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International Investment Agreements (IIAs): Frequently Asked Questions

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Summary

In recent decades, the United States 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.

This report answers frequently asked questions about U.S. IIAs including provisions for investor-state dispute settlement.

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The United States is a major source and recipient of foreign direct investment (FDI). In recent decades, the United States has entered into binding international investment agreements (IIAs) with foreign countries to facilitate investment flows, reduce restrictions on foreign investment, expand market access, and enhance investor protections, while balancing other policy interests. Congress is active in developing and implementing U.S. policy on protecting and promoting FDI, including through setting trade policy negotiating objectives in Trade Promotion Authority (TPA) legislation, Senate ratification of bilateral investment treaties (BITs); and congressional consideration of legislation to implement free trade agreements (FTAs). 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 and is currently under consideration.

This report answers frequently asked questions about IIAs made between the United States and other countries. Questions are categorized in three main areas: (1) background and context; (2) U.S. international investment agreements; and (3) investor-state dispute settlement (ISDS). An appendix summarizes select ISDS cases.

Background and Context

What is foreign direct investment (FDI)?

Foreign direct investment (FDI) is a type of cross-border capital flow. It takes place when a resident (including a company) of one country obtains a lasting interest in, and a degree of influence over the management of, a business enterprise in another country. The United States defines direct investment as the ownership of at least 10% of the voting securities of an incorporated business enterprise or the equivalent interest in an unincorporated business enterprise.[1] The U.S. "international investment position" or "stock" of FDI is the cumulative amount at a given point in time, while the flow of FDI measures its movement for a particular period of time, such as for a year.

What is the composition and size of FDI?

In 2013, the total stock of global FDI surpassed $25 trillion, with the United States continuing to have the world's largest cumulative share of FDI on a country basis ($4.9 trillion).[2]. Global FDI inflows increased by 9% to reach nearly $1.5 trillion in 2013, though remaining below pre-2008 financial crisis levels (**Figure 1**). [3] According to preliminary estimates, global FDI inflows decreased to $1.26 trillion in 2014.[4] Historically, developed countries have been the primary sources of global direct investment. In recent years, emerging market and developing economies have played an increasing role in global investment. In 2010, these economies accounted for the

[1] 15 C.F.R. §806.15(a)(1).

[2] United Nations Conference on Trade and Development (UNCTAD), UNCTADstat database. Investment stock measured in U.S. dollars at current prices and current exchange rates.

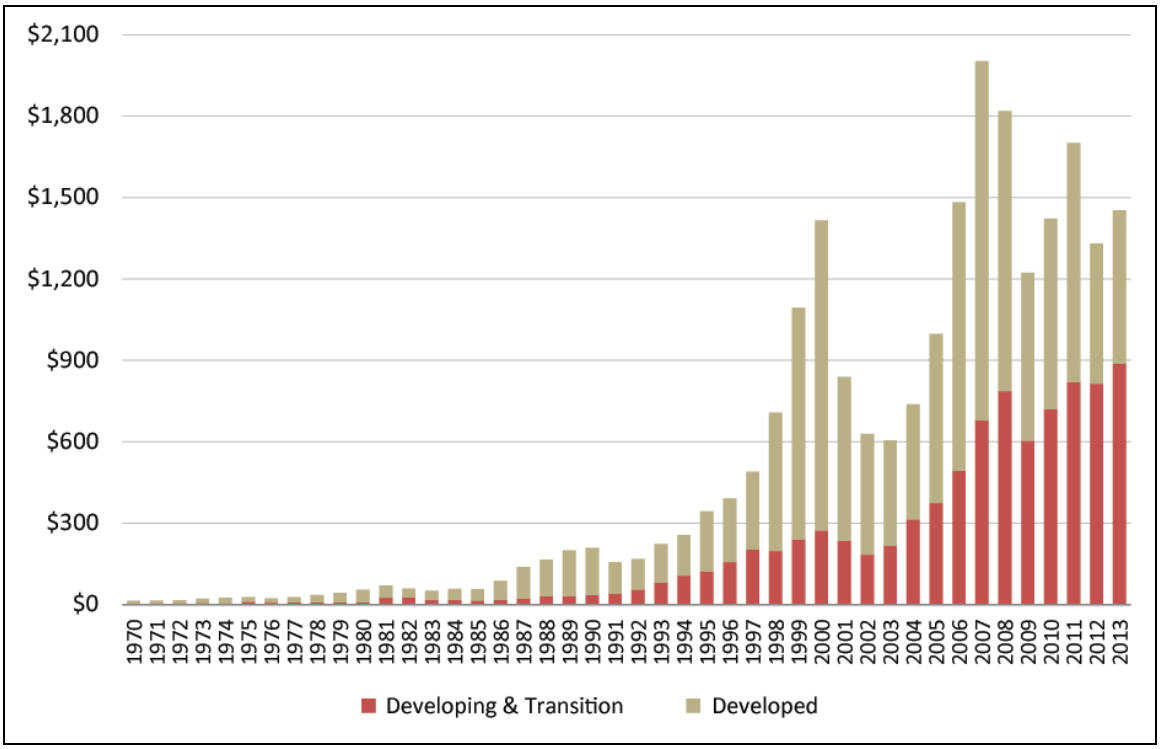
[3] Ibid.

[4] UNCTAD, "Global FDI Flows Declined in 2014, China Becomes the World's Top Recipient," January 29, 2015. According to UNCTAD, 2014 preliminary estimates exclude Caribbean offshore financial centers.

more than 50% of global FDI inflows for the first time. While FDI generally has flowed from capital-exporting, developed countries to developing countries, "South-South" investment flows are growing. . FDI flows can fluctuate broadly on a year to year basis, associated with changes in global economic conditions, the impact of certain business deals, and other factors. As such, the U.S. position as the leading recipient of direct investment flows has been overtaken in some years. According to preliminary estimates, in 2014, the U.S. position as a recipient of inward direct investment dropped to third largest ($86 billion), after China ($128 billion) and Hong Kong ($111 billion).[5]

Figure 1. Global FDI Inflows, 1970-2013

(Billions of U.S. Dollars)



Source: UNCTAD, FDI database.

Notes: Data for inward FDI flows. Measured in current prices and current exchange rates.

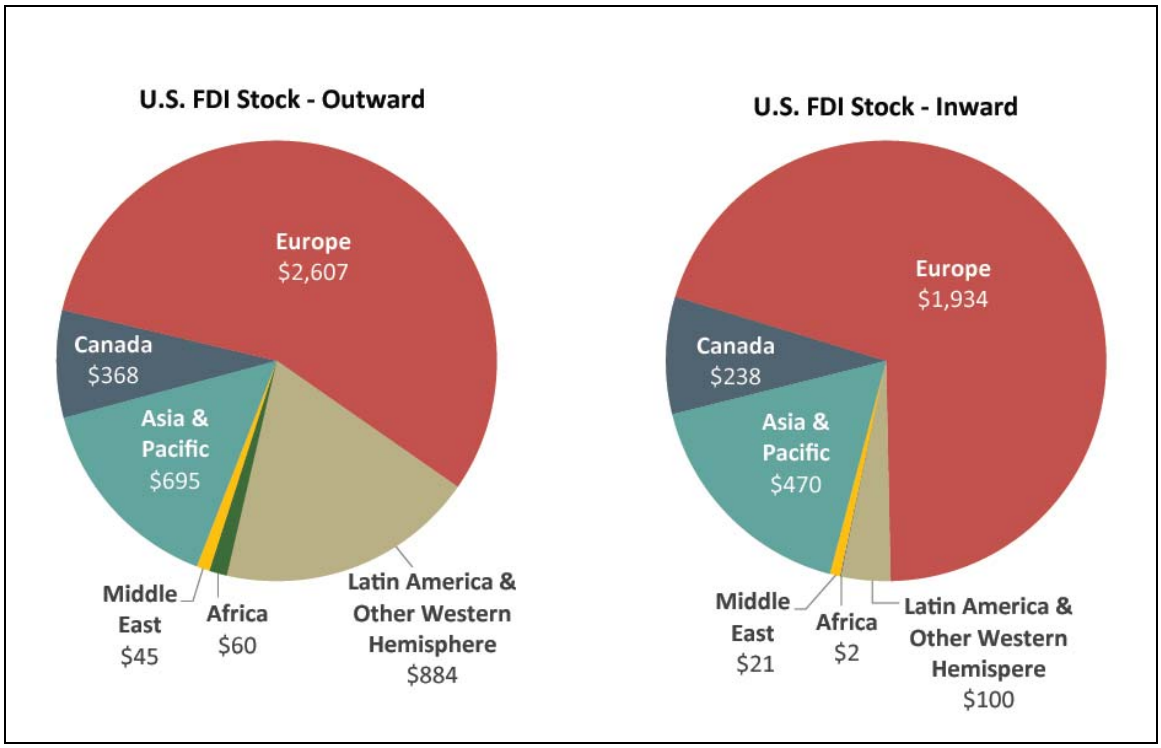
In 2013, the stock of U.S. direct investment abroad totaled $4.7 trillion, with Europe and Latin America ranking as the first and second largest recipients.[6] Meanwhile, the stock of direct investment in the United States totaled $2.8 trillion, with investors from Europe and the Asia-Pacific ranking as the first and second largest sources of inward U.S. FDI.

[5] UNCTAD, "Global FDI Flows Declined in 2014, China Becomes the World's Top Recipient," January 29, 2015. The publication does not provide include information on 2014 FDI outflows. As of this writing, UNCTAD's statistical database does not include comprehensive information for 2014. Cross-border merger and acquisition sales in the United States declined in 2014, attributed primarily due to a stock buyback deal by Verizon of shares owned by Vodafone, a European firm.

[6] U.S. Bureau of Economic Analysis (BEA), Department of Commerce. U.S. FDI stock is reported on a historical-cost basis.

Figure 2. U.S. Direct Investment Abroad and FDI in the United States, 2013

(Billions of U.S. Dollars)



Source: CRS, based on data from the Bureau of Economic Analysis.

Notes: Stock of FDI on a historical cost basis.

What is the relationship between international trade and investment?

Investment is considered to be a major driver of trade. Economists generally believe that firms invest abroad because those firms possess some special process or product knowledge or because they possess special managerial abilities which given them an advantage over other firms.[7] In general, U.S. firms invest abroad to serve the foreign local market, rather than to produce goods to export back to the United States, although some firms establish overseas operations to replace U.S. exports or production, or to gain access to raw materials, less expensive labor, or other markets.[8] Foreign companies may choose to invest in the United States, for instance, to access U.S. skills, resources, and the U.S. consumer market.[9] Both U.S. inward and outward direct investment play a role in U.S. trade, jobs, and production. In 2011, the affiliates of foreign firms

[7] Language drawn from CRS Report RS21118, *U.S. Direct Investment Abroad: Trends and Current Issues*, by James K. Jackson.

[8] Ibid.

[9] The Executive Office of the President and the Department of Commerce, *Winning Business Investment in the United States*, May 2014.

in the United States employed about 6.3 million workers, exported $343 billion in goods, and imported $677 billion in goods.[10]

Investment gives rise to inter- and intra-firm trade, which represents trade between U.S. parent companies and their foreign affiliates and U.S. affiliates of foreign firms and their foreign parent company. The rapid pace of globalization in recent years has led to the creation of diverse international supply and value chains, where goods are transformed from basic components to end-use consumer products, often crossing the borders of multiple countries in the process. Thus, for example, exports by U.S. parent companies to their foreign affiliates include not only exports for resale without further manufacture, but also exports for further manufacturing.

U.S. Department of Commerce data indicate that the value of exports shipped by U.S. parent companies was $738 billion in 2012, which accounted for 47% of total U.S. exports of $1.6 trillion. Similarly, the U.S. affiliates of foreign parent companies exported $334 billion in 2012, or 21% of total U.S. exports. Also, U.S. parent companies accounted for 41% of U.S. imports, or $ 949 billion, and the U.S. affiliates of foreign firms accounted for 29% of U.S. imports. Intra-firm trade, or trade between parent companies and their affiliates accounted for 29% of total U.S. goods exports and 34% of total U.S. goods imports. Intra-firm trade between U.S. parent firms and their foreign affiliates accounted for 18% of U.S. exports and 13% of U.S. imports, while trade between the U.S. affiliates of foreign firms and their foreign parent companies accounted for 10% of U.S. exports and 21% of U.S. imports. [11]

What are international investment agreements (IIAs)?

