FACULTY OF LAW

RETHINKING BILATERAL INVESTMENT TREATIES IN NIGERIA: THE MOROCCO-NIGERIA BILATERAL INVESTMENT TREATY IN VIEW

A mini-thesis submitted in partial fulfilment of the requirement for the award of Master of Philosophy in International Trade Investment and Business Law

By

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DECLARATION

I declare that *Rethinking Bilateral Investment Treaties in Nigeria: The Morocco-Nigeria Bilateral Investment Treaty* is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

SENO OTU USENDIAH

October 2021

________________________________ ____________________

Prof. R WANDRAG **Date**

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DEDICATION

This thesis is dedicated to my loving mother Mrs. EO Usendiah, without who's support and persistence I would not have come this far. To the memory of my father Col. OE Usendiah, who's passion for education I am grateful to have witnessed. To my mentor Mr. Bernard Tayoh, who's passion for excellence has fueled my growth.

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ABSTRACT

This study focuses on Re-thinking Bilateral Investment Treaties in Nigeria: The Morocco-Nigeria BIT in view. Two countries, Morocco and Nigeria, signing BITs commit themselves to several specific standards on the treatment of foreign investments within their jurisdiction. If there is a breach of such commitments, BITs provide expansive procedures for the resolution of disputes. By and large, the substantive provisions of BITs are similar to Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices across countries, but there can be important differences between treaties in different jurisdictions. In the absence of a comprehensive multilateral agreement on investment, cross-border investment flows are currently governed by bilateral and regional investment treaties along with investment chapters in FTAs. It is fair to say that BITs have emerged as the primary source of international investment law to protect and promote cross-border investment flows.

The current FDI climate as well as the evolution of BITs in Nigeria were discussed with respect to the national and international frameworks concerning FDI and IR within which Nigeria operates. This study analyses the Cooperation and Facilitation Investment Agreement (CFIA) of Brazil alongside the evolution of BITs leading up to the CFIA in Brazil.

The thesis was able to establish that the Morocco-Nigeria BIT has made some advances in the BIT environment of Nigeria and Africa, with indication that there is need for improvement in the balance between interests of the host state and the foreign investors. BITs like any other treaties, are simply instruments at the disposal of the contracting parties to legally protect their respective interests. Morocco and Nigeria have shown confidence that such an instrument can offer investors solid protection without compromising on the host State's rights or on social values. This BIT contains several innovative provisions that recalibrate the legal protection of the interests of all stakeholders and can be expected to enhance the chances for economically, socially and environmentally sustainable investments. Using the traditional model of BITs as a backdrop, Nigeria has certainly taken progressive steps in the Morocco-Nigeria BIT. As found in the study, the Morocco–Nigeria BIT, 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.

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CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF THE STUDY

In a poem titled 'No Man Is an Island', the famous English Poet, John Donne wrote that "no man is an island entire of itself; every man is a piece of the continent, a part of the main".[1] Although used with regards to human isolationism, the underlying theme of the poem helps in explaining the rise in different areas of international economic interdependence between countries

One of the leading areas of such interdependence is Foreign Investment (FI). This is one of the major sources of economic development. FIs can exist in several forms such as; Foreign Direct Investment (FDI), Portfolio Investment, Commercial Loans etc. These foreign investments tend to be susceptible to risks and this may require special protection. For example, if a Foreign Investor (investor) incorporates a company in the Host–State as a result of such long term commitment –it may not be able to forfeit such an investment and will eventually leave the Host-State at will. This means that, in order to promote a foreign investment in any State, long term investment protection assurances and certainty must be made.

Hence, one of the leading forms of foreign investments is through Foreign Direct Investment (FDI).[2] Congregational Research Service observes that FDI flows have increased the integration of the global economy and the growth of international value chains.[3]

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FDI has been defined in various ways, but it primarily involves the movement of capital across borders through the acquisition of a lasting interest in an enterprise operating in a different country from that of the investor.[4] FDI is grouped alongside other forms of international capital flows like Foreign Portfolio Investment (FPI).[5] FPI, however, differs from FDI in that it lacks the element of lasting interest and control.[6]

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[1] Poem from Donne, J Devotions Upon Emergent Occasions and Several Steps in my Sicknes - Meditation XVII, 1624.
[1b] Hobbes, T: "Solitary, Poor, Nasty, Brutish and Short 1651.
[2] Nourbakhshian MR, Hosseini S & Aghapour AH et al 'The Contribution of Foreign Direct Investment into Home Country's Development' 2012 3(2) *International Journal of Business and Social Science* 276.
[3] Congregational Research Service *Report on U.S. International Investment Agreements: Issues for Congress* (2013)
[4] Chidede T *Entrenching the Right to Regulate in the International Investment Legal Framework: The African Experience* (unpublished LLD thesis, University of the Western Cape, 2019) 1; Njogo BO *Foreign Direct Investment Determinants in Pre and Deregulated Nigerian Economy* (unpublished PhD 1thesis, University of Nigeria, 2013) 18.
[5] Bank of Canada *Working Paper on Composition of International Capital Flows: A Survey* (2010) 2
[6] Bank of Canada (2010) 2.

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As used in relation to FDI, 'capital' broadly captures foreign funds, technology, skills and practices internal to multinational enterprises (MNEs).[7] Accordingly, FDI takes different forms, including mergers and acquisitions, Greenfield investment, joint venture and technology transfer, among others.[8] Given that some countries have nationals and enterprises that have more capital compared to others, FDI has grown as a means to balance the issue of demand and supply of capital between countries that have it and those in need of it.[9]

There are differing perspectives on the actual contributions of FDI to a country, but existing literature produced by scholars accepts that FDI facilitates economic growth and development, job creation, and advancement in technology.[10] Due to the apparent deficiency of domestic investments and fall in funds received as foreign aid in the continent, many African countries have had to compete for FDI to accelerate economic growth and development.[11] This competition has resulted in these African countries introducing incentives as well as removing investment and trade restrictions.[12]

Bilateral Investment Treaties (BITs), a type of International Investment Agreements, are at the heart of FDIs.[13] BITs generally set out the terms and conditions for FDI investment by nationals and firms of one country in another country.[14] Swart observes that BITs primarily serve two purposes.[15] First, to facilitate the protection of foreign investors and their investments in a foreign country and, secondly, they aim to encourage FDI inflows.[16] Vig describes BITs as the most

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[7] Lall S & Narula R 'Foreign Direct Investment and Its Role in Economic Development: Do We Need a New Agenda?' 2004 *The European Journal of Development Research* 448.
[8] Awolusi OD, Adeyeye OP & Pelser TG 'Foreign Direct Investment and Economic Growth in Africa: A Comparative Analysis' 2017 9(3) *Int. J. Sustainable Economy* 186.
[9] Lull S & Narula R (2004) 448.
[10] Swart D *Legal Protection of Foreign Investment in South Africa* (unpublished LLM thesis, University of Pretoria, 2016) 1; Nourbakhshian MR, Hosseini S & Aghapour AH et al 'The Contribution of Foreign Direct Investment into Home Country's Development' 2012 3(2) *International Journal of Business and Social Science* 276.
[11] Awolusi OD, Adeyeye OP & Pelser TG (2017) 186; Chidede T *The Legal Protection of Foreign Direct Investment in the New Millennium: A Critical Assessment with a focus on South Africa and Zimbabwe* (unpublished LLM thesis, University of Fort Hare, 2015) 29.
[12] Chidede T (2015) 29.
[13] Swart D (2016) 2; Congregational Research Service (2013) 3.
[14] Woolfrey S 'The SADC Model Bilateral Investment Treaty Template: Towards a new standard of investor protection in southern Africa' available at https://www.tralac.org/publications/article/6771-the-sadc-model-bilateral-investment-treaty-template-towards-a-new-standard-of-investor-protection-in-southern-africa.html (accessed on 15 October 2020).
[15] Swart D (2016) 2.
[16] Swart D (2016) 2.

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important international legal tool regulating FDI.[17] The Congregational Research Service observes that BITs have emerged as the primary source of international investment law and primary tool for promoting and protecting global direct investment.[18]

BITs are known for their asymmetric nature. Yackee underscores this nature by noting that BITs mostly grant investors right while they impose upon States obligations unaccompanied by rights.'[19] BITs have grown massively over the last few decades. From the adoption of the first BIT between West Germany and Pakistan in 1959, the number of such treaties has grown exponentially to more than 3000 as of 2020.[20]

There have been at least three views over the years among scholars on why countries enter into BITs with each other.[21] A common theme in these views is that they use the level of economic development within a country in analysing the motivating factor for such country entering BITs.[22] The first view is that developing countries conclude BITs in order to attract FDI.[23] The second view is that developed countries enter BITs in order to create international legal rules and enforcement mechanisms that are effective in protecting their nationals investing in the territories of foreign states.[24] Thirdly, there is the view that countries approach BITs with the dual purpose of protecting their outward FDI while attracting inflow of FDI from the contracting BIT partner.[25]

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Regardless of what the motivating factor may be, the popular opinion now seems to be that BITs are not the Holy Grail, especially in the context of developing countries.[26] There is a growing awareness that economic growth and development have not increased significantly despite the

[17] Vig Z 'The Importance of Foreign Direct Investments and Instruments for their Protection' (2018) 59 (4) *Hungarian Journal of Legal Studies* 447.
[18] Congregational Research Service (2013) 3.
[19] Yackee J 'Investment Treaties and Investor Corruption: An Emerging Defense for Host States?' available at https://cf.iisd.net/itn/2012/10/19/investment-treaties-and-investor-corruption-an-emerging-defense-for-host-states/ (accessed on 15 June 2020).
[20] Salacuse J 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries'(1990) 24(3) *The International Lawyer* 655.
[21] Congregational Research Service (2013) 3.
[22] Forere MA 'New Developments in International Investment Law: A Need for a Multilateral Investment Treaty' (2018) 21 *Potchefstroom Electronic Law Journal* 3.
[23] Swenson DL 'Why Do Developing Countries Sign BITs?' (2005) 12(131) *University of California, Davis* 155.
[24] Salacuse J (1990) 661.
[25] Congregational Research Service (2013) 3.
[26] Singh K & Ilge B 'Introduction' in Singh K & Ilge B (eds) *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices* (2016) 1-16.

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large and increasing number of BITs concluded.[27] Putting it bluntly, Johnson noted that BITs represent the most efficient way to attract FDI needed to fuel economic development, but they have failed to achieve their potential in Sub-Saharan Africa'.[28] Apart from failing to meet their targets, FDI activities have had adverse impacts on the African host countries, especially in relation to undermining sovereignty, labour rights abuse, environmental degradation and human right abuse.[29] Given these among other drawbacks, African countries are either not drawn to or skeptical about concluding BITs.[30]

As the usefulness of BITs is being called to question, it has been recommended that African countries should strive to balance the regime where BITs are too biased towards investors to the detriment of the host country.[31] Neumayer and Spess's point out the fact that when developing countries succumb to unfavourable BIT obligations, it does not have the desired payoff of higher FDI inflows.[32] These recommendations are clear; developing countries should not place themselves in a more disadvantaged position or even undermine their sovereignty in order to secure BIT contracts.

On the way forward, Johnson proposes that discussions on BITs and FDI within the African continent should be based on domestic considerations.[33] He observed that this discussion should also capture the following:[34] (i) BIT provisions that reduce risk, (ii) BITs that strengthen democratic institutions and the rule of law, and (iii) BITs that adopt a liberal approach as against strict adherence to a theoretical model. Chidede gave some insight into the issue of 'domestic consideration' as used by Johnson.[35] He recommended that in negotiating and framing investment

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[27] Kollamparambil U 'Why Developing Countries are Dumping Investment Treaties' available at *https://theconversation.com/why-developing-countries-are-dumping-investment-treaties-56448* (accessed on 16 October 2020).
[28] Johnson AR 'Rethinking Bilateral Investment Treaties in Sub-Saharan Africa' (2010) 59 *Emory Law Journal* 966.
[29] Chidede T (2019) 2.
[30] Kollamparambil U 'Why Developing Countries are Dumping Investment Treaties' available at *https://theconversation.com/why-developing-countries-are-dumping-investment-treaties-56448* (accessed on 16 October 2020).
[31] Johnson AR (2010) 966.
[32] Neumayer E & Spess L 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?' 2005 *London Research Online* 27 (**1 - 30**).
[33] Johnson AR (2010) 966.
[34] Johnson AR (2010) 966.
[35] Chidede T (2019) 308.

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frameworks, African governments and policymakers should consider issues like sustainable development, environment, public health and safety, human rights and labour standards.[36]

It is against this background, that this study will see how well Nigeria has adopted some of these recommendations in its most recent BIT, the Nigeria-Morroco BIT and then explore areas for further improvements.

1.2 STATEMENT OF PROBLEM

Foreign Direct Investment is supposed to bring more of good than harm to Nigeria economy that is, boosting of production, improved capital flow, expansion of the local market thereby create exchange rate stability and stimulate economic growth.[36a] In spite of the expected benefits of FDI, the reverse is the case in Nigeria.

From the period that Nigeria gained independence in 1960, the FDI environment of Nigeria has evolved from a protectionist era which dominated the 1970s to the current liberalized era which came into existence in the 1980s.[37] The legal frameworks and government policies during these two eras both encouraged the use of local service providers and increased participation of the private sector in national development. However, these eras can be differentiated by their openness to foreign investors and investments.

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The protectionist regime was founded on the Nigerian Enterprises Promotion Decree which was first promulgated by the Federal Military Government in 1972 (Decree No. 4 of 1972) and amended in 1977 (Decree No. 3 of 1977).[38] These Decrees advocated for what became known as the 'Indigenization Policy' which primarily sought to impose multiple limitations on foreign investors and investments.[39] Mohammed observes the objectives of this Policy were to create opportunities for indigenous business people; maximize local retention of profits by repositioning ownership in favor of domestic capital, and increasing industrialization.[40] The Head of the Federal

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[36] Chidede T (2019) 308.

[36a] OECD (Organization for Economic Cooperation and Development)

[37] Akinsanya A 'The Power Structure in Nigeria and the Indigenization of the Economy' (1994) 47(2) *Pakistan Horizon* 78.

[38] Akinsanya A 'The Power Structure in Nigeria and the Indigenization of the Economy' (1994) 47(2) *Pakistan Horizon* 64-5.

[39] Akinsanya A (1994) 63.

[40] Mohammed I *The Nigerian Enterprises Promotion Decrees 1972 and 1977* (unpublished PhD thesis, University of Warwick, 1985) 117-8.

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Military Government at that time, General Yakubu Gowon had this to say on why the Decree was promulgated in 1972:[41]

> *We are consolidating our political independence by trying our best to promote participation by Nigerians in our economic life while attracting more investment in sectors of the economy where Nigerians do not have the capacity to rely on themselves*

The Nigerian Investment Promotion Commission (NIPC) Act No. 16 of 1995 was passed, and it annulled the Nigerian Enterprises Promotion Decrees. The Act dismantled the limitations on foreign investors and investments. It notably allowed for 100 per cent foreign ownership in all sectors with few stated exceptions. The Act created the Nigerian Investment Promotion Commission (NIPC) with a mandate to facilitate foreign investment and advocate on behalf of foreign investors in accordance with government policies.

The liberalization regime has seen the country enter a few BITs to attract foreign investors and investment. To date, Nigeria has entered into 31 Bilateral Investment Treaties (BITs) starting with France in 1990. The most recent of these BITs is the Nigeria-Morocco signed in 2016.[41a]

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Although Nigeria has witnessed increased FDI inflows, some of which are attributable to these BITs, these investments have not made significant contributions to the economy as anticipated.[42] The country still struggles with mass poverty, over-dependence on the oil sector, weak manufacturing sector and overall underdevelopment.[43] This saddening tale has called into question the benefits of deregulating the economy to allow foreign investments and investors.[44]

In line with the trend towards BIT frameworks that promote the interests of host countries, Nigeria's BIT regime has also witnessed a shift from investor-biased BITs to more balanced BIT frameworks. The Morocco-Nigeria BIT is notable for its attempt to bring a balance to the structure

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[41] Akinsanya A (1994) 64.
[41a] Akinsanya A (1994) 64
[42] Njogo BO *Foreign Direct Investment Determinants in Pre and Deregulated Nigerian Economy* (unpublished PhD thesis, University of Nigeria, 2013) 18.
[43] Njogo BO (2013) 18.
[44] Njogo BO (2013) 18.

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of traditional BITs which had been heavily criticized by experts as overly favoring the investor.[45] It creates more regulatory space for the respective host countries which were stifled by earlier agreements. The BIT holds foreign investors to global standards on humanitarian and environmental matters. It also provides additional room for dialogue and dispute prevention through a joint committee before arbitration is initiated.

Despite these laudable improvements provided under the Nigeria-Morocco BIT, the question remains on whether the BIT fully reflects the current standards in BIT frameworks?

Some variables, including the introduction of new laws in Nigeria, the coronavirus (COVID-19) pandemic and social instability in some parts of the country, have inadvertently emphasised the importance of this question. The Nigeria-Morocco BIT neither envisaged these variables nor addressed them. A discussion on how to further improve the Nigeria-Morocco BIT, therefore, becomes critical. However, given the country's historical protectionist approach to foreign investments, another important question is, how can the Nigeria-Morocco BIT be improved without undermining the central objectives of BITs in protecting foreign investors?

1.3 OBJECTIVES OF THE STUDY

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The objective of this study can be considered from two main angles, namely: the broad or general objective and the specific objectives.

The main objective of this study is to investigate and analyze bilateral investment treaties between Morocco and Nigeria. The specific objectives are as follows:

- To examine if the Nigeria-Morroco BIT fully reflects the current standards in the BIT framework;
- To analyse measures to facilitate improvement in the Morocco and Nigeria BIT without undermining the central objectives of BITs in protecting foreign investors;
- To evaluate the current state of FDI climate in Nigeria and the evolution of BITs in Nigeria;
- To examine the current BIT and FDI climate in Brazil
- To carry out comparative analysis between the BIT climates in Nigeria and Brazil.

