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INSULATING A WTO INVESTMENT FACILITATION FRAMEWORK FOR DEVELOPMENT FROM INTERNATIONAL INVESTMENT AGREEMENTS

Manjiao Chi

About the paper

This report is part of a series of background papers written in the context of a project by the International Trade Centre (ITC) and the German Development Institute/Deutsches Institut für Entwicklungspolitik (DIE) on “Investment Facilitation for Development.” The project supports the negotiations of a multilateral framework on investment facilitation for development by building negotiation capacity in developing (including least developed) countries, channelling ground-level and analytical expertise to negotiators and promoting public discussions of issues related to investment facilitation for development.

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Acronyms

BIT	Bilateral Investment Treaty
CETA	Comprehensive Economic and Trade Agreement between Canada and the EU
CFIA	Cooperation and Facilitation Investment Agreement
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EU	European Union
FET	Fair and Equitable Treatment
FTA	Free Trade Agreement
GATT	General Agreement on Trade and Tariffs
ICSID	International Centre for Settlement of Investment Disputes
IE	Indirect Expropriation
IFF4D	Investment Facilitation Framework for Development
IIA	International Investment Agreement
IPA	Investment Protection Agreement
ISA	Investor-State Arbitration
ISDS	Investor-State Dispute Settlement
ITC	International Trade Centre
MFN	Most-Favoured-Nation Treatment
OECD	Organization of Economic Cooperation and Development
TBT	Agreement on Technical Barriers to Trade
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UNCTAD	United Nations Conference on Trade and Development
U.S.	United States of America
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

Abstract

Investment facilitation elements can be found in many existing international investment agreements (IIAs). An investment facilitation framework for development within the WTO (IFF4D) is likely to have subject-matter overlap with IIAs. Thus, it is possible for IFF4D obligations to be imported to an IIA through application of various IIA clauses, such as most-favoured nation, umbrella, indirect expropriation, as well as fair and equitable treatment clauses, in the context of Investor-State Dispute Settlement (ISDS). Because such importation could create profound uncertainty to WTO members with regard to their obligations under the IFF4D and even subject the IFF4D to ISDS, it is necessary to insulate the IFF4D from IIAs and ISDS, especially investor-state arbitration (ISA). Yet, since IIAs are extremely decentralized, the only feasible way to achieve such insulation is to insert proper treaty interface clauses in the IFF4D. While several types of treaty interface clauses in the IFF4D could be helpful, complete insulation also calls for reforms of IIAs and ISDS.*

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I. INTRODUCTION

In recent years, consensus for an investment facilitation framework for development ("IFF4D") has been on the rise among the members of the World Trade Organization ("WTO").¹ Though there lacks a uniform definition of "investment facilitation" at the global level,² this term is often broadly understood to refer to measures aimed at assisting investors to start, operate and exit businesses, by improving transparency and predictability of investment policies, streamlining administrative procedures and adopting tools to handle inquiries or complaints by investors.³

Discussions on investment facilitation in the WTO have been initiated since the 11th Ministerial Conference in 2017. Since 25 September 2020, formal negotiations on a multilateral agreement on an IFF4D has been kicked off in the WTO, and the participating WTO members hope to achieve a concrete outcome by the 12th WTO Ministerial Conference scheduled for next year.⁴ Until now, a number of proposals for an IFF4D have been submitted to the WTO.⁵ While the form and contents of an IFF4D are yet to be negotiated, parties to the negotiations hope to make it a multilateral agreement under the WTO umbrella,⁶ and they expect it to play a helpful role in attracting investment and in promoting sustainable development by creating an efficient, predictable, and "investment-friendly" business climate.⁷

Almost all WTO members maintain a certain number of international investment agreements ("IIAs"), including bilateral investment treaties ("BITs") and investment chapters of free trade agreements ("FTAs").⁸ Naturally, they will be bound by both an IFF4D and IIAs. Since both types of legal instruments deal with investment-related issues, they are likely to overlap and interrelate with each other. This situation gives rise to an important and relevant question, i.e. how an IFF4D should interrelate with IIAs?

Bearing this question in mind, this paper aims to analyze how to construct a proper IFF4D-IIA relationship, with the goal of insulating potential IFF4D claims from investor-state dispute settlement ("ISDS"), especially investor-state arbitration ("ISA"). This paper has seven parts. Part I is an introduction. Part II explains the subject-matter overlaps between an IFF4D and IIAs, laying down the basis for this study. Part III and Part IV focus on the two major aspects of IFF4D-IIA relationships respectively. Part III discusses potential mutual importation of obligations between an IFF4D and IIAs, especially considering that an IFF4D could incorporate "IIA-plus" investment facilitation obligations; and Part IV analyzes potential "dispute roving" between ISDS and WTO dispute settlement and *de facto* parallel proceedings mainly through the application of the fair and equitable ("FET") and indirect expropriation ("IE") clauses commonly found in IIAs. Part V aims to design proper treaty clauses to help deal with the above two aspects of IFF4D-IIA relationships. While drawing reference from existing trade and investment treaties, Part V also proposes several concrete treaty interface clauses in an IFF4D. Part VI briefly discusses how an IFF4D could serve the purpose of promoting

¹ WTO (2017). *Joint Ministerial Statement on Investment Facilitation for Development*. WTO document WT/MIN (17)/59.

² Berger, A., Sebastian, G., & Olekseyuk, Z. (2019). Investment facilitation for development: a new route to global investment governance. *DIE briefing Paper No. 5/2019*. Last accessed on 27 November 2020 from: <https://www.die-gdi.de/en/briefing-paper/article/investment-facilitation-for-development-a-new-route-to-global-investment-governance/>.

³ Singh, K. (2018). Investment facilitation: Another fad in the offing?. *Columbia FDI Perspectives* (No. 232). Last accessed on 27 November 2020 from: <http://ccsi.columbia.edu/files/2016/10/No-232-Singh-FINAL.pdf>.

⁴ WTO (2020 September 25). *Structured discussions on investment facilitation for development move into negotiating mode*. Press Release, Geneva: World Trade Organization. Last accessed on 27 November 2020 from: https://www.wto.org/english/news_e/news20_e/infac_25sep20_e.htm.

⁵ A list of these submissions to the WTO is available at WTO official website, https://docs.wto.org/doc2fe/Pages/FE_Search/FE_S_S006.aspx?Language=ENGLISH&SourcePage=FE_B_009&Context=Script&DataSource=Cat&Query=%40Symbol%3dINF%2fIFD%2f*&DisplayContext=popup&languageUIChanged=true.

⁶ However, it has also been proposed that an IFF should be adopted as a WTO plurilateral agreement, which would only bind WTO members that are parties thereto. See, e.g., Talkmore, C. (19 November 2018). *A WTO Multilateral Investment Facilitation Agreement: An African Perspective*. Tralac online article. Last accessed on 27 November 2020 from: <https://www.tralac.org/blog/article/13703-a-wto-multilateral-investment-facilitation-agreement-an-african-perspective.html>.

⁷ WTO (2018). *Investment Facilitation: Relationship between Trade and Investment*. WTO website. Last accessed on 27 November 2020 from: https://www.wto.org/english/thewto_e/minist_e/mc11_e/briefing_notes_e/bfinvestfac_e.htm.

