

REFLECTIONS ON NIGERIA V. PROCESS &
INDUSTRIAL DEVELOPMENTS LIMITED

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Following an unprecedented ruling by an English High Court on an application in the Nigeria v. Process & Industrial Developments Limited (P&ID) case granting Nigeria an extension in time to bring challenges under sections 67 and 68(2)(g) of the English Arbitration Act 1996 (“the 1996 Act”), this article reflects on the implication of the public policy elements of fraud relied on by Nigeria. The article interrogates the reasoning behind the Court’s decision, especially the allegations of fraud in the procurement of the underlying contract - a Gas Supply and Processing Agreement (‘GSPA’). The article also explores themes of economic justice arising from Nigeria’s reliance on fraud as a basis for challenging the arbitration award. Drawing on a recent decision of the Mozambique Constitutional Council over illegally procured commercial loans, the article argues that there are parallels and opportunities for learning between the two cases, especially relating to the role of civil society organisations (CSOs) in holding public officials accountable and exposing fraudulent deals with corrupt foreign officials. The reflection concludes with some thoughts about ongoing debates in Nigeria over whether adopting a national arbitration policy constitutes a viable option for reducing dependence on foreign courts and arbitration tribunals as forums for settling disputes with foreign investors.

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I. BACKGROUND CONTEXT

A protracted legal dispute between Nigeria and Process & Industrial Developments Limited (P&ID) over a purported repudiation by Nigeria of a Gas Supply and Processing Agreement (“GSPA”) entered into on January 11, 2010 has attracted significant attention in both domestic and international media.¹

The terms of the GSPA required Nigeria to arrange for the supply of wet gas (natural gas) to P&ID’s gas processing facility, which it intended to build in Nigeria. In return, P&ID would process the wet gas and return approximately 85% of it to the Government of Nigeria (‘the Government’) in the form of lean gas.² This arrangement required the Government to construct pipelines and arrange facilities to transport the wet gas to P&ID’s facilities. The Government did not meet its part of the agreement for three years.³

1. See, e.g., TVC News Nigeria, *P&ID Fine: Another Crucial Win Against the Vulture-Fund Backed Firm - AGF Malami*, YOUTUBE (Sep. 16, 2019), <https://www.youtube.com/watch?v=O85KgXNop-s&feature=youtu.be> (Weighing in on the P& ID case, Dr. Oludara Akanmidu discusses the fraud and collusion allegations in the P&ID Case. Also, critiquing the initial arbitral award issued by the London Tribunal, Yemi Candide Johnson, Senior Advocate of Nigeria, argues that the initial arbitral award was excessive.). See also *Nigerian Government ordered to pay \$9bn to private gas firm*, BBC (Aug. 16, 2019), <https://www.bbc.co.uk/news/world-africa-49377517> (Analysing the Nigeria v. P&ID case, the BBC discusses the dispute and the final arbitral award issued against Nigeria).

2. *Process and Industrial Developments Ltd. v. The Ministry of Petroleum Resources of the Federal Republic of Nigeria*, Part Final Award on Jurisdiction, ¶ 3 (2014), https://jusmundi.com/fr/document/decision/en-process-and-industrial-developments-ltd-v-the-ministry-of-petroleum-resources-of-the-federal-republic-of-nigeria-part-final-award-tuesday-3rd-june-2014#decision_5287 [hereinafter P&ID v. Nigeria 2014]. ‘Lean gas,’ also referred to as ‘dry gas,’ is “Natural gas that contains a few or no liquefiable liquid hydrocarbons.” *What is Natural Gas?*, NATGAS.INFO (Jan. 20, 2021), <http://www.natgas.info/gas-information/what-is-natural-gas>.

3. *Process and Industrial Developments Ltd. v. The Ministry of Petroleum Resources of the Federal Republic of Nigeria*, Final Award, ¶ 49 (2017), <https://jusmundi.com/fr/document/decision/en-process-and-industrial-develop->

Viewing this failure as a repudiation of the contract,⁴ P&ID commenced, in August 2012, an arbitration action against the Government before a London tribunal. In July 2015 the tribunal decided that the Government had repudiated the agreement by failing to meet its obligations.⁵ In 2017, the tribunal awarded damages to P&ID in the sum of \$6.597 billion with interest at the rate of 7% starting from March 20, 2013; the sum had increased to \$10 billion as of September 2020.⁶ If enforced, the Award would also create contingent liabilities for Nigeria because it poses a significant threat to Nigeria's economy, with the damages amounting to over 20% of the country's foreign exchange reserves as of December 2020,⁷ and 10% of the Total Public Debt Stock

ments-ltd-v-the-ministry-of-petroleum-resources-of-the-federal-republic-of-nigeria-final-award-tuesday-31st-january-2017#decision_5289 [hereinafter P&ID v Nigeria 2017].

