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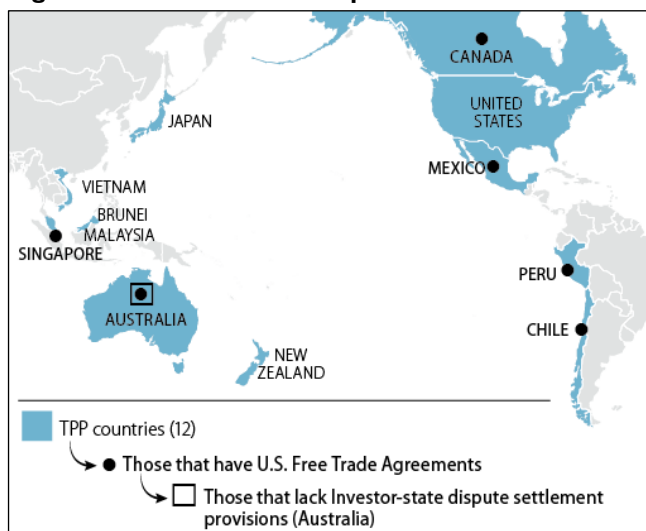
TPP: Investment Provisions

Background

The Trans-Pacific Partnership (TPP) is a proposed free trade agreement (FTA) among the United States and 11 Asia-Pacific countries that would reduce and eliminate tariff and non-tariff barriers on goods, services, and agriculture. TPP also would establish trade rules and disciplines that expand on commitments at the World Trade Organization (WTO), such as on investment, and address new “21st century” issues, such as digital trade and state-owned enterprises.

In 2015, the United States was the largest source of and destination for foreign direct investment (FDI). TPP covers about 20% of U.S. FDI abroad, and includes major U.S. investment partners, such as Japan and Canada. The United States has FTAs in force with six TPP countries, all with investment obligations (**Fig. 1**). Still, concerns remain over investment barriers in the TPP region, such as sectoral restrictions, discriminatory treatment, and local content requirements.

Figure 1. U.S. FTAs with Proposed TPP Partners



Source: CRS.

Investment Provisions and Key Debates

TPP’s investment chapter defines “investment” broadly as assets that investors control directly or indirectly. Examples of forms that may qualify as an investment, include enterprises, stocks, debt instruments, intellectual property, licenses, authorizations, and permits. The TPP investment chapter aims to promote investment and protect investors, while balancing these goals with other policy objectives. Investment is a cross-cutting issue, and other chapters in TPP also address investment. TPP investment rules largely mirror the 2012 U.S. model bilateral investment treaty (BIT), but also contain certain innovations.

Common Core Protections

TPP maintains core investor protections reflecting U.S. law and found in prior U.S. FTAs, such as obligations for governments to provide investors with non-discriminatory treatment, a minimum standard of treatment, and protections against uncompensated expropriation. Other protections include a prohibition on imposing performance requirements as a condition of investment (e.g., local content requirements) and a requirement for the free movement of capital. These obligations are subject to certain general exceptions, such as for prudential and essential security interests, as well as country-specific exceptions. TPP also establishes procedures for investors to take host governments to binding arbitration through investor-state dispute settlement (ISDS) to resolve disputes over alleged violations by host governments of their investment obligations.

Selected New Features

Clarification of minimum standard of treatment (MST).

TPP requires parties to provide MST in accordance with applicable customary international law (e.g., due process). New in TPP is clarification that a party’s action or inaction that may frustrate an investor’s expectations is not, *on its own*, a breach of the MST, even if loss or damage to the investment follows. Industry groups argue that the change narrows investor protections too much, while civil society groups argue that the scope of protection remains too broad.

Reaffirmation of governments’ right to regulate. TPP carries over language found in prior U.S. FTAs that states, except in rare circumstances, non-discriminatory regulatory action by a government does not qualify as indirect expropriation. In addition, TPP more explicitly states that nothing in the Investment Chapter shall be construed to prevent parties from taking action otherwise consistent with the chapter to pursue environmental, health, or other regulatory objectives. Such provisions target ongoing concerns in U.S. investment policy raised by certain stakeholders, but continue to elicit debate such as about how to balance investor protections with governments’ right to regulate, particularly in the context of investor-state arbitration.

Other new features. TPP contains new prohibitions on performance requirements, including banning requirements related to the purchase, use, or preferential treatment of a country’s technology. TPP is also the first U.S. FTA to make explicit that the investment obligations apply to state-owned enterprises (SOEs). While such issues are a concern in the TPP region, the provisions also could be relevant to any future multilateral rules-setting.