⁸ UNCTAD (2020). *International Investment Agreement Navigator*. UNCTAD website. Last accessed on 27 November 2020 from: <https://investmentpolicy.unctad.org/international-investment-agreements>.

sustainable development in all states. Part VII concludes and raises policy recommendations for WTO members in making an IFF4D.

II. SUBJECT-MATTER OVERLAPS BETWEEN AN IFF4D AND IIAS

Though the exact contents of an IFF4D remain to be negotiated, there is a broad consensus that, on the one hand, an IFF4D should consider measures that aim at improving regulatory transparency and predictability, streamlining and speeding up administrative procedures, and enhancing international cooperation. On the other hand, an IFF4D should exclude issues relating to market access, investment protection and ISDS from its ambit.⁹

While there is no precise definition of investment facilitation, a recent study shows that typical investment facilitation measures include:

- ♦ Transparency of investment measures
- ♦ Simplification of administrative procedures and requirements
- ♦ Digitalization
- ♦ Measures that directly increase the development contribution of FDI
- ♦ Coordination and cooperation
- ♦ Enhanced international cooperation.¹⁰

The above list of investment facilitation measures, though not exhaustive, provides a helpful basis for not only the negotiation of an IFF4D, but also an assessment of states' existing investment facilitation commitments. In fact, many investment facilitation measures listed and envisaged for an IFF4D could be found in existing IIAs. In this regard, an empirical study suggests that several categories of provisions that embody or reflect different types of investment facilitation elements are incorporated in existing IIAs, which include the following:

- ♦ Improving the investment climate
- ♦ Removal of bureaucratic impediments to investment
- ♦ Facilitation of investment permits
- ♦ Facilitation of entry and sojourn of personnel related to investment
- ♦ Transparency
- ♦ Capacity-building on investment issues
- ♦ Investment financing
- ♦ Insurance programs
- ♦ Pre-establishment investor servicing
- ♦ Post-establishment investor aftercare
- ♦ Relations with investors and the private sector
- ♦ Joint cooperation and treaty bodies on investment facilitation.¹¹

⁹ WTO (2017). Proposal for a WTO Informal Dialogue on Investment Facilitation for Development. *Joint Communication from the Friends of Investment Facilitation for Development*. WTO document JOB/GC/122.; WTO (2017). *Joint Ministerial Statement on Investment Facilitation for Development*. WTO document WT/MIN (17)/59, para 4; WTO (2017). *Joint Ministerial Statement on Investment Facilitation for Development*. WTO document WT/L/1072.WTO, at para 3.

¹⁰ See, generally, ITC and DIE. (2020). *An Inventory of Concrete Measures to Facilitate the Flow of Sustainable FDI: What? Why? How?*. Last accessed on 27 November 2020 from: <https://www.intracen.org/itc/Investment-Facilitation-for-Development/>.

¹¹ See Polanco, R. J. (12 October 2018). Towards a Multilateral Investment Facilitation Framework: Elements in International Investment Agreements. *The RTA Exchange*. Last accessed on 27 of November 2020 from: <http://www.ictsd.org/opinion/towards-a-multilateral-investment-facilitation-framework-elements-in-international>; Polanco, R. J. (2018). Facilitation 2.0: Investment and trade in the digital age. *The RTA Exchange*, 5-13. Last accessed on 27 November 2020 from: <https://www.ictsd.org/themes/global-economic-governance/research/facilitation-20-investment-and-trade-in-the-digital-age>.

Not all IIAs contain all investment facilitation elements. In fact, the availability and distribution of these elements in IIAs vary dramatically, which could have profound implications to the making of an IFF4D.

Horizontally, some investment facilitation elements are more frequently incorporated in IIAs than others. For instance, many IIAs contain a transparency provision and mention improving investment climate as an objective of the treaty, whereas few IIAs contain provisions relating to investment finance and investment insurance.¹² The level of popularity of an element in IIAs could denote the level of consensus among states on this element. Reasonably, elements that feature a higher level of consensus would be more likely to be negotiated and incorporated in an IFF4D. For instance, in light of the frequent appearance of transparency provisions in IIAs and the growing convergence of the contents of these provisions,¹³ it seems that states have formed a broad consensus on the purpose, contents and application of transparency provisions in international investment governance. Given such consensus, it would be unsurprising that an IFF4D incorporates transparency provision(s).

Vertically, the concentration of investment facilitation elements is uneven among IIAs. While some IIAs contain multiple elements, others barely contain any. In a sense, if a state has already undertaken certain investment facilitation obligations in IIAs, it is likely to accept similar obligations in an IFF4D. In this regard, Brazil's cooperation and facilitation investment agreements ("CFIAs") are worth mentioning. Unlike traditional BITs that primarily aim at protecting foreign investment, the premise of the CFIAs is the long-term perspective that states need to cooperate and maintain fluent and organized dialogue with investors to foster sustained investments.¹⁴ As a result, a CFIA could contain much more investment facilitation elements than other types of existing IIAs. Since Brazil has made a wide range of investment facilitation commitments in CFIAs, it would be unsurprising for Brazil to make similar commitments to an IFF4D. As a matter of fact, Brazil has put forward a concrete IFF4D proposal at the WTO.¹⁵

As discussed above, an IFF4D and IIAs are likely to have substantial subject-matter overlaps, which seems to suggest that interrelation between the two types of instruments is inevitable. On a specific subject matter, the relationship between an IIA and an IFF4D could be classified into one of the following scenarios:

- A. An IFF4D is "IIA-identical", if the obligations in the IFF4D and those in the IIA are identical or substantively similar;
- B. An IFF4D is "IIA-plus", if the obligations in the IFF4D are greater or at a higher level than those in the IIA;
- C. An IFF4D is "IIA-minus", if the obligations in the IFF4D are fewer or at a lower level than those in the IIA; or
- D. An IFF4D is "IIA-conflicting", if the obligations in the IFF4D conflict with those in the IIA.

In scenario A, though states are subject to both an IFF4D and an IIA, they are actually subject to the same or similar investment facilitation obligations. In this scenario, the two instruments are unlikely to be interrelated. In scenarios B, C and D, as states are subject to different obligations under an IFF4D and an IIA on a same subject matter, constructing a proper IFF4D-IIA relationship seems necessary. Furthermore, for the purpose of an IFF4D, sustainable development should also be taken into account in constructing such a relationship.

To briefly summarize, investment facilitation elements are not entirely alien to existing IIAs. This not only implies that an IFF4D and IIAs are likely to share subject-matter overlaps, but also shows that states have

¹² Polanco, R. J. (2018). Facilitation 2.0: Investment and trade in the digital age. *The RTA Exchange*, 1-24. Last accessed on 27 November 2020 from: <https://www.ictsd.org/themes/global-economic-governance/research/facilitation-20-investment-and-trade-in-the-digital-age>.

¹³ UNCTAD (2004). Transparency. *UNCTAD Series on Issues in International Investment Agreements (UNCTAD/ITE/IIT/2003/4)*, 13-47. Last accessed on 27 November 2020 from: http://unctad.org/en/Docs/iteit20034_en.pdf.