IIAs broadly refer to agreements that establish binding rules on investment protections. U.S. IIAs are reciprocal in nature; thus, in exchange for the specific protections that the United States offers foreign investors in the United States, U.S. investors investing in IIA partner countries are expected to receive the same protections. For the United States, the primary forms of IIAs are bilateral investment treaties (BITs) and BIT-like investment chapters in regional and bilateral free trade agreements (FTAs). Investment chapters in U.S. FTAs generally resemble investment provisions in U.S. BITs. The major difference is that BITs, as their name indicates, focus on investment issues, while FTAs are more comprehensive, encompassing a wide range of trade and trade-related issues involving goods, services, agriculture, and investment.[12]

What types of barriers do investors face in foreign countries?

Barriers faced by investors in foreign countries include discriminatory and other restrictions on foreign equity participation, forms of establishment, local content requirements, technology transfer requirements, export performance requirements, and restrictions on repatriation of

[10] BEA data on activities of U.S. affiliates of foreign multinational enterprises.

[11] For more information, see CRS Report RS21118, *U.S. Direct Investment Abroad: Trends and Current Issues*, by James K. Jackson; CRS Report RS21857, *Foreign Direct Investment in the United States: An Economic Analysis*, by James K. Jackson; and CRS Report RL32461, *Outsourcing and Insourcing Jobs in the U.S. Economy: Evidence Based on Foreign Investment Data*, by James K. Jackson.

[12] 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 R43052, *U.S. International Investment Agreements: Issues for Congress*, by Shayerah Ilias Akhtar and Martin A. Weiss.

earnings, capital, fees, and royalties, among other issues.[13] Companies also can face barriers in a foreign market's operational environment. These barriers may include economic and political instability; economic policies and measures that limit growth (such as capital controls, exchange rate controls, tax and regulatory policies); expropriation and nationalization of private property; weak, underdeveloped, or overly bureaucratic institutions; corruption and lack of transparency; non-independent judicial systems, and limited infrastructure.[14]

What is the U.S. policy on IIAs?

The United States' dual role as both a major source and recipient of direct investment shapes its investment policy and generally supports an open investment climate consistent with national security. The United States has pursued binding, reciprocal investment agreements with foreign countries to facilitate investment flows, reduce restrictions on foreign investment, expand market access, and enhance investor protections, while balancing other policy interests. U.S. commitments in IIAs also provide national security exceptions.

In addition to negotiating IIAs, the United States conducts other activities related to facilitating U.S. investment abroad. For example, the Overseas Private Investment Corporation (OPIC) provides political risk insurance, financing, and other services to U.S. investors to mitigate the risks of investing in developing and emerging countries.[15] With respect to national security, the interagency Committee on Foreign Investment in the United States (CFIUS) serves the President by overseeing the national security implications of foreign investment in the economy by reviewing proposed foreign investment transactions in the United States. The President has the authority to block proposed or pending foreign investment transactions that threaten to impair the national security.[16]

U.S. investment policy also includes a focus on attracting investment to the United States. In 2011, President Obama issued a statement reaffirming the United States' "open investment policy," which is a "commitment to treat all investors in a fair and equitable manner under the law."[17] The Department of Commerce's SelectUSA program is intended to coordinate federal efforts to attract and retain investment in the United States, complementing states' investment promotion activities.[18]

[13] Office of the U.S. Trade Representative (USTR), *2015 National Trade Estimate Reports on Foreign Trade Barriers*, March 2015.

[14] "Investing for Growth: Spurring Infrastructure Development and Economic Growth Through Foreign Direct Investment," prepared for the National Center for Asia-Pacific Economic Cooperation (APEC) and APEC Business Advisory Council; and For example, see World Bank Group, "Doing Business 2015: Going Beyond Efficiency."

[15] CRS Report 98-567, *The Overseas Private Investment Corporation: Background and Legislative Issues*, by Shayerah Ilias Akhtar.

[16] CRS Report RL33388, *The Committee on Foreign Investment in the United States (CFIUS)*, by James K. Jackson; and CRS Report IF10177, *The Committee on Foreign Investment in the United States*, by James K. Jackson

[17] The White House, "Statement by the President on United States Commitment to Open Investment Policy," June 20, 2011.

[18] For more information, see http://selectusa.commerce.gov/.

What is the congressional role on IIAs?

The role of Congress on IIAs includes setting U.S. trade policy negotiating objectives on investment[19]; Senate advice and consent on ratification of BITs; and congressional consideration and passage of legislation to implement free trade agreements, which typically include an investment chapter. Congressional prerogatives are present in the U.S. trade and investment negotiating agenda. Presently, the United States is negotiating two mega-regional free trade agreements—the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (T-TIP)—that would include investment provisions. Other U.S. engagement on investment includes current BIT negotiations with China, India, Pakistan, and Mauritius, and discussions with the East African Community (EAC—Kenya, Tanzania, Uganda, Rwanda, and Burundi) over a possible regional BIT.[20]

Does Trade Promotion Authority (TPA) include investment negotiating objectives?

Congress provides investment negotiating objectives in statutes granting the President Trade Promotion Authority (TPA). The 2002 TPA (P.L. 107-210), which expired in 2007, included a principal negotiating objective to "reduce or eliminate artificial or trade-distorting barriers to foreign investment while ensuring that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States..." It also sought to "secure for investors important rights comparable to those that would be available under United States legal principles and practice...."

Recently introduced bicameral legislation to reauthorize TPA, the "Bipartisan Congressional Trade Priorities and Accountability Act of 2015" (H.R. 1890/S. 995) incorporates the investment negotiating objectives of the 2002 TPA, as well as provisions in other negotiating objectives that may affect investment.[21] The 2002 TPA, the 2012 Model BIT, and the recently-introduced legislation includes language advocating for a future multilateral appellate mechanism, which could review awards rendered by investment arbitration tribunals.

Are there multilateral rules on investment in the World Trade Organization (WTO)?

Presently, some World Trade Organization (WTO) agreements address investment issues in a limited manner:

- The Trade-Related Investment Measures (TRIMS) Agreement includes disciplines on WTO member countries applying restrictive investment measures

[19] CRS Report R43052, *U.S. International Investment Agreements: Issues for Congress*, by Shayerah Ilias Akhtar and Martin A. Weiss.

[20] USTR, *2015 Trade Policy Agenda and 2014 Annual Report*, March 2015.

[21] CRS Report IF10038, *Trade Promotion Authority (TPA)*, by Ian F. Fergusson; CRS Report RL33743, *Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy*, by Ian F. Fergusson; CRS Report R43491, *Trade Promotion Authority (TPA): Frequently Asked Questions*, by Ian F. Fergusson and Richard S. Beth.

that are inconsistent with national treatment obligations (such as performance requirements[22]) under the General Agreement on Tariffs and Trade (GATT);

- The General Agreement on Trade in Services (GATS) includes investment liberalization provisions related to trade in services; and
- The Agreement on Subsidies and Countervailing Measures (ASCM) and the Government Procurement Agreement (GPA) deal indirectly with investment by including several investment incentives in its definition of subsidies and public procurement services, respectively.

Additionally, the Energy Charter Treaty, agreed to in 1994, covers investment in the energy sector among its 51 member countries (the United States is not a member[23]). Over the past several decades, efforts have been made through international organizations to develop investment rules (see **text box**). In the absence of an overarching multilateral framework on investment, investment flows largely are governed by bilateral and regional IIAs.

International Efforts to Develop Investment Rules

In contrast to other areas of policymaking such as international trade, there is no comprehensive agreement on international rules for the promotion and protection of investment. The last major effort to develop a comprehensive agreement on international rules on investment was through the Organization for Economic Cooperation and Development (OECD). During the 1990s, developed countries in the OECD proposed a Multilateral Agreement on Investment (MAI), which would have included provisions to liberalize and provide non-discriminatory treatment for investment and provide a dispute settlement mechanism.[24] The OECD negotiations ultimately were abandoned following policy disagreements among participating countries, the business community, and nongovernmental organizations.[25]

Some WTO members, particularly the European Union (EU) sought to include investment in the Doha Round of WTO trade negotiations. The 2001 WTO Doha Declaration directed the WTO Working Group on the Relationship between Trade and Investment to focus on several investment issues. However, debate over the inclusion of investment issues (as well as trade and competition and procurement) in the negotiations led to their omission from the WTO agenda at the 2003 WTO Ministerial Conference in Singapore. In addition, investment is covered by several so-called "soft law" (non-binding) efforts such as the OECD's Guidelines for Multinational Enterprises and the OECD's Code of Capital Movements.

How many IIAs exist globally and in the United States?

To date, around 3,200 international investment agreements have been concluded worldwide, of which around 2,500 are in force).[26] The first modern BIT, concluded in 1959, was between West Germany and Pakistan. During that time, European countries, especially those lacking colonial ties and informal networks in developing countries, began negotiating investment treaties to safeguard their existing global investments and facilitate new investments in their former

[22] Performance requirements can be used by governments to influence the behavior of foreign investors and secure certain benefits for their economies. They can include export requirements, local content requirements, restrictions on domestic sales tied to export performance, technology transfer requirements, among other restrictions.

[23] The United States is an observer to the Energy Charter. Although the United States signed the Energy Charter in December 1991, it has not been ratified by the President.

[24] Jeswald Salacuse, *The Law of Investment Treaties* (Oxford: Oxford University Press, 2010), p. 104-108.

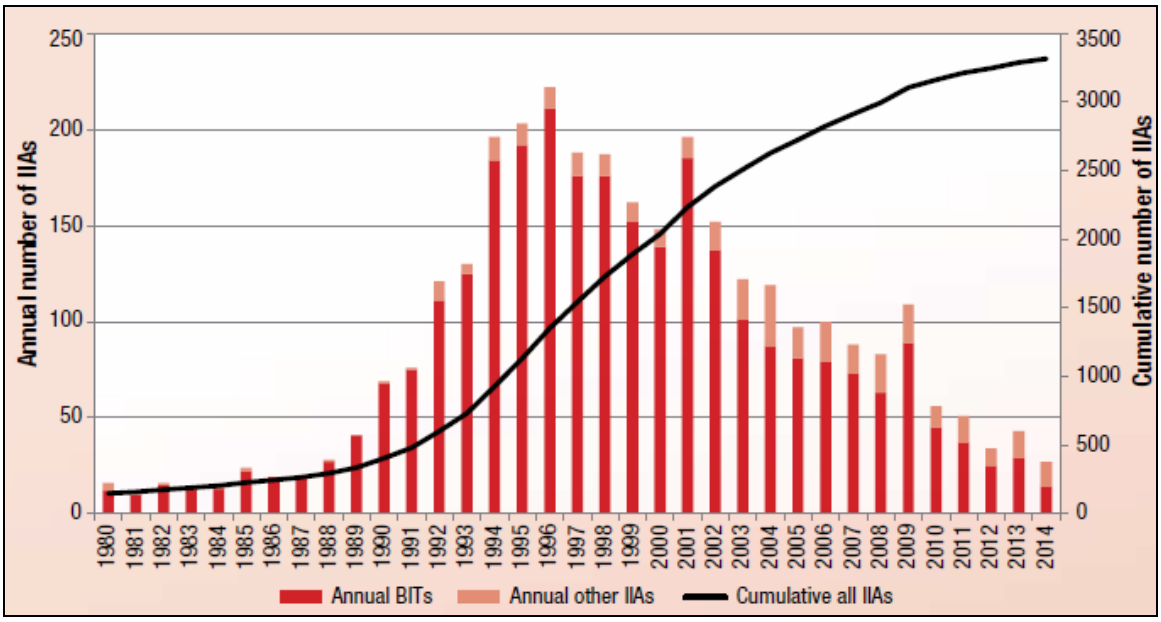
[25] Meredith Broadbent and Robbins Pancake, "Reinvigorating the U.S. Bilateral Investment Treaty Program: A Tool to Promote Trade and Economic Development," CSIS, June 2012, p. 3.

[26] UNCTAD, International Investment Agreements Navigator database.

colonies. By the mid-1960s, several European countries had initiated BIT programs. Asian nations began to sign BITs in the 1970s; Japan signed its first BIT in 1977 with Egypt. The United States subsequently initiated its BIT program in 1977. Following the fall of the Soviet Union, Central and Eastern European countries began signing BITs in the late 1980s and 1990s, and Latin American countries entered the arena in the 1990s.

