

Investment Treaty Arbitration **Kenya**

Rahim Moloo and Yamini Grema

Kenya

Rahim Moloo and Yamini Grema

31 March 2015

I. OVERVIEW

1. What are the key features of the investment treaties to which this country is a party?

BIT Contracting Party or MIT ¹	Substantive protections					Procedural rights		
	Fair and equitable treatment (FET)	Expropriation	Protection and security	Most-favoured-nation (MFN)	Umbrella clause	Cooling-off period	Local courts	Arbitration
France (not in force)	Yes	Yes	Yes	Yes	No	3 months	Yes	Yes
Germany (7 December 2000)	Yes	Yes	Yes	Yes	Yes	6 months	No	Yes
Italy (4 August 1999)	Yes ²	Yes	No	Yes	No	6 months	Yes	Yes
Netherlands (11 June 1979)	Yes	Yes	No	No ³	No	No	No	Yes ⁴
Slovakia (not in force)	Yes	Yes	Yes	Yes	Yes	4 months	Yes	Yes
Switzerland (10 July 2009)	Yes	Yes	Yes	Yes	Yes	3 months	Yes	Yes
United Kingdom (13 September 1999)	Yes	Yes	Yes	Yes	Yes	3 months	No	Yes

FTAs ⁵	Substantive protections					Procedural rights		
	Fair and equitable treatment (FET)	Expropriation	Protection and security	Most-favoured-nation (MFN)	Umbrella clause	Cooling-off period	Local courts	Arbitration
COMESA Investment Agreement (not in force)	Yes	Yes	No	Yes	No	6 months	Yes	Yes ⁶
COMESA Treaty (8 December 1994)	Yes	Yes	No	Yes	No	No	Yes	No
COMESA – U.S. TIFA (29 October 2001) ⁷	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
EAC – U.S. TIFA (16 July 2008)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

II. QUALIFYING CRITERIA

2. Definition of investor

What are the distinguishing features of the definition of 'investor' in this country's investment treaties?

Issue	Distinguishing features in relation to the definition of 'investor'
Seat of the investor/ place of business	Most of Kenya's investment treaties require that protected entities have their 'seat,' 'head office' or 'principal place of business' within the territory of the home state (ie, the contracting party that is the nationality of the investor). ⁸ In contrast, the Netherlands BIT and the COMESA Investment Agreement only require that the protected entity be duly organized under the applicable laws of the appropriate Contracting Party. The COMESA Investment Agreement requires that an entity must maintain 'substantial business activity' in the Member State in which it is duly constituted or organized.
Type of legal personality	The Italy, Slovakia and France BITs specifically note that a legal entity is protected by the investment treaty regardless of whether it is organized with limited liability status. The Germany, Slovakia and France BITs specify that entities are covered regardless of whether they are organized for profit.
Natural persons	Many Kenyan treaties ⁹ define an investor as a national or citizen in accordance with the laws of a Contracting Party. The Germany and Netherlands BITs do not define the term 'investor,' but instead define 'nationals' in a similar fashion. The German BIT adds that a person holding a passport issued by either Contracting Party is considered a national of that party. The U.K. BIT does not define the term 'investor.'
Foreign affiliates	The Italy BIT expressly extends protection for natural or legal persons to their foreign subsidiaries, affiliates and branches controlled by them in any way.

3. Definition of investment

What are the distinguishing features of the definition of 'investment' in this country's investment treaties?

Issue	Distinguishing features in relation to the definition of 'investor'
Eligible assets	Most of Kenya's investment treaties define 'investment' to include all or every kind of asset or property and contain a non-exhaustive list of qualifying investments. This list is relatively consistent across the BITs. Most treaties also provide that a change in form of the investment does not affect its classification as an investment. In contrast, the COMESA Treaty includes an exclusive list of all items that normally qualify as investments and provides that the council created by the Treaty will determine whether any other items or activities qualify as investments. The Netherlands BIT does not define 'investments.'
Specific assets	With the exception of the U.K. treaty, all of Kenya's investment treaties expressly protect intellectual property or similar rights. Most of these treaties also expressly protect rights conferred by law or under contracts related to activities in the extractive industries.
Commencement of treaty protection	Three of Kenya's investment treaties specifically protect all existing and future investments. ¹⁰ Four treaties require that for an investment to be protected, it must be admitted in accordance with the relevant laws and regulations of the state in which the investment is made. ¹¹
Exclusions of certain assets	The COMESA Investment Agreement specifically excludes from protection certain assets, like goodwill market share, rights to trade, letters of credit and certain claims to money.