¹⁴ See, e.g., Martins, J. H. V. (2017). *Brazil's Cooperation and Facilitation Investment Agreements (CFIA) and Recent Developments*. International Institute for Sustainable Development (IISD). Last accessed on 27 November 2020: <https://www.iisd.org/itn/2017/06/12/brazils-cooperation-facilitation-investment-agreements-cfia-recent-developments-jose-henrique-vieira-martins/>; Moreira, N. C. (2018). Cooperation and facilitation investment agreements in Brazil: The path for host state development. *Kluwer Arbitration Blog*. Last accessed on 27 November 2020 from: http://arbitrationblog.kluwerarbitration.com/2018/09/13/cooperation-and-facilitation-investment-agreements-in-brazil-the-path-for-host-state-development/?print=pdf&doing_wp_cron=1586831929.0269958972930908203125.

¹⁵ WTO (2018). Structured discussions on investment facilitation. *Communication from Brazil*. WTO document JOB/GC/169.

formed certain levels of consensus on these elements. Such overlaps and consensus necessitate construction of a proper IFF4D-IIA relationship when developing an IFF4D. Since IIAs are highly decentralized at the global level, the IFF4D-IIA relationship should be evaluated on an IIA-specific basis. In light of this, it makes sense for states to survey their IIAs for existing investment facilitation elements as a preparatory step for making an IFF4D.

III. IMPORTATION OF OBLIGATIONS BETWEEN AN IFF4D AND IIAS

The construction of a proper IFF4D-IIA relationship relies heavily on how potential subject-matter overlaps between an IFF4D and IIAs are dealt with, especially how IIA-inconsistent obligations in an IFF4D (including IIA-plus, IIA-minus and IIA-conflicting obligations) are addressed. In this connection, it is necessary to discuss whether and how the obligations in an IFF4D and those in IIAs can be mutually imported.

Modern international trade and investment treaties normally incorporate two major types of “treaty bridging” clauses that can be applied for importation of external obligations and rights to the treaty system, namely most-favoured nation (“MFN”) and umbrella clauses.

MFN is deemed to be a cornerstone principle of WTO agreements. In the context of IIAs, MFN treatment ensures that a host state extends to the covered foreign investor and its investments, as applicable, treatment that is no less favourable than that which it accords to foreign investors of any third state.¹⁶ While MFN clauses are differently drafted in IIAs, many IIAs contain an MFN clause with broad coverage. A typical example can be found in the 2012 U.S. Model BIT, which provides that,

Article 4: Most-Favoured-Nation Treatment

1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.¹⁷

As can be seen, this MFN clause covers not only investors but also nearly the whole life cycle of an investment. Given its broad coverage, this clause makes it possible for a state’s IIA-plus obligations in an IFF4D to be imported to an IIA system. Such possibility could be particularly high considering that MFN clauses in IIAs are often expansively interpreted and that ISDS jurisprudence relating to MFN clauses appears inconsistent.¹⁸

Admittedly, application of MFN clauses has restrictions. Depending on its treaty language, an MFN clause could only be invoked if the following requirements were satisfied: that the IIA-plus obligation in an IFF4D was a “treatment”, was “no less favourable”, and was applied in “like circumstance”.¹⁹ Some MFN clauses

¹⁶ UNCTAD (2010). Most-Favoured-Nation Treatment. *UNCTAD Series on Issues in International Investment Agreements II*, 12-13. Last accessed on 27 November 2020 from: https://unctad.org/en/Docs/diaeia20101_en.pdf.

¹⁷ See, e.g., United States Model BIT (Bilateral Investment Treaty) 2012 Annex B art. 4.b.

¹⁸ See Batifort, S., & Heath, J. B. (2017). The new debate on the interpretation of MFN clauses in investment treaties: Putting the brakes on multilateralization. *American Journal of International Law*, 111(4), 873-913.

¹⁹ See UNCTAD, *supra* note 16, at 23.

include exceptions, such as economic integration, government procurement and taxation exceptions.²⁰ These exceptions could help prevent certain IFF4D obligations that fall into the exceptions from being imported to an IIA system through the MFN clause.

Importation of IFF4D obligations to an IIA is also possible through an umbrella clause in the IIA. Typically, an umbrella clause requires the contracting states of an IIA to honor their commitments or obligations with regard to foreign investments other than those in the IIA, such as contractual obligations or specific arrangements between host states and foreign investors.²¹ The wording of umbrella clauses varies among IIAs. In ISDS jurisprudence, umbrella clauses are often applied to “lift” a state’s breach of a contractual obligation to violation of an IIA obligation.²² Yet, this does not exclude the possibility that a broadly-drafted umbrella clause could also be applied to import external treaty obligations. A typical example of such a clause can be found in some German BITs, such as the Germany-Lebanon BIT (1997), which includes the following article:

Article 7: Other Obligations

*2. Each Contracting State shall observe any other obligation it has assumed with regard to investments in its territory by investors of the other Contracting State.*²³

The term “any other obligation it has assumed” in this clause appears quite broad, which arguably encompasses both contractual obligations and treaty obligations. In such a case, it is possible for an IFF4D obligation to be imported to an IIA system through such an umbrella clause.

To sum up, both MFN and umbrella clauses can be used for mutual importation of obligations between an IFF4D and IIAs. Such importation could bring about profound legal uncertainty to states, as states will almost always be subject to the greater or the higher level of investment facilitation obligations, whether in an IFF4D or an IIA. Thus, a major aspect of a proper IFF4D-IIA relationship is to regulate the mutual importation of obligations between an IFF4D and an IIA through MFN and umbrella clauses in the IIA. To put it slightly differently, it is necessary to explore whether and how the obligations in an IFF4D and those in IIAs can be insulated from each other, especially in dispute settlement. In light of the “bridging” role of MFN and umbrella clauses, it is advisable that states conduct a thorough review of the MFN and umbrella clauses in their IIAs to assess the possibility and risk of importation of IFF4D obligations to the IIA system, especially through ISDS.

IV. “DISPUTE ROVING” BETWEEN ISDS AND WTO DISPUTE SETTLEMENT AND *DE FACTO* PARALLEL PROCEEDINGS

An IFF4D and IIAs are enforced through different dispute settlement regimes. On the one hand, as an IFF4D is likely to be a multilateral or plurilateral agreement under the WTO, disputes under the IFF4D should be subject to the exclusive and compulsory jurisdiction of the WTO, according to the Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”).²⁴ The WTO has one of the most active

²⁰ See Nikièma, S. H. (2017). The most-favoured-nation clause in investment treaties. *IISD Best Practice Series*, 6-7. Last accessed on 27 November 2020 from: <https://www.iisd.org/sites/default/files/publications/mfn-most-favoured-nation-clause-best-practices-en.pdf>; OECD (2004). Most-favoured-nation treatment in international investment law. *OECD Working Papers on International Investment*, 2004(02), 5-8. Last accessed on 27 November 2020 from: www.oecd.org/daf/inv/investment-policy/WP-2004_2.pdf.

²¹ See, e.g., Schreuer, C. (2004). Travelling the BIT route: of waiting periods, umbrella clauses and forks in the road. *The Journal of World Investment & Trade* 5 (2), vii-256.

²² See Yannaca-Small, K. (2006). Interpretation of the umbrella clause in investment agreements. *OECD Working Papers on International Investment*, 2006 (03), 15-21. Last accessed on 27 of November 2020 from: https://www.oecd.org/daf/inv/investment-policy/WP-2006_3.pdf.

²³ See, e.g., Article 7.2, Germany-Lebanon BIT (1997); Article 8.2, German-Nigeria BIT (2000).

