

Kluwer Arbitration Blog

The African Arbitration Academy's Model Bilateral Investment Treaty for African States

Francis Ojok · Thursday, January 26th, 2023

In July 2022, the African Arbitration Academy launched the Model Bilateral Investment Treaty for African States ('Model BIT') with the goal of it serving as a source of cohesion for African States' Investor-State Dispute Settlement ('ISDS') reform strategy. They also expect the Model BIT will promote the codification of Investment Policies and Laws for African States. The Model BIT is based on the principle of "*Ubuntu*" (Art. 1),¹⁾ an African idiom translated to mean a person is a person because of what other community members have done for them. *Ubuntu* is predominantly practiced in Southern Africa, and it emphasizes the importance of communal existence. Adopting *Ubuntu* as the overarching philosophy for the Model BIT reflects the intention that its interpretation, performance, and enforcement must comply with human dignity and quality.

Establishing the Model BIT is important in attracting foreign investments in Africa. According to a report by United Nations Conference on Trade and Development ('UNCTAD'), the amount of Foreign Direct Investment ('FDI') to African countries by 2021 was already at **US\$83 billion**. Although attracting foreign investment is at its core, the Model BIT strikes a balance between attracting foreign investments and promoting sustainable development.

This post focuses on three aspects of the Model BIT: (i) the attractiveness of investment in Africa, (ii) the balance between attracting foreign investment and sustainable development as guided by the Model BIT, and (iii) the dispute resolution provision of the Model BIT and how it fits into the broader options available to foreign investors. Finally, the post ends with forward-looking concluding remarks.

1. The Attraction of Investment in Africa

Most African countries relies heavily on exporting raw materials and agriculture – indeed, the latter accounts for **14% of the continent's GDP**. To encourage further development, Africa focuses on attracting foreign investment, which could benefit the continent at macro and micro-economic levels. At the macroeconomic level, investment contributes to balance payments, adds to the receiving country's capital stock, and leads to future economic growth. It also leads to a stable capital flow, which is more appropriate and development friendly. It raises exports, thus integrating into global financial networks. At the microeconomic level, it increases productivity by enhancing physical and human capital investments. It also improves employment opportunities and enhanced

management. Lastly, it **facilitates** the transfer of technology and positive spill over effects on local firms through supply and distribution chains, trading, and outsourcing.

The drafters of the Model BIT acknowledge these advantages and know that attracting investments requires a certain level of certainty regarding protection from political and commercial risks. Therefore, the Model BIT includes express provisions to protect investors and their investments from unjust actions and treatment by the host state. Some of these include protection against discrimination, measured based on two standards, i.e., national treatment standards and the most favoured nation standard (Art. 4). The host state must comply with all obligations the Model BIT placed on them. Failure thereof, investors can, as of right, bring legal action against the host state for it.

2. Promoting Sustainable Development

Considering its mandate to promote **sustainable development**, understand that the Model BIT acknowledges that there are substantial risks that come with foreign investment, such as hindrance to domestic investment, foreign investment turning into modern-day economic colonialism, and poor performance/poor working conditions in foreign factories. To safeguard against these risks, the **Model BIT limits** what investors can and cannot do. Examples of the specific obligations investors must comply with include respecting and complying with domestic laws. This makes it clear that investors cannot exploit African resources without penalties (Art. 15), respect indigenous people and communities' rights and resources, and expropriate their communal knowledge or intellectual property (Art. 11).

Investors who fail to comply with the obligations of the Model BIT will be in breach. Such violation may result in forfeiture rights, such as the protection to which investors and their investments would be entitled. For example, Art. 12 relieves host states from protection obligations owed to investors and their investments in case of breaches of anti-corruption, anti-money laundering, and counter-terrorism financing obligations. Furthermore, if it chooses, the host state may also bring a counterclaim against investors for violating the BIT (Art. 22(g)).

3. Dispute Resolution Mechanism

Regardless of how transparent the treaty's language is regarding rights and obligations, it would do little to assure foreign investors and attract them to invest in a foreign country if they were to rely on domestic courts for their enforcement because of fear of not getting a fair justice before a host's domestic court. To assure foreign investors against this fear, the Model BIT limits the involvement of domestic courts to only interim relief actions for the sole purpose of preserving the party's right and interest during the pendency of the arbitration and does not involve the payment of monetary damages (Art. 22(b)).

Outside court, parties have options regarding choosing mechanisms to resolve their disputes, including mediation and arbitration. So long as they have attempted to settle through consultation but could not within the required four months period. Restricting parties to attempt to resolve in good faith through consultation is not unique since most modern BITs contain a provision for a cooling-off period. It intends to de-escalate or amicably solve a potential dispute, foster a spirit of

compliance, cooperation, dialogue, and amicable settlement should any dispute arise, and provide an early alert mechanism for preventing and efficiently managing potential conflicts. Indeed, the UNCTAD emphasizes that dispute prevention and avoidance involve extensive planning so as to minimize potential conflict areas and reduce the number of disagreements that escalate or crystallize into actual disputes.

