4

Investment Facilitation and Dispute Settlement

A Structural Analysis

MANJIAO CHI

4.1 Introduction

Investment facilitation touches upon various branches of international law and national law. Notably, in international investment law, investment facilitation provisions or elements are incorporated in a large number of international investment agreements (IIAs), especially bilateral investment treaties (BITs), either as a stand-alone clause or otherwise.[1] In international trade law, with the law of the World Trade Organization (WTO) at the center, the negotiations of an Investment Facilitation for Development (IFD) Agreement under the WTO umbrella have been officially kicked off on September 25, 2020, after several years of structural discussions among a growing number of WTO members.[2] Text-based negotiations have been concluded in July 2023. In addition, investment facilitation measures are also frequently adopted by states at the national level, especially developing states.[3]

Because investment facilitation measures have their root in international trade law and investment law and national law, disputes concerning these measures could be settled through methods in these

[1] See R. Polanco, 'Facilitation 2.0: Investment and Trade in the Digital Age', *The RTA Exchange* (Geneva: International Centre for Trade and Sustainable Development (ICTSD) and Inter-American Development Bank (IDB), 2018), online at: https://boris.unibe.ch/140851/1/rta_exchange_-_facilitation_2.0_investment_-_polanco.pdf (last accessed 13 June 2023).

[2] See, WTO, 'Structured Discussions on Investment Facilitation for Development Move into Negotiating Mode', 25 September 2020, online at: www.wto.org/english/news_e/news20_e/infac_25sep20_e.htm (last accessed 13 June 2023).

[3] See, generally, A. Berger and Z. Olekseyuk, 'Investment Facilitation for Sustainable Development: Index Maps Adoption at Domestic Level', German Institute of Development and Sustainability (IDOS), 8 October 2019, online at: https://blogs.die-gdi.de/longform/investment-facilitation-for-sustainable-development/ (last accessed 13 June 2023).

different legal regimes. Notably, such disputes could be submitted to investor–state dispute settlement (ISDS) or WTO dispute settlement, or both, by different types of disputants and relying on different treaties or laws.[4] This makes settlement of investment facilitation disputes a complicated issue.

Against this backdrop, this chapter aims to present a structural review of the issue of settlement of investment facilitation disputes. It is structured as follows: After this introduction, Section 4.2 discusses investment facilitation and dispute prevention; Sections 4.3 and 4.4 deal with settlement of investment facilitation disputes through ISDS and WTO dispute settlement, respectively; Section 4.5 explores the issue of parallel jurisdiction over investment facilitation disputes; and Section 4.6 concludes.

4.2 Investment Facilitation and Dispute Prevention

To a large extent, preventing disputes from arising between investors and the host states in itself is an important aspect of investment facilitation as well as investor retention. The rationale is self-evident: Investments are best facilitated if they are free from potential disputes with their host states. As suggested by the United Nations Conference on Trade and Development (UNCTAD), a major aim of investment facilitation is dispute prevention and mitigation at the ground level.[5] Thus, it is of interest to briefly discuss dispute prevention from the perspective of national laws, IIAs, and the IFD Agreement.

From the perspective of national laws, many states have established mechanisms or institutions at the national or regional levels that could serve the purpose of dispute prevention. These mechanisms or institutions may take different forms, and a typical form is the investment dispute prevention and management agency set up in some Latin American and Asian states.[6] For the purpose of this chapter, an example should be sufficient.

[4] See R. P. Alford, 'The Convergence of International Trade and Investment Arbitration' (2023) 12 *Santa Clara Journal of International Law* 35–63.

[5] See UNCTAD, 'Global Action Menu for Investment Facilitation', September 2016, at 4, online at: https://investmentpolicy.unctad.org/uploaded-files/document/Actionpercent20Menupercent2001–12-2016percent20ENpercent20lightpercent20version.pdf (last accessed 13 June 2023).

[6] See generally, J. Bonnitcha and Z. Phillips Williams, 'Investment Dispute Prevention and Management Agencies: Toward a More Informed Policy Discussion', The International Institute for Sustainable Development (IISD), January 2022, online at: www.iisd.org/system/files/2021-10/investment-dispute-prevention-management-agencies-policy-discussion.pdf (last accessed 13 June 2023).