²⁴ Article 23, WTO DSU.

international dispute settlement mechanisms in the world, which has admitted nearly six hundred disputes since its establishment.²⁵ On the other hand, ISDS is allowed in many IIAs. Until now there have been about a thousand ISDS cases, and a major part of them have been submitted to the International Centre for Settlement of Investment Disputes (“ICSID”).²⁶

The fact that IIAs and an IFF4D share subject-matter overlaps implies that a state regulatory measure relating to investment facilitation could fall within the ambit of both an IFF4D and an IIA. As a result, disputes arising out of or relating to the same measure could be submitted to either ISDS or WTO dispute settlement, or both, by different disputants and relying on different treaties.²⁷ At this juncture, several scenarios could arise.

Scenario A: A dispute is submitted to the WTO as both an IFF4D claim and an IIA claim. This scenario essentially inquires whether an IIA claim can be admitted under the WTO dispute settlement mechanism. On this issue, WTO jurisprudence suggests a negative answer. DSU provides that the WTO shall have jurisdiction over disputes between WTO members brought under “WTO covered agreements”.²⁸ Thus, an IIA claim seems inadmissible under the WTO dispute settlement mechanism, since IIAs are not “WTO covered agreements”. In this sense, states do not need to be concerned over “dispute roving” from ISDS to WTO dispute settlement mechanisms.

Scenario B: A dispute is submitted to ISDS as both an IIA claim and an IFF4D claim. This scenario inquires whether and how an ISDS tribunal can deal with a WTO claim. In this regard, the high-profile case of Philip Morris Asia v. Australia is an illustrative example. In 2011, Australia adopted the Tobacco Plain Packaging Act (“Act”), aiming at limiting tobacco consumption for public health purpose.²⁹ The adoption of the Act provoked a number of disputes against Australia. In Philip Morris Asia v. Australia, the investor, relying on the umbrella clause of the Australia-Hong Kong BIT,³⁰ claimed that Australia should honor its obligations not only under the BIT, but also under a number of other international treaties, including the Paris Convention for the Protection of Industrial Property, the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) and the Agreement on Technical Barriers to Trade (“TBT Agreement”).³¹ Both TRIPS and TBT Agreement are WTO agreements.

Australia argued that the ISDS tribunal cannot admit WTO claims. It first denied that the umbrella clause in the BIT can be used to import obligations owed by Australia to other states under other treaties; then it further argued that “[i]t is not the function of a dispute settlement provision... of the BIT to establish a roving jurisdiction that would enable a BIT tribunal to make a broad series of determinations that would potentially conflict with the determinations of the agreed dispute settlement bodies under the nominated multilateral treaties [i.e. the WTO agreements and the Paris Convention]. This is all the more so in circumstances where such bodies enjoy exclusive jurisdiction.”³² The tribunal ruled that the investor’s claims were inadmissible

²⁵ WTO (2020). *Dispute Settlement*. WTO website. Last accessed on 27 November 2020 from: https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.

²⁶ As of December 31, 2019, known treaty-based ISDS cases had reached the number of 1023, out of which 745 had been registered under the ICSID Convention and Additional Facility Rules. See, ICSID, “The ICSID Caseload – Statistics (Issue 2020-1)”, last accessed on 27 November 2020 from: <https://icsid.worldbank.org/en/Documents/resources/The%20ICSID%20Caseload%20Statistics%202020-1%20Edition-ENG.pdf>, at 7.

²⁷ See Alford, R. P. (2013). The convergence of international trade and investment arbitration. *Santa Clara Journal of International Law*, 12(1), 35-64. Last accessed on 27 November 2020 from: <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1148&context=scujil>.

²⁸ Article 1, WTO DSU.

²⁹ Article 3.1, the Act, last accessed on 27 November 2020 from: <https://www.legislation.gov.au/Details/C2011A00148>.

³⁰ See Article 2 (2), the Australia-Hong Kong BIT (providing that “Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.”)

³¹ *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Notice of Arbitration, para.7.15-7.17. (21 November 2011). Last accessed on 27 November 2020 from: <https://www.italaw.com/sites/default/files/case-documents/ita0665.pdf>.

³² *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Australia’s Response to the Notice of Arbitration para.35 (21 December 2011). Last accessed on 27 November 2020 from: <https://www.italaw.com/sites/default/files/case-documents/ita0666.pdf>.

and that the tribunal lacked jurisdiction over the dispute,³³ but it did not expressly address the issue of “dispute roving” from WTO dispute settlement to ISDS through the application of the umbrella clause of a BIT.

Whether WTO obligations can be enforced through ISDS remains largely unsettled. On the one hand, it could be argued, as Australia did in *Philip Morris Asia v. Australia*, that because Article 23 of DSU establishes the exclusive and compulsory jurisdiction of the WTO over “all disputes arising under the WTO Agreement”, WTO members should not and cannot consent to submit WTO claims to ISDS. On the other hand, a literal reading of Article 23 of DSU seems to suggest that, while WTO members are obliged to accept the exclusive and compulsory jurisdiction of the WTO, this Article does not prohibit private investors from bringing WTO claims in ISDS.³⁴

Scenario C: A dispute is submitted to both ISDS as an IIA claim by an investor, and to the WTO as an IFF4D claim by a WTO member, creating *de facto* parallel proceedings. This could particularly be the case considering that a same state regulatory measure could well fall within the ambit of both an IFF4D and an IIA. In this connection, FET and IE clauses in IIAs are particularly relevant, as both of them deal with how states should exercise their regulatory power. Typically, an FET clause requires states not to exercise regulatory power that could unduly harm foreign investors or investments, such as taking arbitrary or discriminatory measures or seriously violating due process.³⁵ Similarly, an IE clause requires states not to take regulatory measures that could amount to expropriation of foreign investments.³⁶ Depending on their wordings, both FET and IE clauses could serve as a “linkage” between an IFF4D and an IIA, since the same regulatory measure of a state could be pursued as an IFF4D claim and an FET or IE claim in parallel. Such likelihood could be high considering that both FET and IE clauses are often broadly drafted in many IIAs and flexibly interpreted in ISDS practice.³⁷

A typical example of such *de facto* parallel proceedings is the series of disputes against Australia after its adoption of the Act in 2011. First, a few tobacco producers filed domestic litigations in the High Court of Australia.³⁸ Then, Philip Morris Asia launched an ISDS case, claiming that Australia has violated the FET and IE clauses of the Australia-Hong Kong BIT.³⁹ Further, several WTO members initiated disputes in the WTO against Australia, claiming violations of several WTO agreements.⁴⁰ These legal proceedings occurred around the same time. As can be seen, despite their different fora and legal basis, these disputes actually targeted the same state regulatory measure of Australia, i.e. the adoption of the Act, and thus constituted *de facto* parallel proceedings.

In the strict sense, neither “dispute roving” nor *de facto* parallel proceedings are illegal. But their impacts on states should not be neglected. They not only put states under high pressure for dealing with parallel proceedings, but more importantly, they also expose states to potentially conflicting decisions made by

³³ *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility 186 (17 December 2015). Last accessed on 27 November 2020 from: https://www.italaw.com/sites/default/files/case-documents/italaw7303_0.pdf.

