

UNDERSTANDING THE WTO INVESTMENT FACILITATION FOR DEVELOPMENT AGREEMENT (IFDA)

Potential Risks and Opportunities: The Investment Treaty-IFDA Nexus

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The Possible the Interaction between the IFDA and IIAs

- IFDA addresses issues of regulatory transparency, efficiency, predictability, etc.
 - Same kinds of issues arise in the context of IIAs, especially the fair and equitable treatment (FET) standard.

Concerns that investors might

- a) rely on the IFDA disciplines to interpret the host state's investment protection obligations;
- b) raise “umbrella clause” claims based upon the host state's failure to carry out its obligations under claims the IFDA; and
- c) seek to directly incorporate the IFDA's disciplines via most-favoured-nation treatment clauses in investment protection treaties.

Assessing the Risk of Interaction between IIAs and ISDS

- Drafters have tried to address concerns about unwanted interaction.
- Multiple provisions designed to limit and/or exclude interactions between IIAs, ISDS, and the IFDA.
 - E.g., IFDA, Art. 2.2; Art. 4.1; Art. 4.2; and Art. 5.2.
- Not watertight but a best effort to reduce the risk that the IFDA will be invoked by private parties in ISDS.

The Possibility of Synergy between the IFDA and ISDS Avoidance

- “Self-assessment” process for states to determine whether they will be able to meet IFDA obligations upon accession.
- Creates possibility to ‘kill two birds with one stone’.
 - An opportunity to review state regulatory processes with an eye towards assessing investment treaty risk exposure and compliance.
 - Indispensable information for state formulation of dispute prevention and treaty negotiation policy.
- **Key issue:** The availability of funding and technical assistance. No firm commitments by developed economies.

The IFDA, Sustainable Development, and Climate Change

- No sectoral carveouts in IFDA. No mention of climate change.
 - Commitments apply to all FDI, regardless of whether it tends to promote sustainable development, is Paris-aligned, or not.
- But IFDA does not prohibit providing benefits beyond those required in the IFDA to preferred investments, e.g., green investments.
- Also, IFDA does not affect or apply to subsidies and does not require market liberalisation for investment.
- Incorporates the exceptions language of GATS, Art. XIV.