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Chapter 24

OIL AND GAS DISPUTES IN THE MENA REGION[±]

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I. INTRODUCTION

Oil and Gas (**O&G**) arbitration has a long and fascinating history in the MENA region.[1] It was the epicenter for some of the most important historical international arbitration cases. Many of today's key principles in international arbitration and investment law were established as the result of a number of groundbreaking arbitration cases beginning in the 1950s between international oil companies (**IOCs**) and Middle Eastern governments. These cases arose in response to some of those governments' attempts to increase their share of revenues from their oil and gas resources, or their outright nationalization of the IOCs' investments. To this day, the O&G business continues to have an outsize presence both in the arbitration world and in the MENA region.

O&G arbitrations make up the largest portfolio of international commercial and investment disputes in the world as indicated in the statistics of major arbitral institutions. In addition to having the largest number and size (both in terms of value and complexity) of international arbitrations, the O&G business has the greatest range and diversity of any economic sector in the kinds of arbitration cases that it generates.[2] This chapter will focus on investor-state and commercial O&G disputes in the MENA region. Before discussing them, a brief overview of the development of the O&G business in the MENA region is first provided to put these arbitrations and court cases in perspective.

[±] This chapter is an abridged version of a much larger, in-depth paper published in *Arbitration in the MENA*, Release 4-2021, Gordon Blanke ed. (JurisNet, LLC, 2021).

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[1] The countries of the MENA region referenced in this article for the *Middle East* are: Bahrain, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Oman, Qatar, Saudi Arabia, Syria, UAE and Yemen, and for *North Africa*: Algeria, Egypt, Libya, Morocco and Tunisia.

[2] Timothy Martin, *Dispute Resolution in the International Energy Sector: an Overview,* 4(4) JOURNAL OF WORLD ENERGY LAW AND BUSINESS 332 (December 2011).

II. THE OIL AND GAS BUSINESS IN THE MENA REGION

Oil companies began investing in the MENA region in 1901 when William Knox D'Arcy acquired an oil concession in Iran. IOCs then went on to discover a significant majority of the world's proven oil reserves in the MENA region throughout the 20th century, which resulted in that part of the world holding anywhere between 50% to 70% of the global oil reserves from the 1950s onwards.[3] The American Association of Petroleum Geologists (**AAPG**) compiled a dataset of the world's largest oil and gas fields discovered since 1868 that were 500 million oil barrels equivalent of ultimate recoverable reserves or larger.[4] Based on that study, 18 of the 25 largest O&G fields in the world are in MENA countries, most of which are located in the Gulf region.

These facts impacted the kinds of O&G disputes that first emerged in the region. Much was at stake; including control over these countries' resources, national sovereignty and huge wealth. Given the importance of these early MENA O&G arbitrations and that they occurred at the beginning of the development of modern investment law and international arbitration, they invariably impacted and shaped the development of these areas of international law into what we know today. As a result, the early MENA O&G arbitration cases that took place in the 20th century are of historical significance.

The IOCs' control over the vast majority of global petroleum supplies began to change with a series of nationalizations of their oil fields by MENA host governments after the Second World War, which was mostly completed by the 1980s. These changes were driven by the concern of these governments on how the IOCs set the price of crude oil and volumes produced, their share of the revenue and ultimately control over their own resources, all of which had a direct impact on their economies and the stability of their countries. This had huge geopolitical consequences and resulted in a dramatic reversal in control of the world's oil reserves from the IOCs to the national oil companies (**NOCs**) that host governments established to manage their petroleum reserves.

This change in control was accomplished on multiple fronts, including the formation of the Organization of Petroleum Exporting Countries (**OPEC**), a number of unilateral initiatives by that cartel's member countries, and a series of negotiations and settlements that involved the IOCs and governments from both MENA host countries and the western countries of the IOCs. The final part of this story was a series of historical arbitration cases, which not only resolved some difficult disputes between the IOCs and their host governments,

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[3] BP Statistical Review of World Energy: 2020 (69th ed. 2020), *available at* https://www.bp.com/content/dam/bp/business-sites/en/global/corporate/pdfs/energy-economics/statistical-review/bp-stats-review-2020-full-report.pdf.

[4] This analysis is *available at* https://worldmap.harvard.edu/data/geonode:giant_oil_and_gas_fields_of_the_world_co_yxz (last visited 9 August 2022).

but also which for the first time, addressed a number of important issues in the international investment and arbitration worlds.

Why did this happen in the oil industry, and in particular, in the Middle East? It was because these early concession agreements provided that disputes between the concessionaire and the producing country that were not settled by negotiation or mutual agreement were to be resolved by arbitration. This originated in the earliest oil concessions granted in the Middle East in the following manner:

> The early oil concessions embodied a simple, though obviously deficient, arbitration clause.... For instance, this type of arbitration clause contained no time limits, no indication of what was to be done in the event of refusal by any party to appoint its arbitrator, no provision as to any possible disagreement regarding the appointment of an umpire and no mention of the procedure to be followed or of the law to be applied by the arbitration tribunal. It could almost be said that such a provision simply embodied an expression of an intention, rather than an agreement, to arbitrate.[5]

As a result of this lack of clarity in these arbitration agreements, the first arbitrations that had to deal with them laid down principles on how to conduct an international arbitration that have had an outsize influence in the legal world.

III. ARBITRATIONS IN THE MENA REGION

A. Investor State Oil and Gas Arbitrations

The first investor state O&G arbitration in the Middle East occurred in 1950, from which they developed depending on the kind of O&G concession in dispute and the forum where the dispute was held.

(1) Early Arbitrations in the 20th Century

In response to attempts by host governments in the MENA region to revise the terms of their agreements with IOCs or to expropriate/nationalize their investments, a series of groundbreaking investor state *ad hoc* arbitration cases were initiated in the latter half of the last century. These historical cases dealt with disputes that arose from some of the original oil concessions acquired by oil companies in the Gulf region and North Africa, starting with the 1901 D'Arcy concession in Persia, followed by the concessions acquired in the Gulf states between the 1930s and 1950s. After the Second World War, in an attempt to gain more revenue from their resources, the rulers of these countries began testing the limits of what areas and operations were covered in these agreements.

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[5] HENRY CATTAN, THE LAW OF OIL CONCESSIONS IN THE MIDDLE EAST AND NORTH AFRICA 145 (1967).

They then began a series of attempts to reallocate the revenue sharing arrangement with the concession holders, followed by outright nationalization/ expropriation efforts, which resulted in IOCs (and sometimes the host government) triggering the arbitration clauses in their agreements.

The first two cases dealt with a common issue and similar parties. That issue was the extension by two Trucial states (Qatar and Abu Dhabi) of their jurisdiction over their continental shelves. An American independent oil company by the name of Superior Oil Company attempted to acquire offshore oil concessions from the two countries covering those extensions. This triggered wholly-owned subsidiaries of the Anglo-Iranian Oil Company contesting the awarding of those offshore concessions on the grounds that their earlier concessions already included those rights. The third case flowed from the awarding of one of those offshore oil concessions to a joint venture company owned by Superior Oil Company and its partner.

- *Petroleum Development v. Ruler of Qatar* (1950);
- *Petroleum Development v. Sheikh of Abu Dhabi* (1951); and
- *Qatar v. International Marine Oil Company* (1953).

The next case, the Anglo-Iranian Oil Co. Case (1952), was the first and last attempt by an IOC to press its claim at the International Court of Justice, which resulted in its dismissal for lack of jurisdiction. The *Saudi Arabia v. Aramco* (1958) case was a very unique case on many fronts, including that the parties were able to conduct it in a "friendly" manner and continue on with a successful relationship for many years after the arbitration. That was not the result in the *Sapphire v. NIOC* (1964) arbitration between a Canadian company and Iran, where the parties accused each other of acting in bad faith.

The next three cases were against Libya and shared common facts, similar agreements, but very different results.

- *BP v. Libya* (1974);
- *TOPCO v. Libya* (1977); and
- *LIAMCO v. Libya* (1977).

Then there was the very historically important *Kuwait v. AMINOIL* (1982) case. This arose from a concession in the Kuwait-Saudi Neutral Zone. It broke the trend of IOCs trying to settle with a Gulf State nationalizing its resources by the investor arguing for a greater valuation of its investment.

The 1979 Iranian revolution disrupted the trend of negotiated settlements and resulted in a number of arbitrations, including one *ad hoc* arbitration, the *Elf v. NIOC* (1982) case. The other arbitrations were dealt with in a unique forum, the Iran-U.S. Claims Tribunal, specifically created as a result of that revolution. This marked the end of arbitrations that dealt with the historical concession

agreements and the final transition of control over the Middle East's oil fields from the IOCs to the host states.

Finally, there were two *ad hoc* arbitrations relating to Libya and Qatar in the late 1980s that dealt with disputes arising from Production Sharing Contracts (**PSCs**). Unlike the previous arbitrations, they did not deal with the historical concessions granted in the first half of the century. These were the forerunners of investor state disputes with petrostates arising from newer oil granting instruments.

- *NOC v. Sun Oil* (1987); and
- *Wintershall v. Qatar* (1988).

(2) Iran-U.S. Claims Tribunal

The Iranian revolution of 1979 not only resulted in huge political and cultural changes in Iran, it brought complete disruption to its oil industry and the investments of western IOCs. American companies in particular were hard hit. In order to resolve the crisis of U.S. hostages seized at the U.S. Embassy in Tehran, the United States agreed under the Algiers Accord to terminate litigation against Iran in the U.S. courts, to release Iranian assets in the U.S. that had been frozen under a U.S. Treasury license, and to establish the Iran-U.S. Claims Tribunal to handle all U.S. companies claims against Iran. The result were a number of historically important oil arbitrations:

- *Phillips v. Iran and NIOC* (1982);
- *Amoco v. Iran and NIOC, et al.* (1985);
- *SEDCO v. NIOC and Iran* (1985±1987); and
- *Mobil, et al. v. Iran* (1987).

(3) ICSID Arbitrations

The World Bank was involved in the settlement of the nationalization of the Anglo-Iranian Oil Company after the overthrow of Iranian Prime Minister Mohammed Mosaddeq in 1953.[6] As a result of this and other nationalizations, the World Bank established the International Centre for Settlement of Investment Disputes (**ICSID**) in 1966 to provide a neutral forum to resolve investor state disputes of this nature.[7] Even though ICSID developed into the "premier international investment arbitration facility in the world"[8] handling most of the world's investor state disputes, it has registered very few oil and gas disputes

[6] ANTONIO R. PARRA, THE HISTORY OF ICSID 21 (2nd ed. 2017).
[7] *Id.* at 87.
[8] *Id.* at 267.

from the MENA region. And the few that it has registered have occurred mostly in the last decade.

As of July 2022, ICSID had 905 concluded and pending arbitration cases in its registry, with 215 of those cases coming from the oil, gas and mining sector, which made up 23.8% of ICSID's total caseload. Within that sector, twelve cases were from the MENA region, which resulted in them making up 5.6% of the total ICSID caseload from the oil, gas and mining sector. Those twelve cases are:

Case No.	Claimant(s)	Respondent(s)	Date Registered and Dispute	Status
ARB/19/27	CTIP Oil & Gas International Limited (UAE)	Arab Republic of Egypt	September 2019 Gas pipelines construction and operation agreement Egypt/UAE BIT	Pending
ARB/19/7	Petroceltic Resources Limited (UK)	Arab Republic of Egypt	April 2019 Production Sharing Agreement Egypt/UK BIT	Concluded: Sept 2020 Discontinuance
ARB/18/29	The Carlyle Group L.P. and others (USA)	Kingdom of Morocco	August 2018 Oil storage and trade Morocco/US FTA	Pending
ARB/18/7	Corral Morocco Holdings AB	Kingdom of Morocco	March 2018 Oil Refinery Morocco/Sweden BIT	Pending
ARB/16/7	Attila Doğan Construction Inc. (Turkish)	Sultanate of Oman	March 2016 O&G engineering and construction Oman/Turkey BIT	Concluded: Feb 2021 Award
ARB/15/30	Samsung Engineering Co. (South Korea)	Sultanate of Oman	July 2015 O&G engineering and construction Oman/South Korea BIT	Concluded: Jan 2018 Award

Case No.	Claimant(s)	Respondent(s)	Date Registered and Dispute	Status
ARB/14/4	Unión Fenosa Gas, S.A.	Arab Republic of Egypt	February 2014 Natural gas liquefaction Egypt/Spain BIT	Concluded: Aug 2018 Award *Annulment Proceeding*
ARB/12/30	Lundin Tunisia B.V.	Republic of Tunisia	October 2012 Production Sharing Agreement Contract Based Claim	Concluded: Dec 2015 Award
ARB/12/11	Ampal-American Israel Corporation and others (USA)	Arab Republic of Egypt	May 2012 Natural gas export Egypt/US/German BITs	Concluded: May 2020 Discontinuance
ARB/11/7	National Gas S.A.E. (Egypt)	Arab Republic of Egypt	March 2011 Gas pipelines construction and operation agreement Egypt/UAE BIT	Concluded: April 2014 Award
ARB/09/14	Mærsk Olie Algeriet A/S (Danish)	People's Democratic Republic of Algeria	July 2009 Production Sharing Agreement Algeria/Denmark BIT	Concluded: Sept 2013 Discontinuance
ARB/07/25	Trans-Global Petroleum, Inc.	Hashemite Kingdom of Jordan	September 2007 Production Sharing Agreement Jordan/US BIT	Concluded: April 2009 Settlement

The first MENA case started in 2007. Ten of them were treaty based and one was a contract based claim. Five of the cases were against Egypt, two against Morocco and Oman, with one case each for Tunisia, Algeria and Jordan. Six of the cases were concluded and five are pending, with one case having a final award issued that is presently being reviewed at ICSID under an annulment application. Six of the cases had little or no published material provided on the

ICSID website. The most extensive case was the Union Fenosa Gas case against Egypt that involved an LNG plant. Four of the cases involved production sharing agreements. Four of the cases arose out of O&G construction infrastructure. Two of the cases involved natural gas or LNG exports. Finally, there was one case involving a refinery and one involving crude oil storage and trading.

(4) Recent Arbitrations in the 21st Century

There were a number of ICC cases involving Yemen and its PSCs over the last decade. Even though they were essentially investor state disputes, they were disputed at the ICC Court, rather than at ICSID or the PCA. This was because they were contract based disputes, in which the Yemeni PSCs provided for ICC arbitration in Paris. Those ICC cases were:

- *Hunt Oil and Exxon v. Yemen*;
- *Saba v. Yemen*;
- *Gujaret et al v. Yemen*;
- *Reliance Industries and Hood Energy v. Yemen*
- *Yemen v. Dove, et al*;
- *Yemen v. Nexen, CCC and Occidental*;
- *DNO Yemen AS v. Yemen and KEC Yemen Ltd*; and
- *DNO Yemen AS v. Yemen, TG Holdings and Ansan Wikfs*.

B. Commercial Oil and Gas Arbitrations

There were no reported commercial oil and gas arbitration cases from the MENA region during the twentieth century. Those commercial disputes that did occur took place in foreign courts. The following four cases were pursued by the Anglo-Iranian Oil Company in Japan, Italy and Yemen against third party buyers of Iranian oil after the nationalization of its assets in 1951.

- *Anglo-Iranian Oil Co Ltd v. Idemsitu Kosan Kabushiki Kaisah* (1953);
- *Anglo-Iranian Oil Co Ltd v. Jaffrate* (*The Rose Mary*) (1953);
- *Anglo-Iranian Oil Co Ltd v. SUPOR* (*The Miriella*) (1955); and
- *Anglo-Iranian Oil Co Ltd v. SUPOR* (1955).

There were a series of cases in the English and U.S. courts that spilled over from the *BP v. Libya* case, which lasted for more than seven years until they were finally resolved in 1985. They were between the two co-concessionaires in that Libyan block: BP and Nelson Bunker Hunt.