The BIT network grew slowly over the first three decades. Initially, BITs were drafted by capital-exporting states primarily to protect their investors from unfair foreign treatment. For developing countries, there was a shared belief that BITs would increase foreign investment, spurring economic growth. From the late 1980s through the mid-1990s, BITs proliferated rapidly, both between developed and developing countries and between developing countries, as many developing countries embraced the so-called "Washington Consensus" reforms of macroeconomic discipline, market-based economies, and rules-based openness to trade and foreign direct investment.

Figure 3. Number of International Investment Agreements Signed, 1980-2014



Source: CRS, reproduced from UNCTAD, "Recent Trends in IIAs and ISDS," IIA Issues Note No. 1, February 2015.

Notes: Preliminary data for 2014.

U.S. International Investment Agreements

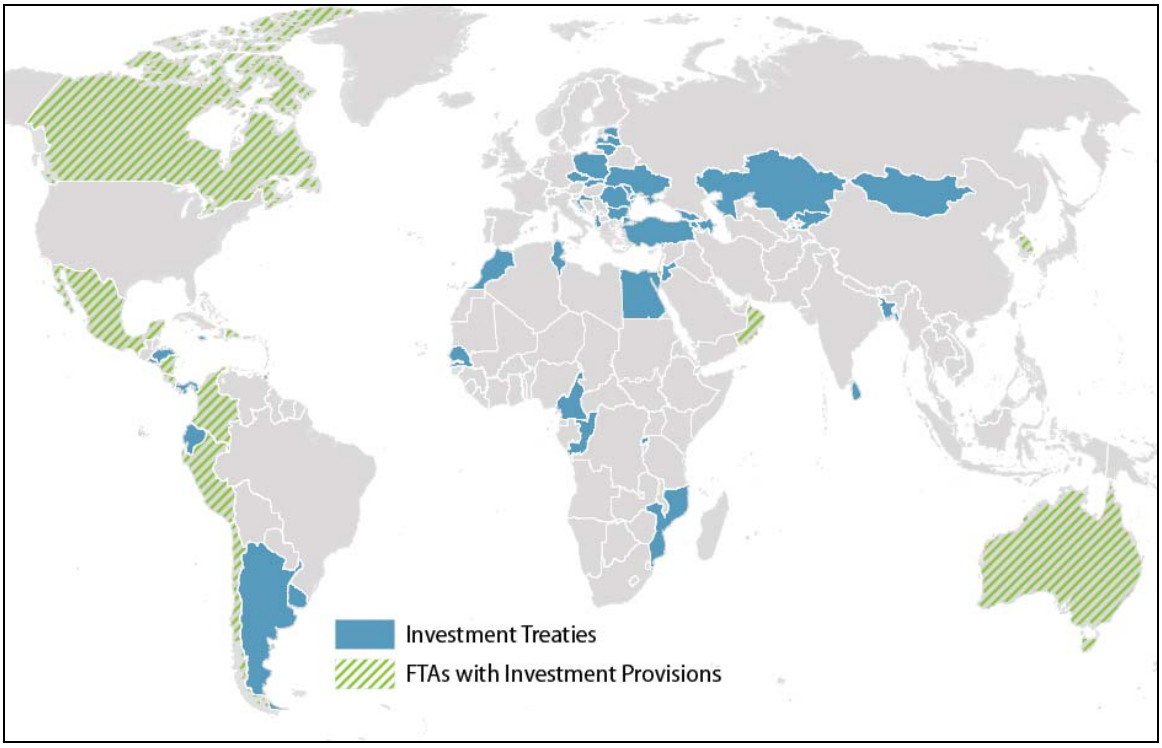
How many U.S. IIAs currently exist and with which countries?

The United States has BITs in force with 40 countries, and 14 FTAs in force with 20 countries, most with investment chapters (see **Figure 4**). While U.S. IIAs are a small fraction of the global total, they are often viewed as more comprehensive and of a higher standard than those of other countries. The U.S. Department of State and the Office of the U.S. Trade Representative (USTR)

co-lead the U.S. BIT program, in close coordination with other U.S. government agencies. The USTR leads FTA negotiations, also in close coordination with other U.S. government agencies.

In contrast to the investment treaty programs of many other advanced economies, the U.S. investment treaty program has focused on developing and emerging economies. All of the individual U.S. BITs are with developing countries. The United States has FTAs (with investment chapters) with six of its top twenty trading partners: Australia, Canada, Columbia, Mexico, Singapore, and South Korea. The U.S.-Australia FTA's investment chapter does not include iinvestor-state dispute settlement.

Figure 4. U.S. International Investment Agreements



Source: CRS, based on information USTR and the Department of State.

Is the United States currently negotiating any IIAs?

Current U.S. investment negotiations center on two proposed mega-regional FTAs: the Trans-Pacific Partnership (TPP) and the 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. The United States has also started BIT negotiations with Mauritius and Pakistan in recent years. Additionally, the United States is in discussions with the East African Community (EAC—Kenya, Tanzania, Uganda, Rwanda, and Burundi) over a possible regional BIT.

Does the United States have a Model BIT?

The USTR and the State Department negotiate U.S. investment agreements on the basis of a Model BIT text. The United States completed its original Model BIT in 1981, and it has been revised several times, most substantively in 2004, and most recently in 2012. Prior to the 2004 changes, the United States negotiated BITs on a 1994 Model BIT based largely on the investment chapter in the North American Free Trade Agreement (NAFTA). The 2004 Model BIT changes primarily related to U.S. concerns that the types of protection granted to foreign investors by NAFTA may have been written too broadly, and that foreign investors would possibly receive more favorable treatment for their NAFTA-related investor-state dispute claims than U.S. investors would under U.S. law.

To address these concerns, the U.S. government made several changes in the 2004 Model BIT in order to give the BIT parties greater control over the arbitral process and to limit access to ISDS. These changes were reaffirmed in recent agreements and the 2012 Model BIT.[27] Post-NAFTA U.S. investment provisions in BITs and FTAs incorporated a principal trade negotiating objective from the 2002 Trade Promotion Authority stipulating that no trade agreement is to lead to foreign investors in the United States being granted greater substantive rights than what are granted to U.S. investors in the United States (see below section on core provisions). Additionally, the 2004 model and subsequent investment treaty chapters now provide more detailed guidance for both parties and tribunals and also address procedural and other matters not included in earlier U.S. investment treaties, such as the expedited review of claims, rules on frivolous claims, the participation of non-disputing third parties in the arbitration, a statute of limitations, and the consolidation of related claims. The 2012 Model BIT and recent FTAs also formalized the transparency and openness of the arbitral proceedings. Presently, questions remain about further revisions to the Model BIT, for instance, in terms of developing an appellate mechanism. [28]

How does the U.S. Model BIT define investment?

Since the beginning of the BIT program, the definition of investment in U.S. treaties has expanded beyond traditional forms of investment, such as "physical" investments. It recognizes that investment may take a variety of forms, including intangible investments such as intellectual property rights but that not all assets are considered an investment. The 2012 Model BIT provides the following definition of investment:

> "investment" means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:
>
> (a) an enterprise;
>
> (b) shares, stock, and other forms of equity participation in an enterprise;
>
> (c) bonds, debentures, other debt instruments, and loans;

[27] The text of the U.S. Model BIT is available at: http://www.state.gov/documents/organization/188371.pdf.

[28] The possible creation of an appellate mechanism was first identified as a negotiating objective in the 2002 TPA.

(d) futures, options, and other derivatives;

(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;

(f) intellectual property rights;

(g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and

(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.

What are the U.S. Model BIT's core provisions?

All U.S. IIAs are binding, reciprocal agreements. In addition to specific market access commitments, U.S. international investment agreements typically include:

Nondiscriminatory 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 (based on U.S. law); 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 requirements and exceptions. Environmental, labor, transparency, and anti-bribery requirements, as well as exceptions for national security and prudential interests and provisions to prevent forum shopping.

These provisions are reflected in the 2015 bicameral TPA reauthorization legislation introduced in the 114th Congress (H.R. 1890/S. 995).

What is Direct and Indirect Expropriation?

The 2012 Model BIT and other U.S. IIAs prohibit the expropriation of covered investments except: (1) for a public purpose; (2) in a non-discriminatory manner; (3) upon payment of prompt,

adequate, and effective compensation; and (4) in accordance with due process of law and the minimum standard of treatment.[29] Direct expropriation of an investment occurs when the host country deprives the investor of the value of its investment by, for example, transferring title in the investment to the state.[30] By contrast, an indirect expropriation occurs when the investor retains title to the investment but cannot make economic use of the investment for a significant period of time because, for example, of discriminatory government regulations that substantially interfere with the investor's use of the investment.[31]

Some observers raised concerns about early NAFTA decisions interpreting the legal standard for indirect expropriation. To address concerns raised by these decisions, the 2012 Model BIT contains an annex that specifically spells out the factors a tribunal must consider when determining whether an indirect expropriation has occurred. These factors mirror those in the U.S. Supreme Court decision in *Penn Central*, a case that determined the test for regulatory takings under the Fifth Amendment of the U.S. Constitution. The factors consist of:

> (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
>
> (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
>
> (iii) the character of the government action.[32]

Do U.S. IIAs prevent governments from taking regulatory action?

Recent U.S. IIAs, such as the investment chapter of the U.S.-South Korea FTA (KORUS), state that nondiscriminatory regulatory measures generally do not result in indirect expropriation. For example, the 2012 Model BIT states that: "Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."[33]

Do U.S. IIAs provide greater rights to foreigners?

U.S. IIAs are binding reciprocal agreements and do not provide greater substantive rights to foreign investors. Earlier concerns that foreign investors were receiving greater substantive rights

[29] 2012 Model BIT, art. 6.

[30] Glamis Gold, Ltd. v. United States, Award, paras. 354-55 (June 8, 2009).

[31] Id. at paras. 355-356. Indirect expropriation generally requires a "radical diminution in the value" of the investment. Id. at ¶ 366. If an investor can make some other economic use of the investment, even a less valuable one, and retains ownership and control, an expropriation is unlikely to have occurred. Grand River Enterprises Six Nations, Ltd. v. United States, Award, paras. 147-50 (January 12, 2011). In addition, the investor must have suffered "actual present harm" for an expropriation claim to be ripe for arbitration. Glamis Gold, Ltd. v. United States, Award, paras. 328-29, 332 (June 8, 2009).

[32] 2012 Model BIT, Annex B(4)(a); *see also* Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978).

[33] 2012 Model BIT, Annex B(4)(b).

under IIAs with ISDS provisions than U.S. investors obtained under U.S. law prompted Congress to include a provision in the investment negotiating objectives in the 2002 TPA stating that the investment protections in future IIAs should ensure that "foreign investors in the United States are not accorded greater **substantive** rights with respect to investment protections than United States investors in the United States."

Some observers argue that the availability of ISDS itself implies greater **procedural** rights by providing foreign investors in the United States with an additional choice of venue besides U.S. courts. While this debate has focused on rights afforded to investors in the United States, it is important to recognize that, under a U.S. investment agreement, a U.S. business investing in a foreign country would have recourse to ISDS to resolve disputes with the host country's government. From the view of supporters, this access may be particularly important in situations where judicial systems in foreign countries may not be fully formed or independent, or where there may be significant corruption.

Investor-State Dispute Settlement

Procedures

What is Investor-State Dispute Settlement (ISDS)?

ISDS provisions in IIAs enable an aggrieved investor, with an investment located in the territory of a foreign host government, to bring a claim against that government for breach of an investment agreement before an international arbitration panel. ISDS provisions are intended to establish a binding and impartial procedure for the settlement of investment disputes. Although ISDS is a common part of the international investment architecture, its use is actively debated, including in the current TPP and T-TIP negotiations.

What is the history of ISDS?

Historically, before the advent of ISDS, "unlawful behavior by States targeting foreign investors tended either to go unaddressed or to escalate into conflict between States."[34] Further, "[m]ilitary interventions in the early years of U.S. history—gunboat diplomacy—were often in defense of private American commercial interests."[35] In the absence of ISDS, an investor whose property has been expropriated, or otherwise injured by a foreign government, such as through discriminatory action, also could either seek redress in the domestic courts of the foreign government or seek the espousal of their claim by their investor's home government through state-to-state dispute settlement. From this perspective, ISDS represented a more peaceful, effective mechanism for addressing disputes between investors and host countries.[36] According to one of the framers of the U.S. BIT program, the decision to include ISDS in U.S. investment treaties "was based on the desire to provide investors with a stable and secure dispute settlement device and to de-politicize

[34] USTR, "Investor-State Dispute Settlement (ISDS)," fact sheet, March 2015.