4. Repudiation occurs where one of the parties to a contract demonstrates an intention not to continue with the contract. In effect, that party is unwilling or unable to perform their obligations under the contract. *See* Heyman v. Darwins Ltd. [1942] AC 356 [¶ 361] (Eng.) (Viscount Simon LC explaining the rudiments and legal implications of repudiation in contracts). In the P&ID v Nigeria arbitration action, P&ID “wrote to the Ministry alleging that it had repudiated the GSPA and accepting the repudiation.” *See* P&ID v. Nigeria 2014, *supra* note 2, at ¶ 6.

5. Process and Industrial Developments Ltd. v. The Ministry of Petroleum Resources of the Federal Republic of Nigeria, Part Final Award on Liability, ¶ 78 (2015), https://jusmundi.com/fr/document/decision/en-process-and-industrial-developments-ltd-v-the-ministry-of-petroleum-resources-of-the-federal-republic-of-nigeria-part-final-award-friday-17th-july-2015#decision_5288 [hereinafter P&ID v. Nigeria 2015].

6. Federal Republic of Nigeria v. Process & Industrial Development Ltd. [2020] EWHC 2379 (Comm) [¶ 2] (Eng.) [hereinafter Nigeria v. P&ID 2020]. The ‘Yukos Award’ of \$50 Billion USD awarded against the Russian Federation still holds the record for the largest damages award in international arbitration. Shearman & Sterling, *Hague Court of Appeal Dismisses Russia’s Attempts to Annul Yukos Awards* (Feb. 18, 2020), <https://www.shearman.com/news-and-events/news/2020/02/hague-court-of-appeal-dismisses-russias-attempts-to-annul-yukos-awards>.

7. Oludara Akanmidu, *Explainer: how Nigeria got hit with a \$9.6 billion judgment debt in London*, CONVERSATION (Sep. 10, 2019), <https://theconversation.com/explainer-how-nigeria-got-hit-with-a-9-6-billion-judgment-debt-in-london-122740>; (Akanmidu chronicles the series of events that resulted in the judgment debt awarded against Nigeria and also highlights the potential negative impact on Nigeria's foreign reserve). *See also \$9.6bn Judgment: Fraudulent target on our foreign reserve – FG*, NATION (Aug. 30, 2019), <https://thenationonlineng.net/9-6bn-judgment-fraudulent-target-on-our-foreign-reserve-fg/> (The article highlights the damaging effect of the judgment debt on Nigeria's foreign reserves. The Minister of Information and Culture Minister Lai Mohammed is quoted saying that “\$ 9.6 billion (about N3.5 trillion) translates to 20 per cent of the nation's foreign reserves.”).

for the third quarter of 2020.⁸

Recent developments in the case began with a judgment for enforcement of the arbitral Award granted by a London High Court in August 2019.⁹ Following that judgment, in December 2019, Nigeria applied to that Court for an extension of time to challenge the initial arbitral Award issued by the London tribunal.¹⁰ Nigeria asserted that it has a *prima facie* case of fraud against P&ID, which justifies the extension of time required to challenge the arbitral Award.¹¹ Nigeria's lead counsel, Mr. Howard QC, focused on three key aspects in his submissions. First, he argued that P&ID fraudulently obtained the GSPA by paying bribes to Nigerian government officials. Second, he argued that Mr. Quinn (the former chairman of P&ID) gave perjured evidence to the tribunal to give the impression that P&ID was able and willing to perform its obligations under the GSPA. Third, Mr. Howard asserted that Nigeria's counsel in the arbitration failed in bad faith to challenge Mr. Quinn's false evidence. Howard QC argued that the arbitration counsel for Nigeria had colluded with P&ID to defend the case thinly such that the tribunal would find in favour of P&ID.¹² Overall, he asserted that the GSPA was obtained by fraud as part of a larger scheme to defraud Nigeria.¹³

In an interesting turn of events, on September 4, 2020, the High Court granted Nigeria an unprecedented extension of time to bring challenges under sections 67 and 68(2)(g) of the English Arbitration Act 1996 ("the 1996 Act").¹⁴ The ruling on the application for extension of time by the English High Court case raises several important issues, some of which have been addressed in other explainers and commentaries.¹⁵

8. Nigeria's Total Public Debt Stock for the third quarter of 2020 stood at N32.223 trillion or USD84.574 billion. Debt Management Office Nigeria, *Press Release: Public Debt Stock As At September 30, 2020* (Dec. 31, 2020), <https://www.dmo.gov.ng/news-and-events/dmo-in-the-news/press-release-public-debt-stock-as-at-september-30-2020>.

9. *See* Process & Industrial Developments Ltd. v. The Federal Republic of Nigeria [2019] EWHC 2241 (Comm) (Eng.).

10. Nigeria v. P&ID 2020, *supra* note 6, at 80.

11. *Id.* at 184.

12. *Id.* ¶ 211.

13. *Id.*

14. *Id.* ¶¶ 274–77. *See also* Arbitration Act 1996, 1996 c. 23 (Eng.) [hereinafter 1996 Act].

