



2 Labour rights protection in international investment agreements: Evidence, trends and impact

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Summary

- In an effort to attract international investment, governments may be persuaded to lower domestic labour standards or refrain from developing domestic labour law. International investment agreements (IIAs), consisting of bilateral investment treaties (BITs) and treaties with investment provisions (TIPs), can help to address this concern by including commitments on (international) labour rights and decent work.
- Current IIAs increasingly include references related to labour rights protection. Such commitments occur more often and are more elaborate in TIPs than in BITs. While there are exceptions, BITs contain, overall, few commitments on labour rights protection. TIPs also include more elaborate provisions on the implementation of these commitments compared to BITs, which contain no or only weak implementation mechanisms.
- Increased attention to labour rights protection can also be observed in model BITs (essentially, templates developed by countries to provide a consistent and harmonized starting point for BIT negotiations). However, only a few countries use and update their (publicly available) model BITs.
- In terms of policy implications, the chapter suggests that future IIAs (mainly BITs) could include more elaborate provisions on labour rights protection and specific mechanisms to implement these commitments. It is also suggested that such commitments should be increased in model BITs.

Background and introduction

International investment agreements are signed between States for the mutual protection and liberalization of investments. They provide legal protection for foreign investors' interests against the host State's interference (in the form of direct and indirect expropriation, unfair taxes and capture by government, among others) in their investments.

Concerns have emerged over the relationship between IIAs and the protection of labour rights. Some argue that IIAs undermine the protection of labour rights and affect the ability of governments to regulate. This might create a regulatory "chill" and undermine the ability of States to develop regulatory initiatives on (international) labour rights and decent work.

To address these concerns, commitments to labour rights protection have been included in IIAs. Little research exists on how labour rights provisions are included in IIAs, which contrasts with the extensive body of research on the inclusion of labour provisions in trade agreements. However, the need for research on the inclusion of labour rights commitments in IIAs

is becoming more pressing, as more of them continue to be negotiated and sustainability concerns, including labour rights protection and decent work, become more prominent.

Research question and methodology

To address this research gap, the chapter investigates the occurrence of keywords relevant to labour rights protection in IIAs. More specifically, the chapter aims to:

- provide an analysis of labour rights protection-related keywords in IIAs (BITs, TIPs and model BITs);
- analyse the articles of BITs in which labour protection keywords occur and explore what they aim to achieve;
- assess how labour-related provisions and commitments are monitored and implemented in BITs;
- highlight the relevance of including labour rights protection in model BITs.

To achieve these objectives, IIAs were screened to gauge the occurrence of various labour-related keywords, using the UNCTAD International Investment Agreements Navigator, a database that lists all concluded IIAs and model BITs. A total of 3,245 IIAs (2,825 BITs and 420 TIPs) and 41 model BITs were screened on more than 50 keywords. In total, 885 agreements that contained keywords were identified and further analysed.

Findings and policy considerations

The findings of the research show that labour-related keywords in IIAs are rather sparse but have increased over time (see figure below). There is significant variation in the occurrence of labour-relevant keywords: the majority appear fewer than 100 times, and several appear only rarely.

Keywords are concentrated in a relatively small number of agreements – only 17 agreements contain 20 or more keywords. These are comprehensive trade and investment agreements (TIPs) that contain specific chapters on labour and/or environmental protection.

Labour rights in BITs and model BITs

The analysis of BITs shows that, although limited in number, there are some that include specific and/or multiple articles referring to labour and labour law protection, including articles which aim to preserve the policy space of governments to develop domestic labour law. For example, the BIT between the Belgium–Luxembourg Economic Union (BLEU) and Ethiopia, and the BLEU–Colombia BIT each contain an article on labour which aims to guarantee that labour legislation is not altered to attract investments. Articles intended to protect labour rights against the encroachment of international investment can also be found in the United States of America–Republic of Rwanda BIT and the Canada–Burkina Faso BIT.

Moreover, some BITs between developing countries include similar articles, as is illustrated by the Nigeria–Morocco BIT. This agreement goes even further and includes post-establishment obligations requiring investors to uphold human rights in the host State and to act in accordance with core labour standards as enshrined in the 1998 ILO Declaration. Finally, some far-reaching BITs include multiple articles on commitments to international labour rights, as is illustrated by the draft EU–China Comprehensive Agreement on Investment.

