

# **International Investment Arbitration in the African Context: Upholding Justice for the Parties and Vulnerable Populations**

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**Kariuki Muigua**

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## **International Investment Arbitration in the African Context: Upholding Justice for the Parties and Vulnerable Populations**

**Kariuki Muigua\***

### **Abstract**

*This paper critically examines the efficacy of international investment arbitration in the African context. The paper defines international investment arbitration. It argues that this form of arbitration is relevant in the African context due to the growth of the investment landscape in the continent. The paper observes that international investment arbitration provides an effective platform towards settling disputes involving foreign investors and host states in Africa. In addition, the paper examines some of the key challenges arising from the international investment arbitration realm in Africa. In particular, the paper notes that injustices and human rights violations in the investment sphere in Africa are a pertinent concern in international investment arbitration. In light of these concerns, the paper discusses how international investment arbitration can be effectively embraced in Africa by upholding justice for the parties and vulnerable populations.*

### **1.0 Introduction**

Arbitration has emerged as one of the most preferred mechanism for dispute resolution particularly in the global context. Arbitration is a dispute management mechanism where parties through an agreement submit their dispute to one or more neutral third parties who makes a binding decision on the dispute<sup>1</sup>. It has also been defined as a private and consensual process where parties in dispute agree to present their grievances to a third party for settlement<sup>2</sup>. Arbitration contains several key features including privacy,

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<sup>1</sup> World Intellectual Property Organization., 'What is Arbitration' Available at <https://www.wipo.int/amc/en/arbitration/what-is-arb.html> (Accessed on 07/01/2026)

<sup>2</sup> Muigua. K., 'Settling Disputes through Arbitration in Kenya.' Glenwood Publishers, 4<sup>th</sup> Edition, 2022

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flexibility and party autonomy which allows parties to engage in an efficient, confidential and fair process leading to a final, binding and enforceable award<sup>3</sup>.

Arbitration can be classified into various forms including domestic and international arbitration<sup>4</sup>. It has been observed that international arbitration is being practiced through various forms including interstate arbitration, investor-state/investment arbitration, and international commercial arbitration<sup>5</sup>. International arbitration has emerged as the preferred mechanism for managing disputes that are transnational in nature<sup>6</sup>. It has a transnational applicability which means that it applies across different jurisdictions and therefore guarantees neutrality in the determination of disputes by addressing differences that may arise as a result of multiple legal systems<sup>7</sup>. Further, it also guarantees enforcement of decisions through the *New York Convention*<sup>8</sup> which provides a harmonized legal framework for the recognition and enforcement of foreign awards in arbitration.

International arbitration is being practiced widely in Africa in its various forms including international commercial arbitration and international investment arbitration. It has been observed that international arbitration has gained a strong foothold in Africa and there is continued growth and acceptance of arbitration as an appropriate and viable option for settling disputes both between private parties and disputes involving states<sup>9</sup>. The growth

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<sup>3</sup> World Intellectual Property Organization., 'What is Arbitration' Op Cit

<sup>4</sup> Muigua. K., 'Settling Disputes through Arbitration in Kenya.' Op Cit

<sup>5</sup> Shonk. K., 'International Arbitration: What it is and How it Works' Available at <https://www.pon.harvard.edu/daily/international-negotiation-daily/international-arbitration-what-it-is-and-how-it-works/> (Accessed on 07/01/2026)

<sup>6</sup> Muigua. K., 'Promoting International Commercial Arbitration in Africa.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/PROMOTING-INTERNATIONALCOMMERCIALARBITRATION-IN-AFRICA.pdf> (Accessed on 07/01/2026)

<sup>7</sup> Moses, 'The Principles and Practice of International Commercial Arbitration' 2<sup>nd</sup> Edition, 2017, Cambridge University Press

<sup>8</sup> United Nations Commission on International Trade Law., 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards.' (New York, 1958)

<sup>9</sup> Arbitration in Africa., Available at <https://www.nortonrosefulbright.com/en/knowledge/publications/558921ae/arbitration-in-africa> (Accessed on 07/01/2026)

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of arbitration in Africa has been attributed to several regional initiatives including launch of regional arbitration centres, adoption of the New York Convention by most African countries and the expansion of the investment landscape in the continent<sup>10</sup>. In light of these developments, it has been observed that arbitration is enjoying a thriving present and a promising future in Africa<sup>11</sup>.

