

# ADDING A BIT OF LABOR PROTECTION TO OUR BITS

November 02, 2013

*By Katie Bacharach*

A Bilateral Investment Treaty (BIT) is a treaty between two states that ensures that investors of one state receive certain agreed upon standards of treatment when investing in the other state. The primary purpose is to encourage foreign direct investment (FDI) between the two states, which in turn should lead to economic growth for both states.

The emphasis on protecting the investor has had two important implications for BITs. First, broader public policy concerns have not traditionally made their way into these agreements. Second, the agreements have typically been characterized by an asymmetry of power, where foreign investors are accorded a number of substantive rights under the agreement without being subject to any specific obligations. For those concerned with labor rights and corporate social responsibility, this can be a dangerous combination that can lead to a “race to the bottom,” where countries continue to relax labor standards in order to attract investors.

One potential way to get around this race to the bottom and to impose labor rights obligations on multinational and transnational corporations is to insert labor commitments directly into BITs. In recent years there has been a push for governments to do a better job of incorporating broader public policy concerns, including labor rights, into their BITs. Consequently, a number of countries have inserted labor safeguards into the language of their model BITs (which are essentially templates that countries formulate as their treaty ideal and then use as a starting point for negotiating actual agreements).

In order to successfully provide labor protections in a BIT, references to labor rights must be incorporated into different parts of the agreement. First, countries can and should include broader policy goals related to labor rights in the preamble of the agreement. The provisions in the preamble of a BIT are not binding, but arbitrators look to them when interpreting language in the BIT as a way to determine the object and purpose of the agreement. Therefore, including language in the preamble that refers to the protection of labor rights can help encourage arbitrators to consider labor rights when arbitrating a BIT dispute. Second, countries can include labor protections directly in the body of the BIT. This is a more direct way to create a binding obligation on parties to a BIT to protect labor rights. Finally, in order for labor protections to be meaningful, there must be an effective enforcement mechanism. Ideally, this means including the labor commitments in the dispute settlement mechanism.

In 2009, the Obama Administration initiated a review of the United States' [2004 model BIT](#) to determine whether it was consistent with public interest objectives. The 2004 U.S. Model BIT was one of the earliest models to devote a full article to labor standards, and enhancing the labor protections was one of the priorities of the Administration. As part of the review process, the Administration consulted with a subcommittee of the Advisory Committee on International Economic Policy (more on that from the [Institute for Policy Studies](#)), and the newly [revised U.S. model BIT](#) was released on April 20, 2012.

The preamble of the model BIT includes a provision calling on parties to achieve the objectives of the agreement in a manner consistent with “the promotion of internationally recognized labor rights.” This direct reference to internationally recognized labor rights reflects an understanding that investment should not come at the cost of lower labor standards, thus helping guard against the race to the bottom phenomenon.

Article 13 of the U.S. model BIT is devoted to investment and labor. The 2004 model stated that a party “shall strive to ensure that it does not waive or otherwise derogate from... such laws in a manner that weakens or reduces adherence to the internationally recognized labor rights,” which include “the right of association; the right to organize and bargain collectively; a prohibition on the use of any form of forced or compulsory labor; labor protections for children and young people, including a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labor; and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.”

The 2012 model strengthened this language by changing “shall strive to ensure” to “shall ensure,” thereby creating a legal obligation not to waive or derogate from the country’s labor laws. The revised article further enhances this protection by including a provision stating that parties cannot fail to effectively enforce their labor laws, which guards against the common problem of countries that have strong labor laws in place but neglect to enforce them in any meaningful way. The revised article also now includes the elimination of discrimination in employment and occupation as well as a provision requiring parties to reaffirm their commitments under the International Labor Organization. The 2012 model BIT would have provided for fuller labor protections if it had required a party to bring its laws into line with minimum international labor rights, as the Subcommittee had proposed, which would have addressed countries that do not already have adequate laws in place to ensure labor rights.

The most significant problem with the U.S. model BIT is the lack of an effective enforcement mechanism for the labor provisions. The labor commitments are not included in the treaty’s dispute settlement mechanism. Instead, in the case of a suspected breach of obligations provided for under Article 13, a party may request consultations. This does not do nearly enough to ensure that the labor rights obligations are enforced. The Subcommittee specifically called for the revised model to subject the labor commitments to the dispute settlement mechanism to ensure that the remedies available for labor standard violations are “as effective as they are for investors.”

While the United States stands out as having a model BIT with some of the strongest labor commitments out there, without an effective enforcement mechanism for these commitments it is difficult to imagine that BITs will be successful in getting multinational and transnational corporations to better respect labor rights.

The Institute for Policy Studies, et al, produced a [critique](#) of the 2012 U.S. model BIT, as did the [World Trade Online](#).