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April 20, 2015

U.S. International Investment Agreements (IIAs)

Introduction

In recent decades, the United States, the largest source of and destination for foreign direct investment (FDI) in 2013, has entered into binding investment agreements with foreign countries to facilitate investment flows, reduce restrictions on foreign investment and expand market access, and enhance investor protections, while balancing other policy interests. Some World Trade Organization (WTO) agreements address investment issues in a limited manner. In the absence of a comprehensive multilateral agreement, bilateral investment treaties (BITs) and investment chapters in free trade agreements (FTAs), known as international investment agreements (IIAs), have been the primary tools for promoting and protecting international investment.

The role of Congress on IIAs includes setting U.S. trade policy negotiating objectives; Senate ratification of BITs; and congressional consideration and passage of legislation to implement FTAs. Current and future U.S. investment negotiations raise several policy issues for Congress.

U.S. Investment Agreements

To date, 2,390 IIAs are in force globally, of which U.S. IIAs are a small fraction. The United States has BITs in force with 40 countries and 14 FTAs with 20 countries, most with investment chapters, covering 21% of U.S. FDI abroad at the end of 2013 (based on Department of Commerce data). At the same time, U.S. IIAs often are viewed as more comprehensive and high-standard than those of other countries. The Department of State and United States Trade Representative (USTR), who co-lead U.S. investment negotiations, use a "Model BIT" (last revised in 2012) to negotiate U.S. BITS and FTA investment chapters (**Box 1**).

Historically, U.S. investment agreements have focused on developing and emerging economies, striving to eliminate investment barriers by protecting U.S. companies investing in countries with weak legal regimes, and/or insufficient protection for private property. The latest U.S. BIT signed was with Rwanda in 2008. In terms of FTAs, U.S. investment agreements exist with six of the top twenty U.S. trading partners: Australia, Canada, Colombia, Mexico, Singapore, and South Korea.

Congress provides investment negotiating objectives in statute granting the President TPA. The 2002 TPA, which expired in 2007, included a principal negotiating objective to reduce or eliminate barriers to foreign investment while ensuring that, in the United States, foreign investors are not accorded "greater substantive rights" for investment protections than domestic investors.

Box 1. Basic Provisions of U.S. IIAs.

In addition to specific market access commitments, U.S. international investment agreements typically include:

Non-discriminatory treatment. Provides for the better of national treatment or most favored nation treatment for the full life cycle of an investment (from its establishment or acquisition, through its management, operation and expansion, to its disposition).

Minimum standard of treatment. Investment protections in accordance with customary international law, including fair and equitable treatment and full protection and security.

Compensation for expropriation. Prompt, adequate, and effective compensation when direct or indirect expropriation takes place; recognition that, except in rare circumstances, non-discriminatory government regulation (e.g., public health, safety, or environmental regulation) is not an indirect expropriation.

Transfer of funds. Timely transfer of funds into and out of the host country without delay using a market rate of exchange.

Limits on performance requirements. Restrictions on trade-distorting performance requirements (such as local content rules or export quotas).

Investor-State Dispute Settlement (ISDS). The right of an investor to submit an investment dispute with the treaty partner's government to binding, impartial international arbitration.

Other interests. Environmental, labor, transparency, and anti-bribery requirements, as well as exceptions for national security and prudential interests.

Issues for Congress

What is the status of U.S. investment negotiations and priorities? Current U.S. investment negotiations center on two proposed mega-regional FTAs: the Trans-Pacific Partnership (TPP) and Transatlantic Trade and Investment Partnership (T-TIP), whose participating countries represent around three-quarters of the stock of U.S. FDI abroad, but do not include major emerging economies, such as China, India, and Brazil. The United States, separately, is conducting BIT negotiations with China and India, which present both significant market access opportunities and challenges. Congress could examine priorities in these and future investment negotiations.

Possible TPA renewal could have implications for investment negotiations. In addition to "traditional" investment objectives, Congress may consider objectives related to issues that have arisen since the 2002 TPA, such as new investment barriers posed by emerging markets and the balance between reducing restrictions to capital flows and ensuring adequate prudential exceptions, such as for financial crises. Bicameral legislation to reauthorize TPA, the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (H.R. 1890/ S. 995), was

introduced in April 2015. The legislation incorporates the investment negotiating objectives of the 2002 TPA as well as provisions in other negotiating objectives that may impact investment.

