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U.S. International Investment Agreements (IIAs)

Background

The United States, a major source of, and destination for, foreign direct investment (FDI), is party to binding international investment agreements (IIAs) with over 50 countries. These treaty agreements reduce FDI restrictions, ensure nondiscriminatory treatment of investors and investment, and aim to balance other policy interests (such as safeguarding a host government's right to regulate in the public interest). While some World Trade Organization (WTO) agreements address investment issues in a limited manner, IIAs, in the form of bilateral investment treaties (BITs) and investment chapters in free trade agreements (FTAs), are the primary tools for promoting investment and protecting investors. The over 2,600 IIAs in force globally, form a complex, overlapping network of investment rules.

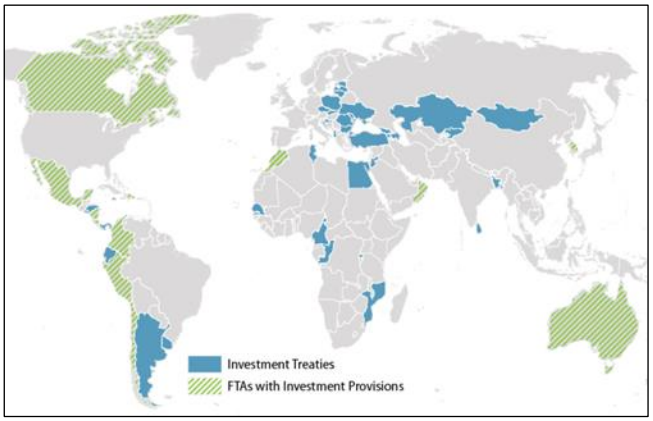
Role of Congress. BITs require Senate approval and FTAs require approval by both Houses to enter into force in the United States. Congress sets U.S. investment negotiating objectives, most recently in the 2015 Trade Promotion Authority (TPA) (P.L. 114-26), which reaffirmed principal U.S. negotiating objectives to reduce or eliminate foreign investment barriers and to ensure that foreign investors do not receive "greater substantive rights" for investment protections than U.S. investors in the United States. The Department of State and U.S. Trade Representative (USTR) co-lead U.S. investment negotiations using a "Model BIT" template, revised in 2012 (**Box 1**).

Box 1. Basic Provisions of U.S. IIAs

Market access for investments.
Nondiscriminatory treatment of foreign investors and investments compared to domestic investors (national treatment) and those of a third country (most-favored-nation treatment).
Minimum standard of treatment (MST) in accordance with customary international law, including fair and equitable treatment and full protection and security.
Prompt, adequate, and effective **compensation for direct or indirect expropriation**, with safeguards allowing for nondiscriminatory regulation in the public interest.
Timely **transfer of funds** into and out of the host country without delay using a market rate of exchange.
Limits on **performance requirements** that, for example, condition investment approval on using local content.
Investor-State Dispute Settlement (ISDS) for binding international arbitration of private investor claims against host country governments for violation of investment obligations, along with transparency requirements of ISDS proceedings.
Exceptions such as for national security and prudential interests.

U.S. IIAs. The United States has in force BITs with 40 countries and 14 FTAs with 20 countries (**Fig. 1**), most with investment chapters, and often viewed as more comprehensive and higher-standard than those of other countries. U.S. IIAs cover about one-fifth of U.S. FDI stock abroad (Department of Commerce). Historically, U.S. IIAs have focused on developing economies, aiming to protect U.S. companies investing in countries with weak legal regimes, and/or insufficient protection for private property. More recent U.S. investment agreements and negotiations involve larger U.S. trading partners.

Figure 1. U.S. International Investment Agreements



Source: USTR and the Department of State information.

Issues for Congress

Status of U.S. investment negotiations. In February 2016, the United States and 11 other countries signed the Trans-Pacific Partnership (TPP), a proposed Asia-Pacific regional FTA. Congress must pass implementing legislation for the agreement to take effect in the United States. TPP's investment provisions reflect compromise among the negotiating parties, as well as efforts to target concerns of some stakeholders. The TPP text carries over core investor protections common in prior U.S. IIAs and contains some new features, such as:

- clarification of MST and certain other provisions;
- greater affirmation of governments' right to regulate;
- expanded provisions on ISDS proceedings (e.g., rules for dismissing frivolous suits, third-party submissions, and arbitral qualifications, and code of conduct); and
- exemption of tobacco control measures from ISDS.

President-elect Trump has announced his intent to withdraw from TPP once in office, making its future uncertain. Nonetheless, investment issues in trade agreements will likely continue to draw congressional attention. They include issues such as balancing investor protections with other interests, including governments' right to regulate for environmental, health, and other objectives. Prospects also are unclear for the Transatlantic Trade and Investment

Partnership (T-TIP), a potential U.S.-EU FTA that has been under negotiation since 2013. If negotiations continue under the next Administration, the agreement's approach to ISDS would likely be a key issue for Congress.

