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*I.C.C.L.R. 69 Abstract

In the past decade, African countries have played an active role in the reform of international investment regime. This is reflected in the increased negotiation of the so-called "new generation" of investment treaties and a slow move away from the European-style lean model bilateral investment treaty (BIT*). This article examines the* Morocco–Nigeria BIT 2016 *which contains a number of innovative features including an emphasis on sustainable development, the inclusion of investor obligations, a joint committee and express protection of the host state's regulatory discretion. This article highlights both the strengths and weaknesses of the* BIT *but also future challenges. This article will inform policy-makers and academics on the innovative features of the* Morocco–Nigeria BIT *as well as its conceptual and practical challenges.*

Introduction

Since the advent of the modern system of international investment protection in the mid-20th century, the participation of African countries in the development of international investment law has been poor. However, since the dawn of the 21st century, the international investment regime has experienced unprecedented turbulence caused by the increased dissatisfaction with investor–state dispute settlement (ISDS) mechanisms and traditional standards of protecting foreign investment.[1] While all forms of international investment agreements (IIAs) have ***I.C.C.L.R. 70** experienced turbulence, the large network of BITs has been at the centre of this criticism.[2] Dissatisfaction with the traditional BITs has generated four main types of reactions: (1) the termination of BITs and the adoption of investment legislation (for example, the South Africa Protection of Investment Act 2015)[3]; (2) the increased concluding of facilitation agreements without recourse to international investment arbitration and the exclusion of most substantive foreign investment protection standards (for example, the Cooperation and Investment Facilitation Agreement (CIFA) between Brazil and Mozambique)[4]; (3) an increased reluctance to ratify BITs, with fewer agreements coming into force in past decade[5]; and (4) countries moving away from the traditional European-style lean model BIT towards a "new generation" of BITs that aim to strike a balance between private investors' interests and national public policy.[6] The recently concluded BIT between Morocco and Nigeria, not yet in force, is a canonical example of this last typology.

On 3 December 2016, Morocco and Nigeria concluded a bilateral agreement with the overarching aim of strengthening "the bonds of friendship and cooperation" between the two states.[7] The agreement is an important attempt by two developing countries to move towards a new generation of BITs which aligns with the evolution of international investment law. In fact, the BIT contains several innovative features designed to address the criticisms levied towards the international investment regime. The BIT takes a modern approach to the balance of rights and obligations between investors and the respective host states by placing emphasis on: the promotion of sustainable development, limits and clarification to the substantive investment protection provisions and treaty obligations on investors and safeguards to the state's discretion to take measures to meet policy objectives.[8]

The underlying aim of this article is to examine the innovative features of the BIT and their practical application. In order to achieve the goal of this article, first and foremost the reform agenda in Africa is highlighted in order to determine the motivations behind the reform. Secondly, specific provisions that represent a ***I.C.C.L.R. 71*** departure from the traditional BIT are critically examined. Finally, a conclusion that ties together the various arguments throughout this article is provided.

Motivation behind the Morocco–Nigeria BIT

The motivation behind the Morocco–Nigeria BIT is to strengthen business relationships through a bilateral agreement that facilitates investment in the two states. Leading up to the BIT, a Joint Initiative on the Morocco–Nigeria Gas Regional Pipeline, dubbed the "the Wonder of Africa" because it was purely African-led, was under negotiation.[9] The project was estimated to have a direct impact on 300 million people and the potential to support and speed up electrification projects in West Africa, therefore serving as a platform for the creation of a competitive electricity market in the region. This was followed by a second initiative to maximise fertiliser production, thereby creating thousands of jobs, reinforcing distribution channels and reinvigorating the regional market for fertilisers. The two projects were the main drivers behind the BIT and its innovative features directly reflect the nature of these negotiations. The fact that it was an intra-African BIT designed to support projects led purely by African investors explains this deviation from the traditional BIT. Without outside influence, both countries had the discretion to draft a BIT that reflects domestic realities such as the inclusion of pre and post-investment obligations on foreign investors. Against this background, while the BIT provides a template and the right impetus for departure from the traditional BIT, it is unlikely that a similar agreement could be reached with a capital exporting developed state, which is likely to dominate the negotiation process.

