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Perspectives on topical foreign direct investment issues

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Limited home state measures in the WTO Investment Facilitation for Development Agreement: a missed opportunity or a starting point?

by
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In November 2023, World Trade Organization (WTO) members concluded the negotiations of the Investment Facilitation for Development Agreement (IFDA) after three years of negotiations as a “Joint Statement Initiative”. Proponents had invited all members to participate, but when some objected, they launched open plurilateral negotiations, now endorsed by 124 members. The [IFDA text](#) was made available only on February 25, 2024, at the WTO’s 13th ministerial conference (although several versions were leaked before), which is ironic for an agreement emphasizing transparency in investment measures.

While it is still unclear if and [how the IFDA will be integrated into the WTO’s legal architecture](#), the conclusion of negotiations is remarkable, considering the difficulties in reaching agreements, both at the WTO and on investment matters.

The content of the IFDA has been outlined in a previous [Perspective](#). This *Perspective* focuses on one element not fully included in the final version of the Agreement: home state measures to facilitate outward investment.

An earlier (leaked) version of the “[Easter Text](#)” of the IFDA included a bracketed Section IVbis recognizing the role of home states in facilitating outward foreign direct investment (OFDI) for sustainable development. It encouraged the adoption or maintenance of measures to facilitate OFDI, such as legal frameworks, investment guarantees, investment insurance, technical assistance, investor support services (feasibility studies, business missions, matchmaking), and financial and fiscal measures (loans, equity, tax exemptions, tax deferrals). The text also considered information commitments, including publishing or making available by electronic means measures to facilitate outward investment, sharing investor information

(responsible business conduct and sustainable investing history), providing information requested by another member, and exchanging experience and information on policies, strategies and practices to facilitate OFDI for sustainable development in the Committee on Investment Facilitation established by the Agreement.

Although mostly couched in hortatory language, including home state measures in the IFDA would have been particularly welcomed. There were discussions on this issue, but, unfortunately, a specific section is not found in the final text, as part of a compromise to reach an agreement. Following the notion that WTO disciplines create obligations, the title of Section IVbis was “Home State Obligations”. However, some members felt that the proposed measures and language were too prescriptive. One member apparently pointed out that agreeing to such provisions could have negative domestic political implications if citizens perceived that the government was encouraging investment abroad rather than at home.

Fortunately, Section II of the final Agreement contains several provisions concerning information commitments, which were apparently hard-fought over. Although not all apply directly to home states, a broad interpretation of these provisions, together with other sections of the IFDA, could help to incorporate most of the information commitments contained in the Easter Text.

Specifically, Section II, Article 6.5, of the IFDA provides that members adopting or maintaining measures of general application to facilitate OFDI “are encouraged to publish or make them publicly available, including by electronic means”. Commitments in Section IV of the Agreement could be interpreted as requiring home states to exchange information on their investors (Article 26.2(b)) and on experiences in facilitating investment (Article 26.2(a)). Section V contains a provision on technical assistance, which could include home states as “Donor Parties” (Article 35). Section VI (“Sustainable Investment”) includes provisions to promote responsible business conduct (Article 37) and ensure anti-corruption measures (Article 38), which could apply to host and home states.

Other international investment agreements (IIAs) or national regulations could complement the absence of additional home state measures in the IFDA. Some IIAs include such measures, like the [Brazilian Cooperation and Facilitation Investment Agreements](#). Home states could take measures to support OFDI, [particularly in least-developed countries \(LDCs\)](#). However, measures in a multilateral/plurilateral agreement would have provided further legal certainty and predictability. This could be particularly important for FDI seekers, many of which are LDCs and developing countries.

Investment facilitation is usually perceived as a host state task, [but home states can play an important role](#) in supporting OFDI for development. Investment financing, political risk insurance, investment guarantees, and information and advisory services [can be adapted](#) to provide preferential support to potential investors in countries most in need of FDI. Such countries are not always well placed to attract sustainable and responsible investment or to determine which investments qualify as such. Developed home states could link the granting

of OFDI facilitation measures to investors' compliance with [sustainable and responsible investment criteria](#). They could also assist in the ex-ante and ex-post assessment of the economic, labor, environmental, social, and human rights impacts of their OFDI. This could [help prevent investment disputes](#), reducing the likelihood of conflicts between investors and host states. For example, starting January 5, 2023, EU member states need to implement the [Corporate Sustainability Reporting Directive](#), requiring businesses to report their operations' environmental and social impacts and related financial and investment plans.

Preventing “unsustainable” or “irresponsible” FDI benefitting from home states' facilitation measures would be an implementation challenge—but that should not be an excuse not to try. Strict requirements on granting financial, insurance or fiscal measures could be introduced, coupled with investor liability rules for non-compliant investors enforced by home states.

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