

# Kluwer Arbitration Blog

## Is the “Africanization” of International Investment Law Needed?

Mohannad A. El Murtadi Suleiman (Curtis, Mallet-Prevost, Colt & Mosle LLP) · Thursday, January 25th, 2024

On 8 December 2023, the International Institute for Conflict Prevention & Resolution and the New York City Bar Association hosted the first [Africa Arbitration Day](#) in New York. One of the event’s panels discussed the prospects of “Africanization” in light of the [Investment Protocol](#) (the “Investment Protocol”) of the [Agreement Establishing the African Continental Free Trade Area](#) (the “AfCFTA”) and the [Africa Arbitration Academy’s Model Bilateral Investment Treaty](#) (the “Model BIT”). This post discusses such prospects and argues that the “Africanization” of international investment law is necessary.

### Introduction

In May 2019, the [AfCFTA](#) entered into force. The AfCFTA’s main objective is to promote trade in Africa by creating a single market for goods and enhancing African states’ economies. In February 2023, African states adopted the Investment Protocol during the 36<sup>th</sup> African Union Summit in Addis Ababa, Ethiopia. The Investment Protocol’s text as adopted in February 2023 is not available to the public. However, a [version of the Investment Protocol](#) is accessible online. This version was submitted to the 7<sup>th</sup> extraordinary session of the African Union’s Special Technical Committee on Justice and Legal Affairs, held in Accra, Ghana, in January 2023. The Investment Protocol calls for adopting an Annex dedicated to rules and procedures for dispute management and resolution between investors and state parties to the Investment Protocol within 12 months of the Investment Protocol’s adoption. Shortly before the Investment Protocol’s adoption, in July 2022, the [Africa Arbitration Academy](#) issued the [Model BIT](#), which African states can adopt as a standard BIT.

While the Investment Protocol and the Model BIT deal with different subjects, they both aim to promote investment and trade in Africa without compromising African states’ abilities to implement necessary national policies and achieve their sustainable development goals. In addition, both contain provisions designed to ensure that they will benefit local African communities and promote Africa’s contribution to investment dispute resolution mechanisms by limiting an imbalance in Africa’s role in such mechanisms.

These features, however, are not new. In 2015, an instrument prepared under the auspices of the

African Union and labeled the “[Pan-African Investment Code](#)” reflected many of the above features to reform international investment law within Africa. Such efforts have been described as the “Africanization” of international investment law.

### **The Context Within Which the Investment Protocol and the Model BIT Were Prepared**

The Investment Protocol and the Model BIT come at a time when African states have already adopted hundreds of BITs, regional economic and investment agreements, and national laws dealing with investments. [To date, African states have signed 975 BITs, 211 of which are intra-Africa.](#) In addition, since the signing of the [Lagos Plan of Action](#) in 1980, which called for Africa’s economic development, and the [Abuja Treaty](#) in 1991, which called for the establishment of an African Economic Community, many regional economic communities have emerged in Africa. These communities aim to foster regional integration among their members. Some of those communities have even adopted investment protocols and model agreements that their members can use as standard investment agreements.

While there are many regional economic communities in Africa, the [African Union only recognizes the following eight](#): (i) the Arab Maghreb Union (UMA); (ii) the Common Market for Eastern and Southern Africa (COMESA); (iii) the Community of Sahel–Saharan States (CEN–SAD); (iv) the East African Community (EAC); (v) the Economic Community of Central African States (ECCAS); (vi) the Economic Community of West African States (ECOWAS); (vii) the Intergovernmental Authority on Development (IGAD); and (viii) the Southern African Development Community (SADC).

### **A Clear Objective to Promote African States’ Interests and Participation in Dispute Settlement Mechanisms**

#### ***1. Provisions Allowing African States to Protect Their Local Communities and Achieve Their Sustainable Development Goals***

The Model BIT and Investment Protocol contain provisions protecting the local communities and promoting sustainable development.

Articles 11 and 22 of the Model BIT require investors to respect the indigenous communities’ biological resources, diversity, rights to intellectual property, traditional knowledge, and culture and to allow those communities to file *amicus curiae* briefs in arbitrations. More generally, Article 1 of the Model BIT provides that its “*interpretation, performance and enforcement [...] shall be in line with the principle of Ubuntu, which accords respect to human dignity and equality to any person irrespective of the status in a communitarian sense.*”

Articles 31 and 35 of the Investment Protocol similarly provide that states’ commitments under the Investment Protocol shall not jeopardize those states’ laws and policies regarding the rights of the indigenous communities and that investors are required to respect the “*rights and dignity of indigenous peoples and local communities in accordance with relevant domestic laws and regulations, international law, norms, and best practices,*” including their right to “*land, water, fisheries, and forests in accordance with relevant laws and regulations.*”

In addition, Articles 7 and 17 of the Model BIT allow host states to take “*any action which is necessary for the protection of its essential security interests*” and to retain the right to “*regulate in the public interest*” and adopt measures to promote and protect those states’ “*sustainable development objectives and cultural diversity*”. Similarly, Articles 24 and 28 of the Investment Protocol allow host states to introduce measures to promote domestic development in pursuit of their objectives and take other regulatory measures in their territories to achieve their sustainable development goals.