Departure from the traditional BIT is driven not only by increased commercial activity within Africa, culminating in intra-African investment agreements, but also by increased calls from the academic community for Africa to chart a new course that reflects and promotes Africa’s economic interests. For example, the *Journal of World Investment and Trade* published a special issue in 2017 that focused on investment law related developments in Africa.[10] The emerging research shows that the developments in Africa mirror those around the world, from innovative treaty-making practices to treaty obligations on investors.[11] Departure from the traditional BIT is also driven by international organisations such as the United Nations Conference on Trade and Development (UNCTAD), which continues to publish relevant statistical information on Africa.[12] Thus, the position taken in the Morocco–Nigeria BIT is not entirely radical but reflects growing international consensus over reform of the international investment regime consisting of both the substantive rules and the institutional bodies. This consensus is reflected in the recent denunciation of the Washington Convention on the ***I.C.C.L.R. 72*** Settlement of Investment Disputes between Investors and States (ICSID Convention)[13] by Latin American states (Bolivia, Ecuador and Venezuela) and the renegotiation of a large number of traditional BITs by Asian countries such as India and Indonesia.[14] This reform activity sends a clear message that the international investment regime is no longer dominated by capital exporting (Western Europe and North American) states but, rather, that Asian and African countries have taken on a more active role in directing its future. Thus, the Morocco–Nigeria BIT is a reflection of the growing influence of African countries over the international economic order.

Africa’s growing influence is further supported by the emerging role of regions, rather than individual countries, as drivers of reform in this area, which has helped to strengthen the bargaining power of individual states. Regional Economic Communities (RECs) such as the Southern African Development Community (SADC), the East African Community (EAC) and the Common Market for Eastern and Southern Africa (COMESA) are co-ordinating and harmonising their Member States’ investment policies in a bid to achieve greater regional economic integration.[15] Thus, the new regionalism in investment governance is shaping the course of not only international investment law reform but also intra-African investment policies. For example, a number of regional and African Union (AU) led initiatives are progressively defragmenting investment agreements from a bilateral to a multilateral model, with the underlying aim of creating an Africa-wide free trade area governed by a multilateral foreign investment agreement. The Pan-African Investment Code (PAIC) is a product of this grand scheme to create an integrated continental policy on investment.[16] Indeed, the PAIC is a strategic building block for the proposed Continental Free Trade Area (CFTA) with all 55 AU Member States for the purpose of promoting sustainable development, economic integration and harmonisation in trade and investment on the continent.[17] Although these projects are yet to fully materialise, they provide the right impetus for the negotiation of Morocco–Nigeria style BITs that reflect national interests. However, without the backing of a unified Africa, as promised by the CFTA, such innovative BITs are likely to remain few and majorly intra-African. Despite that, the innovative features in the Morocco–Nigeria BIT warrant closer scrutiny. ***I.C.C.L.R. 73***

The innovative features of the Morocco–Nigeria BIT

Four innovative features of the Morocco–Nigeria BIT are examined below: (1) sustainability and investor obligations; (2) standards of treatment; (3) dispute settlement provisions; and (4) express protection of the host state's regulatory discretion.

Sustainability and investor obligations

Sustainability is the main theme in the BIT, featuring four times in its Preamble and in a number of its substantive provisions. For example, in the definition of "investment", art.1(3) requires that investments contribute to sustainable development, although sustainable development is not expressly included among the characteristics of investment. However, the definition excludes, inter alia, portfolio investments which are inherently passive and relatively short term. In fact, one of the objectives of the BIT is to "promote, encourage and increase investment opportunities that enhance sustainable development". Similarly, art.24(1) obligates investors to "strive to make the maximum feasible contributions to the sustainable development of the host State and local community" (Preamble). This is why investors are required to satisfy environmental and social impact assessment requirements prior to making their investment (art.14).

