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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. Taking the form of bilateral investment treaties (BITs) and investment chapters in free trade agreements (FTAs), these IIAs reduce FDI restrictions, ensure nondiscriminatory treatment of both investors and investment, and balance investment protections against 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 have been the primary tools for promoting investment and protecting investors. As of January 2021, more than 3,300 IIAs were concluded globally—forming a complex, overlapping network of investment rules.

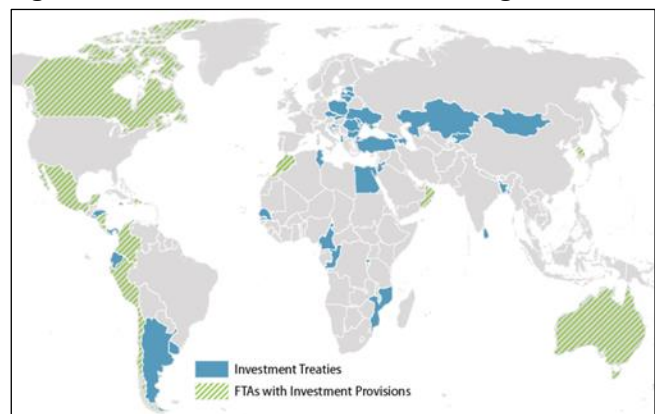
Role of Congress. U.S. BITs require Senate advice and consent. FTAs that include investment provisions that require changes in U.S. law require implementing legislation approved by both Houses to enter into force. Congress sets U.S. negotiating objectives on investment, most recently in the 2015 Trade 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,” revised in 2012 (see **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, along with transparency requirements of ISDS proceedings.
- **Exceptions** for national security and prudential interests.

U.S. IIAs. The United States has BITs with 40 countries and 14 FTAs with 20 countries (see **Figure 1**), most with investment chapters. 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.

The U.S.-Mexico-Canada Agreement (USMCA), which replaced the North American Free Trade Agreement (NAFTA) when entered into force on July 1, 2020, contains the most recent set of U.S. international investment commitments. USMCA retains many of the same core investment provisions, but adds new qualifications and provisions that reflect more recent U.S. trade and investment agreements, as well as compromises struck with the other parties. Notably, USMCA curtails the degree to which foreign investors can bring complaints against host

states under ISDS. USMCA eliminates ISDS all together with respect to Canada. With respect to Mexico, USMCA limits ISDS to claimants regarding government contracts in oil and natural gas, power generation, infrastructure, and telecommunications sectors. It restricts ISDS in other sectors to claims alleging discrimination or direct expropriation and requires claimants to exhaust local remedies first.

Issues for Congress

U.S. investment negotiations. Congress may use a possible renewal of the current TPA, which expires on July 1, 2021, to reaffirm or change U.S. trade negotiating objectives on investment for future U.S. trade agreements. One issue in this regard is whether the USMCA represents a specific shift in U.S. investment policy or a new model for trade agreements more broadly.

Protection of investors' rights balanced against other policy goals may resurface as an issue in potential future trade agreement, such as with the United Kingdom (UK) or the 27-member European Union (EU). Treatment of ISDS may be particularly contentious (see next section). If the Biden Administration continues these, or pursues new, FTA negotiations, Congress may actively monitor and shape their approaches to investment, among things, and could consider implementing legislation for any final agreement.

Congress also may consider whether to encourage the Biden Administration to renew efforts to negotiate BITs with emerging markets. Previous U.S. BIT talks with China and India have stalled over inability to resolve differences. BIT negotiation efforts with economies such as China and India, if renewed, 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. A recent EU-China agreement in principle on a new investment deal with China may inject competitive pressure or considerations for any potential future U.S.-China BIT negotiations.

Debate over ISDS. ISDS was designed to depoliticize disputes by allowing investors to bring claims against foreign governments in a neutral forum (see **Box 2**). While ISDS has been a core component of U.S. IIAs under successive U.S. administrations and retains wide support in the business community, it has been contentious in recent U.S. trade negotiations and is opposed by some in civil society. Issues included how to balance investor protections with governments' right to regulate for environmental, health, and other objectives; and the fairness and transparency of ISDS. The debate has intensified with the growth of global FDI and ISDS cases. U.S. investors account for about one-fifth of ISDS claims. To date, no cases have been decided against the United States. However, some analysts note that measures taken by the United States, as well as other countries, to respond to the COVID-19 pandemic might be subject to future disputes.

Box 2. Rules for ISDS

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) provide the most widely used set of 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.

The Biden Administration's view on ISDS in potential future IIA negotiations is unclear. 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 have been able to appeal decisions to a permanent WTO appellate body (AB); in December 2019, however, the AB ceased functioning as the United States blocked appointments of new jurors to spur WTO reform.) 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.

Treatment of ISDS was a central issue in past U.S. negotiations on the proposed Trans-Pacific Partnership (TPP) and the proposed Transatlantic Trade and Investment Partnership (T-TIP). After President Trump ceased U.S. participation in the proposed TPP, the 11 remaining parties concluded a new Comprehensive Partnership on the TPP (CPTPP), which suspended some contested TPP provisions, including on the use of ISDS for certain purposes (e.g., for claims by private companies relating to investment contracts in which they have entered with governments).

In the T-TIP negotiations, the EU proposed replacing ISDS with a new bilateral Investment Court System (ICS) that would include a standing body with a first instance and appellate tribunal and a permanent set of judges. 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 proposed ICS fails to resolve their concerns about ISDS. Recent EU trade agreements, such as with Canada, Mexico, Singapore, and Vietnam, include a bilateral ICS. In addition, the EU has called for a Multilateral Investment Court. Since 2017, international discussions have been underway in UNCITRAL in working groups on various proposals to reform ISDS.

Investment rules. Congress may consider the U.S. approach to IIAs in the global context, and whether to press a Biden Administration to pursue more comprehensive multilateral rules, such as in the WTO. Continuing to pursue bilateral IIAs may reinforce the current trajectory of overlapping investment rules, yet may allow opportunity for rules more tailored to specific investment relationships; yet,

U.S. IIA commitments could form the basis for potential multilateral investment rules. A consideration may be any efforts by other economies to shape global rules through their own IIAs, and whether they align with U.S. goals.

For more information, see CRS In Focus IF11167, *USMCA: Investment Provisions*; and CRS In Focus IF10636, *Foreign Direct Investment: Overview and Issues*.

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