

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

Research Report

Insulating a WTO Investment Facilitation Framework from ISDS

Columbia FDI Perspectives, No. 286

Provided in Cooperation with:

Columbia Center on Sustainable Investment (CCSI) - A joint center of Columbia Law School and the Earth Institute, Columbia University

Suggested Citation: Bermann, George A.; Jansen Calamita, N.; Chi, Manjiao; Sauvant, Karl P. (2020) : Insulating a WTO Investment Facilitation Framework from ISDS, Columbia FDI Perspectives, No. 286, Columbia University, Columbia Center on Sustainable Investment (CCSI), New York, NY

This Version is available at:

<https://hdl.handle.net/10419/254120>

Standard-Nutzungsbedingungen:

Die Dokumente auf EconStor dürfen zu eigenen wissenschaftlichen Zwecken und zum Privatgebrauch gespeichert und kopiert werden.

Sie dürfen die Dokumente nicht für öffentliche oder kommerzielle Zwecke vervielfältigen, öffentlich ausstellen, öffentlich zugänglich machen, vertreiben oder anderweitig nutzen.

Sofern die Verfasser die Dokumente unter Open-Content-Lizenzen (insbesondere CC-Lizenzen) zur Verfügung gestellt haben sollten, gelten abweichend von diesen Nutzungsbedingungen die in der dort genannten Lizenz gewährten Nutzungsrechte.

Terms of use:

Documents in EconStor may be saved and copied for your personal and scholarly purposes.

You are not to copy documents for public or commercial purposes, to exhibit the documents publicly, to make them publicly available on the internet, or to distribute or otherwise use the documents in public.

If the documents have been made available under an Open Content Licence (especially Creative Commons Licences), you may exercise further usage rights as specified in the indicated licence.



Columbia Center
on Sustainable Investment

A JOINT CENTER OF COLUMBIA LAW SCHOOL
AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

Columbia FDI Perspectives

Perspectives on topical foreign direct investment issues

No. 286 September 7, 2020

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

Managing Editor: Riccardo Loschi (Riccardo.Loschi@columbia.edu)

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.

* **The *Columbia FDI Perspectives* are a forum for public debate. The views expressed by the author(s) do not reflect the opinions of CCSI or Columbia University or our partners and supporters. *Columbia FDI Perspectives* (ISSN 2158-3579) is a peer-reviewed series.**

** George A. Bermann (gbermann@law.columbia.edu) is Professor of Law and Director, Center for International Commercial and Investment Arbitration, Columbia Law School; 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; Manjiao Chi (chimanjiao@uibe.edu.cn) is Professor and Founding Director of the Center for International Economic Law and Policy/CIEPL, Law School, University of International Business and Economics/UIBE; Karl P. Sauvant (karlsauvant@gmail.com) is Resident Senior Fellow, Columbia Center on Sustainable Investment, a joint center of Columbia Law School and the Earth Institute, Columbia University. This *Perspective* benefitted from discussions in the ITC/DIE Expert Network on a Multilateral Framework on Investment Facilitation for Development. The authors are grateful to Evan Gabor for his research assistance and to Makane Moïse Mbengue, Stefan Schill and Christoph Schreuer for their helpful peer reviews.

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.

The material in this Perspective may be reprinted if accompanied by the following acknowledgment: "George A. Bermann, N. Jansen Calamita, Manjiao Chi, and Karl P. Sauvant, 'Insulating a WTO Investment Facilitation Framework from ISDS,' Columbia FDI Perspectives, No. 286, September 7, 2020. Reprinted with permission from the Columbia Center on Sustainable Investment (www.ccsi.columbia.edu)." A copy should kindly be sent to the Columbia Center on Sustainable Investment at ccsi@law.columbia.edu.

For further information, including information regarding submission to the *Perspectives*, please contact: Columbia Center on Sustainable Investment, Riccardo Loschi, riccardo.loschi@columbia.edu.

The Columbia Center on Sustainable Investment (CCSI), a joint center of Columbia Law School and the Earth Institute at Columbia University, is a leading applied research center and forum dedicated to the study, practice and discussion of sustainable international investment. Our mission is to develop and disseminate practical approaches and solutions, as well as to analyze topical policy-oriented issues, in order to maximize the impact of international investment for sustainable development. The Center undertakes its mission through interdisciplinary research, advisory projects, multi-stakeholder dialogue, educational programs, and the development of resources and tools. For more information, visit us at <http://www.ccsi.columbia.edu>.

Most recent *Columbia FDI Perspectives*

- No. 285, Sarah Atkinson and Jessica Hanson, 'Corporate inversions and FDI in the United States,' August 24, 2020
- No. 284, Jens Velten, 'FDI screening regulation and the recent EU guidance: What options do member states have?,' August 10, 2020
- No. 283, Hetal Doshi and Sankalp Udgate, 'India's blueprint for tackling opportunistic acquisitions during COVID-19, with Chinese firms in mind,' July 27, 2020
- No. 282, Anna de Luca and Angelica Bonfanti, 'Investment and human rights: Is there an elephant in the room?,' July 13, 2020
- No. 281, Giorgio Sacerdoti, 'Is USMCA really "the new gold standard" of investment protection?,' June 29, 2020

All previous *FDI Perspectives* are available at <http://ccsi.columbia.edu/publications/columbia-fdi-perspectives/>.