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Insulating a WTO Investment Facilitation Framework from ISDS*

by

George A. Bermann, N. Jansen Calamita, Manjiao Chi, and Karl P. Sauvant**

Over 100 WTO members are engaged in Structured Discussions aimed at a multilateral framework on investment facilitation for development (Framework). The Framework (meant to be a WTO agreement) seeks to facilitate investment flows by creating legal obligations for states regarding (among other things) enhanced transparency and predictability of investment-facilitation measures and regulations, improved efficiency and speed of administrative procedures, and the establishment of related ombudsperson-type mechanisms.

It is our understanding that, in negotiating this agreement, negotiators intend to create binding disciplines for states, but not to confer enforceable rights on private parties. This raises the issue of the Framework's potential interaction with obligations contained in international investment agreements (IIAs), especially in the context of investor-state dispute settlement (ISDS). In particular, could ISDS litigants and arbitrators rely on the Framework's disciplines to add elements to the fair-and-equitable-treatment (FET) standard, claim breaches of umbrella clauses, or directly incorporate the Framework's disciplines via most-favored-nation (MFN) clauses? How can the risk be reduced that the Framework's obligations will be invoked by private parties in investment-treaty disputes?

A future Framework can be expected—and needs to state expressly—that it does not cover “market access, the treatment and protection of investment or investors, and ISDS.”¹

But more needs to be done to ensure that Framework and IIA obligations remain insulated from one another. Specifically, negotiators should consider several treaty-interface clauses:

First, an explicit limitation of the scope of the Framework's obligations, to prevent a breach of the Framework from being treated also as a breach of IIA provisions:

“A determination that there has been a breach of this Framework shall not establish the breach of any rules on investment protection or investor-state dispute settlement.”²

Second, a limitation on MFN treatment, stating that MFN obligations only extend to actual “treatment”, and that the Framework's obligations do not in themselves constitute “treatment”:

“For greater certainty, obligations arising from other treaties do not in themselves constitute ‘treatment’ and thus are excluded for the purpose of assessing a breach of this Article. Conversely, only measures adopted by a Member pursuant to those obligations shall be considered ‘treatment’. Furthermore, the obligations in this Framework shall not constitute ‘treatment’ under any other treaty.”³

Third, a provision addressing the Framework’s use as a tool of interpretation, expressly stating its inapplicability to the interpretation of IIAs:

“This Framework cannot and shall not serve as a means to interpret any rules on investment protection or investor-state dispute settlement.”

As these provisions would be binding among the parties to the Framework, their effectiveness would be assured in IIA-based disputes in which investors’ and respondents’ states are both parties to the Framework. With more than 100 WTO members in the Structured Discussions (and more members joining), the overlap between Framework parties and IIA parties could be sizeable, depending upon how many members decide to adhere (and how quickly).

What about ISDS disputes brought by investors from non-adhering WTO members against adhering WTO members? To the extent that litigants may seek to use MFN clauses to import Framework obligations into IIAs, most IIAs exempt economic integration agreements (such as regional free trade agreements) from the MFN obligation. Depending upon the exact wording of the MFN clause, it is possible, though not without doubt, that arbitral tribunals might find that the Framework is excluded on this basis.

In other cases in this situation, however, in which MFN clauses are broader or investors attempt to use the Framework to supplement an umbrella or open-ended FET clause, members can add the language below to make clear that the Framework does not create rights for third states or their investors:

“The Framework does not create rights for states that are not parties to it or for investors and investments originating from such states (or having the nationality of such states).”

Finally, to address the potential use of the Framework in IIA-based cases, whether as a predicate to a claim or as interpretive support for one, members can clarify that the jurisdiction to interpret and apply the Framework is specifically limited, stating that:

“The Dispute Settlement Body shall have exclusive jurisdiction to interpret and apply the Framework.”⁴

Unintended and unwanted interaction between a Framework and IIAs is possible. WTO negotiators should therefore seriously consider including provisions along these lines in a Framework to insulate it from being imported into investor-state disputes.

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¹ A similar statement is provided by the [Joint Ministerial Statement on Investment Facilitation for Development](#), para. 4.

² [Comprehensive and Progressive Trans-Pacific Partnership](#) (2019), art. 9.3.

³ [EU-Viet Nam Investment Protection Agreement](#) (2020), art. 2.4(5).

⁴ Similar language has been proposed by the EU.

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