- *BP Exploration Co (Libya) v. Hunt*; and
- *Nelson Bunker Hunt v. BP Exploration Company (Libya) Ltd.*

Finally, there were a series of MENA commercial O&G arbitrations at the ICC Court between the years 1988 and 2012, which were initially reported in the ICC Bulletin. Because of confidentiality concerns, the parties and their countries were not reported.

IV. OIL AND GAS ARBITRATIONS BY COUNTRY

An overview of the oil and gas arbitration cases that arose in the key hydrocarbon producing countries in the MENA region follows.

A. Iran

(1) ***United Kingdom v. Iran***

A dispute arose between the Iranian government and the Anglo-Iranian Oil Company (**AIOC**), on whether the company could be nationalized. The Government of the United Kingdom submitted an application on behalf of AIOC to the International Court of Justice (**ICJ**) on 26 May 1951 instituting proceedings between it and the Imperial Government of Iran, on the grounds of invoking the right of diplomatic protection for one of its subjects.[9] The ICJ eventually determined that it lacked jurisdiction to hear the case. This was the first and last time that an oil company pursued an investor state arbitration concerning the expropriation of a Middle Eastern oil concession at the ICJ.

(2) ***AIOC v. Third Parties***

While the dispute at the ICJ was unfolding, the National Iranian Oil Company (**NIOC**) was selling oil from the AIOC concession to other third parties. In response, AIOC launched a series of claims and injunctions[10] against those third party buyers in the national courts of other jurisdictions to seize their tanker cargoes. One was in the Japanese courts, two in the Italian courts and the other in Yemen. AIOC only succeeded in one of them, which was in a court in Aden, Yemen, which was a British protectorate at the time. The judge in that case was British.

(3) ***Sapphire v. NIOC***

Sapphire Petroleums Limited, a Canadian oil company, entered into a Joint Structure Agreement in June 1958. Things went wrong when NIOC refused to

[9] *Anglo-Iranian Oil Company* Case (*United Kingdom v. Iran*), ICJ REPORTS 93 (1952).

[10] *Anglo-Iranian Oil Co Ltd v. Idemsitu Kosan Kabushiki Kaisah* (1953) 20 ILR 305; *Anglo-Iranian Oil Co Ltd v. Jaffrate (The Rose Mary)* (1953) 20 ILR 316; and *Anglo-Iranian Oil Co Ltd v. SUPOR* (1955) 22 ILR 23. *Anglo-Iranian Oil Co Ltd v. SUPOR* (*The Miriella*) (1955) 22 ILR 19.

allow the refunding of Sapphire's expenses on the grounds that it had not been consulted before the operations. This developed into a landmark *ad hoc* arbitration case[11] in 1963, in which NIOC did not appear.

The sole arbitrator, Judge Cavin, held that Iran, as an expropriating state, must compensate the investor for actual loss suffered (*damnum emergens*) and lost profit (*lacrum cessans*). This was one of the first arbitration cases establishing those principles. He included lost profits based on the principle of *pacta sunt servanda*, which required that contract damages should put the aggrieved party in the position that it would have been in if the contract had been performed. In determining the amount of compensation for loss of profit, he relied on the *ex aequo et bono* approach and awarded actual damages of $650,874 and lost profits of $2 million.[12]

An update of the Petroleum Act in 1974[13] continued with the increasing nationalization of Iran's oil industry. Iran was thrown into turmoil in 1979 when a revolution began with the toppling of Shah Mohammed Reza Pahlavi on 16th January 1979 and the return shortly afterwards of Ayatollah Ruhollah Khomeini to the country. The oil companies first experienced disruption in their Iranian operations in December 1978. NIOC began shutting them down in March 1979 with all relations ceasing in November 1979. The Revolutionary Council in Iran adopted the Single Article Act on 8th January 1980, which relied upon the 1951 nationalization law to expropriate the IOCs' investments. The result was a series of arbitrations and settlements between the revolutionary Iranian government and the oil companies, all of which had similar facts.

(4) ***Elf v. NIOC***

NIOC signed its first risk service agreement (**RSA**) in 1966 with a French State agency, Enterprise de Recherches et d'Activités Petroliers (**ERAP**) and a related French corporation, Société Française des Petroles d'Iran (**SOFIRAN**). ERAP subsequently assigned its interests to its subsidiary, Elf Aquitaine Iran (**Elf**). This RSA was nationalized as a result of the Iranian Revolution, which was the basis for another *ad hoc* arbitration.[14] Since Elf was a French company and not a U.S. national, it did not fall within the Iran-United States Claims Settlement Declaration and its claim could thus not be heard before the Iran-U.S. Claims Tribunal.

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[11] *Sapphire International Petroleums Ltd. v. National Iranian Oil Co. (NIOC)*, Award of 15 March 1963, 35 ILR 136 (1963).

[12] *Id.* at 186.

[13] Official Gazette of Islamic Republic of Iran, No 8626 dated 19 August 1974.

[14] *Elf Aquitaine Iran v. National Iranian Oil Company (NIOC)*, Preliminary Award of 14 January 1982, 96 ILR 251, 11 Y.B. COM. ARB. 97 (1986).

NIOC refused to co-operate in the appointment of a three member tribunal as provided under the arbitration clause. As a result, the President of the Supreme Court of Denmark appointed a sole arbitrator, to which the Iranians objected. In response, that arbitrator issued a preliminary award in which he confirmed the autonomy of the arbitration clause, his own appointment and his competence to rule on his own competence. The merits of Elf's claims or NIOC's argument that the agreement was null and void *ab initio* were never addressed in this arbitration. Details of any settlement between the parties (if any) were not made public.

(5) *Iran-U.S. Claims Tribunal*

American investors who had their assets seized initially pursued their claims in the U.S. courts. However, in order to resolve the hostage crisis of U.S. citizens seized by Iranian students, the United States agreed under the Algiers Accord to terminate litigation against Iran in the U.S. courts, to release Iranian assets in the U.S. that had been frozen under a U.S. Treasury license, and to establish the Iran-U.S. Claims Tribunal to handle all U.S. companies claims against Iran. This tribunal has dealt with more than 4,000 cases since its inception, and is still functioning to this day. However, it has only issued five awards that arose from the nationalization of the oil industry.

(6) *Amoco v. Iran*

Amoco initiated two arbitrations. The first arbitration concerned the nationalization of its oil concession in Iran, while the second arbitration dealt with the seizure of its 50% share in a petrochemical joint venture with the Iranian government's petrochemical company, the National Iranian Petrochemical Company.[15] The majority of the tribunal issued an interlocutory award on the first claim stating that the tribunal's assertion of jurisdiction was invalid. The tribunal issued nothing further until the dispute was finally resolved in a settlement agreement described below.

In the petrochemicals claim, the majority of the Tribunal issued a partial award, in which it held, amongst other things, that international law required, in the case of an unlawful expropriation, for the expropriating State to grant *restitutio in integrum* in the form of restitution in kind or its monetary equivalent, which included the loss of future profits. The standard of compensation for a

[15] *Amoco Iran Oil Company v. Government of the Islamic Republic of Iran, et al.* Award No. ITL 12-55-2 of 30 December 1982, 1 IRAN-U.S. CL. TRIB. REP. 493, 70 ILR 490, 83 ILR 490 (Settlement) and 78 ILR 637 (Dissent), Award No. 480-55-22 of 15 June 1990, 25 IRAN-US CTR 301; and *Amoco International Finance Corp. v. Government of the Islamic Republic of Iran*, Award No. 310-56-3 of 14 July 1987, 15 IRAN-US CTR 189, 83 ILR 500.

lawful expropriation was the full value of the undertaking at the time of the expropriation as a going concern. The majority of the tribunal dismissed both the discounted cash flow (**DCF**) and net book value of calculating compensation. The parties subsequently concluded a settlement agreement, in which the Amoco Iran Oil Company received US $540 million under the first claim and Amoco International Finance Corporation received US $60 million under the second claim. The parties requested an award that gave effect to the settlement agreement, which the Tribunal provided on 15th June 1990.[16]

(7) *Mobil v. Iran*

Mobil, as lead claimant, filed a claim[17] under the Consortium Agreement.[18] The Consortium was made up of 28 oil companies. Only 11 members of the Consortium filed claims. Of the remaining 17 members of the Consortium, either they did not qualify as U.S. nationals to make a claim before the Iran-U.S. Claims Tribunal or Iran was able to conclude settlement agreements with them before this arbitration began. Seven of the 11 cases were settled in the course of proceedings, which were recorded as awards on agreed terms by the tribunal. The remaining four claimants were: Mobil, Exxon Corporation, Arco and San Jacinto Eastern Corporation (owned by Conoco). Those claimants sought the recovery of prepayments for undelivered oil and the repayment of assets transferred by the Consortium to NIOC in 1973. They also sought damages for lost profits and losses connected with the Abadan Oil Refinery in Iran. Their claims were: US $262,136,422 (Mobil), US $15,807,968 (Conoco), US $63,331,904 (Arco), and US $262,319,035 (Exxon); for a total of US $603,595,329 for the four claims.

The majority of the tribunal issued a Partial Award in which it determined it had jurisdiction and that events during the revolution only resulted in temporary suspension of their Consortium Agreement, which fell short of frustration or termination. The tribunal held that the acts of Iran and the NIOC did not amount to expropriation, but were instead to be construed as an agreement to terminate the agreement subject to compensation. The tribunal did not decide

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[16] Award No. 480-55-22 of 15 June 1990, 25 IRAN-US CTR 301 at 490-500, Award No. 310-56-3 at 629–638.

[17] *Mobil Oil Iran Inc. and Others v. Government of the Islamic Republic of Iran and National Iranian Oil Company*, Award Nos. 311- 74/76/81/150-3 of 14 July 1987, 16 IRAN-US CTR 3, 86 ILR 230.

[18] On April 19th, 1954, a Consortium was formed to run the area previously operated by AIOC, in which AIOC was camouflaged within a group of other oil companies, most of whom were American. The initial Consortium consisted of a newly rechristened British Petroleum or BP (40%), Royal Dutch Shell (14%), five American companies: Socony-Vacuum (Mobil), Standard Oil of California (Chevron), Standard Oil of New Jersey (Exxon), Texaco and Gulf Oil (8% each), and the French national oil company, Compagnie Française des Pétroles (CFP) later renamed Total) (6%).

on actual damages in its Partial Award, but instead requested the parties to brief them further on quantum. Iran subsequently settled these claims and others brought against it by the other Consortium members.

(8) *Phillips v. Iran*

Phillips Petroleum made a claim[19] arising out of a Joint Structure Agreement it entered into on 17th January 1965 with joint venture partners AGIP and the Oil and Natural Gas Commission of India. Phillips claimed damages of US $160 million plus interest, costs and fees. Iran and NIOC filed defences asserting that the tribunal did not have jurisdiction, which the tribunal dismissed in a preliminary award. The Phillips arbitration is one of the leading cases that dealt with allegations of creeping expropriation.[20] The tribunal found that the government's liability did not depend on proof that the expropriation was intentional. The tribunal considered a number of valuation methods in its award, including the DCF methodology, going concern value, and underlying asset value. The tribunal calculated a depreciated replacement value for Phillips' tangible investment at US $22–23 million and an intangible asset value of approximately US $38 million, based on US $3 million of annual income and a reasonable rate of return of 5%. On that basis, the tribunal awarded Phillips US $55 million for its expropriated interest.

(9) *Sedco v. NIOC*

There were also a number of awards arising from claims made by SEDCO,[21] which was about the expropriation and valuation of an oil drilling company, rather than an investment in an O&G field or project like the prior cases. The tribunal issued several awards regarding this claim; the first two being interlocutory awards with the third being a final award. The tribunal decided in its first award that Sedco's shareholder interest in its Iranian drilling company was expropriated by Iran. The next phase of the arbitration dealt with the standard of compensation to be applied in determining the compensable damages resulting from the expropriation of Sedco's shareholder interest, which was the full value of its expropriated shareholder interest. In its final award, the majority of the tribunal

[19] *Phillips Petroleum Company Iran v. Islamic Republic of Iran*, Award No. ITL 11-39-2 of 30 December 1982, 1 IRAN-U.S. CL. TRIB. REP. 487, 70 ILR 483 and 78 ILR 637 (Dissent), *Phillips Petroleum Co. Iran v. Islamic Republic of Iran*, Award No. 425-39-2 of 29 June 1989, 21 IRAN-US CTR at 79.

[20] R. Doak Bishop, *International Arbitration of Petroleum Disputes: The Development of a Lex Petrolea,* 23 YBCA 1163 (1998).

[21] *Sedco, Inc. v. National Iranian Oil Company (NIOC)*, Awards ITL 55-129-3 (24 October 1985), ITL 59-129-3 (27 March 1986) and ITL 309-129-3 (2 July 1987), 15 IRAN-US CTR 189, 239-41, 84 ILR 483.

awarded compensation to Sedco for the value of its rigs (US $26 million), loss of revenue (US $4.8 million), value of warehouse (US $2.1 million), outstanding invoices (US $4.5 million) and shareholder interest in the drilling company (US $30.8 million).

Instead of pursuing the full course of arbitration, most of the disputes arising out of the nationalization of the O&G industry after the 1979 revolution were resolved by settlement agreements with Iran, which were confirmed in awards issued by the Iran-US Claims Tribunal. There were more than 18 of these settlements, which included such U.S. oil companies as Exxon, Mobil, Texaco, Sun, Chevron and Arco. These settlements were driven by the political turmoil in the Middle East at the time and the desire of these companies to maintain their access to markets in the region.[22]

(10) *Crescent v. NIOC*

The most recent O&G arbitration cases involving Iran are the *Crescent v. National Iranian Oil Company* cases.[23] These disputes involved a 2001 long-term gas supply and purchase contract (**GSPC**) between the parties for a duration of 25 years. In 2009, the Crescent companies (including Dana Gas) lodged their arbitration claim, arguing that NIOC had failed to deliver any gas under the GSPC, which Crescent had planned on delivering to the UAE.

In an unpublished 2014 award on jurisdiction and liability, the majority of the tribunal upheld jurisdiction over the case and found NIOC in breach of the contract since December 1, 2005, leaving questions of damages for subsequent phases. NIOC applied for set-aside proceedings against this 2014 award at the seat in London, which was dismissed by the High Court of Justice in March of 2015.

Crescent sought nearly US $11.64 billion from NIOC. A September 21, 2021 final award on the merits awarded nearly US $607.5 million to Crescent. This first arbitration covered the period of the first 8.5 years of the 25 year gas sales agreement from 2005 to 2014. In its application to enforce the award in the U.S., Crescent disclosed that NIOC had not paid the award up to that date.

In addition to this first arbitration, Crescent lodged a second arbitration claim against NIOC under the GSPC in 2018, for the purpose of recovering damages for the period 2014–2030. In a July 30, 2019 award, that tribunal upheld jurisdiction over this second dispute. In a May 5, 2020 award, the tribunal further decided that the GSPC had been terminated as of September 11, 2018. A request to set aside this latter award at the seat, in Switzerland, was dismissed in a July 24,

[22] Charles N. Brower & Jason D. Brueschke, IRAN-US CTR 420, note 1978 (1998).

[23] *Crescent Petroelum Company Limited v. National Iranian Oil Company*, PCA Case No. 2019-03. There was also an UNCITRAL *ad hoc* arbitration.

2020 decision from the Swiss Federal Tribunal. This arbitration will likely not conclude until 2023.[24]

B. Saudi Arabia

(1) *Saudi Arabia v. Aramco*

Unlike many of the investor state arbitrations that arose in the region at that time, the Aramco arbitration[25] was a narrow dispute concerning the transportation rights of Aramco's crude oil production and refined products, rather than about a unilateral change in the concession's fiscal terms or an expropriation of its investments by the government.

Aristotle Onassis, who at the time owned one of the largest crude oil shipping companies in the world, first obtained the approval of the government in 1954 to form a company in Saudi Arabia called the Saudi Arabian Maritime Tankers Company (**SATCO**). The government then signed a shipping contract with SATCO on 20 January 1954, which gave it a "right of priority" to transport all the oil produced under the Aramco contract from Saudi Arabia and from its pipeline terminus in Sidon, Lebanon to foreign markets for a period of thirty years. Aramco refused to comply with the SATCO contract and did not allow Onassis to transport the crude oil produced from the concession. This set the stage for the first, and only, arbitration between Aramco and the Kingdom of Saudi Arabia.

