

Gambia

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I. OVERVIEW

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

(A significant number of bilateral investment treaties that are publicly listed as having been signed by the Gambia, are not publicly available and could not be obtained by the authors.¹ This chapter contains information only on those treaties that were available to the authors. When the chapter states, for example, that 'all Gambian investment treaties contain a FET article', this should be understood as all Gambian investment treaties available to the authors.)

BIT Contracting Party or MIT	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
ECOWAS Energy Protocol	Yes	Yes	Yes	Yes	Yes	3 months	Yes	Yes
Guinea (not in force)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Mauritania (not in force)	Yes	Yes	Yes	Yes	Yes	3 months	Yes	Yes
Morocco	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Netherlands	Yes	No	Yes	Yes	Yes	No	No	Yes
OIC Investment	No	Yes	Yes	Yes	Non	Compulsory conciliation - period undetermined	Yes	Yes
Switzerland	Yes	Yes	Yes	Yes	Yes	12 months	No	Yes
Qatar (not in force)	Yes	Yes	No	Yes	No	6 months	Yes	Yes
United Kingdom (not in force)	Yes	Yes	Yes	Yes	Yes	3 months	Yes	Yes

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 investor/ substantial business activities	While the majority of Gambian investment treaties provide that a juridical or legal person need only be constituted under the law of a Contracting Party to qualify as an 'investor', a number of Gambian investment treaties impose further requirements. The Switzerland BIT provides that 'legal entities' must also 'have their seat, together with real economic activities' in the territory of a Contracting Party and the Morocco BIT requires a 'legal person' to have its 'head office' in the territory of either Contracting Party. The Qatar BIT requires companies and other legal entities incorporated in Qatar, but not those in The Gambia, to also have their headquarters in Qatar.
Third-party legal persons	The Switzerland BIT provides that 'legal entities established under the law of any country' may qualify as 'investors' under that BIT, provided that they are controlled, directly or indirectly, by nationals (natural persons) of a Contracting Party or by legal entities that have their seat, together with real economic activities, in the territory of a Contracting Party. The Netherlands BIT does not contain a definition of 'investor', but with respect to the definition of 'nationals', provides that legal persons not constituted under the law of a Contracting Party may qualify as a 'national' under the treaty if they are controlled, directly or indirectly, by national persons with the Nationality of that Contracting Party, or legal persons constituted under the law of that Contracting Party.
Residents	The ECOWAS Energy Protocol includes in its definition of 'investor' any natural person who resides or establishes an office in the area of a Contracting Party in accordance with its laws.

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 concept of 'investment'
Eligible assets	The majority of Gambian investment treaties contain the typically broad formulation of 'every kind of asset' to qualify an 'investment'. The Guinea BIT adds that these assets must be 'invested in connection with economic activities.' The multilateral Organisation of the Islamic Conference Treaty, to which The Gambia is a party, defines 'investment' as 'the employment of capital.' 'Capital' is defined separately, and very broadly, as all assets, 'including everything that can be evaluated in monetary terms.' The definition also states that this extends to everything pertaining to such assets including, inter alia, profits accruing from such assets, undivided shares and intangible rights.
Indirect control of assets	Only one investment treaty to which The Gambia is a party, the ECOWAS Energy Protocol, includes in its definition of 'investment' assets owned or controlled directly or indirectly by an investor.
Commencement of treaty protection	While all of The Gambian investment treaties (save for the Organisation of the Islamic Conference Treaty, which is silent on <i>rationae temporis</i>) expressly provide for protection of investments made prior to the entry into force of those agreements, the Guinea and Mauritania BITs, and the ECOWAS Energy Protocol, state that those treaties do not apply to disputes that have arisen prior to their entry into force.
Admission/compliance with national law	The Mauritania BIT limits the term 'investment' to those 'admitted' in the territories of the parties in accordance with the relevant laws, regulations and administrative practices, while the Guinea, Morocco and Qatar BITs also provide that protected 'investments' are those invested in accordance with national laws and regulations.

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
Formulations of the FET standard	While the majority of Gambian investment treaties provide no more than that the parties must accord fair and equitable treatment, two treaties do contain further particularities. The Guinea and Morocco BITs both link FET to most-favoured-nation treatment (the references to FET in the Guinea BIT are found within that treaty's MFN article). These treaties provide that the parties must accord FET that is not less favourable than that which is accorded to investors of any third State.

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
Indirect expropriation	A number of Gambian investment treaties, both bilateral (Switzerland, Qatar and the Netherlands BITs) and multilateral (the Organisation of the Islamic Conference Treaty) explicitly provide protection against indirect expropriation.
Expropriation in accordance with the 'due process of law'	While the majority of Gambian investment treaties provide that any expropriation must be carried out 'in accordance with' or 'under' due process of law, the Qatar BIT does not contain any such requirement. The Organisation of the Islamic Conference Treaty provides that it is 'permissible' to expropriate when, inter alia, such expropriation has been carried out 'in accordance with the law' (as opposed to 'in accordance with the due process of law').