[35] Id.

[36] Id.

investment disputes."[37] Predecessors to the contemporary form of ISDS date to the 1900s, with arbitration institutions established in London, Stockholm, and Paris.[38] States began to include ISDS in their investment treaties in the late 1960s and early 1970s. By the 1990s, ISDS became a standard element of international investment agreements.[39]

Under what rules are ISDS cases arbitrated?

Although an investor submitting a claim under a U.S. IIA must typically consent to the mandatory substantive and procedural rules contained therein, the parties to an investment dispute generally may jointly choose the forum as well as many of the procedural rules under which the tribunal conducts the arbitration.[40] Most international investor disputes are conducted under rules of the 1965 *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, which established the International Centre for Settlement of Investment Disputes (ICSID).[41] ICSID, an affiliate of the World Bank Group headquartered in Washington, DC, provides arbitral services and rules for investment disputes to the 147 members who have ratified the ICSID Convention. Investment arbitration tribunals (e.g., NAFTA Chapter 11 tribunals) may use the facilities and rules provided by ICSID. A separate facility, the ICSID Additional Facility, was created in 1978 to arbitrate disputes if either the home or host state, but not both, is not a member of ICSID. The ICSID Additional Facility can also arbitrate non-investment disputes. The most common alternative to ICSID is international arbitration under the rules established in the United Nations Commission on International Trade Law (UNCITRAL).[42] The

Who decides investment disputes?

The methods of selection and disqualification of arbitrators may differ depending on whether the arbitration is conducted under ICSID or UNCITRAL Arbitration Rules, NAFTA, or agreements based on the U.S. Model BIT. Furthermore, the parties may also contract to have the dispute governed by rules other than the ICSID and UNCITRAL Arbitration Rules.

With regard to selection of arbitrators, both NAFTA and U.S. FTAs based on the recent Model BIT state that, unless the parties otherwise agree, the tribunal shall be comprised of three arbitrators. The claimant appoints one arbitrator; the respondent state appoints one arbitrator; and the parties then agree on a presiding arbitrator. If the disputing parties cannot agree on appointment of an arbitrator, then the Secretary-General of ICSID becomes the appointing authority.

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[37] K. Scott Gudgeon, "Arbitration Provisions of U.S. Bilateral Investment Treaties," in *International Investment Disputes: Avoidance and Settlement* (West Publishing, 1985).

[38] Roderick Abbott, Frederik Erixon, and Martina Francesca Ferracane, *Demystifying Investor-State Dispute Settlement (ISDS)*, European Centre for International Political Economy (ECIPE), 2014.

[39] UNCTAD, *Investor-State Dispute Settlement,* UNCTAD Series on Issues in International Investment Agreements II, 2014, p. 23.

[40] See, e.g., NAFTA, arts. 1121-22; 2012 Model BIT, arts. 25-26; id. art. 24(3)(d) ("[I]f the claimant and respondent agree," the parties may submit a claim "to any other arbitration institution or under any other arbitration rules."). For example, the parties to an investment dispute brought under a particular IIA may modify the UNCITRAL Arbitration Rules so long as this is consistent with the IIA. UNCITRAL Arbitration Rule 1.

[41] The United States is a signatory of ICSID.

[42] Other arbitration rules include those of the International Chamber of Commerce, the Stockholm Chamber of Commerce, and the Permanent Court of Arbitration.

Under the ICSID Convention, arbitrators must be "persons of high moral character and recognized competence in the fields of law, commerce, industry or finance."[43] However, under the UNCITRAL Arbitration Rules, there does not appear to be a corresponding provision that explicitly requires arbitrators to be recognized as competent in any particular field.

Can arbitrators be disqualified for bias?

In the event that a party to the arbitration believes that an arbitrator should be disqualified, the procedures it must follow depend on the rules that govern the arbitration. Under the ICSID Convention and Arbitration Rules, a party may propose disqualification of an arbitrator on account of any fact indicating that the arbitrator has a "manifest lack" of the ability to exercise independent judgment. Similarly, under the UNCITRAL rules, an arbitrator may be challenged if "circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence." Arbitrators have an obligation to affirmatively disclose such circumstances both prior to, and during, the dispute proceedings.

What circumstances have led to an arbitrator being disqualified?

It appears that many challenges to an arbitrator's qualifications to sit on a tribunal arise from prior existing relationships between the arbitrators and the disputing parties. For example, one arbitrator, in 2013, was disqualified from the tribunal in *Blue Bank v. Venezuela* because the arbitrator in question was a partner at a law firm that was representing the claimant in a different ISDS proceeding against Venezuela that dealt with issues similar to the case he was set to decide. However, tribunals have also held that "the mere existence of some professional relationship with a party is not an automatic basis for disqualification of an arbitrator." In one case, the arbitrator in question advised the disputing parties that one of the partners in his law firm had worked for the claimant-company's predecessor on an unrelated tax issue but the panel did not find this relationship warranted disqualification.

Prior relationships with disputing parties are not the only reason that an arbitrator can be disqualified. Arbitrators can also be removed from a panel if they have biases against the law in dispute or the specific subject at issue. One such example, involving a successful challenge, came when the United States, during a NAFTA arbitration conducted under the UNCITRAL Arbitration Rules, challenged the appointment of an arbitrator who had previously given a speech on the U.S. law at issue in the dispute. The arbitrator, in his speech, referred to the U.S. law in question as "harassment." The ICSID Secretary General, who was authorized to make the final determination on the issue as the appointing authority, informed the arbitrator that ICSID would be issuing an opinion upholding the challenge. In response, the arbitrator resigned and the ICSID did not issue a written opinion on the matter.

How are claims brought?

Under U.S. IIAs, a claimant must follow several procedures in order to initiate an arbitration proceeding. First, the claimant must attempt to resolve the dispute by consultations and negotiations with the respondent state.[44] The agreements generally contain a "cooling down

[43] ICSID Convention, art. 14.

[44] E.g., 2012 Model BIT, art. 23.

period" of six months from the time the claim arose to the time that an investor may submit it to arbitration.[45] This is intended to give the investor and respondent state time to enter into consultations and possibly negotiate a settlement. In addition, U.S. IIAs typically require the claimant to provide 90-days' written notice to the respondent state prior to submitting a claim to arbitration, which includes, among other things, the legal and factual basis of its claim.[46]

When the investor submits the claim, they must consent in writing to the mandatory substantive and procedural rules contained in the IIA under which the investor submits the claim.[47] The claimant investor (and, if applicable, the enterprise on behalf of which it submits the claim) must also waive its rights to pursue monetary relief for its claim in domestic tribunals of parties to the treaty or under other dispute settlement procedures.[48] There is a three-year limitation period on claims beginning on the date on which the claimant had actual or constructive knowledge of the respondent state's breach of the investment agreement, as well as knowledge that the claimant or the relevant enterprise "incurred loss or damage."[49] The parties generally have a large amount of discretion in jointly choosing the facilities at which the arbitration will be conducted as well as many of the procedural rules that will govern the arbitration.[50]

In terms of investor eligibility to ISDS under an investment agreement, one issue is the amount of business activity an investor would need to have in the host country in order to qualify. Under the KORUS FTA(Chapter 11), a Party may deny investment benefits to investors of the other Party that are enterprises and to their investments if: (1) the enterprise has "no substantial business activities" in the territory or the other Party; *and* (2) persons of a non-Party, or of the denying Party, own or control the enterprise.[51] The threshold for "substantial business activities" is not defined in Chapter 11 of the KORUS FTA. According to USTR, in the TPP, the United States is seeking a "denial of benefits" provision that would prevent "the use of shell companies" from accessing ISDS.[52]

Must investors exhaust their remedies in the host country's court system first before using ISDS?

Neither NAFTA nor the 2012 Model BIT requires exhaustion of local administrative or judicial remedies as a prerequisite to a tribunal's jurisdiction over an ISDS claim against a host country.[53]

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[45] Id. art. 24(3).

[46] Id. art. 24(2).

[47] Id. art. 26.

[48] Id. art. 26(2).

[49] Id. art. 26(1).

[50] See id. art. 24(3).

[51] The other circumstance under the KORUS FTA where a Party may deny investment benefits to investors of the other Party that are enterprises and to their investments is if the persons of a non-Party own or control the enterprise *and* (a) the denying party does not maintain normal economic relations with the non-Party *or* (b) it adopts or maintains measures with the non-Party that would prohibit transactions with the enterprise or would be violated if Chapter Eleven benefits were accorded to the enterprise or its investments. CRS Report R41779, *Dispute Settlement in the U.S.-South Korea Free Trade Agreement (KORUS FTA)*, by Brandon J. Murrill.

[52] [2] Office of the U.S. Trade Representative (USTR), "Investor-State Dispute Settlement (ISDS)," press release, March 2015, https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds.

[53] See, e.g., Waste Management, Inc. v. Mexico, ICSID Case No. ARB/AF/00/3, Award, ¶ 116 (April 30, 2004) ("It is (continued...)

This may be related to U.S. concerns about inadequate judicial systems or corruption in potential partner countries. However, at least under NAFTA, it appears that, as a matter of *substantive law*, an investor seeking to establish a violation of the minimum standard of treatment obligation based on "denial of justice" by a host country's judiciary must have first exhausted its judicial remedies (i.e., pursued all appeals) unless these remedies are not reasonably available.[54] Tribunals have deemed this requirement to be an element of a "denial of justice" claim under NAFTA Article 1105 (minimum standard of treatment) rather than a prerequisite to a tribunal's exercise of jurisdiction.[55]

Do investment agreements allow "forum shopping"?

"Forum shopping" generally refers to a practice in which an investor first pursues compensation in either the host country's local courts or before an ISDS tribunal and, if the investor is unhappy with the outcome, then pursues compensation in the other forum. U.S. IIAs typically provide that an investor cannot seek local remedies in the form of monetary compensation after consenting to arbitration under the agreement. For example, under the 2012 Model BIT, an investor must, as a condition of pursuing a claim under the ISDS provisions, agree to waive "the right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach ... " except to the extent that the investor seeks interim injunctive relief during the pendency of the arbitration.[56] However, this does not prevent an investor from seeking local remedies in the form of monetary compensation *prior to* bringing a dispute before an international investment arbitration tribunal.

Impact on U.S. Law

What are the possible remedies?

U.S. IIAs limit the remedies that an arbitration tribunal may award. For example, in both NAFTA and the 2012 Model BIT, the ISDS provisions state that a tribunal may award only monetary damages and/or restitution of property.[57] Furthermore, if a tribunal elects to award restitution of property, the respondent state has the option of paying monetary damages in lieu of such restitution.[58] NAFTA and the 2012 Model BIT also provide that an arbitration panel cannot award punitive damages.[59]

(...continued)

true that in a general sense the exhaustion of local remedies is a procedural prerequisite for the bringing of an international claim, one which is dispensed with by NAFTA Chapter 11.").

[54] Apotex Inc. v. United States (*Apotex I and II*), Award on Jurisdiction and Admissibility, ¶ 276 (June 14, 2003); The Loewen Group, Inc. v. United States, ICSID Case No. ARB(AF)/98/3, Award paras. 215-17 (June 26, 2003).

[55] The Loewen Group, Inc. v. United States, ICSID Case No. ARB(AF)/98/3, Award, paras. 215-17 (June 26, 2003). A recent decision by a NAFTA tribunal suggests that failure to pursue administrative remedies may also hurt a claimant's chances of establishing a violation of the minimum standard of treatment. See Apotex Holdings Inc. v. United States (*Apotex III*), Award, ¶ 9.58 (August 25, 2014).

[56] 2012 Model BIT, art. 26; see also NAFTA, art. 1121.

[57] NAFTA, art. 1135(1); 2012 Model BIT, art. 34(1).

[58] NAFTA, art. 1135(1); 2012 Model BIT, art. 34(1).

[59] NAFTA, art. 1135(3); 2012 Model BIT, art. 34(3).

Can ISDS change domestic laws?