15. *See* Chizaram Uzodinma, *Balancing the Principle of Finality of Arbitration Awards*

In this piece, we focus on the broader significance of the *prima facie* case put forward by Nigeria that “the GSPA, the arbitration clause in the GSPA and the awards were procured as the result of a massive fraud perpetrated by P&ID.”¹⁶ Nigeria further argued that “to deny them the opportunity to challenge the Final Award would involve the English court being used as an unwitting vehicle of the fraud.”¹⁷ In Part II, we reflect on the importance of the fraud allegations in the reasoning of the English High Court. In Part III, we explore some economic justice themes arising from Nigeria’s reliance on fraud as a basis for challenging the arbitration award. In particular, we argue that the investigation by the Nigerian Government into allegations of fraud in the procurement of the GSPA contract represents a ‘knee jerk’ reaction motivated by a growing realisation that the US \$10 billion awards may be enforced against Nigeria.

More importantly, drawing on a recent decision by the Mozambique Constitutional Council, we argue in Part IV that there are parallels and opportunities for learning between the Nigerian and Mozambican cases, especially pertaining to the role of civil society organisations (CSOs) in holding public officials accountable and exposing illegal deals with corrupt foreign conspirators.¹⁸ The paper ends with some thoughts on an ongoing debate among practitioners about Nigerian efforts to adopt a national arbitration policy. Calls for a national arbitration policy have gained traction due to the latest ruling by the English High Court in the *Nigeria v. P&ID* case, granting Nigeria

and the Public Policy of Censuring Illegality: The Case of Nigeria v. P&ID, AFRONOMICSLAW (Oct. 7, 2020), <https://www.afronomicslaw.org/2020/10/06/balancing-the-principle-of-finality-of-arbitration-awards-and-the-public-policy-of-censuring-illegality-the-case-of-nigeria-v-pid/> (highlighting the judgment’s “contribution to jurisprudence on determining the point at which an allegation of illegality will be allowed to threaten the finality of an award.”).

16. *Nigeria v. P& ID* 2020, *supra* note 6, at ¶ 3.

17. *Id.*

18. See James T. Gathii, *Introduction: Sovereign Debt Under Domestic and Foreign Law: Lessons from the Mozambique Constitutional Council Decision of May 8, 2020*, AFRONOMICSLAW (Aug. 3, 2020), <https://www.afronomicslaw.org/2020/08/03/introduction-sovereign-debt-under-domestic-and-foreign-law-lessons-from-the-mozambique-constitutional-council-decision-of-may-8-2020/> (summarizing key contributions by authors who wrote critical reflections on the May 2020 decision by the Mozambique Constitutional Council to the effect that non-concessional loans totalling USD 622 million borrowed from two London-based banks—Credit Suisse and Russian VTB—were illegal, null and void.).

an “unprecedented” extension of time.¹⁹ The article situates this debate within the broader argument about African countries’ dependence on foreign courts and arbitration tribunals as a forum for settling disputes with foreign investors.

II. THE IMPORTANCE OF FRAUD AND PUBLIC POLICY CONSIDERATIONS IN THE *NIGERIA V. P&ID* OUTCOME

Section 68 (2) (g) of the 1996 Act contains fraud and public policy considerations as criteria for challenging an arbitration award for serious irregularity. However, Nigeria’s significant delay in bringing this challenge within the statutory time limit (28 days as stipulated under the Arbitration Act) was a significant hurdle to surmount.²⁰ This is especially so, considering that speed and finality are deemed essential features of arbitration under the English Arbitration Act.²¹ Indeed, P&ID argued that given the length of time since the final Award was issued, it would be “unprecedented” for the courts to grant the extension of time requested by Nigeria.²²

The English Courts have generally been less inclined to grant extensions,²³ even in cases involving fraud. For example, Uzodinma points out that “. . . of the 8 cases cited by counsel (in the *Nigeria v. P&ID* case) involving an application for extension of time to challenge

19. *Nigeria v. P&ID* [2020], *supra* note 6, at ¶¶ 261–63.

20. By virtue of Section 70(3) of the Arbitration Act, a challenge brought under Section 68 must be filed within 28 days of the contested arbitral award. If there has been any arbitral process of appeal or review, the challenge must be brought within 28 days of the date on which the claimant was notified of the outcome. 1996 Act, *supra* note 14, § 70(3).

21. See Justice Eder, *Challenges to Arbitral Awards at the Seat*, Mauritius International Arbitration Conference (Dec. 15, 2014) 25-28, <https://www.judiciary.uk/wp-content/uploads/2015/10/Eder-Speech-Dec-2014.pdf> (analysing several cases decided in English Courts on the issue of challenges to Awards under the English Arbitration Act. Eder argues that patterns from these cases, which indicate a hesitancy of the Courts to usurp the jurisdiction of arbitration tribunals, “strongly underline the robust approach of the English Courts in supporting speed and finality in the arbitral process.”). See also *Terna Bahrain Holding Company WLL v. Bin Kamil Al Shamsi* [2012] EWHC 3283 (Comm), [2013] 1 Lloyd’s Rep 86 ¶ 27 (per Popplewell, J.) (Eng.) (Popplewell (at ¶ 27), commenting on the 28-day period given under the English Arbitration Act, argued that “This relatively short period of time reflects the principle of speedy finality which underpins the Act”).

