Labour rights protection in international investment agreements

Evidence, trends and impact

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2

▶ Introduction

International investment agreements (IIAs) are agreements that States negotiate for the promotion and liberalization of investments. They provide legal protection for foreign investors' interests against the host State's interference in their investments. Broadly defined, IIAs fall into two categories. First, there are bilateral investment treaties (BITs), which are pure investment agreements ("pure" in the sense that they deal only with investment and investment protection). Second, there are broader treaties or agreements, such as trade agreements and economic partnership agreements, that include investment provisions; these are referred to in this chapter as "treaties with investment provisions" (TIPs). The current international investment regime is therefore a patchwork of a few thousand agreements comprising both BITs and TIPs.

There has been debate on the link between the current international investment regime and the protection of labour rights and the environment. In theory, the strengthening of labour rights and environmental and health protection can affect the investments made and lead to arbitration. In this context, the current system has been accused of being overprotective towards investors, sometimes at the expense of what in the literature is referred to as the "policy space" of national governments to pursue social, labour and environmental regulation (Mayer 2009; Spears 2010). The concern is that governments might be constrained in developing stronger labour, health and environmental laws that could negatively affect the value of an investment and thus prompt the investor to take the government to an arbitration tribunal to seek compensation and/or to have the regulatory initiatives undone. There are several examples of such dispute cases (see section 2.1). One way to address these concerns is to include references and commitments to labour protection in investment agreements, as has been done in a number of trade agreements.

The aim of this chapter is to explore the use of labour protection-related references (broadly defined) in investment agreements. Little research has been conducted to explore how sustainability concerns, and especially labour concerns, are included in investment agreements, in contrast to the substantial research on the inclusion of labour provisions in trade agreements (Harrison et al. 2018; ILO 2013, 2016, 2019). This chapter will identify and analyse references to labour rights protection in investment agreements, based on a search of relevant keywords.[1] This analysis was

1 The terms "keywords" and "labour-related references" are being used interchangeably.

undertaken using the United Nations Conference on Trade and Development (UNCTAD) International Investment Agreements Navigator; this database contains all negotiated investment agreements, both BITs and TIPs, in all languages, and so-called model BITs (essentially, templates drafted to secure consistency in the formulation of new IIAs; see section 2.3.3). Additionally, since the keyword approach may have limitations in capturing the true intent and contextual meaning of terms, this chapter provides several examples using the actual text of the agreements to illustrate this.

The chapter is structured as follows. Section 2.1 introduces IIAs and their link to labour protection. In section 2.2, the data sources and methodological approach are described. Section 2.3 presents the results of the analysis: in section 2.3.1, the inclusion of references relevant to labour protection in IIAs is presented, including their frequency, the number of agreements and their evolution over time; in section 2.3.2, the occurrence of relevant keywords in BITs is contextualized through an analysis of selected BITs; and in section 2.3.3, the results of the analysis of model BITs are presented. Section 2.4 focuses on the implementation of labour rights commitments in IIAs. The chapter ends with a brief conclusion (section 2.5) on the main findings and takeaways.

2.1 Labour rights, foreign direct investment and investment agreements

The discussion of the relationship between foreign direct investment (FDI), facilitated by IIAs, and the protection of labour rights is long-standing and touches upon a range of issues. First, there is the question of whether FDI undermines the protection of labour rights. The traditional view is that countries with weak labour standards attract more investment. For example, Truman and Emmert (2004) find that poor human rights records are positively related to investment inflows. This argument is corroborated by Bodea and Ye (2020), who argue that BITs might contribute to weakening human rights protection because they lock in initial conditions that are attractive to investors. According to this view, several developing countries compete for investment on issues ranging from environmental regulations to taxes and labour protection; BITs may then lock in favourable conditions (low standards) that are initially put in place and provide incentives not to change the regulatory environment since such changes could potentially be challenged by investors. With BITs in place, it is potentially more costly for States to reverse policies.

However, empirical studies do not fully support this argument (Egan 2012). Some studies have made the opposite case – namely, that countries, including developing ones, with stronger labour protection rights attract more investment (Brown 2000). In early studies, Kucera (2002) and Busse (2004) find that investment inflows are positively related to stronger protection of labour rights. Mosley (2011) reports mixed results. She distinguishes between labour rights protection in law and in practice, and finds that investment is positively related to labour rights protection in law, suggesting that investment does not lower labour legislation, but is negatively related to labour rights protections in practice, indicating that investment might exert pressure discouraging enforcement of existing labour legislation. The findings of Mosley were recently confirmed by a study of Ye (2020), who investigates whether BITs affect collective labour rights in developing countries. He uses the Freedom of Association and Collective Bargaining indicator developed by David Kucera (Kucera 2001, 2002; Kucera and Sari 2019), which allows the protection of collective labour rights to be differentiated in law and in practice. His results show that BITs do not influence laws on freedom of association and collective bargaining, but do worsen the implementation of these laws, resulting in a widening gap between the protection of collective labour rights in law and in practice. He explains this in light of the competition between countries to attract investment, which is facilitated by BITs. To gain competitive advantage in attracting investment, developing countries lower their enforcement of labour standards, including enforcement of related collective rights. In another frequently cited study, Neumayer and de Soysa (2006) did not find any significant effect of FDI on labour rights.

Other scholars have focused on how IIAs create a regulatory “chill” (Tienhaara 2011; Moehlecke 2020; Sands 2023). They are negotiated to attract FDI. For this purpose, they contain provisions that protect foreign investors against the host State’s interference in their investments. The aim is to attract investments by ensuring that foreign investors are protected from unfairly or unjustly losing their investment. Such loss can occur through various mechanisms, including expropriation, unfair taxes and capture by governments. In addition, changes in public policy might affect the value of investments and be challenged by investors. For example, a change in environmental, health or labour regulation might potentially affect the costs of an investment project and be considered a form of indirect expropriation.

As a result, there is concern about whether IIAs affect the policy space of national governments to pursue public policies.

Broude and Haftel (2020, 14) refer to the State regulatory space under investment agreements as "the extent of the ability of governments to freely legislate and implement regulations in given public policy domains" (see also Thompson, Broude and Haftel 2019). More recent criticism has underlined investment law's incapacity to balance investment protection and public interests (Aisbett et al. 2018). Critics argue that current IIAs act asymmetrically, granting rights to investors while imposing strong obligations on capital-importing States to protect investors' interests. They generally incorporate an investor–state dispute settlement system, which gives investors the right to sue a country for potential breach of investment agreements and expropriation of investments. The sued government can be forced to pay a significant amount of money in damages (Gaukrodger and Gordon 2012).[2]

Dispute cases illustrate that the State regulatory space may be impeded by investment agreements. In this context, two relevant cases are *Vattenfall v. Germany (II) (2012)*[3] *and Philip Morris v. Uruguay (2010).*[4] In the former case, the Swedish energy utility Vattenfall sued the German Government before both the German Federal Constitutional Court and the World Bank's International Centre for Settlement of Investment Disputes (ICSID). The Swedish company challenged the new German law (13th Amendment of the Atomic Energy Act), which was intended to accelerate the phase-out of nuclear energy, claiming that it negatively affected their investment. The national complaint before the Constitutional Court was resolved in favour of the applicant since the Court declared that the 13th Amendment was incompatible with the German Constitution. Consequently, the German Government had to undo its policy decision and revise its policy. The ICSID

2 Examples of large awards in investment disputes: the United Nations Commission on International Trade Law (UNCITRAL) awarded US$1,111.3 million to the investor in *Oschadbank v. Russian Federation*, PCA Case No. 2016-14; UNCITRAL awarded US$1,232.82 million to the investor in *Cairn Energy PLC and Cairn UK Holdings Ltd v. The Republic of India,* PCA Case No. 2016-7.