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
Exceptions to MFN treatment	All Gambian investment treaties contain exceptions to MFN obligations under those treaties with respect to privileges accorded pursuant to customs unions, free trade areas, monetary unions and other similar international agreements. With the exception of the Switzerland BIT, such exceptions also apply to international tax agreements. While some treaties provide that the exception applies to international tax agreements generally (see the UK, Qatar and Morocco BITs), others specify the type of taxation agreement that is exempt. The Netherlands BIT provides that advantages accorded under double taxation agreements are not covered by the MFN article, while the Organisation of the Islamic Conference Treaty provides that the MFN obligation does not extend to privileges provided pursuant to 'mutual tax exemption arrangements.'
Scope of national and MFN treatment	The majority of Gambian treaties afford national and MFN treatment to 'investments' and 'returns' from such investments (the Mauritania and Morocco BITs do not, however, stipulate 'returns' as being covered by the national treatment and MFN clause). The UK, Morocco and Guinea BITs also provide that the national and MFN treatment protections apply to the 'management, maintenance, use, enjoyment or disposal of their investments.' The Netherlands BIT specifically provides that, in addition to applying generally, the national and MFN treatment obligation extends to taxes, fees, charges and to fiscal deductions and exemptions for investors engaged in economic activity.
Scope of national and MFN treatment restricted to FET	The Switzerland BIT provides that the parties shall ensure fair and equitable treatment to investors and their investments and that 'this treatment' shall be no less favourable than that afforded to national investors and investors of the MFN. This could therefore be construed as limiting the obligation to provide MFN treatment to one to provide FET no less favourable than FET provided to investors of the MFN.

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
Formulations of the standard	All except for two of The Gambia's investment treaties (Qatar and Switzerland BITs) contain the obligation to provide protection and security. The majority of those treaties contain the common formulation of the standard whereby the obligation is one to provide 'full protection and security.' The Organisation of the Islamic Conference Treaty, however, provides that the obligation is one to provide 'adequate' protection and security, the Netherlands BIT provides for full 'physical' protection and security (thereby potentially limiting claims to those relating to physical rather than legal protection and security), and the ECOWAS Energy Protocol provides for the 'most constant' protection and security.

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'
Formulations of the standard	All except four of The Gambia's investment treaties (the Guinea, Switzerland and Qatar BITs and the Organisation of the Islamic Conference Treaty) contain umbrella clauses. For those treaties that do contain umbrella clauses, the wording is very consistent, obliging parties to observe any obligation it may have entered into regarding an investor and its investment.

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
Armed conflict/civil strife	All of The Gambia's investment treaties, save for the Organisation of the Islamic Conference Treaty, contain compensation for losses provisions. These provisions provide that compensation or restitution awarded to investors due to armed conflict or civil strife will be just as favourable as that awarded to nationals of the host State or of nationals of the MFN.
Free transfer of payments	All Gambian investment treaties contain a provision requiring the Contracting Parties to permit the free transfer of payment and returns relating to investments. The free transfer provisions in the majority of these treaties (though not the Netherlands, UK, Switzerland and Qatar BITs) are subject to the laws and regulations in force in the territories of the Contracting Party. The Morocco BIT provides that the guarantee of free transfer only operates after the payment of tax.
Non-impairment by unreasonable or discriminatory measures	All Gambian investment treaties, save for the Qatar BIT and the Organisation of the Islamic Conference Treaty, contain a provision prohibiting Contracting Parties from impairing, by unreasonable or discriminatory measures, the management, maintenance, use, enjoyment or disposal of investments.

IV. PROCEDURAL RIGHTS

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

Issue	Procedural rights
Fork-in-the-road provisions	Only the Qatar BIT contains what could be described as a fork-in-the-road clause. While the wording of this clause is not the same as typical fork-in-the-road clauses, it states that once an investor has chosen either local litigation, ICSID arbitration and ad hoc arbitration, the investor cannot then avail itself of the other two options. It would seem therefore to have the effect of barring an investor from international arbitration once it has brought its claim before the local courts. The Organisation of the Islamic Conference Treaty likewise prevents investors from bringing claims to international arbitration once they have been submitted to the national courts.
Negotiation/cooling-off periods	All of The Gambia's investment treaties, save for the Netherlands BIT, contain either compulsory conciliation (Organisation of the Islamic Conference Treaty) or mandatory settlement periods to be observed prior to the lodging of claims. These periods are either 3, 6 or in the case of the Switzerland BIT, 12 months.
International arbitration fora	Of The Gambia's investment treaties only three do not provide a choice of international fora, with the Switzerland and the Netherlands BITs providing only for ICSID arbitration and the Organisation of the Islamic Conference Treaty providing only for ad hoc international arbitration. Three treaties provide for a choice between ICSID and ad hoc arbitration (see the Morocco, Qatar and Guinea BITs), while the Mauritania BIT provides for a choice between ICC and ad hoc arbitration. The ECOWAS Energy Protocol, in addition to ICSID and ad hoc arbitration, provides investors with the option of having claims administered by the Stockholm Chamber of Commerce and the Organisation for the Harmonisation of Trade Laws in Africa.