22. *Nigeria v. P&ID* [2020], *supra* note 6, at ¶¶ 261–63.

23. See *AOOT Kalmneft v. Glencore* [2001] 2 All ER (Comm) 577, [2002] 1 Lloyd’s Rep 128 (Colman, J. at ¶ 52).

an award where fraud was alleged, 5 of them were refused either because the applicant was aware of the fraud and/or the fraud allegation was weak.”²⁴ These statistics underscore the significance of the decision reached by Sir Ross Cranston in this case.

A. *Navigating the Kalmneft Factors*

Drawing on the seven *Kalmneft* factors used to test whether to extend time limits for challenging an arbitration award,²⁵ Sir Ross Cranston appears to have been swayed by factor vii, which stipulates that the courts should take into consideration “whether, in the broadest sense, it would be unfair to the applicant for him to be denied the opportunity of having the application determined.”²⁶ Nigeria’s application would perhaps have failed if it were premised on the so-called

24. See Uzodinma, *supra* note 15. See also Eder, *supra* note 20 (Eder considered statistics for the period 2012–14, for applications brought before English Courts for serious irregularities under section 68 of the English Arbitration Act. He pointed out that “in 2012, there was a total of 7 challenges all of which were rejected; in 2013, there was (again) a total of 7 challenges of which only 1 was allowed and the remaining 6 were rejected; in 2014, there was a total of 8 challenges of which 2 were allowed and the remaining 6 were rejected”).

25. The Seven factors established by Justice Colman in *AOOT Kalmneft v. Glencore*, *supra* note 22, at ¶ 59, are:

- “(i) the length of the delay;
- (ii) whether, in permitting the time limit to expire and the subsequent delay to occur, the party was acting reasonably in all the circumstances;
- (iii) whether the respondent to the application or the arbitrator caused or contributed to the delay;
- (iv) whether the respondent to the application would by reason of the delay suffer irreparable prejudice in addition to the mere loss of time if the application were permitted to proceed;
- (v) whether the arbitration has continued during the period of delay and, if so, what impact on the progress of the arbitration or the costs incurred in respect of the determination of the application by the court might now have.
- (vi) the strength of the application;
- (vii) whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined.”

26. *Id.* at ¶ 59. The strength of the application (factor vi) can also factor into this unfairness point because Nigeria adduced more than sufficient evidence to establish a *prima facie* case of fraud. It was reported that 34 bundles of documents with hundreds of pages of evidence and thousands of pages of exhibits were submitted in this case, and in the related application for relief from sanctions to adduce new evidence in response to an enforcement application. See *Nigeria v. P& ID* [2020], *supra* note 6, at ¶ 4.

“primary” *Kalmneft* factors, i.e., factors (i)–(iii) discussed by the Court of Appeal in *Nagusina Naviera v. Allied Maritime Inc.*²⁷ However, while not entirely discrediting *Nagusina*, Sir Ross Cranston aligned with Judge Carr’s judgment in *Ali Allawi v. The Islamic Republic of Pakistan*²⁸ by noting that the weight given to each *Kalmneft* factor varies with the context of the particular case. The primary factors are therefore not necessarily of greater significance than the others. Overall, the Court based its decision in this extension application on the fact that Nigeria successfully established a “strong *prima facie* case” that the GSPA was procured by fraud.²⁹

This outcome raises further issues about the role of fraud in arbitration law. Although fraud is an established ground for challenging an arbitration award under the 1996 Act, allegations of fraud in the underlying contract cannot themselves constitute the basis for setting aside an arbitration award unless the fraud extends to the arbitration proceedings and Award as well.³⁰ Furthermore, based on the principle of separability,³¹ mere allegations of fraud in the procurement of the underlying contract will not invalidate the arbitration agreement that led to Nigeria’s challenge of the Award.³² In *Chantiers de l’Atlantique SA v. Gaztransport & Technigaz S.A.S.*,³³ the English High Court held that a party must establish a causal link between fraud and the Award itself to successfully set aside an award under § 68 (2) (g) of the 1996 Act.³⁴ It will therefore be interesting to see whether Nigeria’s allegations of fraud, perjured evidence given by Mr. Quinn, and dishonest conduct by Nigeria’s counsel in the arbitration proceedings will prove sufficient

27. [2002] EWCA Civ 1147, [2003] 2 CLC 1. See in particular the elucidations of Mance LJ at ¶ 39. See also *L. Brown & Sons Ltd. v. Crosby Homes (North West) Ltd* [2008] EWHC 817 (TCC), [2008] BLR 366 (per Akenhead, J.) ¶¶ 29–32 (Akenhead restates the dicta of Mance, L.J.).

28. [2019] EWHC 430 (Comm) ¶ 47.

