The Investments Protection Under the Bilateral Investment Treaty Between China and Morocco

ID BOUHOU MOHAMED

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Abstract

A Bilateral Investment Treaty (BIT) is a legally binding investment agreement between two countries that establishes the right and obligation to facilitate investment into each other's territories. For more than 50 years, Bilateral Investment Treaties (BITs) have given standard treatments to protect foreign investors and their investments. On 27 March 1995, the government of Morocco signed an Agreement on the Promotion and Protection of Investment with the government of China, and this Agreement entered into force on 27 November 1999. This BIT has remained in effect and has not been amended or modified. However, foreign investors predicted that this issue with the old treaty would destabilize the investment climate between China and Morocco. On the other hand, bilateral investment treaties in recent years have witnessed an important development. Therefore, China and Morocco are in urgent need to renew this agreement under international investment agreements.

I dedicate this book to my parents (Mr. and Mrs. Id Bouhou), who made me understand the value of education at a tender age. Against all odds, they ensured that my siblings and I got an education. Today, I say this is surely a product of their sacrifice. They have and will always continue to be a great source of inspiration.

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Lastly, I convey my heartfelt gratitude to my family, my Dad Lhassane Id Bouhou, my Mom Reqia Guighri, my brothers and sister, and colleagues whom I could not mention due to the constraint of space for their support during writing this book.

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List of Abbreviations

BIT	Bilateral Investment Treaty
CETA	Canada-European Union Comprehensive Economic and Trade Agreement
Doha Declaration	Doha Declaration on the TRIPS Agreement and Public Health
EU	European Union
EU-Singapore FTA	EU-Singapore Free Trade Agreement
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
IIA	International Investment Agreement
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Center for Settlement of Investment Disputes
MFN	Most -Favoured Nation Treatment
NAFTA	North American Free Trade Agreement
NT	National Treatment
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization
VCLT	Vienna Convention on the Law of Treaties (1969)
IPR	Intellectual Property Rights

CHAPTER ONE

INTRODUCTION TO THE RESEARCH

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1.1 Research Background

The foreign investment necessitates the transfer of real assets from one country to another with the intention of using them to generate revenue in that country under the complete or partial control of the asset owner.[1] In the case of Salini,[2] investment was specified to include significant commitment, period of success, benefit and return regularity, risk assumption and significance for the development of the host state. Foreign Direct Investment (FDI) is also known as an investment in which a foreign investor purchases an asset with the intention of running it in another country.[3] Since States have the exclusive right to identify and determine what constitutes a foreign investment in their economies, the definitions set out above can only be illustrative and subject to the precise definitions established by states in their bilateral investment treaties (BITs), regional trade agreements or in the form of an investment agreement between investors and states.[4]

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[1] Muthucumaraswamy Sonarajah, "*The International Law on Foreign Investment*" (3rd edn, Cambridge University Press 2010) 7.

[2] Salini Costrutiorri SpA & Italstrade SpA v Kingdom of Morocco, ICSID Case ARB/00/4, Available at: https://www.italaw.com/cases/958 [Accessed 09 January 2021].

[3] Don Wallace Jr & David B Bailey, "*The Inevitability of National Treatment of Foreign Direct Investment with Increasingly Few and Narrow Exceptions*", 31 (3) Cornell International Law Journal) 27-28 (1998).

[4] Valentine Nde Fru, "*The International Law on Foreign Investments and Host Economies in Sub-Saharan Africa: Cameroon, Nigeria, and Kenya*" (1st edn, Hamburg 2011) 16.

The international investors take into account the regulatory climate in the prospective host state in determining whether to invest, as well as the opportunity to make money. Therefore, in order to draw international investment, the host state must have a friendly climate, ensure that investors will be handled equally and provided with assurances against expropriation. Hence, in order to ensure that foreign investors and their investments are secured in the territories of the host state and the home state, sign BIT, thereby granting foreign investors substantive and procedural privileges. So, BITs are intended to improve bilateral ties between the two countries involved, safeguard trade, enhance technology transfer and capital inflows, and encourage the economic growth of the host state.[5]In view of the great Chinese project of the new Silk Road, which is an opportunity for Morocco not only to invest in infrastructure (e.g., bridges, railway, solar plant, renewable energy and telecoms...) but also to galvanize Chinese investments in different sectors of Morocco, it is possible to ask what degree of protection is provided under international law, in particular, international investment law for Chinese investors in Morocco and correspondingly for Moroccan investors in China.[6]

This book is aimed at presenting the protection given to investors under the China-Morocco (BIT). During the 20th

[5] August Reinisch, "*Standards of Investment Protection*" (1st edn, Oxford University Press 2008) 34.

[6] Ahmed Charai, "*On the Rising Continent of Africa Morocco and China Eye Heightened Partnership*" (Huffington Post, 2017) Available at: https://www.huffpost.com/entry/on-the-rising-continent-o_b_9929306 [Accessed 10 January 2021].

century, China and Morocco made tremendous efforts to control their trade and investment ties and to become more transparent, the Chinese and Moroccan policy to protect investment changed dramatically. Under their governmental policy, Chinese and Moroccan investments in foreign states are also promoted. The Chinese and Moroccan policies on the ratification of investment treaties also show a similar trend.[7] More than 140 investment treaties have been signed by the Chinese government today, and Morocco has concluded 85 investment treaties, most of which are BITs. The substance of such treaties, of course, has changed over time, ranging from the first wave of succinct and concentrated BITs of the European style, signed in the 1980s, to the new nuanced and detailed Americanized BITs. Traditionally, from the beginning of their history, investment exporting countries have used BITs as a method to shield their outbound investments, mostly in developing countries.[8] The protective role of BITs is decisive for investment exporting countries, defining terms of care in favor of investors and equipping investors with direct access to the depoliticized investor-state dispute resolution system. However, the picture is more mixed with the host countries; their key concern, on the one hand, is to draw FDI from

[7] Ken Davies, "*Inward FDI in China and Its Policy Context in 2012",* (4 (4) China International Journal) 62-74 (2012).

[8] See e.g. The practice of the United States, a party to forty seven BITs with states, almost all of which can be classified as developing, Available at: http://investmentpolicyhub.unctad.org/IIA/CountryBits/223#iiaInnerMenu [Accessed 15 January 2021].

developing countries by agreeing to onerous foreign commitments (the Grand Bargain theory).[9] On the other hand, the protection role of BITs is stressed by host states when they are inclined to limit the extent and scope of investment safety responsibilities to leave as much control as possible at the discretion of a state (e.g., with respect to the implementation of regulatory measures) and thereby prevent the interference of foreign arbitrators.[10] The implicit understanding is that it should be theoretically mutual to secure investors/ investments given by BITs. However, factors such as the unequal relationship between the established rich and dominant states and the emerging states that existed during the first BITs' development period, as well as the actual practice as scholars have noted, the fact that only little to no investors from developing countries have invested in developed countries can contribute to a disparity that benefits developed world investors in developing countries.[11]China-Morocco was an investment importing nation before launching their BIT projects and understandably took a defensive and conservative stance in BITs. Times have altered today; as major importers and capital exporters, China-Morocco has become dual role states of differing degrees. It is also predictable that China-Morocco will

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[9] Jeswald W Salacuse, "*The Law of Investment Treaties"* (3th Edn, Oxford University Press 2010) 111.

[10] Maciej Zenkiewicz, "*Compensable vs. Non-compensable States Measures: Blurred Picture under Investment Law"* 17 (3), Manchester Journal Of International Economic Law (2020).

[11] Jeswald.W.Salacuse, "*The Emerging Global Regime for Investment"* (52, Harvard International Law Journal) 464 (2010).

need to find the proper balance between the protection of incoming and outgoing foreign investment in their BITs and future upgrades.[12]

1.2 Research Objectives

One of Morocco's current challenges is establishing a favorable investment environment in order to attract foreign investments into the most important sectors of the economy in order to fuel demand and build employment. However, there have been complaints that the BITs provided greater protection for international investors than the protection of investment agreement and encroached more on Morocco's legislative space to govern for the public good. As a result, Morocco's government started to examine its internal BITs in order to ensure that the government had sufficient legislative space to achieve legitimate goals. Morocco and China signed a Bilateral Investment Treaty (BIT) on 27 March 1995 to protect foreign investors. Morocco's government is currently grappling with how to strike a balance between the need for FDI and its need to implement empowerment policies and initiatives. The Moroccan government's exercising of its sovereign right to control in the national interest could bring serious economic harm to foreign investors, but failing to do so would jeopardize the country's effectiveness. As a result, Morocco's response to what it sees as inequity in the foreign investment scheme of BIT would create a tension between the country's sovereignty to

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[12] Won Kidane & Weidong Zhu, "*China-Africa Investment Treaties: Old Rules, New Challenges"* (37 (4) Fordham International Law Journal) 10 (2014)

govern in the national interest and the need to compensate in cases of administrative direct or indirect expropriation.

In general, the goal is not only to define protection requirements but also to provide dispute resolution as a practical incentive that provides real protection to foreign investors.

[a] The aim of the thesis is to examine the protection of investments provided for in the agreement between China and Morocco on investment promotion and protection.

[b] To explain the resolution of conflicts and protection against expropriation between China and Morocco under the BIT.

[c] However, by revising and clarifying the problems of investment protection in the current BIT, the purpose of this is to make suggestions and investment criteria for a new BIT between China and Morocco.

1.3 Prior Investigation

Foreign investment treaties in many countries around the world have been considered a significant factor of economic development. Several scholars, government publications and foreign agency publications have addressed the question of the importance of concluding investment treaties and the effect of FDI inward flows on the economic growth of a region. On the other hand, Many developed countries have applauded Morocco's government for paving the way in re-balancing the rights and duties of states and investors. Many developed countries are working to sign BITs, and they provide incentives. The report would mainly concentrate on the need to strike an acceptable balance between China and Morocco in terms of foreign investment protection. Sornarajah [13] claims that sovereignty is limited by all bilateral investment treaties. He adds that investment treaties limit territorial rights to regulate the invasive foreign investment process, which exists completely within the host state's jurisdiction. To this point, the erosion of sovereignty is substantial in such treaties. Johnson[14] argues that restricting the space for the state to control is an integral component of reducing the risk of investors and thereby encouraging international investment. He adds that investors have the right to implement the terms of a treaty by international arbitration, in compliance with current BITs, in order to promote full protection for investors, which encourages greater inflows of FDI.

Muchlinski[15] claims that, while the reduction of government interference in economic decision making is seen as key to the efficient operation of international investment, the model

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[13] Muthucumaraswamy Sonarajah, "*The International Law on Foreign Investment"* (3rd edn, Cambridge University Press 2010) 265.

[14] Alec R Johnson, "*Rethinking Bilateral Investment Treaties in Sub-Saharan Africa"* (2010, Volume 59, Issue 4, Emory Law Journal) 26.

[15] Peter T Muchlinski, "*Regulating Multinationals: Foreign Investment, Development and Balance of Corporate and Homes Country Rights and Responsibility in a Globalizing World"* (2011, Oxford Scholarship Online) Available at: http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199793624.001.0001/acprof-9780199793624-chapter-001003 [Accessed 25 January 2021].

agreement of the International Institute for Sustainable Development (IISD) strengthens the need for the home state to involve civil action before its own courts before resorting to international arbitration by investors. He also suggests that the IISD Model Agreements represent a useful move forward while not uncontroversial at all. He also argues that this change would be compatible with the Doha Declaration's call for an investment system that balanced represents the needs of the home and host states. Lall and Narula,[16] on the other hand, raise the question that most developed countries have eliminated FDI inflow constraints, but this has encouraged foreign investors to take advantage of established capacities more openly. The need to find a balance, however, between the interest of foreign investors and the ability of the host state to govern for public gain. While the views expressed by the above authors sound reasonable, there are further challenges that have not yet been fully addressed. The challenge is now how the treaty between morocco and china protects investment and the dilemma and disputes settlement for the investment protection in this BIT. This challenge is the major focus of this study.

1.4 Research methodology

The legal method is an expression that describes the application of the law at all stages. All legal science requires an approach in which each person in the procedure conducts sufficient research. The legal method has a more general significance in

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[16] Sanjaya Lall & Rajneesh Narula, "*Foreign Direct Investment and its Role in Economic Development: Do we need a new agenda ?",* (2004, Volume 16, Issue 3, The European Journal of Development Research) 15.

research; it extends legal texts and formulas by study and communication for the purpose of interpreting the law, communicating the law to others, and amending or repealing the law.[17] The book aims to propose amendments to the BIT between China and Morocco and produce a new BIT between China and Morocco by reviewing and clarifying vague formulations and loopholes. This research would provide legal documentary studies on the primary source of wordings in the BIT between China and Morocco, such as (BITs) of other countries or models of (BITs), Agreements of Free Trade Areas (FTAs) of other countries or models of International Investment Agreements (IIA), the Vienna Convention on the Law of Treaties (1969), and the Vienna Convention on the Law of Treaties (VCLT) (1969). The secondary references in this research will include academic books on legal theory, public international law, international investment law, international arbitration and articles in academic journals, commentaries and reports. This thesis would use a variety of analytical and comparative techniques.

1.4.1 Analytical Techniques and Applications

In this research, primary and secondary references would be included in the methods for interpretation and implementation in order to comprehend the terminology of the BIT between China and Morocco, as well as to amend the wordings in order to create a new BIT between China and Morocco.

1.4.2 Methods of comparison

[17] Michael D. Murray & Christy Hallam Desanctis, "*Legal Research and Writing Problems and Exercises"* (1st Edn, Foundation Pr, 2005) 1.

Comparative approaches would be used to compare the wordings of BITs of other countries and models of BITs, agreements of Free Trade Areas (FTAs) of other countries, and other models of International Investment Agreements (IIA) for detailed interpretation and clarification. In addition, this research would compare academic doctrines and judgments of international arbitral tribunal awards and rulings, as well as the International Court of Justice and other international courts in regard to international affairs.

CHAPTER TWO

THE RELATIONSHIP OF THE BIT BETWEEN CHINA AND MOROCCO

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Abstract

The aim of this chapter is to clarify and discuss the signing background, significance, evolution of the bilateral investment treaties of China and Morocco. Then, we will clarify the relationship between China and Morocco through the bilateral investment agreement that has brought them together, as well as identifying the invested fields by Chinese investors in Morocco and the investment thereof.

