

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.<sup>3</sup>

#### *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

<sup>3</sup> 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>.

in the public interest. A joint statement by the U.S. Department of State and the U.S. Trade Representative explains the principles' origins.

U.S. Cabinet-level principals and EU commissioners attending a Transatlantic Economic Council meeting on November 29, 2011, urged that a joint set of international investment principles be developed to strengthen our collaborative efforts to foster open investment policies worldwide. These principles would guide the United States and EU and the governments of third countries in developing future investment policies. The United States looks forward to working with the EU to promote the principles around the world, including through the G8 Deauville Partnership with countries in the Middle East and North Africa (MENA) region.

The principles embody a number of shared core values, including a commitment to open and non-discriminatory investment policies, a level competitive playing field, strong protections for investors and their investments, neutral and binding international dispute settlement, strong rules on transparency and public participation, responsible business conduct, and narrowly-tailored reviews of national security considerations. The joint statement recognizes that governments can fully embrace these principles without compromising their ability to regulate in the public interest.<sup>1</sup>

The text of the principles follows:

As the world's largest sources of and destinations for foreign investment, the European Union and the United States have long recognized the critical importance of creating and maintaining open and stable investment climates and policies, which contribute to sustainable economic development and growth, job creation, increased productivity, technological innovation, and competitiveness. We therefore reaffirm our shared commitment to the following principles regarding international investment, which we believe are essential elements for developing and maintaining open investment policies worldwide. We believe that governments can fully implement these principles while still preserving the authority to adopt and maintain measures necessary to regulate in the public interest to pursue certain public policies. We further believe that governments should not seek to attract foreign investment by weakening or failing to apply such measures.

1. *Open and Non-Discriminatory Investment Climates:* Governments should commit, subject to limited exceptions, to provide broad market access to foreign investors and allow them to establish investments and conduct business on terms no less favorable than those available to domestic investors or other foreign investors.
2. *A Level Playing Field:* Governments should seek to enhance their understanding of the concrete challenges posed by state influence in relation to commercial enterprises, which is playing an increasingly significant role in the global economy, and work to coordinate their approaches to address these challenges. To this end, the European Union and the United States support the work of the Organization for Economic Cooperation and Development (OECD) in the area of "competitive neutrality," which focuses on the importance of state-owned entities and private commercial enterprises being subject to the same external environment and competing on a level playing field in a given market.

<sup>1</sup> U.S. Dep't of State Press Release No. 2012/538, United States, European Union Reaffirm Commitment to Open, Transparent, and Non-Discriminatory Investment Policies (Apr. 10, 2012), at <http://www.state.gov/r/pa/prs/ps/2012/04/187645.htm>.

3. *Strong Protection for Investors and Investments:* Governments should provide the highest possible level of legal certainty and protection against discriminatory, arbitrary, and otherwise unfair or harmful treatment to all investors and investments in their territories, both tangible and intangible, such as intellectual property rights. This includes the right to prompt, adequate, and effective compensation in the event of a direct or indirect expropriation or nationalization.
4. *Fair and Binding Dispute Settlement:* Governments should provide access to effective dispute settlement procedures, including investor-to-State arbitration, and ensure that such procedures are open and transparent, with opportunities for public participation.
5. *Robust Transparency and Public Participation Rules:* Governments should ensure the highest levels of transparency and public participation in the development of domestic laws and other measures relating to investment.
6. *Responsible Business Conduct:* Governments should urge that multinational enterprises operate in a socially responsible manner. To this end, the European Union and the United States intend to promote responsible business conduct, in general, and adherence by third countries to the OECD Guidelines for Multinational Enterprises, in particular.
7. *Narrowly-Tailored Reviews of National Security Considerations:* Governments should ensure that their reviews, if any, of the national security implications of foreign investments focus exclusively on genuine national security risks.<sup>2</sup>

#### INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

##### *Military Commission Proceedings Resume at Guantánamo Bay*

Following unsuccessful efforts to end detentions at the U.S. naval base at Guantánamo Bay, Cuba, and to bring some major terrorism suspects to trial in U.S. civilian courts,<sup>1</sup> the U.S. administration has resumed military commission proceedings against a small number of Guantánamo detainees charged with serious offenses. (An interagency task force recommended that thirty-six detainees should face charges, either in civilian courts or before military commissions.<sup>2</sup>) In June 2011, Brigadier General Mark Martins, a prominent and well-regarded military lawyer, was appointed chief prosecutor.<sup>3</sup>

*USS Cole Attack.* In September 2011, capital charges were referred against Abd al-Rahim al-Nashiri, the alleged mastermind of the 2000 bombing attack on the USS *Cole* and attacks on other vessels.<sup>4</sup> He was arraigned before a military commission at Guantánamo Bay in November 2011.<sup>5</sup> An excerpt from the Department of Defense's September 2011 announcement of the charges follows:

<sup>2</sup> Statement of the European Union and the United States on Shared Principles for International Investment (Apr. 10, 2012), at <http://www.state.gov/p/eur/rls/or/2012/187618.htm>.

<sup>1</sup> John R. Crook, *Contemporary Practice of the United States*, 103 AJIL 325, 325 (2009); 103 AJIL 575, 575 (2009); 104 AJIL 100, 112 (2010); 104 AJIL 489, 506 (2010); 105 AJIL 333, 351 (2011).

<sup>2</sup> Peter Finn, *Pentagon Names New Prosecutor for Guantanamo Trials*, WASH. POST, June 24, 2011, at A7.

<sup>3</sup> *Id.*; Peter Finn, *Taking on 9/11 Case, and Public Opinion*, WASH. POST, May 5, 2012, at A1.

<sup>4</sup> John R. Crook, *Contemporary Practice of the United States*, 105 AJIL 568, 596 (2011).

<sup>5</sup> Peter Finn, *USS Cole Suspect Referred for Trial*, WASH. POST, Sept. 29, 2011, at A8; Peter Finn, *Alleged Leader of USS Cole Attack Is Arraigned*, WASH. POST, Nov. 10, 2011, at A3 [hereinafter *Alleged Leader*].