Despite the arbitration being a "friendly one", the Aramco Arbitration faced a number of initial challenges in establishing such matters as the proper procedural law of the arbitration, the governing law of the concession contract, the nature of the concession, and the impact of Islamic law in determining the dispute, before the tribunal could address the conflict between the Onassis Agreement and the Al-Hasa Concession Agreement held by Aramco. This reflected both the lack of clarity in the original 1933 Agreement on these points and the embryonic stage of international arbitration at the time.

In determining the procedural law that applied to the arbitration, the tribunal decided that since one of the parties was a sovereign state, the arbitration itself was governed by the Law of Nations, rather than the law of the seat of the arbitration, which was the Canton of Geneva, Switzerland.

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[24] Lisa Boehmer, *UAE-based company claims victory in long-running gas arbitration with Iran's National Oil Company,* INVESTMENT ARBITRATION REPORTER (**IAREPORTER**), 28 September 2021, www.iareporter.com.

[25] *Saudi Arabia v. Arabian American Oil Company* (*Aramco*), Award of 23 August 1958, 27 ILR 117 (1963) (the "Aramco Arbitration" or what is sometimes referred to as the "Onassis Arbitration").

There was no choice of law (or governing law) clause in the original 1933 Agreement or in any of its amendments or supplements. The tribunal's decision on the choice of law to determine the merits of the dispute was that:

- The concession agreement was the fundamental law of the parties;
- That law must be supplemented by general principles of law, by the custom and practice in the oil business and by notions of pure jurisprudence;
- The sale and transport of oil as governed by custom and practice in maritime law and the international oil business would apply; and
- Public international law applied to matters such as transport by sea, the sovereignty of the State on its territorial waters and the responsibility of States for the violation of its international obligations.[26]

The cause of the dispute was Articles IV and XV of the Onassis Agreement, which provided that SATCO was to have a right of priority for the transport of oil for a period of thirty years, renewable for a further period by mutual agreement. Saudi Arabia argued that Aramco was not entitled to the absolute right to transport oil beyond Saudi territorial waters, since that right was not expressly provided in the concession agreement. It further argued that even if Aramco was conferred such a right, it was in breach of the concession by transferring those rights to a third party, i.e., their buyers. Aramco submitted that it had, by virtue of its agreement, the exclusive right to transport petroleum extracted by it to any place overseas and upon such terms as it chose.

The tribunal's conclusions were declaratory in nature, confined to the proper interpretation of the 1933 Agreement and to Aramco's exclusive rights under that agreement. The tribunal concluded that Aramco had the exclusive right under its Concession Agreement to transport its oil and products by land or by sea within Saudi Arabia, within the territorial waters of that State and on the high seas to all foreign countries overseas, as it chose, by such means and on such terms as it deemed advisable; and that the Onassis Agreement was in conflict with the Aramco Concession Agreement and was not effective against Aramco.[27] As a result, the majority of the tribunal held that Aramco succeeded in the arbitration.[28]

(2) ***Sidon Price Claim***

Aramco initiated one other arbitration, called the "Sidon Price Claim", against the Saudi government, which was settled at the last minute. It dealt with a pricing claim on the Tapline, which was owned by Aramco's shareholders. Saudi Arabia

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[26] *Id.* at 168–172.
[27] *Id.* at 226–228.
[28] *Id.* at 134.

claimed US $283 Million. The parties had appointed their arbitrators but settled at the last minute for US $180 Million.[29]

(3) *Samsung Engineering v. Saudi Arabia*

Samsung Engineering Co. Ltd., a South Korean firm, was the contractor in two power generation projects in Saudi Arabia. The first project was with Saudi Aramco, which it began in 2011 and completed in 2015, to construct a power plant to supply electricity to Saudi Aramco's Wasit gas processing facility. The second project was to build a $3 billion power plant to provide electricity to the Yanbu industrial complex for a partnership between Chinese investors and the Saline Water Conversion Corporation.[30]

Samsung initiated ICSID proceedings against Saudi Arabia pursuant to the Korea-Saudi Arabia bilateral investment treaty. The case[31] was registered by ICSID on 10 November 2017 and concluded when the tribunal rendered its award on 3 December 2021. There are no materials on this case on the ICSID website.

C. Kuwait

Kuwait granted its second oil concession to the American Independent Oil Company (**Aminoil**) in an area known as the "Kuwait-Saudi Arabia Neutral Zone" on 28 June 1948 for a term of 60 years. The Aminoil Concession Agreement was a "classic" oil concession agreement, which was modelled, article by article, on the Kuwait Oil Company (**KOC**) concession agreement, which was Kuwait's first concession.[32] This was the basis for the only published oil and gas arbitration case involving Kuwait.[33]

On 19 September 1977, Kuwait promulgated Decree Law No. 124, which terminated the Aminoil concession and nationalized all of Aminoil's assets in Kuwait. This Law provided that a committee appointed by the Government would assess any compensation due to Aminoil and any outstanding obligations it had to Kuwait. Aminoil protested the enactment of Law No. 124 and initiated its now famous arbitration, rather than submit itself to the committee provided

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[29] Interview with William L. Owen, former Aramco General Counsel in AMERICAN PERSPECTIVES OF ARAMCO, THE SAUDI-ARABIAN OIL PRODUCING COMPANY, 1930S TO 1980S 318–319 (Carole Hicke ed. 1995).

[30] Zoe Williams*, Saudi Arabia faces a second BIT claim within days, as Korean investor turns to arbitration*, IAREPORTER, 13 November 2017, https://www.iareporter.com/articles/saudia-arabia-faces-a-second-bit-claim-within-days-as-korean-investor-turns-to-arbitration/.

[31] *Samsung Engineering Co., Ltd. v. Kingdom of Saudi Arabia* (ARB/17/43), *available at* https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/17/43.

[32] Alan Redfern, *The Arbitration between the Government of Kuwait and Aminoil*, 55 BR YEARBOOK OF INTERNATIONAL LAW 65, 66 (1985).

[33] *Government of Kuwait v. American Independent Oil Company* (AMINOIL), Award of 24 May 1982, 66 ILR 518 (1982), and 9 YCA 71 (1984).

for under that law. This resulted in the most cited state investment arbitration case, which became a microcosm of the disputes that arose from Middle Eastern governments' demands for a greater share of and control over their resource revenue. The Aminoil case enunciated many of the fundamental principles accepted today in investor state disputes, such as the principle of "legitimate expectations" and the usage of stabilization clauses. It even referred to the concept of "lex petrolea" for the first time in any arbitration case. It is also one of the few published international arbitration cases that addressed the issue of "good oilfield practices".

Both parties claimed substantial sums of money from each other. The Government claimed: (a) more than US $32 million under the financial provisions of a Draft 1973 Agreement, (b) more than US $90 million applying the "Abu Dhabi Formula", and (c) more than US $18 million for liabilities of Aminoil assumed by the Government after its nationalization. In response, Aminoil claimed: (a) more than US $423 million that it paid under the terms of the Draft 1973 Agreement, which it argued it should not have paid since that Draft Agreement was ineffective, and (b) US $2,587 million for profits it lost as a result of the unlawful termination of its concession.[34]

The tribunal decided that the proceedings were subject to the mandatory provisions of French law, since it was the law of the seat of arbitration, while leaving it to the tribunal to prescribe procedural rules, insofar as French law permitted, on the basis of natural justice and principles of transnational arbitration.[35] The tribunal decided that on the substantive issues, Kuwaiti law applied to matters over which it was the law most directly involved. However, public international law and the general principles of law were also relevant.

The tribunal held that the stabilization clauses created "legitimate expectations" that must be taken into account in assessing damages. Compensation had to be assessed with regard to the legitimate expectations of the parties reflected in the "equilibrium" of the contract. Those expectations had been modified, and the equilibrium had shifted over the years so that the tribunal could not base its awards on the profits Aminoil would have made if the concession had run its full course on the basis of the 1961 financial arrangements. On the other hand, the amount of compensation was not to be restricted merely because other oil companies had accepted limited amounts by way of compensation. These precedents did not give rise to a general rule of law.[36]

For the first time in the literature, the phrase *lex petrolea* appeared. Kuwait raised the argument that a number of nationalizations of oil concessions had occurred in the Middle East, and elsewhere in the world, in the years 1971–77 that "had generated a customary rule valid for the oil industry—a lex petrolea

[34] Redfern, *supra* note 34, at 74–75.
[35] *Kuwait v. Aminoil*, *supra* note 35, at 559–560.
[36] *Id.* at 603–608.

that was in some sort a particular branch of a general universal lex mercatoria."[37] The Government maintained that the only compensation Aminoil was entitled to was the "net book value" of its redeemable assets as determined by those precedents, and was the reason why Kuwait, in the course of the 1977 discussions, had offered such compensation for the expropriation.

The tribunal rejected Kuwait's arguments on *lex petrolea* for reasons of fact and law. The tribunal first noted that such negotiations on compensation were both complex and uncertain. However, it was clear that, in addition to monetary compensation, a preferential relationship was often instituted or maintained between the State and the foreign entity concerned. That was particularly the case for major integrated concerns (such as BP and Gulf in the case of the KOC) where they "may have preferred compensation that had no relation to the value of their undertaking, if it was coupled with the preservation of good relations with the public authorities of the nationalizing State with, possibly, resulting prospects for the future giving promise of greater worth than the compensation forgone."[38] That was not the case for Aminoil, whose investment was a much more modest undertaking.

As regards the reasons of law, the tribunal found that the "conditions in which these compensation agreements were concluded were peculiar" and that they were made "under the pressure of very strong economic and political constraints." As a result, the compensation set in those cases "had nothing to do with law, and do not enable them to be regarded as components of the formation of a general rule of law."[39]

While Kuwait argued for net book value as the standard for compensation, Aminoil proposed valuating its expropriated assets using the discounted cash flow (**DCF**) valuation method. The tribunal first determined that the amount of compensation for the nationalization of Aminoil's assets was to be based upon international law. The tribunal determined that the award of compensation would be based upon the concept that Aminoil was entitled to a reasonable rate of return, noting that it "had come to accept the principle of a moderate estimate of profits, and this constituted its legitimate expectation."[40]

The tribunal did not base its assessment on any one method of valuation. It held that the DCF method was acceptable in principle, but applied a combination of methods based mainly on a going concern value. The tribunal awarded Aminoil a depreciated replacement value for its fixed assets and a going concern value plus a "reasonable rate of return", i.e., profits. It also made allowance for inflation and the fact that oil was a wasting asset.[41]

[37] *Id.* at 605.
[38] *Id.* at 606.
[39] *Id.* at 606–607.
[40] *Id.* at 608–610.
[41] *Id.* at 609–611.

The tribunal found that Aminoil was required to compensate the Government for liabilities assumed by the Government under Decree Law No. 124. This amount was calculated at US $32,228,500 under the 1973 Draft Agreement; US $71,963,000 using the Abu Dhabi Formula; and US $18,849,500 for third party liabilities. As a result, Aminoil owed the Government a total of US $123,041,000. The tribunal decided that the Government's claim that Aminoil had failed to observe "good oil-field practice", as required by the 1948 and later agreements, was not substantiated by the evidence, and thus did not award any damages for this claim.[42]

Finally, the tribunal determined, on the basis of legitimate expectations, that the value of Aminoil's fixed assets, taking into account depreciation and inflation, was US $206,041,000. The total amount due to Aminoil after deducting Aminoil's liabilities to the Government was therefore US $83,000,000. The tribunal awarded interest at 7.5% per annum, increased by 10% per annum to allow for inflation, giving a compound increase of 17.5% per annum added to that amount. The tribunal thus awarded US $179,750,764 to Aminoil.[43]

D. Qatar

Qatar has had several oil and gas investor state arbitrations. The first occurred between 1949–1951, which involved Petroleum Development (Qatar) Limited (**PDQL**). In 1935, Shaikh Abdullah bin Qasim al Thani, the Ruler of Qatar, signed his first oil concession agreement with the Anglo-Persian Oil Company (**APOC**), the predecessor to the Anglo-Iranian Oil Company, which covered the entirety of Qatar at that time. APOC assigned its rights and obligations under its concession agreement to PDQL in 1946.

(1) ***Petroleum Development v. Qatar***

The first dispute[44] revolved around the size of that concession area after Qatar issued a proclamation that its maritime territory extended to the continental shelf. This was similar to Proclamations being made by other countries within the Gulf region at that time. A similar dispute occurred in Abu Dhabi with PDQL's affiliate company, Petroleum Development (Trucial Coast) Limited. Both affiliated companies took the position that their concessions in Abu Dhabi and Qatar covered the entire area (or sovereign territory) in each country on both the land and sea, not only when the agreement was signed but also at the later date when the countries extended their maritime boundaries. The states took the position that either the concession did not extend into maritime waters, or if they did,

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[42] *Id.* at 594–599 and 611–612.

[43] *Id.* at 612–613.

[44] *Petroleum Development (Qatar) Ltd. v. Ruler of Qatar*, Award of April 1950, 18 ILR 161 (1951).

that the concession ended at the boundary of the territorial sea, which was only recognized in the 1930s as extending three nautical miles from the shoreline, in contrast to the continental shelf that extended much further into the Gulf. The tribunal decided that the area covered by the PDQL concession agreement included oil rights beneath the territorial waters of the Qatari mainland and its islands, but did not extend to the edge of the continental shelf. As a result, Qatar won this arbitration and subsequently awarded an offshore concession to another consortium.

(2) *Qatar v. International Marine*

The second arbitration[45] in 1953 involved the very offshore concession that Qatar had awarded to the International Marine Oil Company after winning its first arbitration against PDQL. It dealt with an interpretive issue of when annual rental payments of 1 million Rupees should be made under that agreement as a result of its termination. The Shaikh argued that the rental payment was in the nature of rent for the past twelve months, whereas the Company argued that the sum was a payment for the future twelve months. The Referee decided that the Company had the right to terminate the Agreement at any time it desired, except that the Company was to pay all amounts due from it to the Ruler up to the actual date of termination, including any apportioned part of the annual payment. He, in effect, decided in favour of the Shaikh.

(3) *Wintershall v. Qatar*

The next arbitration[46] in 1988 involved a consortium led by a German oil company called Wintershall against the state of Qatar. This was one of the first arbitration cases that dealt with the relatively new petroleum granting instrument of production sharing contracts (**PSC** or **PSA** or **EPSA**). The tribunal expressly rejected the companies' claim that Qatar had expropriated their contractual rights and economic interest under the EPSA. It also concluded that Qatar received no unjust enrichment in bad faith and that accordingly no payment was due to the companies on this claim. The tribunal refused the companies' request for a declaration that the EPSA was terminated. Accordingly, in the absence of termination by either party, the provisions of the EPSA continued to apply to both Qatar and the companies, including the obligation of the companies to pay rental. The EPSA remained in force and the relinquishment provisions of the EPSA were extended. In addition, the tribunal clarified how the cost recovery

[45] *Ruler of Qatar v International Marine Oil Company* (1953) 20 ILR 534.

[46] *Wintershall, A.G., et al. v. Government of Qatar*, Partial Award of 5 February 1988 and Final Award of 31 May 1988, 28 I.L.M. 795 (1989).

and production sharing principles of the EPSA applied to a non-associated natural gas project.

(4) ***Edison v. RasGas***

An Italian electric utility company, Edison, filed an ICC arbitration against RasGas in March 2011, seeking to reduce the amount it paid for liquified natural gas (**LNG**) under a long-term gas supply contract. At issue was the pricing mechanism of indexing gas supplies to oil prices. Qatar, which exports its LNG, adopted the same model set by Europe's two biggest pipeline exporters Russia and Norway by linking gas supplies to oil prices.

The unpublished award imposed a discount on the price Edison paid Rasgas for LNG, which according to Edison reflected the merits of its position. The impact on the 2012 accounts of Edison was approximately EUR 450 million.

