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Editor-in-Chief: Karl P. Sauvant (Karl.Sauvant@law.columbia.edu)

Managing Editor: Matthew Conte (msc2236@columbia.edu)

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Unexpected opportunities to support investor-state dispute prevention through the WTO Investment Facilitation for Development Agreement

by

N. Jansen Calamita *

Establishing mechanisms and create tools to promote dispute prevention are an increasing priority for states. That said, states often struggle to develop whole-of-government information regarding the operation of their regulatory systems and the risks of claims that may be raised under their investment protection treaty commitments. This, in turn, undermines the [development of effective, evidence-based dispute-prevention mechanisms](#). The [recently completed text negotiations](#) of the WTO Investment Facilitation for Development Agreement (IFDA), however, present states with unexpected opportunities to bolster their dispute-prevention efforts.

At bottom, the IFDA is about improving administrative due process for FDI in the countries that join the Agreement. Indeed, the stated goal of the IFDA is the establishment of “rules and disciplines on investment facilitation designed to enhance the transparency, efficiency and predictability of the investment regulatory environment” for the purpose of facilitating investment for development.¹ Regulatory transparency, efficiency and predictability are not the only concern of the IFDA, of course. Similar issues of administrative due process arise in the context of investment-protection treaties, especially with respect to the fair-and-equitable-treatment standard. Such issues include the transparency of procedures and proceedings, clarity of the law and decision making, fair administrative procedures (including the right to be heard and the right to prompt decisions), administrative consistency, and the availability of administrative review. And herein lies an unexpected opportunity.

Under the IFDA, each developing and least developed country is expected to conduct a whole-of-government “self-assessment” or “gap analysis” to determine whether it will be able to meet the IFDA’s obligations, or whether it will be necessary to use the IFDA’s “Special and Differential Treatment” provisions and make reforms before taking on certain commitments.

To that end, the WTO is preparing a “Self-Assessment Guide” designed to guide countries’ assessments.² While the purpose of the self-assessment process is for countries to identify their compliance levels and technical assistance needs with respect to the IFDA, the information developed through the self-assessment process is not only relevant to the IFDA, but it is also relevant to ISDS dispute prevention.

Because of the close conceptual relationship between the commitments contained in the IFDA and many of the obligations under investment-protection treaties, the information that a state develops when assessing the compliance of its current legal processes vis-à-vis the IFDA’s obligations will be simultaneously relevant to an examination of those legal processes through the lens of its investment-protection obligations. As a consequence, even though the self-assessment process has been established for the specific purpose of considering compliance with the IFDA, the self-assessment process presents states with the additional opportunity to better understand the investment treaty risks they face from their administrative processes.³

Using the information gathered through the self-assessment process would allow developing and least-developed states to formulate evidence-based dispute-prevention policies, consider possible domestic reforms and consider treaty reforms. That said, even with this information, the effective development and implementation of dispute-prevention mechanisms will remain [markedly difficult](#) for many states. Here again, however, the IFDA may provide an opportunity.

Under the IFDA it is contemplated that donor countries will provide support to developing and least-developed countries for implementation and for the self-assessment of their current levels of compliance with the IFDA’s commitments. While the degree of support that is ultimately provided remains to be seen, the synergy between issues relevant to the IFDA and investment treaties creates an opportunity for donor countries to multiply the value of their support by helping to build capacity with respect to ISDS dispute prevention at the same time as they support self-assessments and the implementation of the IFDA. As a result, not only does the IFDA present opportunities for developing and least-developed countries, but it also provides opportunities for donor countries to substantially increase the impact of their contributions.⁴

* N. Jansen Calamita (n.j.calamita@nus.edu.sg) is Head, Investment Law & Policy, Centre for International Law, and Research Associate Professor (CIL), Faculty of Law, National University of Singapore. The author wishes to thank colleagues at CIL for their valuable comments and Manjiao Chi, Federico Ortino and Rodrigo Polanco for their helpful peer reviews.

¹ WTO, “Investment Facilitation for Development (IFD) Agreement”, INF/IFD/RD/136, 6 July 2023. The text of the Agreement has not been made public.

² WTO, “Self-Assessment Guide: Draft Sample for Provision 5 of the Easter Text”, INF/IFD/RD/97, 9 March 2022.

³ According to [a 2016 study](#) of investor-state treaty disputes, examining 584 arbitration cases from 1990-2014, 61% of cases were triggered primarily by administrative measures.

⁴ It bears noting that the IFDA is specifically drafted to prevent legal interaction among its commitments, investment protection treaties and investor-state dispute settlement. (For a review of the concerns raised by possible interaction, see George A. [Berman, N. Jansen Calamita, Manjiao Chi and Karl P. Sauvart.](#)) Nevertheless, nothing in the IFDA would prohibit donor states from providing assistance packages to developing and least-developed states that not only address the IFDA, but also other issues like dispute-prevention policy.

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