

HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW: THE 2016 MOROCCO–NIGERIA BILATERAL INVESTMENT TREATY

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Abstract The 2016 Morocco–Nigeria bilateral investment treaty (BIT) stands out from other such treaties because of its innovative human rights approach to the protection and promotion of foreign direct investment. Human rights permeate its approach to the regulation of investment in a manner which is most unusual in international investment agreements (IIAs). As a result, this is the most socially-responsible BIT currently concluded. Although it remains exceptional within the investment-treaty framework, the treaty reflects African initiatives to ensure that the next generation of BITs encourages more responsible investments. As such, it shows that human rights-compliant investment treaties can find fertile ground in developing African countries and it sets an example for current and future negotiations aimed at fostering respect for human rights in investment activities.

Keywords: human rights, international investments, investor’s obligations, sustainable development, environmental provisions.

1. INTRODUCTION

In recent years, the traditional view supporting the separation of international investment law and human rights law, with no possibility of there being an overlap between them, has been abandoned.¹ Human rights issues have been raised in a great number of investor–State arbitral proceedings²—either by investors, States or third-parties—and have been addressed by arbitral tribunals when broad compromissory clauses have given them jurisdiction to do so. With the notable exception of the right to property,

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¹ See eg PM Dupuy, ‘Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law’ in PM Dupuy *et al.* (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009) 45–62; SL Karamanian, ‘Human Rights Dimensions of Investment Law’ in E De Wet and J Vidmar (eds), *Hierarchy in International Law* (Oxford University Press 2012) 236–71.

² See eg *Spyridon Roussalis v Romania*, ICSID Case No ARB/06/1, Award (7 December 2011) where the claimant based its claim on, among other grounds, art 1 of the First Additional Protocol to the European Convention on Human Right; *Hesham Talaat M. Al-Warraq v Republic of Indonesia*, UNCITRAL, Final Award (15 December 2014), where the investor argued that human rights were included in the term ‘basic rights’ contained in the relevant BIT.

arbitral tribunals have avoided in-depth analysis of the relationship between investment and human rights, although some recent awards have delved into the issue.³

Increasing attention to human rights is being paid by States when drafting international investment agreements (IIAs).⁴ In addition to the traditional focus on investor's rights, a growing number of IIAs include provisions dealing with the rights of the host State's population as part of that State's right to regulate. Though human rights clauses are emerging as a feature of these new-generation IIAs, their relevance is still marginal as they are usually limited in scope, confined to sporadic provisions or drafted in soft-law language.

A more resolute approach to human rights can be seen in instruments adopted within the African context. The 2008 Appendix 3 to the ECOWAS Treaty⁵ binds both States Parties and investors to respect human rights. The 2012 SADC⁶ Model BIT adopts similar language to that of the Ruggie Report⁷ and imposes human rights obligations directly on investors. The 2016 Draft Pan-African Investment Code (Draft PAIC)⁸ imposes human rights obligations on investors and is permeated by sustainable development concerns. With the exception of the ECOWAS Treaty, such instruments are not binding and do not have any direct effect, although they provide important background for the negotiation of new human rights-compliant investment treaties. The Morocco–Nigeria bilateral investment treaty (BIT)⁹ stems from such a context and is, to date, the investment instrument which is the most far-reaching as regards the protection of human rights. The treaty is heavily influenced by the ECOWAS framework – of which Nigeria is a founding Member and which Morocco has recently applied to join – and by the Draft PAIC adopted by the African Union, the negotiation of which took place alongside that of the Morocco–Nigeria BIT.

The Morocco–Nigeria BIT has come to the attention of commentators since it is innovative in many respects. It strikes a balance between the striving for investment protection and promotion and the need to safeguard the State's legitimate public-policy space.¹⁰ It is part of what has been defined as a 'new trend' in international

³ See *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic* (Urbaser v Argentine Republic), ICSID Case No ARB/07/26 (8 December 2016).

⁴ See UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* (United Nations 2015) 120–73.

⁵ (Economic Community of West African States) Supplementary Act A/Sa.3/12/08 Adopting Community Rules on Investment and the Modalities for their implementation with ECOWAS (signed on 19 December 2008, entered into force on 19 January 2009).

