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 Chingueti 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. There is great excitement about the resource potential of the continent. 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.

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. 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. 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. There was widespread iron smelting and forging in sub-Saharan Africa dating back to 500 BC. Iron and steel making was particularly prominent in Meroe (modern Sudan), Tayuga (in Nigeria) and Buhaya (Tanzania). 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. 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. 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. Native mining was permitted so far as it did not interfere with the mining interests of the colonial administration. 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, to date the second-biggest gold mining company in Africa.
Introduction

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. 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. 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. 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. 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. 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. Scientific data were collected and re-analysed several times to establish their veracity. They were then marketed to the international oil industry. The result was GNPC’s ability to partner with international oil interests, such as Petro-Canada, Norway’s Statoil, Brazil’s Petrobas, 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. 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. 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.
The dependency of African governments on resource rent and the competitiveness of their fiscal regimes are not the only reasons for the continued interest in their resources. The global cycles of demand and supply, accentuated by the surge in economic activities in China, India and other industrialising countries, sustain the current excitement about resources in Africa. Cycles of high demand and high prices of commodities followed by high production and then low prices are now quite well established in the global economy. The latest cycle of high demand and high prices started in about 2002 and, if the historical trend is a guide, there are about three to five more years to go before supply and demand reach equilibrium and the bear market sets in. Except that the current cycle has some unique features. The first is that the world seems to be running short on reserves of essential resources, particularly crude oil. Almost all the leading oil producing countries are said to have reached their peak in production. This is a situation that was forecast by Hubert, hence the term Hubert’s curve to denote peak production of oil. In 2004 global oil demand was 83.4 million barrels per day and rising, but supply was 83.5 million barrels per day, and declining. Added to this dire market situation is the increasing demand for oil and other resources by rapidly industrialising China and India. In 1993, China moved from being oil exporter to oil importer and, ten years later, it became the second-biggest oil consumer. China’s oil consumption is forecast to grow at 3.2 percent annually, compared with the US 0.5 percent. With resources depleting in mature fields and countries while demand is increasing, the search for oil and other resources in unconventional countries is set to continue.

All these factors – history, dependency, global market – have contributed to a phenomenal increase in the known reserves and the production of hard rock minerals and fossil fuel in Africa. Regarding gold production, in 1986 Ghana produced 288,000 fine ounces of gold and, ten years later this had quadrupled to more than one million fine ounces annually. In 2008, the country produced a record 2.6 million fine ounces. Gold was first produced (in modern times) in Tanzania in 1998, and each year since, a new gold mine has been opened in the country. Barely three years after starting production in Tanzania in 2000, AngloGold Ashanti produced a record 661,045 ounces of gold. And, regarding fossil fuel, Ghana had not produced any oil by 2009, but in December 2010 it started production at about 100,000 barrels per day, with estimated reserves of 2 billion barrels. Equatorial Guinea discovered oil in 1991 and is now producing 330,000 barrels per day; Sudan discovered oil in 1996, started exporting in 1999, and in 2010 is producing 400,000 barrels per day; Uganda’s estimated reserves are more than 1.6 billion barrels.
The puzzling question is why is it that African countries with such massive endowments are among the poorest countries in the world? In fact, the story of the continent is one of poverty. In Nigeria and Angola, two of Africa’s leading oil producers, two-thirds of their populations live in abject poverty, about half are illiterate and 40 percent have no access to clean water. In sub-Saharan Africa, less than half of the entire population have access to electricity, with countries like Chad, Tanzania and Niger able to make electricity available to only 10 percent of their populations. Equatorial Guinea, with a population of about 600,000 and the third largest oil producer in Africa, has about 70 percent of its population living on less than a dollar a day, and life expectancy is less than 50 years. Gabon has a small population and produces oil, but it ranks 124th on the human development index.

As well, the physical environment in most of the resource-rich countries continues to deteriorate. In 1960, about 40 percent of Ghana’s landscape was covered with rich forest canopy, but in 2005 only 11 percent forest cover remained. Rich fishing lakes and creeks in southern Nigeria are all heavily polluted with oil products and gas flaring by the oil companies. More than 1.5 million tons of oil has been spilled in Nigeria over the course of oil production in the country. It is alleged that Uganda is set to permit gas flaring in its new oil production.