(5) ***Barzan v. Hyundai***

Hyundai Heavy Industries Co. (**HHI**) was awarded a US $860 million project in January 2011 to build and install the topside, deck house and pipelines for offshore natural gas facilities for the Barzan Gas Company. The project was completed in April 2015.

Barzan filed an ICC arbitration against HHI on March 24 2018 demanding US $2.6 billion for damages resulting from gas leaks in the pipeline welds. It also sought to have the entire line rebuilt with corrosion-resistant alloy rather than carbon steel. HHI apparently settled this arbitration for US $222 million.

(6) ***QatarEnergy v. Total***

In September 2021, QatarEnergy filed an UNCITRAL arbitration against Total for alleged defects and deficiencies in the operation of the Al-Shaheen Oil Field, which is located in the offshore Block 5 EPSA that expired in July 2017. These defects apparently occurred during the operatorship of the Al-Shaheen field by Maersk Oil Qatar (**MOQ**). Total acquired the parent company of MOQ, Maersk Olie og Gas A/S, in April 2018 and thus inherited this potential liability. This arbitration is ongoing as of the date of publication of this report.

E. UAE

On 18th July 1949, the Anglo-Persian Oil Company, through its wholly owned subsidiary, the Petroleum Development Ltd., issued a claim[47] against the Sheikh

[47] *Petroleum Development Ltd. v. Sheikh of Abu Dhabi*, Award of September 1951, 18 ILR 144 (1951).

of Abu Dhabi regarding the areal extent of its oil concession, in which Lord Asquith of Bishopstone was appointed the umpire, or sole arbitrator. It had similar facts as the Qatar arbitration involving PDQL described above.

In deciding what law to apply in interpreting the Agreement, Lord Asquith stated the following:

> This is a contract made in Abu Dhabi and wholly to be performed in that country. If any municipal system of law were applicable, it would prima facie be that of Abu Dhabi. But no such law can be reasonably said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments.[48]

As a result, Lord Asquith rejected the use of *Shari'ah* in determining the areal extent of the concession. Instead, he applied the "modern law of nature", which closely resembled the English common law with which he was most familiar:

> ... albeit English Municipal Law is inapplicable as such, some of its rules are in my view so firmly grounded in reason, as to form part of this broad body of jurisprudence—this 'modern law of nature'.... yet on the other hand the English rule which attributes paramount importance to the actual language of the written instrument in which the negotiations result seems to me no mere idiosyncrasy of our system, but a principle of ecumenical validity.[49]

Lord Asquith's final holding was that the Sheikh retained the subsoil under the "Continental Shelf". Abu Dhabi thus won its case.

F. Libya

Libya enacted Petroleum Law No. 25 of 1955 to encourage foreign capital investment and to develop its natural resources, at a time when it did not have any petroleum production. That law established a framework for the exploration and production of petroleum using a concessionary system. Approximately 133 concessions were granted to American, British, German, Italian and French companies within the framework of that Petroleum Law by the end of the 1960s. The concessions that were issued were based on a template or model contract referenced in the Petroleum Law.

On 1st September 1969, the Revolutionary Command Council, headed by Colonel Muammar el Qadhafi, overthrew King Idris and his government in a *coup d'etat* and announced the formation of the Libyan Arab Republic. This new

[48] *Id.* at 149.
[49] *Id.* at 149.

regime first assured foreign investors that there would be no policy changes and that they would continue to honour their contractual obligations. However, various measures contrary to this promise were subsequently taken, which were justified by Qadhafi as protecting Libya against imperialism and achieving the nationalistic goals of the revolution. Oil companies were subjected to gradual measures restricting rights granted in the concession agreements, ultimately resulting in complete nationalization of all of their physical assets and concession rights in Libya, despite the Petroleum Law and their concession agreements providing that "the contractual rights expressly created by this concession shall not be altered except by mutual consent of the parties."

The result was the initiation of three well known oil and gas arbitrations through the 1970s. They were the BP, TOPCO and LIAMCO arbitrations, all of which had similar contract terms, very similar facts, and virtually identical issues of law. Each award confirmed the basic tenet that states cannot disregard duties to foreign private persons.

(1) ***BP v. Libya***

The Libyan Government promulgated Decree No. 115 on 7 December 1971 nationalizing BP's interest in Concession 65. BP started arbitration proceedings[50] on 11 December 1971, contending that the nationalization amounted to a unilateral and unacceptable repudiation of the Concession Agreement. As the Libyan Government did not respond to the notice of arbitration, BP applied to the President of the ICJ for the appointment of a sole arbitrator, who nominated Judge Lagergren, President of the Court of Appeal for Western Sweden, as the sole arbitrator.

Judge Lagergren found that the nationalization of BP's property, rights and interests constituted a fundamental breach of the concession and was a total repudiation of the agreement. He also found that the Government's actions a) were arbitrary and discriminatory, b) violated public international law because it was made for purely extraneous political reasons, and c) were confiscatory because no offer of compensation had been made since the nationalization.

Judge Lagergren rejected BP's request for specific performance.[51] BP initially claimed damages in the order of £240 million.[52] By an agreement dated 20 November 1974, BP reached a full and final settlement with the Libyan Government of all outstanding disputes between them. Pursuant to that agreement, the Libyan Government agreed to make an immediate cash payment of approximately £17.4 million to BP. On receipt of that payment, BP agreed

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[50] *BP Exploration Company (Libya) Limited v. Government of the Libyan Arab Republic*, Award of 10 October 1973 and 1 August 1974, 53 ILR 297 (1979), V YCA 143 (1980).

[51] *Id.* at 354.

[52] *Id.* at 306.

to discontinue its arbitration proceedings against the Libyan Government and to withdraw all notices of rights given by it to third parties.[53] During the arbitration proceedings, BP had attempted to claim title of the oil produced from Concession 65, which the Libyan NOC had sold to third parties.[54]

BP made a claim against Nelson Bunker Hunt (its co-concessionaire) in the English courts on 2 May 1975. The case[55] wound its way through the English courts for nearly seven years. The House of Lords issued its final judgement in February 1982 confirming that Mr. Hunt had lost on all counts and that he owed BP i) a principal sum of US $10,801,534 with interest of US $4,774,289; and ii) a further principal sum of £5,666,399 with interest of £3,060,219, as originally decided by the trial judge.

After BP filed its claim in the English courts, Nelson Bunker Hunt filed a suit in the United States District Court in Dallas.[56] The Dallas court eventually rejected all of the grounds for the non-recognition of the English judgment advanced by Bunker Hunt, and concluded that under Texas law the English judgment was valid and enforceable.

(2) ***Texaco Overseas Petroleum Co. (TOPCO) v. Libya***

Texaco Overseas Petroleum Co. (Topco) and California Asiatic Oil Company (Calasiatic) initiated the second *ad hoc* arbitration[57] against Libya in response to the country nationalizing their oil concessions. The sole arbitrator, Professor R. J. Dupuy, held that:

a) The Deeds of Concession were contracts binding on the parties. They were of a contractual nature because they expressed an agreement of the wills of both the investor and Libya based on general principles of law, which was the case even if they were granted by a former government of Libya.
b) The Libyan Government had breached its obligations under the Deeds of Concession by nationalizing the companies interests in their concessions and was legally bound to perform those contracts and give them full effect.

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[53] *Id.* at 298.

[54] *BP Exploration Co. (Libya) Ltd. v. Astro Protector Compania Naviera S.A.*, Civ. Action No. 2852/71, Civil Court of Siracusa, Italy (Feb. 15, 1973), reprinted in 13 ILM 106, 114–116 (1974).

[55] *BP Exploration Co (Libya) v. Hunt* [1979] 1 WLR 783 (High Court), [1982] 1 All ER 925 (Court of Appeal), [1983] 1 WLR 232, [1983] 2 AC 352.

[56] *Nelson Bunker Hunt v. BP Exploration Company (Libya) Ltd.*, 492 F.Supp. 885 (1980), 580 F.Supp. 304 (1984), 756 F.2d 880 (5th Cir. 1985).

[57] *Texaco Overseas Petroleum Co. (TOPCO) and California Asiatic Oil Co. v. Government of the Libyan Arab Republic*, Award of 19 January 1977, 53 ILR 389 (1977), IV YCA 177 (1979).

c) There was no legal justification for the nationalization measures and in adopting them the Libyan Government had failed to perform its obligations under the Deeds of Concession.
d) The appropriate remedy was *restitutio in integrum* to be performed within five months. If the award were not to be implemented within the time period fixed, the matter of further proceedings was reserved.[58]

That arbitral award did not result in the two companies regaining their interests in their Concessions, i.e., *restitutio in integrum*. Instead on 27 September 1977, approximately eight months after the award, Calasiatic announced that it had reached an agreement with the Government of Libya under which it would receive a volume of crude oil equivalent in value to approximately US $76 million over a period of 15 months.[59] Texaco made a similar settlement. As a result, the Libyan Government provided Topco and Calasiatic with Libyan crude oil worth a total of $152 million. Both Topco and Calasiatic terminated the arbitration proceedings on that basis.[60]

(3) *Libyan American Oil Company (LIAMCO) v. Libya*

This third a*d hoc* arbitration[61] against Libya had similar facts with similar provisions in its disputed concession agreements as the BP and TOPCO arbitration cases. The arbitral award focused on some different issues, in particular on the calculation of damages, and as a result, reached some different conclusions from the two other *ad hoc* cases against Libya. The ICJ President appointed Dr. Sobhi Mahmassani, as the sole arbitrator. Professor Mahmassani was a Lebanese legal scholar and former judge, who was educated and trained in Islamic law, civil law and the common law.

LIAMCO[62] claimed that the Libyan nationalisation laws of 1973 and 1974 were politically motivated, discriminatory and confiscatory in nature, and constituted a denial of justice, a wrongful taking, an unlawful breach of contract

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[58] *Id.* at 511.

[59] *Id.* at 391.

[60] WALL STREET JOURNAL, Sept. 26, 1977, at 6, col. 4; N.Y. TIMES, Sept. 26, 1977, at 55, col. 1.

[61] *Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic*, Award of 12 April 1977, 62 ILR 140 (1977), also in VI YCA 89 (1981).

[62] LIAMCO was incorporated in Delaware, USA and was originally a wholly owned subsidiary of Texas Gulf Producing Company. In 1964, Texas Gulf Producing Company transferred its interest in LIAMCO to Sinclair International Oil Company, which, in turn, transferred that interest to its parent, Sinclair Oil Corporation. In 1969, as a result of the merger of the Sinclair into Atlantic Richfield Company (ARCO), LIAMCO became a wholly owned subsidiary of ARCO. In 2000, many years after this arbitration, ARCO was acquired by BP.

and were contrary to both the principles of the law of Libya and to the principles of international law.[63]

Professor Mahmassani found that concession rights constituted property, as they could be both corporeal and incorporeal, as long as those rights had a pecuniary or monetary value. He then held that:

a) The right of property, including the incorporeal property of concession rights, is inviolable in principle, subject to the requirements of its social function and public well-being.
b) Contracts, including concession agreements, constitute the law of the parties, by which they are mutually bound.
c) The right of a State to nationalize its wealth and natural resources is sovereign, subject to the obligation of indemnification for premature termination of concession agreements.
d) Nationalization of concession rights, if not discriminatory and not accompanied by a wrongful act or conduct, is not unlawful as such, and constitutes not a tort, but a source of liability to compensate the concessionaire for said premature termination of the concession agreements.[64]

LIAMCO had requested as its principle relief the restoration of its concession rights together with all the benefits accruing from such restoration (*restitution in integrum*). This was dismissed by the tribunal on a number of grounds, including that: a) it was impossible to compel a state to make restitution, b) this would constitute an intolerable interference in the internal sovereignty of states and c) it was practically unenforceable.[65]

Instead, the tribunal found that LIAMCO was entitled to indemnification for the lawful nationalization of its assets and concession rights. The tribunal held that, in total, Libya would have to pay US $79,882,677 plus interest and costs in compensation, which was significantly less than the US $250 million[66] that LIAMCO initially claimed.

LIAMCO sought to enforce its Award in the Swiss Federal Supreme Court, the United States District Court for the District of Columbia, the Svea Court of Appeals, Sweden and the French courts with minimal success.[67] In the end, LIAMCO and Libya concluded a settlement in March 1981, approximately four years after the issuance of the arbitral award, in which they entered into "a

[63] *Id.* at 167–168.
[64] *Id.* at 195–196.
[65] *Id.* at 196.
[66] *Id.* at 180.
[67] Robert B. von Mehren & P. Nicholas Kourides, *International Arbitrations between States and Foreign Private Parties: The Libyan Nationalisation Cases*, 75 AJIL 476, 546–548 (1981).

compensation agreement in accordance with the nationalization laws of Libya" resolving their dispute. LIAMCO agreed to terminate all legal actions to enforce the LIAMCO award in this agreement. The details on the amount and terms of this settlement were never made public.

(4) ***NOC v. Sun Oil***

Difficulties arose between the parties to this PSC in 1981 as a result of political tension between the United States and Libya. The American government first took steps to restrain the use of passports of its citizens travelling to Libya and then imposed economic sanctions. On 19 July 1982, the Libyan National Oil Corporation (**NOC**) filed a Request for Arbitration at the ICC Court of Arbitration[68] pursuant to Article 23.2 of the EPSA. The EPSA was governed by and interpreted in accordance with the laws and regulations of Libya, including the Petroleum law.

The Tribunal concluded that the U.S. passport order and the U.S. Export Regulations did not constitute for Sun Oil an event of force majeure within the meaning of Article 22 of the EPSA excusing the discontinuance of exploration for such time as such order or regulation remained in force, whether viewed separately or together.[69]

In its Final Award, the Tribunal decided on a majority basis that:

a) Sun Oil did not withdraw from the EPSA in 1982;
b) NOC did not repudiate the EPSA in 1982;
c) Sun Oil breached its contractual obligations in ceasing exploration in 1982 on the basis of a force majeure excuse which was found unjustified;
d) Sun Oil owed damages to NOC for an amount fixed at US $20 million on account of such breach (principal and interest included), and ordered Sun Oil to pay such amount to NOC;
e) All other claims were rejected; and
f) The Tribunal ordered Sun Oil to pay 60% and NOC to pay 40% of the arbitration proceedings, which were a total amount of $702,400. All other costs, including attorney fees, were borne by the parties that incurred them.[70]

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[68] *National Oil Corporation (Libya) v. Libyan Sun Oil Company*, ICC Case No. 4462, First Award of 31 May 1985, 29 I.L.M. 565 (1990), and Final Award of 23 February 1987, 29 I.L.M. 601 (1990), 16 YCA 54 (1991). The Opinion and Order of the United States District Court for the District of Delaware, issued March 15, 1990, enforcing the Award but staying execution of the Judgment pending compliance with U.S. Libyan Sanctions Regulations, appears at 29 I.L.M. 718 and 743 (1990).

[69] *Id.* at 591–600.

[70] *Id.* at 623.

(5) *Trasta and LERCO v. NOC and Libya*

Trasta Energy, a UAE registered firm that is a subsidiary of the Al Ghurair group of companies in Dubai, entered into a joint venture with Libya's National Oil Corporation in 2009 to operate a 200,000 barrels-per-day oil refinery at Ras Lanuf on Libya's Mediterranean coastline. The joint venture between the NOC and TRASTA was formed under a shareholder agreement and was called Libyan Emirates Oil Refining Company (**LERCO**). LERCO and NOC had then entered into a Feedstock Supply Agreement (**FSA**) for the supply of crude oil to the refinery.

In 2013, the refinery closed following various disputes between the joint venture partners. Both Trasta and LERCO brought four different contract-based ICC claims against NOC in relation to the refinery's shutdown, the first two cases in 2013[71] and the second two in 2019.[72] Trasta alleged breaches of its shareholder agreement with NOC, while LERCO alleged breaches of the FSA in which NOC was to supply crude oil to the refinery. The first two ICC cases were heard by two different tribunals under the ICC Rules and concluded in 2018.

