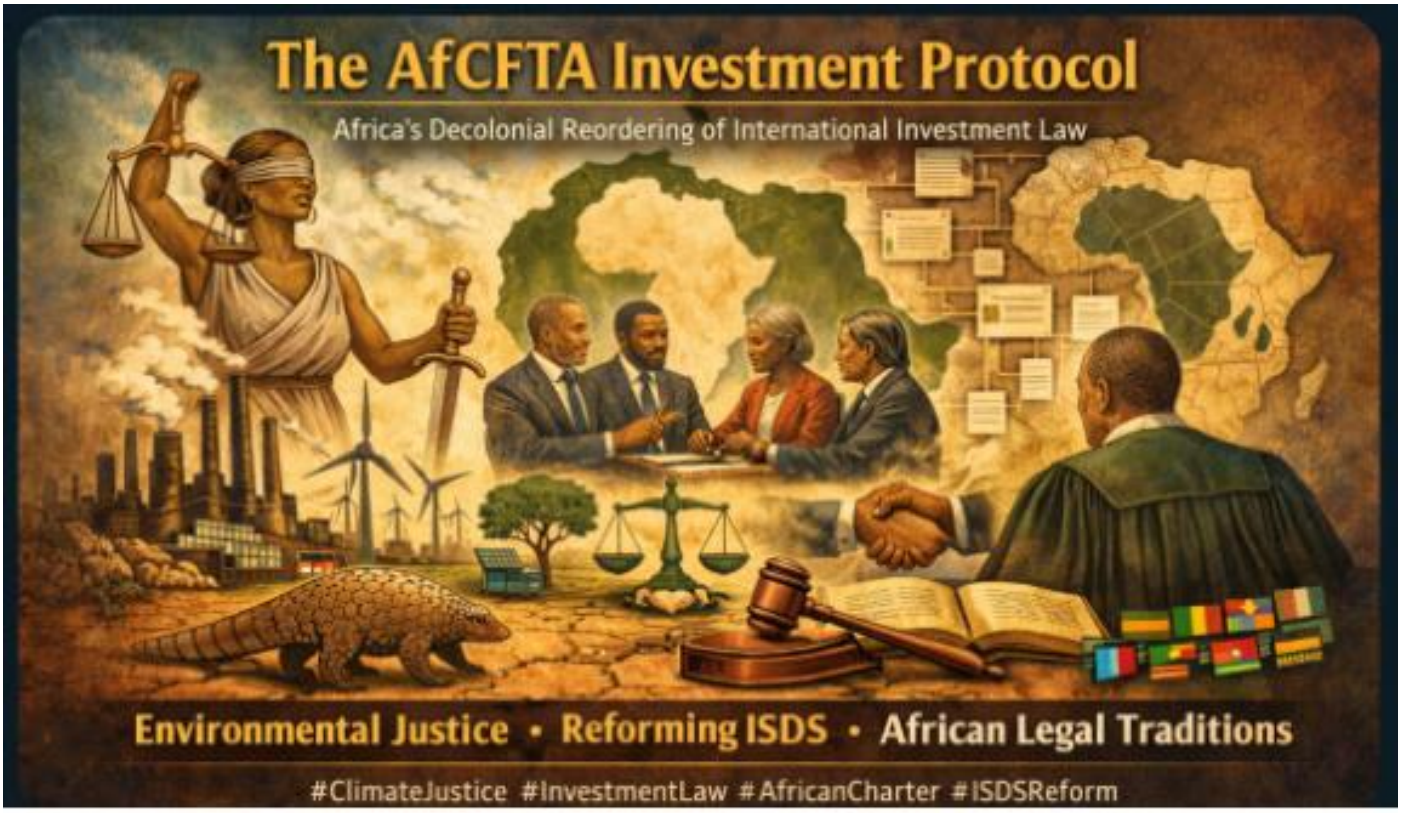

AfCFTA Investment Protocol : Africanizing Arbitration as a Vanguard for Climate and Environmental Justice ?

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Despite contributing minimally to global greenhouse gas emissions, the African continent bears a disproportionate burden of climate impacts. Historically, Africa's investment regime prioritized capital inflows over environmental stewardship, subordinating ecological integrity to investor protections. The 2023 AfCFTA Protocol on Investment (Protocol) represents a watershed in post-colonial treaty-making: environmental protection is elevated from symbolic reference to a binding, enforceable core obligation, anchored in Article 24 of the African Charter on Human and Peoples' Rights, which guarantees a "satisfactory, healthy and sustainable environment." This raises a fundamental normative question: can the Protocol's Africanization of investment arbitration operationalize environmental human rights as a legal shield against climate degradation while redefining investor protections? The Protocol's transformative potential lies not solely in its drafting but in the development of an « Africanized » interpretative methodology rooted in African legal traditions, constitutional norms, and regional jurisprudence. By systematically integrating Vienna Convention principles (Article 31), Charter jurisprudence, domestic constitutional environmental norms, and regional precedents, tribunals can reposition environmental human rights as co-primary objectives, bridging substance and procedure to recalibrate the balance between investor safeguards and climate imperatives.