29. In delivering the judgment, Sir Ross Cranston reiterated this point several times. See *Nigeria v. P& ID* [2020], *supra* note 6, ¶¶ 196, 210, 221, 225, 226, 260, 265, 267, 270, and 273.

30. See 1996 Act, *supra* note 14, § 68(2)(g).

31. According to Redfern & Hunter, “the arbitration clause in a contract is considered to be separate from the main contract of which it forms part and, as such, survives the termination of that contract.” See NIGEL BLACKBAY & CONSTANTINE PARTASIDES, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 117 (2015).

32. See 1996 Act, *supra* note 14, § 7. See also *Fiona Trust & Holding Corporation v. Yuri Privalov* [2007] EWCA Civ 20.

33. [2011] EWHC 3383 (Comm).

34. *Id.* ¶¶ 58–62.

to bring into question the integrity of the proceedings and the Award.³⁵ Given that these matters are yet to be determined in the pending application, the broader significance of this recent judgment by Sir Ross Cranston is perhaps the fact that Nigeria was able to convince the Court to depart from its conventional stance on extension requests. Success at this stage opens up the possibility that these broader issues may be heard.

III. ANY LESSONS LEARNED BY NIGERIA?

The details establishing the allegations of fraud in the procurement of the GSPA by P&ID are persuasive, to put it mildly. The alleged facts point to a series of fraudulent practices perpetrated by Nigerian senior government officials and public civil servants.³⁶ However, the Government itself appears keen to expose these corrupt practices to overturn this arbitration award. The obvious question is why these investigations were not carried out earlier. Changes in government and allegations of complicity and connivance between Nigeria's former lead counsel and P&ID during the arbitration proceedings were among the grounds adduced at the High Court by Nigeria to explain the delays.³⁷ Once the tribunal issued the adverse award, Nigerian anti-fraud agencies carried out a comprehensive, albeit delayed, investigation.³⁸ The level of detail outlined in Nigeria's application reminds us that anti-graft institutions can function effectively in Nigeria with the right motivation. In this case, the threat of a US \$10 billion Award motivated the Government to uncover the alleged fraud.

35. *In re Cheney Bros.*, 218 A.D. 652, 653 (App. Div. 1st Dept. 1926) (holding that "the question as to whether or not the contract was fraudulently induced raises an issue of fact which must be tried before the right to arbitration under the contract may be enforced. If the contract was voided by fraud, the arbitration provision therein falls.").

36. For details of the allegations adduced by Nigeria to substantiate the allegations of fraud and collusion *see* Nigeria v. P& ID [2020], *supra* note 6, ¶¶ 93–151.

37. In the High Court ruling, Sir Ross Cranston said: "In the result there is a possibility that Mr. Shasore [Nigeria's Lead Counsel] had been corrupted. At the least I accept Mr. Howard's submission that there is a prima facie case that Mr. Shasore made the payments to Ms. Adelore and Mr. Oguine to purchase their silence in relation to his conduct of the arbitration and settlement negotiations. There is therefore a prima facie case that the arbitration proceedings were tainted." *See* Nigeria v. P&ID [2020], *supra* note 6, ¶ 225.

38. Details of the investigation conducted by Nigeria's anti-graft Agency, the Economic and Financial Crimes Commission (EFCC), were a critical part of the evidence adduced by Nigeria in support of the application for extension of time filed before the English High Court in 2020. Nigeria v. P& ID [2020], *supra* note 6, at 82–151.

More importantly, as the twists in this scandal continue to unfold, are we likely to see more significant accountability from Nigerian government officials? Or are the culprits in the P&ID case mere scapegoats, exposed because they are dispensable? Has Nigeria exposed the allegations of fraud solely to overturn this arbitration award without any significant lesson learned or change in attitude towards the broader issues of economic injustice which led to the scandal in the first place? With cross-sections of the Nigerian populace expressing their frustration at the rising incidence of corruption by government officials, the P&ID scandal might be a watershed moment that tilts the scale favouring the vulnerable masses.³⁹ However, any meaningful and lasting change will require greater vigilance from the general public and civil society organizations (CSOs).

IV. PARALLELS TO AND LESSONS FROM MOZAMBIQUE?

Afronomicslaw recently held a webinar focusing on a landmark decision by the Mozambique Constitutional Council in May 2020. The Court overturned two non-concessional commercial loan agreements valued at approximately \$2.2 billion granted to two state-owned companies—Proindicus and the Mozambique Asset Management (MAM)—formed by the Mozambique government.⁴⁰ The loans, structured under three supply contracts, were intended for the construction of shipyards and naval repair facilities in Pemba and Maputo.⁴¹ The

39. A rather absurd example is the disappearance of N 36 million (approximately \$100,000) from the account of the Nigerian exam board for public universities. A clerk subsequently alleged that the money was stolen and swallowed by a snake. See Tolu Olanrewaju, *Snakes and monkeys are getting the blame for corruption in Nigeria*, (March 8, 2018), <https://theconversation.com/snakes-and-monkeys-are-getting-the-blame-for-corruption-in-nigeria-92779>. More recently, allegations of massive fraud and misappropriation of funds have been levied against the management of the Niger Delta Development Commission (NDDC). The NDDC was founded as an agency to reduce poverty and promote socioeconomic development. Yet, the agency has failed to meet its objectives despite the substantial funding it receives. See Kelvin Ebiri, *Outrage over fraud, rot in NDDC, Niger Delta*, THE GUARDIAN (July 18, 2020), <https://guardian.ng/news/outrage-over-fraud-rot-in-nddc-niger-delta/>.