[45] Ejims O 'The 2016 Morocco–Nigeria Bilateral Investment Treaty: More Practical Reality in Providing a Balanced Investment Treaty?' (2019) 0 *ICSID Review* 23.

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1.4 RESEARCH QUESTIONS

With respect to the research objectives, the research investigated answers to the following central and sub-central questions raised in this study which are as follows;

- Does Nigeria-Morocco BIT reflect current standards of the BIT framework?
- What are the factors that facilitate improvement in the Morocco– Nigeria BIT while influencing an enhanced BIT regime in Nigeria?
- How can the BIT fully reflect the current standards in the BIT framework?
- What measures that will facilitate improvement in the Morocco and Nigeria BIT without undermining the central objectives of BITs in protecting foreign investors?
- What is the current FDI climate and evolution of BITs in Nigeria?
- What is the current BIT and FDI climate in Brazil?
- What are the differences between the BIT climates in Nigeria and Brazil?

1.5 SIGNIFICANCE OF THE STUDY

The Federal Government of Nigeria has announced its plans to review all the BITs signed between 1990 and 2001 fiscal periods to ensure compliance with global standards.[46] The review is also aimed at ensuring that the country attracts responsible, inclusive, balanced and sustainable investments.[47] In view of this landmark exercise, this research will be useful to policy makers in this review process, predicting the future consequences, as well as in negotiating and drafting new BITs that the terms will be more favourable to the host-state.

To legal practitioners it will also add to the ongoing discussions on improving the legal framework for BITs in Nigeria.

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[46] Alu K 'Nigeria Begins Reforms of International Investment Agreements' *Leadership* 14 August 2020 available at https://www.business-humanrights.org/en/latest-news/nigeria-government-begins-reforms-of-bilateral-investment-treaties-to-comply-with-global-standards-on-labour-human-rights-environment/ (accessed on 16 October 2020).

[47] Alu K (2020) 'Nigeria Begins Reforms of International Investment Agreements'.

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To researchers, will boost the morale on looking at other areas that the study could not cover which might also improve or gives optimal policy measures to improve BIT between Nigeria and the rest of the world.

Finally, to the society at large, the findings of this research will contribute to knowledge for both professionals and non-professionals who engage in business activities related to trade.

1.6 RESEARCH METHODOLOGY

This study will be completed using desktop and library-based research. The study will rely heavily on peer-reviewed journal articles, thesis, books by popular authors, reports written by foreign organisations and related submissions to BITs. In drawing recommendations for improving the BIT framework in Nigeria, the study will examine Brazil's Cooperation and Facilitation Investment Agreements [CIFA]. This document has been selected for this research because it is considered one of the leading documents by many writers for its thoughtful introductions that balance the interests of both investors and host countries.

1.7 LIMITATIONS OF STUDY

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Inadequacy of literature on Nigeria's BITs and its effect is a factor that affected this research. More than half of the BITs signed by Nigeria are yet to come into force including the Morocco-Nigeria BIT which is the focus of this research.[48] In other words, they are yet to be implemented. As a direct result, we can only theorize about the effects of most of these agreements drawing from other countries as opposed to working with hard facts of what the actual impact is in Nigeria specifically.

1.8 PLANNING AND ORGANIZATION OF THE STUDY

This study focuses on Re-thinking Bilateral Investment Treaties in Nigeria: The Morocco-Nigeria BIT in-view. In substantiating the argument for thesis, the researcher included five chapters broken down as follows:

[48] https://investmentpolicy.unctad.org/international-investment-agreements/countries/153/nigeria (accessed on 16th October 2020)

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Chapter one titled Introduction contains an outline of what the mini-thesis is about providing the background to the study including but not limited to statement of problem, objectives of the study, research questions, significance of the study, research methodology, and proposed structure.

Chapter two titled FDIs and BITs explores the current FDI climate as well as the evolution of BITs in Nigeria. It covers the national and international frameworks concerning FDI and IR within which Nigeria operates. This will help shed more light on the country's current policy regime and its goals.

Chapter three titled Morocco-Nigeria BIT examines important points identified in previous chapters in the context of the Morocco-Nigeria BIT. Challenges and advantages of specific provisions are discussed in relation to the goals identified in chapter two.

Chapter four titled Brazil Model BIT Review interrogates the Cooperation and Facilitation Investment Agreement (CFIA) of Brazil. The evolution of BITs leading up to the CFIA in Brazil is discussed. Similarities and differences in the evolution of BITs in both Nigeria and Brazil is highlighted. Areas of challenges identified in chapter three is compared to equivalent provisions in the CFIA.

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Chapter five titled conclusion draws conclusions from previous chapters and makes recommendations bearing in mind the goals of the current policy regime in Nigeria, recent world occurrences e.g. COVID 19 as well as insights from the CFIA.

1.10 DEFINITION OF TERMS

I. **Foreign Direct Investment (FDI)**: this is a type of investment that operates in the form of a controlled ownership in a business in one country with entity based in another country.

II. **Portfolio Investment**: this can be described as a type of investment in which resident entities in a country seek capital gain without having a lasting interest in another country.

III. **International Investment Agreements (IIAs)**: these are agreements that establish binding rules on investment protection.

IV. **Bilateral Investment Treaties (BIT)**: these are agreements between two countries for reciprocal encouragement, promotion and protection of investments in the territory of both countries by companies based in one of these countries.

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CHAPTER TWO

FOREIGN DIRECT INVESTMENTS AND INVESTMENT REGULATION

2.0 Introduction

This chapter will focus on the current FDI trajectory as well as the evolution of BITs in Nigeria. It will also discuss international frameworks concerning FDI and Investment regulation (IR) within which Nigeria operates. This will help shed more light on the country's current policy regime and its goals in relation to foreign direct investment (FDI).

2.1 Foreign Direct Investments and Globalization

The pursuit for foreign capital to endorse local resources in the economic growth process of a country is not discussed enough; it has been accepted as a factor to improve economic growth and development.[49] .FDI has been seen as a strong impetus for economic growth due to its impact on the pattern of flow of new products, new technologies, management skills and competitive business environment and employment generation overtime.[50] A number of policies that encourage inflows of FDI due to its positive influence on the economic growth via its support with funding and expertise that could contribute to small businesses to broaden and improve in external sales and transfer of technology has been adapted by many countries of the world, especially emerging economies, Nigeria inclusive.[51] Foreign direct investment is seen as a way of meeting up with the domestically available supplies, foreign exchange, revenues, talent and an organized level of the resources needed to attain an improvement in the economic development. Unfortunately, the history of Nigeria in the accumulation of foreign direct investment has been undesirable, and this led to the accumulation of huge external debt in relation to gross domestic product and being faced with serious debt servicing problems in terms of foreign exchange flow and also living in serious poverty.[52]

Globalization is defined as the process whereby production and market in two or more different countries move towards becoming very interdependent as a result of the trade dynamics in goods

[49] Osunkwo (2020)
[50] Osunkwo (2020)
[51] Osunkwo (2020)
[52] Osunkwo (2020)

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and services as well as the flows of capital and technology.[53] It comes into play in the process of the intensification of economic, political, social and cultural relations across international systems.[54] Change in international economy including the pattern of trade and investment amongst several countries is a major phenomenon discussed in international economics these past decades; with economic theories of comparative advantage suggesting that free trade leads to a more efficient allocation of resources with all economies involved in the trade benefiting.[55] The acquisition of imported knowledge and information through international businesses, foreign direct investment (FDI), technology licensing, partnerships, networks and related aspects appear to be unlimited.[56] Hence, it is in lieu of the relevance of globalization which promote free trade and enhance efficient allocation of resources that most countries tend to design investment regulation policies that might reduce the pitfall of globalization and increase its benefit.

2.1.1 Historical Overview of Foreign Direct Investment (FDI) Flows in the World

The flow of FDI has been acting as a catalyst in the processes of globalization. It also become the focus of discussions in economics for many years with its attendant relation economic growth.[57] However, the trends in the shares of the costs, benefits and losses of the wave have all along been unequal.[58] Thus, the attendant being uneven trends will be observed in the influence of the benefits of the FDI-growth process and it is argued to be a consequence of the different magnitude of the share to different part of the world.[59] This requires clarification for the impact of the Nigeria-Morocco BIT to be identified on the distribution of FDI flows across the two countries. The pattern of flow of foreign direct investment (FDI) internationally and the distribution on unequal attendants across various parts of the world have been discussed many times. Studies have shown that upsurge and increasing degree of international capital mobility in the major industrial countries and emerging economies that offer high returns.[60] It was suggested that these types of economies realise macroeconomic stability and liberal trade regimes as well as smooth financial

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[53] Organization of Economic Cooperation and Development (OECD, 1993)
[54] (Sheila, 2004; Uwatt, 2004; Czinkota, Ronkainan and Moffett, 2009; Mimiko, 2010; Akinmulegun, 2012)
[55] (Obadan, 2004; Obaseki, 2007)
[56] Akinmulegun, 2012
[57] UNCTAD, 2007
[58] UNCTAD, 2007
[59] Akinmulegun, 2012
[60] Montiel, 1993

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restrictions and offer free access to listed stocks. Thus, the recent years have evidently witnessed a logical increase in the flows of FDI all over the world.

As evident from Figure 1, the flows in FDI in the world exponentially increased during the 1980s and 1990s with a keen growth in the late 1990s. It was also discovered that the flows increased geometrically, then reaching a peak of $1,411.4billion in year 2000 from $58billion figure recorded in 1985; this is equally mirrored in the developed economies. Meanwhile, in these decades, the flows of FDI in the developing and transition economies remain relatively dwindling. The trends took a turn when it depreciated between 2001 and 2003 therefore falling to $564.1 billion in year 2003. This is usually experienced by both developed and developing economies in the world but the transition economies was not seriously hurt. This sharp decline in FDI flows in the world in general and the developed countries in particular was attributed to a general economic recession alongside depreciating stock market sentiments and business cycles all over the world, both of which resulted into massive decline in M&A investments especially in developed countries.[61] The impact was very minimal in the developing countries. A recovery growth in the global FDI flows took off in the year 2004 and were back at the 2000-level in 2006 recording a $1,305.9billion figure.[62] Moving from $58billion in 1985 to $1,306 billion in 2006 and $2,100billion in the year 2007, the flows could be said to be a good index for the world economy manifesting in the world intra-state transfers as a result of globalization stance.[63] The trends took another dimension and recorded a 16 percent decline in 2008 to $1,771billion which further had a 37 percent decline to $1,114billion in the year 2009.[64] This figure is less than the 2000 and 2006 figures of $1,411.4billion and $1,305.9billion respectively.

The world's FDI has been fluctuating since the year 2007 and this can be related to the global economic recession which started in 2007; the plague that the world is still battling with till date. Thus, the global fall in FDI flow had its impact on the weak economic performance in many parts of the world, as well as the reduced financial capabilities of Transnational Corporations (TNCs).[65] Meanwhile, in 2010, the flows assumed an upward trend to peak at a record level of $2,041 billion in 2015. The same growth pattern is experienced in the developed economies. This is largely

[61] UNCTAD, 2007
[62] UNCTAD, 2020
[63] UNCTAD, 2020
[64] UNCTAD, 2020
[65] UNCTAD, 2010
[64a] UNCTAD database 2020, available at https://unctadstat.unctad.org (accessed on 25 June 2021)

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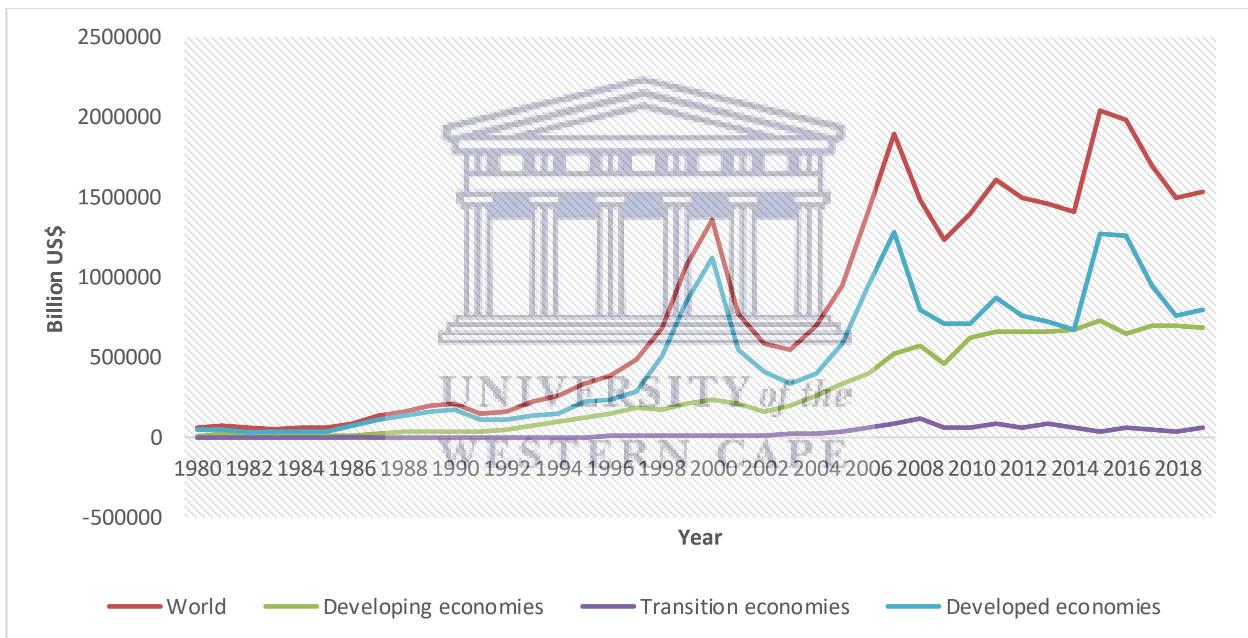
attributed to the increased share of investments by developing-country multinational enterprises (MNEs) and a rise in cross-border Merger & Acquisitions (M&As) that led to increase in the expenditures of FDI for period of three years from 2015 to 2017 with about 32 per cent growth. Trends also pointed to a return to growth in 2015.[66] Unfortunately, in the recent times, even before the Covid-19 pandemic, a continuous decline in global FDI flows is the other of the day. This decline, from 2016 to 2019, was majorly caused by large repatriations of accumulated foreign earnings by United States multinational enterprises (MNEs) in the first two quarters of 2018, following tax reforms introduced at the end of 2017, and a compensation rather insufficient from upward trends in the second half of the year.[67]

Figure 1: FDI inflows, globally and groups of economics from 1980 to 2019



Source: UNCTAD database (https://unctad.org.statistics) (2020)

Regionally, Figure 1, reveals that FDI increase in developed countries and they recorded a sharp increase within 1985 at $1,146.2billion in the 2000. It increased further and reached the highest level of $1,444billion in 2007, similar to the trend in the global case. Unfortunately, relative to the flow of FDI globally, decline occurred and the FDI flows reduced to a low figure of $1,018billion in developed nations; about 30 percent fall. FDI flows to developed countries further contracted by 44 percent in 2009 to an unprecedented figure of $566billion. This was the largest recorded

[66] World Investment Report, 2015

[67] World Investment Report, 2019

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decline within all regions and sub-regions and the worst since 2006.[68] Meanwhile, the developing and transition economies which proved relatively resilience to the world's challenges in 2008 didn't exclude 2009, even though, they did better than the developed countries. The FDI flows to developing economies took a fall by 24 percent in 2009 after consistently growing for six years, the figure declined from 2008 at $630billon to $478billion.[69] Judging by the performance history recorded during 2007 to 2009, alongside the growth achieved by the developing and transition economies together with reforms in these type of economies coupled with the increase in openness to FDI and foreign production, the pace of recovery of FDI flows in these periods was stronger in the developing countries than in developed ones.[70] Similarly with the global trend, there was a sustained increased flow of FDI in the developed economies between 2010 and 2015 to a record level of $1,274 billion. This period of sustained growth was accompanying by a period of decline between 2016 and 2019. Meanwhile, in the developing and transition economies, despite the global economic challenges, FDI flows remain relatively stable till around 2019.

