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POLICY BRIEF

Investment Facilitation in WTO: For Development?

Introduction

Fifteen countries of World Trade Organization (WTO) have submitted proposals in WTO which are aimed at initiating negotiations on an Investment Facilitation Agreement (IFA) during the 11th WTO Ministerial Conference scheduled for 10-13 December 2017 in Buenos Aires, Argentina. The proponents of IFA underscore the positive impact of foreign investment on development to emphasise the importance of IFA. Interestingly this proposal has come from a small group of countries, consisting mostly of developing countries and economies in transition. This policy brief brings out major elements of IFA and its implications in making foreign investment to cater to development of host countries. It also critically examines India's response to IFA.

Major features of IFA

Fifteen Members of the WTO[1] have kick started an informal discussion on an IFA in the WTO, by underscoring the growing linkages between international trade and investment and its mutually reinforcing role in facilitating global development. There are five submissions from these countries: (i) "Friends of Investment Facilitation for Development" (FIFD)[2]; (ii) "MIKTA"[3]; (iii) Russia; (iv) China; and (v) a joint submission by Argentina and Brazil. The last three proposals provide detailed information on the key elements of the proposed IFA. According to the Argentina-Brazil proposal, IFA would encompass "the set of policy measures and activities aimed at making it easier for investors to establish, maintain and expand their investment in host countries as well as to conduct their day to day business". The main elements of IFA as coming out from the proposals are given below.

1. *Scope*: Covers investment in the production of goods and supply of services.
2. *Transparency*: In order to have transparent laws and regulations regarding investment matters, WTO Members are required to report to WTO all laws relating to investment policy. They are also called to consider providing opportunity for investors and other stakeholders to comment on measures related to investment.
3. *Processing of Applications*: In order to establish a stable, predictable and efficient framework for investors, a common set of principles for processing and screening of investment proposals would be established.
4. *Single Electronic Window*: Access to competent authorities by investors in the host countries would be through a single window electronic system.
5. *National Focal Points*: National focal points or ombudsperson would be established. They will provide all required information to investors. Cooperation between national focal points of different

[1] Argentina, Australia, Brazil, Chile, China, Colombia, Hong Kong, Indonesia, Kazakhstan, South Korea, Mexico, Nigeria, Pakistan, Russia and Turkey.

[2] FIFD consists of Argentina, Brazil, Chile, China, Colombia, Hong Kong, Kazakhstan, Mexico, Nigeria and Pakistan.

[3] MIKTA consists of Mexico, Indonesia, Korea, Turkey and Australia.

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countries would help in preventing disputes between Members.

6. *Fees and Charges*: Fees and other expenses which investors have to incur while processing their applications should be made publicly available and be commensurate with the actual cost of services extended by the concerned authorities.
7. *Investors' Principles and Standards*: Members could encourage investors to adopt certain principles and standards for responsible business conduct. Adoption of these principles and standards would be voluntary on investors.
8. *Special and Differential Treatment*: Developing countries and Least Developed Countries (LDCs) would be given special provisions given their special economic and development needs. LDCs would not be required to implement any obligations arising out of IFA, but they will be encouraged to do so.
9. *Technical Assistance*: Technical assistance will be provided to developing countries and LDCs to strengthen their institutional and regulatory capacities to facilitate investment.
10. *Regulatory Space*: Regulatory space of members would be protected.
11. *Addressing of Sensitive Issues in International Investment Agreements (IIAs)*: IFA will not address controversial issues such as investment protection measures and investor-state dispute settlement provisions.

Limitations of IFA in Catering to the Development of Host Countries

Absence of Meaningful Provisions to Ensure Policy Space

The regulatory autonomy of host countries is critical in channelling foreign investment for development. The major criticism against Bilateral Investment Treaties (BITs) and treaties with investment chapters has been the curtailment of policy space of countries. But it does not intend to address the challenges which IIAs raise in channelising foreign investment for development. It merely refers to protection of regulatory space of members. The proposals of FIFD and MIKTA indeed maintain that the IFA would not address the controversial and sensitive issues coming out of IIAs . When a large number of WTO Members are parties to more than 3300 IIAs[4], which are binding in nature and which severely curtail the regulatory autonomy of countries, an agreement that merely states that regulatory space will be protected, does not make much sense.

[4] IIAs include BITs and treaties with investment chapters.