³⁴ See Li, S. (2018). Convergence of WTO dispute settlement and investor-state arbitration: Closer look at umbrella clauses. *Chicago Journal of International Law*, 19(1), 189-232. Last accessed on 27 November 2020 from: <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1740&context=cjil>.

³⁵ See, generally, UNCTAD (2012). Fair and Equitable Treatment. *UNCTAD Series on Issues in International Investment Agreements II*. Last accessed on 27 November 2020 from: https://unctad.org/en/Docs/unctadddiaeia2011d5_en.pdf.

³⁶ See, generally, OECD (2004). ‘Indirect Expropriation’ and the ‘Right to Regulate’ in international investment law. *OECD Working Papers on International Investment*, 2004(04). Last accessed on 27 November 2020 from: <http://dx.doi.org/10.1787/780155872321>; Nikièma, S. H. (2012). Best Practices Indirect Expropriation. *IISD Best Practice Series*. Last accessed on 27 November 2020 from: https://www.iisd.org/pdf/2012/best_practice_indirect_expropriation.pdf.

³⁷ See Weiler, T. (2013). *The Interpretation of International Investment Law*. Leiden, The Netherlands: Brill | Nijhoff. DOI: <https://doi.org/10.1163/9789004232235>.

³⁸ Attorney-General’s Department, “Tobacco Plain Packaging—Investor-State Arbitration”, available at <https://www.ag.gov.au/Internationalrelations/InternationalLaw/Pages/Tobacoplainpackaging.aspx>.

³⁹ UNCTAD, *Philip Morris Asia Limited v. The Commonwealth of Australia*. Last accessed on 27 November 2020 from: <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/421/philip-morris-v-australia>.

⁴⁰ WTO, *Australia - Tobacco Plain Packaging (Ukraine)*(DS434), *Australia - Tobacco Plain Packaging (Honduras)*(DS435), *Australia - Tobacco Plain Packaging (Dominican Republic)*(DS441), *Australia - Tobacco Plain Packaging (Cuba)*(DS458), *Australia - Tobacco Plain Packaging (Indonesia)*(DS467), last accessed on 27 November 2020 from: https://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm.

different adjudicatory bodies. Especially, the broad coverage and flexible interpretation of FET and IE clauses in IIAs increase the possibility of “dispute roving” and *de facto* parallel proceedings.

In recent years, some states have revised FET and IE clauses in IIAs. For instance, unlike many IIAs that include an open-ended FET clause, the Comprehensive Economic and Trade Agreement between Canada and the European Union (“CETA”) incorporates a closed-list FET clause, which identifies five specific situations as FET violations.⁴¹ Likewise, exceptions of IE clauses have been incorporated in some IIAs, so that state regulatory measures for public interest purposes will not be deemed as an act of indirect expropriation, except in rare circumstances.⁴² While the primary purpose of such revisions is to help preserve state regulatory power, they could also help limit the possibility of using FET and IE clauses for creating “dispute roving” or *de facto* parallel proceedings, though such possibility cannot be completely eliminated. However, as mentioned earlier, because IIAs are decentralized, it would be unrealistic to make systematic revisions of FET and IE clauses in IIAs. Consequently, it remains possible for investors to select IIAs with broad FET and IE clauses, typically through nationality planning or MFN clauses, for creating “dispute roving” or *de facto* parallel proceedings.

V. PROPOSED TREATY INTERFACE CLAUSES IN AN IFF4D

As mentioned, a number of provisions in IIAs could link an IFF4D with IIAs. While MFN and umbrella clauses could create obligation importation from an IFF4D to IIAs, FET and IE clauses could create “dispute roving” and *de facto* parallel proceedings. While these situations are not necessarily illegal, they could bring about profound uncertainty to states. This implies that construction of a proper IFF4D-IIA relationship should aim at both disallowing obligation importation and insulating IFF4D claims from ISDS. Ideally, these issues could and should be addressed by both IIAs and an IFF4D concurrently. Yet, as a systematic revision of IIAs seems impossible due to their decentralization, it seems only feasible for an IFF4D to address these issues.

It is necessary for WTO members to consider incorporating proper treaty interface clauses in an IFF4D for disallowing obligation importation and insulating IFF4D claims from ISDS.⁴³ Drawing reference from existing trade and investment treaties, several types of treaty interface clauses are proposed below.

Alternative A: As subject-matter overlaps between an IFF4D and IIAs are the ground reason that gives rise to interrelation between these two types of instruments, it seems natural for states to incorporate a “**coverage clause**” in the IFF4D, which could reaffirm the subject matter coverage of the IFF4D and separate the IFF4D from IIAs. Such a clause could be in the form of a positive statement, a negative statement or a combination of both.

A positive statement could read that,

For greater certainty, members confirm that this Agreement shall only apply to issues relating to investment facilitation.

A negative statement could read that,

For greater certainty, members confirm that this Agreement shall not apply to any issues relating to or arising out of market access, protection of investors or investments, and investor-state dispute settlement.

⁴¹ Article 8.10, CETA (Comprehensive Economic and Trade Agreement).

⁴² See, e.g., Article 4 (b), Annex B, 2012 U.S. Model BIT.

⁴³ See Bermann, G., Calamita, N. J., Chi, M., & Sauvant, K. P. (2020). Insulating a WTO Investment Facilitation Framework from ISDS. *Columbia FDI Perspectives No.286*. Last accessed on 27 November 2020 from: <http://ccsi.columbia.edu/files/2018/10/No-286-Bermann-Calamita-Chi-and-Sauvant-FINAL.pdf>.

A combination could be made of both positive and negative statements,

For greater certainty, members confirm that this Agreement only applies to investment facilitation; it shall not apply to any issues relating to or arising out of market access, protection of investors or investments, and investor-state dispute settlement.

Alternative B: States could consider inserting an “**MFN restriction clause**” in an IFF4D, which could limit the function of an MFN clause from importing an IIA obligation to the IFF4D system. In this respect, the recent *European Union-Vietnam Investment Protection Agreement* (“EU-Vietnam IIA”) offers an example:

Article 2.4: Most-Favoured Nation Treatment

5. For greater certainty, the term "treatment" referred to in paragraph 1 does not include dispute resolution procedures or mechanisms, such as those included in Section B (Resolution of Disputes between Investors and Parties) of Chapter 3 (Dispute Resolution), provided for in any other bilateral, regional or international agreements. Substantive obligations in such agreements do not in themselves constitute "treatment" and thus cannot be taken into account when assessing a breach of this Article. Measures by a Party pursuant to those substantive obligations shall be considered "treatment".⁴⁴

The above MFN clause denies that substantive obligations in other treaties constitute “treatment” in the EU-Vietnam IIA. Such a denial has at least two implications. First, as mentioned, as an MFN clause is typically used to import “treatment”, this denial impliedly disables the importation role of the MFN clause in the IIA. Second, the term “substantive obligations” impliedly excludes procedural obligations from the application scope of the MFN clause, especially obligations of ISDS. This seems to be a reasonable and timely response to the inconsistent ISDS jurisprudence on whether an MFN clause can be used to import procedural obligations.⁴⁵ If a similar “MFN restriction clause” is incorporated in an IFF4D, such a clause could help prevent IIA obligations from being imported to the IFF4D system.