However, the FDI inflows performance of developing countries were adjudicated to have been better than the developed nations in recent times, an uneven distribution of the flows were noticed within this region.[71] As revealed in Figure 2, throughout the 1980s and 1990s, a progressive increase in FDI inflows was experienced in Africa; both Sub-Saharan and North African inclusive. Africa being a developing region, received the least share of global FDI flows. An estimated 3% FDI flow were given to Africa for years earlier than 2007 before it was increased to a little over 5% in 2009.[72] Emphasis should be laid on the fact that the share given to Africa in the global FDI which doubled during the early 1990s declined in 2009 to $56billion from $58billion of 2008. This decline in FDI inflows to Africa between 2008 and 2009 was concluded to be as a result of the fall in demand and the decline in the prices of commodity globally.[73] The recorded share of FDI flows allocated to Africa in developing countries has been dispiriting. However, the flow in developing nations increased from 11.15% in 2007 to 11.42% in 2008 and eventually to 12.34 percent in 2009, the absolute share is as well not encouraging when it's being measured against that Asia or Latin America. Comparatively, the Asian share in 2007 was recorded to be 45.8% and this decreased to

[68] UNCTAD, 2010
[69] UNCTAD, 2019
[70] World Investment Report, 2010
[71] Akinmulegun, 2012
[72] Akinmulegun, 2012
[73] UNCTAD, 2010

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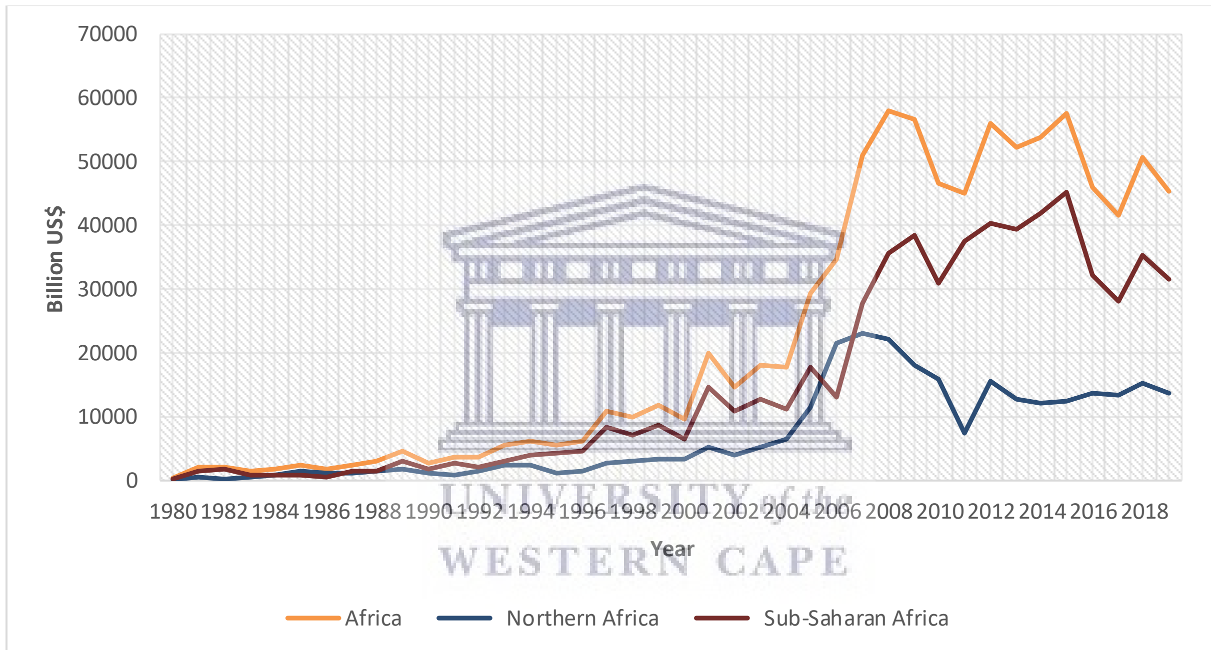
44.8 percent in 2008 and later increased to 48.7 percent in the year 2009.[74] Meanwhile, there was a relative fluctuation in the inflows of FDI in Africa between 2010 and 2015. However, all the developing economies put together experienced a share rise in global FDI inflows between 2010 and the year 2015. Nonetheless, in the recent times, even in Africa, a continuous decline in FDI flows was experienced up till 2019. The total inflows of FDI in Africa is divided into Northern African and Sub-Saharan African. Throughout the period under review, FDI flows in Northern Africa was lagging behind that of Sub-Saharan Africa except in 2006 when it was $21 billion.

Figure 2: FDI inflows in African Economics from 1980 to 2019



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Source: UNCTAD database (https://unctad.org.statistics) (2020)

Meanwhile, Nigeria share of FDI flows to Africa remains a subject of concern as the region largest economy and the most populous nation on the continent. As evident from Figure 3, foreign direct investment into Nigerian has been unstable but rising since 1980. In 1980, the flow of FDI in Nigeria was negative due to capital flight and thereafter there was a progressive increase to a record level of $0.485billion in 1985. This was attributed to increased demand for oil in the global market which led to investment in the sector.[75] Relating to the adoption of Structural Adjustment Programme (SAP) in 1986, and the following liberalization of many areas of the Nigerian economy, FDI continue to achieve an increasing trend ranging from $0.193 billion in 1986 to as

[74] UNCTAD, 2020 *https://unctad.org.statistics* (accessed on 25 June 2021)

[75] Ekpo, 1996

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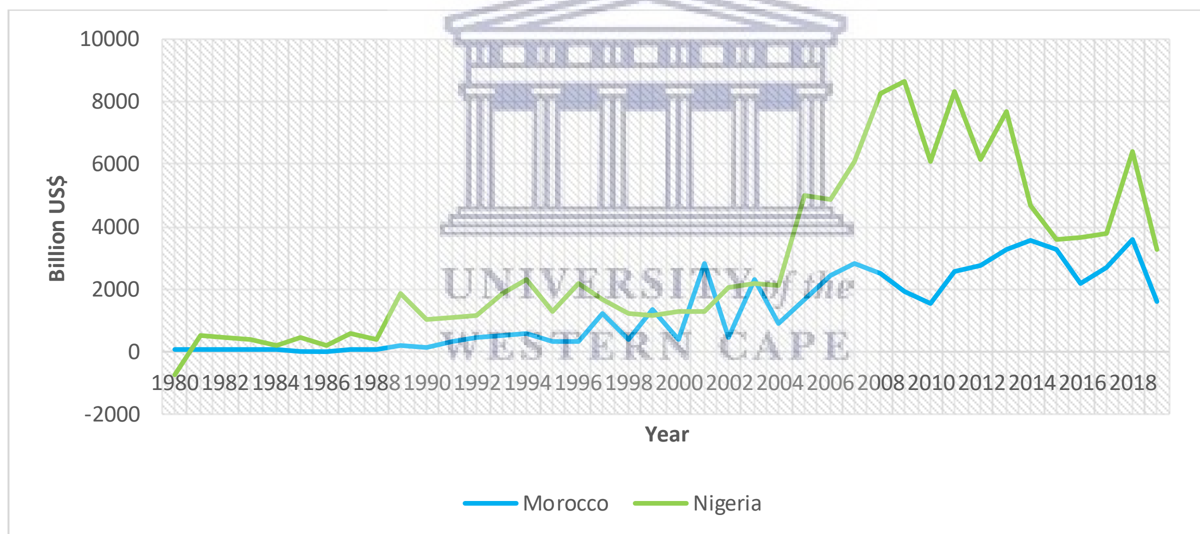
high as \$2.19 billion in 1996 and \$2.04 billion in the year 2000. In the years between 1996 and 1999 the flow was on a downward trend before it picked-up in year 2000. The economic crisis, declining productivity, reduced capacity utilization and other factors; mainly policy reversal which tended to send uncertainty signals to potential investors as result of the turbulent political atmosphere in the country has been alluded to as the bane behind this fall.[76] The increasing trend continued to the peak of \$8.65 billion in 2009 despite the decline expressed in global FDI as a result of the global financial crisis. Nonetheless, from 2010 onward, the trend has been fluctuating at an average of \$5.37 billion per annum with maximum value in \$8.39 billion in 2011 and the least value in \$3.29 billion in 2019.

Comparatively, the volume of FDI flows in Nigeria is far higher than that of Morocco throughout the period under discussion except in years 2001 and 2003.

Figure 3: Comparative FDI inflows in Nigeria and Morocco from 1980 to 2019



Source: UNCTAD database (https://unctad.org.statistics) (2020)

2.1.2 The global trends of Foreign Direct Investment (FDI) in the presence of Covid-19 pandemic

According to UNCTAD[77], following the uncertainty about the Covid-19 pandemic, global foreign direct investment (FDI) declined in year 2020, collapsing 42% from \$1.5 trillion in 2019 to \$859

[76] Ekpo, 1996
[77] UNCTAD (2020) (https://unctad.org.statistics)
[76a]UNCTAD investment Trends Monitor published on 24 January, 2021

http://etd.uwc.ac.za/

billion[76a]. This level of decline was last recorded in the 1990s and it is above 30% below the investment trough consequent the 2008-2009 global financial crisis.[78] Irrespective of the projections for the economy of the world to recover in 2021, although unequal and hesitating, UNCTAD expects FDI flows to continue to fall as a result of uncertainty over the evolution of the COVID-19 pandemic. The organization had predicted a 5-10% FDI slide in 2021 in last year's World Investment Report[77a]. In a report made by the director of UNCTAD's investment division, James Zhan, the impact of the pandemic on investment is actually expected to linger because investors tend to be very cautious when making investments to new international productive assets.[79]

Meanwhile, the decrease in FDI recorded was seen to be more serious in developed countries, where FDI flows fell by 69% to roughly $229 billion. North America flows declined by 46% to $166 billion, with cross-border mergers and acquisitions (M&As) dropping by 43%.[80] The greenfield investment projects also fell by 29% and project finance deals crashed by 2%. The United States recorded a 49% decline in FDI, plummeting to $134 billion. The crash occurred in wholesale trade, financial services and manufacturing. Cross-border M&A sales of US assets to foreign investors declined by 41%, more in the primary sector. In other areas of Europe, investments crashed totally.[81] The decline in flows was about two-thirds to become $4 billion. In the UK, there was a total fall to zero in the FDI, there were crashes recorded in other major aspects as well. For instance, in Sweden, a double from $12 billion to $29 billion was experienced. FDI to Spain increased by 52%, as a result of several acquisitions including private equities from the US KKR and Providence acquiring 86% of Masmovil. Between other developed economies, flows to Australia were declined with -46% to $22 billion but later increased for Israel from $18 billion to $26 billion and Japan from $15 billion to $17 billion.[82]

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[78] https://unctad.org/news/global-foreign-direct-investment-fell-42-2020-outlook-remains-weak

[77a] https://unctad.org/news/global-foreign-direct-investment-fell-42-2020-outlook-remains-weak

[79] https://unctad.org/news/global-foreign-direct-investment-fell-42-2020-outlook-remains-weak

[80] https://unctad.org/news/global-foreign-direct-investment-fell-42-2020-outlook-remains-weak

[81] https://unctad.org/news/global-foreign-direct-investment-fell-42-2020-outlook-remains-weak

[82] https://unctad.org/news/global-foreign-direct-investment-fell-42-2020-outlook-remains-weak

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However, FDI flows towards developing nations declined by 12% to an $616 billion, it was accounted for 72% of global FDI which makes the highest recorded share[83] The fall was highly lopsided across developing economies: -37% in Latin America and the Caribbean, -18% in Africa and -4% in developing nations in Asia. FDI to transition economies declined by 77% to $13 billion. During this period, developing countries in Asia attracted an estimated $476 billion in FDI in 2020, flowed towards members of the Association of Southeast Asian Nations (ASEAN) contracted by 31% to $107 billion, as a result of crash in the investment to the largest recipients in the sub-region.[84]

With regards to individual nations, China was the world's largest FDI recipient, with flows to the Asian giant rising by 4% to $163 billion. Increase of 11% in 2020 was witnessed by high-tech companies, and cross-border M&As 54% rise in ICT and pharmaceutical industries. A return to positive GDP growth (+2.3%) and the government's targeted investment facilitation programme assisted in the facilitation of investment prior to the lockdown," likewise, there is a report of a positive growth recorded in India (13%), increased by investments in the digital sector.[85]

As against this background, and with the trajectory in the flows of FDI across the globe, this study will explore foreign investment regulations in the international, continental and regional context before the Morocco-Nigeria BIT is analysed in detail in chapter three of the study.

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2.2 International and National Frameworks of FDI and Investments

2.2.1 Global Investment Framework for Africa

Many African countries signed multilateral agreements relating to international investment regulation including the World Trade Organization (WTO) Agreement on Trade-Related Investment Measures (TRIMs);[86] the WTO General Agreement on Trade in Services (GATS);[87] the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA

[83] https://unctad.org/news/global-foreign-direct-investment-fell-42-2020-outlook-remains-weak
[84] https://unctad.org/news/global-foreign-direct-investment-fell-42-2020-outlook-remains-weak

[85] https://unctad.org/news/global-foreign-direct-investment-fell-42-2020-outlook-remains-weak

[86] Agreement on Trade-Related Investment Measures, Annex 1A, Apr. 15, 1994, 1868 U.N.T.S. 186.
[87] General Agreement on Trade in Services, Annex 1B, Apr. 15, 1994, 1869 U.N.T.S. 183, 33 I.L.M. 1167.

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Convention);[88] the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention);[89] and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) amongst many others.[90] Alongside these treaties, these countries agreed to the terms including all political, legal, and administrative procedures required for the implementation of core aspects of the treaties as included in the agreement. TRIMs offer regulation in investment measures with restrictions in trade, while GATS regulate trade in services and include the rules of investment (especially in the Mode 3 service supply). Mode 3 which is also recognized as commercial presence indicates that a service supplier of a member builds a type of presence which is territorial, using methods which include lease of premises or ownership in a different territory of another member for the purpose of service provision.[91]. Currently, of all the seating members (164 Members) of the World Trade Organization (WTO), 44 members are from Africa. 27% of total WTO membership is constituted of African members and 29% of WTO membership are from developing countries.[92] As WTO members, African countries are bounded legally through the provision of investment on the TRIMs and GATS.

The MIGA Convention help foreign investors to develop risk insurance against political risks such as expropriation, transfer restriction, breach of contract, non-honoring of financial obligations, alongside cases of terrorism, and civil disturbance. The Convention makes investment dispute resolution available on a case-by-case basis. About 54 countries in Africa are as of today members of the MIGA Convention with Somalia as the 182nd members.[93] The ICSID Convention establishes the International Centre for Settlement of Investment Disputes (ICSID) and makes the resolution of investor-state disputes and interstate disputes available. Some of the services provided by ICSID include:

- Arbitrations under the ICSID Convention

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[88] Convention Establishing the Multilateral Investment Guarantee Agency, Oct. 11, 1985, 1508 U.N.T.S. 99. The MIGA Convention was signed in 1985 and came into operation in 1988.
[89] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Oct. 14, 1966, 575 U.N.T.S. 159
[90] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, May 20, 1958, 330 U.N.T.S. 38.
[91] Agreement on Trade-Related Investment Measures, Annex 1A, Apr. 15, 1994, 1868 U.N.T.S. 186.
[92] https://journals.openedition.org/poldev/1492
[93] *Member Countries*, WORLD BANK GROUP, https://www.miga.org/member-countries (last visited Mar. 18, 2020).

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- Arbitrations under the Additional Facility
- Conciliations under the ICSID Convention
- Conciliations under the Additional Facility
- Fact-finding proceedings; non-ICSID investor-state arbitrations (for example, under the UNCITRAL Arbitration Rules); non- ICSID state-to-state disputes (for example, under free trade agreements); mediations; and other cases relating to dispute resolution. A total of 49 countries in Africa are signatories, contracting states and bounded legally by the ICSID Convention.[94]

Another convention worth discussing is the New York Convention which requires domestic courts in the contracting states to acknowledge and enforce arbitration awards being initiated by other contracting states. The Convention is the principal international instrument on the recognition and enforcement of foreign arbitral awards—arbitral awards made in the territory of another state other than where recognition and arbitration is sought.[95] The Convention requires each contracting state to recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon.[96]

The treaties discussed above do not include substantive provisions on the regulation rights for states. The concepts of the treaties were strongly impacted by the Western capital-exporting economies who insisted on maintaining international rules favorable to their social and economic interests.[97] More interest was focused on concluding investment treaties as instruments for the purpose of protecting and promoting investors. The treaties incorporate suggestions to regulatory space which are viewed as an impediment to the principal purpose of the treaties. African countries were not full investment rule consumers in the North-South BITs.[98] They didn't have enough capacity to discuss and bargain public policy alongside issues on development into these IIAs, or to analyze the practical legal and policy consequences of negotiating such agreements.[99]

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[94]Database of ICSID Member States, INT'L CTR. FOR SETTLEMENT OF INV. DISP., https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx (last visited Mar. 18, 2019).

[95] Convention on the Settlement, supra note 15, art. 1(1).

[96] Convention on the Settlement, *supra* note 15, art. 3.

[97] Emmanuel Tetteh Layrea et al. eds., 2012

[98] Wolfgang Alschner & Dmitriy Skougarevskiy, *Rule-Takers or Rule-Makers? A New Look at African Bilateral Investment Treaty Practice* (June 7, 2016),

[99] Adeleke, F. 'Human rights and international investment arbitration' (2016). *South African Journal on Human Rights*, *32*(1), 50.

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2.2.2 Africa's Continental Investment Framework

Africa has no legally binding and continent-wide instrument on investment regulation. The international investment regulatory framework is fragmented, consisting of BITs, regional investment agreements, and free trade agreements with investment provisions. Nonetheless, African countries, under the auspices of the African Union (A.U.), have developed and adopted a nonbinding continent-wide investment code, the Pan-African Investment Code (PAIC).[100] The PAIC aims to create a balanced investment regime that promotes and protects investments while conserving the policy space for host states.[101] It contains many references and inferences to the right to regulate of host states. The preamble of the PAIC, for instance, expressly refers to the right of A.U. member states to regulate all investment-related aspects within their territories to promote sustainable development objectives.[102] In principle, preambles do not necessarily constitute normative standards that are legally enforceable, but they have an important role as to how IIAs will be interpreted in the event of a dispute between state parties or between investors and host states.[103]

History has, however, shown that international investment arbitral tribunals do not depend on the preamble to influence interpretation of the treaty's text.[104] In addition, the PAIC consists of numerous substantive provisions, including the right of host governments to regulate admitted investments in accordance with their laws and regulations,[105] and the right to adopt measures concerning environmental preservation, international peace and security, national security interests, and promoting national development (including through performance requirements and local content).[106] Performance requirements are significant because they can serve as a tool for

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[100]African Union Commission [AUC], Draft Pan-African Investment Code (Dec. 2016), https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_ december_2016_en.pdf.

[101] Adeleke (2016)

[102] Draft Pan-African Investment Code, *supra* note 31, pmbl. at 3.

[103] Rudolph Dolzer & Margrete Stevens, Bilateral Investment Treaties 20 (1995). See also Max H. Hulme, Preambles in Treaty Interpretation, 164 U. PA. L. REV. 1281, 1296–97 (2016).

[104] Christina L. Beharry & Melinda E. Kuritzky, *Going Green: Managing the Environment Through International Investment Arbitration* 30 AM. U. INT'L L. REV. 391 (2015).

[105] Draft Pan-African Investment Code, supra note 31, art. 5.