The Constitution governs how federal statutes may be enacted, amended, or repealed.[60] Therefore, in order to amend a duly enacted statute, Congress must follow the processes established in Article I of the Constitution.[61] Because the Constitution is superior to ISDS provisions in BITs and investment chapters in FTAs, such ISDS provisions cannot alter federal law.[62] Although, to date, the United States has yet to lose a claim brought against it under an IIA, if it were to lose a claim in the future, the arbitration panel would not be able to amend, void the application of, or repeal the laws of the United States.

However, a tribunal's inability to change the laws or regulations of the United States directly does not mean that arbitration awards cannot be substantial. For example, in *Occidental Petroleum Corp. v. Ecuador*, the tribunal ordered Ecuador to pay Occidental $1,769,625,000—over 1 billion dollars—in damages.[63] The tribunal rendered that award, which is one of the largest awards in favor of a claimant under ISDS arbitration, after finding that Ecuador violated an investment agreement by expropriating Occidental's property in response to Occidental transferring some of its economic interests under an oil production contract in contravention of Ecuador law.[64] Therefore, although a tribunal lacks authority to alter a U.S. statute directly, some commentators believe that the possibility for such large monetary damages potentially could influence lawmakers and regulators when they consider proposed laws or regulations that may run afoul of IIA obligations.[65] However, other commentators counter that the federal government faces potential monetary damages under its own domestic legal system for claims filed against the government and that most would not consider this practice a threat to democratic principles.[66]

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[60] See U.S. Const. art. I; *see also* INS v. Chadha, 462 U.S. 919, 951 (1983) (holding the Article I of the Constitution "represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered procedure").

[61] U.S. Const. art. I

[62] See Reid v. Covert, 354 U.S. 1 (1957) (Black, J., plural) ("It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe [the Supremacy Clause] as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions."); Doe v. Braden, 57 U.S. 635, 657 (1853) ("The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States.").

[63] Occidental Petroleum Corporation Occidental Exploration and Production Co. v. Republic of Ecuador, ICSID Case No. ARB/06/11, Award, ¶ 876 (Oct. 5, 2012).

[64] Id. at paras. 199-200, 453-55. In 2012, Ecuador initiated an annulment proceeding, challenging the decision of the tribunal, which is currently pending. See Case Details, Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador, ICSID Case No. ARB/06/11, available at https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/06/11&tab=PRO.

[65] See, e.g, Perry E. Wallace, *International Investment Law and Arbitration, Sustainable Development, and Rio+20: Improving Corporate Institutional and State Governance*, 12 Sustainable Dec. L. & Pol'y 22, 24 (2012) ("Furthermore, the true worry is that the specter of a hefty arbitral award against it might have a chilling effect on the healthy evolution of that country's regulatory evolution ... ").

[66] Parvan P. Parvanov & Mark Kantor, *Comparing U.S. Law and Recent U.S. Investment Agreements: Much More Similar than You Might Expect*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY: 2010-2011 834-35 (Ed. Karl P. Sauvant 2011).

How transparent is ISDS?

The level of transparency in ISDS proceedings depends on the underlying IIA giving rise to the dispute and on the rules that the parties agree to follow during the arbitration. Generally speaking, U.S. IIAs are regarded as providing a great level of transparency when compared to other agreements between other countries.[67] For example, under the NAFTA Free Trade Commission interpretation of the NAFTA investment chapter, the public has access to "all documents submitted to, or issued by, a [investor-state dispute settlement] tribunal, subject to redaction of" confidential information, such as trade secrets or information related to national security.[68] Similar transparency requirements are a U.S. trade negotiating objective, and are provided for in the 2012 Model BIT[69] and other U.S. IIAs.[70]

Although the transparency provisions provided for in the underlying IIA would control, regardless of which set of arbitration rules are followed during the proceeding, it is worth noting that the ICSID Arbitration Rules and the UNCITRAL Arbitration Rules differ with regard to transparency requirements. Under the ICSID Arbitration Rules, the transparency provisions are less robust than what the United States has negotiated in recent IIAs. ICSID awards are only made publicly available if both disputing parties consent.[71] Importantly, if the disputing parties do not consent to the publication of the full award decision, ICSID Arbitration Rules still provide for publication of "excerpts of the legal reasoning of the Tribunal."[72] Further, commentators have noted that "oral and written submissions of the disputing parties and their experts and witnesses ... almost always remain confidential."[73]

UNCITRAL amended its Arbitration Rules in 2013 by adding Rules on Transparency in Treaty-Based Investor-State Arbitration (Rules on Transparency).[74] The Rules on Transparency will apply to all arbitrations conducted under treaties governed by UNCITRAL Arbitration Rules that were entered into after April 1, 2014, "unless the Parties to the treaty have agreed otherwise."[75] In order to facilitate states to agree to follow these new transparency rules, states can sign the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, known as the Mauritius Convention on Transparency (Mauritius Convention).[76] The Mauritius Convention opened for signature on March 17, 2015, and provides for the Rules on Transparency to apply to

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[67] See, e.g., Julie A. Maupin, *Transparency in International Investment Law: The Good, the Bad, and the Murky*, in Transparency in International Law (Andrea Bianchi and Anne Peters, eds., 2013), available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5840&context=faculty_scholarship.

[68] Notes of Interpretation of Certain NAFTA Chapter 11 Provisions, NAFTA Free Trade Commission (July 31, 2001), Part A, available at http://www.state.gov/documents/organization/38790.pdf.

[69] 2012 Model BIT, art. 29.

[70] KORUS, art. 11.21(1); CAFTA-DR, art. 10.21.

[71] ICSID Arbitration Rule 48(4).

[72] Id.

[73] Julie A. Maupin, Transparency in International Investment Law: The Good, the Bad, and the Murky, in Transparency in International Law (Andrea Bianchi and Anne Peters, eds., 2013), available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5840&context=faculty_scholarship.

[74] United Nations General Assembly Resolution, G.A. Res. 68/109 (Dec. 18, 2013).

[75] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, art. I(1) [hereinafter UNCITRAL Rules on Transparency].

[76] United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, opened for signature March 17, 2015, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention.html [hereinafter Mauritius Convention on Transparency].

IIAs entered into by both parties prior to April 1, 2014, by stipulating that if both parties have signed the Mauritius Convention, they will be deemed to have agreed to apply the Rules on Transparency to such IIAs.

Does the United States support ISDS transparency reforms?

The United States has supported ISDS transparency reforms and efforts have been made in recent years to expand transparency, for instance through the 2004 and 2012 U.S. Model BITs. Indeed, commentators regard U.S. IIAs as some of the most transparent agreements currently in existence. Furthermore, the United States signed the Mauritius Convention on Transparency, discussed above, on the first day that the Convention was opened for signature, March 17, 2015.[77] In a memorandum to reporters, the USTR stated that transparency provisions in U.S. IIAs

> afford respondent governments and interested members of the public the ability to monitor the progress of ISDS proceedings in a way that they could not if the claims were filed in many countries' domestic court systems. Investment arbitration hearings under recent U.S. trade and investment agreements, as well as all key documents submitted to investor-state tribunals and tribunal decisions, are public and available on the State Department website.[78]

At the same time, some stakeholders remain concerned about the level of transparency in ISDS proceedings. In the TPP, the United States is seeking "full transparency" in ISDS cases, such that governments "must make all pleadings, briefs, transcripts, decisions, and awards in ISDS cases publicly available, as well as open ISDS hearings to the public," with a key objective in these provisions being to "allow governments that are party to the agreement, as well as the public at large, to carefully monitor pending proceedings and more effectively make decisions about whether to intervene."[79]

Can non-disputing parties contribute to the proceedings?

Similar to submissions of amicus briefs to the United States Supreme Court, ISDS arbitration tribunals may allow interested persons, who are not parties to the dispute, to present their views to the tribunal. The rules governing the submission of third-party statements vary depending on whether the arbitration is governed by the ICSID Arbitration Rules, the UNCITRAL Arbitration Rules, or some other arbitration provision. NAFTA is generally silent on amicus submissions but provides that NAFTA parties, even when they are not involved in the particular dispute in question, may "make submissions to a Tribunal on a question of interpretation of this Agreement,"[80] while the Model BIT provides that a non-disputing state that is a party to the treaty "may make oral and written submissions to the tribunal regarding interpretation" of such treaty.[81] The U.S. Model BIT further provides that the presiding arbitration tribunal "shall have the

[77] The Senate has yet to provide its consent to the Mauritius Convention on Transparency and the Convention has yet to enter into force. See Status: United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, UNCITRAL website, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html.

[78] USTR, USTR Memo to Reporters on ISDS (Mar. 11, 2015) available at http://infojustice.org/archives/34117.

[79] USTR, "Investor-State Dispute Settlement (ISDS)," fact sheet, March 2015.

[80] Id. art. 1128.

[81] 2012 Model BIT, art. 28(2).

authority to accept and consider amicus curiae submissions from a person or entity that is not a disputing party."[82]

The KORUS FTA provides more discretion to the tribunal regarding amicus curiae submissions. It states that, "[a]fter consulting the disputing parties, the tribunal may allow a party or entity that is not a disputing party to file a written amicus curiae submission with the tribunal regarding a matter within the scope of the dispute."[83] It also provides a set of factors to be considered in determining whether to permit an amicus curiae filing including the extent to which

- the submission would assist the tribunal in determining a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge, or insight that differs from that of the disputing parties;
- the submission would address a matter within the scope of the dispute; and
- the third party has a significant interest in the proceeding.

Further, the KORUS FTA requires the tribunal to ensure that the submission does not disrupt the proceeding or unduly burden or unfairly prejudice either disputing party, and that the disputing parties are given an opportunity to present their observations on the amicus curiae submission.

The ICSID Arbitration Rules were amended in 2006 to permit submission of amicus briefs expressly.[84] ICSID arbitration tribunals have interpreted the ICSID Arbitration Rules in a manner that requires a third-party to ask for leave to provide written statements for the tribunal's consideration.[85] Pursuant to Rule 37, the tribunal must consult with the disputing parties prior to permitting the submission.[86] However, notably, the disputing parties do not have a "veto" power—that is, the tribunal may allow third-party submissions over the objection of a party to the dispute. Under the ICSID Arbitration Rules, the grant of permission to provide amicus submissions does not permit the nonparty to attend closed hearings or get access to documents that have not been made publicly available.[87]

The new UNCITRAL Rules on Transparency provisions on third-party submissions, discussed above, are similar to the ICSID rules. The UNCITRAL Rules on Transparency provide clear authority and procedural requirements for accepting written statements from third parties and non-disputing states that are parties to the treaty in question.[88] A third party must apply to the

[82] Id. art. 28(3).

[83] KORUS, art. 11.20.5.

[84] See ICSID Convention, Regulations, and Rules, Introduction (April 2006), available at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/basic-en.htm.

[85] Though Rule 37 does not explicitly state that a third-party must seek leave to submit an amicus brief, tribunals have functioned in this manner because the tribunal, under the rule, must make a decision as to whether to allow the third-party submission. *See* ICSID Arbitration Rule 37; Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae* (May 19, 2005) ("The Tribunal will ... only accept *amicus* submissions from persons who establish to the Tribunal's satisfaction that they have the expertise, experience, and independence to be of assistance in this case. In order for the Tribunal to make that determination, each nonparty wishing to submit an *amicus curiae* brief must first apply to the Tribunal for leave to make an *amicus* submission.").

[86] ICSID Arbitration Rule 37.

[87] See ICSID Arbitration Rule 32(2); Biwater Gauff Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Procedural Order No. 5, ¶ 46 (February 2, 2007).

[88] See UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, arts. 4,5. As discussed above, the (continued...)

tribunal to make a submission, the tribunal must consult with the disputing parties, and the tribunal must consider whether the submission would be able to assist the tribunal in making a determination on the dispute.[89] A notable difference between the UNCITRAL Rules on Transparency and the ICSID Arbitration Rules is that the UNCITRAL Rules on Transparency require third-party submissions to be made public.[90]

Do ISDS cases create precedent?

When rendering decisions in ISDS cases, investment arbitration tribunals do not establish legally binding precedent.[91] Thus, investment arbitration tribunals do not have to follow the decisions of prior tribunals in the way that, for example, U.S. federal courts must adhere to the decisions of the U.S. Supreme Court. However, arbitrators serving on ISDS tribunals have noted that a tribunal departing from a holding of a prior tribunal (particularly, in a case brought under the same IIA) may feel inclined to explain its reasoning in detail.[92] As the *Glamis Gold* tribunal put it, a NAFTA tribunal, "while recognizing that there is no precedential effect given to previous decisions, should communicate its reasons for departing from major trends present in previous decisions, if it chooses to do so."[93] Other commentators argue that there may be some value in evaluating each case on its own merits without being tied to precedent.[94]

Is there an appeals process?

