INDIA - EU FREE TRADE AGREEMENT NEGOTIATIONS - AN AGREEMENT WITHIN DISAGREEMENTS

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India and Europe economic ties date back to the early medieval times with the arrival of the Portuguese, French, Dutch and the English in India who have established trade with India. In the course of being India independent in 1947 trade ties between Europe and India have been limited but economic relations with Europe have always been important for India which has established diplomatic relations with the European Economic Community (EEC) in 1962. India had a strategic alliance with the EEC through the Agreements which were signed in 1973 and 1981. The focus of these agreements is on trade promotion with India and has created bilateral relations with individual EEC Member States in various areas of economic importance. The early 1990's, India has embarked on economic reform and integration with the global economy for sustained growth and rapid industrialization of the economy. During this period India has achieved a per capita income in excess of 8% which has competed with the best developing countries of the world. India has been at the forefront of having Free Trade Agreements (FTA) with majority of the developed countries and this endeavor the Government of India had initiated the EU – India FTA in 2007 which was renamed as "Broad based Trade and Investment Agreement" (BTIA) through which negotiations have been ongoing. The FTA negotiations have been ongoing between EU and India for more than 11 years now and the last round of negotiations have taken place on 30th March, 2016 in Brussels, Belgium and in May 2017 when Prime Minister Narendra Modi met German Chancellor Angela Merkel to finalize the EU – India FTA on matters relating to taxation, contract clauses and Intellectual Property issues between them.

During the FTA negotiations there have been some sticking points which includes eliminating tariffs on more than 90% of goods along with agricultural issues and given India's high regulatory barriers on professional services, financial services and Government services there have been negotiations but little progress has been made on every front. This has led to a state of impasse and the recent unilateral termination of Bilateral Investment Treaties (BITs) by India has put the business community into a state of limbo in which the negotiations had reached a point of no return. The EU is the largest trade and investment partner of India in goods and in services where the trade has increased from 30bn Euros to 45bn Euros during the years 2008 to 2017.

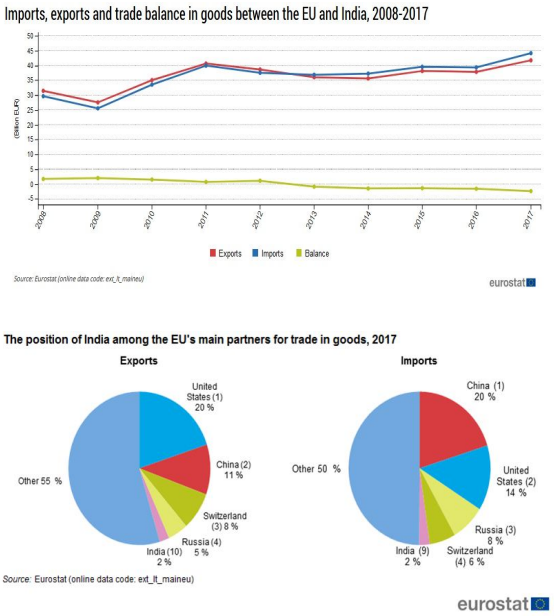


Figure: India's position among the EU's main trade in goods partners, 2017
Source: Eurostat

The termination of the BITs and the advent of the new Government in India has compelled both the parties to resume FTA negotiations but the EU wants to negotiate the Bilateral Investment Treaty before the negotiations of the BTIA. The Indian side wants liberalization to take place in four modes of services trade which come under the 1995 General Agreement on Trade in Services (GATS) which is on:-

- **Mode – 1 :-** Which refers to cross-border trade, data security is imperative, but EU laws say that outsourcing must be done to those countries where data is secure and as per the EU India does not measure up to these norms.
- **Mode – 3 :-** For the retail services like Banking and Insurance India is in favor of majority stake not being given to foreign direct investment i.e., up to 100% but to have an Indian counterpart for it.
- **Mode – 4 :-** In which India wants stilled professionals to be allowed to work in EU countries which would require changes in Visa and Work Permit and the sticking point is the professional qualification of the Indian personal has to be equal to the EU norms.
- The EU wants to bar agricultural products from India due to non-compliance with World Trade

Organization (WTO) norms and the EU has asked for duties to be reduced on Automobiles and Wine Spirits.