⁶ Southern African Development Community.

⁷ See UNGA, 'Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie' UN Doc A/HRC/17/31 (21 March 2011).

⁸ African Union, 'Draft Pan-African Investment Code', AU/STC/FMEPI/EXP/18(II) (26 March 2016).

⁹ Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (Morocco–Nigeria BIT) (adopted on 3 December 2016). The treaty has been ratified by the Moroccan Parliament on 30 August 2017 and is not yet in force, pending the ratification by Nigeria.

¹⁰ See eg T Gazzini, 'Nigeria and Morocco Move Towards a "New Generation" of Bilateral Investment Treaties' (EJIL: *Talk!*, 8 May 2017) <<https://www.ejiltalk.org/nigeria-and-morocco-move-towards-a-new-generation-of-bilateral-investment-treaties/>>.

investment law that shows IIAs imposing obligations directly on investors.¹¹ It provides an innovative dispute-resolution system that attempts to tackle the shortcomings of current investor–State arbitration by creating a joint committee to prevent the initiation of arbitration procedures.

The most notable feature of the treaty is, however, its human rights dimension. The treaty goes beyond the above-mentioned instruments by adopting an innovative and comprehensive approach towards human rights (either specific rights or human rights in general) that strictly links the promotion and protection of investments to the protection of human rights and adds a new dimension to the regulation of investment activities. The present analysis will address the human rights provisions in the treaty in order to provide a better understanding of their relevance and of their potential effectiveness in protecting human rights.

II. THE TREATY PREAMBLE

The Morocco–Nigeria BIT makes its first reference to human rights in the treaty preamble, which recognizes the importance of investments in the ‘furtherance of human rights and human development’.¹² The role of treaty preambles is well-known in international law: they are a guide for treaty interpretation, since, according to Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT), the context of a treaty comprises the ‘treaty text, its preamble and annexes’.¹³ Treaty preambles are of particular importance in investment treaty law given the nature of substantive investment provisions, which traditionally grant investors protection by means of narrowly-worded and generally-phrased standards.¹⁴ Investment arbitral tribunals have often resorted to treaty preambles in the determination of the content of treaty standards, sometimes using them as a basis for far-reaching conclusions.¹⁵

The Morocco–Nigeria BIT is the only BIT that contains a general reference to human rights in its preamble. BITs usually only mention specific rights, such as labour rights¹⁶ or cultural rights.¹⁷ Only a few other recent Model BITs adopt a general approach,¹⁸ and such instruments have not yet led to the adoption of final texts which have equally

¹¹ N Briercliffe and O Owczarek, ‘Human-Rights-Based Claims by States and “New-Generation” International Investment Agreements’ (Kluwer Arbitration Blog, 1 August 2018) <<http://arbitrationblog.kluwerarbitration.com/2018/08/01/human-rights-based-claims-by-states-and-new-generation-international-investment-agreements/>>.

¹² Morocco–Nigeria BIT (n 9) Preamble.

¹³ Vienna Convention on the Law of Treaties (adopted on 23 May 1969, entered into force on 27 January 1980) 1155 UNTS 33 (VCLT) art 31(1).

¹⁴ Although since the early 2000s IIAs have started to include more detailed substantive provisions.

¹⁵ See eg the relevance of preambles in the inclusion of the stability of the host State’s regulatory framework within the protection provided by the fair and equitable treatment (FET) standard: *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No ARB/01/08, Award (12 May 2005) para 247; *Occidental Exploration and Production Company v The Republic of Ecuador*, LCIA Case No UN 3467, Final Award (1 July 2004) para 183.

¹⁶ See eg Austria–Kyrgyzstan BIT (2016) Preamble.

¹⁷ See eg Canada–EU Comprehensive Economic and Trade Agreement (2016) Preamble.