In addition, art.18(1) requires investors to maintain an environmental management system post-investment and, in the case of resource exploitation and high-risk industrial enterprises, a current certification to ISO 14001 or an equivalent environmental management standard is required. Moreover, investors must comply with international labour standards (such as the International Labour Organization (ILO) 1998 Declaration on Fundamental Principles and Rights of Work),[18] human rights (art.18) and apply corporate social responsibility requirements such as the ILO Tripartite Declaration on Multinational Investments and Social Policy,[19] as well as specific or sectorial standards of responsible practice (art.24). These obligations are coupled with a relatively broad discretion on the part of the host state under art.13(4) to take non-discriminatory measures that "it considers appropriate to ensure that investment activity … is undertaken in a manner sensitive to environmental and social concerns".

Taken together, these provisions point towards a more socially responsible form of investment promotion. They emphasise the prevailing view that, although investment is encouraged, it should not be at the cost of the long-term environmental and social well-being of the host state. This is further underlined by the inclusion of a provision for an investor to be subject to civil liability in their home state for committing damaging acts in the host state (art.20).[20] Equally, the BIT requires that investors and their investments shall never engage or be complicit in corrupt practices that would amount to a breach of the domestic law of the host state and would be subject to prosecution in the host state, according to its applicable laws and regulations (art.17(2)–(5)). This is an important provision since corruption impairs development in host states. It also allows the host state to evade liabilities ***I.C.C.L.R. 74*** as seen in *Metal-Tech* [21] and *World Duty Free*,[22] thus giving investors the necessary incentive to act in accordance with the law. However, it is not clear whether the anti-corruption provisions can be interpreted to mean that arbitral tribunals cannot handle the issues of corruption emanating from the BIT since they are dealt with in the local courts of the host state. Nonetheless, sustainable development reinforces Africa's social-economic aspirations as reflected in the negotiations towards the PAIC and the Principles on International Investment for Sustainable Development in Africa developed by the African Society of International Law.[23] Thus, although questions on the practicality of the sustainability agenda remain, emphasis on sustainability in the Morocco–Nigeria BIT captures Africa's social-economic aspirations and is likely to remain a feature of the ongoing reform of the international investment regime on the continent.

Standards of treatment

The Morocco–Nigeria BIT requires the host state to "accord to investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security" (art.7(1)). The same article notes 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 system of a Party".

The last sentence of this article also mentions full protection and security, which "requires each Party to provide the level of police protection required under customary international law". Thus, rather than leaving this requirement open to interpretation, the BIT goes on to clarify that the host state must accord the US minimum standard of treatment of aliens.[24] It means that both fair and equitable treatment as well as full protection and security will not afford investors any additional protection beyond the minimum standard provided.

The position taken in the Morocco–Nigeria BIT provides a departure from the traditional approach found in BITs signed by countries such as Germany, the Netherlands, Switzerland and Sweden, in which fair and equitable treatment constitutes a standalone standard of protection. By providing that fair and equitable treatment and full protection and security do not afford investors any additional protection beyond the minimum standard, the BIT removes any scope for confusion as to whether they constitute autonomous standards of protection. The BIT also takes a similar approach to the North American Free Trade Agreement (NAFTA)[25] by attempting to clearly define the level of protection afforded to investors. Eric de Brabandere argues that broad fair and equitable treatment and full protection and security provisions, largely contained in the older BITs, have contributed ***I.C.C.L.R. 75** significantly to the rising number of ISDS cases against African countries.[26] This is supported by global ISDS statistics indicating that a majority of new cases were brought under BITs pursuant to investment protection standards such as fair and equitable treatment and full protection and security.[27] In fact, excluding cases that were settled or otherwise discontinued, dismissed at the jurisdictional stage or where the tribunal found liability without awarding any damages, 60% of the cases were decided in favour of the investor.[28] Thus, the standard of protection contained in the Morocco–Nigeria BIT is essentially designed to limit the scope of fair and equitable treatment and full protection and security provisions. However, the effectiveness of such an approach could be affected by the lack of a clear definition for the minimum standard of treatment.