A. From symbol to substance : codifying environmental protection in African investment law

Articles 34 and 35 operationalize these obligations through mandatory environmental and social impact assessments (ESIAs), application of the precautionary and preventive principles, restoration of damaged sites, and free, prior, and informed consent (FPIC) for indigenous and local communities. Article 47 codifies civil liability, empowering host states to pursue enforcement through national courts. These provisions reflect a profound normative shift: environmental protection is no longer ancillary but central to investment governance, explicitly anchored in Article 24 of the Charter and the UN General Assembly's recognition of the right to a healthy environment. These provisions can be read through the lens of environmental justice, which emerges as an implicit structuring principle of the Protocol. First, at a distributive level, they seek to correct the historical externalization of environmental costs onto local communities, and second, at a procedural level, mechanisms such as environmental impact assessments and free, prior and informed consent (FPIC) reinforce participation and inclusiveness in investment governance, and finally, and perhaps most significantly, Article 47 introduces a form of corrective justice, anchoring investor liability and reflecting a shift from risk allocation to harm accountability, echoing the polluter pays principle. By foregrounding environmental security alongside investor accountability, the Protocol signals a deliberate ecocentric recalibration of African investment law. This move transcends anthropocentric frameworks where human welfare dominates, and situates Africa as a laboratory for integrating human rights, environmental justice, and sustainable development within the investment law architecture. The climate change-related cases against major polluters and ICSID cases Renco v. Peru (II) and Urbaser mark a significant step in this direction. The Protocol's normative ambitions are reinforced by a growing body of African jurisprudence, which provides interpretative guidance and legitimacy. The landmark SERAC v. Nigeria case (1996) decision linked Ogoni environmental degradation to violations of the African Charter, establishing a precedent for human-rights-based environmental claims. This approach was domesticated into Nigerian law through Gbembre v. Shell case, demonstrating the operationalization of Charter principles at the national level. More recently, the Bille and Ogale communities case (2025) foregrounds constitutional and Charter-based environmental rights in litigation over repeated oil spills, highlighting both the justiciability of environmental claims and the practical challenges of enforcement in resource-constrained jurisdictions. These cases illustrate that African courts and tribunals are capable of advancing environmental justice, but the Protocol's success depends on the development of consistent jurisprudence, robust institutional capacity, and interpretative coherence across national and regional fora. The Protocol systematically recalibrates classical investor protections to safeguard

regulatory autonomy for climate and environmental governance. Articles 12 and 14 carve out environmental public policy from national treatment and most favoured nation (MFN) obligations, blocking the importation of restrictive ISDS interpretations. The Protocol also introduces the administrative and judicial treatment clause in article 17. The first paragraph of this article is intended to differentiate itself from established conventional practice regarding the standard of fair and equitable treatment. It's also clarified that this provision should not be interpreted as guaranteeing fair and equitable treatment according to the traditional approach, specifying that this clause includes a minimum standard of treatment of foreigners but cannot go beyond this provision. It is undeniable that African states seek an African approach, defending their contested position under this regional agreement against any autonomous interpretation of the fair and equitable treatment standard. Article 17 confines fair and equitable treatment (FET) to a minimum standard, preventing expansive investor claims that could chill climate measures, while expropriation clauses (Articles 19–21) explicitly protect bona fide environmental regulation. The Protocol thus indirectly includes the principle of noscitur a sociis, requiring substantial identity between the subject of the two sets of clauses to bind the States to the obligations contracted. Stressing the importance of environmental protection to guarantee public safety, health and morality and that damage to the environment will necessarily result in societal drift on these various points. This approach also reinforces the principle of the relative effect of treaties in the area of international investment law, in accordance with Article 34 of the Vienna Convention on the Law of Treaties and the Relative Effect of Treaties. Furthermore, the protection against expropriation clause can be interpreted directly or indirectly. Indeed, the article 19 of the Protocol provides for this provision, with an exception in article 20 to the protection against expropriation clause. The clause protecting against expropriation of foreign investors in the agreement requires, on the one hand, that the public interest and compensation are prior to any legal expropriation measure, and on the other hand, that the measure be in accordance with the law. Therefore, the indirect expropriation clause mentioned in article 21 of the Protocol must not hinder the legitimate ecological regulatory measures of the host State, as specified in the article 18 expression "subject to its capabilities", thus supporting the ejusdem generis theory of interpretation (Virat, 2023) as one of the facets of the principle noscitur a sociis. Therefore, direct and indirect expropriations are thereby also increasing the possibility of a "dissuasive effect" for foreign investments that may lead to environmental damages. Beyond these textual innovations, the Protocol signals a deeper structural shift in African investment law. It reflects a move from an investor-centric and extractive model toward what may be described as an ecologically embedded investment regime, where investment protection is conditioned by its social and environmental legitimacy. This transformation is not merely incremental but axiological, reconfiguring the purpose of investment law from facilitating capital flows to regulating their impact and in this sense, the Protocol illustrates a form of regulated rebalancing, grounded in reciprocal obligations and a more controlled interpretation of classical standards such as fair and equitable treatment and expropriation.