Take China for example, the 2019 Foreign Investment Law of the People's Republic of China established the first national foreign investment complaint mechanism (FICM), which covers all situations where a foreign investor "views that the administrative act of an administrative authority or the staff has infringed upon its lawful rights or interests".[7] The functioning of the FICM is supported by a number of other national regulations and ministerial rules.[8] As suggested, because (governance) issues frequently raised by investors through the FICM may be brought to the attention of upper-level authorities and will likely be solved effectively through the internal reporting system within the government,[9] the FICM could play a helpful role in dispute prevention in addition to being an investment facilitation mechanism.[10] China's FICM is nothing exceptional; many other states have put in place similar mechanisms and institutions with a function of investment prevention and management.[11]

Dispute prevention is a major aspect envisaged by participating WTO members in the negotiations of the IFD Agreement. An informal informal consolidated text of an IFD Agreement ("Easter Text")[12] contains several proposed provisions closely relevant to dispute prevention. One provision, entitled "contact/focal point/ombudsperson types of mechanisms", requires that participating WTO members should establish a certain type of contacting institution or mechanism. This provision is expected to serve a purpose of assisting investors in resolving investment-related difficulties or grievances.[13] Another proposed provision, entitled "investment facilitator", requires participating WTO members to establish or designate a private or public entity as investment facilitator, whose

[7] Foreign Investment Law of the People's Republic of China, Art. 26.

[8] See, M. Chi and Z. Li, 'China's Foreign Investment Complaint Mechanism: A New Beginning of Foreign Investment Governance Reform?', Columbia FDI Perspectives (No. 308), 28 June 2021, online at: https://ccsi.columbia.edu/content/columbia-fdi-perspectives (last accessed 13 June 2023).

[9] Foreign Investment Law of the People's Republic of China, Art. 26.

[10] See Z. Yun, 'China's New Foreign Investment Law: Deeper Reform and More Trust Are Needed', Columbia FDI Perspectives (No. 264), 4 November 2019, online at: https://ccsi.columbia.edu/content/columbia-fdi-perspectives (last accessed 13 June 2023).

[11] See, generally, Bonnitcha and Williams, 'Investment Dispute Prevention and Management Agencies', at 16–31.

[12] WTO, 'WTO Structured Discussion on Investment Facilitation for Development' ("IFD Agreement"), INF/IFD/RD/74/Rev.1, 23 July 2021, online at: www.bilaterals.org/IMG/pdf/wto_plurilateral_investment_facilitation_draft_consolidated_revised_easter_text-2.pdf (last accessed 13 June 2023).

[13] IFD Agreement, Option I, Art. 18.

tasks include, among other things, seeking to resolve the problems of investors.[14] It seems clear that both clauses are designed with a purpose of solving potential problems of investors vis-à-vis their host governments. However, without clear mentioning, the establishment and functioning of the institution envisaged in these clauses could play a helpful role in facilitating investment through dispute prevention.

Some IIAs contain a clause with a specific purpose of dispute prevention. Under these IIAs, dispute prevention could be achieved through various ways, such as setting up information sharing mechanisms, intergovernmental agencies, negotiation facilities, and interstate cooperation mechanisms, to list some.[15] A recent example is the new IIA model of Brazil. In 2015, Brazil adopted a new IIA model, namely, the Agreement on Cooperation and Facilitation of Investment (ACFI),[16] which is deemed to represent a new paradigm of modern IIAs.[17] Up to the present, Brazil has signed over a dozen ACFIs with its trade partners.[18] Distinct features of Brazilian ACFIs include that they stress coordination between contacting states, investment facilitation, and deference to domestic legislation and do not allow ISDS, especially investor–state arbitration (ISA).[19] The Brazilian ACFIs incorporate a clause explicitly entitled "Dispute Prevention", charging the respective national focal points and the joint committee of the contracting parties to "act in coordination in order to prevent, manage and resolve any disputes between the Parties" through meetings, dialogues, consultations, negotiations, and interstate arbitration.[20] It is noteworthy that the ACFIs also

[14] IFD Agreement, Option II, Art. 18.