Such an “MFN restriction clause” has limits. As investment facilitation obligations in an IFF4D are likely to be IIA-plus, it does not make a good sense to import IFF4D-minus obligations in an IIA to the IFF4D system. Rather, importation of IIA-plus obligations in the IFF4D to an IIA system should be restricted, but the “MFN restriction clause” seems unhelpful in this regard. To address this concern, a second sentence could be inserted in the “MFN restriction clause” in the IFF4D, which should essentially state that,

For greater certainty, substantive obligations in this Agreement do not constitute “treatment” in any other bilateral, regional or international agreements.

This sentence demonstrates the intention of states of restricting IFF4D obligations from being imported to an IIA system.

Alternative C: States should also consider inserting an “**insulation clause**” in an IFF4D, which reaffirms that IFF4D rights and obligations and those in other treaties, including IIAs, should not affect each other, particularly when the relevant treaty clauses are in conflict. An example of such a clause can be found in the 2012 U.S. Model BIT, on the issue of taxation, which reads,

⁴⁴ Article 2.4.5, EU-Vietnam IPA.

⁴⁵ See, e.g., Douglas, Z. (2011). The MFN clause in investment arbitration: Treaty interpretation off the rails. *Journal of International Dispute Settlement*, 2(1), 97-113.

Article 21: Taxation

4. Nothing in this Agreement shall affect the rights and obligations of either member under a tax convention. In the event of any inconsistency between this Agreement and any such tax convention, the tax convention shall prevail to the extent of the inconsistency.

The above “insulation clause” not only separates the BIT from the tax treaty, but also addresses potential conflicts between the BIT and the tax treaty by prioritizing the latter. If a similar “insulation clause” is incorporated in an IFF4D, it could be in one of the following three forms:

Members of the Agreement confirm that nothing in this Agreement shall affect the rights and obligations of any bilateral, regional and international investment agreements.

or

Members of this Agreement confirm that this Agreement does not create any new obligations or modify any existing obligations relating to treatment or protection of investors and investments in any bilateral, regional and international investment agreements.

or

Members of this Agreement confirm that both themselves and the covered investors of their bilateral, regional and international investment agreements shall not refer to or rely on this Agreement for any purpose.

Such a clause could help an IFF4D to be insulated from IIAs, despite their subject-matter overlaps. Especially, it could help prevent IIA-plus obligations in the IFF4D from being imported to an IIA system through the MFN and umbrella clauses in the IIA, because importation of IFF4D obligations could be deemed as “creating new obligations” or “modifying existing obligations” in the IIA.

Alternative D: From the enforcement or dispute settlement perspective, states could also consider inserting a “**dispute roving prevention clause**” in an IFF4D, e.g. to prevent alleged IIA violations from being treated as IFF4D violations. An example of such a clause could be found in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (“CPTPP”), which provides that,

Article 9.6: Minimum Standard of Treatment

3. A determination that there has been a breach of another provision of this Agreement, or a separate international agreement, does not establish that there has been a breach of this Article.⁴⁶

By denying that a breach of a different treaty constitutes a breach of the minimum standard of treatment (“MST”) clause of the CPTPP, this clause insulates claims based on other treaties from MST claims under the CPTPP. While this clause is confined to MST, it could be used in a broader setting. If a similar clause is incorporated in an IFF4D, it could insulate IIA claims from being treated as IFF4D claims, thus preventing potential “dispute roving” from ISDS to the WTO. Such a clause, however, could not insulate IFF4D claims, which are likely to be related to IIA-plus obligations, from ISDS. To help address this issue, it is helpful to insert a second sentence to this clause, which should essentially state that,

⁴⁶ Article 9.6.3, CPTPP (Comprehensive and Progressive Agreement for Trans-Pacific Partnership Implementation Act).

A determination that there has been a breach of any provision of this Agreement does not establish that there has been a breach of any separate international agreement.

Such a sentence clearly shows the intention of states of denying IFF4D claims to be treated as IIA claims, thus potentially preventing “dispute roving” from the WTO to ISDS. Similarly, as this is an IFF4D clause, it is not necessarily binding on ISDS tribunals.

Alternative E: Treaty interpretation could play a crucial role in ascertaining a state’s obligation in international dispute settlement. It is necessary to include a “**treaty interpretation restriction clause**” to help prevent IFF4D obligations from being imported to an IIA system through treaty interpretation. The Vienna Convention on the Law of Treaties (“VCLT”) provides the general framework for treaty interpretation. According to the VCLT, adjudicators may consider, among other things, “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” and “any relevant rules of international law applicable in the relations between the parties”.⁴⁷ As a matter of fact, in both ISDS and WTO dispute settlement practices, adjudicators often refer to “other treaties” for treaty interpretation purposes.

Using an IFF4D clause to interpret an IIA clause *per se* does not import an IFF4D obligation into the IIA system, but because it allows IFF4D clauses to be considered in ascertaining and enforcing a state’s IIA obligation, it potentially connects the IFF4D with IIAs. It could particularly be the case as ISDS tribunals sometimes adopt a flexible approach in treaty interpretation, especially with regard to FET and IE clauses. In light of this, it is advisable for states to consider restricting an IFF4D to be used as a treaty interpretative tool in ISDS. Towards this end, states may consider inserting a clause as the following:

This Agreement shall not be treated as a subsequent agreement and any provisions of this Agreement shall not be treated as relevant rules of international law in the meaning of Vienna Convention on the Law of Treaties in the interpretation of any provisions of investment treatment and protection in a bilateral, regional or international investment agreement.

To sum up, while these proposed treaty interface clauses vary in wordings and coverages, all of them share a clear aim of insulating an IFF4D from IIAs, through limiting importation of IFF4D obligations to the IIA system, reducing the possibility of “dispute roving”, and restricting flexibility of treaty interpretation in ISDS. Such insulation is particularly necessary since an IFF4D is likely to contain IIA-plus obligations. However, because these proposed treaty interface clauses are IFF4D clauses, they are only binding on WTO members in the strict sense. This situation could limit the effectiveness of these clauses. On the one hand, as these IFF4D clauses do not necessarily bind ISDS tribunals, whether and to what extent ISDS tribunals would follow these clauses remains to be observed. On the other hand, if a contracting state of an IIA is not a WTO member, it is not bound by the IFF4D. In such a case, it is uncertain whether these clauses could still play a helpful role in insulating an IFF4D from IIAs. In light of this, it seems reasonable to say that while the proposed clauses could be helpful in insulating an IFF4D from IIAs and ISDS, such insulation is incomplete. Complete insulation also calls for proper treaty interface clauses in IIAs and necessary restriction on the adjudicative power of ISDS tribunals, neither of which could be easily achieved.

VI. A PRO-SUSTAINABLE DEVELOPMENT IFF4D AND ITS RELATIONSHIP WITH IIAS

As mentioned earlier, an IFF4D is not just about facilitating investment; it is also expected to promote sustainable development in all states. Given that states make investment facilitation commitments in IIAs that could overlap those made in an IFF4D, and that such commitments may be inconsistent, construction

⁴⁷ Article 31.3 (a) and (c), VCLT (Vienna Convention on the Law of Treaties).

of a proper IFF4D-IIA relationship could not only help create more predictability as to how investment facilitation is regulated in the two different legal frameworks, but it could also help create more certainty to the WTO and IIA legal systems through insulating IFF4D obligations from IIAs and ISDS. Enhanced legal predictability and certainty could help enhance the contribution of foreign investment to the sustainable development.