III. SUBSTANTIVE PROTECTIONS

4. Fair and equitable treatment

What are the distinguishing features of the fair and equitable treatment standard in this country's investment treaties?

Issue	Distinguishing features of the fair and equitable treatment standard
Formulation of the standard	All except one of Kenya's investment treaties grant investments fair and equitable treatment. The Italy BIT provides 'just and fair treatment' to investments.
Example of what violates the standard	The treaties generally do not contain explanations of the fair and equitable standard. Only the COMESA Investment Agreement expands on this standard. The agreement contains language similar to that found in the 2004 U.S. Model BIT, explaining that 'fair and equitable treatment includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.'
Exclusions	Some of Kenya's BITs include carve-outs to fair and equitable treatment. For instance, the Switzerland BIT provides that fair and equitable treatment does not apply where a Contracting Party grants special advantages to third-party investors due to a free trade or customs union agreement, or an agreement to avoid double taxation. Other treaties contain similar exemptions (relating to free trade zones and double taxation) to the entire investment agreement. ¹²
Customary international law	Only the COMESA Investment Agreement equates the obligation to provide fair and equitable treatment with the minimum standard of treatment under customary international law.

5. Expropriation

What are the distinguishing features of the protection against expropriation standard in this country's investment treaties?

Issue	Distinguishing features of the 'expropriation' standard
Conditions for lawful expropriation	Under most of Kenya's investment treaties, both direct and indirect expropriation is forbidden. ¹³ Most treaties allow for expropriation only when it is for public benefit, non-discriminatory, and against compensation. ¹⁴ The Germany BIT does not specify a non-discrimination requirement. The Netherlands BIT does not explicitly protect against indirect expropriation and it does not expressly require that expropriation be for a public purpose; however, it does state that any expropriation must be in accordance with generally recognized rules of international law.
Compensation	All of Kenya's treaties allowing expropriation under certain circumstances require prompt, full, effective, adequate and/or just compensation. With slight variation, most of Kenya's investment treaties require that compensation be equivalent to the (genuine, true or market) value of the expropriated investment immediately before the expropriation was made or when it became publicly known. ¹⁵ The compensation must be paid without delay and carry a certain amount of interest. ¹⁶ The Italy BIT specifies that compensation must include interest calculated at the LIBOR rate. The compensation must also be freely transferable. ¹⁷
Repurchase of assets	The Italy BIT specifies that if, after dispossession, the expropriated asset is not used, even partially, for the stated purpose, the original owner is entitled to repurchase the asset at market price.
Judicial review	Most of Kenya's treaties that allow expropriation under certain circumstances require that the expropriation itself and the amount of compensation be subject to review by appropriate judicial or administrative agencies. ¹⁸
Ownership of shares	A distinguishing feature of the expropriation clause of some of Kenya's BITs is a provision that a Contracting Party which expropriates assets of a company which is incorporated or constituted in accordance with its own laws, and in which an investor of the other Contracting Party owns shares, shall ensure that the expropriation provision of the BIT is applied to the extent necessary to guarantee compensation in respect of the investments. ¹⁹
Exclusions	The COMESA Investment Agreement includes expropriation-specific exceptions. These exceptions are for the 'issuance of compulsory licenses granted in relation to intellectual property rights,' and 'bona fide regulatory measures . . . designed and applied to protect and enhance legitimate public welfare objectives, such as public health, safety and the environment.' Also, a measure of general application is not an expropriation of a debt security or loan solely on the ground that it imposes costs that cause its default.

6. National treatment/most-favoured-nation treatment

What are the distinguishing features of the national treatment/most favoured nation treatment standard in this country's investment treaties?