[15] See UNCTAD, *Investor-State Disputes: Prevention and Alternatives to Arbitration*, UNCTAD/DIAE/IA/2009/11 (New York and Geneva: United Nations, 2010), at xxvi–xxvii, online at: https://unctad.org/system/files/official-document/diaeia200911_en.pdf (last accessed 13 June 2023).

[16] Brazil Model Agreement on Cooperation and Facilitation Investment (ACFI). See chapters by M. Sanches-Ratton and M. Misra in this book.

[17] See H. Choer Moraes and F. Hees, 'Breaking the BIT Mold: Brazil's Pioneering Approach to Investment Agreements' (2018) 112 *American Journal of International Law Unbound* 197–200.

[18] A list of Brazil's ACFIs is available online at: https://investmentpolicy.unctad.org/international-investment-agreements/countries/27/brazil (last accessed 13 June 2023).

[19] J. H. Vieira Martins, 'Brazil's Cooperation and Facilitation Investment Agreements (CFIA) and Recent Developments', IISD Investment Treaty News, 12 June 2017, online at: www.iisd.org/itn/2017/06/12/brazils-cooperation-facilitation-investment-agreements-cfia-recent-developments-jose-henrique-vieira-martins/ (last accessed 13 June 2023).

[20] See Brazilian Model ACFI, Art. 23.

provide that to facilitate the search for a solution between the contracting parties, whenever possible, representatives of the affected investors and nongovernmental entities shall participate in the bilateral meetings.[21] Up to the present, there has been no publicly reported case relating to the implementation of the dispute prevention clause in ACFIs.

Fairly speaking, dispute prevention is an integral aspect of investment facilitation. This could be sensed from the many types of mechanisms and institutions established under national laws and regulations, IIAs, and envisaged in the Easter Text of the IFD Agreement. One has reason to expect it to play a major role in settling investment facilitation disputes.

4.3 Investment Facilitation and Investor–State Arbitration

ISA is the main method of ISDS and an important element of investment protection.[22] A major part of existing ISA cases have been submitted to the International Centre for Settlement of Investment Disputes (ICSID).[23] According to UNCTAD, the number of ISA cases has been on the rise since the 1990s.[24] IIAs remain changing in content and orientation, which have a profound impact on ISA in relation to investment facilitation. The relationship between investment facilitation and ISA could be roughly categorized into three types as follows:

First, while the majority of existing IIAs incorporate an ISA clause in one form or another, some recent IIAs do not include an ISA clause. The deletion of an ISA clause from IIAs implies that investors cannot resort to ISA to solve disputes with the host states, including those relating to investment facilitation. These disputes need to be solved through other methods under such IIAs. As mentioned, Brazilian ACFIs are a typical example of such IIAs.

[21] See Brazilian Model ACFI, Art. 23(c).
[22] UNCTAD, *Investor-State Disputes*, at xxii.
[23] As of December 31, 2019, known treaty-based ISDS cases had reached the number of 1,023, out of which 745 had been registered under the ICSID Convention and Additional Facility Rules. See, ICSID, 'The ICSID Caseload – Statistics (Issue 2020-1)', at 7, online at: https://icsid.worldbank.org/sites/default/files/publications/Caseloadpercent20Statistics/en/Thepercent20ICSIDpercent20Caseloadpercent20Statisticspercent20percent282020–1percent20Editionpercent29percent20ENG.pdf (last accessed 13 June 2023).
[24] UNCTAD, 'Investor-State Dispute Settlement Cases: Facts and Figures 2020', IIA Issues Note, Issue 4, September 2021, at 1, online at: https://unctad.org/system/files/official-document/diaepcbinf2021d7_en.pdf (last accessed 13 June 2023).