Lack of Clarity on Definition on Investment

The definition of investment has become central to the investment-development linkage debate. A broad definition of investment along with strong investment protection measures will considerably squeeze the policy space of the host countries. Although two Agreements of WTO – TRIMS (Trade-Related Investment Measures) and GATS (General Agreement on Trade in Services) cover investment, the term investment has not been defined in WTO. As the scope of investment in these agreements is limited, absence of definition of investment was not felt to be a major problem. TRIMS covers only trade related investment measures and GATS covers only FDI in services through commercial presence (mode 3).

Even though the scope of IFA is limited to investments for the production of goods and services, investment is being considered in totality. Therefore, a number of new issues are now coming up which were not the case with GATS and TRIMS. Would a proprietary technology used in the production of goods or supply of services be considered as investment? The IIAs define investment very broadly to cover every asset an investor may possess. The EU-Canada CETA defines investment as "every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk". It clarifies that investment could be in the forms such as shares, stocks and other forms of equity participation in an enterprise, IPRs, etc. Similar is the definition of investment used in the investment chapter of the Regional Comprehensive Economic Partnership (RCEP) to which four of the IFA proponents are parties to the negotiations. The implication of a broad definition of investment is that commitments that Members have accepted in other agreements such as TRIPS will also come under the purview of IFA as IPRs will be treated as investments.

In this context, the submission of MIKTA needs to be seen carefully. It states that "TRIPS provisions are relevant to the legal environment affecting foreign investment". This probably indicates that

IFA might adopt a broad definition of investment. A broad definition of investment may not distinguish between Foreign Direct Investment (FDI) and Foreign Portfolio Investment (FPI) which have very different implications in terms development.

Probability of IFA taking the shape of MAI

There are a number of advanced countries – EU, Norway, Japan and Switzerland, which have extended support to IFA in the WTO General Council. The support extended by these countries raises doubts on the likely transformation IFA might go through. The EU along with US came out with the *Statement of EU and US on Shared Principles for International Investment* in 2012 in the context of Transatlantic Trade and Investment Partnership (TTIP) negotiations[5]. The Statement incorporates broad market access to foreign investors, strong protection for investors and investments and fair and binding dispute settlement as the essential elements in the approaches of EU and US to rules on foreign investment. What explains EU's support to IFA which does not aim to establish binding commitments in terms of market access, protection of investors and investments and dispute settlement? It can't be ruled out that a modified version of the failed Multilateral Agreement on Investment (MAI) of OECD might find way into WTO in the backdrop of IFA. The MAI had been strongly criticised for its adverse implications for regulatory autonomy and the OECD had to abandon the negotiations on it in April 1998.

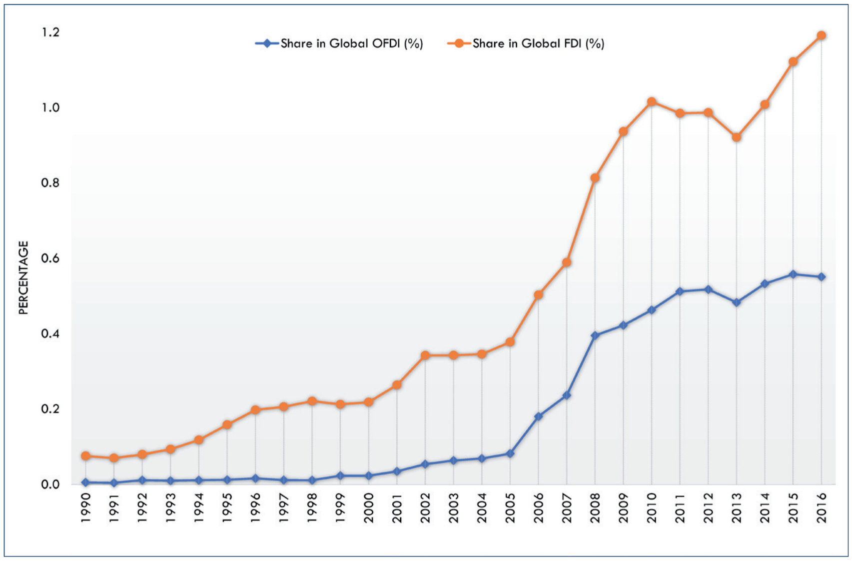
India's Response to IFA

India has serious concerns on the likely shape the IFA would take once the formal negotiation is permitted in WTO. An agreement with binding commitments on market access and Investor State Dispute Settlement (ISDS) would amount to surrendering of policy space to decide on FDI norms and arbitration clauses. Due to this concern, India has made clear while agreeing to participate this year in the investment facilitation mechanism of BRICS that the negotiations at the BRICS forum would not be used for a similar agreement in WTO. When EU and Canada initiated an informal discussion on a possible multilateral investment agreement in WTO with ISDS, in January 2017, India outrightly rejected the idea[6]. The support of leading advanced countries to IFA in the WTO General Council meeting lends weight to India's apprehensions. In the WTO General Council meeting held on 10th May 2017, India opposed the inclusion of IFA in the agenda of upcoming ministerial meeting (Raghavan 2017). India has opposed IFA also for the reasons that dealing with a new topic needs some time for preparations and that the issues which are already there in the agenda have to be addressed before taking up new issues.