Furthermore, the national treatment standard in the Morocco–Nigeria BIT applies in "like circumstances", which are indicated in a non-comprehensive list in art.6(3), and it is also in line with the US approach.[29] In interpreting like circumstances, the BIT follows the generally accepted concept that national treatment should be assessed on a case-by-case basis and supplemented by a non-exhaustive list of the circumstances that may go towards determining equivalent measures. Putting limits to the meaning of like circumstances could be seen as an attempt to take a narrow approach towards the national treatment standard but be counterbalanced by the non-exhaustive list, thus leaving the standard open to broader interpretation. The remaining substantive provisions, including expropriation, transfer of funds and subrogation, largely reflect traditional BIT practice.

Dispute settlement provisions

The rising number of ISDS claims has fuelled the growth of protectionist investment policies designed to limit investor access to investment arbitration and state exposure to investment claims. However, as in traditional BITs, the Morocco–Nigeria BIT provides for mandatory settlement of investor–state disputes (art.27) in addition to state–state disputes (art.28). On the latter, the BIT requires state–state disputes to be settled before a three-member arbitral tribunal. However, before resorting to arbitration, the parties "shall strive with good faith and mutual cooperation to reach a fair and quick settlement of the dispute" (art.28(1)). No timeframe for the amicable settlement of the dispute is provided. On the other hand, art.27 grants investors access to arbitration under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID), United Nations Commission on International Trade Law (UNCITRAL) Rules[30] or any other tribunal. Thus, the primary arbitration provisions of the BIT are not particularly unusual. ***I.C.C.L.R. 76***

However, art.26(1) and (2) provide an innovative yet problematic provision entitled "disputes prevention", which requires that, before initiating the arbitral procedure, "any dispute between the Parties [is to] … be assessed through consultations and negotiations by the Joint Committee" subject to a written request by the home state of the investor. Article 4 provides for the establishment of a Joint Committee to oversee the administration of the treaty, comprising representatives of the two states. It is not clear from the BIT how the representatives of the committee will be chosen and the duration of their tenure and, since only the states can elect who members of the committee will be, there is concern that the interests of the foreign investors may not be adequately represented. However, even though art.26 refers only to the "Parties" (i.e. the signatory states), the following provisions seem to clarify that the assessment requirement also applies between investors and states. At this stage of the dispute, representatives of the investor and the host state (or other competent authorities) are required to participate in a bilateral meeting (art.26(2)). The procedure can be concluded at the request of any party and with the adoption by the Joint Committee of a report summarising the position of the parties. And if the dispute is not settled within six months from the date of the written consultation and negotiation, the investor may resort to international arbitration, only after exhausting domestic remedies (art.26(5)). Furthermore, art.29 provides for the consolidation of proceedings which "have a question of law or fact in common and arise out of the same events or circumstances" (art.28) upon a request by "any disputing party" of two or more claims submitted separately to arbitration. The procedure for consolidation is to be agreed by the parties through the Joint Committee.

However, the power to actually refer the disputes to the committee pertains to the state exclusively and seems to be discretionary, therefore creating a system of espousal where the referral process depends on the relationship between the investor and the home state. Furthermore, although this provision aims to better facilitate the amicable resolution of disputes and to reduce the chances of disputes proceeding to arbitration, all the prescribed steps that parties have to take before initiating arbitration may actually result in making the process more time consuming and costly.