3 International Centre for Settlement of Investment Disputes, *Vattenfall AB and Others v. Federal Republic of Germany (II)*, ICSID Case No. ARB/12/12.

4 International Centre for Settlement of Investment Disputes, *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7.

dismissed the case pursuant to ICSID Arbitration Rule 44.[5] In *Philip Morris v. Uruguay*, the applicant initiated arbitration against Uruguay, claiming a breach of the obligations under its BIT with Switzerland; this followed the adoption of two tobacco control measures, related to regulating logos and brands on cigarette packaging, that were enacted by Uruguay to protect public health. In this case, the policy space on health regulation was challenged by the multinational Philip Morris since the two tobacco control measures on packaging were assumed to negatively affect the investment by Philip Morris in Uruguay. The arbitration tribunal dismissed Philip Morris's claims, upholding the validity of the tobacco control measures.

In some cases, these disputes directly relate to labour protection. For instance, the friction between labour-oriented public policies and conflicting foreign investors' interests emerged in the dispute *Veolia Propreté v. Arab Republic of Egypt* (2015).[6] In light of the France–Egypt BIT, the French utility company challenged the Egyptian labour legislation that raised the minimum wage before an arbitration tribunal, claiming either a revision of the contract or a compensation of around US$200 million. Despite the ICSID tribunal eventually dismissing Veolia's claim, the case illustrates how investment agreements can be used when there is a change in domestic labour law. Moreover, national labour standards and laws can indirectly be undermined by competition between States in order to attract foreign investments, as States may reduce labour protection in order to encourage investments in their countries (so-called "race to the bottom" arguments in trade and investment literature). Most recently, in 2020, Donatas Aleksandravicius, a Lithuanian investor and owner of the company DS Byggeri, claimed that Denmark had failed to take action against labour union protests that took place at its company construction site located in Copenhagen.[7] The protests caused damage to the company site and financial harm. The claimant sought compensation under the Lithuania–Denmark BIT. This was the first investment treaty claim against Denmark brought before the ICSID; however, the proceeding was eventually discontinued in 2021 according to ICSID Arbitration Rule 44.

5 Rule 44 of the ICSID Rules of Procedure for Arbitration Proceedings (2006 version) introduced the possibility of discontinuing the proceeding at request of one party. The discontinuance of the proceeding will take place if the other party agrees to the request or does not object within a fixed time limit.

6 International Centre for Settlement of Investment Disputes, *Veolia Propreté v. Arab Republic of Egyp*t, ICSID Case No. ARB/12/15.

7 International Centre for Settlement of Investment Disputes, *Donatas Aleksandravicius v. Kingdom of Denmark*, ICSID Case No. ARB/20/30.

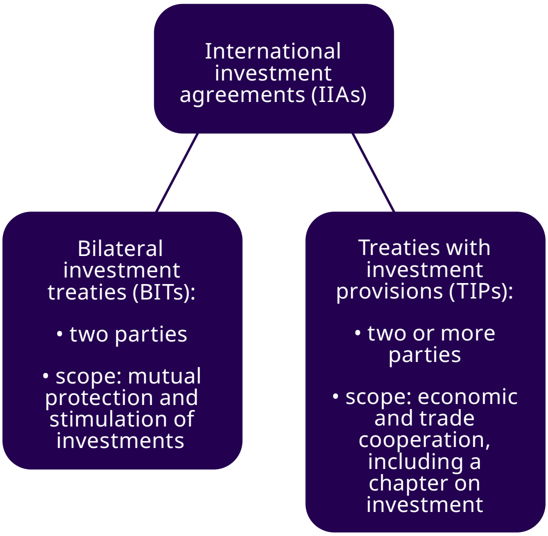
These different cases highlight concerns about how investment agreements might influence the policy space of governments and the latter. One possible solution to address such concerns is to explicitly stipulate in agreements that the policy space should be preserved or introduce references to environmental or labour provisions designed to maintain the policy space in these areas. As Pohl (2018, 55) argues, such references "may require States, for instance, to uphold defined environmental, labour, human rights, anti-corruption, competition or intellectual property protection standards, or to have specific legislation in place" (see also Aisbett et al. 2018). In this way, the negotiation of future investment agreements may present an opportunity to include stronger references to labour protection. The degree to which this strengthening of labour rights protection in agreements is necessary will partly depend on current approaches and practices. In the next section, the occurrence of labour-related references in current IIAs and model BITs is considered.

2.2 Screening labour-related references in investment agreements

Discussions of the relationship between IIAs and labour rights protection make clear that such agreements can influence the protection of labour rights. One way to address the possible negative effects of IIAs on the protection of labour rights is through the inclusion of labour rights protection commitments in investment agreements. This section maps and discusses the occurrence of labour-relevant references across all available IIAs through a keyword search.

As explained above, IIAs comprise both bilateral investment treaties (BITs) and treaties with investment provisions (TIPs) (figure 2.1). A BIT is an agreement between two countries stipulating that they shall reciprocally protect and stimulate investments in each other's territory. Such BITs are so-called "pure" investment agreements as they deal only with investment and investment protection. A TIP also contains investment provisions, but they are set within the context of a broader regional and plurilateral trade and economic agreement. Such TIPs include trade agreements, but also broader economic partnership and association agreements.

▶Figure 2.1 Two types of international investment agreement (IIA)



The process of mapping labour-relevant references across all available IIAs was performed using the United Nations Conference on Trade and Development (UNCTAD)'s International Investment Agreements Navigator, a database in which UNCTAD keeps track of all negotiated and publicly available IIAs. The database lists all concluded IIAs. An agreement is concluded when it has been signed by the parties, regardless of its entry into force. The information presented in the database is continuously amended based on comments by, and a process of verification with, United Nations Member States.[8] As of November 2021, the UNCTAD database contained 2,825 BITs, of which 2,257 were in force, and 420 TIPs, of which 325 were in force. The Navigator has an advanced search function which enables cross-screening of the text of all the IIAs in the database by entering specific keywords. Besides IIAs, the database contains model BITs. These are templates developed by countries to harmonize their approach and represent the starting base for negotiations of BITs (Haftel, Link and Broude 2022). Use of model BITs differs from country to country; most countries do not currently have a model BIT, while certain countries have revised their model BIT several times (Broude and Haftel 2020).

