# BIT between Morocco and Nigeria – A Bold Step in the Right Direction?

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**Introduction:**

In December 2016, Morocco and Nigeria signed the Reciprocal Investment Promotion and Protection Agreement ("Bilateral Investment Treaty" or "BIT") – an agreement between two countries for the provision of foreign investment to the nationals and companies from one country, in the other. This BIT contains some innovative provisions that attempt to strike a balance between the power of the host State to regulate its economy and the need to protect the rights of foreign investors in the host State. In particular, the BIT gives investors pre and post-investment obligations, unlike most BITs that simply represent obligations which host States must respect in guaranteeing the safe operations of foreign investment like provisions on fair and equitable treatment, full protection and security, expropriation, national treatment, and settlement of disputes. This note briefly analyzes some of the innovative provisions introduced in the BIT and considers their practical implications.

**Public interest provisions:**

The BIT started in its preamble by reaffirming the right of both States to regulate and introduce new measures relating to investments in their territories. Regarding environmental regulation, article 13 gives a host State the right to exercise

discretion with respect to regulatory, compliance, investigatory, and prosecutorial matters. Article 13(4) expressly confirms that a host State can, in a non-discriminatory manner, adopt, maintain, and enforce measures which it considers appropriate to ensure that investment activities are undertaken in a manner that is sensitive to environmental and social concerns. In addition, foreign investors are required to comply with environmental assessment screening and assessment processes that are applicable to their investments prior to their establishment. On labor and human rights, both States agreed in article 15 not to weaken, reduce, relax, or waive their domestic labor laws as well as international labor and human rights instruments in relation to domestic labor, public health and safety, or human rights to encourage foreign investment. In particular, article 18 requires foreign investors to maintain environmental management systems, uphold human rights in the host State, act in accordance with core labor standards, and not to operate their investments in a manner that circumvents international environmental, labor and human rights obligations to which the host State and/or home State are parties.

These provisions constitute a welcome development. They reflect the growing concern on the part of many States to bridge the gap between foreign investment and public interest issues. Indeed, the dilemma faced by arbitral tribunals (as reflected in the conflicting decisions between Santa Elena v. Costa Rica; Metaclad v. Mexico; Tecmed v. Mexico on one hand, and Methanex v. USA and Saluka v. Czech Republic on the other) on whether host States should strictly respect their international obligations towards foreign investors as evidenced in investment treaties or whether host States should strictly respect their international obligation of persevering public interest issues, particularly the environment, will be significantly minimized. Hence, the obligations will serve as a clear defense for a host State in the event of an investment dispute which is related to the exercise of its regulatory powers, subject to the relevant limitations. However, there is need not to misuse the right to regulate so as not to put off potential foreign investors with burdensome regulation.

Furthermore, both States agreed to prevent and combat corruption regarding foreign investment. By article 17, foreign investors have an obligation to desist from offering, promising or giving undue pecuniary or other advantage, or be complicit for gaining any favor regarding a proposed investment, license, and so on. Breach of these provisions will subject the foreign investor to prosecution in the

host State, according to its applicable laws and regulations. This is a remarkable provision since there is little doubt that corruption impairs development in host States. As host States are increasingly relying on this defense to evade liabilities that befall them as seen in World Duty Free v. Republic of Kenya and Metal-Tech Ltd. v. the Republic of Uzbekistan amongst others, this provision affords foreign 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 and a mere reaffirmation that issues of corruption are best dealt within the local courts of the host State since foreign investors are subject to prosecution in the host State.

In addition, article 6 contains the National Treatment and Most Favored Nation ("MFN") provisions. These clauses *prima facie* may undermine the express provisions of the BIT relating to public interest issues. For example, it is not clear from the provisions whether MFN treatment covers only substantive rules or extends to procedural protections such as dispute resolution. These debates have been raised in several cases, including Maffezini v. Spain, Impregilo SpA v. Argentina, and Salini v. Jordan. The beginning words of Article 6(5) are: "[t]he treatment granted under 1, 2, 3, 4 of this article shall not be construed as to preclude national security, public security or public order…", and the article does not provide that MFN treatment apply to the dispute resolution processes as well as other public interest provisions in the BIT.

**Administrative and dispute resolution provisions:**

Article 4 established a Joint Committee for the administration of the BIT and this committee will be composed of representatives of both States. The committee will seek to resolve any disputes concerning foreign investment. It is not clear from the BIT how the representatives of the committee will be chosen, duration of their tenure, and so on. In addition, since only the States can designate who the members of the committee will be, there is concern that the interests of the foreign investors may not be adequately represented. Interestingly, article 5 provides that the States can exchange information concerning investments through the committee. This will probably assist the investors of each State with their due diligence exercises before going into the host State since some of the information that can be exchanged include regulatory conditions for investment, public policies and legal landmarks that may affect investments, trade procedures and tax regimes, amongst others.

On arbitration, before initiating proceedings, the BIT provides for specific steps. First, a party (i.e., host or home State) may submit a specific question of interest of an investor to the committee. By article 26, if the dispute cannot be resolved within six months from the date of the written request for consultations and negotiations, the investor will resort to the local remedies or the domestic courts of the host State, and may afterwards, resort to international arbitration. It appears that this proposed mechanism for resolving disputes may take more time. A more serious concern is that the power to refer disputes to the committee rests solely on the States and this power is discretionary. Hence, being able to refer a dispute to the committee may depend on the relationship between the investor and its home State. The opportunity to resort to arbitration after exhausting local remedies in the domestic courts of host State still leaves the concerns about judicial sovereignty of the host State unresolved. This is because the process arguably grants the arbitral tribunal tremendous powers in deciding issues that have important judicial and regulatory implications of a host State, and arguably gives foreign investors an unfair advantage over domestic investors.

Another significant question that arises in the context of the BIT is the method of enforcing breach of these obligations against foreign investors. According to article 20, if foreign investors fail to adhere to these obligations, they will 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. However, this provision is ambiguous. It is not clear who can bring such an action against the investors in their host State and if (besides charges of corruption), other breaches of the obligations that rests on the shoulders of the investors can be initiated in the courts of the host State.

On the bright side, article 10 provides for a transparent dispute resolution process, which addresses the problem of publicity, especially in relation to proceedings that involve public interests. Both States agreed that their laws, regulations and administrative rulings regarding foreign investment will be published in the shortest possible time and be accessible, if possible, by electronic means. If the dispute gets to arbitration, the notice of arbitration, pleadings, briefs submitted to the tribunal, other written submissions, minutes of transcripts of hearings, orders, awards and decisions of the tribunal shall be available to the public. In addition, the arbitral tribunal shall conduct hearings publicly provided that any protected

information that is submitted to the tribunal shall be protected in accordance with the applicable law. This mechanism is an impressive development since the arbitral tribunals may assess the regulatory policies and actions of a host State, and the assessment may have significant economic and political consequences to the citizens of the host State. It will also minimize the uncertainty and lack of uniformity in the resolution of investment disputes.

**Conclusion and way forward:**

The BIT, although still unratified by both States, is a bold step towards striking a balance between the need to protect foreign investment and the power of a host State to regulate its economy. Whether the step was in the right direction is uncertain, especially since some provisions are ambiguous. The right answer will be revealed when the provisions of the BIT are put in practice. Be it as it may, there is an opportunity to amend the BIT at any time at the request of either State giving the other party six months' notice in writing, in accordance with article 30. Both States also agreed to meet every five years after the entry into force of the BIT to review its operation and effectiveness, and may adopt joint measures to improve the effectiveness of this Agreement, in accordance with article 33.