40. See *Overturning Sovereign Debt for Violating National Law: Lessons from a recent Mozambique Constitutional Council Decision*, AFRONOMICS.LAW.ORG (Jun. 08, 2020), <https://www.afronomicslaw.org/2020/05/30/afronomicslaw-webinar-series/>.

41. See Joseph Hanlon, *Mozambique: Constitutional Council Rules Secret Debt Null and Void*, ALL AFRICA (May 14, 2020), <https://allafrica.com/stories/202005140478.html#:~:text=The%20secret%20loans%20to%20MAM,if%20they%20never%20had%20existed.&text=But%>

contexts of both cases differ, but there are some important points of convergence from which we can draw useful parallels.

A. *Advocating for Early Intervention in Public Procurement Processes: The Role of Civil Society Organisations (CSOs)*

Similar to the Nigeria GSPA scandal, Mozambique alleged in its case that the commercial loan contracts between Proindicus, MAM and two foreign creditors—Credit Suisse and VBT Bank—were procured in breach of Mozambican law.⁴² Mozambique also alleged fraud, with Mozambique arguing that “. . . bribes had been paid to government officials and to Credit Suisse employees and that the supply contracts were shams and instruments of fraud.”⁴³ There has already been an indictment of several individuals involved in the transaction, of whom three Credit Suisse bankers, as well as a former Mozambican Minister of finance, were charged with various offences, including embezzlement, money laundering, abuse of office charges (for the ex-minister) and wire fraud conspiracy (for the three Credit Suisse bankers).⁴⁴ In essence, there are two connecting factors between the Mozambican and Nigerian cases: alleged corruption and breach of due process in the procurement of contracts between public officials acting on behalf of a sovereign state (in an international transaction backed by sovereign guarantee), and officials of a foreign contracting party.

The two cases differ in that the allegations of fraud in Nigeria’s case have only recently come to light after the better part of a decade and came to the fore primarily as a litigation strategy.⁴⁵ In Mozam-

20the%20CC%20notes%20that%20the%20original%20Ematum%20loan%20is%20equally%20illegal.

42. See Mozambique Constitutional Council, in Case No:05/CC/2019 of May 8, 2020 where the court held that the government “violat[ed] unequivocally” the Mozambican constitution by granting sovereign guarantees to the loans without parliamentary approval. The court held that the loans taken out were not registered in the 2013 and 2014 budget laws.

43. See *Mozambique v. Credit Suisse International* [2020] EWHC 1709 (Comm).

44. See Brendan Pierson, *Second ex-Credit Suisse banker pleads guilty in Mozambique loan scheme*, REUTERS (July 19, 2019), <https://www.reuters.com/article/us-mozambique-credit-suisse-gp-charges-idUKKCN1UE2OJ>; see also *Mozambique files charges against ex-fin min over \$2 billion debt*, REUTERS (Nov. 9, 2020), <https://www.reuters.com/article/mozambique-credit-suisse-chang/mozambique-files-charges-against-ex-fin-min-over-2-billion-debt-idUKL8N2HV6FQ>.

45. The decision to launch an investigation to the issue of fraud surrounding the

bique's case, although there were also attempts to hide the loan transactions signed in 2013, N'WETI—a CSO based in Mozambique—proved instrumental in uncovering the transactions and instituting public interest litigation involving two thousand Mozambican citizens.⁴⁶ Denise Namburete, who played a prominent role in the public interest litigation that ensued, reports that “[p]ressure from different actors, such as civil society, development partners and the media, led the Attorney General in Mozambique to commission an audit on the three loans in 2017.”⁴⁷

The Mozambique case demonstrates the potency of CSOs in holding government officials accountable. Could a similar approach have helped uncover the fraud in the Nigerian scenario? This is an important question because there is no guarantee that the Nigerian Government would have exposed the allegations of fraud surrounding the GSPA contract with P&ID if it had no strategic litigation interest, and perhaps desperation, to do so. With calls by the Mozambican government for Credit Suisse to be held complicit for the actions of several of its employees who have already been indicted in the loan scandal, this is a wakeup call for foreign investors engaged in public-private partnerships involving sovereign states with endemic corruption to be more vigilant.⁴⁸ This is also a point of reflection for sovereign states, considering the grave socio-economic implications for a sovereign state facing an adverse arbitration award. CSOs and other advocacy groups must work collaboratively to facilitate more proactive interven-

procurement of the GSPA contract only came in June 2018, when the Office of the Vice-President insisted on this course of action rather than negotiate a settlement with P&ID. See *Nigeria v. P&ID* [2020], *supra* note 6, at ¶ 90, where the Vice President's Office stated thus “the whole arrangement amounts to a fraud on the nation,” and that he had therefore additionally recommended to the President “the need to independently investigate all the relevant circumstances.”