8 For more information, see UNCTAD's Methodology.

The screening of all 3,245 agreements was conducted using more than 50 relevant keywords.[9] In total, 885 agreements (574 BITs and 311 TIPs) were identified that contain references to relevant keywords. The keywords were selected through an iterative process which started with a list of relevant keywords that was then further refined in dialogue with ILO researchers. Since the search was sensitive to words and letters, different spellings of the same word were used (for instance, "labor" and "labour"). These *labour-relevant keywords can be considered as proxies for the importance of labour issues in an agreement.* On the basis of the agreements that were identified, a database containing the relevant keywords and organized by agreement was created.

The approach of searching the UNCTAD database on English-language keywords has some strengths and weaknesses. The main strength is that it allows researchers to search a large body of text on the selected keywords and thereby to identify relevant IIAs. It also allows trends and developments to be identified, some of which are discussed in section 2.3 below.

Among the weaknesses of the approach are, first, that the keywords used do not constitute labour provisions as defined by the ILO Labour Provisions in Trade Agreements Hub, since labour provisions consist of whole texts or paragraphs.[10] As a consequence, the keyword search might result in the identification of keywords in sections of an agreement which are not related to labour protection. This is especially true of some more generic keywords such as "non-discrimination". However, the assumption is that the majority of keywords have a link to formulations typically used in labour provisions or provisions on responsible business conduct. This assumption is partly confirmed by the results presented in section 2.3.

9 Keywords included: labour standards, rights, protection, legislation, law and inspection; child labour; employment; training/education; worker; occupation; just transition; rights at work; work condition(s); skills; occupational safety and health; working hours; trade union(s); International Labour Organization; Declaration on Fundamental Principles and Rights at Work; decent work; ILO Convention(s); Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE); (non-)discrimination; human rights; social development; economic rights; woman/women; gender; social protection; social rights; corporate social responsibility; corporate governance; OECD Guidelines for Multinational Enterprises; responsible business conduct.

10 According to the ILO Labour Provisions in Trade Agreements Hub, labour provisions are "(i) any principle or standard or rule (including references to international labour standards), which addresses labour relations, minimum working conditions, terms of employment, and/or other labour issues; (ii) any framework to promote cooperation and/or compliance with standards, through activities, dialogue and/or monitoring of labour issues; and/or (iii) any mechanism to ensure compliance with national labour law and standards set out in the trade agreement, such as through the settlement of labour-related disputes".

Second, the use of English-language keywords only might have led to an underestimation of the number of labour-related references, since some IIAs are in other languages. Broude and Haftel (2020) identify two waves of BITs. The first wave started with the first BIT between Germany and Pakistan in 1959 and ended around 1990, at the time of the fall of the Berlin Wall. In total, around 400 agreements were signed in this period between Western European countries and African and Asian countries. These were mostly BITs. The second wave started in the 1990s and included investment provisions as part of larger liberalization programmes and agreements, such as the Energy Charter Treaty and the North American Free Trade Agreement (NAFTA), among others. Especially in relation to the first wave of IIAs, the search might under-represent existing references to labour protection since some of these agreements were in non-English languages, such as French, German, Spanish, Russian or Portuguese. Overall, however, the proportion of non-English IIAs to total number of IIAs is only 16 per cent.

Third, the UNCTAD database underestimates the number of existing IIAs, since it does not include so-called “missing investment treaties”. Missing investment treaties are defined as IIAs that have been concluded but whose text is not publicly available or is incomplete for various reasons (Polanco Lazo, Desilvestro and Bazrafkan 2018, 712–715); these authors estimate (p. 709) that in 2018 there were approximately 460 such missing treaties not included in the UNCTAD database. These missing treaties, together with treaties not available in English, constitute a significant additional number of IIAs that could be considered in follow-up research.

▶ 2.3 Labour-related references in IIAs, BITs and model BITs: Main results

In the first section (2.3.1), the main results of the screening of existing IIAs for labour-related references are presented: how keywords were distributed across IIAs, their concentration within IIAs, and the way their occurrence evolved over time and across countries. The second section (2.3.2) delves more deeply into specific articles in selected BITs to explore how labour-related references occur. In the third section (2.3.3), the occurrence of keywords in model BITs is considered.

2.3.1 Labour-related references in IIAs

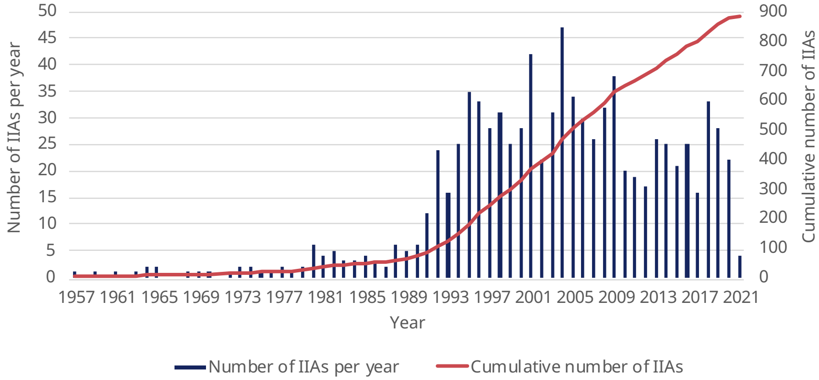
Across the 3,245 IIAs included in the UNCTAD database, numerous references to the preselected keywords were found. These were divided thematically and ordered according to frequency, and five broad categories were identified: labour rights-related keywords (375 occurrences of the keywords); work-related keywords (1,461); ILO-related keywords (220); human rights-related keywords (749); and keywords related to responsible business conduct (167). In total, the 50-plus keywords, divided into these five categories, appeared 2,972 times in 885 IIAs, out of a total of 3,245 IIAs. Hence, in total only 27 per cent of all IIAs contained references to the identified keywords, which is an indication that, overall, only a minority of IIAs incorporate labour concerns in their texts.

The research shows that the majority of the keywords appeared fewer than 100 times, and several appeared only rarely. Keywords such as training/education, worker, (non-)discrimination and employment appeared in more than 200 IIAs. Sometimes these frequent keywords were not related to labour protection: (non-)discrimination, for example, was also used in articles dealing with issues such as transfers and expropriation. Furthermore, the analysis shows that there was a significant number of references to labour rights, labour standards and human rights, as well as to work-related keywords such as employment, training and inspection, among others. References to keywords that relate to the broad area of responsible business conduct were also found. In relation to the ILO and decent work, agreements were identified that included a reference to keywords such as International Labour Organization, decent work, and the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration).

A few observations emerge. First, references to the ILO (57 IIAs) and decent work (35 IIAs) appeared in several agreements, while the MNE Declaration appeared much less frequently (in only 8 IIAs). Second, references to the ILO appeared more often in BITs, whereas references to decent work and the MNE Declaration appeared infrequently in such agreements. These keywords were more frequent in TIPs, which have more extensive trade-related labour provisions. Finally, there were few references to specific issues such as child labour and forced labour.

Considered over time, however, an increase in labour-related references can be observed. Figure 2.2 shows the number of IIAs (both BITs and TIPs) containing keywords by year, as well as the cumulative number of IIAs over time (blue line). From this, it is clear that the number of IIAs containing keywords started to increase in the 1990s, coinciding with the second wave of agreements described above (section 2.2).