[106] Chidede (2019)

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economic development policies.[107] For instance, requirements for technology transfers or the employment of local workers can help materialize beneficial spill-over effects for the host state.[108]

Moreover, the PAIC includes a list of exceptions to the application of most-favoured-nation treatment (MFN) and national treatment obligations to investors and investments in order to preserve public interests. For instance, Article 8(2) provides that a state does not violate the MFN clause if it adopts measures that are "designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment."[109] Closely related, Article 8(5) provides that the MFN principle "does not oblige a member state to extend to the investors of any other country the benefit of any treatment contained in an existing or future customs union, free trade area or international agreement to which the investor's home state is not a party, or any international agreement or domestic legislation relating to taxation. With reference to national treatment, Article 10(3) of the PAIC permits states to grant investments and investors preferential treatment in accordance with their respective domestic legislations. Article 10(4) preserves the right of states to deny an investor the benefits of the PAIC and "to grant special and differential treatment to any investor and investment in such cases, though not limited to instances where:[110] the investor does not have substantial business activities in the Member State; or the investor is engaged in activities inimical to the economic interest of Member States."[111] Article 10(6) of the PAIC further prescribes that national treatment does not apply "to subsidies or grants provided to a government or a State enterprise, including government supported loans, guarantees and insurance; or to taxation measures aimed at ensuring the effective collection of taxes, except where this results in arbitrary discrimination." It is worth mentioning that the implementation of these exceptions does not entitle an investor to compensation for any competitive disadvantages.[112]
More importantly, the PAIC contains an entire chapter on investors' obligations, which is rare in traditional BITs.[113] The PAIC allows host governments to impose certain obligations on investors,

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[107] Chidede (2019)
[108] United Nations Conference on Trade and Development, Investment Policy Framework for Sustainable Development, 99, U.N. Doc. UNCTAD/DIAE/PCB/2015/5 (2015).
[109] Draft Pan-African Investment Code, supra note 31, art. 8(2).
[110] Chidede (2019)
[111] Art. 10(3).
[112] Art. 10(8).
[113] See, e.g., Roussalis v. Romania, ICSID Case No. ARB/06/1, Award, 871 (Dec. 7, 2011), where the ICSID Tribunal conceded that "the BIT imposes no obligations on investors, only on contracting states."

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including to comply with corporate governance standards,[114] to adhere to Socio political obligations,[115] to refrain from bribery,[116] to adhere to corporate social responsibility standards,[117] to use natural resources in a responsible manner,[118] and to comply with business ethics and human rights.[119] The PAIC also comprises provisions regulating state contracts, public-private partnerships, labor issues, human resources development, and the promotion of technology transfer and clean technologies, and environmental and consumer protection.[120]

With regard to dispute resolution, the PAIC gives host governments the discretion to implement investor-state dispute settlement (ISDS), thereby offering a middle-ground solution to African states that are either pro-ISDS or anti-ISDS.[121] The PAIC's ISDS provisions articulate the possibility for a state to file a counterclaim against an investor in an investor-state arbitration.[122] This mechanism is non-existent in traditional investment treaty practice. The counterclaim provision will make it possible to legally enforce the investor obligations contained in a specific investment treaty. As a result, for instance, a state can invoke any violation of any relevant international treaty protecting the environment, human rights, and labour standards under the PAIC's provision on counterclaims. The breadth of potential legal bases of a state's counterclaim is thus very large. The PAIC's dispute settlement provisions seek to establish a better balance between the rights and obligations of investors and host states. Furthermore, the PAIC exempts dispute settlement procedures from the scope of the MFN clause.[123]

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The investment regime espoused in the PAIC is consistent with the current global initiatives[124] and new generation IIAs[125] aimed at balancing rights and obligations of host states and investors. In contrast, the majority of Africa's investment treaties do not impose direct obligations on foreign

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[114] Draft Pan-African Investment Code, supra note 31, art. 9.
[115] Id. ch. 4, art. 20.
[116] Id. ch. 4, art. 21.
[117] Id. ch. 4, art. 22.
[118] Id. ch. 4, art. 23.
[119] Id. ch. 4, art. 23.
[120] Chidede (2019)
[121] Chidede (2019)
[122] Chidede (2019)
[123] Mouhamadou Madana Kane, The Pan-African Investment Code: A Good First Step, But More Is Needed, in COLUMBIA FDI PERSPECTIVES, NO. 217, 2 (Mar. 21, 2018).
[124] *E.g.*, UNCTAD *Investment Policy Framework for Sustainable Development* (2015) and International Institute for Sustainable Development (IISD)
[125] *See, e.g.*, Australia-Japan Economic Partnership Agreement, Austl.-Japan, Jan. 15, 2014, https://dfat.gov.au/trade/agreements/in-force/jaepa/full-text/Pages/full-text-of-jaepa.aspx

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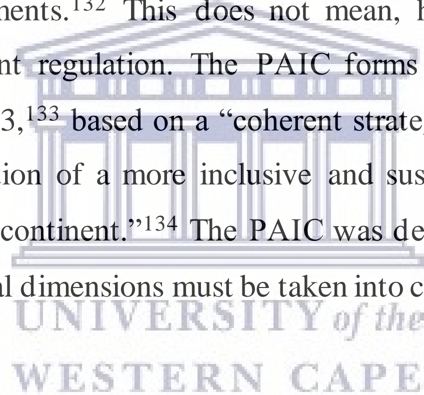
investors, which potentially leads to unregulated investments.[126] However, imposing direct obligations on a foreign investor has not yet gained real recognition or traction in conventional investment treaty practice,[127] yet it is a viable mechanism for striking an appropriate balance between investment protection and corporate responsibility in host states.[128] Nonetheless, a vast majority of modern investment treaties are increasingly integrating, such as the obligation of foreign investors to comply with all applicable domestic law and measures of the host state.[129] Mbengue and Schacherer emphasize the need to enforce direct obligations for investors, such as "the denial of treaty protection for the investor or the possibility of a state to file counterclaims in an arbitral proceeding."[130]

As alluded earlier, the PAIC is not legally binding on member states, nor investors, nor their investments,[131] although the original goal was to have a binding instrument replacing the existing intra-African investment agreements.[132] This does not mean, however, that the PAIC is not important in Africa's investment regulation. The PAIC forms part of a broader continental framework, namely Agenda 2063,[133] based on a "coherent strategic framework for development whose foundation is the promotion of a more inclusive and sustainable growth, the engine of structural transformation on the continent."[134] The PAIC was developed "based on the idea that national, regional, and continental dimensions must be taken into consideration in order to propose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[126] Adeleke (2016)

[127] See, e.g., Community Investment Code of the Economic Community of the Great Lakes Countries, art. 19,

[128] Mbengue & Schacherer Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA) (2019) 435

[129] COMESA, Revised COMESA Common Investment Agreement TabledvBefore Legal Affairs Committee, art. 25, http://www.comesa.int/revised-comesa-commoninvestment-vagreement-tabled-before-legal-affairs-committee/ (last visited Sept. 29, 2018).

[130] Mbengue & Schacherer Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA) (2019) 435

[131] Draft Pan-African Investment Code, supra note 31, ch. 1, art. 2(1) (The PAIC is a "guiding instrument.").

[132] The legal nature of the PAIC stimulated a hot debate. See Dr. Amr Hedar, The Legal Nature of the Draft Pan-African Investment Code and Its Relationship with International Investment Agreements, SOUTH CENTRE (Jul. 2017), https://www.southcentre.int/wpcontent/ uploads/2017/07/IPB9_The-Legal-Nature-of-the-Draft-Pan-African-Investment- Code-and-its-Relationship-with-International-Investment-Agreements_EN.pdf.

[133] Agenda 2063 is a strategic framework of the African Union for the socioeconomic transformation of the continent over the next fifty years.

[134] 2017 AU-ECA Conference of Ministers: Committee of Experts' Meeting, AFRICAN UNION (2017), https://www.tralac.org/news/article/11444-2017-au-eca-conference-ofministers- committee-of-experts-meeting.html [hereinafter A.U. (2017)].

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a conducive legal environment to promote the flow of investments in Africa, facilitate intra-African trade and promote cross-border investment."[135]

The development of the PAIC was Africa's attempt to shape international investment treaty in accordance with its own developmental priorities, the so-called Africanization of international law.[136] This was a reaction to the earlier models of investment regulation that have been presumably unfavourable to Africa's developmental interests.[137] As UNECA has noted, the PAIC purports to develop "a business climate to stimulate investment at national, regional and continental levels, and to develop a roadmap and strategy on how African countries can adopt this code to their own context."[138] The PAIC is therefore a guiding instrument for African countries in investment policy-making at the continental, regional, and bilateral level. The PAIC can be a useful instrument for the investment protocol for the African Continental Free Trade Agreement (AfCFTA)[139] as well as the investment chapters envisaged in the Tripartite Free Trade Agreement (TFTA).[140] Both the AfCFTA Agreement and TFTA Agreement are intended to be binding instruments. A binding instrument at the continental level guarantees that right to regulate provisions are preserved in new bilateral investment treaties negotiated by African countries. Additionally, a Pan-African wide, binding instrument that allows African countries to speak with a single voice on investment creates leverage when negotiating investment deals with other non-African states and the international business community.[141]

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2.2.3 African Regional Investment Law

Africa's Regional Economic Communities (RECs) have adopted regional agreements of relevance to investment called intra-African Regional Investment Agreements (RIAs). For example, the Common Market for Eastern and Southern Africa (COMESA) adopted the Investment Agreement

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[135] Chidede (2019)
[136] Mbengue & Schacherer Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA) (2019) 414–48.
[137] Adeleke (2016).
[138] UNECA (2016)
[139] The AfCFTA is a free trade agreement between fifty member states of the African Union, whose primary objective is to establish a single continental market for goods, services, and investments.
[140] The TFTA Agreement is a free trade agreement between three regional economic communities: the East African Community, the Southern African Development Community, and the Common Market for Eastern and Southern Africa.
[141] Chidede (2019)

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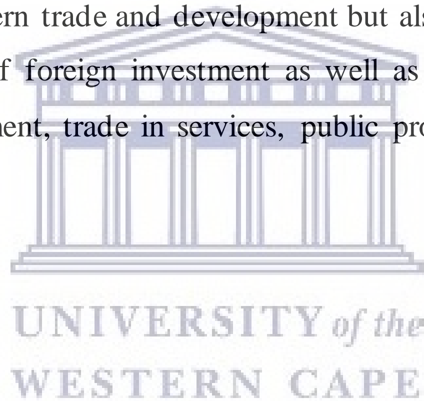
for the COMESA Common Investment Area (COMESA Common Investment Agreement),[142] the Southern African Development Community (SADC) adopted the Finance and Investment Protocol (SADC FIP)[143] and the SADC Model BIT,[144] the Economic Community of West African States (ECOWAS) adopted the Supplementary Act adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS (ECOWAS Supplementary Act)[145] and the ECOWAS Energy Charter,[146] and the East African Community (EAC) has adopted the Model Investment Code (EAC Model Investment Code).[147] In addition, other African regional blocs whose constituency spreads beyond the continent have also adopted a comprehensive "and less systematic compilation of substantive and procedural provisions on investment."[148] Similarly, African countries have negotiated or are negotiating Economic Partnership Agreements (EPAs) with the European Union as part of their central, eastern, western, and southern African regional blocs.[149] EPAs essentially concern trade and development but also include provisions related to the promotion and protection of foreign investment as well as rendezvous clauses for future negotiations in areas of investment, trade in services, public procurement, and competition.[150]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[142]See Investment Agreement for the COMESA Common Investment Area, UNCTAD (May 23, 2007), https://investmentpolicy.unctad.org/international-investment-agreement/ treatyfiles/3092/download [hereinafter COMESA Investment Agreement].

[143] SADC FIP was adopted and signed in 2006 and entered into force on Apr. 16, 2010.

[144]SADC Model Bilateral Investment Treaty Template, SADC (Jul. 2012), https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf.

[145] Supplementary Act Adopting Community Rules on Investment and the Modalities for Their Implementation with ECOWAS was adopted and signed in December 2008.

[146] ECOWAS Energy Protocol was adopted and signed on Jan. 31, 2003.

[147] EAC Model Investment Code, 2006.

[148] Erik Denters & Tarcisco Gazzini, The Role of African Regional Organisations in the Promotion and Protection of Foreign Investment, 18 J. WORLD INV. & TRADE 451, 457 (2017).

[149] These EPAs are available at the European Commission website: http://trade.ec.europa.eu/tradehelp/economic-partnership-agreements-epas.

[150] See, e.g., Article 53 of the EPA between the European Union and the Eastern and Southern Africa States, 2007; Chapter IX of the EPA between the European Union and SADC EPA States, 2016;

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Furthermore, the United States has executed Trade and Investment Framework Agreements (TIFAs) with EAC,[151] COMESA,[152] SACU,[153] and ECOWAS.[154]

Intra-African RIAs reflect a remarkable attempt to incorporate host states' right to regulate. According to Denters and Gazzini[155] the content of African regional treaties must be appreciated also from the standpoint of the second concern mentioned above, namely risk that investment agreements could unduly limit the sovereignty of host states, curtail their regulatory powers and ultimately undermine their capacity to develop efficient policies, in particular in the field of the protection of the environment and public health.

2.3 BENEFITS AND LIMITATIONS OF INVESTMENT TREATIES

2.3.1 Increased inward investment

One of the most prominent justifications for investment treaties is that they, along with its ISDS provisions, can attract investment. However, there is no compelling evidence that investment treaties increase investment flows.[156] In short, a substantial amount of quantitative and qualitative evidence contradicts prevalent assumptions about the importance of [bilateral investment treaties (BITs)] in attracting foreign investment. BITs do not appear to be essential – directly or indirectly – to the great majority of investors when deciding where and how much to invest abroad.[157]

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Other factors, such as market size and growth, the availability of natural resources, and the quality of hard and soft infrastructure, are far more important to investors than investment treaties when making the decision to invest, according to studies on determinants of foreign direct investment

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[151] Trade and Investment Framework Agreement between the United States and EAC, which was signed on Jul. 16, 2008, and entered into force on Jul. 16, 2008.

[152] Agreement Between COMESA and the United States Concerning the Development of Trade and Investment Relations, which was signed on Oct. 29, 2001, and entered into force on Oct. 29, 2001.

[153] Cooperative Agreement Between the United States and the SACU to Foster Trade, Investment and Development, signed on Jul. 16, 2008, and entered into force on Jul. 16, 2008. Cooperative Agreement Between the United States of America and the Southern African

[154] Trade and Investment Framework Agreement Between the Government of the United States of America and the Economic Community of West African States, Economic Community of West African States-U.S., Aug. 5, 2014, available at https://investmentpolicyhub.unctad.org/Download/TreatyFile/5102 .

[155] Erik Denters & Tarcisco Gazzini, The Role of African Regional Organisations in the Promotion and Protection of Foreign Investment, 18 J. WORLD INV. & TRADE 481.

[156] COSTS AND BENEFITS OF INVESTMENT TREATIES (2018)

[157] Bonnitcha, J., Skovgaard Poulsen, L. N., & Waibel, M. 'Legitimacy and Governance Challenges' (2017). The Political Economy of the Investment Treaty Regime. (60)

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(FDI).[158] This helps to explain why, despite the absence of an investment treaty, investment flows between the United States and China are substantial, and why Brazil has remained a key destination for foreign investment despite having ratified no investment treaties incorporating ISDS.

To summarize, it is critical for states to examine not only whether investment treaties result in increased investment into the host country (which is inconclusive), but also (1) whether that increased investment is induced investment or investment merely structured to benefit from the treaty; (2) whether the investment is actually desirable; and (3) whether the investment is induced investment or investment merely structured to benefit from the treaty, and (3) Whether any investment advantages outweigh the cost of the investment in terms of policy space lost or other costs (more of which are discussed below). When performing a cost-benefit analysis, it's also crucial to consider the distributional implications of relevant gains and losses. According to the evidence so far, governments considering their investment treaty policies should not expect favorable outcomes in terms of investment flows or that investment treaties will result in long-term advantages.

2.3.2 Increased outward investment

Countries may also enter into investment treaties to benefit its outside investors, on the notion that encouraging outward investment will result in advantages flowing back into the home country. This poses two major concerns, which are identical to those raised in the context of inbound investment. One is whether the benefits provided by normal investment treaties are truly what external investors from the host country desire or need. What are the obstacles that these individuals and businesses encounter when it comes to investing abroad? Do the treaties assist them in overcoming these obstacles? Outbound investment firms, like inbound investment firms, may opt to exploit investment treaties' increased leverage to file or threaten to file a claim against their "host" states. However, this does not imply that the treaty will have any impact on, much less be vital to, the corporations' investment plans (or worth the costs the home country has assumed so as to provide its investors that leverage).[159]

It is therefore critical for countries evaluating their outward investment policies to (1) consider whether, what types, and under what conditions outward investment provides positive spillovers

[158] Lisa E Sachs and Karl P Sauvant, 'BITs, DTTs, and FDI flows: An Overview' in Sauvant and Sachs (eds)

[159] Andreea Michalache-O'Keef and Quan L

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into the domestic economy, and (2) identify limiting factors that are preventing optimal amounts and types of outward investment (for example, through the use of surveys), (3) Assess what complementary measures the government might want to adopt to anticipate and address negative effects the home country may experience – such as a reduced tax base or increased unemployment among workers with specific skill sets – and what policy tools the government has to help overcome those limiting factors as a result of offshore investment promotion efforts, such as a lower tax base or increased unemployment among employees with specific skill sets.[160]

Finally, it is critical for home nations to evaluate how increasing investment may influence host countries, as well as to guarantee that the investors and projects they support do not jeopardize long-term development elsewhere.

2.3.3 "Depoliticization" of Disputes

Another ostensible benefit of investment treaties is that they "depoliticize" issues by allowing investors to make claims directly against the countries in which they have invested.[161] This appeals to the host state's wish to be free of "gunboat diplomacy," diplomatic protection, or other political or economic penalties imposed by the investor's home state in response to the host state's alleged abuse of the investor.[162] Depoliticization appeals to the home state's wish to avoid tarnishing diplomatic relations with the host state by becoming involved in conflicts between the home state's investors and their foreign host governments.[163] The premise is that allowing investors to file arbitration claims directly against their host governments eliminates the need for the home state to intervene. Moreover, the Convention on the Settlement of Investment Disputes.