TPP and T-TIP currently 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. BIT discussions, however, have been underway with China and India. While such potential BITs present opportunities for enhanced commercial relations, debate exists over whether high standard investment commitments can be achieved. These existing U.S. BIT negotiations, if continued, as well as potential new BIT negotiations with other countries, could be of oversight interest in the 115th Congress.

Debate over ISDS. ISDS was designed to depoliticize disputes by allowing investors to bring claims against foreign governments in a neutral forum (**Box 2**). While ISDS is a core component of U.S. IIAs, it was a contentious issue in the TPP and T-TIP negotiations. The ISDS debate has intensified with the growth of both global investment and ISDS cases (**Fig. 2**). U.S. investors account for around one-fifth of investment claims. To date, no cases have been decided against the United States.

Box 2. Mechanisms for ISDS

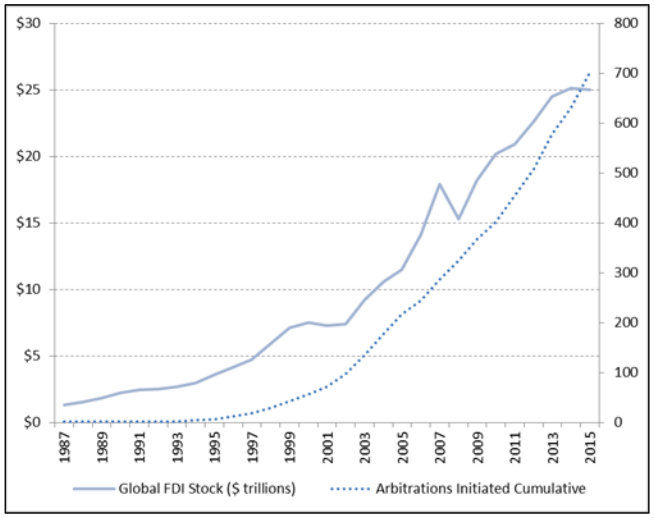
The most widely used fora for ISDS are the International Centre for Settlement of Investment Disputes (ICSID), a World Bank Group affiliated organization, and the United Nations Commission on International Trade Law (UNCITRAL). They provide the procedural rules for arbitrating international investment disputes, typically by a unique tribunal consisting of: one arbitrator appointed by the investor; one by the State; and one by agreement of both parties.

Members of Congress could revisit issues raised in the ISDS debate. 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, the scope of covered protections is too broad, and that ISDS presents transparency and fairness concerns.

Other aspects of ISDS elicit debate as well. Critics argue companies' use of ISDS, or the mere threat of it, can lead to a "regulatory chill." They also highlight the use of ISDS to resolve claims, for example, centering on environmental and labor regulations. Supporters counter that U.S. IIAs provide basic due process protections modeled after U.S. law, and do not prevent governments from adopting or maintaining nondiscriminatory laws or regulations that protect the public interest. They also note that ISDS awards are restricted to monetary penalties or restitution and cannot force governments to change its laws or regulations.

Currently, ISDS decisions cannot be appealed. (In trade disputes, by contrast, participants can appeal a decision to a permanent WTO appellate body.) Members of Congress could consider the pros and cons of an appellate mechanism for investment disputes, as well as whether to advocate more assertively for its creation, which was endorsed in TPA-2015. Contradictions between arbitral awards resulting from the use of ad-hoc dispute panels have raised concerns about the coherence of global investment protections. Yet, appeals processes prolong disputes and investor uncertainty. During the T-TIP negotiations, the EU proposed a new "Investment Court System," which would include, among other things, an appellate mechanism. To date, the U.S. government and U.S. industry have favored ISDS over the EU proposal, while some civil society groups assert that the EU proposal fails to resolve their concerns about ISDS.

Figure 2. Global FDI Stock and ISDS Cases, 1987-2015



Source: U.N. Conference on Trade and Development (UNCTAD).

Investment rules architecture. Congress may consider the U.S. approach to IIAs in the global context. Proposed mega-regional agreements such as TPP and T-TIP, if pursued, could form the basis for potential multilateral investment rules. New IIAs may also be an opportunity to consider revisions to ISDS, such as developing an appellate body mechanism. Pursuing bilateral FTAs and BITs might reinforce the current trajectory of overlapping investment rules, yet may allow opportunity for rules more tailored to the specific investment relationship. BIT negotiations with economies such as China and India could expand U.S. market access and investor protections, but would need to overcome unique challenges faced in these markets such as state-driven strategic investment strategies and strong presence of state-owned enterprises in investment activity.

Open policy questions include the effectiveness of the current global network of IIA, the role of 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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