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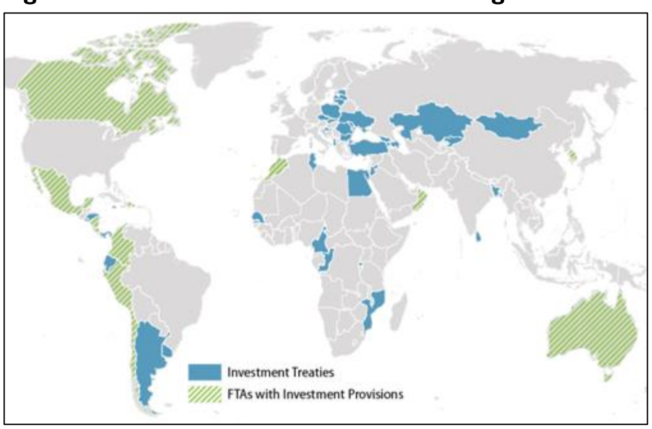
U.S. International Investment Agreements (IIAs)

The United States, a major source and recipient of foreign direct investment (FDI), historically has sought to promote U.S. FDI and protect U.S. investors through the negotiation and enforcement of international investment agreements (IIAs). Taking the form of bilateral investment treaties (BITs) and investment chapters in free trade agreements (FTAs), IIAs aim to reduce FDI restrictions, ensure nondiscriminatory treatment of investors and investment, and balance investment protections and other policy interests through binding, reciprocal obligations. While some World Trade Organization (WTO) agreements address investment issues in a limited manner, IIAs have been key tools to govern bilateral and regional investment ties. The United States has BITs with 40 countries and 14 FTAs with 20 countries (see **Figure 1**), most with investment chapters. According to the United Nations Committee on Trade and Development (UNCTAD), as of March 2022, 2,805 IIAs were concluded globally, of which 2,242 were in force—forming a complex, overlapping network of investment rules. Congress has a major role in overseeing and approving U.S. IIAs.

Figure 1. U.S. International Investment Agreements



Source: USTR and the Department of State information.

Overview

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. TPA expired on July 1, 2021.

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**). The U.S.-Mexico-Canada Agreement (USMCA), which entered into force in 2020, retains many of the historically core investment provisions, but notably, curtails the degree to which foreign investors can seek enforcement of these provisions under the investor-state dispute settlement (ISDS) provisions, although recourse may be available through USMCA's state-to-state dispute settlement mechanism. USMCA eliminates ISDS with respect to Canada. With respect to Mexico, for government contracts in oil and natural gas, power generation, infrastructure, and telecommunications sectors, USMCA maintains ISDS for any claim for breach of investment chapter obligations. USMCA, however, restricts ISDS in other sectors to claims alleging discrimination or direct expropriation, and requires claimants to exhaust local remedies first—also a significant change compared to the U.S. approach to ISDS historically.

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.

Issues for Congress

U.S. IIA Negotiations. Protection of investors' rights balanced against other policy goals may resurface as an issue in potential future IIA negotiations. The Biden Administration is reviewing FTA negotiations pursued by its predecessor, such as with the United Kingdom and Kenya. If the Administration pursues these or other trade negotiations, Congress may monitor and shape the Administration's approaches to foreign investment trade barriers and rules, among things, and consider implementing legislation for any final agreement. Congress also may consider whether to modify U.S. trade negotiating objectives on investment in any future TPA renewal debate.

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 stalled over inability to resolve differences. BIT negotiation efforts with such economies, 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 investment strategies and the strong presence of state-owned enterprises in investment activity. A new EU-China investment deal agreed to in principle may inject competitive pressure for the United States in terms of investment ties with China.

Congress also may consider the scope of other bilateral trade tools to further promote U.S. investments and protect U.S. investors internationally, as well as potentially to help set global standards for investment policy. These may include Trade and Investment Framework Agreements (TIFAs) and other dialogues, including the newly-launched trade dialogues with the European Union (EU) and the UK.

ISDS Debate. ISDS aims to depoliticize disputes by allowing investors to bring claims against foreign governments in a neutral forum (see **Box 2**). Historically a core component of U.S. IIAs under successive U.S. administrations, ISDS has been subject to increased debate with the growth of global FDI and ISDS cases. U.S. investors comprise 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.

Supporters, including in the business community, argue that ISDS is a reciprocal right that protects U.S. investors abroad, and does not give foreign investors in the United States more substantive rights than U.S. investors. They also argue that U.S. IIAs provide 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. Additionally, they note that ISDS awards are restricted to monetary penalties or restitution and cannot force governments to change its laws or regulations. They further point to the U.S. record of prevailing in ISDS cases.

Critics take issue with ISDS affording investors with additional procedural rights to challenge governments in a venue outside of a country's courts. Some also argue that the scope of covered protections is too broad, claiming that some recent tribunals have awarded multi-billion settlements that go beyond protecting property rights and may deter host countries' ability to take legitimate policy measures to address climate change or public health. Critics argue companies' use of—or mere threat to use—ISDS to resolve claims can lead to a "regulatory chill."

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.

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 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 now-stalled T-TIP negotiations, the EU proposed replacing ISDS with a new bilateral Investment Court System (ICS) that would include a standing body of judges and appellate tribunal. The U.S. government and U.S. industry favored ISDS over the EU proposal, while some civil society groups assert that the proposed ICS would not resolve their concerns about ISDS. Recent EU trade agreements with other countries include a bilateral ICS. The EU also has called for a Multilateral Investment Court that would include a standing tribunal and appeals mechanism.

Since 2017, international discussions at UNCITRAL have been underway on various proposals to reform ISDS. In 2021, UNCITRAL approved a work plan to focus on a range of procedural and structural reforms and leaving core substantive issues for a later date. Members of Congress could revisit ISDS issues in any future TPA renewal debate or IIA negotiations.

Investment Rules. Congress may also 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.

Russia/Ukraine. An evolving issue for Congress may be treatment of U.S. investments in Russia. After Russia's February 2022 invasion, the United States and international partners imposed financial and economic sanctions. Russia is retaliating by expropriating foreign assets in Russia, among other things. It has also destroyed foreign-owned businesses in Ukraine. While Russia never ratified the 1992 U.S.-Russia BIT, U.S. investors in Russia may nevertheless be able to pursue claims against Russia via international arbitration if their presence is through a subsidiary or joint venture in a jurisdiction with an IIA with Russia. Russia is a party to over 60 IIAs and the Energy Charter Treaty.

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