B. Africanized arbitration : reconceptualizing method and norms in continental investment law

The "Africanization" of arbitration should not be understood as a mere geographical relocation of dispute settlement, but rather as a methodological and epistemic shift in the way investment disputes are interpreted and resolved. It entails a re-centering of interpretative authority around African legal sources, including the African Charter on Human and Peoples' Rights, domestic constitutional norms, and regional jurisprudence, thereby contributing to an epistemic decolonization of investment arbitration (Mahmoud & Sheikhattar, 2024). At the heart of the Protocol is the Africanization of arbitration, a methodology prioritizing continental institutions, jurisprudence, and socio-ecological priorities over imported ISDS norms. This approach may be conceptualized as an African contextual interpretative method, combining Vienna Convention principles (Article 31) with a teleological emphasis on environmental protection and a systemic integration of regional legal norms. In parallel, the Protocol reflects a form of strategic regionalization of dispute settlement, aimed at reasserting control over adjudicatory processes while strengthening the legitimacy and accessibility of African fora, in contrast with ongoing reforms such as UNCITRAL Working Group III on ISDS reform. Despite its innovative orientation, the AfCFTA Investment Protocol has not, at this stage, established a permanent continental investment court or a formal appellate mechanism comparable to those envisaged in

other reform processes, such as the European Union's Investment Court System or the discussions taking place within UNCITRAL Working Group III. The Protocol instead anticipates further institutional development through its dispute-settlement architecture, including annexes that remain under negotiation and the progressive strengthening of African fora. As a result, interpretive authority currently remains largely decentralized, resting primarily with domestic courts and ad hoc arbitral bodies operating within diverse legal systems. This institutional configuration, while consistent with the Protocol's emphasis on sovereignty and regional ownership, carries well-known implications in investment law. Decentralized adjudication may generate variations in the interpretation of key treaty standards particularly with respect to environmental obligations, regulatory exceptions, and the scope of indirect expropriation, thereby affecting the coherence of the emerging AfCFTA legal framework and the predictability sought by both states and investors. The risk is not inherent in the substance of the provisions themselves, but in the absence, for now, of a centralized interpretive authority capable of consolidating jurisprudence across the continent. In addition, several operative concepts employed by the Protocol such as "public interest," "sustainable development," and the "precautionary principle" are framed in deliberately open terms and are not accompanied by detailed interpretive guidance or annexes. This drafting technique is familiar in contemporary treaty practice and allows adjudicators to adapt the standards to diverse regulatory contexts. At the same time, however, it places considerable weight on judicial methodology, increasing the importance of consistent interpretive approaches if legal certainty is to be preserved. Divergent readings of these clauses in future disputes involving climate regulation or environmental measures could otherwise reproduce long-standing tensions between regulatory autonomy and investment protection. In addition, the Protocol's exclusion of investor-state dispute settlement from the scope of the most-favored-nation clause and to emphasize African dispute-resolution mechanisms reflects a deliberate effort to recalibrate procedural authority within the international investment regime. This approach aims to prevent the jurisdictional expansion of arbitration through MFN clauses and to strengthen regional and domestic institutions. Its effectiveness, however, will depend on the availability of transparent, efficient, and technically capable fora at the national and regional levels. Continued investment in judicial training, procedural harmonization, and cross-border cooperation will therefore be central to ensuring that the Protocol's environmental ambitions can be implemented without undermining confidence in the stability of the investment framework. Operationalization requires therefore a tripartite approach, a contextualist interpretation based on the Vienna Convention, a primacy of African jurisprudence to interpret open-textured terms such as "sustainable development" and "public interest" and teleological elevation of environmental protection as a regime-defining objective. Hypothetically, a coal investor claims indirect expropriation due to accelerated phase-out policies, would result in African tribunal cross-reference of Articles 34, 47, and Charter obligations, recognizing the measure as legitimate under Article 21, and calibrating compensation based on polluter-pays principles and investor compliance. Such an approach demonstrates how Africanized arbitration would operationalizes climate justice while maintaining investor certainty.