Second, to IIAs that include an ISA clause and investment facilitation provisions, it is possible to exclude disputes relating to investment facilitation from the scope of ISA. Investment facilitation provisions in IIAs could be clustered in one stand-alone clause or scattered in different clauses. For instance, the investment chapter of the agreement of the Regional Cooperation and Economic Partnership (RCEP) includes a clause entitled "investment facilitation"[25]; other IIAs, though without a stand-alone clause on investment facilitation, contain a number of investment facilitation elements scattered in various provisions, such as transparency provision.[26] Despite the inclusion of investment facilitation provisions, some IIAs explicitly or implicitly exclude investment facilitation disputes from ISA. For instance, the 2012 United States Model BIT contains an elaborated transparency clause, a typical investment facilitation provision in modern IIAs.[27] But according to the ISA section of this BIT,[28] ISA is available for disputes relating to the substantive standards, and disputes on transparency obligations of states are not admissible for ISA.[29]

Third, even if an IIA does not contain any investment facilitation provision, it does not necessarily mean that investment facilitation disputes are absolutely immune from ISA. ISA typically targets state regulatory measures, and investors frequently initiate ISA cases relying on fair and equitable treatment (FET) and indirect expropriation (IE) clauses, which seem to have become "standard" clauses in modern IIAs. 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,[30] and an IE clause requires states not to take regulatory measures that could amount to expropriation of foreign investments.[31] As investment

[25] Regional Comprehensive Economic Partnership (RCEP), Art. 10.17.
[26] See Polanco, 'Facilitation 2.0'.
[27] 2012 US Model BIT, Art. 11.
[28] 2012 US Model BIT, Section B.
[29] 2012 US Model BIT, Art. 24.1.
[30] See, generally, UNCTAD, *Fair and Equitable Treatment*, UNCTAD/DIAE/IA/2011/5 (New York and Geneva: United Nations, 2012), online at: https://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (last accessed 13 June 2023).
[31] See, generally, OECD, '"Indirect Expropriation" and the "Right to Regulate" in International Investment Law', OECD Working Papers on International Investment, No. 2004/04, (Paris: OECD Publishing, 2004), online at: http://dx.doi.org/10.1787/780155872321 (last accessed 13 June 2023); S. H. Nikièma, 'Best Practices Indirect Expropriation', IISD Best Practice Series, March 2012, online at: www.iisd.org/pdf/2012/best_practice_indirect_expropriation.pdf (last accessed 13 June 2023).

facilitation measures are state regulatory measures in nature, they could be deemed by investors as a violation of the FET clause or IE clause of an underlying IIA if they are implemented inappropriately or unduly by the host states and could thus be subject to ISA. Such likelihood could be high as both FET and IE clauses are often broadly drafted in many IIAs and flexibly interpreted in ISA practice.[32] In this sense, FET and IE clauses could serve as a "linkage" between investment facilitation and ISA.

A typical example in showing an investment facilitation measure being disputed in ISA as an FET violation could be cases relating to transparency obligations of states. Some IIAs incorporate transparency as an FET obligation. For instance, the investment chapter of the *Comprehensive and Economic Trade Agreement between Canada and the European Union* (CETA), which provides that "fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings" amounts to an FET violation.[33] Similarly, the 2019 *Dutch Model BIT* also explicitly lists transparency as an FET obligation.[34] Clearly, under these IIAs, violation of the transparency obligation would amount to an FET violation.

Furthermore, even if an IIA does not explicitly list transparency as an FET obligation, it remains possible that arbitral tribunals interpret the FET clause to cover the obligation of transparency. For instance, the tribunal in *Invesmart v Czech Republic* held that there has been a growing jurisprudence and case law in dealing with the notion of FET and held that the content of FET obligations "has been variously and not consistently as including the different strands of, *inter alia*, transparency."[35] In *Biwater Gauff v. Tanzania*, the tribunal also held that "[t]he general standard of 'fair and equitable treatment' as set out above comprises a number of different components,' which include 'transparency, consistency, non-discrimination".[36]

[32] See T. Weiler, *The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standards of Treatment in Historical Context* (Leiden: Martinus Nijhoff Publisher, 2013), at 287–332.

[33] Comprehensive Economic and Trade Agreement (CETA), Art. 8.10.2.

[34] Dutch Model BIT, Art. 9.2(b).

[35] *Invesmart, B. V. v. Czech Republic, UNCITRAL Arbitration Rules*, Award, at para. 200 (26 June 2009), online at: www.italaw.com/sites/default/files/case-documents/italaw4162_0.pdf (last accessed 13 June 2023).

[36] *Biwater Gauff (Tanzania Ltd.) v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, at para. 602 (24 July 2008), online at: www.italaw.com/sites/default/files/case-documents/ita0095.pdf (last accessed 13 June 2023).