The key explanatory variable for the paradox of poverty in the midst of plenty is governance. Thus far, there have been four main governance epochs in Africa: the colonial period (1900–1960); the immediate post-colonial period (1960–66); the Cold War era (1966–90); and the post-Cold War period. The objective of colonial rule was access to raw materials and maintenance of markets for finished goods. This meant that there was no plan to industrialise or develop the colonies. Education was minimal, if at all, and health was not a priority. Colonial administrations depended on rent from natural resources, and all opposition was stifled. This was the apparatus that independence governments in Africa inherited. Given their general opposition to colonial rule, the first few years of independence governance gave an appearance of democratic practice. Legislatues, independent judiciaries, civil service and other means of state authority and administration were established and operated with significant degrees of freedom.

By the mid-1960s, marked by military coups in Congo, Togo, Nigeria and Ghana, and in the full throes of Cold War hostilities, African governments increasingly ditched democratic principles and moved onto paths of dictatorship and bad governance. This was worsened by the advent of military adventurism and autocracy. The results have been massive corruption, poor leadership, patrimonised bureaucracy, and obsession
with political power. The end of the Cold War released significant enthusiasm and aspirations for democratic governance across the continent. Dictatorships in Malawi, Benin, Zambia, Ghana, Kenya, Ethiopia, Algeria, South Africa and so on have been forced to accede to elections which most of the incumbents lost. Unfortunately, many dictators held on to power either by rigging the elections or by managing the transition to suit their sons and protégés. More disheartening is the fact that many of the new leaders, such as Chiluba, Muluzi, Obasanjo, Afewki, Kibaki, Menawi and Kabila, did little to end corruption or transform their countries and have wanted, and do want, to retain power by the same methods that the previous dictators employed.

The consequences of bad governance are not limited to autocracy and corruption. Bad governance also enabled foreign companies to obtain resource concessions on very generous terms, whereby they paid relatively little to governments in terms of taxes and royalty. In a bid to attract investments to the sector and under intense pressure from the resource companies and their supporters, and lacking the capacity to administer complicated fiscal systems, African countries in many cases essentially abdicated obtaining proportionate returns for the resources. For example, mining companies in Sierra Leone exported $179 million worth of minerals in 2007 and paid only $10 million in taxes. AngloGold Ashanti paid $1 million in taxes after ten years of producing gold in Tanzania. Ghana received less than $100 million for more than $2 billion worth of minerals produced in the country in 2008.

The general regulatory framework for resource exploitation has not been comprehensively thought out and managed. Many countries basically copied the regulatory framework operating in other resource producing developing countries. Most of the legislation in effect vests much power and discretion in the Ministers and the state oil companies. In Nigeria, the Minister has the power to waive environmental requirements without an obligation to give reasons. Although Uganda is set to start oil production in 2011, it has no legislation for oil production or for revenue management. With the exception of South Africa, Mauritius, Namibia and Egypt, which adopted competition laws in the last decade, almost all other African countries do not have competition laws that could promote efficiency and transparency and discourage anti-competitive behaviour. Again, despite the efforts of the World Bank and NGOs, Chad, Cameroon, Nigeria, Angola and others still do not have laws that mandate full disclosure of production, receipts, and use of revenue. Production Sharing Agreements signed between the government of Uganda and oil companies and Diamond Mining Agreements signed between the government of Botswana and De Beers remain secret to date.
A final consequence of bad governance is the dislocation that the natural resource industry causes in other sectors of the national economy of the relevant country. Sudden and substantial liquidity generated by the operations and personnel of the resource industry engenders inflation that makes productive activity in other sectors uncompetitive. In a short time, even previously common products such as bananas, textiles, salt, fish and water need to be imported. Separation of economies, of classes of people and of lifestyles becomes inevitable. This is what is described as the Dutch disease, or the third form of the resource curse.