¹⁸ The preamble of the SADC Model BIT (2012) presents an identical phrasing to that of the Morocco–Nigeria BIT. See also Austria Model BIT (2008), Preamble; Draft Norway Model BIT (201) Preamble.

general formulations. A similar reference to human rights is included in recent Free Trade Agreements (FTAs) concluded by the European Union (EU), which usually recall specific international human rights instruments in their preambles.¹⁹ Although the Morocco–Nigeria BIT does not indicate any specific international convention, the lack of a clear catalogue of human rights does not seem to hinder the interpretative value of the provision.

The inclusion of human rights in general in the treaty preamble gives relevance to non-economic concerns in the regulation of international investments, allowing arbitral tribunals to reach a better balance between economic interests and human rights concerns in the interpretation of treaty provisions.

III. SUBSTANTIVE PROVISIONS ON HUMAN RIGHTS

What is notable in the Morocco–Nigeria BIT is the numerous references to human rights in its substantive provisions, in addition to the traditional standards of investment protection. Such a consistent presence clearly indicates that the focus of the treaty is not solely the protection and promotion of investments and that human rights concerns are relevant in the regulation of investment activities. Most human rights clauses follow the traditional structure of commitments between States Parties, displaying an indirect effect on individuals as they confer rights upon them, although some provisions refer directly to investors. Human rights clauses are generally worded in hard-law language but have different levels of effectiveness, as will be shown below.

A. Non-Binding Formulations

Most provisions do not contain obligations for States Parties. Article 15(5) deals with labour rights, and provides that ‘each Party shall ensure that its laws and regulations provide for high levels of labour and human rights protection’. But it then limits the practical relevance of this by adding that such protection must be ‘appropriate to [each Party’s] economic and social situation’. In a similar fashion, Article 17(1) provides that Parties ‘shall ensure that measures and efforts are undertaken to prevent and combat corruption’, but then goes on to specify that this be ‘in accordance with [their] laws and regulations’. Non-binding commitments constitute the typical approach of recent investment treaties that include human rights language and this can be seen particularly in Corporate Social Responsibility (CSR) clauses.²⁰ Their practical relevance, once again, lies in their letting non-economic values enter the treaty and allowing them to contribute to the determination of the context when interpreting the treaty.

¹⁹ See eg EU–Moldova Association Agreement (2014) Preamble: ‘committed to all the principles and provisions of the Charter of the United Nations, the Organisation for Security and Cooperation in Europe (OSCE), in particular of the Helsinki Final Act of 1975 of the Conference on Security and Cooperation in Europe and the concluding documents of the Madrid and Vienna Conferences of 1991 and 1992 respectively, and the Charter of Paris for a New Europe of 1990, as well as the United Nations Universal Declaration of Human Rights of 1948 and the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950’.

²⁰ See eg Benin–Canada BIT (2013) art 16: ‘Each Contracting Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility ...’.

B. Binding Formulations

Notably, the treaty also contains binding provisions related to human rights protection. Article 15(2) presents a so-called ‘not-lowering of standard’ clause regarding labour rights, which provides that ‘the parties recognize that it is inappropriate to encourage investment by weakening or reducing the protection accorded in domestic labour laws’. Clauses of this kind appear in several IIAs²¹ and require States to avoid the relaxation of their domestic standards and the ensuing ‘race to the bottom’ to attract foreign investments. The Morocco–Nigeria BIT abandons the soft-law language adopted by some treaties²² and imposes an obligation of result (‘each Party shall ensure’), following recent developments in FTAs and BITs.²³ The treaty then goes further, not only prescribing that derogations on labour standards must not occur as a result of positive actions, but also as a result of omissions, thereby adopting a more stringent approach and offering the same level of protection as recent IIAs.²⁴

More importantly, Article 15(6) provides that ‘all parties shall ensure that their laws, policies and actions are consistent with the international human rights agreements to which they are a Party’, adopting the same wording of the Appendix 3 to the ECOWAS Treaty.²⁵ These two treaties are the only investment treaties already adopted that impose human rights obligations on State Parties. By linking State conduct to respect for human rights instruments, the treaty ensures that the regulation of investment activities will not fall short of international human rights obligations undertaken by the Parties.