Currently, U.S. IIAs lack a mechanism under which a disputing party may appeal a decision of an investment arbitration tribunal. Under ICSID Arbitration Rules,[95] a committee may be established to consider annulment of an award on five limited grounds.[96] However, these committees are not supposed to serve as appellate bodies.[97]

(...continued)

UNCITRAL Rules on Transparency are only applicable to IIAs entered into after April 1, 2014, unless the parties agree otherwise. *See supra* discussion on UNCITRAL Rules on Transparency. However, as noted above, UNCITRAL tribunals have accepted third-party submissions under their authority to conduct proceedings as appropriate. *Methanex Corp.*, Amici Decision at paras. 26, 47.

[89] UNCITRAL Rules on Transparency, art. 4.

[90] Id. art. 3.

[91] E.g., NAFTA, art. 1136(1) ("An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case.").

[92] Glamis Gold, Ltd. v. United States, Award ¶ 6 (June 8, 2009).

[93] Methanex Corp. v. United States, Final Award of the Tribunal on Jurisdiction and Merits Part IV, Chapter D, ¶ 8 (August 3, 2005).

[94] Irene M. Ten Cate, *The Costs of Consistency: Precedent in Investment Treaty Arbitration*, 51 Colum. J. Transnat'l L. 418, 471 (2013).

[95] Under UNCITRAL rules, a party may request that a tribunal interpret, correct, or supplement an award. UNCITRAL Arbitration Rules, arts. 37-39. However, the rules do not mention annulment of an award.

[96] Either party may request annulment of an award rendered under ICSID Arbitration Rules within 120 days of the tribunal rendering the award (or, with respect to requests based on corruption of an arbitrator, 120 days after the corruption is discovered but no more than three years after the tribunal renders the award) on one of five grounds:

(a) that the Tribunal was not properly constituted;

(b) that the Tribunal has manifestly exceeded its powers;

(c) that there was corruption on the part of a member of the Tribunal;

(d) that there has been a serious departure from a fundamental rule of procedure; or

(continued...)

The United Nations Conference on Trade and Development (UNCTAD), ICSID, and other commentators have suggested that establishing an international appellate system for ISDS arbitral decisions could improve the overall operation of investment agreements.[98] For example, an appellate mechanism might bring some coherence to inconsistent tribunal decisions, resulting in greater certainty for investors and host countries regarding their rights and obligations under IIAs.[99] However, to date, there does not appear to have been any concrete progress toward establishing such a body. Some observers have noted that including an appeals process could lead to additional delays and costs for disputing parties.[100] In addition, some commentators have questioned whether a *global* appellate body would be able to reconcile inconsistent decisions based on numerous investment treaties that provide different substantive and procedural rights to investors.[101]

While NAFTA does not mention an appeal process, the 2012 U.S. Model BIT provides that if "an appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals is developed in the future under other institutional arrangements, the Parties shall consider whether awards rendered under Article 34 should be subject to that appellate mechanism."[102] The

(...continued)

(e) that the award has failed to state the reasons on which it is based.

ICSID Convention, art. 52; ICSID Arbitration Rule 50. To consider a request for annulment, the Chairman appoints a new three-person tribunal from the panel of arbitrators. ICSID Convention, art. 52. The tribunal may not include members of the previous tribunal and must meet other requirements (e.g., they cannot be nationals of either disputing party). Id. The annulment committee may stay enforcement of the award until it reaches a decision. ICSID Convention, art. 52; ICSID Arbitration Rule 54. If the committee annuls an award, either party may request that the dispute be submitted to a new tribunal. ICSID Convention, art. 52.

The ICSID Convention and related arbitration rules also provide for the supplementation, interpretation, or revision of an award, upon request of either party and under certain limited circumstances. ICSID Convention, arts. 49(2), 50, 51(4); ICSID Arbitration Rule 49.

[97] E.g., Vivendi v. Argentine Republic (*Vivendi II*), ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award Rendered on 20 August 2007, ¶ 247(i) (August 10, 2010) ("It is agreed by all that Article 52 does not introduce an appeal facility but only a facility meant to uphold and strengthen the integrity of the ICSID process. In the Treaty, the possibility of annulment is in this connection based on specific and limited grounds."); see also ICSID, Background Paper on Annulment for the Administrative Council of ICSID 30-35 (August 10, 2012), available at https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Background%20Report%20on%20Annulment_English.pdf.

[98] See, e.g., UNCTAD, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap* (June 25, 2013) available at http://unctad.org/en/publicationslibrary/webdiaepcb2013d4_en.pdf. See also ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration*, Discussion paper Part VI (Oct. 22, 2004), available at https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf.

[99] See Katia Yannaca-Small, Organization for Economic Cooperation and Development, "Improving the System of Investor-State Dispute Settlement" (2006), http://www.oecd.org/china/WP-2006_1.pdf.

[100] E.g., Organization for Economic Cooperation and Development, Improving the System of Investor-state Dispute Settlement: An Overview 194 (2006), http://www.oecd.org/investment/internationalinvestmentagreements/40079647.pdf

[101] Glamis Gold, Ltd. v. United States, Award, ¶ 8 (June 8, 2009); Karin L. Kizer & Jeremy K. Sharpe, *Reform of Investor-State Dispute Settlement: The U.S. Experience*, Transnat'l Dispute Mgmt. 1, 173-74 (2014).

[102] 2012 Model BIT, art. 28(10). The 2004 Model BIT contained stronger language regarding negotiations on an appeal mechanism, requiring the parties to an investment treaty to enter into negotiations within three years of a BIT's entry into force to determine whether to establish a "bilateral appellate body or similar mechanism." *See* 2004 Model BIT, Annex D.

Model BIT also provides that the parties should "strive to ensure" that any appellate process agreed to is transparent.[103]

In terms of TPA, the possible creation of an appellate mechanism was first identified as a U.S. trade policy negotiating objective on foreign investment in the 2002 TPA. The 2015 bicameral TPA bill (H.R. 1890/S. 995) incorporates this objective as well.

What is the relationship between ISDS and state-to-state dispute settlement?

Some U.S. IIAs provide for state-to-state dispute settlement when a respondent state to an ISDS proceeding fails to pay compensation to a prevailing investor or when state parties to the IIA disagree about an issue of interpretation. For example, the 2012 Model BIT provides that the non-disputing state party may bring a dispute settlement case against the respondent state if the respondent does not comply with a final award.[104] The panel hearing the dispute may determine that the respondent state has breached its obligations under the BIT and recommend that the respondent state abide by or comply with the award.[105] State-to-state dispute settlement proceedings may also be available when state parties to the IIA disagree over the interpretation or application of its provisions.[106]

Cases and Overall Trends

Has the United States ever lost an ISDS case?

The United States has never been ordered to pay compensation to an investor in an ISDS case. At the same time, the United States has spent a considerable amount in costs and attorneys' fees defending ISDS cases. According to the USTR, ISDS is "accompanied by similar legal costs to complex litigation in [U.S. domestic] courts."[107] In addition, the United States entered into settlement agreements with investors' home countries to resolve issues raised by investors in the Softwood Lumber Consolidated Proceedings (Canada)[108] and the CANACAR case (Mexico).[109] However, in both cases, a state-to-state dispute settlement panel had already determined that some aspects of the U.S. measures at issue were inconsistent with U.S. WTO or NAFTA obligations.[110]

[103] 2012 Model BIT, art. 28(10).

[104] Id. art. 34(8).

[105] Id.

[106] Id. art. 37.

[107] USTR, "Investor-State Dispute Settlement (ISDS)," fact sheet, March 2015.

[108] For more on these proceedings, see http://www.state.gov/s/l/c14432.htm.

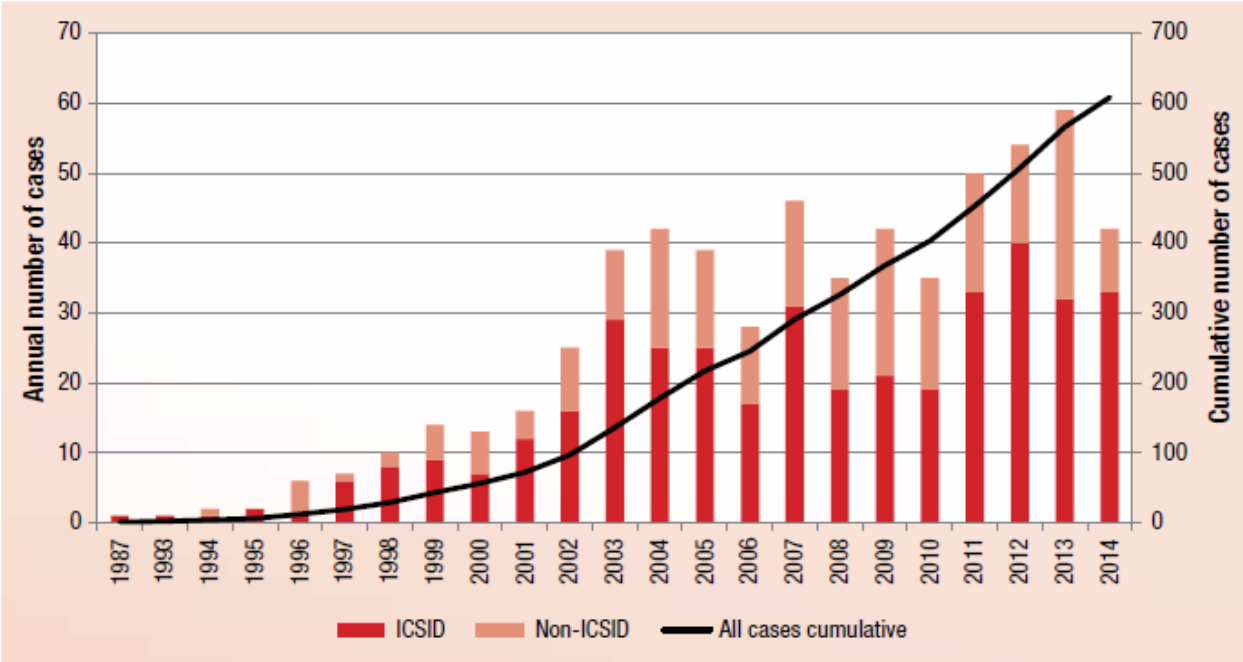
[109] For more on this dispute, see http://www.state.gov/s/l/c29831.htm.

[110] In the matter of Cross-Border Trucking Services, USA-MEX-1998-2008-01, Final Report of the Panel, paras. 295-98 (February 6, 2001) (finding a violation of NAFTA by the United States). For more information on the softwood lumber dispute, see CRS Report R42789, *Softwood Lumber Imports From Canada: Current Issues*, by Katie Hoover and Ian F. Fergusson.

How common are ISDS cases?

The right to ISDS, in some form, is a common feature of many international investment agreements. Despite the inclusion in BITs of ISDS provisions since 1968, it was not until the mid-1990s, following the passage of several investment agreements between advanced economies, that the number of cases of investment disputes began increasing. Since then, the prominence of ISDS has increased concurrent with the rapid growth of FDI in recent decades – From a negligible amount in the 1960s global FDI flows were $1.45 trillion in 2014. Globally, in 2014, investors initiated 42 known ISDS cases, bringing the overall known number of ISDS cases to 608 since the early 1960s.[111] At the same time, in the overall context, ISDS appears to be relatively infrequently used; for example, about 90% of all BITs in force reportedly have operated without any claims filed.[112]

Figure 5. Global ISDS Cases,1987-2014



Source: CRS, reproduced from UNCTAD, "Recent Trends in IIAs and ISDS," IIA Issues Note No. 1, February 2015.

Notes: Preliminary data for 2014.

Who are the most frequent claimants and respondents in ISDS cases?

Investors from capital-exporting countries most frequently file ISDS claims. In terms of the total at the end of 2014, the main users of ISDS have been investors from the United States (around 130 cases); several European countries, namely the Netherlands (over 60), the United Kingdom

[111] UNCTAD, "Recent Trends in IIAs and ISDS," IIA Issues Note No. 1, February 2015.