▶Figure 2.2 Number of IIAs containing one or more keywords, by year and cumulatively over time, 1957–2021



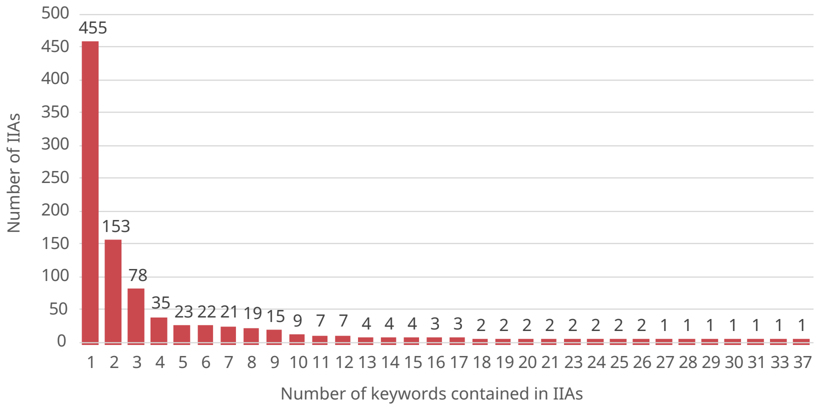
Source: Authors' calculations based on UNCTAD International Investment Agreements Navigator database.

The assumption underlying the analysis is that the number of keywords in an IIA is indicative of the importance placed on labour protection in that IIA. Figure 2.3, showing the number of IIAs containing a given number of keywords, indicates that the occurrence of keywords was concentrated in a small number of agreements: 455 IIAs – more than half – contained just a single keyword, while more than 75 per cent included three keywords or less. By contrast, a small number of IIAs included a relatively large number of keywords: one IIA contained 37 keywords,[11] another IIA 33 keywords,[12] and so on. Approximately half of all labour-related references were found in just 100 agreements. Thus, the analysis reveals that, in broad terms, there are very few references to labour protection in IIAs; and that, where there are labour-related references, they are contained in a limited number of IIAs.

11 Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, OJ L 149, 30.4.2021.

12 Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, OJ L 260, 30.8.2014.

▶Figure 2.3 Number of IIAs containing a given number of keywords



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

Besides an evolution over time and variation in the number of references in IIAs, variation between countries can also be observed. To explore this variation, it is illuminating to focus on the major economies in the world (the G20[13]), since they have signed the most IIAs. Canada and the European Union (EU) score very high in terms of IIAs that contain labour-related references. More than 90 per cent of their agreements contain them. By contrast, middle-income G20 members tend to have few references to labour keywords. Countries such as Argentina,[14] China, India and the Russian Federation rarely include labour-related keywords in their agreements.

To gain further insight into which kinds of agreement contain the most keyword references, a "Top 20" of IIAs containing the most keywords was made. This analysis shows that all the agreements that include multiple keywords are typically more comprehensive agreements (TIPs), which, besides investment, also cover trade and other forms of economic cooperation. For this reason, they are more elaborate agreements, which typically take the form of trade and investment agreements, association agreements, and economic and political partnership agreements. On the other hand, BITS tend to have significantly fewer keyword references,

13 As of 2023, the 20 members of the G20 were: Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Republic of Korea, Russian Federation, Saudi Arabia, South Africa, Türkiye, United Kingdom of Great Britain and Northern Ireland, United States of America and the European Union.

14 In the case of Argentina, the lack of references to labour-related keywords may be explained by the high percentage of its IIAs (63 per cent) that are not in English.

and none of the Top 20 agreements are BITs. Most keywords appear in comprehensive agreements (TIPs) concluded by the EU, the United Kingdom and the European Free Trade Association (EFTA). These comprehensive agreements sometimes have separate chapters on labour rights or trade and sustainable development, and these include many of the keywords. A typical example is the trade and sustainable development chapters in EU trade and investment agreements (see also Corley-Coulibaly, Grasselli and Postolachi in this volume).

To further explore whether keywords also appear in the investment chapters of TIPs, two investment chapters from recent EU agreements – namely, the EU–Viet Nam agreement[15] and the EU–Singapore agreement[16] – were screened for keywords. In the investment chapters of these TIPs, some of the relevant keywords appear (such as human rights, labour protection, work, gender and education), but mentions are rather limited, indicating that the keywords mostly appear in other chapters of the agreement. The keywords that do appear are similar in the two agreements, which can be explained by the "blueprint" approach used by the EU when drafting agreements.

2.3.2 Labour-related references in BITs

While several investment chapters are included in trade and economic partnership agreements (TIPs), and these more comprehensive agreements have separate chapters containing several of the keywords, it is also interesting to explore the occurrence of keywords in BITs. An analysis of BITs containing more than five keywords shows that, overall, BITs have a relatively low number of keywords. However, several keywords are of special relevance in the context of debates on decent work, since they refer to the ILO, including the MNE Declaration, human rights, corporate governance, corporate social responsibility (CSR), responsible business conduct, and specific labour rights such as those related to occupational safety at work.

An analysis of some of these BITs further contextualizes where the labour-related references occur in such agreements. Some BITs include references to protection of labour rights in their preamble. For example, the BIT between Hungary and Kyrgyzstan states in its preamble that the parties seek "to ensure that investment is consistent with the protection of internationally

15 Investment Protection Agreement between the European Union and Its Member States, of the One Part, and the Socialist Republic of Viet Nam, of the Other Part (2019).

16 Investment Protection Agreement between the European Union and Its Member States, of the One Part, and the Republic of Singapore, of the Other Part (2018).

and domestically recognised human rights, labour rights, and internationally recognised standards of corporate social responsibility".[17]

Other BITs include articles specifically referring to labour rights protection and the promotion of CSR. For example, the BIT between the Belgium–Luxembourg Economic Union (BLEU) and Ethiopia defines the term "labour legislation" in relation to "internationally recognized labour rights", such as "the right of association", "a prohibition on the use of any form of forced or compulsory labour" and "a minimum age for the employment of children".[18] Furthermore, this BIT has a specific article (Art. 6, "Labour") that is dedicated to labour rights protection; it starts by recognizing the right of each party to freely develop its own labour standards and legislation, and further stipulates, in this regard, that the parties "shall strive to ensure" that their labour legislation conforms to "the internationally recognized labour rights" (Para. 1). The next paragraph refers to the commitment of each party to "strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such legislation as an encouragement for the establishment, maintenance or expansion in its territory of an investment" (Para. 2). The Article then contains a best-endeavours obligation of the parties to ensure that the "Fundamental Principles and Rights at Work" (referencing the ILO's 1998 Declaration) and the "internationally recognised labour rights" (including "minimum wages, hours of work and occupational safety and health", as set forth in Art. 1(6) of the agreement) are "recognised and protected by domestic legislation" (Para. 3). Finally, the Article concludes by acknowledging that cooperation between the parties "provides enhanced opportunities to improve labour standards" and introduces the obligation of the parties "to accept to hold expert consultations" on labour legislation and standards upon request of the other party (Para. 4).