Some reflections are necessary on the enforcement of this provision. The obligation to respect human rights does not go beyond the ambit of investment-related activities, as demonstrated by the jurisdictional clauses. As with most investment agreements, the treaty allows for both investor–State and inter-State dispute settlement. Inter-State arbitration applied solely to the operation of investments, by virtue of Article 28, and does not constitute a tool by which to sanction violations of the State’s human rights obligations which are unrelated to investments. As to the investor–State dispute settlement, Article 27 allows only those persons who qualify as investors to bring a claim against a host State.²⁶

Within this limited scope, Article 15 may constitute a textual basis for the jurisdiction of arbitral tribunals over human rights issues that arise out of the activities of the host State. In this regard, it will need to be harmonized with the other substantive provisions of the BIT that, following the current trend in international investment law, set out the limits of investor protection. For example, Article 7 links the fair and equitable treatment (FET) standard to the minimum standard of treatment (MST) under customary

²¹ See eg Slovakia–Iran BIT (2014) art 10(1).

²² See eg recent BITs concluded by Japan. As a matter of example, Japan–Israel BIT (2017) art 20: ‘Each Contracting Party recognizes that it is inappropriate to encourage investment activities ... by relaxing its domestic health, safety, environmental and labor standards legislation.’

²³ See eg EFTA–Montenegro FTA (2011) art 34(2); see also Islamic Republic of Iran–Slovakia BIT (2016) art 10(1).

²⁴ See eg EFTA (European Free Trade Association)–Georgia FTA (2016) art 10(4).

²⁵ Appendix 3 (n 5) art 21(5): ‘All Member States shall ensure that their laws, policies and actions are consistent with the international human rights agreements to which they are a Party and at a minimum, with the list of human rights obligations and agreements already adopted.’

²⁶ Morocco–Nigeria BIT (n 9), art 27(1): ‘the Investor concerned may submit at his preference the dispute settlement to’.

international law, specifying that FET ‘includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process’. The exact content of the MST remains a subject of debate,²⁷ but the obligation to ensure that the State’s policies and actions are consistent with international human rights agreements may go well beyond the limited protection offered by the standard. The provision of Article 15(6) might thus have an impact on the interpretation of the FET clause, broadening their scope when it comes to the protection of the investor’s human rights.

IV. HUMAN RIGHTS PROVISIONS DIRECTED TO FOREIGN INVESTORS

The treaty then refers directly to foreign investors when regulating the post-establishment conduct of foreign investments. On the one hand, it contains human rights provisions formulated in soft-law language. Article 24 indicates the need for respecting CSR standards, providing that ‘investors should strive to apply and achieve the higher-level standards’. This language can be found in several recent BITs concluded by Canada, the EU and Brazil and in the 2016 Draft PAIC.²⁸ Once again, provisions of this kind play a role in the determination of the investor’s good faith in the conduct of its investment and allow a better balance in the interpretation of the treaty, as tribunals will take into account CSR policies in the assessment of the treaty’s substantive provisions.

On the other hand, the BIT also resorts to hard-law language. Article 18 provides that investors ‘shall uphold human rights in the host state’, ‘shall act in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work’ and that investors and investments ‘shall not manage or operate the investments in a manner that circumvents international environmental, labour and human rights obligations to which the host state and/or home state are Parties’. Article 17(3) adds that ‘investors and their Investments shall not be complicit’ in any act of corruption. By imposing obligations on investors, the Morocco–Nigeria BIT adopts a clear approach towards the protection of human rights: investors must not only respect human rights, but must also actively uphold them in their investment activities.

The provisions indicated above are similar to the wording of Article 14 of Appendix 3 to the ECOWAS Treaty. As with the human rights provisions binding on States, the two instruments are the only existing IIAs already concluded that contain such clauses. Similar formulations can be found in non-binding instruments adopted in the African regional context, such as the 2012 SADC Model BIT,²⁹ and in a handful of recent Model BITs elaborated by developing countries,³⁰ although these have not yet resulted in the adoption of final texts with similarly-binding human rights provisions. By imposing obligations directly on foreign investors, the treaty transcends the traditional structure of human rights obligations which bind States directly and confer rights on individuals.³¹

²⁷ For the influence that human rights can have on the MST, see: M Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford University Press 2013) 172ff.