2.1 The Signing background of the BIT between China and Morocco

In 1995, the Moroccan national newspaper published an article announcing the signing of a BIT between Morocco and China. In the article, the Moroccan Minister of Industry, Investment, Trade and Digital Economy at the time announced the agreement, declaring that;

"For Morocco, this agreement is of special importance, because it will protect Chinese investment in (our country) ... (and) increase the confidence of Asian investors."[18]

While on the surface, the Minister's announcement appears to be standard political rhetoric, its significance lies in its frankness. In the twentieth century, Chinese investment in Africa is absolutely significant, and African governments are making more and more efforts to ensure the confidence of Chinese investors. China's new influence in Africa embodies the dramatic change that China has undergone since its open-door policy in 1978 issued its limits to foreign investment.

[18] The Moroccan Investment and Development Agency, Available at: http://www.china-invests.net/ma/InvestMorocco/ [Accessed 27 January 2021].

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Since that announcement, Chinese foreign investment and participation have expanded at an astonishing rate. In less than 40 years, China has gone from a protectionist state wary of foreign influence to one of the world's most important economic and political actors. China's expanding global influence is especially striking in Africa. In a region historically dominated by France, England and American control and influence, the Chinese have achieved profound economic and political successes. The emergence of (BIT) was one of the most important notations for expanding China's influence in Morocco. In theory, this treaty serves as a tangible representation of the mutual commitment between China and Morocco to investment. As an article from the Georgetown Journal of International Law explains;

"Countries sign BITs to encourage foreign investment with their treaty partners. For developing country governments, BITs are a way to reassure investors and thus attract more investment through a trusted commitment to protect property rights."[19]

Moreover, some empirical research indicates that BITs have a significant impact on investment.

2.2 The Significance of the BIT between China and Morocco

The BIT between China and Morocco is the subject of this thesis. In the quantitative section, the signature of a BIT is used

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[19] Kete Hadley, *"Do China's Bits Matter? Assessing The Effect Of China's Investment Agreements On Foreign Direct Investment Flows, Investor's Rights, And The Rule Of Law"* (2013, Georgetown Journal of International Law) 260.

as a dependent variable that is expected to indicate and correspond to higher levels of FDI. In the qualitative section, the BITs are analyzed critically to gain a deeper understanding of the investment relationship between China and Morocco. Thus, in order for both analyzes to be correct, it is necessary to demonstrate the importance of BITs both internationally and in the context of the China-Morocco relationship. Perhaps the biggest testament to the significance of BITs is their sheer abundance. According to the United Nations Conference on Trade and Development, there are 2852 bilateral investment treaties worldwide, involving nearly every country. Moreover, BITs remain by far the most common method of generating foreign direct investment. As international law expert Dr. Tarcisio Jazzini explains;

"There is no multilateral treaty regarding foreign countries. An investment that is comparable in terms of participation in multilateral trade agreements ... Hence, foreign investment, under treaty law, is currently protected by a complex web of bilateral investment treaties."

The proliferation of these treaties testifies to their important global role. There are a number of reasons why the BIT is so prominent between China and Morocco. Clearly, BIT offers a number of advantages over other options. Specifically, BITs tend to be somewhat flexible and adjustable. As Gazzini notes;

"The flexibility of the bilateral framework allows states to adapt their obligations according to specific needs ... (and) the binary nature of these treaties facilitates their modification."[20]
In other words, this treaty could be drafted by order. These advantages inherent in the BIT in relation to the multilateral investment treaties explain the continuing significance of the bilateral investment treaty. However, competition is a more pressing reason for the abundance and pervasiveness of BITs. An investigation co-authored by researchers Zachary Elkins, Andrew Guzman and Beth Simmons in 2008 found that;
"The prevalence of bilateral investment treaties is associated with competitive economic pressures among developing countries to gain a share of foreign investment."[21]
Put simply, and competition breeds growth. Countries have shown more eagerness to sign BITs, such as China and Morocco after competing countries have seen the same agreements sign. This has led to the proliferation of bilateral investment treaties around the world. This spread of bilateral investment treaties (BITs) spread to China and Morocco. In addition, nearly this treaty has signed during the past 25 years, indicating an increased interest in investment between China and Morocco. Some experts have claimed that the spread of these treaties is due to the favorable conditions of Chinese loans

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[20]Gazzini Tarcisio, "*Bilateral Investment Treaties",* In Gazzini T (Ed.), "*International Investment Law: The Sources of Rights and Obligations"* (2012, The Hague: Martinus Nijhoff) 6.

[21] Elkins Zachary & Andrew T Guzman, and Beth A Simmons, "*Competing for capital: The diffusion of bilateral investment treaties,1960-2000"* (2006, International Organization 60) 265.

compared to their traditional Western investors, such as the World Bank and the International Monetary Fund. However, the analysis on this topic has been mixed, with some studies indicating that Chinese banks are already imposing more stringent requirements than the World Bank.

2.3 Evolution of China's bilateral investment treaties

In 1982, China concluded its first BIT and had concluded BITs with more than 145 countries by 2020.[22] In terms of countries which have signed the most agreement, China now ranks second, behind Germany. Today, about 74% of China's outward FDI destinations are occupied by BITs. Since the 1980s, the number of BITs involving China has increased over the years, and the views of Beijing on BITs have changed.[23] Making a summary periodization of Chinese BIT is not easy. However, it seems clear from the general trend that Chinese BIT has undergone a change from a traditional paradigm to one of controlled liberalization.[24] Since 1982, when China signed

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[22] See International Investment Agreements Navigator, Available at: https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china [Accessed 01 February 2021].

[23] Axel Berger, "*China's New Bilateral Investment Treaty Programme: Substance, Rational and Implications for International Investment Law Making",* (2008, The Politics of International Economic Law: The Next Four Years, Washington, D.C) Available at: https://www.diegdi.de/uploads/media/Berger_ChineseBITs.pdf [Accessed 01 February 2021].

[24] James. Zhan, "*G20 Guiding Principles for Global Investment Policy making: A Facilitator's Perspective"* (2016, E15 Initiative Tink Piece, Geneva: International Centre for Trade and

its first BIT with Sweden, a shift in posturing towards a stance away from protectionism towards a more liberal model has convinced Chinese attitudes towards FDI and BITs.[25] The incremental implementation of national care and complete ISDS mechanisms illustrates the change in mindset.

Chinese BITs can be classified into two generations in terms of ISDS mechanisms, namely: The first generation of BITs with minimal ISDS mechanisms before 1997, covering disputes surrounding the amount of expropriation compensation; and the second generation of BITs with a complete ISDS mechanism after 1997, covering all investment disputes.[26] The first generation of Chinese BIT can be further divided into two sub-categories that apply to ICSID arbitration and those that refer only to ad hoc arbitration, taking into account that China signed the ICSID Convention in 1990.[27] The Chinese BIT program

Sustainable Development (ICTSD) and World Economic Forum) 1-2.

[25] Lars A Markert, "*Arbitration under China's Investment Treaties – Does It Really Work?"*(2012, Volume 5, Issue 2, Contemporary Asia Arbitration Journal) 208.

[26] S W Schill, "*Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China"* (2007, Volume 15, Issue 1, Cardozo Journal of International and Comparative Law) 89-94.

[27] Convention on the settlement of investment disputes between States and nationals of other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159, signed by the People's Republic of China on 9 February 1990, entered into force on 6 February 1993. Available at:

was initiated in the early 1980s at the request of investors from developing countries. Because of the lack of a liberal legal framework focused on a market economy, foreign investors in China were somewhat under protection under Chinese laws and regulations when China started its open-door policy in the late 1970s. China has introduced new initiatives at both the national and international levels in order to assure foreign investors. In 1979, it was passed the Foreign Equity Joint Ventures Act of the People's Republic of China. In 1980, BIT negotiations were very rapidly started with Germany, the US, and Japan, and then with the UK, France, Sweden and Switzerland.[28] Since most investors were from European countries in the early 1980s, it is not shocking that the early BIT activities of China were heavily inspired by European BITs. The Chinese BITs of the first century is very traditional. They contained essential guarantees of substantive protection, including the requirement to reimburse the lender in the event of expropriation, restitution for penalties and injuries, FET and Most Favoured Nation (MFN) requirements. However, where there is no successful investor-state settlement provision in BITs, all of those rights and meaningful protections are worthless. Basically, the

https://treaties.un.org/Pages/showDetails.aspx?objid=080000028012a925 [Accessed 03 February 2021].

[28] X. Liu, 对外开放起始录 "*The Beginning of China's Opening Up*", (2008, Beijing Economy & Management Publishing House) 160. Available at: https://ecfr.eu/wpcontent/uploads/ECFR66_CHINA_30_final.pdf [Accessed 04 February 2021].

following stipulations can be found in the first generation of Chinese BIT on the conflict resolution mechanism:

(a) the BIT does not contain settlement provisions allowing investors to make a suit against the host state (e.g., China-Sweden BIT 1982; China-Denmark BIT 1985; China-Norway BIT 1987);

(b) the BIT shall contain arbitration provisions but shall be limited to disputes relating to the interpretation or implementation of the investment treaty.

(c) the BIT includes settlement provisions limited to disagreements over the amount of restitution to be paid in expropriation measure situations (e.g., China-Singapore BIT 1985).

The Chinese BIT no longer varied substantially after 1998 from the pattern of their European counter-parties. In Chinese usage, the European-styled BIT was simplified until 2012, when China concluded and signed investment deals with Canada, Japan and South Korea. With the China-US BIT negotiations, Chinese movements towards the Americanized BITs were further strengthened. In specific, China accepted the policy of per-establishing a derogatory list of national care, which served as the basis for China's agreements with both the US and the EU. Some developments are also included in recent Chinese BIT and in discussions to resolve, both substantively and procedural, the manifest issues of Legitimacy. Some scholars, therefore, argue that a Chinese BIT is taking shape.[29] In

[29] Wenhua Shan & Hongrui Chen, "*China-US BIT Negotiation and the Emerging Chinese BIT 4.0"* (3rd edn, CUP 2016). 223-252.

conclusion, an evolution of progressive and controlled liberalization has been subject to Chinese BITs. First, Chinese BIT is flexible and sensitive to help address the needs of different treaty partners.[30] While there is a BIT model for treaty negotiations in a given time,[31] BITs of different generations will coexist in a given period. Second, Chinese BIT is closely managed by the domestic dynamics of change and regulation and is associated with them. On the one hand, investment protection remains the primary objective of BITs in Chinese treaty procedure, while investment promotion and admission were primarily governed by national legislation until 2013 when China started discussing investment admission in BITs. On the other hand, in correlation with China's domestic reform, China steadily liberalized its BITs and tended to allow systemic tryouts for big breakthroughs in BIT structures. China is seeking to strike a balanced BIT to secure its growing overseas investment while safeguarding the space needed to regulate in the public interest.

2.4 Evolution of Morocco's Bilateral Investment Treaties

[30] Shi Shi Li, *"Bilateral Investment Promotion and Protection Agreements: Practice of the People's Republic of China"*, (1988, International Law and Development, Martin us Nijhoff Publisher, Dordrecht) 179-180.

[31] The main differences in generations of Chinese Model BITs are reflected in the national treatment and dispute settlement provisions. For more, see the text of several Chinese Model BITs on the UNCTAD Investment Policy Hub, Available at: https://investmentpolicyhub.unctad.org/IIA [Accessed 05 February 2021].

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It was the first bilateral investment agreement that Morocco signed with Germany in 1961, and then it was followed by many other agreements with many countries. The Morocco treaties did not know any change even in 2015. Morocco has conducted a study of its model BIT using a versatile and realistic framework in order to make the required changes while retaining the Kingdom's policy of transparency to FDI in light of the increasing number of lawsuits brought by investors against host states based on BITs and the exorbitant sums granted to investors by arbitral tribunals. In 2015, a working group was formed with the aim of developing a new model, BIT. It began with an analysis of recent trends in foreign investment law and a general evaluation of Morocco's old-generation BITs in order to find places for a change. In 2016, the first updated draft model BIT was finalized, and in 2017 it was submitted for national consultation. In July 2018, the draft model was presented to UNCTAD for approval after a consultation process involving a variety of stakeholders. Morocco released the model in December 2019 after the UNCTAD analysis was completed in September 2018. [32] Morocco had the first experience of investment treaties when

[32] Throughout this article, parenthetical references to articles refer to: Kingdom of Morocco. (2019, June). Accord entre le Royaume du Maroc et … pour la promotion et la protection réciproques des investissements. [Moroccan Model BIT] Available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5895/download [Accessed 07 February 2021].

Morocco signed the treaty with Germany in 1961.[33] This treaty was desirous of encouraging capital investment between the two countries and creating necessary conditions for investing the money of the subjects and companies of each country on the others soil, and in recognition of it that encouraging these investments would advance the personal economic initiative and contribute to the prosperity of both countries. This treaty also affirmed the principle of Fair and Equitable Treatment (FET), National Treatment (NT).[34]

Furthermore, this convention included procedures for resolving conflicts between contracting nations, providing that any conflict between the parties concerning the understanding or implementation of the new treaty, which can be resolved satisfactorily by diplomacy or by diplomatic means, shall be resolved, It must be referred to a commission of arbitrators at the behest of either party for resolution in compliance with relevant international law rules. The panel consists of three participants, one from each faction and the third from the members elected by the parties. The parties fail to settle on a third member within one month; the third member is an official chosen by the Secretary-General of the United Nations at either party's request.[35] After the experience of the investment treaty

[33] Treaty of the encouragement of capital investment between the Federal Republic of Germany and the Kingdom of Morocco 1961 Available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5149/download [Accessed 09 February 2021].

[34] Ibid

[35] Ibid

with Germany, Morocco, by using (BIT) planned to encourage international direct investment of foreign capital. To this day, as confirmed by the Moroccan Investment Development Agency, Morocco has signed BITs with 85 countries. [36] Morocco's BIT models describe the mode of investments and owners, their respective rights under the Fair and Equitable concept, and National Treatment and Most Favored Nation Treatment (MFN Clauses). Expropriation rights and guarantees for the resolution of conflicts between contracting parties and investors are included in these clauses. Consultation, dialogue, reconciliation, and arbitration are all options for resolving these conflicts.[37]

2.5 The investment relationship between China and Morocco

In recent years, the relationship between China and Morocco has become more and more remarkable, particularly because China, through 'the Belt and Road' (or the Modern Silk Road) initiative, has begun to extend its economic and cultural influence. The visit of King Mohammed VI to China in 2016 and the establishment of the Confucius Institutes can be clearly seen.[38] In 1958, the North African countries recognized China

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[36] International Investment Agreements Navigator, Available at: https://investmentpolicy.unctad.org/international-investment-agreements/countries/142/morocco [Accessed 10 February 2021].