## **2. Provisions Promoting African States’ Participation in Dispute Settlement**

The Model BIT and the Investment Protocol also contain provisions to promote Africa’s participation in dispute settlement mechanisms.

Article 22 of the Model BIT requires presiding arbitrators of tribunals constituted to resolve investment disputes to be of “African descent”, where that is possible, and restricts the choice of arbitral seats for arbitrations other than those conducted under ICSID to state parties to the African Union. The same article requires appointing authorities to consider appointing African arbitrators where the disputing parties fail to constitute a tribunal.

Similarly, Article 46.1 of the Investment Protocol provides that investors and host states shall first attempt to resolve their investment disputes amicably “*through consultations, negotiations, conciliation, mediation or other amicable dispute resolution mechanisms available in the Host State*”. In case the dispute is not resolved amicably, the Investment Protocol provides that it may be resolved in accordance with the Investment Protocol’s Annex on dispute resolution, which has yet to be finalized. However, an [initial draft of this Annex](#) provides that, absent the parties’ agreement, hearings and meetings regarding their dispute shall be held in a state party to the AfCFTA, “*either in the facilities of a mediation or arbitration institution or other facilities as appropriate.*” This draft also provides that tribunals’ presiding arbitrators “*shall be a national of an African State other than the State Party to the dispute or the State Party of which the investor is a national.*”

### **The “Africanization” of International Investment Law Is Necessary**

While African states have an interest in attracting foreign direct investment, they also need to be able to achieve their sustainable development goals by taking measures to serve such goals. The Model BIT and Investment Protocol’s provisions allowing African states to protect their local communities and take measures to pursue their national development policies are necessary for those states to truly benefit from foreign investment.

In addition, the Model BIT and Investment Protocol’s promotion of African states’ participation in dispute settlement mechanisms is justified in light of the evident gap in African states’ contribution to such mechanisms. Despite [several important initiatives](#) under the ICSID Convention, African states have not had a sufficient opportunity to participate in international arbitration. A report regarding [ICSID’s caseload from its first registered case in 1972 to June 2023](#) shows that Sub-Saharan countries have been involved in 14% of all cases registered with ICSID. Yet, those countries’ share of all appointments of arbitrators, conciliators, and *ad hoc* committee members in cases registered with ICSID is only 2%. In contrast, Western European countries have been

involved in only 8% of all cases registered in ICSID, while they have contributed to 46% of all appointments. In addition, only one of the ten arbitrators designated to the [ICSID Arbitrators' Panel](#) by the Chairman of the ICSID Administrative Council is a citizen of an African state.

In his keynote speech at the first ICCA Congress held in Africa, judge Abdulqawi Yusuf of the International Court of Justice linked arbitration to the rule of law, stating that African states' insufficient participation in arbitration is “*a negative factor with respect to the potential contribution of arbitration to the rule of law in Africa*”. (Abdulqawi Ahmed Yusuf, *The Contribution of Arbitration to the Rule of Law—The Experience of African Countries* (Mauritius 2016), 19 ICCA Congress Series 27, 31 (2017)). Allowing African states to increase their participation in dispute settlement is not only necessary to ensure that those states have a role in resolving their investment disputes, but it is also indispensable for the development of their laws and promotion of the rule of law.

---

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](#).

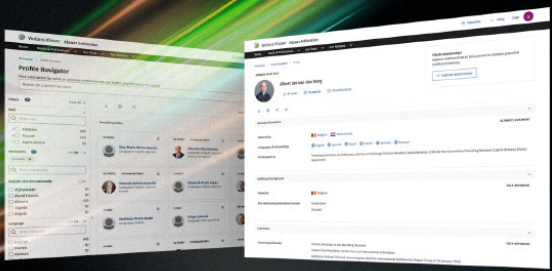
### Profile Navigator and Relationship Indicator


Access 17,000+ data-driven profiles of arbitrators, expert witnesses, and counsels, derived from Kluwer Arbitration's comprehensive collection of international cases and awards and appointment data of leading arbitral institutions, to uncover potential conflicts of interest.

Learn how [Kluwer Arbitration](#) can support you.

Newly updated

# Profile Navigator and Relationship Indicator Tools



 Wolters Kluwer

Request your free trial now →

---

This entry was posted on Thursday, January 25th, 2024 at 8:38 am and is filed under [AfCFTA](#), [AfCFTA Investment Protocol](#), [Africa Arbitration Academy](#), [Model BIT](#)

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