The foregoing, and related outcomes, cannot remain the status of resource-rich African countries. So what can be done? The contributions to this book dissect the problems in detail and propose solutions that, if considered seriously alongside other works on the subject, would go a long way in resolving the puzzle. Given the critical contribution of governance to the crisis in Africa, it is fitting that Part I of the book and, indeed, the first chapter, by Rhuks Ako and Nilopar Uddin, deals forthrightly with the governance challenges that resource-rich African countries face. Ako and Uddin dissect the anatomy of the ‘resource curse’ phenomenon and conclude that, indeed, principles of good governance have been compromised in many resource producing countries. These principles include the rule of law, democracy, transparency and accountability. The authors move from the discussion of broad principles to examine the working of the principles in the context of resource management in Angola, Botswana, Chad and Nigeria. By far, Botswana best adheres to the principles of good governance, which is why it apparently has escaped the resource curse. The other three countries in the survey have not had sustained practices of good governance and this is evident in the concentration of power in their presidents, the vesting of wide discretion in their government officials, and the absence of accountability for the revenues generated from the production of their resources. The solution is simple: ‘practise the principles of good governance, and the blessings of equitable distribution of resource revenue, higher levels of economic development, and political peace and stability shall be your inheritance.’

One important element of good governance that was not overly emphasised by Ako and Uddin is the place of the judiciary. Abba Kolo picks this up in Chapter 2, which deals with dispute settlement and sustainable development. Kolo argues that an effective judiciary and reliable access to judicial remedies is an important way of avoiding conflicts that could jeopardise the stability and viability of resource development projects. In the face of the clear failure of many African countries to secure the independence and effectiveness of the judiciary, Kolo makes the somewhat
provocative suggestion of the inclusion of provisions in investment agreements conferring capacity on local people to access the dispute resolution process prescribed in the agreement between the investment company and the government. He relies on the precedents set by the NAFTA Citizen Submission process, and the system provided under the Aarhus Convention of 1998, to fashion a similar model for African investment regimes.

Kolo’s concerns are borne out by Rhuks Ako’s analysis of environmental justice in Nigeria in Chapter 3. Ako gives examples of abuse of ministerial discretion and how this contributes to gas flaring and environmental destruction in the Delta region of Nigeria. Together with inequities in land and resource ownership and revenue distribution, this has engendered unrest and conflicts in Nigeria. One of the factors that could have restrained injustice and the resulting violence is an independent and effective judiciary. Unfortunately, the judicial process is compromised and local people cannot get redress. Even if they get judicial pronouncement in their favour, the victory is often hollow. This is one reason why Abba Kolo’s suggestion in Chapter 2 for the incorporation of standing provisions for local people to seek redress for environmental injustice is attractive.

Part II of the book takes up what a reasonably secure and exuberant governing system pursues or must seek in its commercial and corporate relations with investors in natural resources and related stakeholders. The five chapters in this part examine the economic aspects of the resource industry in Africa from varying perspectives. Emmanuel Laryea looks at contractual relations; Gavin Hilson evaluates the relationship between small-scale or artisanal, mainly local or indigenous, and large-scale, predominantly multinational, gold mining, Francis Botchway analyses mergers and acquisitions in the resource business; Evaristus Oshionebo examines the fiscal regime and stability issues; and Benjamin Richardson offers a comprehensive exposé of transparency and socially responsible investment financing in Africa. Many resource producing African countries basically copy the contractual models that are used by other developing country resource producers. These models include concessions, production sharing, service contracts and joint ventures. Laryea analyses these models and their benefits, or otherwise, for the host countries and concludes that the production sharing model is popular mainly because it shifts most of the risks to the investor and allows the host government some flexibility in its oil policies. In many cases, the distinction between models is blurred as countries and investors seek the best terms for their respective constituencies. For example, modern concessions, production sharing and buy-back schemes are very similar in their terms and
Natural resource investment and Africa’s development

objectives. Some contractual or business arrangements are more suitable for or are determined by the nature or type of resource being explored. In fairly accessible hard rock mining, regulatory and contractual arrangements can be made that allow for the co-existence of large-scale capital intensive mining and small-scale labour intensive artisanal mining. This is the challenge that Hilson takes up in Chapter 5. He argues that regulatory and other business reforms of the mining industry must be holistic at conceptual and implementation levels. This would help avert or restrain any tensions or conflicts between different stakeholders. Such regulatory arrangements are crucial for any consolidation or attraction of investment and acquisitions in the sector.