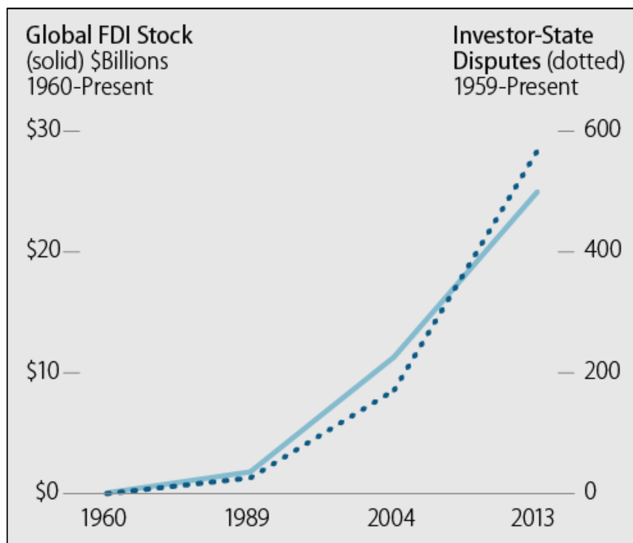
Why is investor-state dispute settlement (ISDS) controversial? International investment rules originally were seen as significant in depoliticizing investor disputes by allowing investors to bring claims against foreign governments in a neutral forum instead of requiring their governments to espouse claims on their behalf (**Box 2**). ISDS is a core component of the U.S. Model BIT, and is in most U.S. FTAs. At the same time, its treatment is actively debated in current negotiations, such as TPP and T-TIP.

Box 2. Mechanisms for ISDS

The most widely used fora for investor-state arbitration are the International Centre for Settlement of Investment Disputes (ICSID) a World Bank Group affiliated organization, and United Nations Commission on International Trade Law (UNCITRAL). They provide the procedural rules for arbitrating international investment disputes. Each investment dispute is decided by individual tribunals, typically consisting of three arbitrators: one appointed by the investor, one by the State, and one by agreement of both parties.

Contributing to the increased prominence of the ISDS debate has been the growth in investor-state disputes in recent years (568 treaty-based claims as of April 2014), along with the growing stock of global FDI (**Figure 1**). U.S. investors file around one-fifth of investment claims. Since the United States began signing investment treaties in the 1980s, only 17 cases have been initiated against the United States, with none decided against the United States.

Figure 1. FDI and Investment Disputes



Source: CRS, adapted from Center for Strategic and International Studies.

Members of Congress could examine issues raised in the ISDS debate. Supporters of ISDS argue that it is a key way to remove investment restrictions and protect their investments against inequitable treatment by a host government. They also assert that U.S. IIAs do not prevent governments from adopting or maintaining non-discriminatory laws or regulations that protect public interests, and, further, that outcomes of ISDS cases focus on treatment of a specific investor and cannot force governments to change laws or regulations. Critics argue that large multinational companies can use ISDS to restrict governments' regulatory ability, leading to a "regulatory chilling" environment, even if the dispute is not decided in a company's favor. Critics also highlight the increased use of ISDS to resolve claims centering, for example, on the host state's environmental and labor regulations.

Also at issue is whether ISDS treats foreign and domestic investors equally. The 2002 TPA stipulated that, in the United States, foreign investors are not accorded "greater substantive rights" for investment protections than domestic investors. ISDS supporters stress that provisions in U.S. IIAs are equivalent to existing protections in U.S. law (e.g., the Takings Clause) and are reciprocal, while critics argue that the use of ISDS itself implies greater procedural rights.

Additionally, Members could consider whether to advocate more assertively for creating an appellate body to review investment disputes, first identified as a negotiating objective in the 2002 TPA. Contradictions between arbitral awards resulting from the use of ad-hoc dispute panels may raise concerns. In trade disputes, by contrast, participants can appeal a decision to a permanent WTO appellate body.

What are prospects for the investment rules architecture? The 2,390 IIAs currently in force form a complex, overlapping network of investment rules. The mega-regional agreements under negotiation (e.g., TPP and T-TIP) may impact global investment rules. First, the proposed agreements could enhance rules with a range of trading partners, some of which already have robust investment ties with the United States. Second, they could serve as a platform for developing approaches to address investment issues with countries that are not a part of these negotiations. Third, these proposed agreements could form the basis for potential future multilateral investment rules. Fourth, they may present an opportunity to consolidate the currently fragmented global investment network. The United Nations Conference on Trade and Development points out that proposed or concluded mega-regional agreements overlap with 140 separate investment treaties.

The proposed U.S. BITs with China and India also could affect global investment rules. They could not only expand U.S. market access and enhance legal protections for investors in these countries, but also may set an example for addressing investment challenges with other emerging and developing economies. However, their successful conclusion requires resolving complex issues such as differing approaches to market access and ISDS.

In this global context, Members of Congress could examine the effectiveness of the current global network of IIAs; the role of proposed FTAs and BITs in shaping the investment rules architecture; and if more comprehensive multilateral rules should be pursued, such as through the WTO. See CRS Report R43052, *U.S. International Investment Agreements: Issues for Congress*.

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