[112] Scott Miller and Gregory N. Hicks, *Investor-State Dispute Settlement: A Reality Check*, Center for Strategic & International Studies (CSIS), January 2015, http://csis.org/files/publication/150116_Miller_InvestorStateDispute_Web.pdf.

(around 50), Germany (over 40), and France (nearly 40); and Canada (around 30)—collectively representing over 80% of all ISDS claims filed.[113]

By contrast, developing and transition countries are the most frequent respondents in ISDS claims. In 2014, 60% of all cases were brought against developing and transition economies, with Argentina, Bolivia, and the Czech Republic the top three historically. In 2014, Spain was the most frequent respondent (with five cases).[114]

What issues and sectors are most commonly involved in ISDS cases?

The nature of disputes brought under ISDS has evolved. For example, claims over direct expropriation, such as those related to the nationalization of economic sectors in the 1970s and 1980s, have largely given way to disputes involving foreign investment regulation and indirect expropriation.[115] In 2014, the two types of government conduct most commonly at issue in ISDS were cancellations or alleged violations of contracts and revocations or denial of licenses.[116]

Around 61% of the cases filed in 2014 related to the services sector, followed by primary industries (28%) and manufacturing (11%).[117] According to one analysis of ISDS cases during 2003-2013, the primary (oil, mining, hydrocarbon, etc.) and electricity generation and distribution sectors were the most frequently involved in cases.[118] Another analysis characterizes the economic sectors most frequently involved in ISDS cases generally as ones with "significant government involvement or those governments view as critical for the national economy."[119]

Who typically wins ISDS cases?

Cumulatively, in 2014, the global number of concluded ISDS cases reached 356, with 37% decided in favor of the host country; 25% in favor of the investor, and 28% settled.[120] Information regarding the amounts claimed by investors is limited, though efforts to enhance transparency exist: for example, in the 2012 U.S. Model BIT and the new UNCITRAL rules. Internationally, from available information on cases, the amounts sought in claims by investors historically have varied from about $8 million to $2.5 billion.[121] In cases where investors win, the damages awarded are often lower (see **text box**).[122] One dispute that has been characterized as being a record high is the aggregate amount of $1.77 billion sought by three claimants who constituted

[113] UNCTAD, *Recent Trends in IIAs and ISDS*, IIA Issues Note, February 2015.

[114] Ibid.

[115] Organization for Economic Cooperation and Development (OECD), *"Indirect Expropriation" and the "Right to Regulate" in International Investment Law*, OECD Working Papers on International Investment, 2004/04, OECD Publishing, 2004.

[116] UNCTAD, *Recent Trends in IIAs and ISDS*, IIA Issues Note, February 2015.

[117] Ibid.

[118] Roderick Abbott, Frederik Erixon, and Martina Francesca Ferracane, *Demystifying Investor-State Dispute Settlement (ISDS)*, European Centre for International Political Economy (ECIPE), 2014.

[119] Scott Miller and Gregory N. Hicks, *Investor-State Dispute Settlement: A Reality Check*, CSIS, January 2015.

[120] UNCTAD, *Recent Trends in IIAs and ISDS*, IIA Issues Note, February 2015.

[121] Ibid.

[122] USTR, "Investor-State Dispute Settlement (ISDS)," March 2015.

the majority shareholders of the former Yukos Oil Company in an arbitration proceeding against Russia, and the subsequent award issued against Russia of $50 billion.[123]

How Do ISDS Award Amounts Vary by Countries' Development Status?

Of both policy and academic interest has been the extent to which amounts awarded have varied between countries, based on development status, particularly with respect to the debate over whether ISDS causes a regulatory chilling effect. One recent analysis, which used a dataset of 159 final investment arbitration awards from before January 2012, found that the average amount awarded was $2.95 million.[124] The study did not find a statistically significant difference in the average award amounts for arbitration cases based on whether countries were OECD or non-OECD members. In contrast, it found an overall statistically significant pattern for average award amounts based on countries' World Bank classification by income (high, upper-middle, lower-middle, and low income)—specifically that average awards for investors against high-income countries ($626,000) were lower than average awards for investors against upper-middle income countries (about $4 million). It explored the outcomes in other ways as well. The study noted several limitations to its findings, including possible statistical modeling limitations, variables omitted (e.g., the possible impact of democracy levels on outcomes), and assumptions. Such analysis has been used by some ISDS supporters to give weight to the argument that ISDS is not biased against developing countries. On the other hand, amounts claimed and awarded can nevertheless "exert significant pressure on public finances and create potential disincentives for public-interest regulation"[125] At the same time, exposure to ISDS might also encourage more non-discriminatory treatment.

Under which agreements have ISDS cases most commonly been brought against the United States?

According to the USTR, under the 50 agreements the United States has concluded which include ISDS, the United States has faced "17 ISDS cases, 13 of which were brought to conclusion."[126] Nearly all ISDS cases brought by investors against the United States have been brought under NAFTA. Additionally, one case has been filed under each of the CAFTA-DR, the U.S.-Chile FTA, the U.S.-Peru FTA, and the U.S. Uruguay BIT by foreign investors.[127] None of these cases was decided against the United States.

What are examples of recent ISDS cases?

The **Appendix** contains a summary of the facts and outcomes of recent ISDS cases that may be of interest to Congress. Not all of these cases involve claims under U.S. IIAs. Some have played a role in current U.S. investment negotiations and the U.S. trade policy debate over immigration. For example, in recent years, two cases concerning the pharmaceutical industry and intellectual property rights have been prominent: one filed by a subsidiary of Philip Morris against Australia

[123] UNCTAD, *Investor-State Dispute Settlement: UNCTAD Series on Issues in International Investment Agreements II*, 2014, p. 25.

[124] Susan D. Franck, "Conflating Politics and Development? Examining Investment Treaty Arbitration Outcomes," *Virginia Journal of International Law*, March 10, 2015.

[125] UNCTAD, *Investor-State Dispute Settlement: UNCTAD Series on Issues in International Investment Agreements II*, 2014, pp. 25-26.

[126] USTR, "Investor-State Dispute Settlement (ISDS)," March 2015.

[127] Information about ISDS cases filed by foreign investors against the United States is available at: U.S. Department of State, "International Claims and Investment Disputes (L/CID)," http://www.state.gov/s/l/c3433.htm.

concerning its plain packaging law for tobacco[128] and the other filed by Eli Lilly against Canada regarding its so-called "promise doctrine" concerning patent utility.[129] For example, businesses claim an interest in seeking compensation for what they consider to be deprivation of their property (IPR) through a fair hearing in a neutral body.[130] Others argue that these cases infringe on a state's right to regulate in the public welfare, and that the "mere threat" of litigation can have a "chilling effect on policy."[131] Some observers argue that these cases are not "representative" of ISDS, and express caution as to drawing any conclusions from either case, given that in neither case has the tribunal yet issued an award on jurisdiction or on the merits in the dispute.[132]

[128] On December 1, 2011, the Tobacco Plain Packaging Act 2011 became law in Australia. The law requires "plain packaging" and new and expanded health warnings on tobacco products, and prohibits the use of logos, brand imagery, and promotional text on tobacco products. See Australian Government, The Department of Health, "Plain Packaging of Tobacco Products," updated March 2, 2015, http://www.health.gov.au/tobaccopp.

[129] According to the Canadian government, the so-called "promise doctrine" "consists of distinct tests for patent validity under Canadian law." Further, "[i]n Canadian patent law, fulfilment of the three core criteria of patentability—novelty, non-obviousness, and utility—is judged no later than *as at the time of filing of the patent application*." A Canadian court reviewing a claim that a patent is invalid on utility grounds "will first seek to determine whether the applicant itself asserted ("or promised") a particular level of utility for its invention in its patent specification." According to the USTR *2014 Special 301 Report*, the United States has "serious concerns about the lack of clarity and the impact of the heightened utility requirements for patents that Canadian courts have applied recently." USTR states that, "[u]nder this amorphous and evolving standard, courts can invalidate a patent on utility grounds by construing the "promise of a patent" years after the patent has been granted, leading to uncertainty for patent holders and applicants and undermining incentives for investment in the pharmaceutical sector. In applying this standard, courts have invalidated a number of patents held by U.S. pharmaceutical companies, finding now that those products lack utility (i.e., not capable of industrial application), even though such products have been in the market and benefiting patients for years."

[130] Letter to the editor by Julie Soderlund (Vice President, Communications, Philip Morris International), "Tobacco industry has no less right to justice," October 13, 2014, *The Financial Times*.

[131] For example, see letter from law professors circulated by Alliance for Justice to Majority Leader McConnell, Minority Leader Reid, Speaker Boehner, Minority Leader Pelosi, and Ambassador Froman, March 2015, http://www.afj.org/wp-content/uploads/2015/03/ISDS-Letter-3.11.pdf.

[132] For example, see letter from law professors from various universities to Majority Leader McConnell, Minority Leader Reid, Speaker Boehner, Minority Leader Pelosi, and Ambassador Froman, April 7, 2015, https://www.mcgill.ca/fortier-chair/isds-open-letter.

Appendix. Summaries of Selected Investor-State Dispute Settlement Cases

Table A-1. Summaries of Selected Investor-State Dispute Settlement Cases

Case Name, Date of Filing, and Applicable Investment Treaty	Facts	Status/Outcome
Occidental Petroleum Corp. v. Republic of Ecuador November 11, 2002 U.S. – Ecuador BIT	Occidental filed a dispute against Ecuador concerning its termination of a participation contract for oil exploration and extraction in the Amazon rainforest. Occidental had entered into the contract with PetroEcuador, a state-owned oil company. The contract barred Occidental from assigning its production rights under the contract without obtaining the state's approval. Ecuador declared the contract void after Occidental allegedly breached the non-assignment provision. Occidental alleged that Ecuador had violated the U.S.-Ecuador BIT, including Articles II.3(a) (fair and equitable treatment) and III.1 (expropriation and compensation). Ecuador filed counterclaims alleging malicious prosecution, among other things.	The tribunal determined that Ecuador had not accorded Occidental's investment fair and equitable treatment because its termination of the participation contract in response to claimants' breach was not "proportionate." It also found that Ecuador had expropriated the claimants' investment. The tribunal reduced the amount of its Award to the claimants because they had breached provisions in the participation contract requiring Ecuador's approval prior to assignment of contract rights. The tribunal awarded Occidental $1.8 billion dollars plus interest.
Glamis Gold, Ltd. v. United States December 9, 2003 NAFTA	A Canadian mining company that owned rights to mine gold on federal land in California alleged that the United States had expropriated these rights and denied the company fair and equitable treatment with respect to the company's attempt to exercise the rights. The investor argued that the federal government delayed its consideration of the project and that California passed legislation making the project "economically infeasible." The investor alleged violations of NAFTA Articles 1105 (minimum standard of treatment) and 1110 (expropriation and compensation).	The tribunal declined to find an indirect expropriation as a result of the federal and state regulatory measures because Glamis retained its mining rights, which had a reduced but still significantly positive value. The tribunal denied the investor's claim under the minimum standard of treatment, holding that the conduct of the U.S. federal and state governments was not "sufficiently egregious and shocking."
Grand River Enterprises Six Nations, Ltd. v. United States March 12, 2004 NAFTA	Claimants, who professed to be members of American Indian tribes, manufactured cigarettes in Canada for export to the United States. Claimants alleged that actions of states of the United States to give effect to the 1998 Master Settlement	The tribunal found that it did not have jurisdiction over all but one of the claimants (except one individual) because they lacked an "investment" within the United States. With respect to the individual over