The regulatory environment for mergers and acquisitions in South Africa, the US and the EU, together with efficiency ideals of mergers, forms the framework within which Botchway reviews mergers and acquisitions in the resource industry and their implications for Africa in Chapter 6. He shows that, contrary to the position put forward by some academics, mergers and acquisitions in the natural resource industry do not respond directly to upsurges in the equity market. Mergers are propelled by several factors, not least, low commodity prices and the loss of value of marginal mines or concessions. He analyses the laws on mergers in the US, the EU and South Africa to conclude that, despite rhetorical differences, the objectives and reach of the competition laws in the three jurisdictions in terms of their respective test for mergers, efficiency dynamics and extra-territorial application are very similar. For Africa, the impact of ‘mergers and acquisitions’ for companies that have operations on the continent includes not only the new interest in developing competition laws and the increased flows of investment but also the weakening or loss of bargaining strength, a reduction in revenue receipts and, in some cases, the loss of ‘locational’ benefits.

Oshionebo follows up in Chapter 7 with a detailed look at the fiscal and stabilisation regimes that are prescribed in legislation and in contractual or investment agreements. The particular terms and rates discussed are royalties, rents, income tax, licence fees and bonuses. The settlement of the particular fiscal terms in any investment agreement is motivated by two sets of goals: for the government, the attraction of investment to the sector, and for the company, maximum and stable returns on its investment. It is these goals that underpin the fiscal regimes currently operating in the resource sector in African countries. These incentives and the increased worldwide demand for resources have led to significant increases in foreign direct investment in the resource sectors of African countries. The returns to African countries from this increased investment are, however, minimal. This is because not only are the terms overly generous
but they are also fixed through stabilisation clauses, thereby making it impossible for African countries to benefit from windfall profits. Besides, even the revenue that is received by governments is not distributed equitably or used to develop all parts of the country, especially the areas that bear the environmental and social brunt of the resource exploitation. To change this, Oshionebo suggests that tax and other fiscal rates must be comparable to the industry standard, and stabilisation clauses must be limited. As well, laws, agreements and management of the resources and the revenue receipts must be transparent.

A comprehensive examination of ways to promote transparency in the management of resource revenue and to encourage ethically responsible investment is presented in Chapter 8 by Richardson. To appreciate current initiatives to ensure transparency, Richardson outlines the evolution of the debates and efforts to promote ethical investment. From the 1774 Quaker push against slavery through seeking divestment from the slave trade and its associated economic emanations, to the contemporary Darfur divestment campaign, Africa has been the focus of the need for socially responsible investment. To monitor and ascertain the processes and outcomes of the ethics of investment, the institution of transparency is critical. This explains why the Equator Principles, the Extractive Industries Transparency Initiative, the Kimberley Principles and the UN Principles of Responsible Investment all emphasise transparent administration and accountability of the resource business. Almost all these initiatives emphasise either governmental roles or a joint governmental and corporate collaboration to work toward attaining the principles of the particular initiative. This is why the initiatives coming out of South Africa are unique and invigorating. The Black Empowerment Act, the Financial Sector Charter and, most importantly, the Johannesburg SRI Index introduce market and more nuanced ideals into ethical investment. Their impacts have begun to shift the paradigm from Africa as an object to Africa as an agent of socially responsible investment. From Ako and Uddin’s opening chapter on governance through to Richardson’s socially responsible investment work in Chapter 8, one point stands out – the need for conscientious and open processes of accountability to be in place in the African states regarding the exploitation of natural resources and the management and distribution of the revenues they yield.

The first eight chapters are largely cast in comparative paradigms – an initiative originating in one jurisdiction or system and being experimented or implemented or frustrated in a jurisdiction in Africa. Governance ideals, standing for local people before international adjudicatory bodies, local participation in environmental decision making and implementation, merger regulation and incentives for resource investment, almost all
Natural resource investment and Africa’s development

draw on the experiences of other systems to analyse the African situation. The subsequent chapters are much more international in conception. In Chapter 9, Emmanuel Laryea gives a historical account of the development of the rules and norms of international investment law and their African dimensions. Although the main original debates about investment law, in particular the treatment of alien property, centred on the binary positions of Calvo and Cordell Hull, the experiential manifestations of the debates were mainly in post-colonial Africa and the rest of the developing world, particularly South America and the Middle East. These are the regions that also depend on natural resources for their survival and development. Africa’s second contribution to the development of the international investment regime is the set of bilateral investment treaties (BITs) that countries on the continent entered into, especially with developed countries. Although the Calvo–Hull debate has apparently been resolved in favour of the Hull doctrine and foreign investors in general, the legal debate surrounding the implications of the numerous BITs for global international investment is ongoing.