Other novel dispute settlement provisions include a requirement under art.10(5) for arbitral proceedings to be transparent and, in particular, the notice of arbitration, the pleadings, memorials, briefs submitted to the tribunal, written submissions, minutes of transcripts of hearings, orders, awards and decisions of the tribunal to be made available to the public. The transparency requirement is, in our view, an impressive and important development since the arbitral tribunal might assess the regulatory policies and actions of a host state, which could have significant economic and political consequences to the citizens of that state. It will also minimise the uncertainty and lack of uniformity in the resolution of investment disputes. Furthermore, the BIT introduces a novel provision on the liability of investors who

"shall be subject to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state" (art.20). ***I.C.C.L.R. 77***

However, the host state would be dependent on the home state taking independent action; a measure which risks contaminating the negotiation process with political motives. It also remains unclear about who can bring an action against the investor and whether (besides charges of corruption) other breaches of the obligations can be initiated in the courts of the host state. Overall, the uncertainty left by the unclear dispute settlement provision is likely to create challenges in the future.

Express protection of the host state’s regulatory discretion

African countries share the same burden and concern as other reform active states, namely that IIAs, particularly BITs, limit national regulatory space, thereby making it difficult for governments to discharge their public responsibilities or reverse potentially damaging decisions. This is reflected in the Morocco–Nigeria BIT which expressly incorporates the right of the host state to regulate or introduce new measures to meet national policy objectives. Article 23(1) affords the host state

"the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives".

Furthermore, art.13(2) refers to the parties’ right to exercise discretion, as follows:

"[W]ith respect to regulatory, compliance, investigatory, and prosecutorial matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities."

Thus, the BIT permits parties to adopt, maintain, or enforce, in a non-discriminatory manner, any measure otherwise consistent with this agreement that they consider appropriate to ensure that investment activity in their territory is undertaken in a manner sensitive to environmental and social concerns (art.13(4)).

The Morocco–Nigeria BIT strikes a balance between investor protection and state sovereignty. The express inclusion of regulatory discretion is targeted towards addressing the tension between an investor's legitimate expectations of stability of the legal framework and the host state's right to determine its own legal and economic order. The political transitions in North Africa following the Arab Spring provide a good example of where a new government might be deterred from reversing the previous government's policy decisions owing to fear of investor reprisals.[31] These claims operate as a hindrance to the social, economic and political recovery agenda. The right to stability has produced classic tribunal decisions such as *CMS v Argentina* [32] and a recognition in *Parkerings v Lithuania* that each state has an "undeniable right and privilege to exercise its sovereign legislative power". ***I.C.C.L.R. 78** [33]

In the Morocco–Nigeria BIT, the host state's right to regulate is drafted relatively broadly, by reference to sustainable development and "other legitimate social and economic policy objectives" (art.23(1)). However, this right is limited by art.23(2), which confirms that it is not absolute and must be exercised in accordance with international obligations contained in the BIT. Moreover, regulatory powers must be exercised in accordance with customary international law and the principles of international law (art.23(2)). Furthermore, in accordance with art.23(3), non-discriminatory measures taken to comply with international obligations under other treaties do not constitute a breach of the BIT. The BIT therefore broadly appears to incorporate the approach of previous investment tribunals to this question. Thus, lack of clarity on whether host states should strictly respect their international obligations towards foreign investors as contained in investment treaties[34] or should strictly respect their international obligation of persevering public interest issues,[35] particularly the environment, will be significantly minimised by the clear provisions in the BIT.

The future of the Morocco–Nigeria BIT

Having examined the Morocco–Nigeria BIT, it can be concluded that substantive provisions of the treaty reflect those commonly found in traditional BITs. Once the BIT comes into force, it will be interesting to observe these innovative features in practice. From the assessment carried out above, there are three main innovative features found in the Morocco–Nigeria BIT that should be keenly observed. First, the BIT addresses one of the main sources of criticism towards international investment law by proving measures for safeguarding national regulatory space. The express obligation is dependent on the host state exercising its regulatory powers in accordance with customary international law and the general principles of international law. With regard to environmental measures, their adoption depends on the good-faith judgement of the host state without satisfying any necessity test. Secondly, the treaty counterbalances the protection afforded to investors with a number of investment-based obligations. Obligations related to human rights, corruption, corporate governance, environmental and social impact assessment further promote and protect national interests and represent a new generation of regulatory instruments.