46. See generally *N'Weti*, DEVEX, <https://www.devex.com/organizations/n-weti-123223> (last visited Feb. 3, 2021).

47. See Denise Namburete, *How Public Interest Litigation Led to Invalidation of Illegal Mozambican Debt*, AFRONOMICSLAW (Aug. 04, 2020), <https://www.afronomicslaw.org/2020/08/04/how-public-interest-litigation-led-to-invalidation-of-illegal-mozambican-debt>.

48. The Mozambican government argues that “Credit Suisse employees, and therefore the bank, knew that large bribes were being paid and that guarantees for the loans exceeded limits set out in law, or were wilfully blind to it.” *Credit Suisse says Mozambique liable for \$622 million loan at heart of bribery scandal*, REUTERS (Jan. 22, 2020), <https://www.reuters.com/article/us-mozambique-credit-suisse-idUKKBN1ZL1Q4>.

tions across the continent to ensure that government officials and foreign entities are held accountable.⁴⁹

Furthermore, both cases involve foreign law and require a foreign court's judgment. Although the substance of each dispute and the initial dispute settlement forums differ (i.e. the P&ID dispute went to arbitration before it appeared before the English and New York Courts,⁵⁰ while the Mozambique case went through the Mozambican courts before appearing before English courts⁵¹ and is subject to arbitration in Switzerland⁵²) in both cases, foreign courts will play a crucial role in determining the outcomes of disputes involving African states and foreign parties with a fraud element. This links both cases on a normative level, which we explore in the next section.

B. *Advocating for an African Approach to Dispute Settlement*

Having foreign forums handle cases involving sovereign states plagued by endemic corruption can create problems if those forums do not factor in the public interest considerations of the home countries that bear the brunt of the consequences of these fraudulent deals. In

49. See generally *African Sovereign Debt Justice Network* (AfSDJN), AFRONOMICSLAW (last visited Feb. 3, 2021), <https://www.afronomicslaw.org/category/afsdjn> (exemplifying a type of economic justice network that is seeking to transplant the strategy adopted in Mozambique to other African countries).

50. P & ID also filed an enforcement action before the United States District Court for the District of Colombia seeking to confirm the 2017 Final Arbitral Award pursuant to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, codified in Chapter 2 of the Federal Arbitration Act ("FAA") 9 U.S.C. § 201, et seq. See Opinion and Order of the United States District Court for the District of Colombia - 1 Nov. 2018 https://jsumundi.com/fr/document/decision/en-process-and-industrial-developments-ltd-v-the-ministry-of-petroleum-resources-of-the-federal-republic-of-nigeria-opinion-and-order-of-the-united-states-district-court-for-the-district-of-colombia-thursday-1st-november-2018#decision_5290.

51. See *Mozambique v. Credit Suisse International*, *supra* note 43.

52. Although the loan transactions are subject to English law, the three underlying supply contracts for which the loans were procured have arbitration clauses that designate arbitration in Switzerland. A decision in the Swiss arbitrations is expected in June 2022. See *Mozambique and the "Tuna Bond" Scandal*, SPOTLIGHT ON CORRUPTION (Mar. 17, 2021) <https://www.spotlightcorruption.org/mozambique-and-the-tuna-bond-scandal/> (According to this report by Spotlight on Corruption, "There are five separate ongoing arbitration cases in Switzerland which are expected to take place around 2022."). See also James Thomas, *Swiss arbitration stalls Mozambique's Tuna Bonds bribery claim against Prinvest*, GLOBAL INVESTIGATION REVIEW (Mar. 11, 2021), <https://globalinvestigationsreview.com/bribery/swiss-arbitration-stalls-mozambiques-tuna-bonds-bribery-claim-against-prinvest>.

essence, the cases we have examined present unique opportunities for foreign courts or arbitration panels to champion or stifle economic justice for millions of people who suffer the real impact of fraudulent transactions between public officials and foreign investors. Hence, the High Court's finding in the recent P&ID application could serve as a deterrent for parties who think that foreign courts are less likely to engage in judicial activism in similar cases that involve a conspiracy to defraud vulnerable communities and citizens of developing countries. However, Bradlow, speaking about the Mozambique case, argues that it is "not easy to predict the outcome of this case" mainly because existing English precedent "suggests that the courts in England will uphold the Credit Suisse contract."⁵³ In the P&ID case, Sir Ross Cranston's approach raises a glimmer of hope that English Courts are willing to adopt a broader approach to interpreting contracts allegedly tainted by or procured by fraud. However, it is still hard to escape from Bradlow's realist estimation of the potential outcomes.