[37] Morocco Model BIT, Available at: https://www.iisd.org/itn/en/2020/06/20/moroccos-new-model-bit-innovative-features-and-policy-considerations-hamed-el-kady-yvan-rwananga/ [Accessed 10 February 2021].

[38] Jeremy Luedi, "*Under the Radar: What's behind China's love affair with Morocco?*", Global Risk Insights, March 26, 2017,

and were one of the first African countries to do so. Their alliance is primarily focused on strategic trade and protection cooperation alliances, as well as mutually non-interventionist strategies, while Morocco is a significant non-NATO ally of the United States.[39] The following are some of the strong examples in which, in the sense of Morocco, the very abstract grand plan of present-day Chinese foreign policy falls down to earth. In addition to traditional phosphate exports to China, there is a significant influx of Chinese investment in a variety of sectors in Morocco. Chinese Foreign Direct Investment rose by 195% between 2011 and 2015 and by 93% from 2014 to 2015. Chinese firms are also active in large-scale infrastructure development, such as roads, highways and solar power projects in Morocco.

In addition, large ventures involving big sectors such as clean energies and telecoms are now beginning to invest in rising global power. Yet, tourism has the most drastic growth. That was driven by the Moroccan government's decision to abolish visa requirements for Chinese nationals remaining in the country for fewer than 90 days[40] and by supporting China's

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Available at: http://globalriskinsights.com/2017/03/chinaslove-affair-with-morocco/. [Accessed 12 February 2021].

[39] Ibid

[40] "Morocco Exempts Chinese Nationals From Visa Requirements", Morocco World News, May 11, 2016, Available at: https://www.moroccoworldnews.com/2016/05/186284/morocco-exempts-chinesenationals-from-visa-requirements/. [Accessed 13 February 2021].

main travel website. At the end of 2016, there has been a six-fold increase in the number of Chinese visitors. In fact, the abolition of visa requirements for Chinese nationals raises the number of Chinese visitors, but it also draws Chinese entrepreneurs who have a limited amount of money over a three-month visa-free stay to test their companies the cost of doing so is much smaller than before. In other words, as a result of the Moroccan government's more transparent policy to Chinese investment and tourists, there would be a proliferating presence of Chinese nationals.[41]

2.5.1 The fields invested by Chinese investors in Morocco

61 years ago, Morocco was one of the first African countries to recognize the People's Republic of China. And since then, both countries have had steady cooperation covering fields ranging from products, automotive industry, energy, railways and infrastructure, etc...

a) Derb Omar [42]

Derb Omar is a shopping area where twisting streets and alleys are spreading like a spider web in all directions from victory square. You can see hundreds of small shops along the two sides of these avenues, sometimes not more than 20 square meters. There are stores and stalls offering quality items of all sorts. Most of them are shops selling textile-related products, including fabrics, garments, home accessories such as curtains,

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[41] Jeremy Luedi, "*Under the Radar: What's behind China's love affair with Morocco?*", Global Risk Insights, March 26, 2017, Available at: http://globalriskinsights.com/2017/03/chinaslove-affair-with-morocco/. [Accessed 15 February 2021].

[42] Derb Omar is a mercantile district.

cushions, shoes, school bags, blankets, bed sheets. Lamps, art plates, kitchenware, tableware, candy and nuts, vegetables, and even books are sold by some.

b) Automotive industry

Mr. Mohamed Boussaid, Minister of Economy and Finance, Mr. Moulay Hafid Elalamy, Minister of Industry, Investment, Commerce, and Digital Economy, and Mr. Xu Zuo, Vice President of the CITIC Group Corporation and Chairman of CITIC Dicastal, signed an investment agreement that saw the establishment of CITIC Dicastal,[43] in Morocco in two phases, in Kenitra and Tangier. Thus, the group was developing its activities in Atlantic Free Zone in Kenitra; that's a true expression of Morocco's adhere to the Belt & Road Initiative (BRI). The 2 plants now have a combined capacity of 6 million alloy wheels for a total investment of $ 350 million USD and the creation of 1200 direct jobs and 10.000 indirect jobs.[44]

"Mr. Boussaid welcomed the dynamics of the automotive industry in Morocco, which positioned the Kingdom in the global automotive map as a platform for production and exportation. Mr. Boussaid stated that he was also pleased that

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[43] CITIC Dicastal is the world's largest Chinese producer and exporter of automotive aluminum wheels. The company also manufactures a full range of lightweight aluminum cast components for automotive power train, chassis and body systems under KSM Castings.

[44] See the official website of the Moroccan minister of economy, finance and administration reform, Available at: https://www.finances.gov.ma/en/Pages/detail-actualite.aspx?fiche=3588. [Accessed 19 February 2021].

a world leader in the construction of aluminum rims as CITIC Dicastal is located in Morocco, expressing his wish to make this automotive industry project « a great success."
"Mr. Xu Zuo reported that thanks to this project, Dicastal will expand its global presence and will contribute to the industrial development in Morocco and the Moroccan-Chinese economic trade."
In Europe, North America, and China, the CITIC Dicastal Group has 30 manufacturing units devoted to the production of light vehicle parts and aluminum rims. It provides parts to major automakers such as Renault, Nissan, PSA, GM, Ford, FCA, Toyota, Volkswagen, BMW, Audi, etc...

c) Energy and Railways

Morocco is collaborating with the Chinese company Haite on a $10 billion project to construct an industrial city that will house 300,000 people. Huawei, the Chinese telecom company, is also preparing to establish its new regional headquarters for French-speaking Africa in Casablanca, according to the China Power Construction Corporation, one of the country's largest hydro and thermal power project providers in terms of both revenue and overseas market share, By 2022, Morocco will have completed the world's largest solar farm by energy generation, the Noor complex solar plant. Morocco will also introduce Chinese high-speed railway technologies and co-build a 300-kilometer high-speed railway in the southwest of the region connecting Marrakech and Agadir.[45]

d) Infrastructure

[45] Ibid

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Morocco is collaborating with the Chinese company Haite on a $10 billion project to construct an industrial city that will house 300,000 people. The plan calls for a 2,500-acre Chinese-style industrial park on the Mediterranean coast, with the potential to extend to nearly 5,000 acres. The park will have both industrial sites and residential blocks, similar to those in China. The site will recruit 300,000 Moroccans, all of whom will live on the premises. The scheme is heavily influenced by China's growth policy. China's reform and opening in the 1980s started with the creation of "special economic zones," such as Shenzhen in southeastern China, which gradually opened the Chinese economy to foreign investment. Morocco aspires to take a similar path to growth. The unnamed project will be located near Tangiers, Morocco's fifth-largest city and one of the country's poorest.[46] Following Moroccan King Mohammed VI's visit to China in May 2016, during which the two countries signed a strategic partnership agreement and over 15 public-private partnership agreements, China has played a critical role in Morocco's infrastructure growth. These agreements bolstered the growth of relations that started following the 2014 Moroccan–Chinese Investment Forum.

e) Tourism

The Moroccan tourism engineering company organized a Chinese-Moroccan digital forum under the slogan "Chinese-Moroccan tourism investment" to discuss investment opportunities in the tourism field in the Kingdom, especially in the regions of southern Morocco. A large number of senior Chinese and Moroccan officials, as well as major players in the

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[46] Ibid

tourism industry and Chinese hotels, such as the China-Africa Development Fund, the (FOSUN) Group and the Beijing Yongji Investment Fund, as well as major brands in the Chinese tourism investment field participated. The same source pointed out that this digital forum, which was held in the form of a round table and interventions on tourism investment, during which Imad Barqad, Director General of the Moroccan Companies for Tourism Engineering, confirmed that Morocco is a platform for tourism investment par excellence for Chinese partners. According to the communication, organizing this event in the current circumstances in which the world is living in an unstable situation comes to confirm the position of Morocco's destination on the international stage as a platform for business and tourism and hotel investment. The China-Morocco Tourism Forum was held in Casablanca on February 1st, 2018. The World Tourism Cities Federation, the Moroccan National Office of Tourism, and the city of Casablanca collaborated to host the event. The forum was attended by over a hundred people, including buyers from a major Chinese travel agency, representatives from Africa's tourism department, and tourism industry experts. The forum's theme is "Belt and Road Tourism Cooperation between China and Morocco." The Belt and Road Initiative, Chinese-Africa Tourism Cooperation, and Moroccan Tourism Product Development and Marketing were among the issues discussed at the forum. During the forum, there was also a tourism trade show. Buyers from well-known Chinese travel agencies such as CITS, Tuniu, CCT, and Utour, as well as sellers from African travel agencies, attended the trade show and exchanged ideas on how to improve tourism items relevant to the "Belt and Road Initiative." [47]

2.5.2 The invested amount by Chinese investors in Morocco

According to the 6th Morocco-China finance, fiscal, and technical cooperation joint committee, which was co-chaired by Mr. Moulay Hafid Elalamy, Minister of Industry, Investment, Transport, and Digital Economy, and Mr. Qian Keming, Deputy Minister of Commerce of the People's Republic of China, on 8 February 2020 in Rabat. This dynamic is compounded by the Chinese operator's increasing interest in Morocco as they pursue infrastructure, energy and industry structuring ventures, such as the Cité Mohammed VI Tanger Tech project, Or the project launched by the Chinese group BYD, the world's largest manufacturer of electric cars, which, for the first time in Africa, is launching the integration of the electric transport market. Economic and investment ties are obviously intensifying with this new stage in the relationship between China and Morocco: China is Morocco's third trading partner, with a total trade volume of 39.5 million Moroccan Dir-ham[48] in 2019, reflecting an average annual growth of 18.2 percent since 2001. In 2016, Chinese foreign direct investment in Morocco hit 362.5 million Moroccan Dir-ham and amounted

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[47] China-Morocco Tourism Cooperation Forum Held in Casablanca to promote tourism cooperation between China and Morocco and boost the "Belt and Road Initiative", Available at: https://en.wtcf.org.cn/News/WTCFNews/wzNews/2018020214991.html [Accessed 21 February 2021].

[48] The Moroccan Dir-ham is the currency of the kingdom of Morocco and (1 MAD = 0.72 RMB). [Accessed 24 February 2021].

to 582.4 million Moroccan Dir-ham in the first six months of 2020, double the value achieved in 2019.[49] In this context, Chinese investments in Morocco increased by 143% in 2020; they amounted up to 855 million Morocco Dir-ham. This increase comes in the context of the construction of the city of Mohammed VI Tanga Tech, which will be allocated to receive Chinese investments in Morocco.

In order to give fresh energy to the great momentum and dynamism witnessed by the Morocco-China relationship and to translate the goals of the bilateral strategic partnership, the two parties agree on the need to take advantage of the current prospects for synergy on both sides and completely leverage the potential of their economies. In order to raise their added value, the Chinese side aims to enable its manufacturing companies to invest in Morocco in the automobile, garment and clothes, electrical products, transportation, aggro industry, mining and renewable energy sectors to improve the Kingdom's industrialization and economic development. In order to fund such investments, Chinese financial institutions would be called upon.

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[49] See the Moroccan investment and development agency, Available at: http://www.china-invests.net/ma/InvestMorocco/ [Accessed 27 February 2021].

CHAPTER THREE

DEFECTS RELATED TO THE RELEVANT PROVISIONS UNDER THE BIT BETWEEN CHINA AND MOROCCO

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Abstract

The aim of this chapter is to clarify and discuss the relevant provisions in the BIT between China and Morocco. This segment contains the preamble, which describes the purpose of the BIT as well as investment word and investors as natural or juridical persons and the word transfer of investment and entry into force duration and termination, with the most important of the defects which face it that must be avoided in the new agreement in the future. All of the above necessitates working out how to solve conflicts with the language of the provisions clauses of this BIT in order to change the wording of a new BIT between China and Morocco.

3.1 Purpose of the BIT between China and Morocco

Most BIT preambles state the contracting parties'[50] intentions and expectations when closing the transaction, as well as the BIT's aim, which is primarily to protect and attract foreign investment.[51] The following is mentioned in the preamble of the BIT between China and Morocco;

"The government of the People's Republic of China and the government of the Kingdom of Morocco hereinafter referred to as "Contracting Parties": Desirous of creating favorable

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[50] UNCTAD, *Bilateral Investment Treaties 1995–2006: Trends in Investment Rule making* (2007, Switzerland: United Nations Publication) 3. Available at: http://unctad.org/en/docs/iteiia20065_en.pdf [Accessed 1 March 2021].

51 Rudolf Dolzer & Christoph Schreuer, "*Principles of International Investment Law"* (2nd edn, Oxford University Press, 2008) 18.

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conditions for investments by investors from one of the two contracting parties in the territory of the other contracting party; Recognizing that the reciprocal encouragement, promotion and protection of such investments may promote business contacts of investors and contribute to the prosperity of the two States; Desirous of intensifying economic cooperation between the two states on the basis of equality and mutual benefits."[52]

The BIT between China and Morocco formed a foreign investment regime in the form of a treaty for the effective and equal protection of investment to remove investment risk factors for both countries. The target in the preamble is important because it acts as a tool for understanding BIT, which is found in article 31 of the Vienna Convention on the Law of Treaty (VCLT).[53] In the preamble to the BIT between China and Morocco, the author observes that almost all arbitral awards have been focused on commercial investment, with no respect for human rights, the environment, public health, social rights, and with no comprehension of international law or public law. The author assumes that the aim specified in the BIT's preamble is brief and limited to commercial investment. As a result, future BIT between China and Morocco will need

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[52] BIT between China and Morocco Available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/941/china---morocco-bit-1995- [Accessed 1 March 2021].

[53] Muthucumaraswamy Sonarajah, "*The International Law on Foreign Investment"* (3rd edn, Cambridge University Press 2010) 190.

to be renegotiated and updated to include a revised intent in the preamble. Human rights protection and the idea of long-term economic and social growth should be considered and integrated into investment agreements.[54] We recommend that the aim specified in the preamble of BIT be amended to include investment protection, human rights, the environment, public health, consumer protection, and social rights, as well as the principle of sustainable development. In comparative analyses of other International Investment Agreements (IIAs) or templates of IIAs, we discovered that human rights, the environment, public health, and labor rights are included in the preamble of new IIAs, for example:

"The Norway model BIT 2007 states are desiring to accomplish these goals in a manner compatible with the protection of health, safety, and the environment, as well as the promotion of globally recognized labor rights. Recognizing that the deepening of economic and business relations will serve to improve labor rights. Reaffirms their adherence to justice, the rule of law, civil dignity, and basic freedoms in line with their international commitments, including the United Nations Charter and the Universal Declaration of Human Rights."[55]

3.2 The term "investment"

[54] Virginie Barral, "*Sustainable Development in International Law : Nature and Operation of an Evaluative Legal Norm"*(2017, Volume 23, Issue 2, European Journal of International Law) 381.