Issue	Distinguishing features of the 'national treatment' and/or 'most favoured nation' standard
Scope of protection	All treaties that include the 'most favoured nation' clause also include the 'national treatment' clause. ²⁰ Generally, this protection applies to investments and the income or return of investors. ²¹ Many of Kenya's investment treaties also extend this protection to the 'management, maintenance, use, enjoyment or disposal' of investments. ²² The COMESA Investment agreement provides this protection only 'in like circumstances.' With respect to national treatment, the Agreement provides several factors to assist in the determination of whether 'like circumstances' exist. ²³ The Netherlands BIT only requires the parties to 'endeavor to accord' investors from the other state MFN treatment with respect to the payment of 'taxes, fees or charges and to the enjoyment of fiscal deductions and exemptions.'
General exclusions	As a general rule, Kenya's investment treaties do not extend MFN or national treatment where any privileges granted are (1) on account of membership in or association with, a customs or economic union, a common market or a free trade area; or (2) by virtue of a double taxation agreement or other agreements regarding matters of taxation. ²⁴ The France BIT only makes an exception for privileges related to membership in a free trade area. The U.K. BIT excludes more favourable treatment for the other Contracting Party's investors where domestic legislation regarding taxation extends privileges to certain other parties.
Specific exclusions	Both the Switzerland and France BITs make exceptions for non-conforming measures to stimulate and promote the creation of local industries, especially small and medium-sized enterprises. The France BIT further makes exceptions to protect some emerging industries. The Slovakia BIT makes exceptions for both the promotion of small and medium-sized enterprises, and the protection of emerging industries; however, this exception only applies to Kenya's non-conforming measures and the BIT specifies that the MFN standard still applies. The Slovakia BIT also states that the MFN and national treatment standards don't apply to multilateral agreements relating wholly or mainly to investments. The Germany BIT excludes measures 'taken for reasons of public security and order, public health or morality' from conforming with the MFN and national treatment standards. The COMESA Investment Agreement provides that member countries can submit a temporary exclusion list to temporarily suspend national treatment of member countries' investments.
Treatment less favourable	The Germany BIT provides the following examples of treatment less favourable: 'unequal treatment in the case of restrictions on the purchase of raw or auxiliary materials, of energy or fuel or of means of production or operation of any kind, unequal treatment in the case of impeding the marketing of products inside or outside the country, as well as any other measures having similar effects.'
Precedency	The Germany BIT provides that if the domestic law of a Contracting Party or obligations under international law 'contain a regulation, whether general or specific, entitling investments by nationals or companies of the other Contracting Party to a treatment more favourable than is provided for by [the BIT], such regulation shall to the extent that it is more favourable prevail over [the BIT].' The Italy BIT contains a similar provision.

7. Protection and security

What are the distinguishing features of the obligation to provide protection and security to qualifying investments in this country's investment treaties?

Issue	Distinguishing features of the 'protection and security' standard
Scope	The formulation of the standard varies widely in Kenya's investment treaties. Some provide for 'full protection and security.' ²⁵ Others require 'full and complete protection and security.' ²⁶ The Slovakia BIT requires 'full and constant protection and security.' None of these BITs expand on the meaning of 'protection and security.'
Exclusions	Some of Kenya's BITs include carve-outs to the 'protection and security' requirement. For instance, the Switzerland and Slovakia BITs provide that this requirement does not apply where a Contracting Party grants special advantages to third-party investors due to a free trade or customs union agreement, or an agreement to avoid double taxation. Other treaties contain some narrow exemptions to the entire investment agreement. ²⁷

8. Umbrella clause

What are the distinguishing features of the umbrella clauses contained within this country's investment treaties?

Issue	Distinguishing features of any 'umbrella clause'
Scope	Only four of Kenya's investment treaties contain an umbrella clause. ²⁸ Where umbrella clauses are present, they are largely all variations of the following formulation: 'Each Contracting Party shall observe any other obligation it has assumed with regard to investments in its territory by nationals or companies of the other Contracting Party.' None of the BITs expand further on the meaning on this obligation.

9. Other substantive protections

What are the other most important substantive rights provided to qualifying investors in this country's investment treaties?