The BLEU–Ethiopia BIT is not an isolated case. Article 8 of the BIT between BLEU and Colombia is also dedicated to labour protection.[19] It includes many commitments and statements similar to those found in the BLEU–Ethiopia BIT. For instance, the first paragraph of Article 8 states that the parties recognize "the right of each Contracting Party to establish its own domestic labour standards, and to adopt or modify accordingly its labour

17 Agreement between the Government of Hungary and the Government of the Kyrgyz Republic for the Promotion and Reciprocal Protection of Investments (2020), fourth preambular paragraph.

18 Agreement between the Belgian–Luxembourg Economic Union, on the One Hand, and the Federal Democratic Republic of Ethiopia, on the Other Hand, on the Reciprocal Promotion and Protection of Investments (2006), Art. 1(6).

19 Agreement between the Belgian–Luxembourg Economic Union, on the One Hand, and the Republic of Colombia, on the Other Hand, on the Reciprocal Promotion and Protection of Investments (2009).

legislation". Furthermore, it requires the parties, among other things, to translate into national legislation internationally recognized labour rights and principles, and seeks to dissuade the parties from "encourag[ing] the establishment, maintenance or expansion in its territory of an investment by relaxing domestic labour legislation" (Para. 1). Paragraph 3 of Article 8 provides significant discretion to the parties to determine the appropriate level of labour protection by stating that "[n]othing in this Agreement shall be construed as to prevent a Contracting Party from adopting, maintaining, or enforcing any measure that it considers appropriate to ensure that an investment activity in its territory is undertaken in accordance with the labour law of the Party".

Non-European countries also make labour-related references in specific articles of their BITs. For example, the BIT between the United States and Rwanda regulates the relationship between labour and investment in Article 13.[20] It includes a recognition that it is "inappropriate" to attract investment by lowering labour rights protection and a best-endeavour obligation of the parties to "strive to ensure" that they do not derogate from, weaken or reduce adherence to "internationally recognized labor rights", such as the rights of association and collective bargaining, a "prohibition on the use of any form of forced or compulsory labor", "labor protections for children", and "acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health" (Paras 1 and 2). The BIT between Canada and Burkina Faso also contains references to labour-related keywords.[21] Article 16 on corporate social responsibility states that "[e]ach party should encourage enterprises … to incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies". It then goes on to specify that the principles concerned in this instance are those that address issues such as labour, the environment and human rights.

As well as in European and North American BITs, labour rights protection articles can be observed in South–South BITs. The Nigeria–Morocco BIT, for example, refers to "investment, labour and human rights protection" (Art. 15).[22] After reaffirming "their respective obligations as members of

20 Treaty between the Government of the United States of America and the Government of the Republic of Rwanda concerning the Encouragement and Reciprocal Protection of Investment (2008).

21 Agreement between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments (2015).

22 Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (2016).

the International Labour Organization (ILO) and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up" (Para. 1), the text goes on to stipulate more detailed commitments, acknowledging the parties' recognition that:

> [I]t is inappropriate to encourage investment by weakening or reducing the protection accorded in domestic labour laws. Accordingly, each Party shall ensure that it does not waive or otherwise derogate from or offer to waive or otherwise derogate from its labour laws where the waiver or derogation would be inconsistent with the labour rights conferred by domestic laws and international labour instruments in which both parties are signatories, or fail to effectively enforce its labour laws through a sustained or recurring course of action or inaction. (Para. 2)

Paragraph 5 of Article 15 then adds that each party "shall ensure that its laws and regulations provide for high levels of labour and human rights protection appropriate to its economic and social situation, and shall strive to continue to improve these law and regulations". Paragraph 6 goes even further, requiring that the parties "ensure that their laws, policies and actions are consistent with the international human rights agreements to which they are a Party". Additional labour- and human rights-related references are included in Article 18 on post-establishment obligations: Paragraph 2 requires investors and investments to "uphold human rights in the host state"; Paragraph 3 requires that "[i]nvestors and investments shall act in accordance with core labour standards" as required by the 1998 ILO Declaration; and Paragraph 4 requires investors not to "manage or operate the investments in a manner that circumvents international environmental, labour and human rights obligations to which the host state and/or home state are Parties".

Finally, besides references to the protection of labour rights in existing BITs, such commitments can also be observed in BITs that are currently under negotiation. An interesting example of increased attention to labour rights protection in BITs is provided by the draft EU–China Comprehensive Agreement on Investment (CAI).[23] If concluded, it will be a one of the few BITs that include rather extensive references to labour rights protection.

The CAI follows, to some degree, the more traditional approach of the EU on labour rights and standards in trade agreements, and contains several provisions on labour rights. From China's perspective, it constitutes a significant shift from current practice, as China's trade and investment

23 Terms of the EU–China agreement in principle, as of January 2021, are available on the European Commission website.

agreements have rarely included labour references or labour provisions (Brown 2019, 110), and they rarely include the types of sustainable development provisions that the EU, for example, has included in its agreements. In an assessment of sustainable development provisions in China's IIAs, it was found that only a handful of its 104 BITs and 15 free trade agreements (FTAs) in force in 2018 contained references relevant to sustainable development, and even fewer contained references to labour rights protection (Chi 2019, 10).

Only five of China's agreements currently in force contain labour references – namely, the FTA with Chile signed in 2005, the FTA with New Zealand signed in 2008, the investment agreement with the Association of Southeast Asian Nations (ASEAN) signed in 2009, the FTA with Switzerland signed in 2013, and the FTA with Iceland signed in 2013. The ASEAN–China investment agreement and the China–Iceland FTA contain few labour-related references – respectively, two and three such references – and they are also of a general nature. For instance, the former does not contain any clauses related to labour rights or work protection; the only keywords are "non-discrimination" and "labour", and these are used in the context of transfers and repatriation of profits.[24] Each of "the remaining three FTAs contain a single clause stating that the parties will enhance their cooperation on labour, but they specify that this cooperation is to be carried out in accordance with a separate memorandum of understanding (MoU) signed by the parties" (Otteburn and Marx 2022, 610). It is within these memoranda that more robust provisions on labour protection are to be found, but these provisions remain limited.