There is a counterview expressed by some scholars that India should join efforts to an agreement on investment in WTO. A major reason proffered in support this view is the fact that India has emerged as a capital exporting country. Growing recognition of India as an exporter of capital is also manifested in the decision of the UNCTAD journal - *Transnational Corporations* to have a special issue dedicated to outward investments from India[7]. This counterview may imply that as an exporter of capital, *i.e.*, as a home country, India needs to do the needful to facilitate the efforts of its investors to get access to market in foreign territories which in turn will facilitate development in India.

A preliminary analysis of India's ODFI data suggests that India should continue to have a cautious approach to IFA. *Figure 1* shows that although

Figure 1: India's share in Global FDI and OFDI stock in 2016



Source: Author's compilation based on UNCTAD (2017).

5 *Statement of European Union and United States on Shared Principles for International Investment*, http://trade.ec.europa.eu/doclib/docs/2012/april/tradoc_149331.pdf

6 "Multilateral Investment Pact: India against Canada EU bid on investment agreement at WTO", *Indian Express*, 24 January 2017. Available at http://indianexpress.com/article/business/business-others/multilateral-investment-pact-india-against-canada-eu-bid-on-investment-agreement-at-wto-4488472/

7 Vol 24, No.1, 1 April 2017.

India's contribution to global OFDI has grown in the last one and a half decades, its share in the investment inflows is growing at a higher pace. This indicates that India is still banking on import of capital rather than export of capital to meet its development requirements. The gap between India's OFDI stock and FDI stock in 2016 is $174.4 billion. Therefore, it may not be in India's interest to become party to a treaty, the future course of which is highly unpredictable at this stage.

What more India needs to do?

The position India has taken on IFA is very much justified given the uncertainty in the future course of the treaty, paucity of time to deliberate internally on the issues. But India needs to take constructive steps at least in two areas.

One, India needs to constructively contribute to the discussions on establishment of a multilateral regime to govern foreign investment to make it cater to development. India appears to hold the view that bilateral arrangements are better as they would give more space to protect its interests. However, this need not be the case especially when India is dealing with bigger partners of strategic considerations. As economic considerations are increasingly getting integrated into foreign policy considerations, countries like India need not be able to protect its economic interests when it eyes on strategic engagement with larger countries. Even a few bilateral treaties with broad definition of investment and Most-Favoured Nation clause are more than sufficient to enable investors to engage in treaty shopping. It is not clear whether India would be able to review the investment chapter of its Comprehensive Economic Partnership Agreement with Japan with whom India is having a strategic engagement. It is also not clear whether India would have a BIT with US without MFN provision, modelled after the new Model BIT. Moreover, the large number of IIAs with varying levels of investment protection measures and different forums for settlement of disputes without an overarching mechanism is increasingly resulting in a legitimacy crisis—lack of transparency in the procedures, predictability of interpretations and consistency in interpretations and private lawyers deciding on the legislations passed by sovereign states through established procedures. Bilateral arrangements will not be able to address this legitimacy crisis. In order to establish a regime that upholds transparency, predictability, consistency and respect to legislations of sovereign states and to facilitate foreign investment to serve the cause of development efforts at multilateral level is essential. Whether or not this multilateral regime should be based within WTO is a matter to be decided carefully.

Two, India needs to review its policy on foreign investment to provide a clear roadmap for linking foreign investment with the development needs of India. This would also provide a direction to the position India needs to adopt during international negotiations on foreign investment. The assertion in the *Draft Pharmaceutical Policy 2017* that the competitiveness of Indian pharmaceutical industry has been adversely affected by acquisition of Indian companies by foreign firms and the proposal to review India's FDI policy "to ensure that it facilitates greater technology transfer, leverages strategic linkages and innovation" made in the *Draft Industrial Policy - Discussion Paper* do indicate some change in India's approach towards FDI. The next step is to take it to the logical conclusion.

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