As can be seen, investment facilitation disputes are not completely immune from ISA, regardless of whether an IIA contains investment facilitation provisions. The major reason is that investors may rely on an FET or IE clause of an IIA to challenge the host states' investment facilitation measures in ISA. As far as IIAs, especially their FET, IE, and ISA clauses, remain unchanged, it seems difficult, if possible at all, to effectively insulate investment facilitation from ISA.

4.4 Investment Facilitation and WTO Dispute Settlement

WTO dispute settlement, notwithstanding the current dysfunction of the Appellate Body, is deemed innovative and successful. As a matter of fact, since the establishment of the WTO in 1995, over 600 disputes have been brought to the WTO and over 350 rulings have been issued.[37] Given that the IFD Agreement will be one under the WTO umbrella, it is natural to expect that investment facilitation disputes covered by the IFD Agreement will be submitted to the WTO for settlement. Such a viewpoint makes a strong sense considering that Art. 23 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) provides that the WTO shall have exclusive and compulsory jurisdiction over disputes under WTO-covered agreements.[38]

That said, as implied by the Consolidated Text, some WTO members seem to have concerns over WTO's exclusive and compulsory jurisdiction over disputes under an IFD Agreement, and a number of proposals have been put forward.[39] The dispute settlement clause of the Consolidated Text contains several provisions. A provision actually asserts WTO's compulsory and exclusive jurisdiction, providing that disputes concerning the interpretation and application of the IFD Agreement shall only be resorted to WTO for settlement, with certain specific exceptions.[40] Another provision stresses alternatives, providing that WTO members are encouraged to settle investment facilitation disputes through resorting to good offices, conciliation, mediation, and arbitration within the WTO framework.[41] At this stage, while the form

[37] WTO, 'Dispute Settlement', online at: www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (last accessed 13 June 2023).
[38] WTO, 'Introduction to the WTO Dispute Settlement System', online at: www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s3p3_e.htm (last accessed 13 June 2023).
[39] Consolidated Text, Art. 1.
[40] Consolidated Text, Art. 31.1.
[41] Consolidated Text, Art. 31.2.

and contents of the Consolidated Text are yet to be determined, it is unclear how the dispute settlement clause would precisely look like and how effective they could be in practice.

Assuming that disputes arising out of an IFD Agreement are subject to the exclusive and compulsory jurisdiction of the WTO, WTO members are likely to confront the issue of parallel jurisdiction. This is because, investment facilitation measures are typically state regulatory measures, and disputes concerning a same measure could be submitted to ISA by an individual investor relying on an IIA, or to the WTO by a member relying on the IFD Agreement, or both. If both ISA and the WTO are resorted to concurrently, a further issue of parallel proceedings will be prompted. These issues are discussed in more detail below.

4.5 Parallel Jurisdiction over Investment Facilitation Disputes

In case parallel jurisdiction between the WTO and ISA is prompted, the WTO and an ISA tribunal will need to decide if it has jurisdiction over the dispute, in different legal proceedings but targeting same investment facilitation measures. This part discusses several major legal issues relating to the issue of parallel jurisdiction.

First, does the WTO have jurisdiction over IIA claims? If a dispute is submitted to the WTO on the ground that an investment facilitation measure breaches both the IFD Agreement and an IIA, the WTO will have to decide whether it has jurisdiction over an IIA claim. On this issue, WTO jurisprudence seems to suggest a negative answer. As mentioned, Art. 23 of the DSU establishes exclusive and compulsory jurisdiction of the WTO over "all disputes arising under the WTO Agreement".[42] Such a requirement seems to exclude WTO jurisdiction over disputes arising out of an IIA, as IIAs are not "WTO covered agreements".

At this juncture, it is of interest to note that the issue of parallel jurisdiction has come to the attention in the negotiations of an IFD Agreement in the WTO. A proposed provision in the Consolidated Text states that notwithstanding the MFN and other clauses of the IFD Agreement, a WTO panel shall not apply or consider a provision or treatment in any other IIA.[43] Without explicit mentioning, this provision clearly shows that certain WTO members try to insulate IIA claims from

[42] DSU, Art. 1.
[43] Consolidated Text, Art. 31.3.

the WTO. Such an insulation formula could help address the issue of parallel jurisdiction by limiting the competence of the WTO to the IFD Agreement, but it may not be effective if an investor raises an IFD Agreement claim to an ISA tribunal. This scenario is discussed below.