NOC won the first LERCO case, with LERCO obligated to pay NOC over US $115 million plus interest, which according to NOC amounted to over US $ 132 million up to 28 February 2021. On 23 February 2021, the Paris Court of Appeal declined to annul most of this award. NOC reported that the Paris court confirmed that award, upheld the arbitral tribunal's decision confirming LERCO's ongoing contractual take-or-pay obligation and ordered LERCO to pay 100,000 euros in costs for the Paris court proceeding.[73]

The second pair of cases were filed at the ICC by Trasta and LERCO in 2019, arising from the same feedstock supply agreement and shareholder agreement. The first of these two arbitrations that dealt with the shareholder agreement was decided in 2021. In a statement published online on February 25, 2021, NOC announced that it was ready to exercise a call option in the shareholder agreement and acquire Trasta's 50% stake in LERCO, after the tribunal upheld its right to do so. The second LERCO case that dealt with the FSA is pending as of the date of publication of this report.

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[71] *Trasta Energy v. Libya National Oil Corporation*, ICC Case No. 19814/MCP (2013); and *Libyan Emirates Oil Refining Company (LERCO) v. Libya National Oil Corporation*, ICC Case No. 17958/MCP (2013).

[72] *Trasta Energy v. Libya National Oil Corporation*, ICC Case No. 24722/AYZ (2019); and *Libyan Emirates Oil Refining Company (LERCO) v. Libya National Oil Corporation*, ICC Case No. 24408/AYZ (2019).

[73] LIBYA HERALD, 1 March 2021.

In 2019, Trasta Energy pursued its dispute further by filing a claim against Libya under the Investment Agreement of the Organisation of Islamic Cooperation (**OIC**).[74] That treaty claim is still pending.[75]

(6) *Medco v. NOC*

Medco International Ventures Limited (**Medco**), a subsidiary of Indonesian oil and gas company MedcoEnergi, initiated an ICC arbitration against NOC on March 15, 2022, in order to "enforce its contractual rights under an Exploration and Production Sharing Agreement (**EPSA**) and to protect its right to benefit from its investment in Area 47".

According to Medco's website, it holds a 25% participating interest in the EPSA with NOC holding 50% and the Libyan Investment Authority 25%. Apparently, Medco initiated the arbitration in response to the NOC's alleged attempt to "circumvent its obligations under the EPSA and its further attempt to prevent Medco from fully participating in the development and exploitation of Area 47 by, instead, seeking to develop Area 47 for the NOC's sole benefit".

Medco is apparently seeking relief in the form of an order directing NOC to comply with its obligations under the EPSA or, in the alternative, damages for the losses incurred due to NOC's alleged EPSA breaches. This case is pending as of the date of publication of this report.[76]

G. *Egypt*

Egypt was the first country in the MENA region to begin using production sharing contracts in its petroleum sector. It also pioneered the export of gas to its neighbour, Israel, with whom it previously had poor relations. Both areas have resulted in disputes.

(1) *National Gas v. Egypt/EGPC*

National Gas Company entered into a gas supply contract in January 1999 with Egypt's national oil company, the Egyptian General Petroleum Corporation

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[74] *Trasta Energy v. State of Libya* (2019), *Ad-Hoc* UNCITRAL Arbitration Rules, Treaty Claim under OIC Investment Agreement.

[75] Luke Eric Peterson*, OIC round up: An update on pending arbitration cases lodged under the OIC Investment* Agreement, IAREPORTER, 11 August 2020, https://www.iareporter.com/articles/oic-round-up-an-update-on-pending-arbitration-cases-lodged-under-the-oic-investment-agreement/; and Damian Charlotin, *ICC case against Libya's oil company concludes with an award; parallel treaty case remains ongoing*, IAREPORTER, 3 March 2022, https://www.iareporter.com/articles/icc-case-against-libyas-oil-company-concludes-with-an-award-parallel-treaty-case-remains-ongoing/.

[76] Vladislav Djanic, *Libyan national oil company is facing new ICC claim*, IAREPORTER, 11 August 2020, https://www.iareporter.com/articles/libyan-national-oil-company-is-facing-new-icc-claim/.

(**EGPC**). A government decree cancelled the Egyptian currency's parity with the US dollar, which increased the financial burden upon National Gas. EGPC refused to bear these additional costs. As a result, National Gas filed a request for arbitration at the Cairo Regional Centre for International Commercial Arbitration (**CRCICA**) against EGPC. In an award dated 12 September 2009, the CRCICA arbitral tribunal ruled in favor of National Gas. However, that award was set aside in the courts of Egypt.

National Gas then moved to the French courts to enforce its CRCICA award. In an order issued on 19 May 2010, the President of the *Tribunal de Grande Instance de Paris* (First Instance Court of Paris) allowed enforcement of the award. On 24 November 2011, the *Cour d'appel de Paris* (Paris Court of Appeal) dismissed the claims raised by EGPC and upheld the enforcement of the CRCICA award.[77] During this time period, National Gas SAE filed a request for arbitration against Egypt at ICSID in March 2011.[78] The ICSID tribunal declined jurisdiction in its Award of April 2014 without considering the merits of the claim.[79]

(2) ***CTIP v. Egypt***

Several years later, CTIP Oil & Gas International Limited (**CTIP**) filed an ICSID claim[80] concerning a gas pipeline construction and operation agreement against Egypt on 17 September 2019 under the UAE/Egypt BIT. CTIP is the same UAE corporation that had a 90% ownership in National Gas SAE, which was unsuccessful in the above claim against Egypt. This ICSID arbitration is still pending as of the date of publication of this report.

(3) ***East Mediterranean Gas Disputes***

The East Mediterranean Gas Company (**EMG**) was established in Egypt on 19 April 2000 for the dual purposes of purchasing natural gas from Egypt and exporting it to Israel as well as building and operating a pipeline between Egypt and Israel (**EMG Pipeline**). EMG's shareholders were Mediterranean Gas Pipeline Ltd (28%), an Israeli company Merhav (25%), the Thai state

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[77] *Available online at* http://newyorkconvention1958.org/index.php?lvl=notice_display&id=396 (last visited 4 October 2022).

[78] *National Gas SAE v. Arab Republic of Egypt* (ARB/11/7), *available at* https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/11/7.

[79] Luke Eric Peterson, *As tribunal declines jurisdiction due to lack of foreign control of ICSID claimant, dispute over underlying Cairo arbitral award is not over*, IAREPORTER, 9 April 2014, https://www.iareporter.com/articles/as-tribunal-declines-jurisdiction-due-to-lack-of-foreign-control-of-icsid-claimant-dispute-over-underlying-cairo-arbitral-award-is-not-over/.

[80] *CTIP Oil & Gas International Limited v. Arab Republic of Egypt* (ARB/19/27), *available at* https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/19/27.

owned company PTT Energy Resources (25%), EMI-EGI LP (12%), and EGPC (10%).

The Egyptian General Petroleum Corporation and EMG signed a preliminary agreement for the sale of natural gas in 2000. Egypt gave a license to EMG to operate under a private tax-free zone regime in 2006 and the following year it extended EMG's tax-exempt status until 2025. EMG signed a General Sale and Purchase Agreement (**GSPA**) with EGPC and the Egyptian Natural Gas Holding Company (**EGAS**) on 13 June 2005. EMG then signed On-Sale Agreements with various customers in Israel, including the State-owned Israel Electric Corporation (**IEC**), which is Israel's largest electricity producer. EMG, EGPC/EGAS and IEC also signed a Tripartite Agreement in June 2005 to tie the major parties together.

The EMG pipeline operated without incident between 2008–2011. In 2012, the pipeline ceased operation due to the sabotage of its feeder pipeline in Sinai and gas shortages in Egypt. Egypt formally terminated its contracts with EMG and Israel in April 2012. This resulted in a number of lengthy and complex disputes in a variety of fora, including various arbitration institutions and courts. This included three commercial arbitration proceedings and two treaty based arbitrations.

EMG initiated two ICC arbitrations in 2011. EMG filed its first ICC arbitration in September 2011 against IEC to obtain declaratory relief in relation to the dispute that had arisen between them under their On-Sale Agreement as a result of EGPC/EGAS's supply failures. To ensure that liability for the resulting harm was properly allocated to EGPC/EGAS, EMG then launched a second ICC arbitration[81] in October 2011 against both IEC and EGPC/EGAS pursuant to the GSPA and the Tripartite Agreement. Both arbitrations were seated in Geneva. The first ICC arbitration was suspended by EMG and IEC, with those two companies coordinating their claims against EGAS in the second ICC arbitration.

The ICC tribunal awarded IEC over US $1.7 billion in damages and EMG over US $324 million in damages, plus interest and costs, for EGPC unilaterally cancelling the contract. EGPC and EGAS then appealed the tribunal's decision to the Swiss courts on a number of grounds, all of which were rejected, when the Swiss Federal Supreme Court upheld the tribunal's award against Egypt on 25 April 2017.

EGPC/EGAS contested the jurisdiction of the ICC tribunals, and in response, initiated an arbitration[82] against EMG at the Cairo Regional Centre for International Commercial Arbitration (**CRCICA**). That tribunal awarded EMG more than US $1 billion and ruled that EGPC and EGAS were entitled to a credit against that amount the sum of US $15 million and US $1.8 million

[81] *East Mediterranean Gas Company v. EGPC, EGAS and IEC* (ICC Case 18215/GZ/MHM).

[82] *Egyptian General Petroleum Corporation and Egyptian Natural Gas Holding Company v. East Mediterranean Gas S.A.E.,* (CRCICA Case 829/2012).

(plus interest), resulting in a net total of US $1.033 billion (plus interest) in damages awarded to EMG.

Some of EMG's shareholders initiated claims against the Arab Republic of Egypt under the Poland-Egypt bilateral investment treaty in an *ad hoc* UNCITRAL arbitration (**Maiman Arbitration**)[83] before the Permanent Court of Arbitration (**PCA**). The tribunal accepted jurisdiction over the dispute and found that Egypt had violated the Poland-Egypt BIT and that those violations constituted an unlawful expropriation. That tribunal stated that the issue of damages would be addressed following receipt of the CRCICA damages award, which did not happen.

A number of American companies and a German national, who were shareholders of the East Mediterranean Gas Company S.A.E., filed a claim at ICSID[84] on 2 May 2012 against Egypt under the Egypt-Germany and Egypt-U.S. BITs, and the ICSID Convention. Their initial claim was for US $882.6 million, which they subsequently lowered to US $635 million.

The ICSID Tribunal trifurcated the arbitration into three phases: jurisdiction, merits and quantum. It accepted jurisdiction over the American shareholders' claims and at the merit stage found that Egypt had unlawfully expropriated the claimants' property interest in the GSPA by unlawfully terminating the contract. The Tribunal subsequently issued a procedural order noting the discontinuance and conclusion of the proceeding as a result of a settlement amongst the parties. A decision on quantum and costs was never issued.

A settlement was reached in 2019 between Egypt and most of the claimants, under which Egypt agreed to pay IEC and EMG US $500 million over the course of 8.5 years as compensation for halting the gas supplies. The settlement cleared the way for gas exports from Israel's offshore Leviathan gas fields to Egypt.

In early 2019, PTT Energy Resources initiated a US $1 billion claim against five different instrumentalities of the Egyptian government under the Egypt-Thailand BIT before Egypt's administrative courts. Apparently, PTT Energy was not part of the settlement reached by the other shareholders of EMG, and as a result, brought its own claims against Egypt in the local courts.[85]

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[83] *Yosef Maiman and others v. The Arab Republic of Egypt* (PCA Case No. 2012/26).

[84] *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, and BSS-EMG Investors LLC v. Arab Republic of Egypt*, ARB/12/11: The decision on jurisdiction is dated February 1, 2016, while the decision on liability and heads of loss is dated February 21, 2017. Both decisions are *available at* https://www.italaw.com. They are not available on the ICSID website.

[85] Vladislav Djanic, *In a rare development, Egypt is facing BIT claims before local courts*, IAREPORTER, 21 July 2020, https://www.iareporter.com/articles/in-a-rare-development-egypt-is-facing-bit-claims-before-local-courts/.

(4) *Unión Fenosa Gas v. Egypt and UFG/SEGAS v. EGAS*

Union Fenosa Gas (**UFG**),[86] a Spanish registered company, filed its Notice of Arbitration[87] at ICSID against Egypt in February 2014 under the Egypt/Spain BIT regarding a Natural Gas Sale and Purchase Agreement dated August 1, 2000 (**SPA**) and related agreements. UFG entered into the SPA with EGPC, who later assigned its interest to EGAS. The SPA was governed by Egyptian law and provided for arbitration at the Cairo Regional Centre for International Commercial Arbitration (**CRCICA**).

UFG invested in excess of US $1.2 billion to build the Damietta LNG Plant. UFG established the Spanish Egyptian Gas Company (**SEGAS**), of which it owned 80%,[88] to develop and operate the Damietta Plant. SEGAS had entered into a Tolling Contract with EGAS, under which EGAS was obligated to make toll-or-pay payments to SEGAS regarding the delivery of natural gas. This contract was governed by English law and provided for arbitration at the ICC.

UFG alleged that EGAS blocked delivery of its contractually agreed gas supply to UFG and SEGAS while diverting it to other purchasers, most notably to the domestic electricity generation sector. UFG claimed that Egypt, through EGAS, EGPC and their affiliates breached its obligations under the Egypt/Spanish BIT. The majority of the Tribunal dismissed Egypt's allegations of corruption against UFG and denied its objections on jurisdiction.

The majority of the Tribunal awarded US $2 billion plus interest to UFG in August 2018. Egypt applied to ICSID to annul the award in January 2019. The ICSID annulment proceedings were discontinued in March 2021 as a result of the parties reaching a settlement. There were parallel arbitration cases that dealt with the contractual relationships under the SPA at the CRCICA[89] and under

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[86] UFG was originally owned 100% by Gas Natural Fenosa, the Spanish shareholder, who subsequently sold 50% of its interest in UFG to ENI Spa, an Italian energy company in 2003.

[87] *Unión Fenosa Gas SA v. Arab Republic of Egypt* (ARB/14/4), *available online at* https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/14/4.

[88] The remaining shares in SEGAS were owned by EGAS (10%) and EGPC (10%).

[89] *Union Fenosa Gas, S.A. v. Egyptian Natural Gas Holding Company*, CRCICA No. 896/2013. The first CRCICA Arbitration (896) was commenced by UFG against EGAS on 17 May 2013, claiming damages for the failure to comply with provisions for price adjustments under the SPA, in the amount of approximately US $9.7 million. This first CRCICA tribunal dismissed UFG's claims, in addition to dismissing a defence plea of corruption made by EGAS. A second CRCICA Arbitration (899) was commenced by UFG against EGAS on 30 May 2013 claiming damages for the failure to supply natural gas under the SPA, in the amount of approximately US $2.8 billion. The results of this second CRCICA arbitration are presently not in the public domain.

the Tolling Contract at the ICC Court.[90] The parties reached a settlement on all of these arbitrations.[91]

There was also a case in the Commercial Court of Madrid filed by the ENI-appointed UFG board members against UFG and the other board members of UFG appointed by the Spanish shareholder, Gas Natural Fenosa.[92] That case was also resolved by a settlement.

(5) *Petroceltic v. Egypt/EGPC*

Petroceltic filed an ICSID claim[93] against Egypt on April 4, 2019 under the Egypt/UK BIT. It claimed that EGPC failed to pay its debts and breached multiple gas sales agreements. The ICSID dispute was suspended as of June 2020. The ICSID tribunal ordered the discontinuance of the proceedings, which followed a settlement between the two parties.[94] Petroceltic also initiated parallel arbitration proceedings against EGPC in a contract based claim at the Cairo Regional Centre for International Commercial Arbitration (**CRCICA**). There are no reports on the status of the CRCICA case, which is presumed to have also settled.