The CAI takes a different approach. The draft text of the CAI on sustainable development contains several references to international commitments on labour rights, including progress towards ratification of the ILO fundamental Conventions, the importance of decent work, and responsible business conduct. These provisions include many references to international commitments including, besides the 1998 ILO Declaration, the Ministerial Declaration of the United Nations (UN) Economic and Social Council on Full Employment and Decent Work of 2006; the ILO Declaration on Social Justice for a Fair Globalization of 2008; the UN 2030 Agenda for Sustainable Development and its Sustainable Development Goals; and the 2019 ILO Centenary Declaration for the Future of Work. In addition, there are references to international instruments in the commitment to promote corporate social responsibility, including to the UN Global Compact, the UN Guiding Principles on Business and Human Rights, the ILO MNE Declaration,

24 Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between the People's Republic of China and the Association of Southeast Asian Nations (2009), Art. 10.

and the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises. At the same time, the draft CAI includes a whole subsection on "Investment and Labour", which contains five articles focusing on (among other things) the right to regulate, a commitment of the parties to strive to improve existing labour protection, a reaffirmation of the obligations of the parties to uphold the principles underlying fundamental Conventions of the ILO, and an article entitled "Investment Favouring Decent Work". The last of these contains a commitment of the parties to promote investment that provides "a human-centred approach to the future of work, adequate minimum wages, social protection and safety and health at work".[25]

2.3.3 Labour-related references in model BITs

In addition to negotiated agreements, it is relevant to focus on model BITs. Model BITs are templates ("blueprints") that some governments have drafted to secure consistency in the formulation of new investment agreements.[26] Some countries revise their model BITs. The UNCTAD International Investment Agreements Navigator database contains several model BITs. Using this database, 41 countries that have drafted a model BIT in the last 20 years were identified, and these countries' model BITs were screened for labour-related references. The analysis shows that the use of labour-related keywords in model BITs has evolved over time and their number has increased. It is interesting to note that the most recent model BITs increasingly contain references to the relevant keywords, which suggests that attention to labour references in investment agreements is growing. These include model BITs concluded by Canada (2021), BLEU (2019), the Netherlands (2019), Slovakia (2019) and Colombia (2017). Increased use of keywords can be observed not only in developed countries but also in middle-income and developing countries such as Brazil, Colombia and the Southern African Development Community (SADC) countries.[27] This might be explained by the fact that these countries increasingly engage with trade and investment partners such as the EU and the United States, which promote

25 For a general discussion of the CAI, see Lawrence, Van Ho and Yilmaz Vastardis (2020) and Cotula (2021); and for an assessment of the sustainable development chapter with a specific focus on labour rights, see Otteburn and Marx (2022).

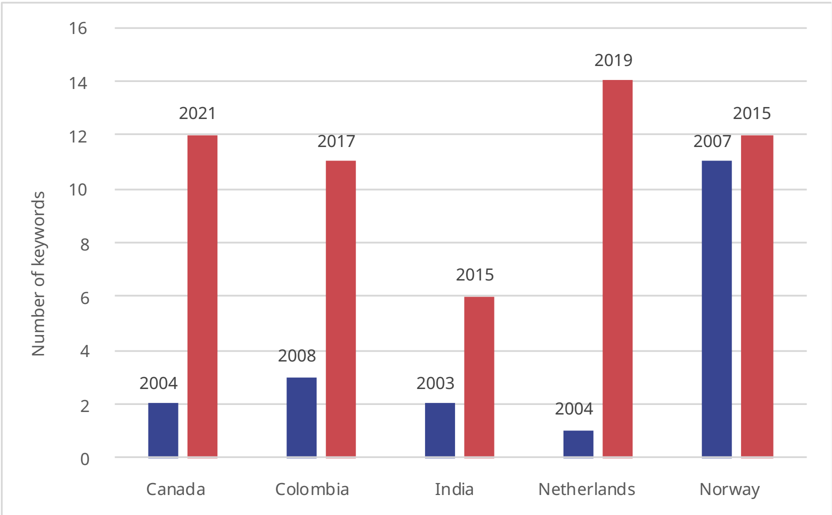
26 Beside model BITs drafted by countries, there are also model agreements provided by governmental and non-governmental international institutions; see Alschner, Elsig and Wüthrich (2022).

27 As of 2023, 16 countries belonged to the SADC: Angola, Botswana, Comoros, Democratic Republic of the Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania (United Republic of), Zambia and Zimbabwe.

commitments on sustainability, labour and environmental protection. While only a few observations can be made (since most countries do not have or share a model BIT), it is still an interesting development to observe that the number of labour-related references in model BITs is increasing.

Since some countries regularly update their model BITs, it was also possible to analyse whether the number of keywords in the model BITs of specific countries has increased over time. For this purpose, five countries were identified that have updated their model BITs recently and for which several model BITs from different years are available. Figure 2.4 shows how the number of keywords in model BITs drafted by Canada, Colombia, India, the Netherlands and Norway has changed over time. With the exception of Norway, which had already included a relatively large number of keywords in its 2007 model BIT, the other countries very substantially increased the number of keywords in their model BITs, thereby strengthening the labour-relevant language of their texts.

▶Figure 2.4 Change over time in the number of keywords in original and updated model BITs in selected countries



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

This increase in the number of keywords indicates that there is growing awareness of the relevance of including references to labour protection in investment negotiations and agreements. A closer analysis of these references shows that they are included in provisions that aim to secure the regulatory policy space of countries, as well as in provisions on corporate social responsibility and responsible business conduct. However, few model BITs make explicit reference to the ILO or to ILO Conventions.[28]

The relevance of including labour commitments in model BITs is illustrated by the case of the model BITs of Brazil and India, and the investment cooperation and facilitation treaty subsequently negotiated between the two countries. This case also provides an interesting example of how South–South agreements are increasingly paying attention to the protection of labour rights and the promotion of responsible business conduct. The Brazil and India model BITs were both devised in 2015,[29] and the Brazil–India investment cooperation and facilitation treaty in 2020.[30] A comparative analysis of the two model BITs and the cooperation and facilitation treaty shows the extent to which model BITs can influence negotiated agreements. The Brazil–India investment agreement includes relevant keywords that were also included in one or both model BITs. Also, when the model BITs are compared, the negotiated agreement does not display a "lowest common denominator" outcome but follows the more advanced model BIT (Brazil's) in terms of labour-related references.

First, the Brazil model BIT contains many more references to labour rights and responsible business conduct than the India model BIT. Each contains an article on corporate social responsibility (CSR), but Brazil's text on CSR (Art. 14) is much more developed than the corresponding passage in India's model BIT (Art. 12). For instance, Brazil's Article 14 contains several subsections which list various voluntary principles and standards with which the investors must comply. This is not the case in the India model BIT, which refers more generally to principles that "may address issues such as labour, the environment, human rights, community relations and anti-corruption" (Art. 12). Thus, while the India model BIT uses noncommittal language such as "may", the Brazil model BIT is more robust in its demands, urging the parties to comply with international standards on responsible business conduct: "The investors and their investment shall endeavour to comply with the following voluntary principles and standards for a responsible business conduct" (Art. 14(2)). In addition to the article on CSR, the Brazil model BIT contains an article entitled "Provisions on Investment and Environment, Labor Affairs and Health" (Art. 16), which was copied over, word for word, into the negotiated Brazil–India investment agreement. It is noteworthy, in a

28 Exceptionally, references to the ILO are found in Art. 6(6) of the Netherlands model BIT (2019), Art. 16(2) of the BLEU model BIT (2019) and Art. 15(2) of the SADC model BIT (2012).

29 Brazil model BIT (2015); India model BIT (2015).

30 Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India (2020).

case of this kind, to observe that stronger provisions set out in one country's model BIT may be carried over into a negotiated agreement.[31]

In conclusion, model BITs are a possible means of strengthening labour protection in investment agreements and can help to diffuse best practices in negotiated agreements. However, only a minority of countries draft model BITs (or make them available), so the findings presented here need to be seen in that perspective.