Despite its efficacy, the practice of international arbitration in Africa raises several concerns. For instance, challenges such as court interference in arbitration, inadequate marketing, inadequate political support and human resources and bias against Africa undermine the growth of international commercial arbitration in Africa<sup>12</sup>. On the other hand, the landscape of international investment arbitration in Africa faces several challenges including human right concerns against vulnerable populations<sup>13</sup>. Addressing such challenges is necessary towards strengthening the role of international arbitration in fostering access to justice in Africa.

This paper critically examines the efficacy of international investment arbitration in the African context. The paper defines international investment arbitration. It argues that this form of arbitration is relevant in the African context due to the growth of the investment landscape in the continent. The paper observes that international investment arbitration provides an effective platform towards settling disputes involving foreign investors and host states in Africa. In addition, the paper examines some of the key challenges arising from the international investment arbitration realm in Africa. In particular, the paper notes that injustices and human rights violations in the investment sphere in Africa are a

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<sup>10</sup> Ibid

<sup>11</sup> Arbitration in Africa Survey Reveals a Thriving Market for Arbitration on the Continent., Available at <https://hsfnotes.com/africa/2022/11/25/2022-soasarbitration-in-africa-survey-reveals-a-thriving-market-for-arbitration-on-the-continent/> (Accessed on 07/01/2026)

<sup>12</sup> Muigua. K., 'Promoting International Commercial Arbitration in Africa.' Op Cit

<sup>13</sup> Allen. N., 'Investment Treaty Disputes Role in Sustainability.' Available at <https://www.addleshawgoddard.com/globalassets/specialisms/litigation/esg-risk-reputation-compliance--disputes/investment-treaty-disputes-role-in-sustainability.pdf> (Accessed on 07/01/2026)

pertinent concern in international investment arbitration. In light of these concerns, the paper discusses how international investment arbitration can be effectively embraced in Africa by upholding justice for the parties and vulnerable populations.

## **2.0 Examining International Investment Arbitration in the African Context**

International investment arbitration also referred to as investor-state arbitration is a mechanism to settle disputes involving foreign investors and host States<sup>14</sup>. It has been pointed out that international investment arbitration allows a foreign investor to directly invoke its claims against the host state in which it has invested in the event a dispute arises<sup>15</sup>.

It has been observed that international investment arbitration flows from the Investor-State Dispute Settlement (ISDS) regime<sup>16</sup>. ISDS is a legal mechanism allowing an investor from one contracting state to an international investment agreement to bring a claim against another contracting state in which it has made an investment (also known as the host state)<sup>17</sup>. ISDS has been described as a key feature of most international investment agreements<sup>18</sup>. By creating a system for the settlement of disputes between investors and host governments, ISDS creates a neutral forum that offers the possibility of a fair hearing before a tribunal unencumbered by domestic political considerations<sup>19</sup>. It has been argued that since relying on national courts to settle disputes may be time-consuming and affected by political influence, the ISDS regime was created to avoid such risks in a

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<sup>14</sup> Introduction to Investment Arbitration., Available at <https://www.international-arbitration-attorney.com/investment-arbitration/> (Accessed on 07/01/2026)

<sup>15</sup> Vienna International Arbitral Centre., 'Investment Arbitration Basics' Available at <https://www.viac.eu/en/investment-arbitration-basics/> (Accessed on 07/01/2026)

<sup>16</sup> Shonk. K., 'International Arbitration: What it is and How it Works' Available at <https://www.pon.harvard.edu/daily/international-negotiation-daily/international-arbitration-what-it-is-and-how-it-works/> (Accessed on 07/01/2026)