Furthermore, an increasing number of model BITs include keywords related to labour protection. A comparison of countries which updated their model BITs over recent years confirms this trend and shows that including language on labour rights and responsible business conduct is gaining ground.

Implementation and impact of BITs

In spite of some progress, BITs in general include few implementation provisions related to labour commitments. However, there are exceptions. For instance, BITs involving BLEU create mechanisms, within their articles on labour and investment, to allow for consultation when concerns are raised. Similarly, the United States–Uruguay BIT’s article on investment and labour provides for a consultation mechanism at the request of one party when investments are attracted through the weakening of labour laws. Given the lack of comprehensive implementation mechanisms, the impact of labour commitments in current BITs is arguably limited.

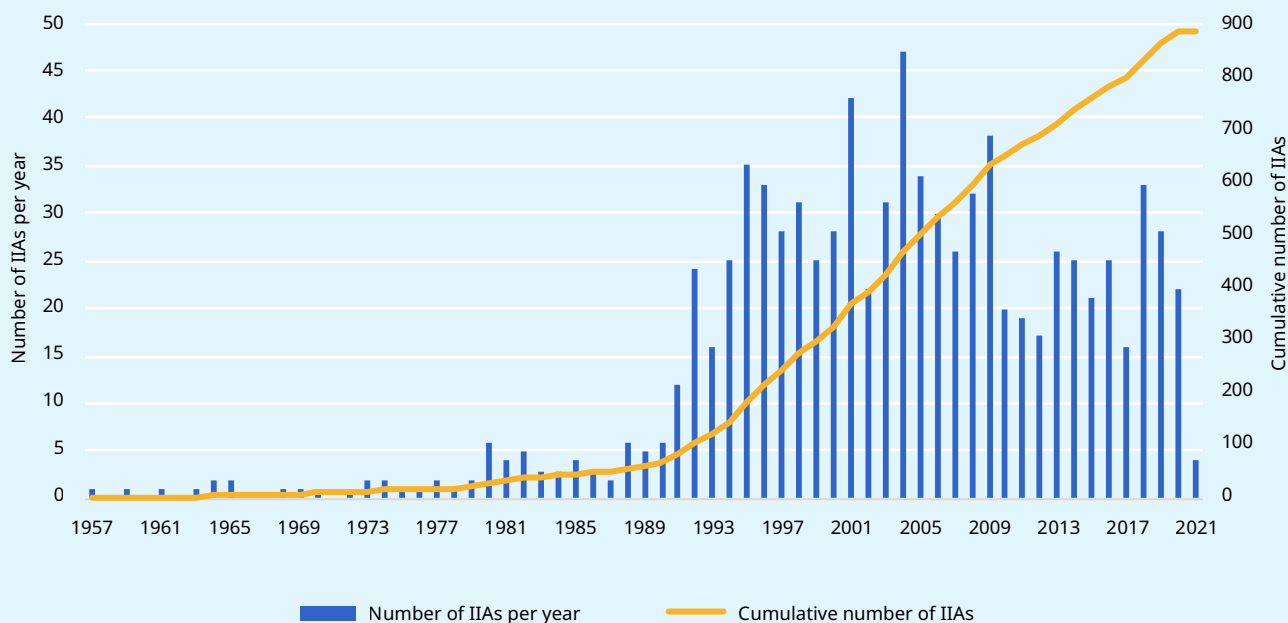
Despite the growing attention to labour rights and responsible business conduct in IIAs, there is still significant room for improvement. It would be advisable to include more elaborate provisions on labour rights protection in IIAs, and especially BITs, that would explicitly safeguard the policy space of governments to develop domestic labour law and to press ahead with regulatory initiatives on (international) labour rights and decent work. Furthermore, future IIAs could include more specific mechanisms to monitor the implementation of their labour rights commitments. This might lead to a more direct impact due to labour rights commitments in IIAs. Finally, it is suggested that such commitments should be increased in model BITs, as there is some evidence that these templates can influence the outcome of negotiated agreements.

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► Number of IIAs containing one or more keywords, by year and cumulatively over time, 1957–2021



Source: Authors' calculations based on UNCTAD International Investment Agreements Navigator database.



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