²⁸ Draft PAIC (n 8) art 24.

²⁹ The Model BIT of the SADC (2012) art 15(1): ‘Investors and their investments have a duty to respect human rights in the workplace and in the community and State in which they are located ...’.

³⁰ See eg the India Model BIT (2016) art 12 that provides that investors and their investments shall be subject to and comply with the law of the host State, including the law relating to human rights.

³¹ See T Buergerthal, ‘Human Rights’ (Max Planck Encyclopedia of Public International Law, March 2007) <<http://opil.ouplaw.com/view/10.1093/law/epil/9780199231690/law-9780199231690-e810>>; on

Even if such provisions are an important development in international investment law, their relevance must not be overestimated. The formulation of the dispute-settlement clause does not allow the State to bring a claim against the investor should the latter violate the treaty provisions, including those regarding human rights. Article 27 is unidirectional, stating that only 'the Investor concerned may submit at his preference ...' the dispute to an arbitral tribunal constituted, among others, under the auspices of the ICSID or established under the UNCITRAL Arbitration Rules.³² The same possibility is not bestowed upon the State, which can consequently only act as a respondent in disputes initiated by the investor. In this regard, the treaty does not go as far as the ECOWAS Supplementary Act³³ or other model instruments adopted in the African context which explicitly include the possibility for host States to initiate investment proceedings against the investor.³⁴

However, the treaty does not seem to preclude the possibility of States raising the violation of the investor's human rights obligations by way of counterclaims. The applicability of counterclaims (contemplated by both the UNCITRAL Arbitration Rules and the ICSID Convention)³⁵ can be problematic in treaty-based investor-State arbitration: in the absence of specific indications on the matter, the tribunal is called to determine whether the investor has consented to counterclaims when accepting the standing offer to arbitration which is contained in the treaty. Although the issue has not yet been finally settled,³⁶ recent ICSID arbitral tribunals have determined the scope of the investor's consent by analysing the jurisdictional clause contained in the relevant BIT, finding that broad offers to arbitrate can include consent to arbitrate State counterclaims.³⁷ In this regard, the Morocco-Nigeria BIT contains a jurisdictional clause that refers to 'any dispute between the Parties'³⁸ without imposing any kind of limitations on the jurisdiction of the arbitral tribunal. Since the BIT does not only confer rights, but also imposes obligations on the investor, a reading in good faith of the terms 'any dispute' contained in the jurisdictional clause seems to include counterclaims by the host State.

the third-party effect of human rights instruments, see also E Bjorge, 'Human Rights, Treaties, Third-Party Effect' (Max Planck Encyclopedia of Public International Law, May 2011) <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e879>>.

³² Morocco-Nigeria BIT (n 9) art 27.

³³ ECOWAS Supplementary Act (n 5) art 18(3): 'Where a host Member State or home Member State believes that an investor or its investment has ... persistently failed to comply with its obligations ... either the host Member State or the home Member State may initiate proceedings before a tribunal established by this Supplementary Act'.

³⁴ See SADC Model BIT (2012) art 19(2) and the Draft PAIC (2016) (n 8) art 43(2).

³⁵ See UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration of 2013 (2013) art 21; Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted on 18 March 1965, entered into force on 14 October 1966) 575 UNTS 159 (ICSID Convention) art 46.

³⁶ In the framework of ICSID arbitration, the view of authors who deem the sole consent to ICSID sufficient to imply the investor's consent to counterclaims is opposed by those who claim that consent must be determined through instruments external to the Convention. The first view can be found, among others, in Spyridon Roussalis v Romania (n 2) Declaration of W. Michael Reisman; MN Bravin and AB Kaplan, 'Arbitrating Closely Related Counterclaims at ICSID in the Wake of Spyridon Roussalis v. Romania' (2012) 9 Transnational Dispute Management. For the second approach, see, among others, D Atanasova *et al.*, 'The Legal Framework for Counterclaims in Investment Treaty Arbitration' (2014) 31 Journal of International Arbitration 357.

³⁷ See *Antoine Goetz & Others and SA Affinage des Metaux v Republic of Burundi* No. ICSID Case No ARB/01/2, Award (21 June 2012).