<sup>17</sup> European Parliament., 'Investor-State Dispute Settlement (ISDS) State of play and prospects for reform' Available at [https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/545736/EPRS\\_BRI%282015%29545736\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/545736/EPRS_BRI%282015%29545736_EN.pdf) (Accessed on 07/01/2026)

<sup>18</sup> United Nations Conference on Trade and Development., 'Investor-State Dispute Settlement' Available at [https://unctad.org/system/files/official-document/diaeia2013d2\\_en.pdf](https://unctad.org/system/files/official-document/diaeia2013d2_en.pdf) (Accessed on 07/01/2026)

<sup>19</sup> Ibid

rapidly growing foreign investments sphere and hold states accountable for commitments made in foreign investment treaties<sup>20</sup>. However, it has also been observed that a host state may be able to make counterclaims against an investor under the ISDS regime<sup>21</sup>.

International investment arbitration is therefore an important process that guarantees flexibility, neutrality, expeditiousness and finality in managing disputes between foreign investors and host states under the ISDS regime<sup>22</sup>. This form of arbitration is set out under the *Convention on the Settlement of Investment Disputes between States and Nationals of other States*<sup>23</sup> which establishes the International Centre for Settlement of Investment Disputes (ICSID) to provide facilities for conciliation and arbitration of investment disputes between contracting states and nationals of other contracting states<sup>24</sup>. International investment arbitration is particularly important in the African context. The investment landscape in Africa is growing rapidly bringing along both opportunities and challenges. For example, the *Agreement Establishing the African Continental Free Trade Area (AfCFTA)*<sup>25</sup> creates the world's largest free trade area covering the entire African continent. It has been observed that implementation of AfCFTA can deepen intra-African trade while also creating opportunities for both regional and foreign investments in the continent<sup>26</sup>. The growth of trade and investments under AfCFTA provides opportunities to foster development in Africa. However, it has been observed that this also creates the risk of

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<sup>20</sup> Ibid

<sup>21</sup> World Health Organization., 'How international investment dispute settlement works' Available at <https://extranet.who.int/fctcapps/fctcapps/fctc/kh/legalchallenges/how-international-investment-dispute-settlement-works> (Accessed on 07/01/2026)

<sup>22</sup> Shonk. K., 'International Arbitration: What it is and How it Works' Op Cit

<sup>23</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (International Centre for Settlement of Investment Disputes [ICSID]) 575 UNTS 159

<sup>24</sup> Ibid, article 1

<sup>25</sup> African Union., 'Agreement Establishing the African Continental Free Trade Area.' Available at [https://au.int/sites/default/files/treaties/36437-treaty-consolidated\\_text\\_on\\_cfta\\_-\\_en.pdf](https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf) (Accessed on 07/01/2026)

<sup>26</sup> World Bank Group., 'The African Continental Free Trade Area' Available at <https://www.worldbank.org/en/topic/trade/publication/the-african-continental-free-trade-area> (Accessed on 07/01/2026)

disputes between states and those involving foreign investors and host states<sup>27</sup>. AfCFTA envisages management of such disputes through arbitration among other appropriate dispute management processes<sup>28</sup>.

In addition to opportunities under AfCFTA, there has been a rise in Bilateral Investment Treaties (BITs) in Africa. BITs are international agreements between two countries establishing the terms and conditions for private investment in each other's territory by nationals and companies of one country to the other country<sup>29</sup>. It has been observed that African states are increasingly negotiating and adopting international investment agreements (IIAs), most especially BITs in order to improve their investment climate and attract Foreign Direct Investment (FDI)<sup>30</sup>. It is estimated that there are more than 3000 BITs of which African countries are party to with more than 900 signed with non-African countries<sup>31</sup>. These BITs envisage settlement of disputes between foreign investors and host African states under the ISDS regime<sup>32</sup>. Further, it has been observed that most African countries have ratified the ICSID Convention which envisages settlement of investor-state disputes through international investment arbitration<sup>33</sup>.

