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The Morocco-Nigeria BIT: An Important contribution to Ensuring the Accountability of TNCs for Their Human Rights Violations?

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Abstract

Corporate accountability for human rights violations has been at the forefront of the business and human rights debate. This debate has focused on the establishment of binding human rights obligations on corporate entities, particularly following the Human rights Council's initiative to establish a treaty on business and human rights– a mandate given to the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. Joining this debate, this paper briefly comments on relevant provisions of the 2016 Morocco-Nigeria Bilateral Investment Treaty (BIT) which appears to contain innovative provisions that seek to ensure that investors (who are often corporate entities) are held accountable for their investment activities that adversely impact human rights within their host States. Although the Morocco-Nigeria BIT remains exceptional within the investment treaty framework, it reflects an initiative to ensure that the next generation of BITs encourages greater corporate accountability for their human rights violations.

Keywords: Morocco-Nigeria BIT, Business and Human rights, Investment treaties, Corporate accountability

Introduction

About 2850 Bilateral Investment treaties (BITs) have been concluded between States and transnational corporations (TNCs) (UNCTAD, 2022).

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These BITs commit State parties to afford certain standards of treatment to foreign investors. They grant foreign investors certain protections and benefits, including recourse to Investor-State Dispute Settlement (ISDS) through which investors can sue their host States for failing to protect investor profits (Columbia Center on Sustainable Development, 2021). Thus, BITs essentially grant investors the right to continued profits and place the obligation on host States to compensate for any losses. Nevertheless, States have no corresponding rights under the BITs. This asymmetrical approach has been criticized for failing to effectively regulate the conduct of foreign investors (Sheffer, 2011).

However, a new set of investment treaties appear to be making attempts at reversing this asymmetry by equally placing obligations on investors to act responsibly (Nyombi et al, 2018). However, on the 3rd of December 2016, Nigeria and the Kingdom of Morocco signed a BIT (The Morocco-Nigeria BIT) to promote, encourage, and increase investment opportunities that enhance bilateral trade relations and strengthen their business relationship (Morocco-Nigeria BIT, 2016). The Morocco-Nigeria BIT, which is currently awaiting ratification, appears to be a prime example of the new approach to updating traditional treaties to move towards a more balanced regime of intra-African investor protection. It contains progressive provisions which are supported by some elements of enforceability. However, commentaries on this revolutionary treaty focus on its incorporation of investor obligations in relation to the concept of sustainable development (Zhang, 2020). While this is a welcome development sustainable development has bearings in human rights, the treaty also places important obligations on investors in respect of investments or activities of the investors that impact the environment, human rights, and labor standards. It is well known that human rights violations often begin or end with activities that affect the environment and labor standards.

There are a plethora of examples of activities of corporate multinationals in the extractive and textile industries that have begun as environmental and labor rights and resulted in human rights violations. For example, the 2014 collapse of the Rana Plaza factory in Bangladeshi's capital and the resulting death of over 1,100 workers after factory managers compelled reluctant workers to enter the building despite major cracks in the complex's walls shows how poor labor conditions can impact human rights (Human Rights Watch, 2015). The land, air, and water pollution by Shell and its cohorts and their impact on the right to water and an adequate standard of living of the people in Nigeria's Niger Delta region are primary examples of the implications of poor environmental conditions on human rights (Inyang, 2021). It is against this background that this paper examines the Morocco-Nigeria BIT in light of its innovative provisions on the human rights

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obligations of investors, which are often transnational corporations. The paper highlights the lessons that can be learned in regulating the conduct of TNCs toward the improvement of corporate accountability for human rights violations.

Standards of protection

Traditional investment treaties include provisions that typically provide investors with protection from the actions of host States, however, they are silent regarding investor obligations. Several commentators have voiced concerns about how the activities of foreign investors negatively impact human rights (Amadi, 2019). There are several accusations of human rights violations by foreign investors within local communities mainly due to the absence of a binding regulatory framework, like a BIT, that requires investors to comply with domestic and international human rights laws (Davitti et al., 2018).

The Morocco-Nigeria BIT places obligations on both the host State and foreign investors (Zugliani, 2019). Under Article 7 of the treaty, investors are entitled to the minimum standard of treatment guaranteed under customary international law. The same provision also places an obligation on investors "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."

The Morocco-Nigeria BIT is the first signed international investment agreement (IIA) that imposes an obligation on the investor to respect human rights as well as environment and labor standards. Traditional IIAs provide non-binding provisions encouraging and requiring the best endeavor of investors and investments to respect, recognize and observe social responsibility and environmental policies (Chi, 2018). However, under the Morocco-Nigeria BIT, investors have pre-and post-establishment obligations to execute several obligations ranging from human rights to environmental protection.

Article 14 of the BIT provides for a pre-establishment binding obligation on an investor to conduct a social and environmental impact assessment screening and processes required for its proposed investment as required by the laws of the home or host state. These pre-establishment assessments ultimately align with and sustain the post-establishment investor obligations.

The post-establishment investor obligations are captured in Article 18 of the Morocco-Nigeria BIT as follows:

1. Investments shall, in keeping with good practice requirements relating to the size and nature of the investment, maintain an environmental management system. Companies in areas of resource exploitation and

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high-risk industrial enterprises shall maintain a current certification to ISO 14001 or an equivalent environmental management standard.
2. Investors and investments shall uphold human rights in the host state.
3. Investors and investments shall act in accordance with core labor standards as required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998.
4. Investors and investments shall not manage or operate the investments in a manner that circumvents international environmental, labor, and human rights obligations to which the host state and/or home state are Parties.