Thirdly, and most controversially, the BIT promotes the peaceful settlement of disputes through a Joint Committee under art.26. Besides its seemingly flawed title, "disputes prevention", the provision deals with investor–state disputes, yet the provision somehow refers to "disputes between the Parties" and "a solution between the Parties", indicating that only states are covered. Above all, the role of the investor in the whole Joint Committee exercise is neither clearly defined beyond the possible participation in a "bilateral meeting", nor are the nature and legal significance of the "assessment" of the dispute and "consultations and negotiations" defined. Furthermore, by placing activation powers in the hands of the national state, art.26 undermines the essence of investor–state disputes, which ***I.C.C.L.R. 79** is mainly to insulate the process from political forces. It also seems rather counterproductive to abandon direct negotiations between the investor and the host state as a precondition for international arbitration in favour of Joint Committee proceedings. Furthermore, the possible consolidation of investor–state and state–state disputes under art.29 is likely to produce procedural difficulties.

Against that background, the BIT sets important lessons for other African countries on how to redistribute rights and obligations between investors and the host state without harming investor confidence to invest. For Morocco, it marks a departure from their recent intra-African BITs with Mali in 2014, Guinea-Bissau in 2015 and Rwanda in 2016, which take a more traditional approach. In those BITs, sustainability is not a predominant theme; they employ traditional fair and equitable treatment opposed to the minimum standard of treatment and like circumstances are not delineated or defined. On the other hand, Nigeria has very few recent intra-African BITs but has signed agreements with countries, such as Canada in 2014, the United Arab Emirates in 2016 and Singapore in 2016. These BITs apply the minimum standard of treatment and endorse the theme of sustainability. For example, the Nigeria–Singapore BIT contains extensive provisions on the environment, health and safety and corporate social responsibility—although not drafted as direct obligations of foreign investors.[36] However, the Morocco–Nigeria BIT departs significantly from these BITs with more innovative provisions on the establishment of the Joint Committee, direct obligations on investors and protection of national regulatory space. The innovative approaches taken in this BIT are likely to spark similar considerations across the African continent but any reform action in this direction is likely to remain intra-African for now.

Conclusion

The Morocco–Nigeria BIT, although not yet ratified by the parties, sends a clear signal to the rest of the world that African countries have begun to embrace the new generation of investment treaties and, therefore, are ready to charter a new course in their reform of the international investment regime. Both Morocco and Nigeria have produced an instrument that can safeguard investors' interests without compromising on national regulatory space or social values and it is expected to enhance economic, social and environmental sustainability. However, on procedural matters, the provisions on Joint Committee involvement in the peaceful settlement of disputes and consolidation of disputes present significant practical challenges that parties might consider addressing through a protocol or other means. The BIT permits amendment at any time at the request of either state giving the other party six months' notice in writing (art.30).[37] Whether the BIT is a step in the right direction is difficult to tell at this stage but, once it is in force, the position would become much clearer. From the assessment carried out in this article, it can be concluded that the BIT represents a new generation of investment agreements with novel features. However, unless backed by a united Africa under the CFTA or through a regional bloc, such novel provisions are unlikely to feature in BITs with ***I.C.C.L.R. 80*** capital exporting extra-African states. Nonetheless, the Morocco–Nigeria BIT provides an important indication on the direction of intra-African investment policy.

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1. See Lorenzo Cotula, "Do Investment Treaties Unduly Constrain Regulatory Space?" (2014) 9 Questions of International Law 19; Susan D. Frank, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions" (2005) 73 Fordham L. Rev. 1521; Charles N. Brower, Charles H. Brower II and Jeremy K. Sharpe, "The Coming Crisis in the Global Adjudication System" (2003) 19 Arb. Int'l 415; *Aikaterini Titi, The Right to Regulate in International Investment Law (Oxford: Hart Publishing, 2014), Ch.VII*; *Joachim Karl, "International Investment Arbitration: A Threat to State Sovereignty?" in Wenhua Shan, Penelope Simons and Dalvinder Singh (eds), Redefining Sovereignty in International Economic Law (Oxford: Hart Publishing, 2008), pp.225–246*.