International investment arbitration is therefore well-entrenched in Africa. This form of arbitration has been identified as a key tool towards ensuring accountability among host states and investors under international investment treaties<sup>34</sup>. International investment arbitration provides a forum to protect investors from arbitrary expropriation of their

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<sup>27</sup> Arbitration in Africa., Op Cit

<sup>28</sup> African Union., 'Agreement Establishing the African Continental Free Trade Area.' Op Cit

<sup>29</sup> Bilateral Investment Treaty., Available at [https://www.law.cornell.edu/wex/bilateral\\_investment\\_treaty](https://www.law.cornell.edu/wex/bilateral_investment_treaty) (Accessed on 07/01/2026)

<sup>30</sup> Aniodoh. A.A., & Yekini. A., 'Prospects and Pitfalls of BITs, and the Quest for a Multilateral Framework in Africa' *African Journal of International Economic Law.*, Volume 4, 2024

<sup>31</sup> Bilateral Investment Treaties: a Continuing Threat to Africa., Available at <https://aefjn.org/en/bilateral-investment-treaties-a-continuing-threat-to-africa/?format=pdf> (Accessed on 07/01/2026)

<sup>32</sup> Ibid

<sup>33</sup> Arbitration in Africa., Op Cit

<sup>34</sup> Goh. N., 'ESG and Investment Arbitration: A Future with Cleaner Foreign Investment?' *The Journal of World Energy Law & Business.*, Volume 15, Issue 6, 2022

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investments while also ensuring non-discriminatory treatment for foreign investments in countries considered risky<sup>35</sup>. Despite its efficacy, international investment arbitration raises several concerns in the African context. For instance, it has been contended that most BITs are drafted in favour of capital exporting countries subjecting African countries to unfavourable terms<sup>36</sup>. Consequently, many BITs have exposed developing countries to high legal costs and liabilities and have occasionally discouraged necessary regulatory actions due to emphasis on protection of investors under the ISDS regime<sup>37</sup>. Further, it has been argued that the lack of predictability, high monetary stakes, limited control mechanisms, and long duration of ISDS proceedings, combined with the fact that states are usually the respondents limits the efficacy of this process and the ability of states to enforce sustainability concerns under the international investments regime<sup>38</sup>.

In addition, it has been observed that since most ISDS proceedings are instituted against states, the harmful activities of foreign investors can be ignored undermining the efficacy of investment arbitration<sup>39</sup>. For example, foreign investors, including Multinational Corporations (MNCs) especially those involved in the extractives sector in Africa, have been accused of fuelling human rights violations such as land injustices against indigenous peoples and local communities, poor labour practices and environmental degradation<sup>40</sup>. In light of these concerns, it is imperative to reform international

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<sup>35</sup> European Parliament., 'Investor-State Dispute Settlement (ISDS) State of play and prospects for reform' Op Cit

<sup>36</sup> The Africanization of International Investment Disputes - from Past to Present., Available at <https://verfassungsblog.de/the-africanization-of-international-investment-disputes-from-past-to-present/> (Accessed on 07/01/2026)

<sup>37</sup> Why Is Investment Treaty and Investor-State Dispute Settlement Reform Needed?., Available at <https://www.iisd.org/system/files/2025-03/investment-treaty-and-isds-reform-questions-answers.pdf> (Accessed on 07/01/2026)

<sup>38</sup> Ibid

<sup>39</sup> Muigua. K., 'Bilateral Investment Treaties and Environmental, Social and Governance in Africa.' Available at <https://kmco.co.ke/wp-content/uploads/2023/07/Bilateral-Investment-Treaties-and-Environmental-Social-and-Governance-in-Africa-1.pdf> (Accessed on 07/01/2026)

<sup>40</sup> Ajibade, L.T & Awomuti, A.A. 'Petroleum Exploitation or Human Exploitation? An Overview of Niger Delta Oil Producing Communities in Nigeria' *African Research Review* Vol. 3 (1), 2009. Pp. 111-124

investment arbitration in the African context including through upholding justice for vulnerable populations.