The BIT further provides in Article 24, that investors and investments must contribute to the sustainable development of the host State and local community by engaging in high levels of responsible practices, which must be embedded in the application of the ILO Tripartite Declaration on Multinational investments and Social Policy. The use of the term "shall" without referring to voluntary principles or best practices or efforts in both the pre and post-establishment investor obligations binding on investors with respect to human rights the environment and labor standards demonstrates the binding nature of the provisions.

In the process of carrying out their activities under the terms of the BIT, foreign investors are prohibited from managing or operating their investments in a manner that circumvents international environmental, labor, and human rights obligations to which Morocco and Nigeria are parties (Article 23(4)). These obligations are accompanied by a relatively broad discretion of the host State to take non-discriminatory measures that "it considers appropriate to ensure that investment activity is undertaken in a manner that is sensitive to environmental and social concerns" (Article 13(4)).

These obligations point towards a more socially responsible form of investment promotion. Thus, although the Morocco-Nigeria BIT encourages investment, such investment is not encouraged at the cost of human rights, and the environmental, and social well-being of the host State.

Implementation of the Morocco-Nigeria BIT

One major reason for the failure of compliance with international agreements is the absence of effective implementation mechanisms. Current international human rights initiatives do not provide mechanisms that effectively implement the standards that they enunciate. The initiatives over-rely on dialogue and cooperation between governments and TNCs to "encourage" TNCs to integrate human rights standards into their business operations (Inyang, 2021). While dialogue and cooperation may be useful in internalizing human rights in TNC operations, excessive focus on such

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strategy trivializes human rights. It gives the impression that human rights are not rights but are dependent upon the cooperation of TNCs (Deva, 2014).

The effectiveness of the Morocco-Nigeria BIT will depend on how the obligations of the investors are implemented. Traditional BITs recognize the right of States to institute actions against foreign investors to hold them accountable for violating their environmental and human rights obligations, however, such actions are limited to counterclaims which can be brought only as a response to the investor filing an investor-state dispute settlement (ISDS) claim. For example, in *Urbaser v Argentina,* a dispute arose as a result of Argentina's financial crisis. Urbaser was a shareholder and concessionaire that was in charge of supplying water and sewage services in Buenos Aires. Argentina's emergency measures caused the concession financial loss and it eventually became insolvent. The claimant commenced ICSID arbitral proceedings Against Argentina for violations of the Spain-Argentina BIT. Argentina filed a counterclaim based on Article 46 of the ICISD Convention (and Rule 40 (1) of the ICISD arbitration rules) which provides:

> Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.

The respondent's counterclaim alleged that the concessionaire's failure to provide the necessary level of investment in the concession led to violations of the human right to water. the tribunal in *Urbaser v Argentina* accepted the jurisdiction over a human rights counterclaim for the first time. Although counterclaims offer the possibility of balancing the duties of States and investors, they are only possible after an ISDS claim has been instituted by an investor; this is a major shortcoming. However, the Morocco-Nigeria BIT offers a ground-breaking mechanism for holding foreign investors liable for failing to uphold their environmental and human rights obligations in this regard. The BIT allows host States to bring direct actions against an investor for violating their obligations to protect the environment and promote human rights. Unfortunately, the power and influence of TNCs coupled with the lack of economic and technical prowess of host States make efficient human rights protection almost impossible. The Morocco-Nigeria BIT appears to recognize this fact as it goes on to provide in Article 20 that 'investors shall be subject to civil actions for liability in the judicial process of their home state where such acts or decisions lead to a significant damage, personal injuries or loss of life in the host state.' Home states of foreign investors, which are usually developed states, are known to have higher human rights standards, functioning and non-corrupt legal systems, financial and personal resources,

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and the necessary technology to conduct efficient investigation and prosecution (Weschka, 2006). These factors make home states more attractive forums for seeking remedies for corporate human rights abuses (Weschka, 2006).

However, there may be situations where the home states of foreign investors are reluctant to impose civil liability on TNCs due to the fear of placing them at a competitive disadvantage in relation to the TNCs of other States (Herbert Smith Freehills, 2017). The Morocco-Nigeria BIT also addresses this situation in Article 28, which provides that either Morocco or Nigeria (whichever is the host State) can bring a direct claim or action before an arbitral tribunal to sanction cases of non-compliance. This reinforces the binding nature of the investor obligations.

Overall, the Morocco-Nigeria BIT's emphasis on human rights, environment, and labor standards suggests that calls for greater accountability of corporate entities for the actions that impact human rights are bearing fruit. Such developments are likely to be well received by States, particularly in the developing world.

Conclusion

Once ratified, the Morocco-Nigeria BIT could serve as a basis for States to bring civil actions against foreign investors for their failure to uphold their environmental and human rights obligations under the BIT. The investor liability provision could also provide access to remedies for those impacted by environmental human rights abuses caused by the activities of foreign investors. When these provisions are considered as a whole, they provide ground-breaking examples of how an investment treaty can enhance corporate accountability, rather than create avenues for escaping liability. It is therefore pertinent to consider how the Morocco-Nigeria BIT provisions regarding investor duties and liability could be tailored to fit other investment agreements, with the aim that they become prerequisites for greater economic integration between countries.

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