The uncertainty about how foreign courts will decide these sensitive disputes involving sovereign states (including Nigeria's main challenge against the P&ID arbitral Award) raises more fundamental issues about the dependence of African countries on foreign courts and arbitration tribunals as a forum for settling their disputes with foreign investors. The reputation and track record of the well-known global arbitration centres remains an attraction to arbitration users from Africa.⁵⁴ However, recent cases like *Nigeria v. P&ID* and *Mozambique v. Credit Suisse International*, which present high economic stakes and public policy considerations, underscore the need to develop the capacity of arbitration centres across Africa to provide a viable forum for settling arbitration disputes. Considering that there are over 80 arbitration centres and institutions across Africa, it is odd that more disputes are

53. See Danny Bradlow, *Prudent Debt Management and Lessons from the Mozambique Constitutional Council*, AFRONOMICSLAW (Aug. 05, 2020), <https://www.afronomicslaw.org/2020/08/05/prudent-debt-management-and-lessons-from-the-mozambique-constitutional-council>.

54. See Robert Wheal et al., *Africa Focus: Autumn 2020*, WHITE & CASE LLP (Sept. 17, 2020), <https://www.whitecase.com/publications/insight/africa-focus-autumn-2020/institutional-arbitration-opportunities-challenges> ("In a 2018 survey of almost 800 arbitration practitioners and users by White & Case and Queen Mary University, African respondents chose the ICC and LCIA as the top two institutions. The Lagos Court of Arbitration (LCA) ranked as the highest African arbitration institution, although in sixth place. So, despite the multitude of emerging African arbitration institutions, most African users appear to continue to prefer to resolve their disputes primarily under the auspices of the ICC and LCIA.").

not settled in arbitration centres in Nigeria, or at least in neutral arbitration forums within the African continent.⁵⁵ In the *Nigeria v. P&ID* scenario, for example, Nigeria's Attorney General, Mr. Malami, raised the issue that "the form of the arbitration agreement [in the GSPA contract] did not match the model reflected in a government circular in force at the time providing for arbitrations with their seat in Nigeria."⁵⁶ In light of this, several legal practitioners have called for Nigeria to introduce a national arbitration policy.⁵⁷

Proponents of a national arbitration policy argue that having Nigeria as the seat of arbitration would provide several benefits to Nigeria.⁵⁸ Olisa Agbakoba, a Senior Advocate of Nigeria and vice-president of the Nigerian Institute of Arbitration, offers arguments supporting a national arbitration policy, three of which deserve mention here. First, he argues that a national policy will help protect Nigeria's national interests in commercial relations (including contracts backed by government guarantees and contracts from private commercial relationships) with foreign investors.⁵⁹ This is a far-reaching proposal, mostly because

55. See Dr. Emilia Onyema & Mr. Sopuruchi Christian, *Updated List of African Arbitration Centres/Institutions*, RESEARCH ARBITRATION AFRICA (Mar. 20, 2020) (last visited Feb. 4, 2020). See also *Figure 1: Local arbitration institutions in Africa*, WHITE & CASE LLP, <https://www.whitecase.com/sites/default/files/2020-09/09-africa-focus-figure-1-local-arbitration-institutions-africa-final.pdf> (last visited Feb. 04, 2021) (putting the number of arbitration centres in Africa at 100); see also Oladimeji Ramon, *Nigeria needs National Arbitration Policy, says Don*, PUNCH NIGERIA (Oct. 15, 2020), <https://punchng.com/nigeria-needs-national-arbitration-policy-says-don>.

56. See *Nigeria v. P&ID* [2020] *supra* note 6, ¶ 22.

57. See Oluwole Akinyeye, *National Arbitration Policy: Critical Next Steps Following the P&ID Award*, *Olisa Agbakoba Legal (OLA)*, (Sept. 9, 2019), <https://oal.law/national-arbitration-policy-critical-next-steps-following-the-pid-award>.

58. According to LexisNexis, reference to 'seat of arbitration' is indicative of the "juridical (or legal) place of the arbitration (sometimes referred to as the locus arbitri)." It is further explained that "[t]he law of the seat (the *lex arbitri*) governs many aspects of the arbitral procedure and the award—it indicates a link between the arbitration and a system of law." See <https://www.lexisnexis.co.uk/legal/guidance/the-seat-of-the-arbitration>. Redfern & Hunter further point out that "the arbitration agreement should be presumed to be governed by the law of the seat, which usually coincides with the place with which the agreement to arbitrate (as opposed to the underlying contract as a whole) has the closest and most real connection." See also BLACKBAY & PARTASIDES, *supra* note 32, at 168.

59. See *P & ID case: create National Arbitration Policy, Agbakoba tells Buhari*, THIS DAY (Sept. 3, 2019), <https://www.thisdaylive.com/index.php/2019/09/03/pid-case-create-national-arbitration-policy-agbakoba-tells-buhari> (showing that Olisa Agbakoba, a Senior Advocate of Nigeria and vice-president of the Nigerian Institute of Arbitration, has called for the introduction of a National Arbitration Policy).