Revisions to Investor-State Dispute Settlement

TPP ISDS provisions include new rules for dismissing frivolous suits, third-party submissions, and arbitrator qualifications and a code of conduct. These provisions aim to address concerns about transparency, public participation, and fairness of ISDS proceedings.

Separately, the TPP Financial Services Chapter includes provisions that allow for greater use of ISDS to resolve certain disputes concerning financial services investment, notably alleged violations of the MST. U.S. financial services firms support this expansion, but would prefer that it also include, for example, specific recourse for discriminatory treatment. In contrast, civil society groups express concern that this provision could allow investors to challenge U.S. financial and other regulations.

Supporters argue that ISDS is a reciprocal right protecting U.S. investors overseas, ISDS gives foreign investors in the United States no additional substantive rights relative to U.S. law as investment obligations mirror U.S. law, and no ISDS case has ever been decided against the United States. Critics, in contrast, assert that investors should not have additional procedural rights to challenge governments through a venue outside of the country's courts, that the scope of covered protections is too broad, that transparency and fairness issues remain, and that ISDS in TPP may open the United States to more liability as inward investment potentially increases. While critics argue that the mere threat of ISDS can lead to a regulatory “chilling effect,” supporters argue that ISDS decisions cannot require a country to change its laws or regulations, and that TPP includes safeguards for regulatory interests.

Tobacco carve-out. A flashpoint in the ISDS debate is its relationship to tobacco control measures. The exceptions to investment would allow countries to exclude tobacco control measures from ISDS. An ISDS case brought by Philip Morris Asia against Australia under a non-U.S. BIT for its plain-packaging requirement for tobacco products, which the company claims expropriated its trademarks, highlighted these concerns. In 2015, the case was dismissed for lack of jurisdiction, with no decision on the merits.

Some Members of Congress and industry groups oppose exempting tobacco control measures from ISDS as discriminatory treatment of a legal industry, unnecessary due to other safeguards in the Investment Chapter, and a “slippery slope” for other sectors to be similarly targeted in the future. Other Members of Congress and civil society groups argue the carve-out addresses a key public health issue and targeting tobacco is rational because, as a product, it is uniquely subject to a United Nations Framework Convention calling for measures such as those undertaken by Australia.

Non-Conforming Measures (NCMs)

TPP investment rules are on a “negative list” basis. In other words, TPP countries must take on the obligations in all sectors unless they specifically take an exception, known as an NCM listed in TPP annexes. The United States, for instance, takes exception to non-discrimination obligations

for investments in sectors such as communications, social services, and transportation. Malaysia's NCMs are among the most controversial for U.S. firms. U.S. industry groups have criticized Malaysia's “best interest test” for financial services investments as non-transparent and broadly defined. In general, some observers express concern that the high number of exceptions undercuts gains in investor protections from TPP, while others assert that such exceptions were necessary to conclude the agreement.

Box 1. Record on ISDS

As FDI flows globally have grown substantially worldwide, known ISDS cases have grown, with 739 ISDS claims during 1987-2016 (to date), including 471 that have been concluded.

- 37% decided in favor of state (on merits/no jurisdiction); 27% decided in favor of investor; 25% settled; 10% discontinued or breach found but no damages; 2% decided in favor of neither party.
- For ISDS cases that reached decisions on the merits, 60% were in favor of investors and 40% in favor of state.

The United States has never lost a case as the respondent state. U.S. investors are the leading users of ISDS globally. TPP parties are prominent in the U.S. experience with ISDS.

- Individual cases initiated against United States: 16. 10 decisions favorable to United States; 0 decisions unfavorable; 3 settled; 1 discontinued; 2 pending.
- Number of cases initiated by U.S. investors: 145.
- Home countries of claimants in cases initiated against United States: Canada (15); Mexico (1).
- TPP respondents in cases initiated by U.S. investors: Canada (25); Mexico (15); Peru (2); Vietnam (1).

Recent developments: 2015 decision in favor of Bilcon (U.S. company) against Canada for denial of mining quarry permit; 2016 TransCanada's complaint against United States for denial of a permit for Keystone XL Pipeline border-crossing facilities.

Source: United Nations Conference on Trade and Development (UNCTAD); U.S. Department of State.

Looking Forward

If TPP enters into force, its impact on investment could extend beyond the TPP to influence U.S. investment rules with other countries, such as ongoing BIT negotiations with China and India or U.S. FTA negotiations with the European Union, as well multilaterally in the WTO. However, questions remain over whether Congress will consider implementing legislation for TPP. For more information, see CRS In Focus IF10052, *U.S. International Investment Agreements (IIAs)*, by Martin A. Weiss and Shayerah Ilias Akhtar; and CRS Report R44015, *International Investment Agreements (IIAs): Frequently Asked Questions*, coordinated by Martin A. Weiss.

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