[55] Norway model BIT 2007. Available at: http://investmentpolicyhub.unctad.org/Download/TreatyFile/2873 [Accessed 1 March 2021].

Article 1 of the BIT between China and Morocco for the purpose of this Agreement states:

"1. The term "Investment" designates any kind of asset and any direct or indirect contribution invested by investors of one of the contracting parties in the territory of the other party. Contracting in accordance with the laws and regulations of the latter in particular but not exclusively:

a) movable and immovable property as well as all other rights in rem such as mortgages and pledges, real securities, usufruct and similar rights;

b) stocks, securities and all other forms of participation in companies;

c) monetary claims and rights to all other services having an economic value;

d) copyrights, trademarks, patents, trade names and any other industrial property right, know-how and technical processes;

e) public law concessions conferred by law, including concessions for the exploration or exploitation of natural resources. No change in the legal form in which the assets and capital have been invested or reinvested shall affect their character as an investment within the meaning of this Agreement."[56]

In a non-exhaustive form, the BIT between China and Morocco has recently formed language to explain the nature of the concept of investment. Most BITs use a non-exhaustive asset-

[56] BIT between China and Morocco Available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/941/china---morocco-bit-1995-

based concept of investments, in which an investment is defined as "any kind of asset," with the specified categories acting only as examples of the kinds of assets protected. It uses the term "every asset" in the same way as the German model treaty and the BIT between China and Morocco, all of which use the phrase "every asset" in the same way.[57] For example, the BIT between Singapore and Germany (1973) can be used to understand the non-exhaustive form of the German model BIT:

"Article 1. For the purpose of this Treaty:

(1) The term "investment" shall comprise every kind of asset and more particularly though not exclusively:

(a) movable and immovable property as well as any other rights in rem, such as mortgage, lien, pledge, usufruct and similar rights;

(b) shares or other kinds of interest in companies,

(c) title to money or to any performance having an economic value;

(d) copyright, industrial property rights, technical processes, trade names, and goodwill; and

(e) such business concessions under public law, including concessions regarding the prospecting for, or the extraction or

[57] Mahnaz Malik, "*Definition of Investment in International Investment Agreements*". (2009, Manitoba, Canada: The International Institute for Sustainable Development) 3. Available at : http://www.iisd.org/pdf/2009/best_practices_bulletin_1.pdf [Accessed 2 March 2021].

winning of, natural resources, as give their holder a legal position of some duration."[58]

In the BIT between China and Morocco, the term "Investment" applies to the key elements that decide the extent of enforcement of rights and obligations under international investment treaties, as well as the ratio material in arbitral proceedings.[59] Since, as in the case of "*Saipem S.p.A.v. Bangladesh"*, an arbitral tribunal must decide whether the claimant's proclamation is an expenditure under the BIT's meaning or not. Article 1 (1) of the BIT defines an investment broadly as "any kind of property". On the surface, this broad meaning seems to be quite broad. Given the preceding finding that Saipem made an investment within the scope of Article 25 of the ICSID agreement, the court cannot see how the mechanism in question cannot be considered a form of property protection by BIT.[60] The case of "*Saipem S.p.A. v. Bangladesh"* illustrates how to view the term "every kind of property", as it is close to the interpretation of the phrase "any possession" in

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[58] BIT between Singapore and Germany 1973. Available at: http://investmentpolicyhub.unctad.org/Download/TreatyFile/1413 [Accessed 1 March 2021].

[59] OECD, "*Benchmark Definition of Foreign Direct Investment"* (4rd edn, OECD 2008) 17. Available at: https://www.oecd.org/daf/inv/investmentstatisticsandanalysis/40193734.pdf [Accessed 2 March 2021].

[60] Saipem S.p.A. v. Bangladesh. Decision on Jurisdiction. 21 March 2007 ICSID Case No. ARB/05/07 para.121-122. Available at: http://www.italaw.com/sites/default/files/case-documents/ita0733.pdf [Accessed 2 March 2021].

the China-Morocco bilateral investment treaty. Following the introductory term, the arbitral tribunal affirmed the form of the non-exhaustive list. Furthermore, it can be generalized by perception.

3.3 The term "investor"

The BIT between China and Morocco defines the term "Investor" in Article 1 as follows:

"- For the Kingdom of Morocco:

a) natural persons who have the nationality of the Kingdom of Morocco and making an investment in the territory of the People's Republic of China;

b) juridical persons established in accordance with the laws of the Kingdom of Morocco, having their head office in the territory of the Kingdom of Morocco and making an investment in the territory of the People's Republic of China.

- For the People's Republic of China

a) natural persons who have the nationality of the People's Republic of China and making an investment in the territory of the Kingdom of Morocco;

b) juridical persons established in accordance with the laws of the People's Republic of China, having their headquarters in the territory of the People's Republic of China and making an investment in the territory of the Kingdom of Morocco."[61]

[61] BIT between China and Morocco Available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/941/china---morocco-bit-1995- [Accessed 3 March 2021].

3.3.1 Natural person

The national law of the states whose ethnicity is asserted defines the BIT between China and Morocco. In general, investors are natural persons with Chinese or Moroccan citizenship, and residence or domicile is not required in this BIT. The ICSID agreement requires that citizenship be determined on two important dates: the date of approval of arbitration and the date of registration. However, ICSID does not cover dual citizenship when one of the nationalities is a contracting state. It refers to Article 25 (2) of the ICSID Agreement as follows:

"A citizen of another contracting state means; a) Any natural person who has the nationality of a contracting state other than the state party to the dispute on the date on which the parties have agreed to submit this dispute for conciliation or arbitration as well as on the date on which the request was registered in accordance with paragraph (3) of Article 28 or paragraph (3) of Article 36, but it does not include any person who on either date also held the nationality of the contracting state party to the dispute."[62]

In "*Soufraki v UAE,*" the complainant supposedly had a certificate of nationality, but the nationality had been lost as a result of the claimant's adoption of Canadian nationality. According to Italian law, the applicant lacked Italian nationality. Furthermore, it was ineffective as a true nationality link.[63] We

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[62] ICSID Convention. Available at :https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf [Accessed 2 March 2021].

[63] Soufraki v UAE. Award. 7 July 2004. ICSID Case No. ARB/02/7. para.55. Available at:

discovered that in the case of natural persons, the terminology of the definition of investor has problems with a natural person's dual nationality as an investor, where the investor has nationality of both the home state and the host state of this BIT, or the investor has successful nationality of a third party state. The aim of this BIT is to protect Chinese and Moroccan investors, but it does not have protection if the foreign investor is a natural person of dual nationality in both the home and host countries.

3.3.2 Juridical person

In relation to any contracting party, the term "juridical person" refers to any body incorporated or formed in conjunction with and recognized as a juridical individual by its statute. According to the statute, the wording of this term corresponds to the model of position of constitution and corporation. [64] Article 25 of ICSID Convention states that:

"(2) National of another contracting state" means: (b) any juridical person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person who had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed

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http://www.italaw.com/sites/default/files/case-documents/ita0799.pdf [Accessed 2 March 2021].

[64] OECD, "*Benchmark Definition of Foreign Direct Investment"* (4rd edn, OECD 2008) 18-20. Available at: https://www.oecd.org/daf/inv/investmentstatisticsandanalysis/40193734.pdf [Accessed 2 March 2021] .

should be treated as a national of another Contracting State for the purposes of this Convention."[65]

The case of "*Tokios Toklés v Ukraine"* is commonly quoted as a criterion for an investor as a juridical individual in BIT. The complainant was a Lithuanian company but 99 % of its shares were held by a Ukrainian shareholder. Under the Lithuania-Ukraine BIT, the applicant corporation registered as a Lithuanian investor. The Applicant is an investor of Lithuania if it is an item of actual legal life that was established on a secure basis in Lithuania's territories in accordance with its laws and regulations, according to the ordinary sense of the treaty term. There are no additional conditions in the treaty for an individual to register as a Lithuanian investor.[66] These investment treaties show that state parties may exempt from the arrangement entities controlled by third-country nationals or host country nationals. In comparison, there is no such "denial of benefits" clause in the Ukraine-Lithuania BIT for companies operated by third-country citizens or by nationals of the refusing group. The omission of such a clause is considered by us as a deliberate judgment by the contracting parties. Tribunals, in our opinion, do not place limitations on the reach of BITs that are not contained in the document. Many fewer limitations

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[65] ICSID Convention. Available at :https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf [Accessed 2 March 2021].

[66] Tokios Toklés v Ukraine. Decision on jurisdiction. 29 April 2004. ICSID Case No. ARB/02/18. para 28. Available at: http://www.italaw.com/sites/default/files/case-documents/ita0863.pdf [Accessed 3 March 2021].

that aren't visible in the history of negotiations. On the one hand, a foreign tribunal with established jurisdiction does not expand its jurisdiction beyond the definition's boundaries. On the other hand, one can do that and therefore is obliged to exercise the breadth of authority for which it is endowed.[67]

We believe that the wording of the concept of the juridical individual in the BIT between China and Morocco would be identical to the cases of "*Tokios Toklés v Ukraine*" and "*Saluka v Czech Republic.*" These two cases dealt with citizenship questions concerning a foreign organization and gave rise to the idea of treaty shopping. The key problem with treaty shopping and mail box firms could be applied to the China-Morocco BIT. It's likely that odd investments happen to abuse the BIT's principles, which are meant to cover only Chinese and Moroccan buyers. For example, the first odd transaction is made by an investor from a non-contracting group (for example, the USA) by an intermediary company founded in the home state (for example, China), which then creates a local subsidiary company in the home state (for example Morocco). The second uncommon investment is made by Moroccan investors by an intermediate company established in the contracting group (for example, China). The intermediate company has Chinese nationality but is owned by a Moroccan who creates a local subsidiary company in Morocco. The third uncommon

[67] Tokios Toklés v Ukraine. Decision on jurisdiction. 29 April 2004. ICSID Case No. ARB/02/18. para 36. Available at: http://www.italaw.com/sites/default/files/case-documents/ita0863.pdf [Accessed 3 March 2021].

investment includes a parent corporation in the home state (such as China), an incorporated intermediate holding company in a non-contracting state (such as the United States), and a USA intermediate holding company with a Chinese owner who formed a local subsidiary company in the host state (for example Morocco). However, under the BIT between China and Morocco, an American intermediate holding firm with a Chinese investor could be entitled to demand investment rights under the BIT between China and Morocco.

3.4 The term "territory"

The BIT between China and Morocco states that the term "territory" means territory over which the contracting party has sovereignty or jurisdiction. So, if a new BIT is signed between China and Morocco, we think it is prudent to enlarge the territorial information in order to increase transparency when implementing the BIT. When contracting parties have investments under the BIT, the word "territory" has a new definition. It must adhere to the BIT scope of operation for investments made in the jurisdiction of the other contracting party. This contracting party must be accepted or approved in compliance with the contracting party's laws and regulations in the jurisdiction where the investment is made. The legislation of the contracting party under which the investment is made, for example, would accept the investment in intellectual property rights know-how and products. This means that since the trademark X. was not created in Morocco and is not recognized under Moroccan intellectual property law, the holders of the trademark X. Since the arbitral tribunal loses authority, an applicant cannot bring a lawsuit under the BIT of arbitration.

3.5 The term "transfer of investment"

The BIT between China and Morocco provides in Article 6 that: *"1. Each contracting party, in the territory of which investments have been made by investors of the other contracting party, guarantees, in accordance with the exchange regulations in force, to such investors the free transfer into the convertible currency of liquid assets net related to these investments and in particular:*

a / a capital or an additional amount aimed at maintaining or increasing the investment;

b / profits, dividends, interest, royalties and other current income;

c / amounts necessary for the repayment of loans relating to the investment;

d / proceeds from a total or partial liquidation of the investment;

e / compensation due in the application of Articles 4 and 5;

f / salaries and other remuneration due to citizens of a contracting party who have been authorized to work in the territory of the other contracting party by way of investment.

2. The transfers referred to in paragraph 1 shall be made at the exchange rate in force on the date of the transfer.

3. The guarantees provided for in this article are at least equal to those granted to investors from the most favored nation who find themselves in similar situations."[68]

[68] BIT between China and Morocco Available at: https://investmentpolicy.unctad.org/international-investment-

The liberal movement of capital is the basis for the article on the transfer of investment. Furthermore, the host state must ensure it. Nonetheless, in light of Morocco's financial difficulties in 2008,[69] the new BIT between China and Morocco should include some preventative measures. It means that transfer would still be dependent on the free flow of capital, but a contracting party could prohibit a transfer by applying its laws in an equal, nondiscriminatory, and good faith manner to bankruptcy, insolvency, or the protection of creditors rights, issuing, selling, or dealing in securities, and in the case of criminal or penal offenses. In particular, terrorism in the event of money laundering, investors must disclose any movements of a currency or other monetary instruments.

3.6 Entry into force, duration and termination

Article 12 of the BIT between China and Morocco provided that:

"1. This Agreement shall enter into force 30 days from the date of receipt of the last of the two notifications relating to the internal completion by the two contracting parties of the legislative procedures required in their respective countries. It will remain in force for a period of ten years. Unless one of the contracting parties denounces it at least six months before the

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agreements/treaties/bilateral-investment-treaties/941/china---morocco-bit-1995- [Accessed 3 March 2021].

