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Avoid old wine in new bottle

Calls for self-reliance shouldn't come in the way of India's trade & investment negotiations with the EU

Rupa Chanda & Pralok Gupta July 23, 2020 Last Updated at 23:24 IST

During the 15th India-EU Summit held recently, both sides reaffirmed their commitment to work towards a mutually beneficial trade and investment agreement. India and the EU have a beleaguered history of bilateral FTA negotiations. The EU-India broad-based Bilateral Trade and Investment Agreement (BTIA) negotiations covering trade in goods, trade in services, and investment, among others, commenced in 2007 but have been stalled since 2013.

The negotiations were beset by many thorny issues. While the granting of data adequacy status by the EU was the main stumbling block from India's services trade perspective, inadequate market access for automobiles and wine and spirits by India and India's refusal to negotiate investment independently from trade were major sticking points on the EU side.

Two important areas in these negotiations are services and investment. India's interests lie in securing market access for IT-IT-enabled services, business and professional services, in attracting FDI, and facilitating overseas investments by Indian businesses. The EU's interest lies in setting up commercial presence in services like banking and insurance and diversifying its investment partners. Therefore, as India and the EU prepare for renewed negotiations, a look at how India can promote its interests in both services and investment through this FTA, assumes significance.

Probably, the main bone of contention in services is India's demand for data adequacy, which the EU was not ready to grant in 2013. Come 2019, India has its Personal Data Protection (PDP) Bill in Parliament and may have its own data privacy laws in place soon. This is likely to allay the concerns of the EU to a significant extent as the underlying principles of both the PDP Bill and the EU's General Data Protection Regulation (GDPR) are broadly similar.

Nonetheless, there are some differences, which may prove to be slippery for the negotiations.

For instance, the PDP Bill takes a lenient approach to contracts with data processors (DPs), whereas the GDPR requires DPs to provide guarantees for adhering to the GDPR. Similarly, while the GDPR grants both the right to restrict processing as well as object to processing of data to the controller, the same is not provided in the PDP Bill. Unlike in the EU, a certification mechanism is absent in India's Bill, which could undermine confidence in India's data protection system. The EU may have concerns about some of these differences. Common ground will need to be found beforehand to prevent derailing of the negotiations.

Another important issue for India is movement of professionals (mode 4). Given India's demographic dividend and the importance of mode 4 in its overall services exports, India can't put aside this issue. However, in the aftermath of Covid-19, when countries are likely to put more restrictions on the entry of foreigners, this may pose a serious challenge. India may need to modify its approach to mode 4 negotiations by considering alternative mechanisms to facilitate the movement of its professionals. This could include signing bilateral labour agreements with the EU, short-term mobility agreements on the lines of seasonal workers agreements, and predetermined return mechanisms for Indian professionals on temporary work assignments. Such arrangements would provide comfort to the EU to allow dedicated short-term entry to Indian professionals, without fearing a large influx and permanent settlement.

The two sides will also need to find common ground on the negotiating approach to be taken for services trade, that is, whether a positive or a negative list approach is to be followed. In a positive list approach, all committed sectors are listed along with their limitations and non-listed sectors are considered as closed to foreigners. A negative list approach only lists those sectors that are either closed or are committed with reservations. Thus, non-listing of a sector in a negative list implies its complete openness.

The negotiating approach should be agreed upon before starting substantive discussions on legal text and market access issues. The EU has recently negotiated an FTA with Canada on a negative list basis and may want the same with India. However, India's interests might be better served by following a positive list approach. A negative list approach, though supposedly more liberal, tends to be more complex, less transparent, and can implicitly undermine the value of commitments.

In the context of investment negotiations, while India has insisted on a comprehensive trade cum investment agreement, the EU wants a separate pact on investment. Bilateral ties were severed in 2016 when India cancelled all investment treaties with EU members and introduced a new model Bilateral Investment Treaty. However, circumstances and priorities have changed since then. There is renewed focus on reducing dependence on a few suppliers and on making them more secure. Finding new investment partners and relocating investments are more important than ever. India should be prepared to leverage this opportunity by showing more flexibility in its approach to investment negotiations. This would also be consistent with its objectives of attracting FDI, developing manufacturing capacity, attracting technology, and entering global value chains.

In short, the India-EU FTA could prove to be a significant economic engagement. Both sides will need to be forward-looking and more accommodating given changing economic realities post-Covid. However, India should not view these negotiations as an alternative to the RCEP from which it withdrew last year. An EU-India BTIA should be pursued on its own merit, not as a substitute to RCEP. Also, unlike in earlier negotiations, India must not view gains and losses from the goods and services tracks as trade-offs given inherent asymmetries between services and goods trade liberalisation. Finally, calls for self-reliance should not come in the way of these negotiations.

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Views are personal