	Agreement (MSA) resolving claims brought by various state attorneys general against various U.S. cigarette manufacturers violated U.S. NAFTA obligations. In particular, the claimants argued that the states' treatment of them as "nonparticipating members" in the MSA violated Articles 1102 (national treatment), 1103 (most-favored-nation treatment), 1105 (minimum standard of treatment), and 1110 (expropriation and compensation). The states required nonparticipants in the MSA to contribute money to an escrow fund for 25 years to approximate the company's payment obligations had the company accepted the MSA. There was a provision in the states' laws, characterized as a loophole, that the investors initially used to significantly decrease their payments. However, the states subsequently modified this provision.	whom the tribunal decided it had jurisdiction, the tribunal determined that the claims failed on the merits because there was not a serious enough deprivation of his business to constitute an expropriation. He retained ownership of the business, which appeared to remain profitable. The tribunal also rejected the investor's claims for violations of most-favored-nation treatment, national treatment, and the minimum standard of treatment.
Railroad Development Corp. v. Republic of Guatemala June 14, 2007 Dominican Republic-Central American FTA (CAFTA)	The claimant, a U.S. railway investment and management corporation, filed a dispute on behalf of itself and its Guatemalan subsidiary related to its contractual rights to use infrastructure and rail assets to provide railway services in Guatemala (the "usufruct"). Subsequently, the executive branch of the Guatemalan government declared the usufruct "injurious to the interests of the State (*lesivo*)" in a resolution. The Attorney General then filed a *lesivo* claim with the Administrative Tribunal, which essentially sought to have the contract declared void. RDC argued that Guatemala had indirectly expropriated its investment under CAFTA Article 10.7, discriminated against it in violation of the country's national treatment obligations under CAFTA Article 10.3, and breached the minimum standard of treatment under CAFTA Article 10.5.	The tribunal noted in its analysis that RDC's contract remained in effect and the Administrative Tribunal, or the Guatemalan Supreme Court on appeal, could ultimately reject the state's declaration. Thus, the tribunal determined that the *lesivo* declaration did not affect RDC's contractual and property rights so severely that an expropriation had occurred. Nor did Guatemala's conduct constitute discrimination in violation of national treatment obligations. However, the arbitrators found that the "manner in which and the grounds on which [Guatemala] applied the *lesivo* remedy in the circumstances" violated the minimum standard of treatment in CAFTA. The tribunal awarded RDC more than $10 million plus interest on the condition that RDC forfeit its rights in the usufruct and transfer its shares in its subsidiary to Guatemala.
Mobil Investments Inc. and Murphy Oil Corp. v. Canada November 1, 2007 NAFTA	Two U.S. corporations with interests in Canadian off-shore oil development projects filed a dispute against Canada after a provincial board issued new "Guidelines for Research and Development Expenditures." The guidelines	The tribunal determined that Canada had not breached its obligation to accord the investors fair and equitable treatment because there was no evidence that the Canadian government induced the claimants to invest in the projects by representing

	allegedly required the claimants to contribute millions of dollars in funding for research projects in the Province of Newfoundland and Labrador. The claimants alleged that Canada had breached NAFTA Articles 1106 (performance requirements) and 1105 (minimum standard of treatment).	that the regulatory framework would not change. Nor did the tribunal find that Canada had engaged in other grossly unfair conduct. However, the tribunal found a violation of the NAFTA investment chapter's provision on performance requirements. It asked the parties to submit evidence on the amount of damages incurred by the investor.
Clayton/Bilcon of Delaware Inc. v. Canada May 26, 2008 NAFTA	Bilcon, a Delaware-based U.S. company, sought to build a quarry in Nova Scotia, initially based on the Canadian government's encouragement. However, the Canadian and provincial government ultimately denied Bilcon a permit to operate the project following a Canada-Nova Scotia Joint Review Panel's environmental review of the project. Bilcon alleged discriminatory and arbitrary treatment of Bilcon during the environmental review and permitting process. The Canadian government argued that the refusal to approve the project was justified based on environmental concerns that it presented a threat to a sensitive ecological area, and also pointed to concerns raised by the local community.	The NAFTA tribunal found in favor of Bilcon, holding that Canada breached NAFTA's national treatment (Article 1102) and minimum standard of treatment (Article 1105) provisions in the conduct of its federal-provincial regulatory process. According to the majority opinion, the tribunal could not find "any justification for the differential and adverse treatment" that Bilcon's investment received as compared to similarly situated Canadian investments. In evaluating Bilcon's claim that treatment of its investment violated the minimum standard of treatment, the tribunal also determined that the approach adopted by the Joint Review Panel, which centered on whether the project violated "community core values," was arbitrary in part because of its inconsistency with the law and policy of the Canadian Environmental Assessment Act. Bilcon is now seeking $300 million in damages in the next phase of the hearing.
Apotex Inc. v. United States (*Apotex I and II*) December 10, 2008 (the "Sertraline Claim") and June 4, 2009 (the "Pravastatin Claim") NAFTA	A Canadian generic drug developer and manufacturer sought approval from the U.S. Food and Drug Administration to market and sell its drugs in the United States. It alleged that a series of U.S. federal court decisions denied it access to the generic market and hurt its efforts to obtain market share. Apotex alleged breaches of NAFTA Articles 1102 (national treatment), 1105 (minimum standard of treatment), and 1110 (expropriation and compensation).	The tribunal held that Apotex lacked an "investment" in the United States and therefore dismissed the investor's claims for lack of jurisdiction. The tribunal found that all of Apotex's development, testing, and manufacturing activities took place in Canada. The company then exported drugs to separate U.S. distributors. The tribunal also rejected the argument that Apotex's applications to market and sell drugs in the United States were an "investment." Nor, in the view of the tribunal, were the costs incurred by the company in preparing its applications (in Canada) to export drugs to the United States an "investment."

Vattenfall AB v. Germany April 2, 2009 Energy Charter Treaty	Vattenfall, a Swedish energy utility, challenged German environmental restrictions imposed on a coal-fired power plant under construction along the Elbe river. Vattenfall applied for the required permits in late 2006, but they were allegedly delayed and when they were issued in 2008, imposed severe limitations on Vattenfall's operations. Vattenfall claimed that the combined effects of the delay of the administrative procedure and the restrictions imposed amounted to an indirect expropriation and a breach of the Energy Charter Treaty's fair and equitable treatment provision.	The parties to the dispute reached an undisclosed agreement to suspend the ICSID proceedings on August 27, 2010.
Pac Rim Cayman LLC v. Republic of El Salvador April 30, 2009 Dominican Republic–Central America FTA	Pacific Rim Cayman LLC, a U.S. corporation wholly owned by a Canadian corporation, asserted that El Salvador failed to act upon applications by its subsidiaries for gold and silver mining exploitation concessions and environmental permits, among other things. The claimant alleged violations of CAFTA Articles 10.3 (national treatment), 10.4 (most-favored-nation treatment), 10.5 (minimum standard of treatment), 10.7 (expropriation and compensation), and 10.16.1(b)(i)(B) (investment authorizations).	The tribunal held that it lacked jurisdiction over the claims. It found that El Salvador had properly denied Pacific Rim benefits under CAFTA's investment chapter because the company lacked substantial business activities in the United States and was owned by a Canadian corporation.
Chevron Corp. v. Republic of Ecuador September 23, 2009 U.S.-Ecuador BIT	Chevron and its subsidiary, Texaco Petroleum Co. (TexPet), brought an investor-state dispute settlement case against Ecuador after the country's courts in the *Lago Agrio* case found claimants liable for billions of dollars in environmental damages stemming from earlier crude oil exploration and production operations in which TexPet participated. Chevron/TexPet claimed that the Ecuadorian courts handling of the earlier cases violated their due process. Claimants also argued that several settlement agreements between Ecuador and Chevron/TexPet had released the claimants from liability upon completion of certain remediation projects.	The tribunal issued interim awards ordering Ecuador to "take all measures necessary" to prevent the enforcement and recognition of the judgment in the *Lago Agrio* case. In February 2013, the tribunal declared that Ecuador had violated the interim awards by not preventing enforcement and recognition of the judgment prior to the tribunal's decision on the merits. In September 2013, the tribunal issued a Partial Award, holding that Ecuador had released the claimants from liability for environmental claims not involving harm to an individual. The case remains ongoing.
Philip Morris Asia Limited v. Australia November 21, 2011	In November 2011, Philip Morris Asia Limited (PM Asia), a subsidiary of Philip Morris International, brought a claim against Australia under the Australia-Hong Kong BIT.	The tribunal has not yet issued a decision on jurisdiction or the merits in the dispute.

Australia-Hong Kong BIT	PM Asia alleged that Australia's enactment and enforcement of its Tobacco Plain Packaging Act expropriated its intellectual property (e.g., its trademarks and copyrights) that it used to brand its tobacco products and packaging, significantly reducing the value of its investments without compensation. The claimants alleged violations of BIT Articles 6(1) (expropriation and compensation) and 2(2) (minimum standard of treatment). The claimants also alleged a violation of Article 2(2) of the BIT based on purported breaches of other international agreements: Australia's World Trade Organization (WTO) obligations under the Trade-Related Aspects of Intellectual Property Rights (TRIPS) and Technical Barriers to Trade (TBT) agreements and the country's obligations under the Paris Convention for the Protection of Intellectual Property. In its response, Australia argued that the tribunal lacked jurisdiction over PM Asia's claims because PM Asia acquired shares in its Australian subsidiary after Australia had announced its intent to introduce plain packaging regulations for public health reasons.	
Apotex Holdings Inc. v. United States (*Apotex III*) March 6, 2012 NAFTA	A Canadian generic drug development and manufacturing company (and its holding company) filed a claim on behalf of its affiliated U.S. distributor. The claim alleged that the U.S. Food and Drug Administration (FDA)'s refusal to admit its products into the United States through issuance of an "import alert" without sufficient process hurt its U.S. distributor's sales and market share. The FDA issued the alert following the agency's determination that two Canadian drug manufacturing facilities had violated U.S. laws. The claimant alleged breaches of NAFTA Articles 1102 (national treatment), 1103 (most-favored-nation treatment), and 1105 (minimum standard of treatment).	The tribunal held that no violation of national treatment had occurred because none of the comparable domestic companies identified by the claimants were "in like circumstances" to the claimants or their investments. The claimants were not subject to the same regulatory regime as a result of their choice to export products to the U.S. market rather than invest in U.S. drug manufacturing companies. The tribunal declined to find a most-favored-nation violation because the alleged comparable foreign company made numerous drugs that were medically necessary. The FDA had apparently determined that the alleged comparable foreign company should not be subject to an import alert because it would hurt U.S. patients. Thus, the foreign comparator was not "in like circumstances" to the claimants and their investments.

		The tribunal found no violation of the minimum standard of treatment because other countries implementing measures blocking the import of adulterated drugs did not require that strict procedures be followed.
Vattenfall AB v. Germany May 31, 2012 Energy Charter Treaty	Vattenfall, a Swedish energy utility, is seeking compensation from Germany of losses that result from Vattenfall having to phase-out its nuclear plants in Germany as result of the German government's decision to phase-out nuclear power in the wake of the 2011 disaster in Fukushima, Japan.	This case has not yet been decided.
Lone Pine Resources Inc. v. Canada September 6, 2013 NAFTA	In September 2013, Lone Pine Resources Inc. submitted a notice of arbitration against Canada on behalf of its Canadian subsidiary. The claimants argued that the government of Quebec had engaged in "arbitrary, capricious, and illegal" conduct when it revoked the subsidiary's rights to drill for shale gas under the St. Lawrence River using horizontal drilling and hydraulic fracturing without payment of compensation. The claimants alleged violations of NAFTA Articles 1105 (minimum standard of treatment) and1110 (expropriation and compensation). The claimants have sought more than $250 million Canadian dollars in damages.	The dispute does not yet appear to have moved beyond the early stages.
Eli Lilly and Company v. Canada September 12, 2013 NAFTA	The investor, a U.S. pharmaceutical company, brought a claim against Canada, arguing that the country had failed to protect the investor's patent rights when its courts used a new common law doctrine to invalidate two of the investor's patents for medicines on the grounds of lack of utility (i.e., broadly speaking, the invention must do what the applicant's patent specification says it will do). Lilly claims that this standard is discriminatory, contrary to utility standards in other countries and in NAFTA itself, and is adverse to Canada's own interpretation of utility at the time of NAFTA signing. The claimants alleged violations of NAFTA Article 1105 (minimum standard of treatment) and Article 1110 (expropriation and	The tribunal has not yet issued an award on jurisdiction or the merits in the dispute.

	compensation). In its defense, Canada argued that the court decisions invalidating Lilly's patents did not amount to a "denial of justice," and that Canadian courts had provided Lilly with sufficient due process. Nor, in Canada's view, could the court's violation of the alleged "expectations" the investor had with regard to Canada's patent law breach NAFTA the minimum standard of treatment. With respect to Lilly's expropriation claim, Canada argued that a court's invalidation of an initial patent grant does not amount to an expropriation. Instead, it constitutes a determination that the investor has no property rights in the alleged invention. Canada also argued that the court decisions were consistent with NAFTA Chapter 17.	

Source: Congressional Research Service. Information obtained from the texts of decisions by international investment tribunals and filings by the parties to investment disputes.

Notes: Not all of these cases involve claims under U.S. IIAs.

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