[69] See the essay about, "*The Crisis In Morocco Effects Of Economic Downturn Economics Essay",* published in 1 Jan 2015, Available at: https://www.ukessays.com/essays/economics/the-crisis-in-morocco-effects-of-economic-downturn-economics-essay.php [Accessed 4 March 2021].

expiry of its period of validity, it is each time tacitly renewed for a new period of ten years, each contracting party reserving the right to denounce it by written notification at least six months before the expiry date of the current validity period.
2. Investments made prior to the expiration date of this Agreement shall remain subject to it for a period of ten years from the date of said expiration."[70]

This article explains how the BIT's entry into force is contingent on China's and Morocco's constitutional formalities, especially ratification and approval by parliament. Renegotiation between the governments of both states and the termination of the old BIT between China and Morocco are needed for the establishment of a new BIT between the two countries. However, in practice, the issue of ambiguous terminology and barriers to implementation in this BIT has not been discussed or renegotiated. As a result, in accordance with Article 12, we propose that all states renegotiate it in order to resolve the current BIT problems and update the resulting BIT. The BIT between China and Morocco shall specify the duration of its entry into effect duration and termination clauses. The BIT, for example, is set to be in effect for ten years. Following that, it will remain in effect for a total of twelve months from the day either contracting party notifies the other in writing that it is terminating this BIT, as well as for investments made previous to the termination of this BIT. The terms of this BIT

[70] BIT between China and Morocco Available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/941/china---morocco-bit-1995- [Accessed 3 March 2021].

will remain in force for a total of ten years until it is terminated. We advise that putting the period into effect would prompt both parties to renegotiate whether both parties are interested, or it will result in the agreement being immediately broken if no party is interested.

CHAPTER FOUR

DILEMMA IN THE INVESTMENT PROTECTION UNDER BIT BETWEEN CHINA AND MOROCCO

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Abstract

According to the BIT between China and Morocco, there must be protection for the property of investors from illegal confiscation or nationalization. Note that confiscation of foreign property of investors is a governmental intervention of the host country.[71] The investments under the BIT between China and Morocco can be company between private owners as individuals, such as the formation of companies for trading, the rental of land or facilities, and so on in private relationships governed by private law. In the BIT between China and Morocco, there is a provision about the protection of investments from expropriation and compensation in Article 4 which states that:

"1. Measures of nationalization, expropriation or any other measure having the same effect or the same character (hereinafter referred to as expropriation), which may be taken by the authorities of one of the Contracting Parties against investments made by investors of the other Contracting Party must meet the following conditions:

(a) they are taken in the public interest;

(b) they are subject to legal proceedings;

(c) they are not discriminatory;

(d) they give rise to the payment of compensation.

2. The compensation referred to in paragraph 1 (d) of this article shall correspond to the market value of the investment

71 Muthucumaraswamy Sonarajah, "*The International Law on Foreign Investment"* (3rd edn, Cambridge University Press 2010) 365-367.

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concerned on the day before the day on which the measures are taken or made public.

3. Arrangements for the fixing and payment of compensation shall be made promptly and without undue delay. Compensation will be paid to investors in convertible and freely transferable currency."[72]

Therefore, we will examine protection against expropriation under the BIT between China and Morocco in this chapter, drawing on academic literature, arbitration awards, and comparisons with other International Investment Agreements (IIAs). The aim of all of this is to adjust and change the provisions on investment protection from expropriation.

4.1 Property Rights Scope

Article 1 of the BIT between China and Morocco states:

"For the purpose of this Agreement:

1. The term Investment designates every asset and any direct or indirect contribution invested by investors of one of the contracting parties in the territory of the other party. Contracting in accordance with the laws and regulations of the latter, in particular, but not exclusively:

a) movable and immovable property as well as all other rights in rem such as mortgages and pledges, real securities, usufruct and similar rights;

b) stocks, securities and all other forms of participation in companies;

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[72] BIT between China and Morocco Available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/941/china---morocco-bit-1995- [Accessed 3 March 2021].

c) monetary claims and rights to all other services having an economic value;
d) copyrights, trademarks, patents, trade names and any other industrial property right, know-how and technical processes;
e) public law concessions conferred by law, including concessions for the exploration or exploitation of natural resources. No change in the legal form in which the assets and capital have been invested or reinvested shall affect their character as an investment within the meaning of this Agreement."[73]

As we've seen in this article, foreign investors' properties include not only physical property but also intangible property, economic assets, and intellectual properties. Since this article uses the phrase "every asset invested," which includes both in rem and contractual property, contractual rights can also be expropriated.[74] In the case of *Polish Upper Silesia* "Chorzów Factory," Germany and Poland had a bipartite arrangement during World War I, in which Germany sold Upper Silesia to Poland and in which Poland did not surrender German property. The court ruled that the contractual right of a German company (Bayerische) to control and run a nitrate plant in the (Chorzów)

[73] BIT between China and Morocco Available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/941/china---morocco-bit-1995- [Accessed 3 March 2021].

[74] Peter Muchlinski, Federico Ortino, and Christoph Schreuer. "*The Oxford Handbook of International Investment Law"* (Oxford University Press, 2008) 410.

Factory operated by another German company (Oberschlesische) was expropriated. The court said:

"Moreover, it is clear that the Bayerische's rights to the exploitation of the factory and to the remuneration set by the contract for the maintenance of the exploitation, as well as the use of its trademarks, licenses, experiments, and other intellectual property, have been specifically prejudiced by Poland's taking over of the factory."

The restriction found in the last sentence of Article 6 of the Geneva Convention refers to these privileges relating to the (Chorzów) factory since they were concentrated in that factory. Poland should have respect the Bayerische's interests under its contracts with the Oberschlesische and the Treuhand, and its approach toward the Bayerische like its attitude toward the Oberschlesische has been in violation of Article 6 and corresponding articles of the Geneva Convention.[75]

In the case "*SPP v Egypt"* the arbitral tribunal said:

"Expropriation was not only right in rem but also covered statutory interests also known as the Pyramids Case. Neither should the tribunal consider the claim that the term expropriation applies exclusively to the right in rem. The Claimant's valuable rights and interests A were taken away by the Respondent's termination of the project. The privileges that SPP (ME), as a shareholder of ETDC, inherited from

[75] Case concerning certain German interests in Polish Upper Silesia (German v Poland). Judgment, 25 May 1926, PCIJ Ser A, No 7, p 44. Available at: http://www.icjcij.org/pcij/serie_A/A_07/17_Interets_allemands_en_Haute_Silesie_polonaise_Fond_Arret.pdf [Accessed 11 March 2021].

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EGOTH'S right of utilization, which had been irrevocably passed to ETDC by the State were expropriated not the property or the right of usufruct; those rights and interests were explicitly statutory in existence instead of in kind. However, there is substantial support for the proposition that contracted rights are subject to international law enforcement and that the taking of those rights entails a repayment duty."[76]

The expropriation of contractual property differs from the violation of contract in that expropriation is a state sovereignty act used to execute a contract. In the case of "*Waste Management v Mexico,"* for example, the arbitral tribunal found that, "In the Tribunal's judgment a company is not expropriated because its loans are not met, or any contractual duties against it are violated. In this scenario, there was no outright denial of the transaction",... [77] "The mere non-performance of a contractual obligation is not to be equated with taking of property, nor is it tantamount to expropriation (unless followed by other elements). Nationalization and expropriation are essentially sovereign activities, while any private entity may refuse to fulfill its contracts".[78]

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[76] SPP v Egypt. Award, 20 May 1992, ICSID CASE No, ARB/84/3, para, 164. Available at: http://www.italaw.com/sites/default/files/case-documents/italaw6314_0.pdf [Accessed 11 March 2021].

[77] Waste Management v Mexico. Award. 30 April 2004. ICSID Case N. ARB(AF)/00/3. para.160. Available at: http://www.italaw.com/sites/default/files/case-documents/ita0900.pdf [Accessed 11 March 2021].

[78] Ibid, para 174.

4.2 The meaning of expropriation

Expropriation is not specified in the BIT between China and Morocco. However, in order to improve clarity, we'd like to define the three types of foreign property acquisition;

The first is confiscation, which Sonarajah defines as;

"The arbitrary taking of land for personal gain by the law or governing clique of the state." This was popular in dictatorial and oligarchy-ruled nations.[79]

The second is nationalization, which UNCTAD defines as;

"The massive or large-scale taking of private property in all economic sectors or on an industry or sector-specific basis. Total nationalization of all economic sectors is usually driven by policy considerations; the measures are intended to achieve complete state control of the economy and include the acquisition of all privately controlled means of production. During the post-World War II era, many former colonies saw nationalizations as a significant part of their decolonization process. When a government attempts to reorganize a single sector by buying over the private companies and establishing a State monopoly, it is known as large-scale nationalization industry. In these instances, the properties recovered are returned to the public domain."[80]

The third is expropriation, which UNCTAD refers to as;

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[79] Muthucumaraswamy Sonarajah, "*The International Law on Foreign Investment"* (3rd edn, Cambridge University Press 2010) 364.

[80] UNCTAD, *Bilateral Investment Treaties 1995–2006: Trends in Investment Rule making* (2007, Switzerland: United Nations Publication) 5.

"The seizures of private property or companies in which property rights remain with the state or are transferred by the state to other economic operators. Expropriation processes may consist of the state's large scale appropriation of land, for redistribution, or specific seizures where the target is a specific foreign company (for example, a company that dominates a market or industry) or a specific piece of land (for example, to build a highway)."[81]

4.2.1 The effect of state intervention or the theory of the single effect

When the government takes steps or takes actions that threaten an investor's right to enjoy their property, this is referred to as state intrusion. It was dubbed "the single impact doctrine" by Dolzer.[82]

In the case "*Metalclad v Mexico*" the arbitral tribunal stated:

"Consequently, expropriation under the North American Free Trade Agreement (NAFTA) includes not only an overt intentional and recognized seizure of property, such as a total seizure or formal or compulsory transfer of property in favor of the host country, but also an accidental interference with the use of the property that results in depriving the owner in whole or in part of the use of the property or of the reasonably

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[81] UNCTAD, *Bilateral Investment Treaties 1995–2006: Trends in Investment Rule making* (2007, Switzerland: United Nations Publication) 5-6.

[82] Dolzer Rudolf, "*Indirect expropriation: New Development ?"*(2002, Volume 11, Issues 1, NYU Environmental Law Journal) 79.

expected economic benefit thereof even if this is not necessarily in the interest of the host country."[83]

The arbitral tribunal in "*SD Myers v Canada"* acknowledged the impact of government actions on investor economic interests. According to the arbitral tribunal;

"Expropriations tend to involve the deprivation of ownership rights; regulations on less interference. The distinction between expropriation and regulation screens out most potential cases of complaints concerning economic intervention by a state and reduces the risk that governments will be subject to claims as they go about their business of managing public affairs". [84] *"An expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights although it may be that, in some contexts and circumstances, it would be appropriate to view a deprivation as amounting to an expropriation, even if it were partial or temporary."*[85]

In practice, the degree of intervention that leads to indirect expropriation must be a substantial radical violation of the owner's investor rights, not ephemeral or build barriers to

[83] Metalclad v Mexico. Award 30 August 2000. ICSID. CASE No. ARB(AF)/97/1. para103. Available at:http://www.italaw.com/sites/default/files/case-documents/ita0510.pdf [Accessed 13 March 2021].

[84] SD Myers v Canada. Partial Award. 13 November 2000 UCITRAL. para 282. Available at: http://www.italaw.com/sites/default/files/case-documents/ita0747.pdf [Accessed 13 March 2021].

[85] Ibid para 283

investment,[86] or the host country may have serious economic impacts on the investor's successful influence over the use and activities of the investor, and the investor may incur a major loss of control or value. There could be damages if the plaintiffs are unable to demonstrate the measure's degree of intervention.

4.2.2 An structured procedure under the rule of law

The equal process of decision-making in the legislation concerning regulations and expropriation is needed for defense against the dangers of favoritism or disparity in investment ties under the rule of law. In the case of "*Feldman v. Mexico,*" the arbitral tribunal said on the quality of the expropriation of law based government measures that:

"The Court notes that the ways in which government authorities can compel a company out of business, or substantially reduce the economic impact. The benefits of its business are various. In the past, expropriation taxes, denial of access to necessary infrastructure or raw materials and imposition of unreasonable regulatory regimes were considered, among other things, expropriation procedures. At the same time, governments should be free to act in the broader public interest through environmental protection, new or revised tax regulations granting or withdrawing government subsidies, cuts or increases in tariff levels, zoning restrictions and the like. Reasonable government regulation of this kind cannot be achieved if any adversely affected business may seek

[86] Anne K Hoffmann, "*Indirect Expropriation*", August Reinisch (ed), "*Standard of Investment Protection*" (Oxford University Press 2008) 158-159.

compensation, and it is safe to say that customary international law recognizes this."[87]

4.2.3 Discrimination

The discrimination in investment relations will result in indirect expropriation if the measure is only available to international investors. As shown by the following case law;

In the case "*Methalnex v. USA"*, the arbitral tribunal decided:

"In the tribunal's view, Methalnex is correct that an intentionally discriminatory regulation against a foreign investor fulfills a key requirement for establishing expropriation. But as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and which affects, inter alias a foreign investor or investment, is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation."[88]

In the case "*Eureko v Poland"* it was decided that:

"Furthermore, the measures taken by the Respondent (RoP) in refusing to conduct the Initial Public Offering (IPO) are clearly

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[87] Feldman v Mexico, Award 16 December. 2002. ICSID CASE No. ARB(AF)/99/1. para.103. Available at: http://www.italaw.com/sites/default/files/case-documents/ita0319.pdf [Accessed 13 March 2021].

[88] Methalnex v USA, Final award of the Tribunal on Jurisdiction and Merits. 3 August 2005. Part IV. Chapter D. para.7. Available at: http://www.italaw.com/sites/default/files/case-documents/ita0529.pdf [Accessed 14 March 2021].

discriminatory. As the Tribunal noted earlier, these measures have been proclaimed by successive Ministers of the State Treasury as being pursued in order to keep Powszechny Zaklad Ubezpieczen S.A. (PZU) under majority Polish control and to exclude foreign control such as that of Eureko. That discriminatory conduct by the Polish Government is a blunt violation of the expectations of the Parties in concluding the SPA and the First Addendum."[89]

4.2.4 Expropriation from creeping

It's likely that both China and Morocco will discuss conflicts concerning the creeping expropriation of their investment ties. As a result, creeping expropriation may be spoken of as an indirect expropriation for a deeper understanding. According to UNCTAD, creeping expropriation can be described as the incremental encroachment on one or more of a foreign investor's ownership rights that destroys (or nearly destroys) the value of his or her investment or deprives him or her of power over the investment. A collection of independent State actions, normally passed over a short period of time are then considered constituent parts of the investor or investment's consolidated treatment".[90] In the case "*Siemens v Argentina,"*

[89] Eureko v Poland, Partial Award. 19 August 2005. UNCITRAL para 242. Available at: http://www.italaw.com/sites/default/files/case-documents/ita0308_0.pdf [Accessed 14 March 2021].

