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A Peek Under the Hood: Unwrapping the 2019 Moroccan Model BIT

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The 2019 Moroccan Model BIT (the '2019 Model BIT') is a good example of the growing body of 'new generation' Model BITs fuelling the ISDS reform conversation. Broadly speaking, the drafters of these agreements (including the 2019 Dutch Model BIT, 2017 Colombian Model BIT, and 2016 Pan-African Investment Code) have attempted to rethink means of dispute resolution and traditional investment protection standards while adding detailed investor obligations and standards of conduct for investors. In this post we look at some of the key provisions of the 2019 Moroccan Model BIT in light of other 'new generation' investment agreements.

Fair and Equitable Treatment

Driven by the apprehension that fair and equitable treatment ('FET') clauses threaten the policymaking autonomy of host States, some States have removed the clause from their 'new-generation' model BITs (see for example, 2015 Brazilian Model BIT, the 2015 Indian Model BIT and the 2016 Pan-African Investment Code). The 2019 Moroccan Model BIT takes a different approach by enumerating measures that constitute an FET breach, including (1) denial of justice; (2) violations of due process; (3) manifestly unjustified discrimination; and (4) abusive treatment and coercion of the investor. While this is an attempt to bring greater certainty to FET interpretation, questions remain about how effective this is in practice, given that the terms in the exhaustive list are inevitably open textured. Other attempts at limiting the scope of FET include a provision specifying that a change in the legislative framework shall not *per se* amount to a breach of the FET obligation, while specifically excluding 'legitimate expectations' as an investor protection. This position perhaps overlooks the importance of regulatory stability for investors. A preferable approach would entail viewing both legitimate expectations of the investor and the State's right to regulate in the public interest as competing constituent factors of the FET obligation. Similar reasoning is found in *Saluka Investments v Czech Republic*, where the tribunal held that it was unreasonable for an investor to expect regulatory circumstances to remain entirely unchanged, and the right to regulate in public interest was a factor in assessing the reasonability of investor expectations (para. 305).

It is noteworthy that treaties signed by Morocco, subsequent to the 2019 Model BIT, do not contain this explicit omission, supporting the view that in practice recourse to legitimate expectations is significant for investors and difficult to omit. One such example is the Japan-Morocco BIT 2020,

which under ‘Article 4: General Treatment’ does not follow the 2019 Model BIT.

Non-discrimination Clauses

The 2019 Model BIT provides both a national treatment and an MFN treatment clause, circumscribed to investors in ‘like circumstances’. The Model BIT enumerates factors that determine ‘like circumstances’, including (1) the objective of the measure; (2) the environmental and social impact of the investment; (3) the economic sector of the investment; and (4) the investment’s public or private origin. By detailing the test, the Model BIT limits the scope for tribunals to interpret ‘like circumstances’ in disparate ways.

The national treatment obligation also permits the State to treat domestic investors differently from foreign investors in some cases. For example, when the national economic policy requires protecting new domestic industries during their infancy, differential treatment is permitted for such purposes.

To protect the regulatory autonomy of the host State, the Model BIT clarifies that substantive obligations contained in other international investment treaties and trade agreements do not constitute ‘treatment’ protected by MFN. Further, similar to the 2021 Canadian Foreign Investment Promotion and Protection Agreement Model, the Model BIT prohibits the importation of procedural provisions across treaties.

Expropriation

While the Model BIT protects investors from both direct and indirect expropriation, it appears to take two contrasting approaches to expropriation. Article 10.1 reflects a very narrow police powers approach under which a measure that is (1) in the public interest; (2) non-discriminatory; and (3) compliant with due process, does not amount to expropriation. This approach would hold only ‘illegal regulatory takings’ as expropriation. Article 10.1 further states that where a measure satisfies the above three conditions, the State is required to compensate the investor without undue delay by paying the fair market value of their investment. This provision applies equally to direct and indirect expropriations.

However, by contrast, Article 10.8 details a proportionality approach, which tests the effect of the measure on investors’ property rights, in cases of indirect expropriation. The relevant factors for this test include the value of the investment, the duration of the measure, whether the measure was contrary to the investors’ legitimate expectations, and whether the measure was disproportionate to the public interest it protected.

Including both approaches in the Model BIT suggests a lack of clarity. While the Model BIT clearly seeks to make room for legitimate public policy measures, its provisions may invite disparate approaches and conclusions by arbitral tribunals.

Investor Obligations

The 2019 Model BIT provides an entire chapter dealing with investor obligations, which include adherence to internationally recognised principles against money laundering, the requirement to contribute to the sustainable development of the host State, and compliance with non-binding international standards such as the International Labour Organization's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy and the OECD's Guidelines for Multinational Enterprises. This replicates the approach of several contemporary model BITs (such as, the 2019 Dutch Model BIT, the 2017 Colombian Model BIT, and the 2012 SADC Model BIT), which refer to various ILO instruments and the OECD Guidelines as voluntary standards for investors. In any event, this is an improvement on the approach of the 2015 Indian Model BIT which requires investors to voluntarily incorporate internationally recognized standards of corporate social responsibility, without referring to any specific instruments.

In relation to enforcing compliance with these international standards, Art. 20.5 of the Model BIT requires an arbitral tribunal to consider any breaches of investor obligations while determining the amount of compensation awarded to the investor. A very similar approach is taken by the 2019 Dutch Model BIT, which requires a tribunal to consider derogations from the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises while deciding the amount of compensation that investors are awarded.