Second, does an ISA tribunal have jurisdiction over WTO claims? If a dispute concerning an investment facilitation measure is submitted to ISA for violating both an IIA and the IFD Agreement, the ISA tribunal will need to decide if it has jurisdiction over an IFD Agreement claim.

In this regard, *Philip Morris Asia v. Australia* seems illustrative. In 2011, Australia adopted the Tobacco Plain Packaging Act ("Tobacco Act"), aiming at limiting tobacco consumption for public health purpose.[44] The adoption of the Tobacco Act provoked a number of disputes against Australia, including this ISA case.

The investor, Philip Morris Asia, relying on the umbrella clause of the Australia–Hong Kong BIT,[45] claimed that Australia should honor its obligations not only under the BIT but also under a number of other treaties, including WTO agreements, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Agreement on Technical Barriers to Trade (TBT Agreement).[46]

Australia argued that the Tribunal cannot admit WTO claims. After denying that the umbrella clause in the BIT can be used to import obligations owed by Australia to other states under other treaties (referring to the TRIPS and the TBT Agreement), Australia also argued,

> It 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 [the WTO agreements and the Paris Convention]. This is all the more so in circumstances where such bodies enjoy exclusive jurisdiction.[47]

[44] 'Tobacco Plain Packaging Act 2011', Art. 3.1, online at: www.legislation.gov.au/Details/C2011A00148 (last accessed 13 June 2023).

[45] See Art. 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.").

[46] *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Notice of Arbitration, at paras. 7.15–7.17 (21 November 2011), online at: www.italaw.com/sites/default/files/case-documents/ita0665.pdf (last accessed 13 June 2023).

[47] *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Australia's Response to the Notice of Arbitration, at para. 35 (21 December

The Tribunal ruled that the investor's claims were inadmissible and that it lacked jurisdiction over the dispute,[48] but it did not expressly address the issue whether it has jurisdiction over a WTO claim via the application of the umbrella clause.

It should be mentioned that in addition to umbrella clauses in IIAs, MFN clause, seen in almost all modern IIAs, could also serve as a "bridge" between an IIA and the IFD Agreement in relation to investment facilitation measures. Depending on the wording of the MFN clause in question, an investor may try to import an IFD Agreement clause through the MFN clause of an IIA.

No matter through an umbrella clause or an MFN clause, it is an unsettled question whether an ISA tribunal has jurisdiction over WTO claims. Such uncertainty has been shown in *Philip Morris Asia* v. *Australia* as well. On this issue, Australia argued that as Art. 23 of the DSU establishes exclusive and compulsory jurisdiction of the WTO over disputes arising under the WTO Agreement, WTO members should not and cannot consent to submit WTO claims to ISA. However, it has been contended that this Article only binds WTO members and does not prohibit private investors from bringing WTO claims in ISA.[49] Consequently, the answer depends on the exact wording of the umbrella or MFN clauses relied on by the investor and the interpretation thereof by ISA tribunals, which will have to be observed through future jurisprudence.

Third, a more complicated issue could be parallel proceedings. If a dispute is submitted to both ISA as an IIA claim by an investor and the WTO as a claim on the IFD Agreement by a WTO member, the same respondent state will confront a situation of parallel proceedings. Australia again is an example. After Australia's adoption of the Tobacco Act, several legal proceedings against it were initiated in different forums at both the national and international levels almost concurrently. A few tobacco producers filed domestic litigations in the High

2011), online at: www.italaw.com/sites/default/files/case-documents/ita0666.pdf (last accessed 13 June 2023).

[48] *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, at 186 (17 December 2015), online at: www.italaw.com/sites/default/files/case-documents/italaw7303_0.pdf (last accessed 13 June 2023).

[49] See S. Li, 'Convergence of WTO Dispute Settlement and Investor-State Arbitration: A Closer Look at Umbrella Clauses' (2018) 19 *Chicago Journal of International Law* 189–232.