The scope of arbitration under the Model BIT is narrow, as it covers disputes arising out of a contractual relationship or transaction, compared to other model arbitration clause that provides for a broader arbitration scope. For example, [the ICC arbitration clause](#) covers disputes arising out of or in connection with a contract or legal relationship. But before parties submit an arbitration claim, they ought to comply with the requirement that four months have elapsed since submitting the request for consultation, no settlement has been reached, or mediation proceedings commenced is terminated. And three years have not elapsed from the date they first acquired knowledge of the breach alleged in the notice of arbitration.

Arbitration is the preferred mechanism for resolving international disputes. Its unique features, such as the system's neutrality, make it attractive. But the Model BIT allows parties to seek interim relief from the national court or administrative tribunal of the contracting state where the subject matter of the dispute is situated. Such relief does not involve the payment of monetary damages for the sole purpose of preserving the party's rights and interests during the pendency of the arbitration.

The Model BIT provision on the arbitral seat slightly differs from UNCITRAL (Art. 19 and 20). It limits the parties' choice of the seat of arbitration to a city of a state party of the African Union other than the investor's home state and the host state. Also, the Model BIT recommends that parties submit their dispute to African arbitration institutions. According to [an assessment](#) conducted by White & Case, as of 2020, there were nearly 100 arbitration institutions in Africa. In this sense, this recommendation will probably boost arbitration practice in Africa and save parties from the high cost associated with arbitrating outside the continent.

Another provision relates to parties' ability to choose whether to submit their disputes to an *ad hoc* or institutional arbitration under ICSID Convention or UNCITRAL Rules. Another option under The Model BIT is for parties to submit their arbitration to the Regional Courts in Africa. They include the East African Court of Justice (EACJ), the Court of Justice of the Economic Community of West African States (ECOWAS), and the Tribunal of the Southern African Development Community (SADC).

Regarding the constitution of the arbitral tribunal, the Model BIT restricts the number of arbitrators to three of African descent (Art. 22 (2)(E)(1)). In doing so, it is likely to help guarantee the quality of awards and increase chances for African-qualified arbitrators to be appointed. Moreover, each party shall appoint one co-arbitrator. The two co-arbitrators will select the president by mutual agreement, who must be a citizen of a third state and of African descent. These requirements probably are in response to complaints about unequal representation and lack of diversity raised by African arbitration practitioners and users of arbitration.

In addition, the tribunal must be constituted within 60 days and must reflect geographical, gender, and age diversity, as well as different legal systems and cultures (Art. 22 (E)(2)). If parties fail in selecting an arbitrator, the Secretary General of the ICSID, head of the selected arbitral institution, or Secretary General of the Permanent Court of Arbitration in case of *ad hoc* arbitration under the

UNCITRAL Rules, appoints on either a request of the parties or at their discretion. In this sense, the scope of diversity requirement under the Model BIT is broader than most treaties, whose coverage, to a greater extent, is limited to gender.

4. Concluding Remarks

Africa is thirsty for business. Investing in Africa is in the best interest of both host states and investors. For states, attracting more investments would mean more revenue and an increase in Africa's GDP, which is about **US\$ 2.7 trillion**. It would also mean more employment opportunities. According to **African Development Bank**, 70% of Africa's population is below 25 years, and young people make up 60% of the unemployment rate. On the other hand, investors will benefit from the abundant natural and human capital. Africa is the second largest continent on earth, with a land area of 30.37 million sq. km, and the second most populous continent, and with a population above **1.4 billion people**.

The progressive nature of the Model BIT makes Africa an attractive destination for foreign investors, while also guaranteeing protection rights for all stakeholders. It promotes a healthy contractual relationship where no one would be left out or exploited, including the most vulnerable ones, such as indigenous communities. But it would be fitting for the JTMC to add a clause for the expeditious options for resolving disputes. Because of extensive discoveries, especially if players are from a common law background, arbitration tends to take an extended period. Because of the long period, it would talk for the tribunal to issue an arbitration award, users began criticizing it for not being time efficient, which discouraged other users from bringing their disputes to be arbitrated. As such, most institutions amended their arbitration rules to include emergency arbitration provisions. For example, Art. 29 and 30 of the ICC rules.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe [here](#). To submit a proposal for a blog post, please consult our [Editorial Guidelines](#).

Profile Navigator and Relationship Indicator

Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

Learn more about the newly-updated *Profile Navigator and Relationship Indicator*



References

?1 Mungi Ngomane et al., *Everyday Ubuntu: Living Better Together, the African Way*, (2020).

This entry was posted on Thursday, January 26th, 2023 at 8:01 am and is filed under [Africa](#), [Africa Arbitration Academy](#), [Investment law](#), [Model BIT](#), [Sustainability](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.