Issue	Other substantive protections
Non-impairment	Most of Kenya's investment treaties include language to the effect that the host state 'shall not impair by arbitrary or discriminatory measures the management, maintenance, use or enjoyment of investments in its territory of nationals or companies of the other Contracting Party.' ²⁹
Armed conflict/civil unrest	All of Kenya's BITs, except the Netherlands BIT, ensure that losses due to an armed conflict or other emergency be accorded, with respect to restitution, indemnification, compensation or other settlement, a treatment which is no less favourable than that accorded to the investors of the host state or the investors of any third state. ³⁰

Free transfer of payments	Most of Kenya's BITs allow an investor unrestricted transfers of its funds back to its home state. Most also require these transfers to be in freely convertible currencies. ³¹ All of Kenya's investment treaties that address transfers, with the exception of the COMESA Investment Agreement and COMESA Treaty, include the express requirement that free transfers be done without delay (or promptly). The Germany BIT expands on the meaning of 'without delay,' and provides that the transfer must not take longer than two months. All of the BITs, except the U.K. BIT, include an expansive list of the types of funds that are eligible for this protection, including capital invested to maintain and develop the investment, proceeds from the sale of the investment, interest, dividends, royalties, profits and other income, funds for the repayment of expenses such as loan payments or management or license fees, remuneration of personnel engaged from abroad, and any compensation for expropriation. A few of the treaties provide that a Contracting Party may temporarily adopt measures that affect the free transfer of payments if the country is suffering from serious financial difficulties. ³²
Subrogation	With the exception of the Netherlands BIT and the COMESA Investment Agreement and Treaty, all of the Kenya BITs entitle the other Contracting Party (or its designated agency or institution) to step into the shoes of its investor if that Contracting Party (or its agency or institution) makes a payment to the investor under a guarantee it has accorded in respect of the investment in question. Some of these treaties explicitly state that the subrogated rights cannot exceed the original rights of the investor. ³³ None of the BITs appear to extend the protection of the subrogation provision to third party insurers (ie, an entity other than the Contracting Party or its agency).
Preservation of rights	Many of Kenya's investment treaties confirm that the treaty obligations shall not supersede any more favourable obligations under domestic or international law that may apply to a protected investment. ³⁴ The Italy BIT further specifies that the treaty's MFN/national treatment standards do not apply where a specific contract or agreement provides more favourable treatment.
Granting of permits	Some of Kenya's investment treaties provide that the host state is required to issue the necessary permits, licenses, or other authorizations to foreign investments, in accordance with its laws and regulations. ³⁵
Right to employ workers	A number of Kenya's investment treaties provide that the host state shall, whenever needed, endeavour to issue necessary entry, stay and work permits for foreign workers in connection with activities related to protected investments. The BITs contain several variations of this requirement. The Germany and France BITs provide for the favourable consideration of travel and work permits of relevant foreign employees generally, while the Slovakia, Switzerland and France BITs only allow such consideration for essential or key employees. Several of these treaties also provide that similar considerations must be given to the employees' immediate family members. ³⁶ The Italy BIT also grants employed foreign workers a right to adequate working conditions. The COMESA Investment Agreement provides member states with a right to hire 'technically qualified persons' from any country, but states a preference for equally qualified persons from member states.
Effective means of asserting rights	The Italy BIT contains an 'effective means' clause. This clause ensures foreign investors 'means of asserting claims and enforcing rights with respect to investments and investment agreements.'
General exceptions	Three treaties provide that the Agreement does not apply where a Contracting Party adopts measures necessary to maintain public order and protect vital national security interests in a time of war. ³⁷ The Slovakia BIT extends this exemption to include times of social, economic, and other international crises. The France BIT specifies that the treaty does not prevent a party from taking steps to preserve cultural and linguistic diversity. The COMESA Investment Agreement includes provisions to protect national security, public morals, human/animal/plant life or health, and the environment. It also provides that, with the exception of the expropriation requirements, the Agreement does not apply to taxation measures.
Stabilization clause	The Italy BIT provides that if laws or policies of a Contracting Party change after an investment has been made, those laws shall not apply retroactively to investments made under the treaty.
Transparency	The Slovakia BIT ensures that each party will promptly publish, or otherwise make accessible, any laws, regulations and other relevant information relating to or affecting foreign investments.