The International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)[164], which governs the enforcement of international arbitration awards, prohibits the home state from 'provid[ing] diplomatic protection or

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[160] COSTS AND BENEFITS OF INVESTMENT TREATIES (2018

[161] Jason Webb Yackee, 'Politicized Dispute Settlement in the Pre-Investment Treaty Era: A Micro-Historical Approach' (2017)

[162] COSTS AND BENEFITS OF INVESTMENT TREATIES (2018)

[163] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, August 25, 1965, 17 UST 1270, TIAS. No 6090, 575 UNTS 159 (entered in force October 14, 1966)

[164] Ibrahim FI Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA' (1986)

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bringing[ing] an international claim in respect of a dispute' already brought by its investor against the host state under the ICSID Convention.[165]

However, the precise contribution of investment treaties, and more especially, ISDS, to the goal of depoliticizing investment disputes is dubious in both theory and reality. Furthermore, "politicization" may not be as serious a problem as it is sometimes perceived to be, and may even be preferable to more legalistic modes of dispute resolution in some instances and from some perspectives.

2.4.1 ECOWAS Supplementary Act

This Supplementary Act was established by West-African state as an affiliate of African investment laws. It is a point to be noted and discussed in this study because the Investment Act reveals the guide of ECOWAS which is expected to be adhered to by all members when entering into any bi-lateral trade agreement with other non-member such as the case of Morocco-Nigeria BITs that is currently understudy. Hence, since Nigeria is a member of ECWAS, there's needs for discussion of such Supplementary Act.

The ECOWAS Supplementary Act is legally binding on ECOWAS member states, investors, and investments.[166] The Act is one of the most advanced investment treaties that is conscious of the distinctive context of African countries and adopts rights-based approach to development.[167] Its declared objective is to stimulate investment that can promote sustainable development within the ECOWAS.[168] Article 20 prohibits member states from relaxing their labour, public health, safety, or environmental standards to lure investment into their territories. In terms of article 24(2) host states can impose performance requirements to promote domestic development benefits from investments. Measures adopted prior to the completion of the host State measures prescribing the formalities for establishing an investment shall be deemed to be in compliance with this Supplementary Act. If such measures are taken after the completion of the host State measures prescribing the formalities for establishing an investment, they shall be subject to the provisions of this Supplementary Act.

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[165] COSTS AND BENEFITS OF INVESTMENT TREATIES (2018)
[166] ECOWAS Supplementary Act, ECOWAS Supplementary Act on Investments art. 4.
[167] Adeleke (2016)
[168] ECOWAS Supplementary Act, ECOWAS Supplementary Act on Investments, art. 3.

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Article 24(3) of the ECOWAS Supplementary Act provides for examples of the performance requirements covered in article 24(2) to include the following:

(a) To export a given level or percentage of goods or services;

(b) To achieve a given level or percentage of domestic content;

(c) To purchase, use or accord a preference to goods produced or services provided in its territory;

(d) To purchase goods or services from persons in its territory;

(e) To relate the volume or value of imports to the volume or value of exports or to the amount of foreign exchange flows associated with such investment;

(f) To restrict sales of goods or services in its territory that such investment produces by relating such sales to the volume or value of its exports or foreign exchange earnings; and

(g) Similar measures intended to promote domestic development.

Moreover, the ECOWAS Supplementary Act provides for ISDS and interstate dispute settlement through the use of good offices, conciliation, mediation, or any other dispute resolution process as agreed upon. Article 33(5) of the Act provides that member states may also establish national mediation centers to facilitate the resolution of disputes between parties and investors or investments, taking into account regional rules, customs and traditions on investment." If a dispute between an investor and a member state is not settled through good offices, conciliation, or mediation, it may be submitted to arbitration under a domestic court; "any national machinery for settling investment disputes;" "the relevant national court of the member states;" or referred to the ECOWAS Court of Justice.

2.4.2 African Investment Regulation at the Bilateral Level

Despite the extensive legislative infrastructure at the disposal of the international investment community for the promotion and protection of investors, BITs have emerged as the main legal instruments to protect investors, provide them with rights and benefits, and deal with investment disputes. Traditionally, BITs have been concluded between developing and developed countries

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(North-South BITs), but the trend has changed in recent decades as BITs are also being concluded among developing countries from Africa, Asia, and Latin America (South- South BITs).[169] Alschner and Skougarevskiy have detected that the South-South BITs contain more public interest and host state regulatory autonomy elements than North-South BITs.[170] African countries have signed 881 BITs, 722 of which are signed with non-African countries and 159 of which are signed between African countries (intra-African BITs).[171] The greater part of these treaties were concluded in the late 1990s and early 2000s. The content of these BITs have been largely dictated by developed countries, particularly countries from Western Europe and North America.[172] African countries were presented with "take-it-or-leave-it" offers by developed countries in the negotiation of investment treaties.[173] The existing network of traditional BITs entered into by African countries with their western trade and investment partners are biased in favor of foreign investors—who seem to enjoy greater privileges than their African or domestic counterparts when investing in Africa.[174]

Furthermore, the BITs signed by African countries are weak in leveraging and imposing obligations on investors, and the BITs tend to favor foreign investors without addressing questions of economic sustainability for the continent.[175] For instance, BITs have established a situation in which foreign investors can bypass local courts of the host states and submit their investment claims directly to international arbitral tribunals mostly based overseas.[176] UNECA has observed that African countries find themselves exposed to the risk of legal disputes and hefty fines "which

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[169]Lauge Skovgaard Poulsen, The Politics of South-South Bilateral Investment Treaties, in THE POLITICS OF INTERNATIONAL ECONOMIC LAW 186 (Tomer Broude et al. eds., 2011).
[170] Wolfgang Alschner & Dmitriy Skougarevskiy, *Rule-Takers or Rule-Makers? A New Look at African Bilateral Investment Treaty Practice* (June 7, 2016), at 10.
[171]International Investment Agreement Database, UNCTAD, https://investmentpolicyhub.unctad.org/IIA (last visited Mar. 18, 2019).
[172] Gus Van Harten, A Critique of Investment Treaties, in RETHINKING BILATERAL INVESTMENT TREATIES: CRITICAL ISSUES AND POLICY CHOICES 41, 50 (Kavaljit Singh & Burghard Ilge eds., 2016).
[173] Mbengue & Schacherer Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA) (2019) 416.
[174] Gus Van Harten, A Critique of Investment Treaties, in RETHINKING BILATERAL INVESTMENT TREATIES: CRITICAL ISSUES AND POLICY CHOICES 41, 50 (Kavaljit Singh & Burghard Ilge eds., 2016).
[175] UNECA (2016).
[176] ICSID, UNCITRAL, the International Chamber of Commerce, the International Court of Arbitration, the Permanent Court of Arbitration, the International Court of Justice, the Arbitration Institute of the Stockholm Chamber of Commerce, and the London Court of International Arbitration.

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put a further strain on scant government resources and narrow the policy space when designing policies which touch on investment."

Meanwhile, a growing number of these cases have been brought by foreign investors against African countries. Since 1972, 111 treaty-based ISDS cases involving African countries have been recorded, sixty-eight of which ended up in awards, settlements, or were discontinued, while forty-four are pending.[177] The ICSID has been responsible for 107 cases, while the UNCITRAL tribunals have handled three cases. Signing and ratifying BITs comes with great risk of investment dispute proceedings. It appears that an increase in BITs worldwide correlates with an increase in investment dispute proceedings. The more BITs African countries enter into, the more they will be parties in dispute settlement proceedings. Egypt is the African country with the highest number of BITs, having entered 100 BITs, and is also the African country with the highest number of ISDS cases: Egypt is a respondent in twenty-nine cases.[178]

Notwithstanding the foregoing arguments, it must be acknowledged that African countries have recently executed investment treaties that attempt to preserve policy space. For example, the investment treaties make reference to right to regulate (regulatory autonomy, policy space, flexibility to introduce new regulations), sustainable development, social investment aspects (human rights, labor, health, corporate social responsibility, poverty reduction), or environmental issues (plant or animal life, biodiversity, or climate change). Most of these BITs were concluded in the twenty-first century and refer to the right to regulate, sustainable development, social investment, and environmental aspects in their preambles.[179]

2.5 CONCLUSION

Conclusively, this chapter has revealed an overview of FDI and IR as well as continental, regional and sub-regional investment laws. However, the fore knowledge of all these discussed in the chapter shall be used in analysing the Morocco-Nigeria Treaties in the next section of the study. In the chapter, other criteria such as market size and growth, natural resource availability, and the quality of physical and soft infrastructure have been to be highly essential to investors when

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[177] Investment Dispute Settlement Database, UNCTAD INVESTMENT POLICY HUB, (*http://investmentpolicyhub.unctad.org/ISDS*) (last visited Mar. 10, 2019).
[178] Investment Dispute Settlement Database, UNCTAD INVESTMENT POLICY HUB, (*http://investmentpolicyhub.unctad.org/ISDS*) (last visited Mar. 10, 2019).
[179] For the Promotion and Reciprocal Protection of Investments, S. Afr.-Eth., Mar. 18, 2008;

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making investment decisions than investment treaties. States must analyse whether investment treaties result in additional investment in the host country. It is vital for home countries to assess how increased investment can affect host countries, as well as to ensure that the investors and projects they support are not imperilled. Thus in the next chapter, the Morocco-Nigeria Bilateral Investment Treaty will be examined in detail.

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CHAPTER THREE

MOROCCO-NIGERIA BILATERAL INVESTMENT TREATY

3.0 Introduction

This section of the study examines important points identified in previous chapters in the context of the Morocco-Nigeria BIT, challenges and advantages of specific provisions are discussed in relation to the goals identified; if the BIT fully reflects the current standards in the BIT framework; to put a measure that will facilitate improvement in the Morocco and Nigeria BIT without undermining the central objectives of BITs in protecting foreign investors; to analyze the current state of FDI climate in Nigeria.

A part of a suite of agreements signed between Morocco and Nigeria during an event in Casablanca in December 2016 is this treaty which indicates "strategic partnership" whereby both countries made decisions to commence a joint venture to construct a 4,000 km regional gas pipeline to connect west African countries' gas resources to Morocco and across to Europe. This treaty serve as a vital effort on the part of two developing economies to take steps leading to a new generation of BITs fully aligned with the evolution of international law. Largely, a number of innovative provisions that are susceptible to address the criticism raised in the last few years against investment treaties are taken into cognizance in the treaty.[180] On 30 August 2017, the Moroccan Parliament ratified the Morocco-Nigeria BITs and it was later ratified by Nigeria.[181]

BITs, as a form of International Investment Agreements grew significantly in the 1990s and 2000s. It is not out of order to say BITs are ultimately the primary source of international investment law which promotes and protect cross-border investment flows. BIT was first signed in 1959 between Germany and Pakistan.[182] In reality, over three thousand BITs exist currently in the world and the great majority has been closed in the 1990s.[183]

A Joint Committee which was established by the treaty is made up of representatives of the two Parties with responsibilities such as: (a) monitoring implementation and the execution of the treaty

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[180] Kavaljit&Burghard (2016)Rethinking Bilateral Invesment Treaties critical issues and policy choice

[181] http://arbitrationblog.practicallaw.com/the-morocco-nigeria-bit-a-new-breed-of-investment-treaty/

[182] Salacuse J 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries'(1990) 24(3) *The International Lawyer* 655.

[183] https://unctad.org/press-material/bilateral-investment-treaties-quintupled-during-1990s

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(which includes facilitation of the information exchange and when appropriate set corporate governance standards); (b) debating and sharing different opportunities towards expansion of mutual investment; (c) to promote the participation of the private sector and civil society; and (d) to seek to resolve any issues or disputes concerning Parties' investment in an amicable manner.[184]

The enhancement of sustainable development is the overarching objective of the treaty as it transpires from the four references to it contained in the preamble. The definition of investment in Art. 1(3) requires that investments contribute to sustainable development, although sustainable development is not expressly included amongst the characteristics of investment. Interestingly, under Art. 24(1), investors "should strive to make the maximum feasible contributions to the sustainable development of the host State and local community".[185] It is also worth noting that the definition of investment excludes *inter alia* portfolio investments.

The treaty ensures a level of substantive protection comparable to that traditionally contained in BITs. Starting with contingent standards, the national treatment standard applies in like circumstances, which are indicated in the non-comprehensive list of Article 6(3). The MFN standard is applicable "to make an investment and conduct business".[186]

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Inspired by North American practice, under Article 7 investors are entitled to the minimum standard of treatment (MST) guaranteed under customary international law. The same provision further clarifies that fair and equitable treatment (FET) 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 a Party", while full protection and security refers to "the level of police protection required under customary international law".[187]

The overwhelming majority of BITs impose obligations only upon States.[188] Meanwhile, the treaty between Morocco and Nigeria introduces a series of obligations upon investors. Investors shall comply with environmental assessment screening and assessment processes in accordance with

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[185]Art. 24(1)
[186]UNCTAD (2020)
[187]https://www.jstor.org/stable/25658134?seq=1
[188]see *Spyridon v. Romania*

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the most rigorous between the laws of the host and home states, as well as a social impact assessment based on standards agreed within the Joint Committee (Art. 14(1) and (2)).

Under the treaty, investors must, after establishment, apply – alongside the host State – the precautionary principle (Art. 14(3)). They also have to maintain an environmental management system and in case of resource exploitation and high-risk industrial enterprises also a current certification to ISO 14001 or an equivalent environmental management standard (Art. 18(1)). Moreover, investors must uphold the human rights and act in accordance with core labour standards (ILO 1998 Declaration on Fundamental Principles and Rights of Work) as well as the international environmental, labour and human rights obligations of the host state and/or home state (Art. 18).

Investments shall meet or exceed national and internationally accepted standards of corporate governance for the sector involved, in particular for transparency and accounting practices (Art. 19). Furthermore, investors and their investments are expected to operate through high levels of socially responsible practices and should apply the ILO Tripartite Declaration on Multinational Investments and Social Policy, as well as specific or sectorial standards of responsible practice (Art. 24).

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Equally important, the BIT requires that investors and their investments shall never engage or be complicit in corruption practices. Noncompliance with this obligation would amount to a breach of the domestic law of the host State and be prosecuted accordingly (Art. 17(2) to (5)).

Each State has an "undeniable right and privilege to exercise its sovereign legislative power"[189]. Such power, however, must be exercised in accordance with international obligations, including investment treaties. Yet, investment treaties are often perceived by the host State as unduly restricting its regulatory powers and its capacity to protect collective interests.

The BIT between Morocco and Nigeria addresses this concern by recognizing – perhaps in a rather inelegant drafting – the parties' right to exercise discretion:

[189]see *ParkeringsCompaniet AS v. Lthuania*

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"With 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".[190]

Moreover, nothing in the treaty prevents them from adopting, maintaining, or enforcing, 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.[191] More generally, regulatory powers – which are based on balancing the rights and obligations of investors and those of the State – must be exercised in accordance with customary international law and the principles of international law.[192] Under Art. 23(3), finally, non-discriminatory measures taken to comply with international obligations under other treaties do not constitute a breach of the BIT.

As most BITs, the treaty provides for mandatory settlement of both investor-State (Art. 27) and State-State disputes (Art. 28). With regard to the first category, Art. 27 provide investors – and investors only – access to arbitration.[193]

State-State disputes are to be settled before a three-member arbitral tribunal (Art. 28). Before resorting to arbitration, however, the Parties "shall strive with good faith and mutual cooperation to reach a fair and quick settlement of the dispute". No timeframe for the peaceful settlement of the dispute is established.

The treaty contains also an innovative – yet rather problematic – provision titled "disputes prevention", according to which, before initiating arbitral procedure, "any dispute between the Parties shall be assessed through consultations and negotiations by the Joint Committee" upon a written request by the State of the concerned investor (Art. 26(1) and (2)). Representatives of the investor and the host State (or other competent authorities) participate, whenever possible, in the "bilateral meeting" (Art. 26(2)). The procedure ends at the request of "any Party" and with the adoption by the Joint Committee of a report summarizing the position of "the Parties". If the

[190] Art. 13(2)
[191] Art. 13(4)
[192] Art. 23(2)
[193] ICSID, UNCITRAL or any other tribunal

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dispute is not settled within 6 months, the investor may resort to international arbitration after exhausting domestic remedies.[194]

This is provision for the possibility of consolidating, upon a request by "any disputing party" of two or more claims submitted separately to arbitration under Art. 27 and 28 that-

"Have a question of law or fact in common and arise out of the same events or circumstances".[195] The Joint Committee decides the procedure for consolidation and indicates the appointing authority.

Arbitral proceedings shall 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 shall be available to the public.[196]

Finally, the treaty 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".[197]

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The treaty contains a provision on termination by mutual consent as well as on unilateral termination but no sunset clause.[198]

3.1 Preliminary assessment of the treaty

The substantive provisions of the treaty replicate in good substance those commonly found in BITs. The specifications on "like circumstances" for the purpose of the national treatment may be expected to facilitate the interpretation and application of the standard. The reference to the making of an investment and the conduct of business in the MFN provision presumably excludes the application of the standard to procedural provisions, although an express clarification in this sense

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[194]Art. 26(5)
[195]Art. 29
[196](Art. 10(5)
[197]Art. 20
[198]Art. 34

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could have been appropriate.[199] The provision on MST conveys the cautious approach of the Parties through the careful demarcation of FET and the confinement of protection and security to police protection. The significance of the treaty lies with three main largely innovative elements.

First, the treaty counter-balances the protection granted to investors with a series of obligations on the conduct of investment. While not entirely novel,[200] these obligations – especially those related to environmental and social impact assessment, human rights, corruption, and corporate governance and responsibly – greatly increase the legitimacy of the treaty and pave the way to a new approach in the regulation of foreign investment.

Second, the treaty effectively addresses another of the main sources of criticism toward investment treaties by carefully safeguarding the policy space of the host State. The express obligation incumbent upon the host State to exercise its regulatory powers in accordance with customary international law and the general principles of international law, although strictly speaking not indispensable, is to be welcomed. The same can be said about the provision on compliance with other international treaties. The difference in the sources of international obligations referred to in the two provisions, however, is not apparent. With regard to environmental measures, it is worth noting that their adoption depends on the good-faith judgment of the host State without any necessity test being applicable.