Court of Australia[50]; Philip Morris Asia launched an ISA case, claiming that Australia has violated the FET and IE clauses of the Australia–Hong Kong BIT[51]; and several WTO members also initiated disputes in the WTO against Australia, claiming violations of several WTO agreements.[52] Despite their different legal basis, all these proceedings actually targeted Australia's adoption of the Tobacco Act.

Parallel proceedings are not necessarily illegal, especially at the international level. But their impacts on respondent states should not be neglected. They not only put states under high pressures for dealing with different and concurrent proceedings, but more importantly, they expose states to potential conflicting decisions made by different adjudicatory bodies. Such consequence is particularly concerning given the fact that both WTO dispute settlement and ISA could be quite costly and time-consuming and that both the WTO and ISA tribunals have demonstrated a worrying degree of discretion in treaty interpretation.[53]

As mentioned earlier, some WTO members have proposed an insulation provision in the Consolidated Text, which could help deal with the issue of parallel jurisdiction and proceedings. However, such a provision, even if adopted, is only binding WTO members and panels but not ISA tribunals. Therefore, unless the competence of ISA tribunals could be strictly refined to IIA claims, one cannot exclude the possibility that ISA tribunals adjudicate claims based on the IFD Agreement, implying that complete insulation between the IFD Agreement and ISA cannot be achieved.[54] Such a situation also shows a need for states to consider

[50] Attorney-General's Department, 'Tobacco Plain Packaging – Investor-State Arbitration', online at: www.ag.gov.au/Internationalrelations/InternationalLaw/Pages/Tobaccoplainpackaging.aspx (last accessed 13 June 2023).

[51] UNCTAD, 'Philip Morris Asia Limited v. The Commonwealth of Australia', online at: https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/421/philip-morris-v-australia (last accessed 13 June 2023).

[52] 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), online at: www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm (last accessed 13 June 2023).

[53] See, generally, UNCTAD, *Investor-State Dispute Settlement: A Sequel,* UNCTAD/DIAE/IA/2013/2, at 4, online at: https://unctad.org/system/files/official-document/diaeia2013d2_en.pdf (last accessed 13 June 2023); I. Van Damme, 'Treaty Interpretation by the WTO Appellate Body' (2010) 21 *European Journal of International Law* 605–648.

[54] See, generally, M. Chi, 'Insulating a WTO Investment Facilitation Framework for Development from International Investment Agreements', in A. Berger and K. Sauvant (eds.), *Investment Facilitation for Development: A Toolkit for Policymakers* (Geneva:

systematically reforming IIAs and the existing ISA mechanism, which should be carried out in forums other than the WTO.[55]

4.6 Conclusion

Investment facilitation has become a major policy and legal consideration in investment rule-making at the national and international levels. Settlement of investment facilitation disputes could emerge as a profound challenge to states and investors in the near future, which gives rise to two interconnected issues: what alternatives should be resorted to and how to deal with the issue of parallel jurisdiction and proceedings. With regards to alternatives, it seems that states have shown a disapproving attitude toward ISA as a main method in settling investment facilitation disputes; instead, states have shown a growing interest in dispute prevention mechanisms and institutions, and other interstate alternatives, such as good offices, meeting, conciliation, mediation, and arbitration. With regards to parallel jurisdiction and proceedings, as indicated by the Consolidated Text, states seem to have shown an interest in designing a mechanism for insulating the IFD Agreement from ISA. At this point of time, given that the IFD Agreement negotiations in the WTO have just been concluded and that the intergovernmental ISDS reform process is ongoing, it remains to be observed how a mechanism for settlement of investment facilitation disputes will be designed and implemented by the international community, and what impact it could have on global investment governance.

International Trade Centre, 2021), at 15–25, online at: www.intracen.org/uploadedFiles/intracenorg/Content/Publications/Investmentpercent20Facilitationpercent20forpercent20Development_rev.Low-res.pdf (last accessed 13 June 2023).

[55] For instance, the interstate discussions on ISDS reform are under the auspice of the United Nations Committee for International Trade Law (UNCITRAL), online at: https://uncitral.un.org/en/working_groups/3/investor-state (last accessed 13 June 2023).