- Intellectual Property Law in India requires a major over hall and the EU has insisted that 20 years of patent term must be given for medicines and the TRIPS Agreement and regulations must be made stringent for Intellectual Property Laws.
- Foreign Investors from the EU who may be Funds or High Networth Individuals (HNI) are demanding the equitable treatment clause but the doubts of getting equitable status has still not been on the agenda.
- Another point has been that the EU Investors can challenges the Indian Government in an International Tribunal and the Government has said that they may not be possible.
- The European Court of Justice recent judgment in the matters of law have attracted attention and has put a spanner in the wheels of the new negotiations that are long overdue between the Indian Government and the EU.

Model BIT and India:

In view of the foreign investors suing India under different Indian BITs and the experiences of major European companies like Vodafone and the UK Company of Cairn on the issue of retrospective taxes the Government of India had to rejig by adopting a defensive model BIT in 2016. This has led to Indian companies being given their own share of problems where Indian companies are investors in the EU.

The European Commission has been negotiating with various countries on new FTAs issues of Tariffs, Investments and Intellectual Property where the issue of Investor-State Dispute Settlement (ISDS) has been discussed at length and issues which pertain to it have been discussed in detail. In the FTA agreement between the EU and Singapore the investors were given a choice to submit any matter of dispute for International arbitration.

The recent judgment by the European Court of Justice (ECJ) that the EU investor could approach the court for arbitration shall have an impact on the negotiations between India and the EU. In view of this, India stated that only after settling all the disputes between a sovereign Government and a corporate in domestic courts and has been exhausted, would allow the issue to be taken up in International Courts. It should be part of a bilateral agreement and not a multilateral agreement. With regard to the FTA negotiations many a jurist who have pointed out that:-

- If the ISDS clause is used by the ECJ in the future then FTAs may have to be renegotiated on the new terms.
- The EU is not willing to negotiate the ISDS system due to the protectionist environment of the Indian Government.
- The ISDS provisions have to be ratified and approved by all EU member states and negotiations could be made difficult due to this.
- The Indian model BIT has that a foreign investor should litigate in an Indian Court for at least 5 years before approaching an International Court.
- It is also felt that the ECJ judgment may become binding on all institutions and this may harm the trade relations existing.

India and the European Union – Agreement among Disagreements

India's Strategic Partnership with the European Union is important both economically and politically with India being one of the largest trading partners of the EU member states. The challenge before the new Indian Government is to renegotiate the FTA keeping in view the new challenges that have emerged even after the liberalization of the Indian economy. The way forward for both the parties in the wake of the disagreements could lead to an Agreement if the following could be considered looking at and bypassing certain sticking points which could be renegotiated at a future stage. Both the European Union and the Indian Government could bring about a balanced and free trade agreement if:

- The Indian Government can accept the proposal of the European Union to set up a Multi-lateral Investment Court (MIC) as the same is mentioned in the EU-Canada FTA (Article 8.29).
- To bring in transparency in the ISDS system all matters which are to be settled can go through the MIC.
- Every MIC member should be given a term as decided by the FTA Agreement and there should be no ad-hoc arbitration.
- India could use this opportunity of negotiations to create a system internationally that would be transparent and would encourage foreign investment to flow on both the sides.
- Retrospective taxation has been the major point of contention between the EU and India as demonstrated by the Vodafone case which could be resolved if a MIC could be put into place.
- The ECJ should also rethink the ISDS mechanism which could encourage India to negotiate the FTA.
- India would be looking at using the State-State disputes settlement between Investor and States rather than the ISDS model.
- The Indian Government should give access to the European Car Industry without any tariff and non-tariff barriers.

The India – EU FTA is much broader in scope than other FTAs with which India has negotiated so far and either parties have to give up their rigid stance

and go ahead with a joint action plan which brings strategic partnership between the European Union and India to a logical conclusion end of signing a new FTA.

Each being a partner in trade and the present Prime Minister Mr. Narendra Modi who is considered to be pro-business and has promised to "Create an India that none could talk down to in the International stage" it could lead to India removing its protection barriers and open the Indian market to both national and foreign investors which could lead to an agreement between the European Union and India even in a large number of disagreements.

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