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Third, with regard to dispute settlement, the treaty confirms that time is not ripe yet for permitting States to file a request for international arbitration against investors. Perhaps more surprisingly, the treaty remains silent on both counter-claims[201] and non-disputing Party submissions.[202]

The involvement of the Joint Committee in the peaceful settlement of disputes is definitely intriguing. Yet, Art. 26 is rather ambiguous in many respects. Leaving aside its unfortunate title, it deals with investor-State disputes and inexplicably refers to "disputes between the Parties" and "a solution between the Parties". Moreover, Art. 26 does not indicate what is the position of the investor in the whole exercise beyond the *possible* participation in "bilateral meeting" of the Joint

[199] see, eg, Art. 4 of the BIT between Switzerland and Colombia
[200] see ECOWAS Supplementary Act on Investments
[201] see, e.g., Art. 14(11) Indian Model BIT
[202] see e.g. Art. 28(2) of the BIT between the United States and Rwanda

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Committee. Equally important, it does not define the nature and legal significance of the "assessment" of the dispute, or the meaning of "consultations and negotiations".

Art. 26 blurs the roles and positions of States and investors. It undermines the essence of the settlement of investor-State disputes, namely their insulation from political considerations, hazards and pressure. The very fact that the procedure under Art. 26 is activated by the national State is questionable and may raise several problems, also with regard to the jurisdiction of arbitral tribunals under Art. 27. Finally, abandoning direct negotiations between the investor and the host State as pre-condition for international arbitration seems rather counterproductive.

The inappropriate conflagration between the roles and interests of investors and States characterizes also the possible consolidation under Art. 29 of investor-State and State-State disputes. Such a possibility is bound to be fraught with procedural and conceptual difficulties.

The provision on the investor liability before the tribunals of the home State, finally, may have a considerable impact on domestic litigation against investors – especially multinational companies – and help overcome jurisdictional hurdles and most prominently the *forum non conveniens* doctrine. This can be considered as an important development from the standpoint of the responsible conduct of investments, the redress of wrongful doings, and the role of the home State.

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3.2 Rationale and context of the Morocco–Nigeria BIT

The main rationale behind the Morocco–Nigeria BIT is to strengthen business relations via a bilateral agreement that facilitates investment in the two states.[203] 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.[204] 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,

[203] Nyombi, C., Mortimer, T. and Ramsundar, N.(2018)

[204] *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].

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thereby creating thousands of jobs, reinforcing distribution channels and reinvigorating the regional market for fertilisers.[205] 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 BITs. 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.[206]

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.[207] For instance, the Journal of World Investment and Trade published a special issue in 2017 that focused on investment law related developments in Africa.[208] The emerging research shows that the developments in Africa mirror those around the world, from innovative treaty-making practices to treaty obligations on investors.[209] 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.[210] Hence, 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 Settlement of Investment Disputes between Investors and

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[205] Nyombi, C., Mortimer, T. and Ramsundar, N.(2018)
[206] Morocco–Nigeria BIT (2016) available at: http://investmentpolicyhub.unctad.org/IIA/treaty/3711 [Accessed 7 December
2017].
[207] Nyombi, C., Mortimer, T. and Ramsundar, N.(2018)
[208] 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).
[209] 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*.
[210] See, UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD) and the 2012, 2013, 2014, 2015, 2016 and 2017 World Investment Reports.

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States (ICSID Convention)[211] 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.[212] 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.[213] Thus, the Morocco–Nigeria BIT is a reflection of the current 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.[214] The new regionalism in investment governance is shaping the course of not only international investment law reform but also intra-African investment policies. For instance, a number of regional and African Union (AU) led initiatives are progressively decomposing 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.[215] The Pan-African Investment Code (PAIC) is a product of this grand scheme to create an integrated continental policy on investment.[216] 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.[217] Although these projects are yet to fully materialise, they provide the right impetus for the

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[211] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965)

[212] See *Abdulkadir Jailani, "Indonesia's Perspective on Review of International Investment Agreements", South Centre Investment Policy Brief No.1 (July 2015)*;

[213] Nyombi, C., Mortimer, T. and Ramsundar, N.(2018)

[214] 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,2016).

[215] Nyombi, C., Mortimer, T. and Ramsundar, N.(2018)

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

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

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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 calls for closer and adequate examination.

3.3 Groundbreaking Features of the Morocco–Nigeria BIT

To put the study in perspective, the following four notable characteristics of the Morocco–Nigeria BIT are discussed below:

i. sustainability and investor obligations;
ii. standards of treatment;
iii. dispute settlement provisions; and
iv. express protection of the host state's regulatory discretion.

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3.3.1 Sustainability and Investor Obligations

Sustainability is the main thematic area in the BIT, featuring four times in its Preamble and in a number of its substantive provisions. For example, 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" (see Preamble). This is why investors are required to satisfy environmental and social impact assessment requirements prior to making their investment (art.14).

In a similar vein, 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),[218] human rights (art.18) and apply corporate social responsibility requirements such as

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

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the ILO Tripartite Declaration on Multinational Investments and Social Policy,[219] 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 emphasize 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[21a]. 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).[220] 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.[221] It also allows the host state to evade liabilities as seen in *Metal-Tech*[222] and *World Duty Free*,[223] therefore, 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.[224]

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.

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[219] ILO Tripartite declaration of principles concerning multinational enterprises and social policy (MNE Declaration), 5th edn
(March 2017).
[220] See a similar provision in the new Indian Model BIT 2016 art.13.
[221] Nyombi, C., Mortimer, T. and Ramsundar, N.(2018)
[222] Metal-Tech Ltd v Republic of Uzbekistan ICSID Case No.ARB/10/3.
[223] World Duty Free v Republic of Kenya ICSID Case No.Arb/00/7.
[224] See African Society of International Law (AFSIL), "Principles on International Investment for Sustainable Development in Africa" (2016)

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3.3.2 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.[225] 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)[226] by attempting to clearly define the level of protection afforded to investors. According to Eric de Brabandere, broad fair and equitable treatment and full protection and security provisions, largely contained in the older BITs, have contributed significantly to the rising number of ISDS cases against African countries.[227] 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.[228] 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.[229]

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[225] See US Model Bilateral Investment Treaty 2012 art.5.

[226] As specified in the Notes of Interpretation to art.1105(1) of NAFTA.

[227] 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.

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

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

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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.[230] 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.

3.3.3 Dispute settlement provisions

The rising number of ISDS claims has fueled 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[231] or any other tribunal. Thus, the primary arbitration provisions of the BIT are not particularly unusual, but also not in line with current attempts to move away from ISDS.

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

[230] See US Model Bilateral Investment Treaty 2012 art.3.

[231] UNCITRAL Arbitration Rules (revised 2010)

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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.

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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 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[34]. Furthermore, the BIT introduces a

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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). Meanwhile, 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.

3.3.4 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: With 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

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reversing the previous government's policy decisions owing to fear of investor reprisals.[232] 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*[233] and a recognition in *Parkerings v Lithuania*[35a] that each state has an "undeniable right and privilege to exercise its sovereign legislative power".

In this 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 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.[234] Thus, lack of clarity on whether host-states should strictly respect their international obligations towards foreign investors as contained in investment treaties[235] or should strictly respect their international obligation of preserving public interest issues,[236] particularly the environment, will be significantly minimised by the clear provisions in the BIT.

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3.3.5 Identified Merits and Criticisms of specific provisions of the Morocco–Nigeria BIT

Identified merits and drawbacks associated with specific provision of the BIT are discussed below: 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

[232] 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*;

[233] CMS v Argentina ICSID Case No.ARB/01/8.

[234] Ejims O 'The 2016 Morocco–Nigeria Bilateral Investment Treaty: More Practical Reality in Providing a Balanced Investment Treaty?' (2019) 0 *ICSID Review* 23

[235] 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*.

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

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measures, their adoption depends on the good-faith judgment of the host state without satisfying any necessity test.[237]

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.

In addition, by placing activation powers in the hands of the national state, art.26 undermines the essence of investor–state disputes, which 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. Also, the possible consolidation of investor–state and state–state disputes under art.29 is likely to produce procedural difficulties.

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Following this backdrop, this 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

[237] Nyombi, C., Mortimer, T. and Ramsundar, N.(2018)

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obligations of foreign investors.[238] 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.

3.4 Concluding remarks

BITs are not necessarily treacherous legal products. As any other treaties, they are simply an instrument at the disposal of the contracting parties to legally protect their respective interests. What really matters is their content, which obviously depends on the agendas, choices and concessions of the parties.

Morocco and Nigeria have shown confidence that such an instrument can offer investors solid protection without compromising on the host State's rights or on social values. Their BIT contains several innovative provisions that recalibrate the legal protection of the interests of all stakeholders and can be expected to enhance the chances for economically, socially and environmentally sustainable investments.

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With regard to procedural matters, the provision on liability of investors before the tribunals of the home State is an important development. The provisions on the involvement of the Joint Committee in the peaceful settlement of disputes and on consolidation, on the contrary, present significant problems that the Parties may consider addressing through an exchange of letters, a protocol, or any other suitable means.

However, the fore knowledge of all these discussed in the chapter shall be used in reviewing the Brazil Model BIT in the next section of the study. In that chapter, the Cooperation and Facilitation Investment Agreement (CFIA) of Brazil will be discussed; the evolution of BITs in Brazil prior to the CFIA, similarities and variations in the evolution of Brazil and Nigeria BITs, the CFIA's analogous provisions will be compared to the areas of dispute outlined in chapter three.

Thus in the next chapter, the Brazil Model BIT will be examined in detail.

[238] See Nigeria–Singapore BIT 2016 arts 11, 18.

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CHAPTER FOUR

BRAZIL MODEL BIT REVIEW

4.0 INTRODUCTION

The Cooperation and Facilitation Investment Agreement (CFIA) of Brazil will be discussed in this chapter of the thesis. The evolution of BITs in Brazil prior to the CFIA will be discussed. In both Nigeria and Brazil, similarities and variations in the evolution of BITs will be explored. The CFIA's analogous provisions will be compared to the areas of dispute outlined in chapter three.

4.1 EVOLUTION OF BITs LEADING TO CFIA IN BRAZIL

None of the 2.369 bilateral investment treaties (BITs) in force involves Brazil.[239] Although Brazil signed 14 traditional BITs between 1994 and 1999,[240] they were never approved by the country's National Congress, which saw the investor–state arbitration regime as limiting states' right to regulate and as granting extraordinary benefits to foreign investors, hence discriminating against domestic investors.[241] For the same reasons, Brazil did not sign the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). Even so, it continued to receive significant amounts of foreign direct investment (FDI), consolidating its position as one of the world's top recipients of FDI[242] and reinforcing the understanding that having BITs in force is not decisive for attracting investments.[243]

The increasing internationalization of Brazilian enterprises,[244] the interest of partner countries in negotiating investment agreements, the several problems perceived in traditional BITs and the growing number of investor–state arbitration cases raised the debate of investment agreements

[239] United Nations Conference on Trade and Development (UNCTAD). (2017). International investment agreements navigator. Retrieved from http://investmentpolicyhub.unctad.org/IIA.
[240] Id. Retrieved from http://investmentpolicyhub.unctad.org/IIA/CountryBits/27#iiaInnerMenu.
[241] Brazilian Ministry of Foreign Relations. (2015). Brasil e Moçambique assinam Acordo de Cooperação e Facilitação de Investimentos. Blog Diplomacia Pública.
[242] UNCTAD. (2016). World investment report 2016: Investor nationality: Policy challenges, p. 5. Retrieved from http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf.
[243] Brazilian Ministry of Foreign Relations. (2015).
[244] By the end of 2014, the stock of Brazilian FDI abroad corresponded to half the amount of FDI stock in Brazil. Brazilian Central Bank. (2014). Brazilian capital abroad. Retrieved from http://www4.bcb.gov.br/rex/CBE/Ingl/CBE2014Results.pdf.

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again in Brazil.[245] This consisted in an opportunity to develop an innovative model that did not focus only on protection of investors and investments, but which aimed at promoting and facilitating productive investment of high quality. The Brazilian government thus adopted a new approach: the Cooperation and Facilitation Investment Agreement (CFIA).[246]

4.1.1 Problems with the traditional model of investment agreement

The traditional model of investment agreement, establishing strong protection clauses for foreign investors and allowing them to initiate international arbitration against the host state without prior recourse to the local judiciary, has had negative effects on host countries.[247] Among several other criticisms, their provisions were excessively burdensome for capital-importing states, particularly when the specific needs of developing countries are considered. Many clauses have been interpreted in a way that limits or prevents states' right to regulate, restricting the implementation of legitimate public policies.

Indirect expropriation clauses, for example, have allowed foreign investors to challenge legitimate public policies aimed at protecting the environment or human health before arbitral tribunals. This happened, for instance, in the cases initiated by Philip Morris against Uruguay and Australia,[248] in which the tobacco company challenged the labeling regulations established by these countries to reduce the attractiveness of cigarette packs and thus limit the consumption of the product.

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Many of the 767 investor–state arbitration cases known to date[249] have had major political repercussions in the countries involved. Investment tribunals have awarded large amounts of

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[245] Brazilian Ministry of Foreign Relations. (2015).

[246] See Bernasconi-Osterwalder, N., & Brauch, M. D. (2015, September). Comparative commentary to Brazil's cooperation and investment facilitation agreements (CIFAs) with Mozambique, Angola, Mexico, and Malawi. Retrieved from http://www.iisd.org/library/comparative-commentary-brazil-cooperation-and-investment-facilitation-agreements-cifas; and Morosini, F., & Sanchez Badin, M. R. (2015, August). The Brazilian agreement on cooperation and facilitation of investments (ACFI): A new formula for international investment agreements? Investment Treaty News, 6(3), 3–5. Retrieved from https://www.iisd.org/itn/2015/08/04/the-brazilian-agreement-on-cooperation-and-facilitation-of-investments-acfi-a-new-formula-for-international-investment-agreements.

[247] Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices

[248] Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12. Retrieved from http://www.italaw.com/cases/851; Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7. Retrieved from http://www.italaw.com/cases/460.

[249] UNCTAD. (2017). Investment dispute settlement navigator. Retrieved from http://investmentpolicyhub.unctad.org/ISDS.

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compensation and are often perceived as favouring individual business interests over social and public considerations of the host state.[250] With a focus on the dispute settlement mechanism and with a structure that stimulates challenges to domestic regulations that somehow affect investments; BITs have created an adversarial dynamic, which does not contribute to create neither a good business environment nor long-term investor–state relations. Despite often having the name "Agreements for the *Promotion* and Protection of Investments," these traditional texts do not have an actual promotion concern[251], but almost exclusively the protection one, and their effectiveness in promoting investments has not been confirmed, after all these years, by any available data[252].

Developing and developed countries alike have started to think of reforming the international investment agreements regime and to promote changes in their investment treaty models, including clauses aimed at clarifying and delimiting states' obligations toward investors and limiting the possibilities of initiating arbitration.[253]

Different countries have adopted various strategies. Bolivia and Ecuador have terminated many of their BITs. India is currently renegotiating or withdrawing from its BITs. Australia has moved away from investor–state arbitration in its agreements. South Africa has turned to domestic mediation for the settlement of investor–state disputes. The United States has made some changes to its model BIT. In the European Union, the opposition of the European Parliament and civil society to the classic investor–state arbitration mechanism led the European Commission to propose the creation of a reformed system with a standing first-instance tribunal and an appellate mechanism.[254] The next section will thus discuss how the issues have been addressed in Brazil under the Cooperation and Facilitation Investment Agreement (CFIA).

4.2 COOPERATION AND FACILITATION INVESTMENT AGREEMENT (CFIA)

Brazil has only recently joined the collection of states that have adopted international investment agreements (IIAs), but in doing so it developed a noteworthy approach in the form of the

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[250] Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices

[251] Only 19 per cent of 500 BITs analyzed by UNCTAD included investment promotion provisions. UNCTAD. (2008). Investment promotion provisions in international investment agreements. Retrieved from http://unctad.org/en/docs/iteiit20077_en.pdf.

[252] Salacuse, J. W., &. Sullivan, N. P. (2005). Do BITs really work? An evaluation of bilateral investment treaties and their grand bargain. Harvard International Law Journal, 46(1), 67–130.

[253] UNCTAD Series on International Investment Agreement II (2010)

[254] The Right to Regulate in Africa's International Investment Law Regime (2019)

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Cooperation and Facilitation Investment Agreement (CFIA)[255]. Article 1 (1) Objective of Brazil investment policy states that "The objective of Cooperation and Facilitation Investment Agreement (CFIA) is to promote cooperation between the Parties in order to facilitate and encourage mutual investment, through the establishment of an institutional framework for the management of an agenda for further investment cooperation and facilitation, as well as through mechanisms for risk mitigation and prevention of disputes, among other instruments mutually agreed on by the Parties".

From the foregoing, analysis will be centered on the fundamental qualities and benefits of the Treaty- model. In this case, the following will be discussed sequentially. Firstly, the CFIA unique qualities as compared to traditional bilateral investment treaties (BITs), which include the state-to-state management of investment relations: investment facilitation rather than investment *protection*. Secondly, the CFIA exhibits a degree of interoperability that has enhanced signing of agreements by Brazilian partners while simultaneously holding BIT portfolios, despite significant differences between the two approaches. Finally, one of the CFIA's key features—that of investment facilitation—is a promising basis for reform in multilateral settings such as the World Trade Organization (WTO). In short, it is believed that the CFIA offers an innovative and attractive option for states intending to supplement or revise traditional BITs, both bilaterally and multilaterally.

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4.2.1 Unique investment facilitation

The Brazilian investment agreement breaks the BIT mold in several ways: First, it shifts the focus from investment protection *to its* facilitation. Second, it embeds investment guarantees within a broader regulatory context that takes other public policy objectives into account. Third, because the model agreement has emerged in—yet differs from—a world where the BIT format prevails, it is designed to maintain its own normative independence from staple BIT provisions. And finally, the model agreement operates as a classic piece of public international law in that it treats investment relations as horizontal interactions between the treaty parties. These elements are thus briefly examined in turn.

[255] Salacuse, J. W., &. Sullivan, N. P. (2005). Do BITs really work? An evaluation of bilateral investment treaties and their grand bargain. Harvard International Law Journal, 46(1), 67–130.