While, in practice, arbitrators have given regard to human rights violations when determining compensation, even in the absence of specific treaty provisions (see e.g. *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Partial Dissenting Opinion of Professor Philippe Sands). Notwithstanding this, clear language to this effect ensures that tribunals are empowered to penalise non-compliant investors. However, the difficulty with this approach is that breaches of investor obligations can only be used as mitigating factors while awarding compensation when a claim is filed against the host State. An alternative formulation, found in Art. 17 of the 2012 SADC Model BIT, subjects investors to civil action in the host State for damage or significant loss of life. A more stringent mechanism is found in the denial of benefits clause of the 2017 Colombian Model BIT, which states that investors, who have been found to have committed serious human rights violations or environmental damage, shall be denied protection under the investment treaty.

Dispute Resolution Provisions

The Model BIT's dispute resolution provisions require a multi-tiered process of negotiation, mediation and exhaustion of local remedies before a treaty claim can be brought by an investor. Notably, Art. 31.3 precludes the commencement of arbitration proceedings where a competent court renders a judgement within 30 months. Further, the Model BIT is unusual in requiring both a notice of dispute as well as a detailed memorandum to be submitted at the commencement of arbitral proceedings (Art. 29).

The Model BIT's dispute resolution provisions also demonstrate several innovative proposals aligned with broader trends in the ISDS reform. A good example of this is the prohibition of double hatting under Art. 35.4. This is in line with other new-generation Model BITs including the Dutch Model BIT and Colombian Model BITs.

Surprisingly, in contrast to the 'pro-disclosure' direction ISDS-reform is taking regarding third-

party funding, the Model BIT makes no reference to third party funding and disclosure. Other Model BITs, such as the 2019 Dutch Model BIT (Article 19.8), the Argentina-Chile FTA, CETA (Art. 8.26) or institutional rules now expressly oblige the disputing parties to disclose if a third party is funding the arbitration on their behalf. Recent efforts at ICSID have also seen proposals to promote greater transparency in the third-party funding of investment disputes.

Conclusion

As a part of the ISDS reform narrative, several States have sought to modernise their Model BITs to balance investment protection with sovereign regulatory imperatives. As previously discussed on the blog, Africa has played a leading role in highlighting the importance of investors obligations in investment law. Morocco itself, in a 2016 BIT entered into with Nigeria, adopts various 'public interest provisions' which reaffirms the right of States to regulate and introduce new measures relating to investments. With its emphasis on sustainable development and investor obligations, the 2019 Model BIT builds on this trend. Notably, the 2019 Model BIT makes several attempts to provide precisely worded clauses to ensure uniform interpretation. However, it is unclear to what extent the 2019 Model BIT achieves these objectives. For example, as we note above, there are concerns regarding the limited FET clause, and the dichotomous approaches to indirect expropriation displayed by the expropriation clause. Ultimately, the true test will be the extent to which Morocco is able to retain these provisions in subsequent BITs – in which we have already seen mixed results. However, as a progressive instrument, which acknowledges the obligations of both investors and States towards sustainable development, the 2019 Moroccan Model BIT is a welcome addition to international investment law.

For interested readers, the authors discuss the 2019 Moroccan Model BIT further in this article.

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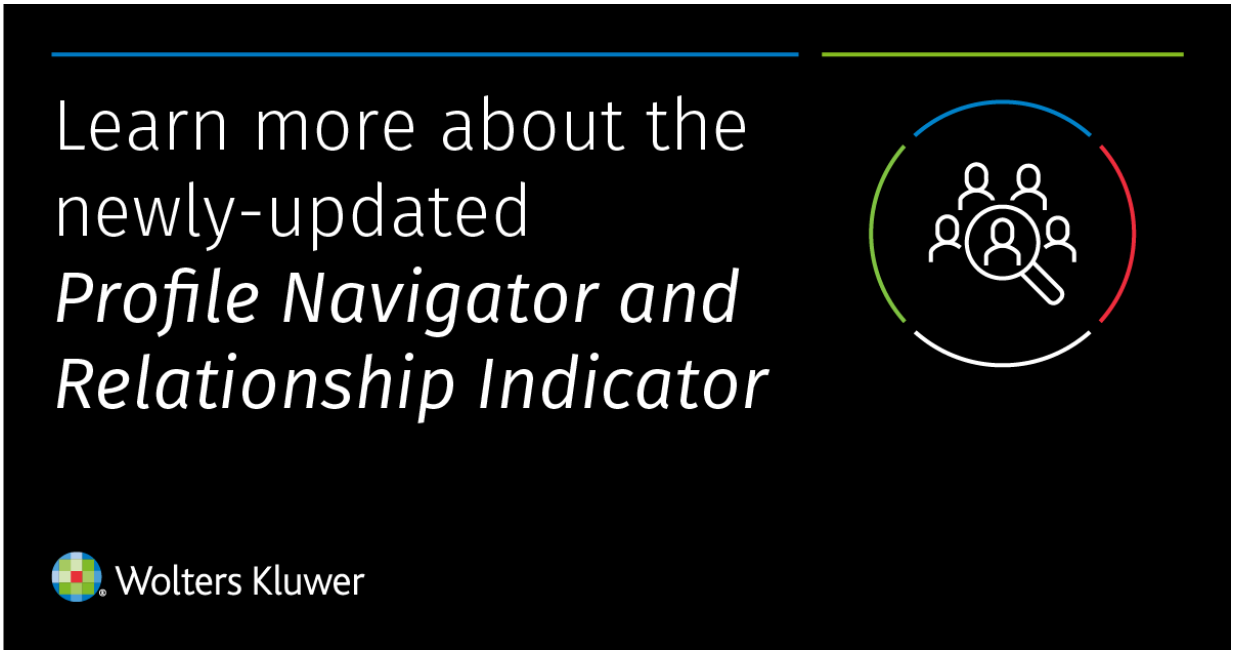

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