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[90] *Spanish Egyptian Gas Company, S.A.E. v. Egyptian Natural Gas Holding Company*, ICC Case No. 19392/MD/TO. This first ICC Arbitration was commenced by SEGAS against EGAS on 11 April 2013 claiming toll-or-pay fees under the EGAS Tolling Contract, in the amount of approximately US $82.9 million. That ICC tribunal dismissed SEGAS's claim in its final award because SEGAS had absolutely assigned its rights under the Tolling Contract to its financing bank, HSBC, and as a result, was not entitled to recover the toll and pay amounts from EGAS. This ICC Arbitration was followed by a second ICC arbitration brought by HSBC against EGAS in February 2018, in its capacity as the financing bank and assignee of SEGAS under the EGAS Tolling Contract. The results of this second ICC arbitration are presently not in the public domain.

[91] Vladislav Djanic, *Egypt settles dispute over LNG plant, thus drawing line under $2+ billion Union Fenosa arbitration*, IAREPORTER, 28 February 2020, https://www.iareporter.com/articles/egypt-settles-dispute-over-local-lng-plant/; IAReporter, Battle over $2 billion award continues as Union Fenosa settlement falls through due to pandemic (24 April 2020); and Lisa Bohmer, *Renewed settlement leads to discontinuation of $2+ billion Egyptian gas case*, IAREPOTER, 14 March 2021, https://www.iareporter.com/articles/renewed-settlement-leads-to-discontinuation-of-2-billion-egyptian-gas-case/.

[92] *Rinaudo, et al. v. Unión Fenosa Gas, S.A., et al.*

[93] *Petroceltic Holdings and Petroceltic Resources Limited v. Arab Republic of Egypt* (ARB/19/7), *available online at* https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/19/7.

[94] IAReorter, Order of the Tribunal Taking Note of the Discontinuance of the Proceeding (15 September 2020); Damien Charlotin, *UK energy firm draws Egypt into dispute with EGPC, filing treaty and contract claims in relation to gas dispute*, IAReporter, 26 March 2019, https://www.iareporter.com/articles/uk-energy-firm-draws-egypt-into-dispute-with-egpc-filing-treaty-and-contract-claims-in-relation-to-gas-dispute/; IAReporter, After tribunal is constituted to hear Egypt claim, investors lodge a challenge to Brigitte Stern (12 December 2019); IAReporter, Gas sales arbitration against Egypt is discontinued at ICSID (16 September 2020), https://www.iareporter.com/articles/gas-sales-arbitration-against-egypt-is-discontinued-at-icsid/.

(6) ***IPR Wastani v. Dana Gas***

Dana Gas PJSC (**Dana**) entered into a Sale and Purchase Agreement (**SPA**) with IPR Wastani Petroleum Ltd (**IPR Wastani**) for the sale of its oil and gas assets in Egypt. Dana terminated that SPA with IPR Wastani on 22 April 2021 as the parties were unable to complete a number of conditions precedent to the transaction by the long-stop date of 14 April 2021. As a result, Dana retained the assets in Egypt. IPR Wastani disputed Dana's right to terminate the SPA and submitted a request for arbitration to the LCIA on 28 April 2021. Dana stated in a press release that the LCIA tribunal rejected IPR Wastani's claim in its entirety in an award dated 19 July 2021, concluding that Dana's termination of the SPA was valid.

H. Algeria

(1) ***Mærsk and Anadarko v. Algeria/Sonatrach***

In 2006, the Algerian government imposed a windfall profit tax on IOCs in Algeria in addition to the fiscal terms in their production sharing contracts (**PSCs**) in an effort to gain a greater share of the revenue from its natural resources. Anadarko Petroleum, an American oil company, along with its JV partner, Maersk Olie Algeriet, a Danish energy company, began an UNCITRAL *ad hoc* arbitration in February 2009 against Sonatrach in a contract-based claim under their PSC. Arbitral hearings were held in June 2011, without the UNCITRAL tribunal issuing a final award.

In parallel with the contract based claim, Maersk brought a treaty-based claim at ICSID[95] in July 2009 under the Danish/Algerian BIT, which was discontinued. The reason for the discontinuance of both the UNCITRAL and ICSID arbitrations was that Algeria decided to settle, which resulted in Anadarko receiving US $2.6 billion and Maersk US $900 million.[96]

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[95] *Mærsk Olie Algeriet A/S v. People's Democratic Republic of Algeria* (ARB/09/14).

[96] IAReporter, Treaty claim is latest salvo by Danish firm Maersk in Algerian windfall tax dispute (6 August 2009), https://www.iareporter.com/articles/treaty-claim-is-latest-salvo-by-danish-firm-in-algerian-windfall-tax-dispute/; and IAReporter, Settlement round-Up: Algeria settles windfall levy claims on eve of arbitral award (19 April 2012), https://www.iareporter.com/articles/settlement-round-up-republic-of-georgia-resolves-dispute-algeria-settles-windfall-levy-claims-on-eve-of-arbitral-award-and-venezuela-pays-for-a-nationalization/.

I. Jordan

(1) *Trans-Global v. Jordan*

This was the first MENA oil and gas case registered at ICSID in 2007.[97] It was filed under the Jordan/U.S. bilateral investment treaty). The dispute involved a Production Sharing Agreement entered into in April 1996 between Trans-Global Petroleum Jordan, Ltd. (**TGPJ**), a wholly owned BVI incorporated subsidiary of a U.S. company, Trans-Global Petroleum, Inc., and Jordan's Natural Resources Authority (**NRA**).

Trans-Global alleged that after it discovered oil, Jordan began a "systematic campaign to destroy the Claimant's investment", in which it did not want TGPJ, a "foreign drilling company", to participate in the exploitation of those deposits. It claimed that Jordan had interfered with its attempts to attract investors to fund the appraisal and development of its oil discovery. Instead, it was "forced" under duress to negotiate and to ultimately assign an 80% share in the PSA for "virtually no consideration" to a company called Porosity, which had no prior experience or expertise in oil exploration. Porosity was a start-up venture incorporated in Bermuda in 2006 at the time of the assignment and was owned by Sheikh Ayman Hariri.

The parties settled their ICSID case on 2 March 2009 with the tribunal registering the settlement as a consent award on 8 April 2009, without ruling on the merits or stating any settlement amounts. In parallel to the ICSID arbitration, Porosity had unsuccessfully pursued an injunction against Trans-Global in the courts of Texas. TGPJ and Porosity conducted an arbitration in Texas, in which TGPJ asserted counterclaims based on Porosity's non-performance under the Farmout Agreement and the JOA. The results of that arbitration are not in the public domain.

J. Morrocco

(1) *Corral v. Morocco*

The SAMIR Group (Société Anonyme Marocaine de l'Industrie du Raffinage) operated the only refinery in Morocco. In 1997, Corral Morocco Holdings AB, a wholly owned Moroccan subsidiary of Corral Petroleum Holding AB, acquired a 67.26% stake in the Samir Group. Corral Petroleum Holding AB is a Swedish company owned by Sheikh Mohammed Hussein Al Amoudi.

The SAMIR refinery started to have financial problems when Morocco began liberalizing and eliminating tariffs on refined oil product imports, which

[97] *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan* (ARB/07/25), *available at* https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/07/25.

negatively impacted SAMIR'S output and cash flow. Corral Petroleum Holding AB filed its ICSID claim against Morocco under the Morocco/Sweden BIT on 14 March 2018.[98] The claim is still pending as of the date of publication of this report.

(2) ***Carlyle Group v. Morocco***

Between February 2015 and August 2015, the Carlyle Group entered into a series of agreements with SAMIR. Those agreements provided that the Carlyle Group would purchase crude oil and petroleum products from SAMIR, which would remain in SAMIR's storage tanks in Mohammedia, Morocco, and that over time, the Carlyle Group would sell those commodities back to SAMIR.

The Carlyle Group, along with its related investment firms,[99] filed an ICSID claim against Morocco under the U.S./Morocco Free Trade Agreement (**FTA**) on 22 August 2018.[100] They are seeking approximately US $400 million in compensation. The arbitration was bifurcated to first address jurisdiction. The case on the merits was suspended until the bifurcated jurisdiction was decided upon.[101]

K. Oman

(1) ***Attila Doğan Construction v. Oman***

Attila Dogan Construction Inc., a Turkish construction company, was awarded a large oil and gas engineering and construction contract in October 2010 in an Omani oil and gas project. Attila Dogan alleged that local authorities took various steps to frustrate its performance under its contract so that the work

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[98] *Corral Morocco Holdings AB v. Kingdom of Morocco* (ARB/18/7), *available at* https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/18/7.

[99] The Carlyle Group L.P., Carlyle Investment Management L.L.C., Carlyle Commodity Management L.L.C., TC Group LLC, TC Group Investment Holdings LP, Celadon Commodities Fund LP, Celadon Partners LLC.

[100] *The Carlyle Group LP and Others v. Kingdom of Morocco* (ARB/18/29).

[101] Damian Charlotin, *U.S. private equity fund, Carlyle Group, puts Morocco on notice of investment claim under Free Trade Agreement*, IAREPORTER, 30 April 2018, https://www.iareporter.com/articles/us-private-equity-fund-puts-morocco-on-notice-of-investment-claim-under-free-trade-agreement/; Zoe Williams, *After encountering obstacles in local court and under insurance policy, Carlyle Group makes good on threat to sue Morocco under U.S. Free Trade Agreement*, IAREPORTER, 23 August 2018, https://www.iareporter.com/articles/after-encountering-obstacles-in-local-court-and-under-insurance-policy-carlyle-group-makes-good-on-threat-to-sue-morocco-under-us-free-trade-agreement/; and Lisa Bohmer, *Morocco's jurisdictional objections to Carlyle Group claims come to light; tribunal agrees to bifurcate proceedings*, IAREPORTER, 23 January 2020, https://www.iareporter.com/articles/tribunal-hearing-moroccan-commodities-dispute-bifurcates-jurisdictional-objections/.

would revert to the former Omani company on the job, Galfar, which resulted in the termination of its contract on 3 March 2012.

Attila Dogan issued a Notice of Dispute on 22 March 2013 to the Sultanate of Oman for a potential claim of US $182.7 million under the Oman/Turkey bilateral investment treaty.[102] It subsequently filed an ICSID claim[103] under the Oman/Turkey BIT against Oman on 21 March 2016, based upon an alleged expropriation of its investment by Petroleum Development Oman (**PDO**). A hearing on jurisdiction and the merits was held and the parties filed post hearing briefs in 2019. The tribunal issued a final award on February 1, 2021, which has not been reported. Attila Dogan filed an application for annulment on June 9, 2021, which is still pending as of the date of publication of this report.

(2) *Samsung Engineering v. Oman*

Samsung Engineering Co. Ltd., a South Korean firm, and its joint venture partner, Chiyoda, made a bid tender in 2013 for the upgrade of the Sohar oil refinery on Oman's northern coast, operated by state-owned Oman Oil Refineries and Petroleum Industries Company (**ORPIC**). On 20 July 2015, Samsung filed a claim[104] at ICSID against the Sultanate of Oman under the 2003 Oman/South Korea bilateral investment treaty. According to ORPIC, Samsung had committed an alleged "failure to meet their obligations under the tender." Apparently, Samsung had deposited a financial deposit as security during the tender process, which was called upon notwithstanding Samsung's failure to win the tender. The ICSID tribunal rendered its final award on 17th January 2018, which embodied a settlement between the parties, prior to the tribunal deciding on jurisdictional questions.[105]

[102] IAReporter, *Turkish investor in Oman puts government on notice of investment treaty arbitration* (26 March 2013); and Zoe Williams, *Turkish firm, Attila Dogan Construction, makes good on earlier threat to sue Oman*, IAREPORTER, 22 March 2016, https://www.iareporter.com/articles/turkish-firm-makes-good-on-earlier-threat-to-sue-oman/.

[103] *Attila Doğan Construction Inc. v. Sultanate of Oman* (ARB/16/7), *available at* https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/16/7.

[104] *Samsung Engineering Co., Ltd. v. Sultanate of Oman* (ARB/15/30), *available at* https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/15/30.

[105] Jarrod Hepburn, *Samsung files claim against Oman over refinery improvement project*, IAREPORTER, 22 July 2015, https://www.iareporter.com/articles/samsung-files-claim-against-oman-over-refinery-improvement-project/; and Luke Eric Peterson, *In a case with broader potential ramifications, arbitrators render award on BIT claim brought by jilted tender bidder Samsung against Oman – embodying parties' agreement to settle,* IAREPORTER, 19 January 2018, https://www.iareporter.com/articles/in-a-case-with-broader-potential-ramifications-arbitrators-render-award-on-bit-claim-brought-by-jilted-tender-bidder-samsung-against-oman/.

L. Tunisia

(1) *Lundin v. Tunisia*

Lundin Tunisia B.V. filed an ICSID claim[106] against Tunisia in October 2012 complaining of the Tunisian National Oil Company failing to make payments and tax enforcement proceedings against Lundin in the Tunisian courts. Lundin subsequently initiated another ICSID case[107] against Tunisia in July 2013, which was discontinued in September 2014. The tribunal held in December 2015 that *inter alia* Tunisia was liable to account for the NOC's debts under the guarantee instrument, and that compensation was due to Lundin.[108]

M. Yemen

(1) *Hunt Oil and Exxon v. Yemen*

In 1984, Hunt Oil Company of Dallas, Texas discovered the Alif oilfield on Block 18. Hunt partnered with Exxon. Sixteen years after the Alif discovery and four years before the expiry of the initial term, the parties began negotiating a five year extension of the PSA. The joint venture and the Ministry signed a renewal and extension agreement (**REA**) for a five year period. The Yemeni Parliament subsequently refused to ratify this and a related agreement.

Hunt and Exxon initiated an ICC arbitration[109] in 2005 against the Ministry of Oil and the Republic of Yemen arguing that the PSA was validly extended by the REA or in the alternative that the PSA had been extended on its old

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[106] *Lundin Tunisia BV v. Republic of Tunisia* (ARB/12/30), *available at* https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/12/30.

[107] *Lundin Tunisia BV v. Republic of Tunisia* (ARB/13/15), *available at* https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/13/15.

[108] Jarrod Hepburn, *In newly-released Lundin v. Tunisia ruling, arbitrators affirm jurisdiction over tax dispute and concede scope for a state to seek moral damages for reputational harm*, IAREPORTER, 17 November 2016, https://www.iareporter.com/articles/in-newly-released-ruling-arbitrators-affirm-jurisdiction-over-tax-dispute-and-concede-scope-for-a-state-could-seek-moral-damages-for-reputational-harm/.

[109] *Joint Venture (US) v. State W*, ICC Case No. 14108, Final Award, August 2008, *in* YEARBOOK COMMERCIAL ARBITRATION 2011, XXXVI, 135-201 (2011). Timothy Martin, *ICC Oil and Gas Cases in the MENA Region*, 25(2) ICC DISPUTE RESOLUTION BULLETIN 21 (2014); and Luke Eric Peterson, *Looking Back: Exxon and Hunt Oil failed to persuade ICC tribunal that lucrative Yemeni oil concession was extended despite lack of parliamentary ratification,* IAREPORTER, 20 October 2021, https://www.iareporter.com/articles/looking-back-exxon-and-hunt-oil-failed-to-persuade-icc-tribunal-that-lucrative-yemeni-oil-concession-was-extended-despite-lack-of-parliamentary-ratification/. Both local and international media reported at the time that Yemen had canceled the Block 18 PSA and that Hunt had commenced an ICC arbitration against Yemen in response.

terms, with a damages claim of US $1.6 billion equating to the volume of oil it would have been entitled to during the five year extension period.

In response, the government made counterclaims of US $8 billion on the basis that the joint venture had:

a) caused environmental damage to Block 18 that resulted from its operations;
b) breached its duty to act as a reasonably prudent operator;
c) failed to withhold and pay certain taxes in respect of its local and expatriate employees for several years while the PSA was in force;
d) recovered cost oil that it was not entitled to under the cost recovery mechanisms of the PSA;
e) failed to implement the required "Yemenization" of the local workforce by not training Yemenis to obtain technical and skilled positions; and
f) failed to pay invoices in respect of goods and services rendered prior to the expiry of the PSA, and sums due to its local employees upon termination of their employment.

