

aviation. And we often pay fees under those treaties recognizing the benefits we get dwarf those minimal fees.

And on the national security front, some argue we would be handing power over the U.S. Navy to an international body. Patently untrue, obviously absolutely contrary to any history or law governing our navy. . . . Disputes concerning U.S. military activities are clearly excluded from dispute settlement under the convention.

And neither is it true that the convention would prohibit intelligence activities. The intelligence community has once again in 2012, as it did in 2007, as it did in 2003, confirmed that is absolutely not true.

So whatever arguments may have existed for delaying U.S. accession no longer exist and truly cannot be even taken with a straight face. The benefits of joining have always been significant, but today the costs of not joining are increasing. So much is at stake, and I therefore urge the Committee to listen to the experts, listen to our businesses, listen to the Chamber of Commerce, listen to our military, and please give advice and consent to this treaty before the end of this year.³

INTERNATIONAL ECONOMIC LAW

United States Adopts New Model Bilateral Investment Treaty

In April 2012, the U.S. Department of State and the Office of the United States Trade Representative released the text of the new U.S. model bilateral investment treaty¹ (BIT). U.S. negotiators will use the new model text as a guide in future investment treaty negotiations with other countries. The text does not alter core investment protections set out in the previous model adopted in 2004 but adds provisions dealing with state-owned enterprises, enhanced transparency, labor and environmental protection, and other matters. While the new model does not require legislative approval, bilateral investment treaties require Senate advice and consent. An excerpt from the two agencies' announcement of the new model text follows:

Like the predecessor 2004 model BIT, the 2012 model BIT continues to provide strong investor protections and preserve the government's ability to regulate in the public interest. The Administration made several important changes to the BIT text so as to enhance transparency and public participation; sharpen the disciplines that address preferential treatment to state-owned enterprises, including the distortions created by certain indigenous innovation policies; and strengthen protections relating to labor and the environment.

BACKGROUND

Since February 2009, when the Administration initiated a review of the United States' (2004) model BIT to ensure that it was consistent with the public interest and the Administration's overall economic agenda, the Administration has sought and received extensive input from Congress, companies, business associations, labor groups, environmental and other non-governmental organizations, and academics. . . .

³ U.S. Dep't of State Press Release, Statement of Secretary of State Hillary Rodham Clinton, *The Law of the Sea Convention* (Treaty Doc. 103-39): The U.S. National Security and Strategic Imperatives for Ratification (May 23, 2012), at <http://www.state.gov/secretary/rm/2012/05/190685.htm>.

¹ The new model text is available online at <http://www.state.gov/e/eb/ifa/bit/index.htm>.

A BIT is an international agreement that provides binding legal rules regarding one country's treatment of investors from another country. The United States negotiates BITs on the basis of a high-standard "model" text that provides investors with improved market access; protection from discriminatory, expropriatory, or otherwise harmful government treatment; and a mechanism to pursue binding international arbitration for breaches of the treaty. High-standard BITs, such as those based on the U.S. model, improve investment climates, promote market-based economic reform, and strengthen the rule of law. The United States has more than 40 BITs in force with countries around the world, and the investment chapters of U.S. free trade agreements (FTAs) contain substantially similar rules and protections. USTR and the Department of State co-lead the U.S. BIT program.²

A substantial excerpt from a Department of State fact sheet explaining the changes made in the new model BIT follows:

The 2012 model BIT maintains language from the 2004 model BIT, in particular its carefully calibrated balance between providing strong investor protections and preserving the government's ability to regulate in the public interest. The Administration made several targeted and important changes from the previous model text, however, in order to improve protections for American firms, promote transparency, and strengthen the protection of labor rights and the environment.

Transparency and Public Participation

Stakeholders representing a range of interests called on the Administration to enhance transparency and opportunities for public participation in the model BIT. The revised model BIT enhances transparency and public participation in several important ways, including:

1. *Transparency consultations.* The 2012 model BIT requires the Parties to consult periodically regarding how to improve their transparency practices, both in the context of developing and implementing laws, regulations, and other measures affecting investment and in the context of investor-State dispute settlement.
2. *Notice and comment procedures.* The 2012 model BIT bolsters Parties' obligations to publish proposed regulations, explain their purposes and rationales, and address substantive comments provided by stakeholders (among other actions), including, as appropriate, with respect to financial services.
3. *Multilateral appellate procedures.* The Administration enhanced language regarding the possibility of a future multilateral appellate mechanism by requiring Parties to strive to ensure that any such mechanism includes provisions on transparency and public participation comparable to those already provided for in investor-State dispute settlement under the BIT.

Labor and Environment

It was an Administration priority to enhance labor and environmental standards in the model BIT. As a result, the 2012 model BIT expands obligations in the areas of labor and environment in four important ways.

² U.S. Dep't of State Press Release No. P2012/611, United States Concludes Review of Model Bilateral Investment Treaty (Apr. 20, 2012), at <http://www.state.gov/r/pa/prs/ps/2012/04/188198.htm>.

1. *New obligation not to “waive or derogate” from domestic laws.* The 2012 model BIT includes an obligation on Parties to not waive or derogate from their domestic labor and environmental laws as an encouragement for investment.
2. *New obligation to “effectively enforce” domestic laws.* The 2012 model BIT also contains an obligation on Parties not to fail to effectively enforce their domestic labor and environmental laws as an encouragement for investment.
3. *New provision whereby Parties reaffirm and recognize international commitments.* Under the 2012 model BIT, Parties reaffirm their commitments under the International Labor Organization (ILO) Declaration and recognize the importance of multilateral environmental agreements.
4. *Strengthened consultations procedure.* Finally, the 2012 model BIT subjects the articles on labor and environment to more detailed and extensive consultation procedures than those applicable under the 2004 model BIT.

State-Led Economies

During the Administration’s review, several stakeholders raised concerns regarding “state-led economies,” *i.e.*, countries that organize economic activity to a significant degree on the basis of state-owned enterprises (SOEs) and other mechanisms of state influence and control. While the 2004 model BIT already contains numerous tools to address such concerns, the Administration responded to this input by including three key innovations in the text.

1. *Domestic technology requirements.* The Administration crafted a new discipline to prevent Parties from imposing domestic technology requirements, *i.e.*, requiring the purchase, use, or according of a preference to domestically developed technology in order to provide an advantage to a Party’s own investors, investments, or technology.
2. *Participation in standard-setting.* U.S. investors may be at a competitive disadvantage when product standards in foreign markets are developed in an opaque, unpredictable, or discriminatory fashion, especially where governments use standards or technical regulations to favor domestic firms and technologies. The 2012 model BIT includes new language requiring Parties to allow investors of the other Party to participate in the development of standards and technical regulations on non-discriminatory terms. This provision also recommends that non-governmental standards bodies observe this requirement.
3. *Delegated government authority.* The Administration developed a new footnote to clarify the standard for whether a Party has delegated governmental authority to an SOE or any other person or entity, in order to help ensure that the actions of SOEs and other entities acting under delegated governmental authority are fully covered by the BIT’s obligations.³

United States and Europe Affirm Shared Principles on International Investment

In April 2012, U.S. and European officials jointly announced a “Statement of the European Union and the United States on Shared Principles for International Investment.” The statement affirms the two sides’ traditional commitments to the open flow and protection of investment and their belief that investment protection is compatible with states’ ability to regulate

³ U.S. Dep’t of State, Fact Sheet: Model Bilateral Investment Treaty (Apr. 20, 2012), at <http://www.state.gov/r/pa/prs/ps/2012/04/188199.htm>.