### **3.0 Strengthening International Commercial Arbitration in the African Context**

International investment arbitration provides an effective forum towards settling investor-state disputes in Africa. By strengthening international investment arbitration, African countries can create a conducive ISDS regime towards attracting FDI and fostering development<sup>41</sup>. However, in light of concerns such as human right violations and injustices against vulnerable populations in the investment real, it is imperative to reform international investment arbitration in Africa.

In order to strengthen international investment arbitration in Africa, there is need to invoke and uphold human rights towards ensuring justice for vulnerable populations. It has been observed that in some cases, the activities of foreign investors can violate human rights including the land rights of indigenous peoples, environmental rights and labour rights<sup>42</sup>. In light of these concerns, it has been argued that there is need to reform the ISDS regime in order to enable African countries to enforce sustainability concerns including human rights and environmental conservation through international investment arbitration<sup>43</sup>. This can be achieved by giving African countries more power to enforce sustainability issues such as environmental conservation and human rights, and allowing the participation of all stakeholders including local communities who are directly impacted by investment activities<sup>44</sup>. Through this, it is possible to foster justice for vulnerable populations including indigenous peoples and local communities.

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<sup>41</sup> Beri. P & Nubong. G., 'Impact of Bilateral Investment Treaties on Foreign Direct Investment in Africa.' Available at <https://onlinelibrary.wiley.com/doi/epdf/10.1111/1467-8268.12583> (Accessed on 07/01/2026)

<sup>42</sup> Feldman. J., 'Human Rights and International Investment Arbitration: A snapshot' Available at <https://www.nortonrosefulbright.com/en/knowledge/publications/11a8c614/human-rights-and-international-investment-arbitration-a-snapshot> (Accessed on 07/01/2026)

<sup>43</sup> Why Is Investment Treaty and Investor-State Dispute Settlement Reform Needed?., Op Cit

<sup>44</sup> Ibid

Further, there is need to reform BITs in order to ensure that international investment arbitration captures the needs and interests of African countries. Most BITs are drafted in favour of capital exporting countries in order to protect their investments in developing countries<sup>45</sup>. This means that in case of violation of provision of such BITs, international investment arbitration decisions will mostly be made in favour of foreign investors even where such instances are justified including in situations to protect the environment and resolve economic crises<sup>46</sup>. Consequently, it has been suggested that African countries should integrate Environmental, Social and Governance (ESG) clauses in BITs in order to make investments more aligned with ESG concerns such climate action, environmental governance, sound labour practices, community welfare, respect for human rights as well as other public policy imperatives<sup>47</sup>. Through this, foreign investors can be compelled to comply with national laws and held accountable in case of violation of ESG standards among other national priorities<sup>48</sup>.

Through the foregoing, it is possible to uphold justice for African countries and vulnerable populations including indigenous peoples and local populations through international investment arbitration.

#### **4.0 Conclusion**

International investment arbitration holds immense potential for Africa. However, in light of injustices and sustainability concerns, it is imperative to Africanize the ISDS regime in order to protect African countries and vulnerable populations<sup>49</sup>. This can be achieved through infusing human rights in international investment arbitration, reforming BITs to capture ESG concerns and giving African countries more power to

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<sup>45</sup> The Africanization of International Investment Disputes – from Past to Present., Op Cit

<sup>46</sup> Why Is Investment Treaty and Investor–State Dispute Settlement Reform Needed?., Op Cit

<sup>47</sup> United Nations Conference on Trade and Development., ‘The International Investment Treaty Regime and Climate Action.’ Available at [https://unctad.org/system/files/officialdocument/diaepcbinf2022d6\\_en.pdf](https://unctad.org/system/files/officialdocument/diaepcbinf2022d6_en.pdf) (Accessed on 07/01/2026)

<sup>48</sup> The Africanization of International Investment Disputes – from Past to Present., Op Cit

<sup>49</sup> Ibid

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enforce national laws under the ISDS regime<sup>50</sup>. Strengthening international investment arbitration in the African context is possible towards upholding justice for the parties and vulnerable populations.

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<sup>50</sup> Ibid

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