In its August 2008 award, the tribunal dismissed the companies' claim for damages for breach of the extended agreement since no extension of the PSA had taken place. However, the tribunal found that the companies were entitled to compensation on the grounds of estoppel, under the form of actions or omissions, for an amount corresponding to the exploration costs incurred by them during the extension period through their reliance on the government's ambiguous and contradictory behavior.

The tribunal dismissed the government's counterclaims, holding that they were either unproved or wrong on the facts of the case. Interestingly, the counterclaims of the Yemeni government in this first case formed the template for its future claims and counterclaims against other oil companies who had operated and produced O&G in the country and who subsequently relinquished or terminated their PSAs.

(2) *Saba v. Yemen*

In the year 2000, Occidental Petroleum (a U.S. oil company) Adair International Oil and Gas (a Yemen owned company) and Saba Netherlands BVI entered into a PSA with the Yemeni Ministry of Oil. Adair subsequently forfeited its interest in the block, after which Occidental decided to withdraw. Saba, on the other hand, wanted to pursue the commercial development of the block on its own. The Yemen Ministry refused to approve the assignment of

Occidental's interest in the PSA to Saba. Saba filed for an ICC arbitration[110] in February 2010 seeking a declaration that the Ministry was in breach of the PSA and Yemeni law. The tribunal found in favour of Yemen.

(3) *Gujaret et al v. Yemen*

The Gujarat State Petroleum Corporation Limited, Alkor Petroo Limited and Western Drilling Contractors Private Limited (all Indian companies) acquired three almost identical production sharing agreements (**PSAs**) in 2008. Pursuant to the PSAs, the three companies undertook a Minimum Work Obligation for the First Exploration Period supported by a Minimum Expenditure Obligation for each PSA. The Minimum Work Obligations consisted of seismic and drilling work totaling US $42 million for the three blocks. The Minimum Expenditure Obligations were guaranteed by irrevocable Standby Letters of Credit in the total amount of US $42 million issued by the International Bank of Yemen. These letters of credit were backed by counter-guarantees issued by other banks in Germany and India.

The three companies contended that from January 2011, the security situation in Yemen deteriorated considerably, preventing them from accessing the blocks and carrying out operations. The Yemen government refused to accept that a force majeure event had occurred. The companies then attempted to terminate the three PSAs, which the government did not accept. The three Indian corporations then filed a request for arbitration at the ICC on 25 February 2013.[111]

The tribunal held that the overall deterioration of Yemen's security situation was sufficient to validly terminate the PSAs for force majeure. The tribunal concluded that the PSAs were only terminated in 2013 and that the mere declaration of force majeure by the companies did not suspend their obligation to pay the two annual bonuses to Yemen. The tribunal rejected all of Yemen's counterclaims.

Yemen subsequently filed a claim in the *Cour d'Appel de Paris* challenging the above Final Award. The results of that claim have not been reported. The

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[110] *Saba v. Republic of Yemen*, unpublished ICC Award dated 1 April 2013, as reported in James Loftis, et al, *Complexity and Commercial Disputes in Production Sharing Contracts, in* THE LEADING PRACTITIONERS' GUIDE TO INTERNATIONAL OIL AND GAS ARBITRATION 599–600 (James M. Gaitis ed. 2015).

[111] *Gujarat State Petroleum Corporation Limited, Alkor Petroo Limited and Western Drilling Contractors Private Limited v. Republic of Yemen and the Yemeni Ministry of Oil and Minerals*, ICC Case No. 19299, Final Award dated 10 July 2015. As disclosed in Petition to Confirm Arbitral Award, Case No. 1:16-cv-01383, U.S. District Court for the District of Columbia, filed on 29 June 2016. *See also* Ridhi Kabra, *Yemen's security situation warrants termination of production sharing agreements, but ICC tribunal draws adverse inferences against the State for failing to produce documents related to terrorism*, IAREPORTER, 6 July 2016, https://www.iareporter.com/articles/yemens-security-situation-warrants-termination-of-production-sharing-agreements-but-icc-tribunal-draws-adverse-inferences-against-the-state-for-failing-to-produce-documents-related-to-terrorism/.

Indian companies filed a Petition to Confirm the Arbitral Award in the U.S. District Court for the District of Columbia in June 2016. That court confirmed both the Final Award and the Indian companies' cost award in an Order and Default Judgment dated 3 October 2018.[112]

(4) *Reliance, et al v. Yemen*

Two other Indian companies, Reliance Industries Limited and Hood Energy Limited initiated a similar ICC arbitration[113] against Yemen concerning Blocks 34 and 37 in eastern Yemen. In a 2017 award, in common with the Gujarat case, the tribunal found that the investors had validly declared force majeure and affirmed the termination of the PSAs. The arbitrators also ruled that Yemen could not draw upon letters of credit due to alleged non-fulfilment of so called "minimum work obligations".

(5) *Yemen v. Dove, et al*

Dove Energy Limited entered into a PSA, effective as of 1998, with the Yemen Ministry of Oil and Minerals for Block 53 in the East Sarr region. The Yemen Oil & Gas Corporation, which is Yemen's NOC, was included as a carried interest party in the PSA. As a result of a number of transactions, Dove assigned most of its interest in the Block 53 PSA to DNO Yemen, Petrolin Trading Limited and MOE Oil & Gas Yemen Limited. All of the contractor parties, including the Yemen O&G Corporation, became parties to a Joint Operating Agreement (**JOA**) to conduct operations on the Block, with Dove named as the operator.

As a consequence of its financial difficulties, Dove attempted to resign as operator and withdraw from the JOA and PSA in November 2014. In January 2015, which was almost one year prior to its expiration date, DNO, Petrolin and MOE withdrew from the PSA and the JOA, reportedly citing civil unrest, the poor security situation, low oil prices, and the failure of the Yemeni government to address a requested license extension.

The Yemen Ministry of Oil and Minerals responded by initiating an ICC Arbitration in January 2015 against the four IOCs, while including the Yemen Oil & Gas Corporation as one of the respondents, as it was a named party in

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[112] Petition to Confirm Arbitral Award, Case No. 1:16-cv-01383, U.S. District Court for the District of Columbia, filed on 29 June 2016. Order and Default Judgment of U.S. District Court for the District of Columbia, dated 3 October 2018.

[113] Luke Eric Peterson, *Investigation: As Yemen's oil sector crumbles due to armed conflict, numerous arbitrations by Chinese, Indian and Western investors have quietly played out*, IAREPORTER, 3 August 2022, https://www.iareporter.com/articles/investigation-as-yemens-oil-sector-crumbles-due-to-armed-conflict-numerous-arbitrations-by-chinese-indian-and-western-investors-have-quietly-played-out/.

the PSA.[114] Similar to Yemen's counterclaim's in the *Hunt Oil* case, the Ministry claimed that the four IOCs took more oil than what they were entitled to and owed approximately US $115 million for over recovered costs, unpaid customs duties, unpaid bonuses, unpaid abandonment costs and damages in respect of breaches of the PSA, including the failure to conduct proper auditing and to provide all data and information to the Ministry.

An award was issued on 15 July 2019. The tribunal found that Dove was not entitled to withdraw from the PSA and JOA, while it found that DNO, Petrolin and MOE were, and that none of them assigned any of their rights and obligations to Yemen Oil & Gas Corporation. The tribunal also found that both the PSA and JOA were terminated in January 2015. The tribunal then determined that the four IOCs were jointly and severally liable for the Ministry's cost recovery claims in the amount of US $14.5 million and over US $14 million for other damages claims relating to the block's infrastructure. The IOCs were awarded US $600,000 for the Ministry's refusal to authorize the lifting of the IOCs' share of production sharing oil. The four IOCs filed an application for annulment of this award at the Cour d'Appel de Paris, which was rejected by that court.[115]

(6) ***DNO v. Yemen***

A Norwegian oil company, DNO operated two other Yemeni PSAs—Blocks 32 and 43. As it exited the country, DNO initiated separate ICC arbitrations naming the Yemeni Ministry of Oil and Minerals and the other block shareholders (who declined to join the case as co-claimants) as co-respondents. In the Block 32 case,[116] the co-respondents were TG Holdings Yemen and Ansan Wikfs Limited. In the Block 43 case,[117] the co-respondent was KEC (Yemen) Limited.

According to a 2021 disclosure to the US Securities and Exchange Commission by one of the co-respondents, Transglobe Energy, an award was rendered in the Block 32 case on March 31, 2021. Apparently, Yemen's Oil Ministry raised an array of claims/counter-claims, including for "accounting practices, environmental and asset integrity/retirement claims, claims related to payment of customs duties and penalties, claims related to amounts allegedly owing to third parties

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[114] Cosmo Sanderson, *Yemen wins damages over abandoned oil block*, GLOBAL ARBITRATION REVIEW, 1 August 2019, https://globalarbitrationreview.com/article/yemen-wins-damages-over-abandoned-oil-block.

[115] Damien Charlotin, *Paris Court of Appeal upholds award in favour of Yemen's oil and gas company, seeing no ground to set the award aside based on allegations that damages paid may reach terrorist organizations*, IAREPORTER, 11 October 2021, https://www.iareporter.com/articles/paris-court-of-appeal-upholds-award-in-favour-of-yemens-oil-and-gas-company-seeing-no-ground-to-set-the-award-aside-based-on-allegations-that-damages-paid-may-reach-terrorist-organizations/.

[116] ICC Case No. 22960/AYZ.

[117] ICC Case No. 22959/AYZ.

for employment and facilities usage claims, and claims related to the handover of the concession."

According to Transglobe, the final award "determined that the contractor parties, including TG Holdings, are entitled to their share of Production Sharing Oil that was lifted by MOM in the amount of $5 million. The award also determined that the contractor parties, including TG Holdings, are jointly and severally liable for certain costs in the amount of $6.5 million."

In the Block 43 arbitration, DNO sought declarations that its notice of termination of the Block 43 PSC was valid and that the company had no further financial liabilities, including in relation to issues of abandonment and decommissioning. Yemen raised a series of counter-claims, similar to the Block 32 arbitration, which were mostly dismissed. According to DNO's 2021 Annual Report, an arbitral award was rendered on February 18, 2020 "in DNO Yemen AS' favor for US $6.8 million (almost entirely dismissing the US $131 million counterclaim of the MOM)."

The tribunal held that there was a right for DNO to relinquish the block, and that the company had properly done so. As such, the PSC was deemed properly terminated in the eyes of the tribunal. The tribunal meanwhile found that the Yemeni side had not cooperated with DNO in relation to the hand-over of the block, thus leading to a breach of Yemen's PSC obligations. The tribunal awarded a small sum (approximately US $200,000) on account of the Oil Ministry's lack of cooperation, as well as a larger sum (approximately US $3.3 million) for DNO's share of certain oil that had been produced by DNO while it was still the operator of the block, and while the PSC was still valid. The tribunal sided with Yemen in relation to whether DNO had failed to meet a PSC obligation to pay an annual bonus of approximately US $900,000.

The tribunal also determined that Yemen was entitled to undertake a cost recovery audit for the years 2014 and 2015 in relation to certain sums which it claimed to be owed. In 2021, Yemen initiated a new arbitration against DNO, asserting that it was owed US $17 million for over-recovered costs. This case is pending with a sole arbitrator as of the date of publication of this report.[118]

(7) ***Other Yemen O&G Arbitrations***

There are a number of other arbitrations between Yemen and various oil companies that held and operated PSA blocks in the country. They are all ICC arbitrations, since the relevant PSCs had similar dispute resolution provisions as described in the *Hunt Oil*, *Gujaret* and *DNO* cases. These disputes have been reported in the local and international media,[119] and included:

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[118] Peterson, *supra* note 113.
[119] *Id.*

- Block 14 (two arbitrations against Nexen/CNOOC, Occidental and CCC)
- Block 51 (Nexen/CNOOC)

Yemen has initiated some of these arbitrations; while some of the companies, similar to the Gujaret case, filed requests for arbitration seeking a declaration that the termination of their PSA was valid. Whether Yemen was a claimant or respondent, it relied upon the same list of claims/counterclaims as detailed in the *Hunt Oil* case. The largest amount of damages being sought by Yemen in these cases arose out of its cost recovery and environmental/abandonment claims against these companies.

V. COMMERCIAL DISPUTES

Reported MENA commercial oil and gas arbitration cases have only emerged since the turn of this century. A review[120] was conducted of oil and gas arbitration cases at the ICC Court that arose from the MENA region between the years 1988 and 2012. There were only 11 ICC oil and gas cases from the MENA region. The amounts in dispute ranged between US $4 million and US $10 billion. There was one state investment dispute, which was the Hunt Oil case in Yemen and which is described above. The remaining ten cases were commercial disputes between companies involving:

- Three service contracts for seismic/drilling
- Three construction infrastructure claims
- Four sales contracts for crude oil, natural gas or LNG

The cases have been redacted so as to maintain the confidentiality of the proceedings, including the parties involved and the country where the dispute occurred.

A. Service Contracts

(1) ICC Case 10302

This was a damages claim arising from a delay in performing seismic work. The Claimant sought damages to cover the financial harm it suffered as a result of Respondent's failure to provide working equipment in time. The Tribunal rejected Respondent's argument that it was prevented from fulfilling its obligations by events of force majeure, including bad weather, chaos in the shipping industry, the Ramadan and customs difficulties, as they were foreseeable or had been taken into account by the parties.

[120] Martin, *supra* note 109.

The majority of the Tribunal found that the Claimant was entitled to reimbursement of expenses incurred to cover Respondent's inadequacies as well as liquidated damages. The dissenting arbitrator considered the former should be included within the liquidated damages and subject to the cap applicable to such damages.

(2) ICC Case 11579

This arbitration involved two drilling contracts in a North African state. The Respondent was the operator of an oil/gas concession and was incorporated in that state. It had entered into the contracts with Claimant, a drilling rig contractor from East Europe.

The Claimant demanded payments due under the contracts and damages for breach of those contracts. The Respondent raised various defences and counterclaimed that the Claimant was in violation of the host country's law and therefore in breach of the contracts. The Tribunal found that the Claimant was entitled to demobilize its rig under the first contract since its invoices had not been paid and that the Respondent could not prevent such demobilization. However, the Tribunal refused the claim for damages to compensate the Claimant for Respondent's unlawfully preventing the demobilization of the rig, as there was no proof that the rig would have been used profitably elsewhere. The Tribunal also found that the Claimant was entitled to suspend drilling under the second contract due to Respondent's failure to give necessary instructions and to terminate the contract due to Respondent's failure to pay its invoices. The Tribunal dismissed the Respondent's counterclaims.

(3) ICC Case 13686

Claimant, a company incorporated in a Middle Eastern state, entered into a contract for the supply of drilling equipment and services to Company X, not a party to the arbitration. Under an assignment agreement, the benefit of this contract was assigned to Respondents, two Caribbean companies with offices in the same Middle Eastern state, which wished to use the equipment to drill wells in the said state. Both the drilling contract and the assignment agreement were governed by French law.

In its arbitration claim, the Claimant demanded payment of its outstanding invoices. Respondents counterclaimed damages for losses suffered as a result of the road blockage. The Tribunal found that Respondents were not justified in terminating the assignment agreement. It rejected the Claimant's claim for standby fees as the delay was largely due to its failure to provide information and rejected its claim for lost revenues, which would have put it in a better position than if the assignment agreement had not been terminated. Overall,

the Tribunal accepted claims that were consistent with the parties' contractual undertakings while rejecting those not supported by sufficient evidence.

B. Infrastructure Contracts

(1) ICC Case 13777

This was a construction claim for delayed damages where i) the Respondent's delay in performance was caused by the imposition of trade sanctions on its U.S. parent and ii) the Claimant attempted to include the Respondent's U.S. parent (who was not a signatory to the contract) in the arbitration. The Claimant was a contractor for the construction of a gas injection plant in a MENA country that was subject to U.S. trade sanctions. The Respondent, a European subsidiary of a U.S. company, agreed to supply Claimant with a "bespoke and critical piece" of equipment for the plant.