C. Climate regulation and the African normative reordering of international investment law

Compared to other regions, the AfCFTA Protocol is at the vanguard of investment law reform. The EU's recent efforts, such as the Investment Court System in CETA and the EU-Vietnam Investment Protection Agreement, have introduced procedural reforms and greater transparency, but still stop short of embedding environmental obligations as binding core duties, and the Escazú Agreement focuses on environmental democracy and access to justice but operates outside investment law. By contrast, the AfCFTA Protocol integrates environmental duties as justiciable obligations, limits classical ISDS through MFN exclusions, and centers Charter Article 24 as a structuring principle. While several authors encourage the idea of a Multilateral Investment Court, the African project aims to perfect the current system, around a revaluation of the continent's various resources, as it's outlined in the article 45 of the Protocol, and the future annex on dispute settlement which is still under negotiation. The Protocol therefore aligns with the broader debates on ISDS reform and climate litigation such as the South African "Deadly Air" case and the growing number of transnational suits against carbon majors and emphasis on local remedies, community rights, and environmental justice resonates with the demands of climate litigation movements worldwide (Sulyok, 2024)

and as a direct responds to critiques of ISDS's legitimacy (see as an example Yu, 2023). This positions Africa as a Global South laboratory, reclaiming normative agency and offering a model for harmonizing investment protection with climate and environmental justice (Kukulis, 2024), potentially exportable under Article 49.4 to extra-African agreements when investments treaties are concluded. Hence, the Protocol introduces profound implications for practitioners, policymakers, and courts, and it also challenges the traditional hierarchy of norms in investment law, placing environmental and social objectives on equal footing with investor protection. This could influence the evolution of customary international law (Gathii, 1998) and future treaty-making, especially as debates on a Multilateral Investment Court and ISDS reform intensify at UNCITRAL and elsewhere. Investors face increased compliance obligations and litigation exposure, states gain actionable recourse, and tribunals are tasked with developing coherent doctrines and jurisprudence networks. The decentralization of enforcement to national courts underscores enduring obstacles, including limited judicial expertise, susceptibility to political interference, and resource deficiencies and in the absence of systematic capacity-building and enhanced regional judicial cooperation, the Protocol's transformative environmental and social obligations may fail to achieve their intended effect. Future priorities include strengthening national and regional courts, developing jurisprudential databases, and fostering AU-backed mechanisms for coherent enforcement. Yet, the Working Group III: Investor-State Dispute Settlement Reform, materialized by an effective reform of interpretation in investment arbitration, particularly through the Africanization of the processes (Akinkugbe, 2021 and Mbengue & Schacherer, 2017), the Protocol yet embodies a strategic shift, elevating environmental protection to parity with investor rights, and potentially transforming investment law into a vehicle for climate and social justice across Africa and the Global South (Davis & Pargendler, 2025). Taken together, these developments suggest that the AfCFTA Protocol does more than reform investment law, it contributes to the emergence of a new alternative normative model, in which environmental protection, human rights, and investment governance are structurally integrated. In doing so, Africa positions itself not merely as a rule-taker, but as a "norm entrepreneur" in the evolving architecture of international investment law.

Conclusion: Africa as standard-setter in investment law

The AfCFTA Investment Protocol represents a bold experiment in rebalancing investment law towards environmental and social justice. Its success depends not only on textual provisions but on the capacity of African legal systems to interpret and enforce these obligations. By integrating environmental human rights, recalibrating investor protections, and prioritizing African jurisprudential authority, the Protocol transforms Africa from a passive participant into a normative architect, at a moment when states at UNCITRAL grapple with the reform of ISDS. If effectively implemented, this "Africanization" of investment arbitration could offer a global model for reconciling economic growth with climate and environmental imperatives, demonstrating that regional legal innovation can advance both human rights and sustainable development. The Protocol is not merely a treaty, it is a normative statement, asserting Africa's agency in international investment law and setting a precedent for Global South leadership in the 21st century, and its success will depend not only on the text of the Protocol but on the capacity of African regional and national legal systems to interpret and enforce these new obligations by fostering dialogues for a harmonious integration (El Marzguioui, 2025).

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