³⁸ Morocco-Nigeria BIT (n 9) art 26.

Given the above, if an activity by the investor negatively affects the human rights of the host State's population, the measures adopted by the host State will not constitute a violation of the treatment provided for by the BIT, even if it is detrimental to the interests of the investor. At the same time, the treaty will allow the host State to sue the investor for the violation of the human rights of its population by way of counterclaims, provided the requirements of Article 46 the ICSID Convention or of the UNCITRAL Arbitration Rules are met.

V. OTHER HUMAN RIGHTS-RELATED ISSUES

In addition to provisions directly mentioning human rights, the treaty regulates matters which, whilst not human rights as such, are inherently connected with them, namely sustainable development and the environment. The relationship between sustainable development, environmental protection and human rights is growing closer, although international courts still adopt a cautious approach to the issue. These provisions show the influence that the African investment framework exercised over the Morocco–Nigeria BIT, as such concerns permeate the 2016 Draft PAIC, negotiated by the African Union at the same time as the BIT, and which are contained in all recent African regional investment instruments. Their presence reflects the abandonment of the traditional Western model of investment protection and the resulting inclusion in investment treaties of clauses concerning the right to regulate and on social issues. In the Morocco–Nigeria BIT such provisions are tied to the State's right to regulate, and reflect the importance that the BIT places on non-economic issues as well as its innovative approach towards investment-related activities.

A. Sustainable Development

The Morocco–Nigeria BIT contains several references to sustainable development. In a similar fashion to the preamble of the 2016 Draft PAIC, the preamble to the BIT mentions sustainable development on three occasions.³⁹ In regulating an investor's activities in accordance with CSR standards, Article 24(1) recalls the 'development plans and priorities of the host State and the Sustainable Development Goals of the United Nations', while Article 23 reserves the right of each State Party to regulate in order 'to ensure that development in its territory is consistent with the goals and principles of sustainable development'. Interestingly, the BIT links the very notion of investment to that of sustainable development. It is, to date, the only investment instrument other than with the Mauritius–Egypt BIT (2014)⁴⁰ to adopt such approach. Article 1(3) defines investment as:

an enterprise within the territory of one State established, acquired, expanded or operated, in good faith, by an investor of the other State in accordance with law of the Party in whose

³⁹ Morocco–Nigeria BIT (n 9) Preamble: 'Recognizing the important contribution investment can make to the sustainable development of the state parties ...', 'Seeking to promote, encourage and increase investment opportunities that enhance sustainable development ...', 'Understanding that sustainable development requires the fulfilment of the economic, social and environmental pillars that are embedded within the concept'.

⁴⁰ Mauritius–Egypt BIT (2014) art 1: 'every kind of asset that has the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, the contribution to sustainable development ...'.

territory the investment is made taken together with the asset of the enterprise which contribute sustainable development

By tying the notion of investment with the requirement of its contributing to sustainable development, the States Parties to the BIT grant protection and access to the investor–State dispute-settlement system provided for by the BIT only to activities that contribute to, among other things, human rights which are included in the notion of sustainable development. The relevance of such clauses in practice is, however, still to be tested. Although the relationship between sustainable development and human rights has been highlighted on different occasions⁴¹ and the 2030 Agenda for Sustainable Development considers the protection and implementation of human rights as necessary steps for the achievement of sustainable development, no international tribunal has confirmed that there is a link between the two or found that there has been a breach of an obligation relating to sustainable development on the ground that there has been a breach of a human rights obligation.

B. Environmental Provisions

Finally, the Morocco–Nigeria BIT contains two provisions dealing with environmental protection as part of the State’s right to regulate. Article 13(1) recognizes, in preambular language, the ‘important role in protecting the environment’ of national legislation and multilateral conventions to which the States are a party. It then expressly allows each Party to adopt measures considered appropriate ‘to ensure that [any] investment activity in its territory is undertaken in a manner sensitive to environmental and social concerns’.⁴² Article 14 requires investors to carry out a preliminary environmental and social impact assessment and prescribes the application of the precautionary principle in the assessment, this being a settled feature of international environmental law.⁴³ Article 18 requires investors to maintain an environmental management system and to ‘not manage or operate the investments in a manner that circumvents international environmental ... obligations to which the host state and/or home state are Parties’.⁴⁴

