Potential Risks and Opportunities: The Investment Treaty-IFDA Nexus

Professor N. Jansen Calamita
Head, Investment Law & Policy, Centre for International Law
Research Associate Professor, Faculty of Law
National University of Singapore
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.