

Militant Attacks in the Niger Delta and Possible Investor-State Arbitration

By James Chalker*

Attacks against oil and gas installations, government forces and foreign workers in the Niger Delta have proven a continuing source of frustration to international oil companies.¹ While for many years attacks were often dismissed as petty criminality, they have been growing in firepower and sophistication, and there has been little evidence that the Nigerian authorities can halt the attacks and make the Delta a stable place for extracting hydrocarbons. Hopes that off-shore production would prove safer were dashed this summer when militants launched an attack against Shell's Bonga oil facility, far from the coast.² These attacks have caused Shell and other oil producers in the region to periodically shut down production reaching hundreds of thousands of barrels of oil per day.

Foreign oil companies operating in Nigeria include Shell, ExxonMobil and Chevron, along with other smaller international operators, including Total and Agip. Typically oil and gas projects are undertaken as joint ventures between the Nigerian National Petroleum Corporation and one or more foreign oil companies. What options might a foreign oil company have to seek redress from the Nigerian government for attacks upon its operations?

At least some international operators may be able to turn to international arbitration to secure financial compensation for their losses. Nigeria has bilateral investment treaties (BITs) with the United Kingdom, the Netherlands, France and Italy, but not the United States. BITs allow nationals, both real persons and legal persons (i.e., companies) whose home country is one of the parties to the treaty to bring an arbitration claim against the country hosting their investment. Both the UK and Netherlands BITs³ contain provisions obligating the country hosting the investment, in this case Nigeria, to provide protection and security.⁴

Looking to a past investor-state arbitration, *American Manufacturing & Trading Company v. Zaire* (AMT), interpreting a protection-and-security clause can help one evaluate the potential for a similar claim involving the Nigerian petroleum sector. Near the end of the Mobutu Sese Seko regime in Zaire some unpaid and hungry troops went on periodic looting rampages in which they destroyed businesses, including a factory and warehouse belonging to the American Manufacturing & Trading Company (AMT). AMT brought a claim under the US-Zaire BIT arguing the attacks violated Zaire's obligation to afford its investment protection and security. Zaire, which was collapsing into civil war and anarchy, barely participated in the arbitration process but the arbitral tribunal ruled on AMT's claim, finding that its rights to protection and security had been violated and awarding the investor \$9 million in damages.

The tribunal's decision interpreted the protection and security obligation very favorably for an investor. It decided that this BIT provision constituted an obligation of vigilance, requiring the host state to take all measures necessary to ensure that the investment received full protection and security. Even though the destruction in this case was caused by uniformed soldiers, the tribunal did not consider this a necessary component of Zaire's responsibility to provide protection and security. Zaire would have been responsible for the damage caused to AMT's investment even if the looting and destruction had been done by "any burglar whatsoever." Finally, unlike many BIT provisions the standard for host-state responsibility, unlike some BIT provisions, is not based on discrimination. According to this tribunal, it is not enough for a state hosting an investment to argue that its own nationals or nationals from a third state also had their property destroyed or its own nationals or third-state nationals also received no compensation for the destruction. In other words, the obligation to provide protection and security is not based on a national-treatment or most-favored-nation standard.

Does this mean that international oil companies, which can bring themselves under the protection of a BIT, will automatically be able to make a successful arbitration claim? Not necessarily. There are some things for such companies to consider before filing an arbitration request. Zaire's participation in the arbitration process was abortive at best. There are several arguments that a skilled attorney could make to both attack the reasoning of the AMT tribunal and to differentiate the situation during Zaire's descent into turmoil and Nigeria today. International arbitration does not operate like a common-law system; tribunals are not obligated to interpret similar treaty provisions the same way that previous tribunals have interpreted those provisions. Zaire's treatment of its soldiers arguably precipitated their looting sprees and the government did nothing to reign in its soldiers once the attacks started. Nigeria's national and state governments have attempted to stop militant attacks in the Niger Delta, even if without

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much success. A tribunal reviewing the situation would have to decide first as a matter of law that the protection-and-security obligation was one of vigilance, and if it agreed with the standard recited by the AMT tribunal, whether Nigeria, as a factual matter, had met that standard. As a business matter, a foreign oil company would have to consider the implications for engaging in future hydrocarbon extraction in Nigeria, if it decided to file an arbitration claim.⁵ If a time comes, though, when a foreign oil company decides that the violence in the Delta is such that its investment in the region has lost all value, one could expect that company to pursue a protection-and-security claim in international arbitration.

As far as Nigeria and other African states with energy resources, the AMT decision should serve as a warning for them when they contemplate entering into new BITs or extending current BITs. They might take all reasonable efforts to prevent attacks on foreign energy assets and still be held liable for the damage suffered by foreign investors. Militant attacks in the Niger Delta could serve as a model for disaffected groups throughout Nigeria and beyond. African states need to be realistic in their appraisal to prevent or control such attacks. Countries hosting foreign energy investors might want to weigh the potential for BITs to increase the attractiveness of the investment climate against the potential liability they may suffer as a result of militant attacks. Given the current value of hydrocarbons, oil companies ever-pressing need to book more reserves, and increased competition from Asian investors, it has to be wondered just how valuable a BIT is in making an energy investment in an African country more attractive than it already is.

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We look forward to your participation in these new initiatives.

Footnotes

¹ <http://allafrica.com/> is a good source for information about events in the Niger Delta. Untapped: the Scramble for Africa's Oil, John Ghazvinian, Harcourt Books, 2007, Chapter 1 provides an informative account of the situation in the area, especially regarding the Movement for the Emancipation of the Niger Delta (MEND).

² "Nigeria attack shuts Shell offshore oilfield," Financial Times, 19 June 2008.

³ These two treaties are selected, as the most likely sources of an arbitration claim. Note that it is possible that a company which one might associate with a non-BIT country, like the United States, might through incorporating a subsidiary be protected by another country's BITs. The Netherlands is often an attractive place for incorporating subsidiaries for both tax reasons and BIT protection.

⁴ This term is used generally here, the language in each treaty varies somewhat.

⁵ It should be noted in this regard that Shell filed an arbitration request regarding the awarding of a concession over a year ago. This would appear to not relate to the protection and security obligation. To date Shell has not pursued the appointment of a tribunal, suggesting that for now, this arbitration request is more of a negotiating strategy than a litigation strategy.