Environmental provisions are not uncommon in IIAs. More than 100 investment treaties concluded after 2010 contain provisions of this kind.⁴⁵ However, environmental rights are generally not contained in human rights instruments and their inclusion in the broader category of human rights has been a matter of debate.⁴⁶ In 2011,

⁴¹ See eg UNGA ‘Report of the United Nations Conference on Environment and Development’ Annex I, (Rio Declaration on Environment and Development) UN Doc A/CONF.151/26 (12 August 1992) Principles 1, 4 and 5; UN Commission on the Status of Women, Beijing Declaration and Platform of Action, endorsed by UNGA ‘Follow-up to the Fourth World Conference on Women and Full Implementation of the Beijing Declaration and the Platform for Action’ UN Doc A/RES/50/203 (22 December 1995) para 36.

⁴² Morocco–Nigeria BIT (n 9) art 13(4).

⁴³ The principle was already contained in the Rio Declaration on Environment and (n 36) Principle 15, which provided that ‘in order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation’.

⁴⁴ Morocco–Nigeria BIT (n 9) art 18(4). ⁴⁵ Source: Investment Policy Hub <<https://investmentpolicyhub.unctad.org/IIA/mappedContent#iiaInner> Menu>.

⁴⁶ A Boyle, ‘Environment and Human Rights’ (Max Planck Encyclopedia of Public International Law, April 2009) <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1948>>.

Human Rights Council Resolution 16/11 established a mandate on human rights and the environment, to study the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. Special Rapporteur John Knox, in its 2018 report, has recognized that international norms do not provide for the explicit recognition of a human right to a safe, clean, healthy and sustainable environment. This notwithstanding, Knox argued that such international recognition was not necessary, due to the protection of the environment by treaty bodies and regional courts through an expansion of other rights, such as the right to life and the right to health.⁴⁷

VI. CONCLUSION

The relevance of human rights in the regulation of investment activities provided for by the Morocco–Nigeria BIT is undeniable. The treaty was not conceived in a vacuum, as it contains provisions in line with those present in other recent IIAs, although it gives a new dimension to human rights when compared to the other existing investment treaties. What is remarkable in the treaty is the number of human rights provisions and their level of commitment, which sets it apart from all other such instruments. Five out of 25 substantive provisions (in addition to the preamble) deal with human rights, forming a major part of the treaty text. As to the quality of human rights clauses, they provide for the highest level of commitment that can be found in IIAs, given the widespread reference to human rights in general and the presence of provisions binding on States and investors alike. Both these indicators make clear that the protection of human rights is a fundamental aspect in the regulation of investment activities for the signatory Countries and they highlight how the treaty aims to stimulate more socially responsible forms of investment promotion.

The treaty clearly shows the influence of the emerging African investment treaty framework, as it absorbs examples of provisions contained in various other binding and non-binding instruments adopted by African regional organizations. At the same time, a similar tendency can be found outside the African context, especially in investment Model BITs drafted by developing countries such as Ecuador or India, and in current treaty negotiations which are also seeking to include human rights clauses in the final texts. The very recent nature of all these instruments suggests that there is a new awareness of human rights in the international investment framework, although since these developments have not yet led to the adoption of binding treaties it would be premature to say that there is a ‘new trend’ towards human rights protection in international investment treaty drafting. In addition, the human rights clauses contained in Model BITs are usually limited to specific rights and do not provide for comprehensive protection, as is provided for in the Morocco–Nigeria BIT, which is the most forward-looking investment instrument concluded to date.⁴⁸ Still, this treaty shows that this more general background can provide a basis for the adoption of more comprehensive approaches in future investment treaties, and it sets an example for ongoing and future negotiations of how to foster respect for human rights in investment activities.

⁴⁷ See UNGA, ‘Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie’ UN Doc A/HRC/17/31 (21 March 2011) paras 11–13.

⁴⁸ Ratification by the Nigerian Parliament is, however, still pending.