prominent in Meroe (modern Sudan), Tayuga (in Nigeria) and Buhaya (Tanzania).¹⁵ The local development of the technology for mining was somehow truncated by the colonial enterprise. The conflicts, resistance and rebellion that attended slavery and colonial rule did not allow for stable environments for these nascent processes to develop.¹⁶ More than that, the laws that were passed by the colonial authorities reserved the richest lands and resources to mining interests from the metropolitan country.¹⁷ This created dual tracks for mining, first by the allocation of different territories and secondly by the distinction of large-scale and 'native' or artisanal mining methods.¹⁸ Native mining was permitted so far as it did not interfere with the mining interests of the colonial administration.¹⁹ It was this set of circumstances that forced three local Gold Coast mining entrepreneurs – Ellis, Biney and Brown – to sell their concession in Ashanti to Arthur Cade's Cote d'Or Mining Company of Britain, leading ultimately to the creation of the Ashanti Goldfields Company in 1897,²⁰ to date the second-biggest gold mining company in Africa.

In the fossil fuel sector, the story is quite different. Apart from coal, there is hardly any record of local oil and gas activity prior to colonial rule and throughout the colonial period. Most of the exploration and discovery of fossil fuel resources in Africa occurred in the throes of colonial rule and in the immediate aftermath of independence. In Nigeria, the discovery was made a couple of years before independence, but commercial development gathered momentum in the 1960s and 1970s. In Angola, the discovery was in 1955, but development progressed significantly in the 1960s. Due to their appreciation of the importance of natural resources, at the dawn of independence, African countries pushed for international efforts to prevent disorderly exploitation and to preserve the natural resources and territorial integrity or unity of the respective territories. The most prominent result of these efforts was the 1962 UN Resolution on Permanent Sovereignty over Natural Resources.²¹ On attaining independence, many African countries paid a lot of attention to the exploration and development of natural resources. In Ghana, basic oil exploration started in the early 1970s, culminating in the promising find in 1972 and 1990. In Uganda, efforts started in the 1970s, leading to the discovery of interesting geological features in the 1980s. There is no doubt that the discovery and production of oil in Nigeria, Angola and Algeria encouraged governments of the countries in the particular region to solicit for and encourage exploration for fossil fuel. In addition, multi-national and independent oil companies in search of reserves and fortune followed the trail of the previous discoveries in the hope of finding more resources.

Ghana and Uganda took very active steps to train and enhance the capacity of their resource institutions and personnel. Soon after taking over the reins of government in the then war-torn Uganda, Yoweri Museveni was asked by Shell, BP and EXXON to endorse an exploration concession covering the entire Lake Albert region of the country.²² He refused and asked for more information. On discovering the dearth of local expertise in petroleum, he selected and dispatched about two dozen Ugandans with basic university education to developed countries for advanced studies in geological sciences and petroleum studies.²³ These returned to form the core of the Department of Petroleum. They, in turn, set out to map the geological and fossil fuel potential of the country. They also encouraged and collaborated with international bodies and interested parties in compiling a comprehensive database of the country's geological features.²⁴ It was their efforts that attracted Hardman Resources of Australia and Tullow of the UK, leading to the discovery of 1.6 billion barrels of oil in 2007.²⁵ Likewise, Ghana developed institutions such as the Geological Survey Department, the Mines Department, the Minerals Commission and the Ghana National Petroleum Corporation (GNPC).

The GNPC was established in 1984, and its proponent, Tsatsu Tsikata, encouraged the education and training of Ghanaians in all areas of petroleum science, law and finance, at a time when there was widespread scepticism about Ghana's oil prospects.²⁶ Scientific data were collected and re-analysed several times to establish their veracity. They were then marketed to the international oil industry.²⁷ The result was GNPC's ability to partner with international oil interests, such as Petro-Canada, Norway's Statoil, Brazil's Petrobras, Angola's Sonangol, Algeria's Sonatrach, and independents like Dana and Shell, to work on various aspects of Ghana's petroleum business. These efforts ultimately led to the commercial discovery at Cape Three Points and the Tano Basin by Tullow, Kosmos and Anadarko in 2007/08. The earlier efforts of the governments of African countries provided baseline material and a corpus of knowledge and resources that founded and encouraged international petroleum interests in the resource prospects of the particular countries.

These efforts by African countries were, and continue to be, motivated by the lack of alternative reliable sources of revenue. At independence, most countries did not have any manufacturing base or financial reserves, and the prospect for breaking the vicious cycle of poverty was almost non-existent. The only thing to count on in the short term, based on the history of hard-rock mining in the pre-colonial and colonial periods, as well as the demand for natural resources, was natural resources. Although resource exploitation is capital intensive and African countries lacked the necessary capital, it offered the easiest source of rental revenue to the various governments. Owing to the absence of highly educated populations and visionary leaders and the inability or unwillingness to generate tax income, post-colonial African governments became dependent on revenue from their natural resource endowments. In Nigeria, oil generated 95 percent of export revenue, in Angola 90 percent and in Gabon 77 percent.²⁸ In Ghana, revenue from mining and timber constituted more than half of export income. This addiction to resource revenues without any effort to link resource exploitation to the domestic economies meant that African governments continued to do everything possible to encourage and sustain exploration and exploitation of natural resources. This is manifested in the very generous fiscal and other terms that they offer to investors in their respective resource sectors. For instance, when Ghana offered a royalty rate of 3–6 percent, with the companies actually paying 3 percent, Malawi reduced its rate from 10 to 1.5 percent, and Zambia offered 0.6 percent.²⁹ These competitive terms led to about 100 mining companies investing in Ghana in the 1990s in the latest gold rush. In oil exploration, Uganda offered a 10 percent royalty rate, while Ghana offered 5 percent and Ethiopia has waived all bonus payments on concessions granted.