[90] UNCTAD, *Bilateral Investment Treaties 1995–2006: Trends in Investment Rule making*. Switzerland: United Nations Publication, 2007.p 11. Available at:

when the host state had taken a series of measures which could be regarded as creeping expropriation, the arbitral tribunal held that:

"By definition, creeping expropriation refers to a process, to steps that eventually have the effect of an expropriation. If the process stops before it reaches that point, then expropriation would not occur. This does not necessarily mean that no adverse effects would have occurred. Obviously, each step must have an adverse effect but by itself may not be significant or considered an illegal act. The last step in a creeping expropriation that tilts the balance is similar to the straw that breaks the camel's back. The preceding straws may not have had a perceptible effect but are part of the process that led to the break."[91]

4.3 The weakness of the provision on expropriation under the BIT

We affirm that the expropriation clause in the BIT between China and Morocco is out of date and creates an imbalance between foreign investors' interests and the host state's jurisdiction over natural resources and public services.

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http://unctad.org/en/docs/iteiia20065_en.pdf [Accessed 13 March 2021].

[91] Siemens A.G. v Argentina, Award 6 February 2007. ICSID CASE No. ARB/02/8. para.291. Available at: http://www.italaw.com/documents/Siemens-Argentina-Award.pdf [Accessed 14 March 2021].

4.3.1 Global standard of expropriation

The expropriation clause in the BIT between China and Morocco is in line with international standards. We assume that the expropriation text, which is based on international customary law, is a global investment standard and that most new IIAs contain expropriation clauses that reflect international customary law. The following examples show a recent trend in expropriation for reference purposes:

Free Trade Agreement between the European Union and the Socialist Republic of Vietnam (EVFTA). Article 16 Expropriation:

"1. Neither Party shall directly or indirectly nationalize, expropriate or subject to measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as expropriation) the investments of investors of the other Party except:

(a) for a public purpose;

(b) under due process of law;

(c) on a non-discriminatory basis; and

(d) against payment of prompt, adequate and effective compensation.

For greater certainty, this paragraph shall be interpreted in accordance with Annex X on expropriation."[92]

EU-Singapore Free Trade Agreement, Authentic text as of May 2015 (EU-Singapore FTA),

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[92] Free Trade Agreement Between the European Union and the Socialist Republic of Vietnam (EVFTA). Available at: http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154210.pdf [Accessed 15 March 2021].

Article 9.6, Expropriation:

"1. Neither Party shall directly or indirectly nationalize, expropriate or subject to measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as expropriation) the investments of investors of the other Party except:

(a) for a public purpose;

(b) under due process of law;

(c) on a non-discriminatory basis; and

(d) against payment of prompt, adequate and effective compensation in accordance with paragraph 2."[93]

The examples of EU-Singapore FTA, EVFTA indicate the world standard for expropriation in accordance with customary international law. The BIT between China and Morocco must include similar provisions. On the one hand, most case law on expropriation shows how to view the definition of indirect expropriation after reviewing it. On the other hand, the trend in arbitral tribunal interpretations is positive extends the concept of indirect expropriation to be unlimited.

4.3.2 Scope of expropriation

The BIT between China and Morocco has the same problem in terms of the extent of indirect expropriation, and the provision is still ambiguous because the text of the expropriation provision leaves a wide void, which would create difficulties for China and Morocco because this provision neither specifies

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[93] EU-Singapore Free Trade Agreement, Authentic text as of May 2015 (EU-Singapore FTA). Available at: http://trade.ec.europa.eu/doclib/docs/2014/october/tradoc_152844.pdf [Accessed 15 March 2021].

nor restricts the scope of direct expropriation and also does not limit the scope of indirect expropriation. Direct expropriation for clarity's sake as seen in the following examples:

Canada-European Union Comprehensive Economic and Trade Agreement (CETA) "ANNEX 8-A" EXPROPRIATION. The Parties confirm their shared understanding that:

"1. Expropriation may be direct or indirect:

(a) direct expropriation occurs when an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure; and

(b) indirect expropriation occurs if a measure or series of measures of a Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.

2. The determination of whether a measure or series of measures of a Party, in a specific fact situation, constitutes an indirect expropriation requires a case by case, fact-based inquiry that takes into consideration, among other factors:

(a) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;

(b) the duration of the measure or series of measures of a Party;

(c) the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations; and

(d) the character of the measure or series of measures, notably their object, context and intent.

3. For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations."[94]

4.3.3 The protection of human rights, environment and social rights

We believe that if the new BIT between China and Morocco can be implemented successfully, the extent of direct and indirect expropriation, as well as expropriation exceptions, the theory of police force may be applied to this situation using article 31(3)(c) of the Vienna Convention on the Law of Treaties (1969) (VCLT), combining human rights, environmental protection and social rights, the parties interactions are governed by the application of the related laws of international law.[95]

The below are the relevant agreement of international law:

Universal Declaration of Human Rights of United Nations (UDHR) in December 1948 in the preamble states:

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[94] Canada-European Union Comprehensive Economic and Trade Agreement (CETA). Available at: https://www.neweurope.eu/article/full-ceta-text-annexes-2255-pages/ [Accessed 15 March 2021].

[95] Bruno Simma, "*Foreign Investment Arbitration : a Place For Human Rights ?"* (2011, Volume 60, Issue 3, International and Comparative Law Quarterly) 584-591.

"Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy the freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people…"[96]

And also in Article 25 (1) states:

"Everyone has the right to a standard of living adequate for the health and well being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to protection in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in the circumstances beyond his control."[97]

And in Article 27 that states:

"(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from

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[96] Universal Declaration of Human Rights (UDHR), United Nations, Available at: http://www.un.org/en/universal-declaration-human-rights/ [Accessed 15 March 2021].

[97] Ibid

any scientific, literary or artistic production of which he is the author."[98]

Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, stated that:

"Transnational corporations and other business enterprises shall respect economic, social and cultural rights as well as civil and political rights and contribute to their realization, in particular the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience, and religion and freedom of opinion and expression, and shall refrain from actions which obstruct or impede the realization of those rights."[99]

Regarding the interpretation of the relevant rules of international law by resorting to Article 31 (3) (c) of the Penal Law Convention, Bruno Simma mentioned that the arbitration panel could take human rights or protection of the international environment and social rights into account when interpreting an investment treaty only if the norms of human rights, international environmental protection, and social rights are established in a particular relationship: The theory of evolutionary or dynamic view, as well as the interpretive

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[98] Ibid

[99] Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN. 4/Sub. 2/2003/ 12/Rev. 2(2003). Available at: http://www1.umn.edu/humanrts/links/norms-Aug2003.html [Accessed 16 March 2021].

presumption that treaties are meant to have consequences that are compatible with modern international law. It will be an economic and social right that will feature prominently in foreign investment disputes and will be brought up as defenses by host countries accused of violating bilateral investment agreements.[100]

4.3.4 Expropriation and intellectual property

The BIT between China and Morocco does not mention the relationship between expropriation and intellectual property, and this gap may cause issues. Since the world economy is becoming more globalized and integrated, businesses today have the opportunity to expand internationally. Their commercial interests are distributed globally as multinational corporations (MNEs), necessitating the application of their IPRs on a global scale, whether in the form of copyrights, trademarks, geographical indications, manufacturing designs, patents, or trade secrets. The issue is serious: according to the Organization for Economic Co-operation and Development (OECD), foreign trade in counterfeit and pirated products totaled approximately US$ 200 billion in 2005, a sum greater than the national GDPs of approximately 150 economies.[101] IPR fraud has far-reaching consequences that go beyond mere

[100]Malaku Geboy Desta, "*GATT and WTO law and international standard : An example of soft law instruments hardening up?",* Andrea K B, August Reinisch (ed), "*International Investment Law and Soft Law"* (Cheltwnham, UK, Northamton, MA, USA: Edward Elgar 2012) 186.

[101] OECD, *The Economic Impact of Counterfeiting and Piracy* (Paris, 2008) 15.

economic losses for businesses, affecting people's health, protection, and employment.[102] In light of the issue's importance, diplomatic attempts to combat IPR breaches around the world seem to be woefully inadequate. Surprisingly, BIT between China and Morocco, as the primary legal tool for protecting investors' investments against expropriation and unequal treatment in a host country, have seen no use in IP matters, despite the fact that IP falls beyond the reach of the treaty. The issues that are most likely to arise in relation to IPR protection in a host country, and which may be of the greatest concern to investors. The question is what protection does the BIT between China and Morocco provide in standard cases of IPR breach in a host country, such as compulsory licenses placed on investors and regulatory performance conditions concerning a company's IPRs, and IPR piracy, which involves patent and copyright violations in a specific country to the detriment of investors' money deposited there. Hence, we suggest that the new bilateral investment agreement between China and Morocco should include provisions regarding the rights and obligations of the parties under the TRIPS Agreement. China and Morocco, both parties, must recognize the importance of the Doha Declaration on the TRIPS Agreement and Public Health (the Doha Declaration), adopted by the Ministerial Conference of the World Trade Organization on November 14, 2001. When interpreting and implementing the rights and obligations stipulated in this chapter, parties shall

[102] James E. Mendenhall, *"Fair Treatment of Intellectual Property Rights Under Bilateral Investment Treaties,"* (2009, Volume 6, Issue 2, Transnational Dispute Management) 1.

ensure consistency with this declaration. Therefore, for greater certainty, the abolition restriction or creation of intellectual property rights to the extent that these measures are compatible with the TRIPS Agreement does not constitute forfeiture. Furthermore, the determination that these measures are inconsistent with the TRIPS Agreement does not constitute expropriation.[103]

4.3.5 State necessity and expropriation in economic crisis

In the event of an economic crisis, the host country must take the necessary measures to solve this problem based on the interests of the host country in circumstances of imminent and grave danger. However, the BIT between China and Morocco does not contain provisions about the necessity of the state or the economic crisis and the confiscation of property, but we suggest in the BIT between China and Morocco must be a clearer definition of the scope of expropriation as in the CETA model or the European Union Free Trade Agreement with Singapore and EVFTA. It will improve the placement of arbitration panels for interpretation.

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[103] Article 8.12(6) Canada-European Union Comprehensive Economic and Trade Agreement (CETA). Available at: https://www.neweurope.eu/article/full-ceta-text-annexes-2255-pages/ [Accessed 17 March 2021]

CHAPTER FIVE

DISPUTES SETTLEMENT MECHANISM UNDER THE BIT BETWEEN CHINA AND MOROCCO

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Abstract

Investors cannot sue foreign countries individually under traditional international law for representations and restitution. It depends on the circumstances under which his home country provides diplomatic protection. Hence, most IIAs around the world should provide arrangements for resolving state-to-state and state-to-investor conflicts. The BIT conflict resolution methods between China and Morocco, such as conciliation and arbitration, will be examined in this chapter in order to change the BIT dispute settlement laws between China and Morocco. The framework of this chapter is focused on resolving state to state and state to investor conflicts.

5.1 Settlement of dispute between states

Article 9 of the China-Morocco (BIT), which deals with the resolution of disputes between the contracting parties, states:

"1. Any dispute between the contracting parties concerning the interpretation or application of this agreement shall be settled as far as possible between the two contracting parties through the diplomatic channel.

2. Failing this, the dispute shall be submitted to a mixed commission composed of representatives of the Parties; The latter shall meet without delay at the request of the most diligent party.

3. If the mixed commission cannot settle the dispute within six months of the commencement of negotiations, it shall be submitted to an arbitration tribunal at the request of one of the contracting parties.

4. The said tribunal shall be constituted as follows: Each contracting party appoints an arbitrator, and the two arbitrators together appoint a third arbitrator, who will be a national of a third State, as President of the tribunal. The

arbitrators must be appointed within three months, the president within five months from the date on which one of the contracting parties notifies the other contracting party of its intention to submit the dispute to an arbitration tribunal.
5. If the time limits set in paragraph (4) above have not been observed, either contracting party shall invite the President of the International Court of Justice to make the necessary appointments. If the President of the ICJ has the nationality of one of the contracting parties, or if he is unable to exercise this function, the Vice-President of the ICJ will be invited to make the necessary appointments. If the Vice-President has the nationality of one of the contracting parties or if he is unable to exercise his mandate, the oldest member of the ICJ who is not a national of any of the contracting parties will be invited to make the said appointments.
6. The arbitral tribunal shall rule on the basis of the provisions of this Agreement and the rules and principles of international law. The court's decision will be adopted by a majority vote. It will be final and binding on the contracting parties."[104]

The conflict resolution arrangement between China and Morocco is settled by mediation or arbitration before being referred to an arbitral tribunal where issues occur that need explanation or implementation. The first step in settling a conflict is for both sides to partake in formal mediation or arbitration, after which the dispute will be presented to an

[104] BIT between China and Morocco Available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/941/china---morocco-bit-1995- [Accessed 18 March 2021].

arbitral tribunal for the second step of further in-depth consultation and negotiation. For both sides, consultation or negotiation is a good and realistic approach that takes no time. Since it will show the nations' gaps and have an effect on investment ties, the arbitral tribunal must refrain from making decisions. However, in order to settle disputes, the arbitral tribunal can only make rulings as a last resort.

5.2 Settlement of disputes between state and investors

Dispute resolution laws are perhaps the most relevant rules because they are of concern to international investors since they guarantee that foreign direct investors' interests are legally protected. Local courts which apply domestic laws and regulations have always been the principal venue for resolving investment disputes[105] unless an overriding international law agreement exists.[106] When the consultation and negotiation[107]

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[105] See the preamble of the ICSID Convention (Washington Convention).

[106] Karen B Brown & Dvid V Snyder, General Reports of the XVIII Congress of International Academy of Comparative Law (2000) 497. Available at: https://www.springer.com/gp/book/9789400723535 [Accessed 19 March 2021]

[107] Before taking a dispute to arbitration, certain foreign investment treaties encourage investors to consult/negotiate with the host state. Provisions for dialogue and negotiation, For example, see NAFTA Article 1118; the Singapore-Japan New-Age Economic Partnership Agreement of 2002; the Mexico-Japan Economic Partnership Agreement of 2004; the Mexico, El Salvador, Guatemala, and Honduras Free Trade Agreement of 2000; the Colonia Protocol on Reciprocal Promotion and

processes break down, the new investment arrangements allow for access to agreed-upon third-party dispute resolution procedures such as consultation, negotiation, and arbitration.[108] According to Article 5 (1) of the World Bank Guidelines, investment disputes are normally settled by mediation, local courts, or other agreed-upon procedures, such as conciliation and neutral arbitration.[109] Arbitration is widely acknowledged as the best means of resolving disputes in investment protection instruments. Global investors may use arbitration to avoid going to the host country's local courts or seeking diplomatic immunity for their home country.[110] Arbitration has the benefit of transferring the case to a traditionally neutral and unbiased international legal tribunal, shielding investors from government influence and defending them from any unfair

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Protection of Investments within MERCOSUR of 1994; and the EU-Mexico Partnership Agreement.