While Laryea’s chapter is global, Billy Melo Araujo, in Chapter 10, takes a specific look at commodity agreements and the marketing of primary natural resources from Africa. He reviews the dependency of African countries on primary commodity exports and draws attention to their susceptibility to commodity price shocks. Like Ako and Uddin earlier, he utilises the diamond industry in Botswana and the copper industry in Zambia to briefly illustrate the contrasting fortunes of two commodity dependent countries. His analysis demonstrates the stark reality of the consequences of dependency and mismanagement encouraged by the cycles of boom and bust that had marked these industries. To alleviate this, commodity producing countries by themselves, or in partnership with their trading counterparts, relied on agreements to assure stability, regular returns, and to promote the use and consumption of the relevant commodity. For economic and political reasons, the commodity agreements collapsed by the end of the 1980s and early 1990s. Melo Araujo utilises the International Tin Agreement and the International Rubber Agreement to illustrate the rise and ultimate fall of commodity agreements. One organisation that survived and grew stronger is OPEC. The reasons for this unique survival, Melo Araujo argues, include the inelasticity of energy products and the heightened demand from newly industrialising countries. Because of its ability to affect global energy prices, the legality of the existence and operations of OPEC is often questioned. This issue is confronted head on by an examination of OPEC’s legality from WTO/GATT and competition or antitrust law perspectives. Melo Araujo calls for a more comprehensive long-term solution to the problems of commodity dependency. Such
a solution requires that the states that are dependent on the export of specific commodities, especially mineral and energy commodities [whose] boom and bust cycles . . . undermine [their] continuous economic growth [must] . . . simultaneously [curb] excessive public spending and [channel] the incomes generated by [their exports] . . . to the development of physical and human capital required for the attraction of foreign direct investment and the diversification of the economy’.

In somewhat of a departure from the comparative and international conceptualisation of the earlier chapters, Francis Botchway examines the resource relations between African countries and China. He employs ‘regime theory’ to frame the analysis mainly because of its flexible and nuanced contours. The overarching framework of Sino-African relations is the China Africa Policy statement of 2006, essentially a statement of principles and ideals that guide China’s foray into Africa, hence the attractiveness of regime theory. The emerging China–Africa tango is very different from the US and EU’s relations with Africa, which are largely based on law – the Africa Growth and Opportunity Act (AGOA), for the US; and the Economic Partnership Agreement (EPA) and its predecessor Lomé and Cotonou agreements, for the EU. Notwithstanding this difference in the foundations of these relations with Africa, the bilateral investment treaties of the US and EU and, especially, the particular resource exploration agreements between China and various African countries are very similar. To explicate this, two agreements, the one between Sudan and a consortium of western oil companies including Shell and Arco, and the other between Sudan and CNPC, a Chinese petroleum company, are compared. The main attraction for Chinese economic involvement in the resource industry in Africa is China’s willingness to build infrastructure projects and offer other forms of economic support in the relevant African country in exchange for access to resources. Although the forensic parity and benefits of this ‘barter’ are yet to be ascertained, many Africans see the ‘Chinese model’ as a way of reducing the resource curse and extending the benefits of exploiting the resource in question to ordinary people. Whether this harbingers a new international economic order will largely depend on the response of Africa’s western economic partners.

The final three chapters re-engage international or transnational methodologies to examine the resolution of disputes in oil and gas development, and the protection of the environment in the context of resource exploitation on the continent. Ibironke Odumosu questions whether the Energy Charter Treaty (ECT) is a crystallisation of customary international law on dispute settlement or whether it is lex specialis. Two of Africa’s leading oil producers, Nigeria and Angola, represent opposing positions on the willingness to accept and put into practice distillable
norms of international adjudication: Nigeria encourages it in its BITs and by domestic legislation, but Angola discourages international arbitration in its legislation and oil investment agreements. Odumosu concludes that irrespective of the status of the ECT in international law, and notwithstanding that it is mainly a European treaty with some participation from Asia, its jurisprudence is very relevant to Africa, mainly because most of its dispute resolution provisions have been incorporated into the ECOWAS Energy Protocol and some bilateral investment treaties involving African countries.