▶ 2.4 Implementation of labour rights commitments in IIAs and BITs

Does the inclusion of labour rights commitments in IIAs make a difference to the protection of labour rights? This depends, in the first instance, on how these commitments are implemented and, in the second, on the impact they have. This section reviews current approaches to implementation of labour commitments in IIAs and discusses their potential impact.

The implementation of commitments in IIAs is the responsibility of the parties involved. Concerning the monitoring and enforcement of the implementation of labour-related commitments, significant variation exists between TIPs and BITs. In TIPs, labour-related references mostly occur in dedicated chapters on labour and/or environmental standards. These chapters include, in addition to the general consultation mechanisms between the parties, specific procedures and institutions to monitor the implementation of labour and environment-related commitments (see Corley-Coulibaly, Grasselli and Postolachi in this volume; see also ILO 2013 and Velluti 2020). These institutions and procedures involve setting up advisory groups and stakeholder consultation and dialogues, and reporting on the implementation of the commitments. These labour, environment and/or sustainability chapters also contain specific provisions on how non-compliance should be addressed. In some cases, such as the TIPs involving the EU, the trade and sustainable development chapters are exempted from the general dispute settlement and enforcement mechanisms of

31 This finding challenges the findings of Alschner, Elsig and Wüthrich (2022), who did not find that model BITs had any impact on negotiated agreements. The main difference is that they looked at model BITs from international institutions (six in total), while the analysis presented here focuses on model BITs of specific countries and how these work through into negotiated agreements in which those countries are involved.

the agreement. However, they establish a specific procedure, operating through a panel of experts, to address non-compliance with the labour and environment commitments (Bartels 2013; Harrison et al. 2018).

Bilateral investment treaties have less elaborate monitoring and enforcement provisions. They generally establish joint committees with the function of discussing and reviewing the implementation and operation of the entire agreement, rather than focusing on specific commitments relating to labour and the environment; there are no specific monitoring institutions to monitor the implementation of the commitments or specific dispute settlement mechanisms. There are some exceptions in which consultation mechanisms are created if concerns are raised. Those BITs involving BLEU generally include an article on labour and investment which provides that "upon request by either Contracting Party, the other Contracting Party shall accept to hold expert consultations on any matter falling under the purpose of this Article".[32] In addition, they note that disputes (related to the entire BIT) should be settled through diplomatic channels or alternatively "submitted to a joint commission consisting of representatives of the two Parties".[33] In this context, some BITs foresee bilateral consultations to address concerns. For example, Article 13 of the United States–Uruguay BIT, entitled "Investment and Labor", provides for a consultation mechanism at the request of one party in the event that investments are attracted through the weakening of labour laws.[34] Whether these consultations are used in practice remains to be researched.

If diplomacy and consultation do not work, the parties can, in principle, have recourse to an arbitration tribunal to settle a dispute. However, some BITs exclude commitments on labour, CSR or the environment from dispute settlement through an arbitration court. For example, the dispute settlement text of the Brazil–United Arab Emirates BIT states that: "The following may not be subject to arbitration: … Paragraph 2 of Article 17 – Provisions on Investment and Environment, Labor Affairs and Health."[35] This exclusion is akin to the exclusion provision in some TIPs (in that it excludes non-compliance with labour/environmental commitments from the dispute settlement mechanism), but no alternative mechanism to address concerns on non-compliance is offered. It was not possible to estimate how many BITs exclude labour and environmental commitments from arbitration. Some

32 See, for example, Art. 4(6) of the BLEU–Montenegro BIT (2010) and Art. 4(6) of the BLEU–Serbia BIT (2004).

33 See, for example, Art. 12(2) of the BLEU–Ethiopia BIT (2006).

34 United States–Uruguay BIT (2005).

35 Brazil–United Arab Emirates BIT (2019), Art. 25(3).

BITs do not exclude these provisions from arbitration.[36] In sum, in terms of their institutional arrangements, BITs do not generally include extensive implementation and enforcement provisions.

Finally, when considering the impact of these provisions in promoting decent work and protecting labour rights, here, too, research points to a difference between TIPs and BITs. In contrast to the extensive research on the impact of labour provisions through TIPs (see Corley-Coulibaly, Grasselli and Postolachi in this volume), little or no research exists on the impact of labour commitments in BITs. On the impact of labour provisions in TIPs, research on EU trade agreements is providing mixed results on the protection of labour rights. Looking at the first generation of TIPs that include significant labour rights provisions, some scholars suggest that the direct impact is rather limited.[37] This view is supported in a recent paper by Francois et al. (2022), which used an extensive dataset covering more than 180 countries and spanning several decades to assess whether provisions on labour standards, environmental protection and human rights protection in trade agreements have any positive impact on indicators related to these issues. Their paper finds no evidence that labour and human rights provisions have any positive effect on associated outcome indicators. In contrast, Postnikov and Bastiaens (2014) do find a strong positive effect on core labour standards in partner States of the EU after an agreement enters into force. They attribute this to learning mechanisms, triggered by the implementation provisions in trade agreements, which focus on dialogue, communication and education. More recent papers also present a more nuanced picture showing evidence of the impact of labour provisions in TIPs. Corley-Coulibaly, Grasselli and Postolachi (2023) report on tangible and concrete activities and effects related to improving labour rights protection in the context of the EU–Republic of Korea FTA. Moreover, several scholars point to the importance of ex ante effects of labour provisions on the protection of labour rights through pre-ratification influence (Kim 2012; ILO 2013). Such influence is confirmed by means of in-depth case studies of (for example) the EU–Viet Nam trade and investment protection agreement (Marslev and Staritz 2022) and the negotiations of the Trans-Pacific Partnership Agreement (Ebert 2019). In addition, recent studies focusing on the US–Mexico–Canada (USMCA) agreement (USTR 2020), which includes new features in terms of enforcement of labour rights commitments, suggest that this novel approach might generate a more direct impact on the protection of labour rights. Comparisons between the USMCA and its

36 For example, the Morocco–Nigeria BIT (2016).

37 Scholars taking this view include Harrison et al. (2018), Marx, Lein and Brando (2016), Orbie, Van den Putte and Martens (2017), and Smith et al. (2020).

predecessor NAFTA show how the USMCA introduces various innovations, including strengthening of the possibilities of accessing the dispute settlement mechanism in case of violations of the labour commitments, and the introduction of a rapid response mechanism in relation to non-compliance with freedom of association and the right to collective bargaining (Corvaglia 2021; see also Bates 2022). These innovations also constitute mechanisms for better enforcement of labour rights commitments.

Notwithstanding the mixed empirical results on what kind of impact labour provisions in TIPs have in protecting labour rights, most authors tend to agree that a key component in generating an impact is related to the implementation and enforcement provisions included in an agreement (Harrison et al. 2018; Ebert 2019; Velut et al. 2022). The more elaborate and concrete these provisions are, the higher the likelihood that an impact, either ex ante or ex post, will occur. Labour provisions with limited or no implementation and enforcement mechanisms will most likely not generate any impact. Hence, if one expects labour provisions to have an impact on the protection of labour rights, then provisions on enforcement and implementation should be taken into account. Recent debates on the reform of sustainable development commitments in trade agreements point in the same direction (European Commission 2022).