To achieve this goal, incorporating sustainable development-related provisions in an IFF4D could be helpful. Several investment facilitation elements in existing IIAs are related to sustainable development. For instance, it is generally agreed that transparency and international cooperation provisions in both an IFF4D and IIAs embody investment facilitation elements, and they could also be viewed as sustainable development provisions in international economic treaties. Also, some concrete investment facilitation measures with a focus on sustainable development have been proposed by international experts.⁴⁸ It is advisable that states take into account these suggested measures and elements in making an IFF4D.

Most sustainable development-related provisions in international economic treaties concern states' exercise of regulatory power for public interest purposes. In reality, such provisions often fail to play a sufficiently helpful role in promoting sustainable development. Many of these provisions have weak normativity and are often deemed as balancing rules instead of legal norms.⁴⁹ Besides, neither WTO dispute settlement nor ISDS has been proved to be adequately supportive to state's regulatory efforts in promoting sustainable development. For instance, ISDS is frequently blamed for causing "chilling effect" to states, which hinders states in taking regulatory measures for public interest purpose.⁵⁰ Likewise, WTO jurisprudence on GATT Article XX (General Exceptions) also seems to suggest that the WTO impliedly favours free trade over public interests.⁵¹ In light of this, to make a pro-sustainable development IFF4D, it is necessary to ensure that the IFF4D will not unduly limit states' regulatory power. This especially requires that an IFF4D should be insulated from IIAs and ISDS, so that IFF4D claims will not be treated as FET and IE claims in ISDS. In this regard, construction of a proper IFF4D-IIA relationship is crucial for states.

VII. SUMMARY AND RECOMMENDATIONS

Considering that an IFF4D and IIAs may share substantial subject-matter overlaps, and that a number of IIA clauses can be used to "bridge" an IFF4D with IIAs, such as MFN, umbrella, FET and IE clauses, constructing a proper IFF4D-IIA relationship is important and necessary. Because an IFF4D is expected by states to exclude investment protection, market access and ISDS, the key to a proper IFF4D-IIA relationship lies in insulating the IFF4D from IIAs and ISDS. To achieve this, proper treaty interface clauses should be designed and included in an IFF4D and IIAs, so that the two types of legal instruments could be separated from each other. Considering that systematic revision of IIAs is almost impossible due to the decentralization of IIAs, such treaty interface clauses should be incorporated in an IFF4D.

Towards this end, several model clauses are proposed, each with a different function and scope of application. These clauses are neither exhaustive nor mutually exclusive. Though they are unlikely to create complete insulation between an IFF4D and IIAs, they could help create more predictability and certainty for the regulation of investment facilitation at the global level.

Aside from the proposed model treaty interface clauses, the article also proposes a number of policy recommendations to facilitate negotiations relating to such treaty interface clauses.

⁴⁸ See Sauvant, K. P. & Stephenson, M. (2020). *Concrete Measures for a Framework on Investment Facilitation for Development: Report*. *Columbia FDI Perspectives*, No. 116, 3-8. Last accessed on 27 November 2020 from: <http://ccsi.columbia.edu/2020/03/05/concrete-measures-for-a-framework-on-investment-facilitation-for-development-report/>.

⁴⁹ See Chi, M. (2017). *Integrating Sustainable Development in International Investment Law: Normative Incompatibility, System Integration and Governance Implications*. *London and New York: Routledge*, 163.

⁵⁰ See, e.g., Tienhaara, K. (2011). *Regulatory Chill and the Threat of Arbitration: A View from Political Science*. In Chester Brown & Miles, K. (Eds.), *Evolution in Investment Treaty Law and Arbitration* (pp. 606-628). Cambridge: Cambridge University Press

⁵¹ See, e.g., Chi, M. (2014). *Exhaustible Natural Resource in WTO Law: GATT Article XX (g) Disputes and Their Implications*. *Journal of World Trade*, 48(5), 939-996; Pauwelyn, J. (2011). *The Dog that Barked but Didn't Bite: 15 Years of Intellectual Property Disputes at the WTO*. *Journal of International Dispute Settlement*, 1(2), 389-429.

First, states are encouraged to carry out a comprehensive and thorough survey of their existing IIAs. Such a survey should cover the existing investment facilitation commitments they have undertaken in IIAs, and the FET and IE clauses in their IIAs. This could help states formulate their overall and subject-matter-specific positions in IFF4D negotiations and assess the potential disputes relating to investment facilitation obligations.

Second, as treaty interface clauses in an IFF4D bind all WTO members, states are encouraged to carefully examine the proposed treaty interface clauses to assess which one(s) would best meet their needs, including the need for promoting sustainable development, with due account paid to the existing investment facilitation provisions in their IIAs and their ISDS experiences.

Third, treaty interface clauses in an IFF4D only bind WTO members, but not non-WTO members, private investors and ISDS tribunals. Thus, it is necessary for states to keep in mind that revising relevant IIA clauses (such as MFN, umbrella, FET and IE clauses) and restricting the power of ISDS tribunals (such as the power of interpreting FET clauses) should remain a policy option for constructing a proper IFF4D-IIA relationship where possible.

REFERENCES

- Alford, R. P. (2013). The convergence of international trade and investment arbitration. *Santa Clara Journal of International Law*, 12(1), 35-64. Last accessed on 27 November 2020 from: <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1148&context=scujil>.
- Australia-Hong Kong BIT (Bilateral Investment Treaty), March 26 2019, last accessed on 27 November 2020 from: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5830/download>.
- Batifort, S., & Heath, J. B. (2017). The new debate on the interpretation of MFN clauses in investment treaties: Putting the brakes on multilateralization. *American Journal of International Law*, 111(4), 873-913.
- Berger, A., Sebastian, G., & Olekseyuk, Z. (2019). Investment facilitation for development: a new route to global investment governance. *DIE briefing Paper No. 5/2019*.
- Bermann, G., Calamita, N. J., Chi, M., & Sauvart, K. P. (2020). Insulating a WTO Investment Facilitation Framework from ISDS. *Columbia FDI Perspectives No.286*. Last accessed on 27 November 2020 from: <http://ccsi.columbia.edu/files/2018/10/No-286-Bermann-Calamita-Chi-and-Sauvant-FINAL.pdf>.
- Chi, M. (2014). Exhaustible Natural Resource in WTO Law: GATT Article XX (g) Disputes and Their Implications. *Journal of World Trade*, 48(5), 939-996.
- Chi, M. (2017). Integrating Sustainable Development in International Investment Law: Normative Incompatibility, System Integration and Governance Implications. *London and New York: Routledge*, 163.
- Douglas, Z. (2011). The MFN clause in investment arbitration: Treaty interpretation off the rails. *Journal of International Dispute Settlement*, 2(1), 97-113.
- EU-Vietnam IPA (Investment Protection Agreement), June 30, 2019, last accessed on 27 November 2020 from: https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157393.pdf.
- ITC (International Trade Centre) & DIE (German Development Institute/ Deutsches Institut für Entwicklungspolitik). (2020). *An Inventory of Concrete Measures to Facilitate the Flow of Sustainable FDI: What? Why? How?*. Last accessed on 27 November 2020 from: <https://www.intracen.org/itc/Investment-Facilitation-for-Development/>.
- Li, S. (2018). Convergence of WTO dispute settlement and investor-state arbitration: Closer look at umbrella clauses. *Chicago Journal of International Law*, 19(1), 189-232. Last accessed on 27 November 2020 from: <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1740&context=cjil>.
- Martins, J. H. V. (2017). *Brazil's Cooperation and Facilitation Investment Agreements (CFIA) and Recent Developments*. International Institute for Sustainable Development (IISD). Last accessed on 27 November 2020 from: <https://www.iisd.org/itn/2017/06/12/brazils-cooperation-facilitation-investment-agreements-cfia-recent-developments-jose-henrique-vieira-martins/>.
- Moreira, N. C. (2018). Cooperation and facilitation investment agreements in Brazil: The path for host state development. *Kluwer Arbitration Blog*. Last accessed on 27 November 2020 from: http://arbitrationblog.kluwerarbitration.com/2018/09/13/cooperation-and-facilitation-investment-agreements-in-brazil-the-path-for-host-state-development/?print=pdf&doing_wp_cron=1586831929.0269958972930908203125.
- Nikiéma, S. H. (2012). Best Practices Indirect Expropriation. *IISD Best Practice Series*. Last accessed on 27 November 2020 from: https://www.iisd.org/pdf/2012/best_practice_indirect_expropriation.pdf.