IV. PROCEDURAL RIGHTS

10. Are there any relevant issues related to procedural rights in this country's investment treaties?

Issue	Procedural rights
Allows ICSID Arbitration	All of Kenya's investment treaties that have arbitration provisions allow for ICSID arbitration. ³⁸ The Netherlands BIT, however, only requires a party to give 'sympathetic consideration' to a request for arbitration or conciliation by a national of the other party.
Allows ad hoc arbitration	Many of the above investment treaties also allow for ad hoc arbitration in accordance with the UNCITRAL rules ³⁹ or any other ad hoc arbitral tribunal as mutually agreed upon by the parties. ⁴⁰
Insurance or guarantee no defence	A few of Kenya's investment treaties include a provision that prohibit a party in a dispute from raising an objection on account of the fact that the investor (who is the other party to the dispute) has received or will receive an indemnification under an insurance or guarantee agreement. ⁴¹
Restrictions on using diplomatic channels	Three of Kenya's investment treaties place limits on when diplomatic channels can be exercised to resolve disputes. The Italy BIT requires that parties refrain from negotiating through diplomatic channels until arbitration procedures have been completed and one party has failed to comply with a ruling of the tribunal. The U.K. and Switzerland BITs allow for the use of diplomatic channels after one party has failed to comply with an award rendered by an arbitral tribunal. The U.K. BIT further provides that diplomatic channels can be used if the arbitral tribunal decides that the dispute at issue is not within its jurisdiction.
Fork-in-the-road	The Slovakia BIT and the COMESA Investment Agreement have express fork-in-the-road clauses, requiring that investors choose to pursue their remedies for breaches of the BIT in either domestic courts or international arbitration (to the exclusion of the other). But the Slovakia BIT (and the France BIT) further provides that an investor who has submitted the dispute to a domestic court may instead resort to arbitration if the investor waives and cancels the action pending in the domestic court before it has ruled on the merits.
Applicable law	The COMESA Investment Agreement provides that claims submitted to arbitral tribunals shall be decided in accordance with the provisions of the Agreement, the COMESA Treaty, domestic law of the host state, and general principles of international law. All other investment treaties are silent as to what law governs the parties' dispute.

Time limits	The COMESA Investment Agreement requires that a claim must be submitted to arbitration within three years from the date the investor first acquired, or should have acquired, knowledge of the alleged breach and the resulting damage.
Confidentiality	The COMESA Investment Agreement provides that an arbitral tribunal can take steps necessary to protect confidential business information from being made public. However, the Agreement specifies that the following shall be available to the public: documents relating to a notice of intention to arbitrate, the settlement of any dispute, pleadings, evidence and decisions. Further, the Agreement provides that oral hearings shall be open to the public.

11. What is the status of this country's investment treaties?

All of Kenya's BITs can be unilaterally terminated by a Contracting Party at any time after the end of the initial term of the treaty (between 5 and 20 years) by giving one year's written notice of the termination (six months for the Netherlands BIT). Most of Kenya's BITs incorporate a 'survival clause,' which extends the treaty's application in relation to existing investments for a further period (between 5 and 20 years) from the date of termination. A Member State can withdraw from the COMESA Investment Agreement and the COMESA Treaty after giving one year's written notice. There is no known plan to renegotiate or terminate any of Kenya's investment treaties, or to renounce ICSID membership.

V. PRACTICALITIES (CLAIMS)

12. To which governmental entity should notice of a dispute against this country under an investment treaty be sent? Is there a particular person or office to whom a dispute notice against this country should be addressed?

Government entity to which claim notices are sent	Office of the Attorney-General and the Department of Justice P.O. Box 40112 – 00100 Nairobi T: +254 020 2227461 / 2251355 F: +254 020 213956 E: info.statelawoffice@kenya.go.ke
---	---

13. Which government department or departments manage investment treaty arbitrations on behalf of this country?

Government department which manages investment treaty arbitrations	Generally, the Attorney General's office is primarily responsible for defending the Government.
--	---

14. Are internal or external counsel used, or expected to be used, by the state in investment treaty arbitrations? If external counsel are used, does the state normally go through a formal public procurement process when hiring them?

Internal/external counsel	Kenya has not been frequently sued in investment arbitration. In the case of <i>World Duty Free v. Kenya</i> (which was an ICSID case brought under an investment contract) the government sought the assistance of external counsel.
---------------------------	---

VI. PRACTICALITIES (ENFORCEMENT)

15. Has the country signed and ratified the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965)? Please identify any legislation implementing the Washington Convention.

Washington Convention implementing legislation	Kenya is a party to the Washington Convention, which came into force for Kenya on February 2, 1967. Implementing legislation was not readily identifiable.
--	--

16. Has the country signed and ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the New York Convention)? Please identify any legislation implementing the New York Convention.

