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Labor provisions in bilateral investment treaties: Does the new US Model BIT provide a template for the future?

by
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Unlike its trade-counterpart, the relationship between international investment law and labor standards has neither resulted in much treaty practice nor attracted extensive scholarly attention. The 2004 US Model bilateral investment treaty (BIT) was among the first to devote a full article to labor standards (Article 13). The revised US Model BIT,[1] published in May 2012, updates and expands this provision.

The 2012 Model provides that each party "shall ensure" it does not derogate from, offer to derogate from, or fail effectively to enforce its labor laws to encourage investment (Article 13(2)). The effective enforcement requirement is new compared to the 2004 Model, reflecting that the weakening of labor standards often occurs due to lack of enforcement rather than formal derogations. These obligations align with firmer commitments in recent US free trade agreements (FTAs) and depart from the aspirational language of the 2004 Model and the BITs of other states, which merely require that parties "should not" derogate from existing labor legislation or "shall strive to ensure" not to do so.[2] The obligations in question are not limited to investments from the other party, but equally apply to the weakening of labor standards in favor of investments of third states (Article 2(1)(c)).

The 2012 Model adds (the right to) non-discrimination in respect of employment and occupation to the list of non-derogable labor rights. Compared to the 2004 Model, the list

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[1] 2012 US Model BIT, available at: http://www.state.gov/documents/organization/188371.pdf.
[2] Cf. e.g. 2009 Japan-Switzerland FTEP, Article 101; or BLEU Model BIT, Article 6(3).

now comprises all four "core labor rights" listed as such in the ILO's 1998 Declaration, as well the right to acceptable conditions of work, which is otherwise not found in the Declaration. In other respects, the 2012 Model is less demanding than similar clauses found in other states' BITs, as it effectively prohibits only derogations from domestic labor laws where such derogations are "inconsistent" with non-derogable rights, and not derogations *in general*. Derogations relating to social security arrangements, easing of termination of employment standards or reduction of labor inspections, for example, would thus not be actionable. Furthermore, a party that currently observes labor standards below the minimum of what is required by the ILO has no express obligation to bring its legislation in conformity with those norms.

As with the 2004 Model, the labor clause of the 2012 Model remains outside the treaty's dispute settlement provisions. This differs from BITs of other states, which provide for that possibility. It also differs from recent US FTAs, which allow for state-state arbitration of disputes concerning labor provisions. Instead, the labor clause provides a consultations procedure (Article 13(4)) that has become more detailed and extensive than that applicable under the 2004 Model. But state-state arbitrations seldom occur under BITs. Investors, on the other hand, can often pursue claims relating to the (non-) enforcement of labor obligations by relying upon other standards of treatment guaranteed by a BIT, for which arbitration remains available.[3]

At a time when concerns are being voiced about BITs unduly restraining states' regulatory autonomy, it is surprising that the 2012 Model does not expressly recognize the right of each party to establish its own level of domestic labor standards. This differs from the labor provisions under US FTAs, and even from the 2012 Model's provision on environment, which expressly recognizes regulatory discretion in environmental matters (Article 12(3)). Arguably, the parties' policy space in relation to the improvement of labor standards is nonetheless safeguarded through the preambular paragraph expressing the desire to achieve the treaty objectives "in a manner consistent with … the promotion of internationally recognized labor rights," as well as by the new provision affirming the parties' respective obligations as ILO members and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work (Article 13(1)).

Regrettably, the 2012 Model does not follow the trend of recent investment treaties that feature provisions providing that contracting parties "should encourage" foreign investors to adhere voluntarily to internationally recognized standards of corporate social responsibility, such as those found in the OECD Guidelines for Multinational Enterprises.[4]

The amendments to the 2012 Model represent a small but welcome step in bridging the divide between investment law and public policy concerns. The scope of applicable labor

[3] See Vid Prislan and Ruben Zandvliet, "Labor provisions in international investment agreements: Prospects for sustainable development" (November 6, 2012), available at: http://ssrn.com/abstract=2171716.

[4] Cf. e.g. 2008 Canada-Peru FTA, Article 810; 2008 Canada-Colombia FTA, Article 816; leaked TPPA, Article 12.15.

standards and the level of commitment are more demanding than in its predecessor and most other (model) BITs. But it lacks a clear obligation to adopt and maintain ILO standards as a minimum, and does not allow disputes to be submitted to arbitration. We see no legal argument that explains why there should be a difference between BITs and FTAs on this issue.

The inclusion of labor provisions in model BITs is on the rise. We hope that this trend will receive more attention from scholars and practitioners, to further the interpretation and development of such provisions.

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