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First, the Brazilian approach changes the conversation, by placing investment facilitation at its center. The idea is simply to make it easier for foreign investors to navigate domestic legal and regulatory hurdles. Two provisions illustrate how this works: (1) the model agreement promotes the establishment of *national focal points* (ombudspersons) whose mandate is to support and facilitate investors' interactions with local authorities, including by suggesting amendments to national legislation. Focal points also play a role in the early management of complaints that might emerge, as they are mandated to, among other tasks, assess "suggestions and complaints received from the other treaty Party or investors of the other Party and recommend, as appropriate, actions to improve the investment environment[256]. Each CFIA signed so far sets out investment facilitation and cooperation *agendas* in areas where further work may improve the investment environment, such as visa processing for business people[257]. The agendas vary depending on each investment relationship, enabling customization for each agreement.

These provisions differ from BIT provisions on investment protection. The traditional BIT approach has been to confer rights—such as the right to fair and equitable treatment—that ultimately enable investors to seek redress against the host state in cases of alleged breach. In contrast, the CFIA's investment facilitation provisions are fundamentally about streamlining the domestic regulatory context in which investors must operate.[258] The BITs were conceived as a means of compensating for institutional shortcomings in the protection of investments in host states, while the Brazilian model focuses precisely on rectifying those shortcomings.[259]

An historical explanation lies behind the Brazilian option. Brazil is the only Group of Twenty (G20) member never to have ratified a traditional BIT. This unique position resulted from a virtually unprecedented event in the history of international investment: just as most developing countries were flocking to sign BITs, the Brazilian government, faced with vocal and effective opposition in Congress, terminated its ratification processes for the fourteen BITs it had signed in the 1990s[260]. The Brazilian lawmakers' criticisms of the BITs in the early 2000s largely resemble

[256] Id., art. 18.4 (c).
[257] See, e.g., Investment Cooperation and Facilitation Agreement Between the Federative Republic of Brazil and the Republic of Malawi ann. I(b), June 25, 2015.
[258] Brazilian Ministry of Foreign Relations. (2015).
[259] Brazilian Ministry of Foreign Relations. (2015).
[260] Daniela Campello & Leany Barreiro Lemos, The Non-Ratification of Bilateral Investment Treaties in Brazil: A Story of Conflict in a Land of Cooperation, 22 Rev. Int'l Pol. Econ. 1055 (2015).

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the debates taking place elsewhere today: the provisions on investor-state dispute settlement (ISDS) were considered discriminatory against national investors, rules on indirect expropriation were seen as a possible hindrance to the adoption of public policies, and little or no causal link was identified between adopting BITs and attracting foreign direct investment[261].

Even without any BIT in force, Brazil did not become a pariah destination for foreign investment. Quite the contrary: Brazil has consistently ranked among the top destinations globally.[262] Thus, unlike many countries, Brazil has been less concerned about attracting new investment than increasing the outward flow of investments *from* Brazil. The CFIA was designed in large part for this purpose.[263] The new template emerged from close consultation between the Brazilian government and the private sector, which sought support in setting up shop in third countries. In other words, the CFIA resulted in part from an urgent call for investment facilitation on the part of Brazilian investors.[264]

Second, the CFIA innovates by situating foreign investment within a broader regulatory context. The agreement acknowledges the state's right to regulate in areas such as health, labor, and the environment[265] and helps to combat corruption, money laundering, and terrorism financing relating to investments by, for instance, exempting signatories from protecting "investments made with capital or assets of illicit origin[266]." Regarding investors, the CFIAs include provisions on corporate social responsibility[267]. Unlike traditional BITs, which often evade the question of

[261] Martino Maggetti & Henrique Choer Moraes, The Policy-Making of Investment Treaties in Brazil: Policy Learning in the Context of Late Adoption, in Learning in Public Policy: Analysis, Modes and Outcomes 295 (Claire Dunlop et al. eds., 2018).

[262] In 2017, Brazil was the fourth-ranked destination for foreign direct investment in the world. See UN Conference on Trade & Dev., World Investment Report 2018 – Investment and New Industrial Policies.

[263] Michelle Ratton Sanchez Badin & Fabio Morosini, Navigating Between Resistance and Conformity with the International Investment Regime: The Brazilian Agreements on Cooperation and Facilitation of Investments (ACFIs), in Reconceptualizing International Investment Law from the Global South 218, 248 (Fabio Morosini & Michelle Ratton Sanchez Badin eds., 2017).

[264] Brazilian Ministry of Foreign Relations. (2015).

[265] Brazilian Model, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4786/download , art. 16. (Accessed 24 October 2021)

[266] Id., art. 15.NO

[267] Id., art. 14.NO

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investor obligations[268], recent CFIAs also subject investors to obligations that cover compliance with the domestic law of the host state[269].

Third, the CFIA avoids language that might jeopardize its normative independence from traditional BITs. It omits basic BIT standards of investment protection, such as fair and equitable treatment, indirect expropriation, and full protection and security. In fact, the Brazilian agreements explicitly exclude these provisions[270], recognizing that their use might encourage arbitrators to transplant BIT norms into the CFIA context.

Finally, the Brazilian model differs from BITs in that it is firmly embedded within public international law. Although commentators recognize that investment rules have recently moved closer to the public (international) law end of the spectrum[271], most investment agreements are unlikely ever to fall neatly into a single classification, given their hybrid character. Yet this longstanding definitional challenge does not apply to the Brazilian model. Its purpose is ultimately to facilitate foreign investment by private parties, but the CFIA approaches investment relations as state-to-state interactions.

This point emerges most clearly in the CFIA's provisions on investment disputes, which do not incorporate ISDS mechanisms. Rather than accord investors' *locus standi* before arbitrators, the agreement provides a forum for dispute prevention in the form of "Joint Committees," where investors and other stakeholders have an opportunity to voice concerns and resolve issues arising from a given investment[272]. For those cases where friction continues to escalate, the CFIA provides only for interstate arbitration.

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[268] Jonathan Bonnitcha et al., The Political Economy of the Investment Treaty Regime 14 (2017).
[269] MERCOSUR Protocol on Cooperation and Facilitation of Investments art. 13, Apr. 4, 2017. Pursuant to Article 23(3)(c), occasional breaches by the investor may be raised in a report prepared in the process of dispute prevention.
[270] See, e.g., id., art. 4(3).
[271] See, e.g., Gus Van Harten, Investment Treaty Arbitration and Public Law 4 (2007); Reassertion of Control Over the Investment Treaty Regime (Andreas Kulick ed., 2017); Anthea Roberts, Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System, 107 AJIL 45, 58 (2013).
[272] Brazilian Model, art. 17.

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The Joint Committee[273]

1. For the purposes of this Agreement, the Parties shall establish a Committee hereinafter "Joint Committee".

2. The Joint Committee shall be composed of government representatives of both parties appointed by the respective governments.

3. The Joint Committee shall meet at such times and places that the parties agree, with alternating presidencies between the Parties shall be held at least one meeting a year.

4. The Joint Committee shall have the following duties and responsibilities:

i. Monitor and discuss the implementation and operation of this Agreement;

ii. Discuss and share opportunities for expansion of mutual investment;

iii. Coordinate the implementation of cooperative and mutually agreed facilitation agendas;

iv. Request and welcome the participation of the private sector and civil society, where appropriate, on specific issues related to the work of the Joint Committee;

v. Seek consensus and resolve amicably any issues or conflicts on the investments of the Parties; and

vi. Set or develop a standard mechanism for the settlement of disputes by arbitration between states.

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5. The Parties may establish working groups ad hoc, which will meet jointly or separately from the Joint Committee.

6. The private sector could be invited to join the ad hoc working groups, when so permitted by the Joint Committee.

7. Representatives of non-governmental organizations may be invited by the Joint Committee to present studies related to issues of interest to the Parties.

8. The Joint Committee will draw up its own regulations which concern the procedures for its operation.

Some might argue that placing the authority to proceed to third-party dispute settlement in the hands of states will politicize cases in a way that disserves the purposes of international investment

[273] Article 4. Agreement for Cooperation and Investment Facilitation between the Government of the Federal Republic of Brazil and the Government of the Republic of Angola

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law.[274] Yet there is reason to question this view. For one, the accumulated experience of investment arbitration offers strong evidence that traditional BITs are themselves politicized, both conceptually and in practice[275]. Moreover, the relevant features of the CFIA are not so radically dissimilar from those of the WTO, where disputes are subject to (diplomatic) consultations followed by state-to-state dispute settlement. One does not often hear that the absence of *locus standi* for affected private parties has politicized the WTO system[276].

Some might also criticize the CFIA for undermining the uniformity of international investment law. At present, there are nearly three thousand BITs,[277] and these "establish rather uniform general principles that order the relations between foreign investors and host States in a relatively uniform manner.[278]" But it is not clear that this uniformity is necessary or even desirable. Indeed, the claim in favor of the existence of a single investment "regime" seems valid only to the extent that states continue to sign agreements incorporating similar commitments. The fact that one particular template—the BIT—has gained global acceptance is perhaps best explained by path dependence,[279] rather than by merit or tacit recognition of overriding principles against innovation. The CFIA shows that investment law permits such innovation, unhampered by structural—or "constitutional"—restraints.

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4.2.2 Interoperability and the Diffusion of the Brazilian Model of Investment Agreement

Although the design of the CFIA owes a great deal to the particular Brazilian experience with the international investment regime, the agreement is attractive because it displays a degree of interoperability with a varied range of investment policy options. This versatility is chiefly due to the CFIA's investment facilitation rules, which stand apart from the topics that are typically controversial in the context of investment regime reform. For example, investment facilitation

[274] Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices
[275] For a recent account with evidence-based arguments supporting this claim, see Geoffrey Gertz et al., Legalization, Diplomacy, and Development: Do Investment Treaties De-politicize Investment Disputes? 107 World Dev. 239 (2018); Joachim Pohl, Societal Benefits and Costs of International Investment Agreements: A Critical Review of Aspects and Available Empirical Evidence 50–54 (OECD Working Papers on Int'l Inv. 2018).
[276] Similarity to the WTO system is also apparent in the purpose of dispute settlement under the CFIAs, which is to bring those measures deemed inconsistent with the agreement into conformity with it.
[277] The most recent number as of August 2018 is 2,952 BITs signed. See UNCTAD Investment Policy Hub.
[278] Stephan W. Schill, The Multilateralization of International Investment Law 16 (2009).
[279] Wolfgang Alschner, The Impact of Investment Arbitration on Investment Treaty Design: Myth Versus Reality, 42 Yale J. Int'l L. 1, 51 (2017).

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measures do not conflict with the options advocated by states with respect to investment dispute settlement mechanisms, standards of protection, or the right to regulate, among other issues[280]. In committing to adopt investment facilitation measures, such as domestic legislation that is more friendly to foreign investment, a signatory state does not diminish the rights it agreed to accord investors from a third state under a BIT. The two approaches to investment rule-making are certainly different, but they can coexist within the portfolio of any given state.[281]

This interoperability seems to have contributed to the growing use of the CFIA. The first agreement, with Angola, entered into force in October 2017. Brazil has signed nine additional CFIAs, on the bilateral and regional levels, with the following eleven states (in chronological order): Mozambique, Malawi, Chile, Colombia, Mexico, Peru, Brazil's partners in MERCOSUR (Argentina, Paraguay, and Uruguay), Ethiopia, and Suriname.[282] Rather than suggesting "rule maker–rule taker" dynamics, this development seems to indicate that the CFIA's approach to investment lawmaking has intrinsic appeal. For one, some of the states have signed a CFIA even while maintaining BIT portfolios—a testament to interoperability. In addition, Argentina, Paraguay, and Uruguay have agreed to manage investment relations in accordance with the CFIA blueprint not only in their bilateral relations with Brazil, but also amongst themselves under the MERCOSUR Protocol on Investment Cooperation and Facilitation.[283]

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From this perspective, the emergence of the CFIA offers insights into the evolution of IIA reform. The recent developments demonstrate that investment rules can cover a broader array of areas than is typical under BITs. States looking for options to reform their investment treaties might focus on provisions so far not incorporated into BITs, such as those on investment facilitation, and thus contribute to the increasing pluralism of international investment rules. The Brazilian experience with the CFIA also shows that states can sign up to innovative rules without necessarily detracting

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[280] Anthea Roberts, Investment Treaties: The Reform Matrix, 112 AJIL Unbound 191 (2018).

[281] Transnational Institute and Corporate Europe Observatory (2014), Profiting from Crisis: How corporations and lawyers are scavenging profits from Europe's crisis countries, Chapter 3. (Available at http://corporateeurope.org/sites/default/files/ profiting-from-crisis_0.pdf).

[282] Martino Maggetti & Henrique Choer Moraes, The Policy-Making of Investment Treaties in Brazil: Policy Learning in the Context of Late Adoption, in Learning in Public Policy: Analysis, Modes and Outcomes 295 (Claire Dunlop et al. eds., 2018).

[283] Facundo Pérez Aznar & Henrique Choer Moraes, The MERCOSUR Protocol on Investment Cooperation and Facilitation: Regionalizing an Innovative Approach to Investment Agreements, EJIL: TALK! (Sept. 12, 2017).

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from their commitments under BITs. And it suggests that state portfolios of investment agreements might become more diversified over time, including BITs with some states and other types of investment agreements with partners that are willing to explore alternatives.[284]

4.2.3 Investment Facilitation: A Promising Option for Multilateral Reform

Finally, the CFIA is noteworthy because its innovations could serve as the basis for multilateral reforms in the future. During the 2017 WTO Buenos Aires Ministerial Conference, seventy members endorsed a Joint Ministerial Statement on Investment Facilitation for Development[285]. In doing so, these states called for the WTO to "identify and develop the elements of a framework for facilitating foreign direct investments that would: improve the transparency and predictability of investment measures; streamline and speed up administrative procedures and requirements; and enhance relations with relevant stakeholders, including dispute prevention[286]. The Joint Statement is the culmination of an active and broad debate that draws on technical work promoted particularly by the UN Conference on Trade and Development[287] and the G20[288], but it hints at areas of considerable disagreement elsewhere. For example, the Joint Statement made clear that WTO "discussions shall not address market access, investment protection, and Investor-State Dispute Settlement[289]. In contrast, the UN Commission on International Trade Law has encountered formidable difficulties in advancing discussions on ISDS reform[290].

To stimulate further discussion, Brazil in January 2018 submitted a proposal that injects certain elements emerging from its treaty-making experience with the CFIAs into the proceedings, such

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[284] Transnational Institute and Corporate Europe Observatory (2014), Profiting from Crisis: How corporations and lawyers are scavenging profits from Europe's crisis countries, Chapter 3. (Available at http://corporateeurope.org/sites/default/files/ profiting-from-crisis_0.pdf).

[285] World Trade Org., Joint Ministerial Statement on Investment Facilitation for Development, WTO Doc. WT/MIN(17)/59 (Dec. 13, 2017).

[286] Id. at para. 4.

[287] UN Conference on Trade & Dev., UNCTAD Global Action Menu for Investment Facilitation, UN Doc. TD/B/63/CRP.2 (Sept. 16, 2016).

[288] G20 Guiding Principles for Global Investment Policymaking, G20 Trade Ministers Meeting Statement, Shanghai, ann. III (July 9–10, 2016).

[289] World Trade Org., Structured Discussions on Investment Facilitation, Communication from Brazil, WTO Doc. JOB/GC/169 (Feb. 1, 2018)..

[290] Anthea Roberts, UNCITRAL and ISDS Reform: Not Business as Usual, EJIL: TALK! (Dec. 11, 2017).

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as the concept of national focal points[291]. Although debates on one issue do not preclude or undermine deliberations on the other, it appears so far that investment facilitation is less divisive than the topic of ISDS reform. Indeed, preliminary reactions from other states have been positive, despite the novelty of the approach. The dual role of the national focal point—assisting investors and acting as ombudspersons of the national regulatory environment—has attracted significant interest, and the provision on corporate social responsibility has also been welcome in the discussions.[292]

4.3 RECENT DEVELOPMENTS IN BRAZIL

In 2013, Brazil's trade policy institutions: Chamber for Foreign Trade (CAMEX) issued a mandate for the negotiation of agreements with African countries, based on the guidelines of the newly developed CFIA model. This mandate was expanded in 2015, right after the conclusion of the first agreements with Angola, Malawi and Mozambique, to include all countries interested in negotiating agreements under the CFIA model with Brazil.[293]

Brazil has also signed CFIAs with Chile, Colombia, Mexico and Peru, and has concluded negotiations with India and Jordan. Negotiations based on a 2015 proposal by Brazil have recently been concluded by the MERCOSUR Working Subgroup on Investments (SGT 12), with the signing of the Cooperation and Facilitation Investment Protocol to the Treaty of Asunción on April 7, 2017.[294]

The CFIAs with Mexico and Peru have just been approved by the Brazilian Senate, becoming the first investment agreements to obtain congressional approval in Brazil. The other CFIAs signed by Brazil are still undergoing the approval process. The Ombudsman for Direct Investment and a National Committee on Investment were established in September 2016 within the structure of CAMEX, including regulations for both institutional frameworks.[295]

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[291] World Trade Org., Structured Discussions on Investment Facilitation, Communication from Brazil, WTO Doc. JOB/GC/169 (Feb. 1, 2018).
[292] Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices (2016)
[293] Brazilian Model, supra note 1, art. 17.
[294] Brazilian Model, supra note 1, art. 17.
[295] Federative Republic of Brazil. (2016). Decree No. 8863/2016. Retrieved from http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2016/decreto/D8863.htm.

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Even if the name or the structure of the agreements may vary slightly, their main features are the same and based on the CFIA model. The small changes indicate adjustments to the specific needs of each partner and the possibility to continually improve the model without losing its essence.[296] This is evident from Brazil-Peru, Brazil-Chile CFIAs just t mention a few.