[108] Andrew T Guzman & Alan O Sykes, "*Research Handbook in International Economic Law"* (Publishing, number 3327 Stanford University 2007) 227.

[109] Article 5 (1) of the WB Guidelines affirms that independent arbitration includes an ad hoc or institutional arbitration agreed upon in writing by the parties to the dispute.

[110] Nathalie Bernasconi Osterwalder & Diana Rosert, *"Investment Treaty Arbitration: Opportunities to Reform Arbitral Rules and Processes"* (2014 The International Institute for Sustainable Development) 11. Available at: https://www.iisd.org/system/files/publications/investment_treaty_arbitration.pdf [Accessed 19 March 2021].

actions carried out by the home party to the detriment of the investors.[111]

5.2.1 Dispute resolution provisions between state and investors under the BIT

Article 10 of the BIT between China and Morocco about the settlement of investment disputes provides that:

"1. Any dispute relating to investments between a contracting party and an investor of the other contracting party shall be settled as amicably as possible by consultations and negotiations between the parties to the dispute.

2. In the absence of an amicable settlement by direct arrangement between the parties to the dispute within six months from the date of its written notification, the dispute is subject to the choice of the investor:

a- Either to the competent court of the contracting party in whose territory the investment was made;

b- either for arbitration at the International Center for the Settlement of Investment Disputes (ICSID), created by the "Convention for the Settlement of Investment Disputes between States and Nationals of Other States", opened for signature in Washington, on March 18, 1965. To this end, each of the contracting parties gives its irrevocable consent to any dispute relating to the amount of compensation inherent in the

[111] Domenico Di Pietro, *"Applicable Law under Article 42 of the ICSID"* in Weiler (ed) International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Investment Treaties and Customary International Law (2005) p 239. See also Susan D Franck, *"Foreign Direct Investment, Investment Treaty Arbitration and the Rules of Law"* (2007, Volume 19, Global Business & Development Law Journal) 347.

expropriation to be submitted to this arbitration procedure. Other disputes will be submitted to this procedure with the consent of both parties.
3. None of the contracting parties take to a dispute that may raise an objection at any stage of the arbitration procedure or the execution of an arbitral award because the investor opposing party to the dispute has received compensation covering all or part of its losses under an insurance policy.
4. The arbitral tribunal shall rule on the basis of the national law of the contracting party to the dispute in whose territory the investment is located, including the rules relating to conflicts of laws, the provisions of this agreement, the terms specific agreements that would be concluded regarding the investment as well as principles of international law.
5. Arbitral awards are final and binding on the parties to the dispute. Each contracting party undertakes to execute these awards in accordance with its national legislation."[112]
The urgency of conflict resolution provisions can be calculated from a variety of perspectives, according to IIA. Dispute agreements have been the most visible position in ensuring that the host country's responsibilities under the BIT are implemented and enforced from the perspective of investors. Investors expect a high degree of assurance and predictability, which is supported by dispute resolution provisions. Furthermore, these provisions establish one of the most

[112] BIT between China and Morocco Available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/941/china---morocco-bit-1995- [Accessed 20 March 2021].

important factors in reducing a party's vulnerability and, as a result, allowing an investor from one contracting party to invest in the territory of another contracting party.

Examining the critical position of the rule-oriented adjudication process in international governance is another way of assessing the urgency of a conflict resolution clause. The BIT between China and Morocco establishes the parameters that will control investment relations between the host country and investors, as well as between contracting parties. This treaty represents an important step forward in the evolution of a rule-based regime for investment affairs in this regard.[113] There are two categories of conflict settlement clauses in the BIT between China and Morocco: those addressing investor contracting state (country to country) disputes and those addressing investor (individual/corporation) state disputes. Before the parties attend their agreed-upon arbitral tribunal, one of them will usually deliver the other a letter of resistance in an effort to reach an amicable agreement by mediation or talks. The objection notice is to send a "trigger message" to the highest authorities of the host country during the "cooling off time." The letter outlines the details and purpose of the conflict before requesting that the host nation engages in negotiations.

In general, the BIT between China and Morocco stipulates that a conflict must be settled within six months of written notice. Furthermore, if a disagreement cannot be resolved by

[113] 22 Bilateral Investment Treaties Signed by Least Developed Countries in Brussels (UNCTAD, 18 May 2001) Available at: http://unctad.org/en/pages/PressReleaseArchive.aspx?ReferenceDocId=2915 [Accessed 26 March 2021]

consensus within the time limit, the dispute can be referred to the counterpart's court processes, international arbitration, or conciliation at the discretion of the investor involved. On March 18, 1965, in Washington, D.C, the procedure of resolving disputes between the state and investors in cases where China and Morocco were contracting states to the convention on the settlement of investment disputes between states and nationals of other states (ICSID Convention) was decided. In the beginning, when there was a dispute with the investors, the investment problem should be resolved amicably. If the disputes cannot be resolved amicably or if no other form of dispute resolution is available, China and Morocco, as contracting parties, must agree to submit any legal dispute arising from investments made by an investor of the other contracting party to conciliation or arbitration at the request of that investor, in accordance with the provisions of the ICSID Convention. Conciliation or arbitration can be used to resolve disputes between states and investors.

5.2.2 Conciliation and arbitration

a) Conciliation is an "Alternative Dispute Resolution" (ADR) mechanism that is a flexible and non-formal or informal process and is focused on a good partnership between the government and the investors.[114] The word "conciliation" has two meanings: wide and narrow. In a general context, conciliation refers to a number of strategies for resolving a

[114] UNCTAD. Investor–State Disputes : Prevention and Alternatives to Arbitration. Switzerland: United Nations Publication, 2010. p 26. Available at: http://unctad.org/en/docs/diaeia200911_en.pdf [Accessed 28 March 2021].

conflict mutually with the assistance of a neutral party (typically another party that is not interested in the dispute) or other independent investigation bodies and advisory commissions. In a strict context, "conciliation" refers to the referral of a case to a tribunal or committee that may provide recommendations and resolution suggestions to the parties. This suggestion is not legally binding.[115] Conciliation by the International Center for Settlement of International Disputes (ICSID) will be a mutually beneficial, non-adversarial conflict resolution mechanism. The conciliation commission's aim is to make the parties' issues more understandable and to reach an understanding on mutually acceptable terms. A conciliation commission may request relevant evidence, hear testimony, perform site visits, and make a report to assist the parties in finding mutually agreeable terms to resolve their dispute, with the consent of the parties to conciliation trials are obligated to cooperate with the commission in good faith and to take the commission's recommendations seriously. The core formal rules of conciliation are found in Chapters III and VII of the Convention. After receipt of the registration, the conciliation committee is formed with one sole conciliator or an uneven number of conciliators as decided by the parties. The Commission has a responsibility to clarify the issues around the settlement of mutually acceptable terms. If the parties sign an agreement, the Commission is required to write a report stating that they have done so.

[115] JG Strake, "*An Introduction to International Law",* (12 edn, Wiley on behalf of the Modern Law Review 1949) 673.

b) Arbitration: The majority of IIAs incorporate arbitration as one of the options for resolving disputes if diplomatic channels are blocked. Arbitration, according to Black's Law Dictionary, means:

"A method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding."[116]

The ICSID arbitration protocol is explained in Chapters IV through VII of the Convention. If a negotiating party wants to seek arbitration, they must send a formal request to the Secretary-General. A further phase, similar to conciliation procedures, is to form the arbitral tribunal; the tribunal shall be composed of a single arbitrator or some odd number of arbitrators named by each group. In most cases, tribunals are made up of three arbitrators: one nominated by each party and a third arbitrator who acts as president and is appointed by the parties jointly. The tribunal resolves a dispute based on the parties' agreed-upon principles of law. If the tribunal is formed, the case is considered to have started. The Tribunal holds its first session within 60 days of its formation to deal with the procedure's preliminary inquiries. A formal procedure and an in-person hearing are typically the two steps of the procedure. The tribunal deliberates and makes its final award after the parties give their perspectives on the matter. The reward is final and not open to challenge or any consequences other than those stipulated by the Convention. The parties, on the other hand, have the right to request a supplemental decision or ratification

[116] Bryan A Garner, *Black's Law Dictionary* (11th edn. 2021).

of the award or to obtain post-award redresses such as annulment of interpretation or revision.

ICSID conducts the ICSID Additional Facility Arbitration as an added benefit to its arbitration operation. When opposed to Arbitration, the ICSID Additional Facility Arbitration has a few distinct procedure variations. Before instituting litigation, parties must seek the consent of entry to the Additional Facility, as well as post-award remedies under the Additional Facility Regulations, which are limited to explanation, correction, and the first tribunal's supplementary judgment. Conciliation, according to Article 34 of the Investment Dispute Settlement Agreement, is an amicable process in which the state and owners agree to maintain their investment partnership, while arbitration is the case in which the two sides have reached the conclusion of their business arrangement. Despite this, conciliation can be less costly than arbitration because most investor attempts to bargain with the host nation fail. Investors can solve conflicts by arbitration because it is the most efficient and time-saving method.

5.2.3 Consent to Conciliation or Arbitration under the BIT between China and Morocco

According to the wording. "shall agree to refer any legal conflict arising out of contributions made by an investor in the other contracting party to conciliation or arbitration at the invitation of such an investor in conformity with the terms of the said Convention."[117] Article 10 of the BIT between China and Morocco specifies that states will agree to accept an

[117] See the ICSID Convention (Washington Convention).

investor's offer to appeal to ICSID conciliation or arbitration.[118] If China or Morocco, which is the host country, refuses to give permission, they will be in violation of their BIT obligations.[119] Both China and Morocco have the option of using the ICSID Convention for the resolution of conflicts under Article 10 of the BIT. Article 10 of the BIT between China and Morocco, which deals with the resolution of conflicts between the two nations, is not controversial since this is the conventional approach that is often preferred in international forums. As a result, the BIT between China and Morocco still uses this form. However, to solve the investment dispute between China and Morocco, we suggest amicable negotiation or consultation. This is better than arbitration because amicable negotiation or consultation enhances relations between the states. Nonetheless, we know that this clause has not been used since the treaty's ratification because no country has filed a lawsuit with the ICSID. Whenever a disagreement arises, it is settled amicably between the parties by mediation and discussion. In contrast, IIAs are increasingly incorporating different options for resolving conflicts by arbitration, such as the EU-Singapore Free Trade Agreement, Authentic text as of May 2015 (EU-Singapore FTA), which states in article 19.6 (1):

"No earlier than three months from the date of the notice of intent delivered pursuant to Article 9.15 (Notice of Intent to

[118] Rudolf Dolzer & Christoph Schreuer, "*Principles of International Investment Law"* (2nd edn, Oxford University Press, 2008) 242.

[119] Ibid p 242

Arbitrate), the claimant may submit the claim to one of the following dispute settlement mechanisms:

(a) arbitration under the auspices of the International Center for Settlement of Investment Disputes (hereinafter referred to as "ICSID") pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of the Other States of 18 March 1965 (hereinafter referred to as the "ICSID Convention");

(b) arbitration under the auspices of ICSID pursuant to the ICSID Convention in accordance with the Rules on the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (hereinafter referred to as "ICSID Additional Facility Rules"), where the conditions for proceedings pursuant to sub-paragraph (a) do not apply;

(c) an arbitral tribunal established in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL); or

(d) any other arbitral institution or under any other arbitration rules if the disputing parties so agree. For this purpose, the respondent shall be deemed to have agreed to the institution or rules proposed by the claimant unless it objects, in writing, within thirty days of the respondent's receipt of notification of the claimant's submission of the dispute, in which case the claimant may submit a claim under one of the dispute settlement mechanisms provided for in sub-paragraphs (a), (b) or (c)."[120]

[120] EU-Singapore Free Trade Agreement, Authentic text as of May 2015 (EU-Singapore FTA).Available at:

http://trade.ec.europa.eu/doclib/docs/2014/october/tradoc_152844.pdf [Accessed 29 March 2021].

CHAPTER SIX

CONCLUSION

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China and Morocco have a long history of investment ties. China is currently investing in a variety of fields in Morocco. As a result, other Chinese companies have the opportunity to invest in and develop investment cooperation with the Moroccan government through agreements that ensure secure trade relations between the two countries. This book is on the theme ***"The Investments protection under the Bilateral Investment Treaty between China and Morocco."*** The object of the thesis is the analysis of the protection of investments under the Agreement Between China and Morocco for the promotion and protection of investments (BIT Between China and Morocco 1995). In regard to the hypothesis, it is assumed that the BIT between China and Morocco in 1995 is out of date and imbalanced with an absence of sustainable development in bilateral investment relations. This may lead to poor investment relations between China and Morocco because this BIT has vague meanings, and the large gaps may cause problems in the interpretation thereof. Hence the purpose of the thesis is to make suggestions for a new BIT between China and Morocco by revising and clarifying the vague wording in the current BIT. This BIT between China and Morocco dates from the early 1990s, during the neoliberal era, and has a framework that involves the purpose of investment promotion and protection in the preamble. The BIT also contains descriptions of investments as any form of asset and owners as natural or lawful individuals, as well as provisions for investment territory, term of return, subrogation, and reimbursement for damages. In terms of investment rights, this BIT contains the clauses of National Treatment, Most-Favored-Nation Treatment (MFN Provision), Fair and Equitable Treatment (FET), the Umbrella Clause, expropriation protection, and the resolution of conflicts between states and investors. The literature on foreign investment law will be examined after the arbitral tribunal awards, and other equivalent International Investment Agreements (IIAs) have been examined. We suggest that must include the protection of human rights, the environment, public health, and social rights are in the preamble of a BIT between China and Morocco. When interpreting the BIT because article 31 (3) (e) of the Vienna Convention on the law of treaties (VCLT) is related to the rules of international law applicable between parties, the relevant rules can be integrated with good international conduct as per the Universal Declaration of Human Rights (UDHR) of the United Nations in December 1948, the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights [121], the Organization for Economic Co-operation and Development (OECD)'s guidelines for multinational enterprises (MNEs), the International Labour Organization which has the ILO Declaration on Fundamental Principles and Rights at Work of 1998 (the 1998 Declaration) and the ILO Tripartite Declaration on Multinational Enterprises and Social Policy.