2. Over 3,330 IIAs have been concluded. See *United Nations Conference on Trade and Development (UNCTAD), World Investment Report 2017: Investment and the Digital Economy (Geneva: United Nations, 2017), p.111*.

3. Promotion and Protection of Investment Bill of South Africa 2015 art.13. The Bill has not yet entered into force. The current draft is available at: https://www.thedti.gov.za/gazzettes/39514.pdf [Accessed 16 July 2017].

4. The text of the Brazil-Mozambique CIFA is available at: http://www.itamaraty.gov.br/index.php?option=com_content&view=article&id=8511&catid=42&Itemid=280&lang=pt-BR; see also the text of the Brazil-Angola CIFA available at: http://www.itamaraty.gov.br/index.php?option=com_content&view=article&id=8520:acordo-brasil-angola-de-cooperacao-e-facilitacao-de-inve [Both accessed 7 December 2017].

5. UNCTAD, BITs & TIPs available at: http://investmentpolicyhub.unctad.org/IIA/AdvancedSearchBITResults [Accessed 7 December 2017].

6. See Suzanne A. Spears, "The Quest for Policy Space in a New Generation of International Investment Agreements" (2010) 13 Journal of International Economic Law 1037, 1040; *UNCTAD, World Investment Report 2012: Towards a New Generation of Investment Policies (UNCTAD/WIR/2012)*; *UNCTAD, "Towards a New Generation of International*

Investment Policies: UNCTAD’s Fresh Approach to Multilateral Investment Policy-Making", IIA Issues Note No.5 (July 2013).

7. Morocco–Nigeria BIT (2016) available at: http://investmentpolicyhub.unctad.org/IIA/treaty/3711 [Accessed 7 December 2017].

8. The art.18 of the Morocco–Nigeria BIT (2016) post-establishment obligations include: (1) maintaining an environmental management system; (2) upholding human rights in the host state; (3) acting in accordance with core labour standards as required by the International Labour Organization (ILO) Declaration on Fundamental Principles and Rights of Work 1998; and (4) a prohibition against managing or operating the investments in a manner that circumvents international environmental, labour and human rights obligations to which the host state and/or home state are parties.

9. *"Nigeria, Morocco sign gas pipeline, fertilizer deals" (18 May 2017), Premium Times* available at: http://www.premiumtimesng.com/foreign/africa/231533-nigeria-morocco-sign-gas-pipeline-fertilizer-deals.html [Accessed 7 December 2017].

10. See (2017) 18(3) Journal of World Trade 367. See also, for example, *Emilia Onyema, "The Role of African States and Governments in Supporting the Development of Arbitration in Africa" (SOAS/CRCICA, 2017)*.

11. Obligations on investors are currently subject to debate at the United Nations (UN) level: see *UN, Report on the second session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (HRC, 4 January 2017), 34th session*.

12. See, for example, UNCTAD’s Investment Policy Framework for Sustainable Development (IPFSD) and the 2012, 2013, 2014, 2015, 2016 and 2017 World Investment Reports.

13. Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965) 4 I.L.M. 524. As of July 2017, 161 states have signed and 153 have ratified the ICSID Convention; see also Emmanuel Gaillard, "The Denunciation of the ICSID Convention", New York Law Journal, 26 June 2007, p.1.

14. See *Abdulkadir Jailani, "Indonesia’s Perspective on Review of International Investment Agreements", South Centre Investment Policy Brief No.1 (July 2015)*; the Department for Industrial Policy and Promotion in India has called for a review of all of the BITs that India has signed (numbering 82): see *Surabhi Surabhi, "Govt to review bilateral treaties to avoid legal battle with telcos" (13 April 2012), Indian Express* available at: http://www.indianexpress.com/news/govt-to-review-bilateral-treaties-to-avoid-legal-battle-with-telcos/936228/ [Accessed 7 December 2017].