New York Convention implementing legislation	The New York Convention came into force in Kenya on May 11, 1989. It is implemented through the Arbitration Act, Act No. 4 of 1995. The Arbitration Act is modelled on the UNCITRAL Model Law.
--	--

17. Does the country have legislation governing non-ICSID investment arbitrations seated within its territory?

Legislation governing non-ICSID arbitrations	Non-ICSID investment arbitrations seated in Kenya would be governed by: the Arbitration Act; the Nairobi Centre for International Arbitration Act, Act No. 26 of 2013 (which establishes a court that has exclusive original and appellate jurisdiction to hear and determine disputes referred to it by the Arbitration Act or any other law); and the Kenyan Constitution (2010).
--	---

18. Does the state have a history of voluntary compliance with adverse investment treaty awards; or have additional proceedings been necessary to enforce these against the state?

Compliance with adverse awards	There are no known adverse investment treaty awards against Kenya.
--------------------------------	--

19. Describe the national government's attitude towards investment treaty arbitration.

Attitude of government towards investment treaty arbitration	The government accepts binding international arbitration with foreign investors. The one known completed investment arbitration against Kenya (<i>World Duty Free v. Kenya</i>) took place under an investment contract as opposed to an investment treaty.
--	---

20. To what extent have local courts been supportive and respectful of investment treaty arbitration, including the enforcement of awards?

Attitude of local courts towards investment treaty arbitration	Given that there are no known adverse investment treaty awards against Kenya, it is unclear what the local courts' attitude is towards investment treaty arbitration. As a general matter, Kenya is supportive of international arbitration, which it has recently promoted through its passing of the Nairobi Centre for International Arbitration Act.
--	--

VII. NATIONAL LEGISLATION PROTECTING INWARD INVESTMENT

21. Is there any national legislation that protects inward foreign investment enacted in this country? Describe the content.

National Legislation	Substantive protections			Procedural rights	
	FET	Expropriation	Other	Local courts	Arbitration
The Constitution of Kenya	No	Yes	No	Yes	No
Foreign Investments Protection Act of 1964	No	Yes	Repatriation of investments; remittance of dividends and interest	Yes	No
Investment Promotion Act of 2004 ⁴²	No	No	No	No	No

VIII. NATIONAL LEGISLATION PROTECTING OUTGOING FOREIGN INVESTMENT

22. Does the country have an investment guarantee scheme or offer political risk insurance that protects local investors when investing abroad? If so, what are the qualifying criteria, substantive protections provided and the means by which an investor can invoke the protections?

Relevant guarantee scheme	Qualifying criteria, substantive protections provided and practical considerations
Multilateral Investment Guarantee Agency (MIGA)	Kenya became a member of MIGA on November 28, 1988. MIGA provides political risk insurance for qualifying investments made by Kenyan nationals in certain developing states.

IX. AWARDS

23. Please provide a list of any available arbitration awards or cases initiated involving this country's investment treaties.

Awards
Although not involving an investment treaty, the following ICSID case against Kenya is worth noting: <i>World Duty Free Company Limited v. The Republic of Kenya</i> , ICSID Case No. ARB/00/7, Award, October 4, 2006.
Pending proceedings
N/A