Regarding the application for investor approval for the BIT, we believe that a BIT between China and Morocco that entails the approval of investments prior to its entry into force by investors of either Contracting Party would be equitable to both parties. To authorize investment prior to the implementation of a BIT between China and Morocco, however, a party must follow or

[121] See U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) (UN Norms).

retain steps in the annex as a measurement to accept investments made prior to the implementation of the BIT. Furthermore, the annex serves as a measurement of the process of settling a conflict in the case of investments made prior to the introduction of a BIT. In the key point of the new wording of the concept of “investments” in the BIT between China and Morocco, we propose that any asset by direct investment and such investments do not include portfolio investments be considered an investment. In the BIT between China and Morocco, the expression “investor” would have the following wording in the meaning of an investor who is a natural person: a natural citizen as an investor and excludes investors who have successful nationality of a third party state, as well as those who have the nationality of both the home state and the host state of this BIT.

In the BIT, the legal person must have their seat as well as actual economic operations in the same contracting party's jurisdiction. In addition, the BIT may have a “denial of benefits” provision that states that a contracting party can refuse the benefits of the BIT to a non-contracting party's investor and its investments if the non-contracting party's investor owns or controls the non-contracting party the first mentioned investor and that investor has no significant business operations in the territories of the contracting group under whose laws it is formed or structured. The denial of benefits would also extend to contributions made previous to the BIT's entry into effect. The word territorial must be defined to include and apply to maritime areas, as well as the terms home state and host state. Transfers in the BIT must be dependent on the free flow of capital, which can be avoided by fair, non-discriminatory, and good faith provisions relating to bankruptcy, insolvency, or the enforcement of creditor's interests, as well as measures to deter protection risks, such as measures to discourage terrorism, corruption, etc. The BIT would be in place for a fixed amount of time, but it would have to be terminated in a way that ensured the continued protection of properties acquired prior to the termination. Since the BIT between China and Morocco contains mixed protection of investment clauses, the amendment of the BIT between China and Morocco would include a special stand-alone arrangement for the defense of investment clauses. In addition, we conclude that the protection of investment clauses in the BIT between China and Morocco must have explicit language, and the loopholes must be excluded, based on the wording of the protection of investment clauses, the review of arbitral tribunal awards, and comparisons with other IIAs. The BIT between China and Morocco is an old paradigm from the 1990s in terms of expropriation and compensation. We assume that the case law shows the current BIT's shortcomings and that now is a good time for China and Morocco to discuss a new BIT to strengthen investment ties. For the extent of the refusal, all states must compromise to explain the nature of expropriation. Both states must negotiate to identify expropriation in terms of obstruction of justice in judicial, civil, and administrative cases, infringement of due process, freedom against arbitrariness and bigotry, intimidation and coercion, misuse of authority or other poor faith behavior, and legitimate expectation, the investor's expectations and responsibilities are restricted as are the exceptions and the sense of restitution for expropriation under the BIT are clarified. Expropriation's purpose will be clarified and will strengthen investment conditions between the two countries. Both states can understand how to use a sovereign authority in the sense of police power to regulate investment practices for public interests, public health, and the protection of human rights, environmental, and social rights under the rule of law.

The settlement of disputes between states in the BIT between China and Morocco need not change in principle, but the settlement of disputes between states and investors must be modernized in terms of form and wording since the text of article 10 in the old BIT from 1995 is an impediment to solving problems between states and investors because it is unfaiable. As a result, we believe that the BIT between China and Morocco should provide options for resolving conflicts by arbitration, such as the ICSID, UNCITRAL rules, or other international arbitral institutions. We do not support the practice of exhausting local solutions first because it loses time and exposes outsiders to dangerous and difficult-to-understand domestic rule. We agree that international law should be used to settle conflicts. The arbitral tribunal will rule on the protocol in the BIT between China and Morocco based on public international law and will provide arrangements for counterclaim damages, restitution, and expenses. We also decided the safest way to address the issues with the BIT between China and Morocco by suggesting that the governments of both countries renegotiate and change the language in order to establish the proposed draft of a new BIT between China and Morocco. The findings of this thesis study should be used to draft a new model (BIT) between China and Morocco. We carefully picked wording from current IIAs and kept some good wordings from the China-Morocco BIT, which is in line with the results of this research.

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Annexes

Annex 1. Table of BITs between Morocco and the other countries

No.	Short title	Parties	Status	Date of signature	Date of entry into force
1	Japan - Morocco BIT (2020)	Japan; Morocco;	Signed	08/01/2020	
2	Brazil - Morocco BIT (2019)	Brazil; Morocco;	Signed	13/06/2019	
3	Congo - Morocco BIT (2018)	Congo; Morocco;	Signed	30/04/2018	
4	Morocco - Zambia BIT (2017)	Morocco; Zambia;	Signed	20/02/2017	
5	Morocco - South Sudan BIT	Morocco; South Sudan;	Signed	01/02/2017	
6	Morocco - Nigeria BIT (2016)	Morocco; Nigeria;	Signed	03/12/2016	
7	Ethiopia - Morocco BIT (2016)	Ethiopia; Morocco;	Signed	19/11/2016	
8	Morocco - Rwanda BIT (2016)	Morocco; Rwanda;	Signed	19/10/2016	
9	Morocco - Russian Federation BIT (2016)	Morocco; Russian Federation;	Signed	15/03/2016	
10	Guinea-Bissau - Morocco BIT (2015)	Guinea-Bissau; Morocco;	Signed	28/05/2015	
11	Mali - Morocco BIT (2014)	Mali; Morocco;	In force	21/02/2014	02/03/2016
12	Morocco - Serbia BIT (2013)	Morocco; Serbia;	Signed	06/06/2013	
13	Morocco - Viet Nam BIT (2012)	Morocco; Viet Nam;	Signed	15/06/2012	
14	Macedonia, The former Yugoslav Republic of - Morocco BIT (2010)	Morocco; North Macedonia;	In force	11/05/2010	15/10/2012
15	Estonia - Morocco BIT (2009)	Estonia; Morocco;	In force	25/09/2009	04/11/2011
16	Morocco - Slovakia BIT (2007)	Morocco; Slovakia;	In force	14/06/2007	11/05/2014
17	Morocco - Portugal BIT (2007)	Morocco; Portugal;	Signed	17/04/2007	
18	Burkina Faso - Morocco BIT (2007)	Burkina Faso; Morocco;	In force	08/02/2007	05/03/2016
19	Cameroon - Morocco BIT (2007)	Cameroon; Morocco;	Signed	24/01/2007	
20	Morocco - Senegal BIT (2006)	Morocco; Senegal;	Signed	15/11/2006	

21	Central African Republic - Morocco BIT (2006)	Central African Republic; Morocco;	Signed	26/09/2006	
22	Gambia - Morocco BIT (2006)	Gambia; Morocco;	In force	20/02/2006	12/10/2011
23	Equatorial Guinea - Morocco BIT (2005)	Equatorial Guinea; Morocco;	Signed	05/07/2005	
24	Croatia - Morocco BIT (2004)	Croatia; Morocco;	Signed	29/09/2004	
25	Gabon - Morocco BIT (2004)	Gabon; Morocco;	In force	21/06/2004	24/07/2009
26	Benin - Morocco BIT (2004)	Benin; Morocco;	Signed	15/06/2004	
27	Denmark - Morocco BIT (2003)	Denmark; Morocco;	In force	22/05/2003	18/09/2013
28	Dominican Republic - Morocco BIT (2002)	Dominican Republic; Morocco;	In force	23/05/2002	04/01/2007
29	Guinea - Morocco BIT (2002)	Guinea; Morocco;	Signed	02/05/2002	
30	Malaysia - Morocco BIT (2002)	Malaysia; Morocco;	In force	16/04/2002	23/04/2009
31	Morocco - Ukraine BIT (2001)	Morocco; Ukraine;	In force	24/12/2001	25/04/2009
32	Morocco - Syrian Arab Republic BIT (2001)	Morocco; Syrian Arab Republic;	In force	23/10/2001	29/03/2003
33	Finland - Morocco BIT (2001)	Finland; Morocco;	In force	01/10/2001	06/04/2003
34	Germany - Morocco BIT (2001)	Germany; Morocco;	In force	06/08/2001	12/04/2008
35	Czech Republic - Morocco BIT (2001)	Czechia; Morocco;	In force	11/06/2001	30/01/2003
36	Morocco - Oman BIT (2001)	Morocco; Oman;	In force	08/05/2001	30/03/2003
37	Morocco - Pakistan BIT (2001)	Morocco; Pakistan;	Signed	16/04/2001	
38	Morocco - Yemen BIT (2001)	Morocco; Yemen;	Signed	24/02/2001	
39	Morocco - Senegal BIT (2001)	Morocco; Senegal;	Signed	18/02/2001	
40	Iran, Islamic Republic of - Morocco BIT (2001)	Iran, Islamic Republic of; Morocco;	In force	21/01/2001	31/03/2003
41	Libya - Morocco BIT (2000)	Libya; Morocco;	In force	02/11/2000	20/10/2001
42	Mauritania - Morocco BIT (2000)	Mauritania; Morocco;	In force	13/06/2000	20/10/2003
43	Bahrain - Morocco BIT (2000)	Bahrain; Morocco;	In force	07/04/2000	09/04/2001
44	El Salvador - Morocco BIT (1999)	El Salvador; Morocco;	In force	21/04/1999	11/04/2002

45	BLEU (Belgium-Luxembourg Economic Union) - Morocco BIT (1999)	BLEU (Belgium-Luxembourg Economic Union); Morocco;	In force	13/04/1999	29/05/2002
46	Morocco - Sudan BIT (1999)	Morocco; Sudan;	In force	23/02/1999	04/07/2002
47	Morocco - Qatar BIT (1999)	Morocco; Qatar;	In force	20/02/1999	21/05/2001
48	Kuwait - Morocco BIT (1999)	Kuwait; Morocco;	In force	16/02/1999	07/05/2001
49	India - Morocco BIT (1999)	India; Morocco;	Terminated	13/02/1999	22/02/2001
50	Morocco - United Arab Emirates BIT (1999)	Morocco; United Arab Emirates;	In force	09/02/1999	01/04/2002
51	Korea, Republic of - Morocco BIT (1999)	Korea, Republic of; Morocco;	In force	27/01/1999	08/05/2001
52	Jordan - Morocco BIT (1998)	Jordan; Morocco;	In force	16/06/1998	07/02/2000
53	Morocco - Spain BIT (1997)	Morocco; Spain;	In force	11/12/1997	13/04/2005
54	Chad - Morocco BIT (1997)	Chad; Morocco;	Signed	04/12/1997	
55	Lebanon - Morocco BIT (1997)	Lebanon; Morocco;	In force	03/07/1997	04/03/2000
56	Egypt - Morocco BIT (1997)	Egypt; Morocco;	In force	14/05/1997	01/07/1998
57	Morocco - Turkey BIT (1997)	Morocco; Turkey;	In force	08/04/1997	30/05/2004
58	Indonesia - Morocco BIT (1997)	Indonesia; Morocco;	In force	14/03/1997	21/03/2002
59	Morocco - Yemen BIT (1997)	Morocco; Yemen;	Signed	24/02/1997	
60	Argentina - Morocco BIT (1996)	Argentina; Morocco;	In force	13/06/1996	19/02/2000
61	Bulgaria - Morocco BIT (1996)	Bulgaria; Morocco;	In force	22/05/1996	19/02/2000
62	France - Morocco BIT (1996)	France; Morocco;	In force	13/01/1996	30/05/1999
63	China - Morocco BIT (1995)	China; Morocco;	In force	27/03/1995	27/11/1999
64	Morocco - Poland BIT (1994)	Morocco; Poland;	In force	24/10/1994	09/07/1999
65	Greece - Morocco BIT (1994)	Greece; Morocco;	In force	16/02/1994	28/06/2000
66	Morocco - Romania BIT (1994)	Morocco; Romania;	In force	28/01/1994	03/02/2000
67	Morocco - Tunisia BIT (1994)	Morocco; Tunisia;	In force	28/01/1994	01/04/1999
68	Austria - Morocco BIT (1992)	Austria; Morocco;	In force	02/11/1992	01/07/1995

69	Hungary - Morocco BIT (1991)	Hungary; Morocco;	In force	12/12/1991	03/02/2000
70	Morocco - United Kingdom BIT (1990)	Morocco; United Kingdom;	In force	30/10/1990	14/02/2002
71	Morocco - Sweden BIT (1990)	Morocco; Sweden;	In force	26/09/1990	16/06/2008
72	Italy - Morocco BIT (1990)	Italy; Morocco;	In force	18/07/1990	07/04/2000
73	Morocco - Spain BIT (1989)	Morocco; Spain;	Terminated	27/09/1989	15/01/1992
74	Morocco - Portugal BIT (1988)	Morocco; Portugal;	In force	18/10/1988	22/03/1995
75	Morocco - Switzerland BIT (1985)	Morocco; Switzerland;	In force	17/12/1985	12/04/1991
76	Morocco - United States of America BIT (1985)	Morocco; United States of America;	In force	22/07/1985	29/05/1991
77	Libya - Morocco BIT (1984)	Libya; Morocco;	Terminated	25/01/1984	18/09/1993
78	Morocco - United Arab Emirates BIT (1982)	Morocco; United Arab Emirates;	Terminated	16/06/1982	
79	Kuwait - Morocco BIT (1980)	Kuwait; Morocco;	Terminated	03/04/1980	
80	Gabon - Morocco BIT (1979)	Gabon; Morocco;	Terminated	13/01/1979	07/11/1979
81	Egypt - Morocco BIT (1976)	Egypt; Morocco;	Terminated	03/06/1976	07/09/1978
82	France - Morocco BIT (1975)	France; Morocco;	Terminated	15/07/1975	13/12/1976
83	Morocco - Netherlands BIT (1971)	Morocco; Netherlands;	In force	23/12/1971	27/07/1978
84	BLEU (Belgium-Luxembourg Economic Union) - Morocco BIT (1965)	BLEU (Belgium-Luxembourg Economic Union); Morocco;	Terminated	28/04/1965	18/10/1967
85	Germany - Morocco BIT (1961)	Germany; Morocco;	Terminated	31/08/1961	21/01/1968