15. Generally see *United Nations Commission for Africa (UNECA), "Investment Policies and Bilateral Investment Treaties in Africa: Implications for Regional Integration: Implications for Regional Integration" (Addis Ababa, Ethiopia, February 2016)*.

16. Documents related to the negotiation of PAIC are not publicly available. An earlier draft of the PAIC (dated 26 March 2016) is available at: http://repository.uneca.org/handle/10855/23009 [Accessed 7 December 2017].

17. See *African Union, "Draft Framework, Road Map and Architecture for Fast-tracking the Continental Free Trade Area" (2011)*.

18. ILO Declaration on Fundamental Principles and Rights at Work (June 1998) 37 I.L.M. 1237.

19. ILO Tripartite declaration of principles concerning multinational enterprises and social policy (MNE Declaration), 5th edn (March 2017).

20. See a similar provision in the new Indian Model BIT 2016 art.13.

21. *Metal-Tech Ltd v Republic of Uzbekistan ICSID Case No.ARB/10/3*.

22. *World Duty Free v Republic of Kenya ICSID Case No.Arb/00/7*.

23. See *African Society of International Law (AFSIL), "Principles on International Investment for Sustainable Development in Africa" (2016)* available at: https://www.cdiph.ulaval.ca/sites/cdiph.ulaval.ca/files/2016_afsil_principles_on_international_investment_for_sustainable_development_in_a [Accessed 7 December 2017].

24. See US Model Bilateral Investment Treaty 2012 art.5.

25. As specified in the Notes of Interpretation to art.1105(1) of NAFTA.

26. Eric de Brabandere, "Fair and Equitable Treatment and (Full) Protection and Security in African Investment Treaties Between Generality and Contextual Specificity" (2017 18 J.W.T. 530, 536.

27. *UNCTAD, World Investment Report: Investment and the Digital Economy (2017), p.117*.

28. *UNCTAD, World Investment Report: Investment and the Digital Economy (2017), p.114*.

29. See US Model Bilateral Investment Treaty 2012 art.3.

30. UNCITRAL Arbitration Rules (revised 2010), UN General Assembly Resolution (A/RES/31/98); unlike ICSID and the ICSID Additional Facility, there is no dedicated institution associated with the administration of arbitrations pursuant to the UNCITRAL Arbitration Rules. However, the parties may agree that the services of an institution such as ICSID or the Permanent Court of Arbitration (PCA) will be responsible for administering an ad hoc UNCITRAL arbitration.

31. For example, following the fall of the Mubarak Government, an Egyptian court queried and reversed the sale of land by a former tourism minister to a foreign investor for a price below its market value. See *Hussain Sajwani, DAMAC Park Avenue for Real Estate Development SAE and DAMAC Gamsha Bay for Development SAE v Arab Republic of Egypt ICSID Case No.ARB/11/16*; see also *Jarrod Hepburn and Luke E. Peterson, "Panels Elected in ICSID Matters involving Moldova, Egypt, and the Central African Republic", IA Reporter, 12 January 2012*.

32. *CMS v Argentina ICSID Case No.ARB/01/8*.

33. *Parkerings v Lithuania ICSID Case No.ARB/05/8* at [332].

34. See *Santa Elena v Costa Rica ICSID Case No.ARB/96/1*; *Metaclad v Mexico ICSID Case No.ARB(AF)/97/1*; *Tecmed v Mexico ICSID Case No.ARB(AF)/00/2*.

35. See *Methanex v USA UNCITRAL Partial Award (7 August 2002)*; and *Saluka v Czech Republic UNCITRAL Arbitral Award (17 March 2006)*.

36. See Nigeria–Singapore BIT 2016 arts 11, 18.

37. But the states also agreed to meet every five years after the entry into force of the BIT to review its operation and effectiveness (art.33).