The investment cooperation and facilitation frameworks of the CFIAs (including the Ombudsmen, the Joint Committees and the flexible Agendas for Further Investment Cooperation and Facilitation) have drawn the attention of relevant international organizations. Almost all the action lines included in UNCTAD's Global Action Menu for Investment Facilitation[297] are also present in the Brazilian model. Furthermore, the IISD-led draft South–South Principles on International Investment for Sustainable Development[298] —still undergoing a drafting process with states—and the OECD Secretariat paper on investment facilitation are in line with many of the ideas included in the Brazilian model. The CFIA model was also echoed in G20 debates on the need to foster investments, which gained force with the Seoul Summit (2010), the creation of the Trade and Investment Working Group (TIWG) and the approval of the G20 Guiding Principles for Global Investment Policymaking.[299]

4.4 Fallacy of the BIT: Evidence from the Literature

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Evidence suggests that BITs play a very minor role in attracting foreign direct investment (FDI) in a country[300].[14] A case in point is Brazil which is the eighth largest economy in the world yet has no BIT in force. Instead, Brazil's adoption of the Cooperation and Facilitation Investment Agreement (CFIA) which is based on three pillars protects investors and ensures quality investment. This sets itself

[296] Brazilian Model, supra note 1, art. 17.

[297] UNCTAD. (2016, May 31). UNCTAD's global action menu for investment facilitation. Retrieved from http://investmentpolicyhub.unctad.org/Upload/Documents/UNCTAD_Investment%20Facilitation%20Action%20Menu_3_1.pdf.

[298] International Institute for Sustainable Development (IISD). (2016). High-level roundtable discussion on the development of South–South principles on international investment for sustainable development, Nairobi, Kenya, July 18, 2016: Meeting report. Retrieved from https://www.iisd.org/sites/default/files/meterial/South-South-Principles-on-International-Investment-Nairobi-July-2016.pdf.

[299] G20. (2016). Trade ministers meeting statement, 9–10 July 2016, Shanghai, Annex III. Retrieved from https://www.wto.org/english/news_e/news16_e/dgra_09jul16_e.pdf .

[300] Lisa E. Sachs and Karl P. Sauvant "BITS, DTTs and FDI flows: An overview" in The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows, Karl Sauvant and Lisa Sachs (eds.), (Oxford: Oxford University Press, 2009).

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apart from conventional BITs by preserving the developmental strategies of the host state while still meeting the various needs of investors[301].

Since 2010, South Africa has slowly phased out its BITs through unilateral termination and non-renewal. These BITs were signed post-apartheid as a way of attracting FDI into the country. The South African backlash against ISDS is mostly in reaction to the 2007 *Foresti* case[302]. In this case, some investors from Italy and Luxembourg filed a claim against South Africa alleging indirect expropriation and a breach of Fair and Equitable treatment standards. In 2002, as part of its Black Economic Empowerment (BEE) policy, South Africa had passed the Minerals and Petroleum Resources Development Act (MPRDA). This Act required black equity ownership in mining companies. The investors contended that this constituted an expropriation of their mineral rights. Although the matter was eventually settled out of court, the South African government concluded in its review of BITs that it posed risks and limitations on the ability of the government to pursue its constitutional-based transformation agenda. Nonetheless, the South African economy continues to get a steady inflow of Foreign Direct Investment[303].

As earlier mentioned, ISDS provisions are one of the main components of BITs. The ISDS landscape is however shifting gradually[304]. There has been a questioning of the rightfulness of the conventional ISDS model. In November 2017, the Working Group III of the United Nations Commission on International Trade Law (UNCITRAL) held a week-long meeting to discuss ISDS reform. This became necessary due to the emerging divergent attitude of countries towards ISDS. There are some countries such as the USA and Japan who agree that reform is necessary but believe that it should be gradual and incremental.[305] The change effected by Nigeria in the Morocco-Nigeria BIT is perhaps an example of this. It was not a completely radical departure from the

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[301] The Cooperation and Facilitation Investment Agreement available at http://www.mdic.gov.br/arquivos/CFIA-Presentation-EN.pdf, accessed 11th October 2018.
[302] Piero Foresti, Laura de Carli & others v. Republic of South Africa (ICSID case No. ARB/(AF)/07/1).
[303] South Africa Economic Update April 2018 available at http://pubdocs.worldbank.org/en/798731523331698204/South-Africa-Economic-Update-April-2018.pdf (accessed 11th October 2018).
[304] Anthea Roberts, "Incremental, System and Paradigmatic Reform of Investor-State Arbitration" (2018) 112 American Journal of International law.
[305] Yao Graham, BITs a Challenge to Regional Integration in Africa, 290/291 THIRD WORLD RESURGENCE 5, 5–7 (2014), http://www.twn.my/title2/resurgence/2014/290-291/econ1.htm. (accessed 11th October 2021)

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traditional BIT model but it effected changes in its ISDS provisions to make it more balanced by restricting access to investor-state arbitration.[306]

There are countries which advocate for reform of the current system through the development of alternative models. The European Union has been a supporter of the establishment of an International Investment Court. The Comprehensive, Economic and Trade Agreement (CETA) signed between the EU and Canada which has been provisionally in force since September 21 2017 contains the establishment of an investor-state dispute court. However, before the ratification of CETA by the European Parliament, Belgium made a request to the ECJ to rule on the legality of this Multilateral Investment Court. This ruling is still pending.[307]

Brazil continues to sign its Cooperation and Facilitation Investment Agreement (CFIA) with other countries. The CFIA consists of no Investor-State arbitration but instead it provides for mediation by a joint committee appointed by the parties. If mediation and settlement by the joint committee fails, then state to state arbitration will be permitted.[308]

4.5 COMPARATIVE ANALYSIS BETWEEN NIGERIA AND BRAZIL INVESTMENT AGREEMENTS

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The subsection examines the difference and similarities between Nigeria and Brazil BITs.

4.5.1 Differences between Nigeria and Brazil Investment Agreements

Nigeria's BIT provisions are broadly divided into the *substantive protections* and *procedural rights* provisions. The substantive provisions include clauses such as Fair and Equitable Treatment (FET), Expropriation, Protection and Security, Most Favoured Nation (MFN) and the Umbrella Clause. The procedural rights include the cooling off period, access to local courts and arbitration. However, the BITs established strong protection clauses for foreign investors and allowing them

[306] 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.

[307] Pedro Martini, "Brazil's New Investment Treaties: Outside Looking…Out?" available at < http://arbitrationblog.kluwerarbitration.com/2015/06/16/brazils-new-investment-treaties-outside-looking-out-2/> , (accessed 11th October 2021).

[308] Brazilian Model, supra note 1, art. 17.

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to initiate international arbitration against the host state without prior recourse to the local judiciary, has had negative effects on host countries.[309]

Among several other criticisms, their provisions were excessively burdensome for capital-importing states, particularly when the specific needs of developing countries are considered. Many clauses have been interpreted in a way that limits or prevents states' right to regulate, restricting the implementation of legitimate public policies.[310]

Unlike Brazil, the several problems perceived in traditional BITs and the growing number of investor–state arbitration cases raised the debate of investment agreements again in Brazil. This consisted in an opportunity to develop an innovative model that did not focus only on protection of investors and investments, but which aimed at promoting and facilitating productive investment of high quality.[311]

4.5.2 Similarities between Nigeria and Brazil BITs

Study has showed that the current Nigeria-Morocco BITs agreement is a unique one, in the fact that, the treaty is a move toward a new generation of BITs fully aligned with the evolution of international law.[312] Indeed, it contains several largely innovative provisions susceptible to address the criticism raised in the last few years against investment treaties. This new agreement is similar to that of the Brazil CFIA model that came into existence as a result of problems perceived in the traditional model of agreements.[313]

However, the following are the areas of their similarities: investments must contribute to sustainable development of the host state and the local community, institutional provisions, regulatory measures and risk mitigation, dispute prevention and settlement etc.

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[309] The Right to Regulate in Africa's International Investment Law Regime (2019)

[310] Chidede T *Entrenching the Right to Regulate in the International Investment Legal Framework: The African Experience* (unpublished LLD thesis, University of the Western Cape, 2019) 1

[311] United Nations Conference on Trade and Development (UNCTAD) World Investment Report 2017

[312] Ejims O 'The 2016 Morocco–Nigeria Bilateral Investment Treaty: More Practical Reality in Providing a Balanced Investment Treaty?' (2019) 0 ICSID Review 23

[313] Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria signed at Abuja on 3rd December 2016.

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4.6 CONCLUSION

In conclusion, Brazil's experience with investment agreements stands in sharp contrast to that of other countries. At a time when most states were promoting them, Brazil declined to do so. For this reason, the government's recent promotion of cooperation and facilitation investment agreements (CFIAs) is of some interest. This chapter of the study has taken a compressive look the context in which CFIAs in Brazil have emerged; considers their main features and reflects on their advantages and disadvantages relative to traditional Bilateral Investment Treaties.

Notwithstanding the lack of BIT protections on offer to foreign investors, Brazil has seen no shortage of foreign direct investment (FDI). Indeed, Brazil ranks as one of the top economies in the world for FDI; in 2016 alone, it attracted almost US $60 billion's worth.[314] All without having signed one single BIT. One can compare Brazil's position with that of Ecuador's – which terminated all its BITs in 2017.

Brazil's record of attracting FDI despite the absence of any BIT protections would seem to suggest that the existence of BITs does not have a direct impact on inbound FDI. Historically, that may have been the case. However, FDI into Brazil has decreased dramatically of late. In 2016, there was a reduction of almost 9%. This, of course, is unsurprising given the country's recent political instability and economic uncertainty, which may suggest that the historic willingness to invest was driven by the promise of huge returns from one of the BRIC economies (Brazil, Russia, India *and* China) and despite the non-existence of BITs.[315] It is believed the framers of Morocco-Nigeria BITs would be cognizance of the fact that a formal BITs is not a sufficient condition for influx of FDI and other benefits.

Finally, in the fifth chapter, inferences will be drawn from the previous chapters and propose recommendations based on the goals of Nigeria's existing policy regime, recent global events such as COVID 19, and CFIA findings.

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[314] United Nations Conference on Trade and Development (UNCTAD) World Investment Report 2017,
[315] http://arbitrationblog.practicallaw.com/trends-in-investment-treaty-arbitration-a-perspective-on-brazil/

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CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.0 Introduction

This chapter draws conclusions from previous chapters and make recommendations bearing in mind the goals of the current policy regime in Nigeria, recent world occurrences e.g. COVID 19 as well as insights from the CFIA.

5.1 Summary

In this study, a broad examination of the bilateral investment treaties in Nigeria specifically between Morocco and Nigeria was conducted. Specifically speaking, the study investigated how the BIT fully reflects the current standards in the BIT framework. The thesis, in addition, observed the measure that will facilitate improvement between Morocco and Nigeria BIT without undermining the central objectives of BITs in protecting foreign investors. Analysis of the current state of FDI climate in Nigeria, the evolution of BITs in Nigeria so far and, analysis of the current BIT and FDI climate in Brazil to do a comparative analysis between the BIT climates in Nigeria and Brazil were evaluated.

The study identified two major purposes of BITs. Among which are the facilitation of the protection of foreign investors and their investments in a foreign country and, secondly, the aim to encourage FDI inflows. BITs as frameworks are the most important international legal tool currently used in the regulation of FDI and has emerged as the primary source of international investment law and primary tool for promoting and protecting global direct investment. And as a result, a massive increase in number of BITs have been witnessed globally, over the last few decades from the adoption of the first BIT between West Germany and Pakistan in 1959, the number of such treaties has grown exponentially to more than 3000 as of 2020.[316]

In general, at least three rationales have been adduced in the literature as the motives behind the drive for BITs among countries. In the first place, developing countries conclude BITs in order to attract FDI. The second motive is that the developed countries enter into BITs in order to create international legal rules and enforcement mechanisms that are effective in protecting their nationals investing in the territories of foreign states. Finally, there is the view that countries

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

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approach BITs with the dual purpose of protecting their outward FDI while attracting inflow of FDI from the contracting BIT partners.[317]

5.2 Conclusion

In particular, the thesis was able to establish that the Morocco-Nigeria BIT has made some advances in the BIT environment of Nigeria and Africa, with indication that there is need for improvement in the balance between interests of the host state and the foreign investors. Although, there still remain areas that need improvement not only on how to bring about more balance to the BIT regime but also to cater for unforeseen changes in global and local context. The experience of Nigeria in the accumulation of foreign direct investment has been unsatisfactory, thus, the accumulation of huge external debt in relation to gross domestic product and faced with serious debt servicing problems in terms of foreign exchange flow and also wallowing in abject poverty.[318]

In addition, in the recent times, a continuous decline in global FDI flows is the order of the day. This decline was attributed to large repatriations of accumulated foreign earnings by United States multinational enterprises (MNEs) in the first two quarters of 2018, following tax reforms introduced at the end of 2017, and insufficient compensation from upward trends in the second half of the year. Meanwhile, in the developing and transition economies, despite the global economic challenges, FDI flows remain relatively stable till around 2019. Throughout the period under review, FDI flows in Northern Africa was lagging behind that of Sub-Saharan Africa. While, Nigeria's share of FDI flows to Africa remains a subject of concern as the region's largest economy and the most populous nation on the continent. Comparatively, the volume of FDI flows in Nigeria is far higher than that of Morocco throughout the period under discussion except in years 2001 and 2003. Similarly, due to the impact of Covid-9, global foreign direct investment (FDI) collapsed in 2020, falling 42% from $1.5 trillion in 2019 to an estimated $859 billion, according to an UNCTAD investment Trends Monitor published on 24 January, 2021.[319]

Studies have asserted that the current Nigeria-Morocco BIT agreement is a unique one, in the fact that, the treaty is a move toward a new generation of BITs fully aligned with the evolution of

[317] Morocco–Nigeria BIT (2016) available at: http://investmentpolicyhub.unctad.org/IIA/treaty/3711 [Accessed 7 December
[318] Morocco–Nigeria BIT (2016) available at: http://investmentpolicyhub.unctad.org/IIA/treaty/3711 [Accessed 7 December
[319] UNCTAD, 2020

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international law. Indeed, it contains several largely innovative provisions susceptible to address the criticism raised in the last few years against investment treaties. This new agreement is similar in some instances to that of the Brazil CFIA model that came into existence as a result of problems perceived in the traditional model of agreements. I therefore, conclude that;

BITs like any other treaties, are simply instruments at the disposal of the contracting parties to legally protect their respective interests. What really matters is their content, which obviously depends on the agendas, choices and concessions of the parties. Morocco and Nigeria have shown confidence that such an instrument can offer investors solid protection without compromising on the host State's rights or on social values. This BIT contains several innovative provisions that recalibrate the legal protection of the interests of all stakeholders and can be expected to enhance the chances for economically, socially and environmentally sustainable investments.[320]

With regard to procedural matters, the provision on liability of investors before the tribunals of the home State is an important development. The provisions on the involvement of the Joint Committee in the peaceful settlement of disputes and on consolidation, on the contrary, present significant problems that the Parties may consider addressing through an exchange of letters, a protocol, or any other suitable means. The region's governments face a number of difficult challenges in fostering national champions and, beyond that, making the Africa Mining Vision a reality. While the vision itself is clear, the path is complex. It involves finding the right mix of policies to work with each state's unique set of circumstances and actors to ensure that mineral wealth translates more effectively into broad poverty reduction and sustainable development. An added complication is the suite of legal obligations embedded in the many international investment agreements to which the region's states are party. In some cases, these agreements restrict governments' ability to use tools that have been successfully used to achieve the types of goals sought here.[321]

Using the traditional model of BITs as a backdrop, Nigeria has certainly taken progressive steps in the Morocco-Nigeria BIT. As found in the study, there are still options that Nigeria may consider

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

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

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in future in order to ensure fair and balanced contractual obligations keeping in mind its developmental aspirations. While on the world stage, Nigeria's position on BITs and especially ISDS remains unclear, a more radical option may be to shun BITs altogether as some countries have done. However, a gradual but well-defined approach to BITs is just as agreeable.

The Morocco–Nigeria BIT, 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. 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 capital exporting extra-African states. Nonetheless, the Morocco–Nigeria BIT provides an important indication on the direction of intra-African investment policy.[322]

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5.3 Recommendations

This study examined how Nigeria has adopted recent developments in BIT frameworks, the Nigeria-Morocco BIT and then explore the areas for further improvements. It is therefore recommended that:

i. All forms of perceived or actual discrimination against national investors, rules on indirect expropriation that are possible hindrance to the adoption of public policies, should be adequately and urgently addressed appropriately.

[322] Ejims O 'The 2016 Morocco–Nigeria Bilateral Investment Treaty: More Practical Reality in Providing a Balanced Investment Treaty?' (2019) 0 *ICSID Review* 23

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ii. All forms of barriers identified with the BITs that make it somewhat difficult for foreign direct investment attractions must be addressed accordingly by the framers of the BITs.

iii. The state's right to regulate in areas such as health, labor, and the environment must be acknowledged and helps to combat corruption, money laundering, and terrorism financing relating to investments by, for instance, exempting signatories from protecting "investments made with capital or assets of illicit origin."

iv. The issue of corporate social responsibility that is often neglected by the traditional BITs need to be addressed in addition with the question of investor obligations.

v. There is every need to guard against language that jeopardize normative independence from traditional BITs. Basic BITS standards that omit standards of investment protection, such as fair and equitable treatment, indirect expropriation, and full protection and security.

vi. The Nigeria-Morocco BITs needs to be firmly embedded within public international law. Although commentators recognize that investment rules have recently moved closer to the public (international) law end of the spectrum, most investment agreements are unlikely ever to fall neatly into a single classification, given their hybrid character.

vii. All provisions that are excessively burdensome for capital-importing states, particularly when the specific needs of developing countries are considered should be reviewed and documented appropriately. Such as unfriend tax policy that discourages capital importation.

viii. In negotiating and framing investment frameworks, African governments and policymakers should consider issues like sustainable development, environment, public health and safety, human rights and labour standards.

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Thus, following the foregoing analysis, it is incumbent upon the Federal Government of Nigeria to hedge against the risks the ratification of Morocco-Nigeria BIT poses to national sovereignty, and should weigh up these risks against the advantages as there is no guarantee of the expected returns in terms of FDI. Specifically, there is need for adequate review of: (i) the protection that will be afforded by the BIT to Nigerians and the manner in which such protection is likely to affect regulatory powers in certain key areas; and (ii) the extent of any disparity between the international standards of protection provided for in the BIT and national laws on the protection of property rights needs to be reconciled.

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