The earlier discussion (in sections 2.3.1 and 2.3.2) highlighted that, in comparison to TIPs, BITs have rather limited provisions on the protection of labour rights and limited provisions on monitoring and enforcement. In light of this, it is hardly to be expected that BITs will have much direct impact on the protection of labour rights. The foregoing analysis shows that there is significant room to increase and strengthen provisions on labour rights protection in BITs. First, future BITs could include more elaborate articles and provisions on safeguarding the policy space of governments to develop and strengthen domestic labour laws, which is also in accordance with international commitments. In section 2.3.2, some examples from BITs were given that could be emulated, or taken as a starting point, in future agreements. Second, future BITs should include sufficiently strong provisions on the enforcement of these labour provisions in order to effectively safeguard the policy space of governments. In this context, ensuring that commitments on the protection of labour rights are not excluded from dispute settlement and arbitration would be an option to be considered. In addition, considering possible sanction mechanisms might also be explored. This approach has gained ground in debates on reforming sustainable development provisions in TIPs (Velut et al. 2022).

The negotiation, renegotiation and conclusion of investment treaties is an ongoing process, and several new BITs emerge yearly. This creates opportunities to include more labour-relevant references and, potentially, labour provisions, as well as provisions on the implementation of these commitments. The latter is illustrated, to a degree, by the CAI, which includes more elaborate provisions on labour rights protection and implementation. Concerning stronger commitments to labour rights protection, it is noteworthy that Article 4 of the draft CAI contained a commitment of the parties to work towards ratification of ILO fundamental Conventions and, in particular, to make continued and sustained efforts to ratify two ILO Conventions on forced labour,[38] which had not been ratified by China at the time of the negotiations of the draft agreement (Otteburn and Marx 2022, 615). In August 2022, the Government of China deposited the instruments of ratification of these two conventions. Whether there is any clear link between the negotiations of the CAI and the ratification of the two ILO Conventions by China is unclear. Ankersmit (2021) notes that the lack of ratification of the ILO Conventions on forced labour by China was not a significant element in the decision to put the contemporary negotiations on hold. Several other factors played a role. Concerning implementation, the CAI also includes more elaborate provisions, including, in case of disputes, the creation of a panel of experts to investigate and issue a public report on a matter of disagreement.

▶ 2.5 Conclusions

The field of investment agreements remains dynamic as more agreements continue to be negotiated. There is growing concern on the possible sustainability and, more specifically, labour impacts of investment treaties. As a result, increased attention to labour protection commitments in IIAs is being proposed. This chapter has provided an exploratory analysis and scoping of labour rights protection-related references in IIAs. Using UNCTAD's International Investment Agreements Navigator database, the analysis focused on all IIAs (both BITs and TIPs) included in the database and on model BITs. In total, 3,245 IIAs and 41 model BITs were screened for more than 50 keywords. This resulted in the creation of a database containing 885 IIAs that included one or more keywords. In the case of model BITs, all 41 screened agreements were analysed.

38 Forced Labour Convention, 1930 (No. 29); Abolition of Forced Labour Convention, 1957 (No. 105).

The analysis showed that there is significant variation in the occurrence of labour-relevant keywords across IIAs. Of the 885 IIAs containing one or more keywords, 164 had five or more keywords, while only 64 had ten or more keywords. More than 50 per cent of IIAs analysed contained only one keyword, and more than 75 per cent contain one to three keywords. Nevertheless, it emerged that references to labour-related keywords in IIAs had increased over time, signalling growing attention to labour-related issues, responsible business conduct and similar sensitivities. Some of the keywords at the core of issues related to labour and responsible business conduct (such as labour rights, labour standards, corporate social responsibility/responsible business conduct, decent work, International Labour Organization and various declarations) did not appear frequently. There were only nine keywords that appeared more than 100 times in all IIAs screened. It should be noted that keywords that appeared more often, such as discrimination, are to a certain degree more generic and used in contexts apart from labour protection. Further contextualization was provided by an analysis of specific BITs, including BITs between BLEU and selected countries, the United States and Rwanda, and Nigeria and Morocco. Here the focus turned to specific articles that contain several keywords and are concerned with upholding domestic labour law and international labour rights. This analysis was followed by a closer look at the draft CAI between the EU and China. A discussion of the CAI showed the increasing importance of labour rights commitments in IIAs and how labour rights protection commitments have been taken on board by a party which had generally been more reluctant to do so in previous agreements.

The chapter proceeded with an analysis of model BITs and their inclusion of relevant keywords. These are essentially BIT templates that governments of many countries have drafted to secure consistency in the formulation of new IIAs. Model BITs are generally subjected to reviews and improvements by governments and constitute a relevant entry point to strengthen labour rights commitments in IIAs. The analysis showed that this is occurring, but only for a limited number of countries. Further analysis of the Brazil–India cooperation and facilitation treaty showed how the two countries' model BITs had influenced the negotiated agreement. In this case, the "stronger" provisions of the Brazil model BIT were included in the negotiated agreement. This indicates that model BITs can play a role in formulating more stringent commitments, which are then taken on board in negotiated agreements. The degree to which these dynamics will unfold in future remains to be seen.

The final section focused on the implementation of labour rights-related commitments. Concerning the implementation and impact of labour-related references and provisions on the protection of labour rights, it was observed that there is a significant difference between BITs and TIPs in terms of monitoring and enforcement of commitments, as the latter include more elaborate monitoring and enforcement mechanisms. Since they only have limited enforcement provisions, the impact of labour-related references on labour rights protection in BITs is hypothesized to be low.

In sum, the analysis shows that increasing attention is being paid to labour issues in investment agreements, as measured by the occurrence of labour-relevant keywords, but that such attention can still be significantly strengthened. Currently, the approach in several BITs does not provide sufficient guarantees to safeguard the policy space of governments to address labour and environmental issues. Such BITs can be significantly strengthened by including articles explicitly safeguarding the policy space of government to develop domestic labour law and by including provisions that guarantee the enforcement of these commitments.

The call for more, and more effective, provisions on labour, environment and responsible business conduct in investment agreements is gaining ground. The background note on potential avenues for future policies, prepared by the OECD for the sixth annual Investment Treaty Conference in 2021, devotes a chapter to how future investment treaties could contribute to sustainable development and business conduct by including commitments to strengthen domestic regulation in accordance with international commitments and address possible adverse impacts of business (OECD 2021). The document recommends more extensive inclusion in IIAs of references to key international commitments such as the ILO Conventions. This call to strengthen the sustainability dimension of investment treaties follows other initiatives on rethinking approaches to investment treaties (Aisbett et al. 2018). The analysis presented in this chapter offers some avenues to further strengthen the labour rights protection component of IIAs. First, in the case of BITs, as well as including strong commitments on labour rights protection, specific mechanisms could be included to monitor the implementation of these commitments. Second, the use of model BITs with stronger commitments on labour rights protection could further diffuse such commitments in investment agreements. If BITs and model BITs are strengthened in these ways, they might contribute, over time, to the decent work agenda and the protection of labour rights.

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