Nikièma, S. H. (2017). The most-favoured-nation clause in investment treaties. *IISD Best Practice Series*. Last accessed on 27 November 2020 from: <https://www.iisd.org/sites/default/files/publications/mfn-most-favoured-nation-clause-best-practices-en.pdf>.

OECD (Organisation for Economic Co-operation and Development). (2004). 'Indirect Expropriation' and the 'Right to Regulate' in international investment law. *OECD Working Papers on International Investment*, 2004(04). Last accessed on 27 November 2020 from: <http://dx.doi.org/10.1787/780155872321>.

OECD (2004). Most-favoured-nation treatment in international investment law. *OECD Working Papers on International Investment*, 2004(02), 5-8. Last accessed on 27 November 2020 from: www.oecd.org/daf/inv/investment-policy/WP-2004_2.pdf.

Pauwelyn, J. (2011). The Dog that Barked but Didn't Bite: 15 Years of Intellectual Property Disputes at the WTO. *Journal of International Dispute Settlement*, 1(2), 389-429.

Philip Morris Asia Limited v. The Commonwealth of Australia. (21 November 2011), *Notice of Arbitration*. PCA Case No. 2012-12, para 7.15-7.17. Last accessed on 27 November 2020 from: <https://www.italaw.com/sites/default/files/case-documents/ita0665.pdf>.

Polanco, R. J. (2018). Facilitation 2.0: Investment and trade in the digital age. *The RTA Exchange*, 1-24. Last accessed on 27 November 2020 from: <https://www.ictsd.org/themes/global-economic-governance/research/facilitation-20-investment-and-trade-in-the-digital-age>.

Polanco, R. J. (12 October 2018). Towards a Multilateral Investment Facilitation Framework: Elements in International Investment Agreements. *The RTA Exchange*. Last accessed on 27 of November 2020 from: <http://www.ictsd.org/opinion/towards-a-multilateral-investment-facilitation-framework-elements-in-international>.

Sauvant, K. P. & Stephenson, M. (2020). *Concrete Measures for a Framework on Investment Facilitation for Development: Report*. *Columbia FDI Perspectives*, No. 116, 3-8. Last accessed from 27 November 2020: <http://ccsi.columbia.edu/2020/03/05/concrete-measures-for-a-framework-on-investment-facilitation-for-development-report/>.

Schreuer, C. (2004). Travelling the BIT route: of waiting periods, umbrella clauses and forks in the road. *The Journal of World Investment & Trade* 5 (2), 231-256.

Singh, K. (2018). Investment facilitation: Another fad in the offing?. *Columbia FDI Perspectives* (No. 232). Last accessed on 27 November 2020 from: <http://ccsi.columbia.edu/files/2016/10/No-232-Singh-FINAL.pdf>.

Talkmore, C. (19 November 2018). *A WTO Multilateral Investment Facilitation Agreement: An African Perspective*. Tralac online article. Last accessed on 27 November 2020 from: <https://www.tralac.org/blog/article/13703-a-wto-multilateral-investment-facilitation-agreement-an-african-perspective.html>.

Tienhaara, K. (2011). Regulatory Chill and the Threat of Arbitration: A View from Political Science. In Chester Brown & Miles, K. (Eds.), *Evolution in Investment Treaty Law and Arbitration* (pp. 606-628). Cambridge: Cambridge University Press

UNCTAD (United Nations Conference on Trade and Development). (2004). Transparency. *UNCTAD Series on Issues in International Investment Agreements (UNCTAD/ITE/IIT/2003/4)*, 13-47. Last accessed on 27 November 2020 from: http://unctad.org/en/Docs/iteiit20034_en.pdf.

UNCTAD (2010). Most-Favoured-Nation Treatment. *UNCTAD Series on Issues in International Investment Agreements II*, 12-13. Last accessed on 27 November 2020 from: https://unctad.org/en/Docs/diaeia20101_en.pdf.

UNCTAD (2012). Fair and Equitable Treatment. *UNCTAD Series on Issues in International Investment Agreements II*. Last accessed on 27 November 2020 from: https://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf.

UNCTAD (2020). *International Investment Agreement Navigator*. UNCTAD website. Last accessed on 27 November 2020 from: <https://investmentpolicy.unctad.org/international-investment-agreements>.

United States Model BIT (Bilateral Investment Treaty), 2012, last accessed on 27 November 2020 from: <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.

Weiler, T. (2013). *The Interpretation of International Investment Law*. Leiden, The Netherlands: Brill | Nijhoff. DOI: <https://doi.org/10.1163/9789004232235>.

WTO (World Trade Organization). (2012). *Australia – Certain measures concerning trademarks and other plain packaging requirements applicable to tobacco products and packaging* (DS434, DS435, DS441, 458, 467). Last accessed on 27 November 2020 from: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds434_e.htm

WTO (2017). *Joint Ministerial Statement on Investment Facilitation for Development*. WTO document WT/MIN (17)/59; WT/L/1072.

WTO (2017). Proposal for a WTO Informal Dialogue on Investment Facilitation for Development. *Joint Communication from the Friends of Investment Facilitation for Development*. WTO document JOB/GC/122.

WTO (2018). *Investment Facilitation: Relationship between Trade and Investment*. WTO website. Last accessed on 27 November 2020 from: https://www.wto.org/english/thewto_e/minist_e/mc11_e/briefing_notes_e/bfinvestfac_e.htm.

WTO (2018). Structured discussions on investment facilitation. *Communication from Brazil*. WTO document JOB/GC/169.

WTO (2020). *Dispute Settlement*. WTO website. Last accessed on 27 November 2020 from: https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.

WTO (2020 September 25). *Structured discussions on investment facilitation for development move into negotiating mode*. Press Release, Geneva: World Trade Organization. Last accessed on 27 November 2020 from: https://www.wto.org/english/news_e/news20_e/infac_25sep20_e.htm.

Yannaca-Small, K. (2006). Interpretation of the umbrella clause in investment agreements. *OECD Working Papers on International Investment*, 2006 (03), 15-21. Last accessed on 27 of November 2020 from: https://www.oecd.org/daf/inv/investment-policy/WP-2006_3.pdf.