Whereas Odumosu (and Kolo in Chapter 2) deals with resource disputes from civil law perspectives, Regina Rauxloh explores the role that criminal law can play in ameliorating the inadequacies of the civil regulatory regime at both national and international levels. She evaluates the operation of international environmental law in peacetime and in times of war or civil conflict, arguing that the laws of war deal with the environmental aspects of war only tangentially. Her conclusion is that, given the power that multinational corporations wield over developing countries, in cases where they engage in activities that cause grave environmental damage and the national state is unable or unwilling to prosecute, international criminal law must be capacious enough to deal with the matter. This conclusion is particularly poignant in the light of the Tranfigura Company dumping deadly toxic waste in Ivory Coast, the conviction of eight corporate officials for the Bhopal gas disaster and BP’S Deep Horizon oil spill off the Gulf Coast in the United States.

David Dzidzornu completes this volume by providing an incisive panoramic discussion of continental efforts to implement environmental protection treaty obligations as part and parcel of exploiting and utilising natural resources for economic development in the African countries. As continental policy, he traces this to a pedigree of declarations and plans which now culminate in the New Partnership for Africa’s Development (NEPAD) and its Action Plan for the Environment Initiative (2003). He sets the discussion against the background of obligations each state assumes under Africa’s regional economic community (REC) treaties. He demonstrates that, for this purpose, the regulatory functions of the RECs are subsumed to the evolving operationalisation of continental economic and political integration put in motion by the African Economic Community (AEC) Treaty 1991 and the Constitutive Act of the African Union (AU) 2000/2003. Consequently, national and regional economic development and integration with environmental protection coalesce, constitutionally, into a socio-political and legal process under the ultimate direction and superintendence of the AU and its bureaucracy of ‘specialized technical committees’ that are still emerging. The juridical nature of these defining normative
elements exposes the provisions of the operative Algiers Convention on the Conservation of Nature and Natural Resources 1968 as incapable of eliciting the compliance efficacy, including commitment to co-operation, that is necessary for the African states to tackle the many environmental protection challenges they face, especially in light of their trans-boundary manifestations. Dzidzornu demonstrates that, given its specification of the seven core issue areas that these challenges fall into, and by expressly and impliedly plugging them into the relevant international environmental protection treaties to which an overwhelming majority of African states are parties, the revised Algiers Convention 2003 serves as a better organising normative framework for tackling these enormous sets of challenges. To this end, ratification of the revised Convention must be actively promoted by the AU Secretariat so that it can actually supersede its 1968 predecessor. Dzidzornu analytically shows why the African Ministerial Conference on the Environment (AMCEN) emerges as the most natural institution to exercise the political and institutional authority of the AU to co-ordinate implementation of the obligations devised under the comprehensive regime created by the reach of the revised Algiers Convention 2003.

Two themes that run through all the chapters in this book are transparency and equity. National governments that are representative of all their peoples and reflect their wishes, and equity in the allocation of the blessings and burdens of resource exploitation offer viable strategies by which to assure Africa’s socio-economic growth and improvement and, simultaneously, ensure that its development partners can be guaranteed a more sustainable return on their investments.

NOTES

Natural resource investment and Africa’s development

7. Ibid.
10. Ibid.
13. Ibid. at 168 and 170.
15. Ibid.
17. See for example 1900 Concessions Ordinance of the Gold Coast, Cap 100 (1900).
19. Ibid.
23. Ibid.
24. Ibid.
27. Ibid.
29. For more details on the competitive fiscal regime for mining in Africa see Christian Aid, TWN et al., BREAKING THE CURSE (2009), http://www.sarwatch.org/sarwadocs/BreakingTheCurse.pdf.
30. See generally Jim Rodgers, supra note 8.
33. Jim Rodgers, supra note 8 at 124–5.
Introduction


41. Alex Perry, supra note 28.

42. Patrick Fort, supra note 6.

43. Alex Perry, supra note 28.


45. Ibid.


49. CHRISTIAN AID, SIERRA LEONE AT THE CROSSROADS: Seizing the Chance to Benefit from Mining (2009).


51. See note 35 supra.

52. Daniel Howden, supra note 46.


55. Alex Perry, supra note 28.

56. The case of Gabon best illustrates this tragedy. Ibid.