X. READING LIST

24. Please provide a list of any articles or books that discuss this country's investment treaties.

N/A

Notes

- The text of Kenya's bilateral investment treaties with the following countries was not publicly available: Burundi, China, Finland, Iran, Kuwait, Libya and Mauritius. None of these treaties are currently in force.
- The Italy BIT requires 'just and fair' treatment.
- Article 5 of the Netherlands BIT only requires the parties to 'endeavor to accord' investors from the other state MFN treatment with respect to the payment of 'taxes, fees or charges and to the enjoyment of fiscal deductions and exemptions.'
- Article 11 of the Netherlands BIT only requires a party to give 'sympathetic consideration' to a request for arbitration or conciliation by a national of the other party.
- Kenya is also a signatory to the Treaty Establishing the African Economic Community (AU Treaty) and the Treaty Establishing the East African Community (EAC Treaty). These treaties are free trade agreements that neither include investment chapters nor otherwise provide substantive protections to investors and investments. For this reason, they are excluded from the current analysis. Kenya is also a signatory to the ACP-EC Partnership Agreement (between members of the African, Caribbean and Pacific Group of States and the European Community).
- This Agreement only requires signatories to 'study the main clauses of a model protection agreement,' including the substantive protections at issue in this chart, for consideration in future bilateral investment treaties. Because this Agreement does not actually grant these protections, it is also excluded from the current analysis.
- This Agreement only allows for arbitration after the parties have used mediation or other means of dispute resolution during the cooling-off period.
- Both Trade and Investment Framework Agreements (TIFAs) establish a 'council' to monitor trade and investment relations between the parties, consider specific trade and investment matters of interest to the parties, and remove impediments to trade and investment. While these treaties deal with furthering investments, they do not overview specific protections to be granted to investors and investments.
- See Germany, Italy, Slovakia, Switzerland and France BITs.
- See Italy, Slovakia, Switzerland and France BITs.
- See Italy, Kenya and Switzerland BITs.
- See Italy, Slovakia and France BITs, and COMESA Investment Agreement.
- See Slovakia BIT.

- 13 See Germany, Italy, Slovakia, U.K., Switzerland and France BITs, and COMESA Investment Agreement.
- 14 See Italy, Slovakia, U.K., France and Switzerland BITs, and COMESA Investment Agreement.
- 15 See Germany, Italy, Slovakia, U.K., Switzerland and France BITs, and COMESA Investment Agreement.
- 16 See Germany, Italy, Slovakia, U.K., Switzerland and France BITs.
- 17 See Germany, Netherlands, U.K., Switzerland and France BITs, and COMESA Investment Agreement.
- 18 See Germany, Italy, Slovakia, U.K., Switzerland and France BITs, and COMESA Investment Agreement.
- 19 See Slovakia, U.K. and Switzerland BITs.
- 20 See Germany, Italy, Slovakia, U.K., Switzerland and France BITs, and COMESA Investment Agreement.
- 21 See Italy, U.K. and Switzerland BITs.
- 22 See U.K., Slovakia, France and Switzerland BITs, and COMESA Investment Agreement.
- 23 Article 17 of the COMESA Investment Agreement specifies that the determination of whether 'like circumstances' exist requires a case by case examination of all the circumstances of an investment, including: (a) its effects on third persons and the local community; (b) its effects on the local, regional or national environment, including the cumulative effects of all investments within a jurisdiction on the environment; (c) the sector the investor is in; (d) the aim of the measure concerned; (e) the regulatory process generally applied in relation to the measure concerned; and (f) other factors directly relating to the investment or investor in relation to the measure concerned; and the examination shall not be limited to or be biased towards any one factor.
- 24 See Germany, Italy, Slovakia, Switzerland and U.K. BITs, and COMESA Investment Agreement.
- 25 See Germany and U.K. BITs.
- 26 See Switzerland and France BITs.
- 27 See France BIT and COMESA Investment Agreement.
- 28 See Germany, Slovakia, U.K. and Switzerland BITs.
- 29 See Germany, Italy, Netherlands, Slovakia, U.K., Switzerland and France BITs. The language in the various BITs differs slightly.
- 30 See Germany, Italy, Slovakia, U.K., Switzerland and France BITs, and the COMESA Investment Agreement. The language in the various BITs differs slightly.
- 31 See Italy, Slovakia, U.K., Switzerland and France BITs.
- 32 See Slovakia and France BITs, and the COMESA Investment Agreement.
- 33 See Slovakia, U.K. and Germany BITs.
- 34 See Germany, Italy, Netherlands, Slovakia, U.K., Switzerland and France BITs.
- 35 The Italy, Slovakia, Switzerland and France BITs all include variations of this requirement.
- 36 See Italy, Slovakia, Switzerland and France BITs.
- 37 See Slovakia and France BITs, and COMESA Investment Agreement.
- 38 See Germany, Italy, Slovakia, U.K., Switzerland and France BITs, and COMESA Investment Agreement.
- 39 See Italy, Slovakia, Switzerland and France BITs, and COMESA Investment Agreement.
- 40 See France and Slovakia BITs, and COMESA Investment Agreement.
- 41 See Germany, Slovakia and France BITs.
- 42 This Act requires all foreign investors to obtain investment certificates from the Kenya Investment Authority (KIA) before investing and meet a mandatory investment amount threshold.