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

According to publicly available information, the majority of The Gambia's BITs have not come into force. The two exceptions are those with Switzerland and the Netherlands. The Netherlands BIT entered into force on 21 April 2007. Its provisions provide that it will remain in force for a period of 15 years and that if no notice of termination is given by either Contracting Party 6 months before such date, will continue to remain in force whereby each Contracting Party tacitly for periods of ten years. The Switzerland BIT entered into force on 30 March 1994. Its provisions state that it remains in force for a period of ten years, which is extended for periods of two years in the event that no Contracting Party gives notice of termination six months prior to the expiry of such a period. There is no indication that The Gambia intends to terminate either of these agreements. Likewise there is no indication that The Gambia intends to withdraw from the multilateral investment treaties to which it is a Party, the ECOWAS Energy Protocol and Organisation of the Islamic Conference Treaty.

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	Claim notices should be sent to the Ministry of Justice or the Office of the President.
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13. Which government department or departments manage investment treaty arbitrations on behalf of this country?

Government department which manages investment treaty arbitrations	The Government departments which manage investment treaty arbitrations are the Ministry of Justice and the Office of the President.
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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	Yes, external counsel are used by the State in investment treaty arbitrations. It is not known whether the State normally goes through a formal public procurement process when hiring external counsel.
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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	The ICSID website states that the Gambia has signed and ratified the ICSID convention, though sources indicate that this issue is under dispute in an ongoing ICSID arbitration.
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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	No, The Gambia has not signed and ratified the New York Convention. However, the New York Convention is scheduled to The Gambian Alternative Dispute Resolution Act (2005), and pursuant to Article 56 of that Act, the provisions of the New York Convention apply to the recognition and enforcement of foreign arbitral awards in The Gambia.
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17. Does the country have legislation governing non-ICSID investment arbitrations seated within its territory?

Legislation governing non-ICSID arbitrations	There is no legislation specifically governing investment arbitrations seated within the Gambia. All arbitrations seated within the Gambia are governed by the Gambian Alternative Dispute Resolution Act (2005).
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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 is only one investment treaty arbitration in which The Gambia was a respondent that has concluded, <i>Alimenta S.A. v. Republic of The Gambia</i> (ICSID Case No. ARB/99/5). This matter settled. Therefore The Gambia has to date not been called upon to comply with any adverse award against it.
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19. Describe the national government's attitude towards investment treaty arbitration.

Attitude of government towards investment treaty arbitration	The Gambia has a cooperative attitude towards investment treaty arbitration. In a number of concluded arbitrations to which it was a party, such as <i>Alimenta S.A. v The Gambia</i> , <i>African Petroleum Gambia Limited (Block A1) v Republic of The Gambia</i> and <i>African Petroleum Gambia Limited (Block A4) v Republic of The Gambia</i> , settlements were reached.
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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	This question is not strictly applicable as the local courts have not been called upon to enforce an investment treaty arbitration award. However, The Gambian judiciary is seen generally to be supportive of parties seeking to enforce international arbitral awards, including those against the Government. In the case of <i>Luis Diaz de Losada Construction Company Limited v. The Gambian Government</i> , The Gambian Supreme Court ordered the enforcement of an ICC award against the Government.
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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 Gambia Investment and Export Promotion Agency Act, 2010	No	Yes	Yes – right to employ foreign personnel, right to transfer funds	Yes	Yes – local arbitration under the Gambian Alternative Dispute Resolution Act (2005) and ICSID arbitration are both provided for under the Act.

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?

No.

IX. AWARDS

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

Settled
<i>Alimenta SA v Republic of The Gambia</i> (ICSID Case No. ARB/99/5).
<i>African Petroleum Gambia Limited (Block A1) v Republic of The Gambia</i> (ICSID Case No. ARB/14/6)
<i>African Petroleum Gambia Limited (Block A4) v Republic of The Gambia</i> (ICSID Case No. ARB/14/7)
Pending proceedings
<i>Carnegie Minerals (Gambia) Limited v Republic of The Gambia</i> (ICSID Case No. ARB/09/19)

24. Reading list

Ike Ehiribe, Chapter 2.2: The Republic of Gambia in Lise Bosman (ed), *Arbitration in Africa: A Practitioner's Guide* (Kluwer Law International 2013)

Notes

- * With thanks to Mohamed Sayed Omar for his valuable assistance.
- 1 The co-signatories of these treaties, according to the UNCTAD website, are: Guinea-Bissau, Iran, Kuwait, Libya, Mali, Spain, Taiwan, Turkey, Ukraine. According to the UNCTAD website, none of these treaties have entered into force.