The Tribunal found that there was no basis in English law to justify including the parent company as a party to the arbitration. It affirmed the basic rule under Article 2 of the New York Convention that in arbitration (unlike court proceedings) only those who are parties to the arbitration agreement expressed in writing can appear in the arbitral proceedings either as claimants or defendants.

In its second award on the merits of the claim and the amount of damages, the Tribunal ruled on the Respondent's liability for the consequences of the delay caused by its repudiation of the contract and the reasonableness of the actions undertaken by Claimant to mitigate its loss. The Tribunal ruled in favour of the Claimant using a classic analysis of English damages law, based upon the application of *Hadley v. Baxendale* principles.

(2) ICC Case 13790

The Respondent was a West European company who was the primary engineering, procurement and construction (**EPC**) contractor for the design/build of an oil refinery in a Middle Eastern country. The Claimant was incorporated in that country and was one of its subcontractors who was responsible for the design, build and supply of materials for civil works on the refinery. The Claimant sought an extension of time to complete the works and compensation for costs caused by delays and disruption, which it alleged were due to Respondent. The Respondent accused Claimant of breach of contract and sought liquidated damages as provided in the subcontract. It also argued that the Claimant had forfeited its right to claim for reimbursement of costs as it had failed to comply with statutory and contractual notice requirements.

The Tribunal analysed the evidence submitted and found that both parties bore responsibility for the lack of adequate programming and for the project's

delay and disruption. In its award, the Tribunal stated that any scientific assessment of the respective responsibility of each Party and their individual contribution to the total damage was "utopian". The Tribunal determined the responsibility of each of the Parties for the delay and disruption on the basis of a rough percentage allocation and on the preponderance of the facts.

(3) ICC Case 16198

Claimant, a construction company in a Middle Eastern state (State E), entered into an EPC agreement to construct facilities required by a South-East Asian oil producer (Respondent) for offshore oil production in a Middle Eastern state (State F) neighbouring State A, pursuant to an agreement with Company X. The dispute arose out of delays and changes in the works to be performed under the parties' contract. The Claimant had a long list of claims, including recovering unpaid invoices, wasted expenditures, additional expenses, liquidated damages that it alleged to have been wrongfully deducted by Respondent, an insurance deductible for which it denied liability, and compensation for the cashing of a performance bond. Respondent contended that it had paid all monies due and that Claimant was responsible for the delays.

The EPC contract's governing law clause provided that "The construction validity and performance of this Agreement and legal relations of Parties thereto shall be governed by the laws of [State E] and/or [State F]." Given the above language, the Tribunal had to decide whether it was more appropriate to apply one body of law versus the other, or to apply both bodies of law. The expert opinions submitted by both parties made it clear that for certain issues, there would be a different outcome depending on the body of law applied. Under those circumstances, the Tribunal took the view that it was necessary to decide to either apply [State E] law or [State F] law, but not both. The Civil Codes of both countries had a similar principle that if the parties had different domiciles, the law of the state where the contract was concluded was applicable. The Tribunal therefore decided that the dispute should be determined in accordance with the applicable principles of the law of State E, since the contract was signed or "concluded" in State E.

With regard to wasted expenditure, the Tribunal found that the contract required Claimant to give timely notice, but that Respondent's lack of candour and good faith meant that it too was partly responsible. The Tribunal found that Respondent did not suffer any claimable loss as a result of the delay attributable to Claimant and that it therefore was not entitled to withhold liquidated damages. With respect to the performance bond, the Tribunal noted that the calling of a bond without ascertaining the maximum amount of potential losses is not an acceptable commercial practice and reflected a lack of good faith on the part of Respondent, entitling Claimant to damages.

C. Sales Contracts

(1) ICC Case 8198

The dispute involved a number of identical crude oil sale contracts between the Claimant (a MENA government), as seller, and the Respondent (a West European company), as buyer. There were a number of claims and counterclaims that arose as a result of the buyer's vessels failing to arrive at the loading terminal within the agreed loading date range and therefore failing to take delivery of the oil on time. This had a number of knock-on effects to the seller, for which it claimed damages. These included storage charges and price differentials.

The Respondent buyer argued that the date range agreed upon referred to the arrival of the vessels, not to the loading of the cargo. The Tribunal found that, regardless of the name given to the period, what was important was that the vessels arrived within the agreed upon dates. This had not been the case and had caused a delay in loading, which made Respondent/Buyer liable for storage charges and price differentials. Respondent/Buyer argued that the contractual provisions relating to storage charges and price differentials were a kind of penalty and that any indemnity resulting from their application could be due only if it had acted fraudulently or in error. Considering the provisions to be conventional damages, the Tribunal found that Respondent/Buyer was not exonerated from paying them under the applicable law of the Middle Eastern state.

(2) ICC Case 10351

This case dealt with a disagreement on the proper application of an indexation price formula for the purchase of liquefied natural gas (**LNG**) under a long-term LNG sales contract. The Claimant, a MENA state gas company, was the seller of the LNG and the Respondent, a West European company, was the buyer.

The parties repeatedly modified the pricing clause for the LNG in a number of contract revisions. They initially indexed the price to competing products such as natural gas, then the price of crude oil, then the price of natural gas based on an FOB breakeven price of a basket of crude oils. The last revision provided for a pricing formula that included a correction factor. It used the arithmetic average during the semester preceding the quarter for the average price per barrel of crude oils from eight different countries, as published by the Platts Oilgram Price Report. Platts subsequently modified the formula for calculating FOB breakeven prices, which resulted in higher prices. Claimant objected to the use of a parameter based on the Platts' revised formula and demanded a return to the previous formula and the refund of overpaid amounts. Rather than issue a final and binding award, the Arbitral Tribunal ordered the parties to negotiate a revision of the correction factor within a three month period, so that the formula could properly set the price.

(3) ICC Case 13898

This was an arbitration between two state owned companies, one from East Europe and the other from a MENA country. The Claimant (the East European company) as a buyer entered into a long-term gas sales contract with the Respondent (the MENA company and the seller). The contract contained a price revision clause, allowing the price to be revised in the event of an unforeseen change in market circumstances, and a price reduction clause, allowing the price to be reduced in the event that the gas delivered was not of the required quality.

The Tribunal found that i) the market conditions for a price revision were met and that ii) Claimant was precluded by the parties' agreements from claiming deficient quantity and quality. The Tribunal considered the law applicable to the merits of the case, which was stated as the "relevant trade usages and general principles of law" in the governing law clause. Both parties agreed that there was no need to determine the proper law of the contract and that it was only necessary to take account of relevant trade usages and general principles of law. The Tribunal therefore interpreted and applied the provisions of the Contract (which in its opinion were sufficiently clear) in the normal way, i.e. by looking at the Contract from the point of the view of the parties and by giving the words used by them a plain and ordinary meaning so as to arrive at their presumed intentions.

(4) ICC Case 15051

This was a dispute about the contracted volumes and applicable prices in two long-term natural gas sales contracts. The Claimant was a MENA state owned company who was the producer/seller of the gas and the Respondent was a Western European company who was the buyer. The Tribunal had to first decide on i) whether the stated Annual Contract Quantity (**ACQ**) was an annual maximum volume and whether the Claimant was not obligated to supply more, and if so ii) the price that the Claimant could charge for any additional volumes it delivered above the ACQ.

The Tribunal determined that the Claimant's interpretation of the ACQ was correct. The ACQ was used to establish the annual maximum quantities that the Claimant was obligated to deliver. The Contract Hourly Rate ("**CHR**") was instead used to establish the maximum capacity of the pipeline by defining the maximum hourly volumes the seller would agree to deliver for any contractual year. This was done based on a purely mathematical computation of applying an 85% Load Factor to the ACQ.

The Tribunal had to then decide whether the conditions stated in the contracts were met for i) an ordinary price review and ii) an extraordinary price review based on hardship. The Arbitral Tribunal decided that i) it would consider the three markets referred to in the price review clauses without giving

a preference to the [destination country] market evolution (as argued by the Respondent), ii) the Claimant]'s proposed formulae including the four segment was valid and reflected the market evolution, and iii) the Claimant's claim on the ordinary price review was admitted. The Tribunal finally found that an extraordinary price review based on hardship was justified only if the changes in the Brent oil price could not be considered to have been part of the parties' shared assumptions when entering into the contract.

VI. CORRELATION BETWEEN NUMBER OF ARBITRATIONS AND AMOUNT OF RESERVES

The amount of proven oil and gas reserves is a good indicator of a country's long-term production rates and therefore the amount of its petroleum activity and related business transactions generated over a sustained period.[121] Long-term business activity and transactions inevitably generate disputes. One would therefore assume that there would be some correlation between the amount of proven oil and gas reserves and the number of oil and gas disputes over time from one region of the world to another. However, that is not the case with regards to the MENA region when compared to the rest of the world. It is not even close.

The MENA region has had between half to two-thirds of the world's proven oil reserves and between 40% and 50% of the world's proven gas reserves at different times over the last half century.[122] There have not been an equivalent percentage of investor state or commercial oil and gas arbitrations coming out of the MENA region compared to the rest of the world during that time period.

The ICSID statistics are a good reflection of the number of investor state disputes in the world, which would include the MENA region. Oil and gas cases from the MENA region make up a little more than 5% of the total ICSID global caseload from the oil, gas and mining sector, which is significantly less than the percentage of global oil and gas reserves located in that region. In contrast, Central and South America had less than 10% of the world's oil reserves for

[121] There is never a direct annual correlation because of geopolitical, economic, technological and logistical reasons over different time periods. Examples are: Saudi Arabia's policy of maintaining 1 to 2 million barrels of daily production in spare capacity to stabilize global markets; economic sanctions imposed upon Iran; regional conflicts in Libya, Iraq, Syria and Yemen; technology advances in fracing and horizontal drilling in the United States; pipeline constraints; etc. However, over time, there is generally a correlation between proven oil and gas reserves with a similar percentage of global production, revenue and business activity.

[122] These percentages change over time with technology advances, fluctuating oil prices and what companies can reasonably recover based upon existing economic and operating conditions at the time of the estimate.

most of that period[123] while generating approximately one-third of the world's oil and gas investor state disputes during the same time period.[124]

Similarly, the ICC statistics are a good reflection of the number of commercial oil and gas arbitrations in the MENA region compared to the rest of the world. Given the confidential nature of most commercial arbitrations, it is not possible to accurately track every oil and gas arbitration everywhere, but the ICC database provides a good indication of where these arbitrations are occurring. There were 450 oil and gas arbitrations in total at the ICC Court during the time period in which the review of the ICC commercial cases in the MENA region was conducted. There were only 11 oil and gas cases from the MENA region.[125] That was less than 3% of the total ICC oil and gas arbitration cases during that time period. Once again, there was no correlation between the amount of oil and gas reserves located in the MENA region and the number of commercial oil and gas arbitrations generated from that region, compared to the rest of the world.[126]

The ICC oil and gas cases that were awarded over the last two decades from the MENA region covered a wide range of oil and gas disputes with a high degree of complexity. However, there were a small number of them considering the size of the oil and gas industry in the region. This could reflect a number of reasons, including i) local companies being less litigious in nature than the global industry, ii) the dominance of national oil companies in the region, which encouraged the settlement of claims rather than using arbitration, or iii) requirements to use local courts, rather than international arbitration.

Why is there a disconnect between the large oil and gas reserves and related business activity in the MENA region and the relatively small number of oil and gas arbitrations it generates? Is it because investors in the region prefer not to

[123] BP Statistical Review of World Energy (1980–2020). For most of the last fifty years, the percentage of proven oil reserves in Central and South America was between 4% and 7% of the global total. The reserve estimates for Venezuela began to increase significantly in 2008 as a result of recognizing the economic viability of its heavy oil deposits based upon the rapid increase in the oil price at that time, which resulted in Central and South America having an estimated 19% of the world's proven oil reserves by 2010. That percentage has subsequently dropped along with the dramatic drop in oil prices in 2014 and 2020.

[124] As of July 2022, ICSID had 905 concluded and pending arbitration cases in its registry, with 215 of those cases coming from the oil, gas and mining sector, which made up 23.8% of ICSID's total caseload. Within that sector, twelve cases were from the MENA region, which resulted in them making up 5.6% of the total ICSID caseload from the oil, gas and mining sector. Another perspective is that within the same time period, ICSID had registered 100 cases against countries in the MENA region but only 15 concerned disputes in the oil, gas and mining sector (of which 12 were O&G cases), i.e., 12% compared with 23.8% for the ICSID caseload overall.

[125] Martin, *supra* note 109.

[126] Countries in the MENA region had up to 67% of the world's crude oil proven reserves and up to 52% of the natural gas proven reserves in the world during that time period. *See*: BP Statistical Review of World Energy (1988–2020).

use arbitration to resolve their disputes? There is some validity to this explanation since there has been a long tradition in the MENA region for parties to use *sulh* (settlement) and *musalaha* (reconciliation) to settle their disputes, rather than the courts or arbitration. However, it could be because there are a number of structural reasons for the relatively few oil and gas arbitrations in the region.

One factor is that IOCs were generally prevented from investing in major oil and gas fields in the region since the nationalizations between the 1950s and 1980s. Instead, it was the large NOCs that made those investments. No IOC investment meant that there could not be investor state disputes in those countries. There have been a few investor state arbitrations at ICSID over the last decade, but they have been in countries such as Tunisia, Oman, Jordan and Egypt,[127] which have smaller reserves and therefore, a need to attract foreign capital and technology. There will be a few more in the future, but not on the scale seen since the historical cases described in this chapter.

There have been limited commercial oil and gas arbitrations in the region for related reasons. The large NOCs, such as Saudi Aramco, NIOC, Kuwait Petroleum Corporation, Abu Dhabi National Oil Company, etc., dominate petroleum activity in their respective countries. They are the only game in town. Consequently, service, equipment and infrastructure providers wanting to build long term business operations are inclined to settle with the NOCs rather than arbitrate. Similarly, the big NOCs want reliable and quality contractors to be there when they need them. It can only do that by encouraging mutually beneficial, long-term relationships, which would preclude disputes.

The large NOCs use sophisticated contracts that lock-in counterparties with detailed obligations. These contracts often require the use of local courts, local arbitration institutions or *ad hoc* arbitration under national arbitration laws, rather than international arbitration institutions. Finally, many of the commercial contracts generated by NOCs and performed in-country stipulate that the governing law is the domestic law of that country. In the MENA region, that law is either *Shari'ah* or is based upon it. That choice of law has an impact on the dispute process and the kinds of damages awarded.

VII. CONCLUSION ON MENA O&G ARBITRATIONS

The historical oil and gas arbitrations from the MENA region were instrumental in establishing many of the key principles now used in investor state disputes. They illustrated how contracts between states and private parties can be "internationalized" by making them subject to public international law and international arbitration. In doing so, the tribunals chose not to exclusively apply local law, which was primarily *Shari'ah*. This was a reflection of these early

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[127] There have been a number of investor state arbitrations, which are contract based, at the ICC involving Yemen that are described above.

arbitration agreements that either did not provide for a governing law, or were ambiguous in setting its terms. Those tribunals did, however, establish other key principles in international investment law, including:

- The sanctity of property and contracts;
- A prohibition on unjust enrichment;
- States have the right to expropriate investments;
- However, in doing so, states must compensate an investor for its loss; and
- Legitimate expectations can be used in determining damages.

Disputes involving the original oil concession agreements in the Middle East had finished by the 1980s. The disputes after that period began to look similar to oil and gas disputes in the rest of the world, both for commercial and investor state disputes. They were, however, not as many on a relative scale to the rest of the oil and gas world. That was for both the reserves and production rates of the MENA region compared to other hydrocarbon producing areas, and the relative volume of commercial and investor state cases.

Nevertheless, the diversity and complexity of oil and gas arbitrations in the MENA region are on a world class level. That is because some of the most sophisticated players in the international oil and gas industry operate in the region, who bring that knowledge base and skill set to both their transactional and disputes work.