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**SOME CRITICAL ISSUES IN EU-INDIA FREE TRADE
AGREEMENT NEGOTIATIONS**

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ABSTRACT

The free trade agreement currently negotiated between the European Union (EU) and India is due to be the first of a new generation of free trade agreements between the EU and an emerging economy. This article addresses a number of critical issues in the negotiations and the EU's response to them. These issues include European labour standards and GATS Mode 4 liberalisation; Indian generic medicine production and EU interests in patent protection; EU agricultural subsidies and their impact on the Indian dairy sector; the human rights and democracy dimension of the EU's foreign policy; and transparency issues of the negotiation process.

KEY WORDS

EU, India, FTA, free trade agreement, trade negotiations, generic medicines, labour rights, transparency

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1. INTRODUCTION

The European Union (EU) has invested considerable resources to conduct and finalize free trade agreement (FTA) negotiations with numerous trade partners, most recently Singapore, Moldova, Georgia and Armenia. However, its negotiations with large trading partners such as India, the focus of this article, have been going on for a considerable amount of time and demonstrate that concluding an FTA between large economic powers is not an easy task.¹ India, too, has been actively – and rather successfully – concluding FTAs, inter alia with major economic powers such as ASEAN, Japan, Korea and Mercosur.² Its foreign trade policy is characterised by a responsiveness to domestic policy-making by politicians and technocrats rather than to international forces. The country has acquired the reputation of hard-line negotiator with a defensive strategy, not easily giving in to trading partner demands.³ Additionally, India has questioned the strategic power of the EU in Asia.⁴ Moreover, the EU's political power may have been constrained by increased global multi-polarity, a growing economic nationalism, the financial and Eurozone crises and the 'judicialisation' of world trade.⁵ It seemed clear from the outset that the FTA negotiations between the EU and India would not be a proverbial 'walk in the park'.

This paper addresses a number of critical issues in EU-India negotiations. We begin by describing the general relationship between the EU and India and the economic potential of the FTA in order to parse out what is at stake. Afterwards, we address some of the difficulties by highlighting the following contentious issues raised by civil society stakeholders: (i) European labour standards and GATS (the WTO's General Agreement on Trade in Services) Mode 4 liberalisation; (ii) Indian generic medicine production and EU interests in patent protection; (iii) EU agricultural subsidies and their impact on the Indian dairy sector; (iv) the human rights and democracy dimension of the EU's foreign policy; and (v) transparency issues of the negotiation process.

¹ For example, EU Negotiations with Mercosur are based on the 1999 Negotiation Directives. Negotiations with ASEAN were ongoing since 2007 but have been stopped; the EU is now focusing on bilateral agreements with separate ASEAN members.

² See for an overview of both concluded FTAs and negotiations: Government of India, 'Trade Agreements', http://business.gov.in/trade/trade_agreements.php <accessed 17 August 2013>.

³ P. Ramdasi, 'An Overview of India's Trade Strategy', (2010) *Idées pour le Débat de l'Institut Du Développement Durable et des Relations Internationales/Sciences Po Paris* 1, 35.

⁴ D. Allen, 'The EU and India: Strategic Partners but Not a Strategic Partnership', in T. Christiansen, E. Kirchner and P. Murray (eds.), *The Palgrave Handbook of EU-Asia Relations* (Palgrave Macmillan, 2013), 572-575; G. Sachdeva, 'India-EU Economic Ties: Strengthening the Core of the Strategic Partnership', in L. Peral and V. Sakhuja (eds.), *The EU-India Partnership: Time to Go Strategic?* (EUISS and ICWA, 2012), 54.

⁵ S. McGuire and J. Lindeque, 'The Diminishing Returns to Trade Policy in the European Union', (2010) 48 *Journal of Common Market Studies* 1329, 1329-1333.

2. GENERAL EU-INDIA RELATIONS

Considered 'natural allies in a wide range of global issues' by both parties,⁶ diplomatic relations between India and the EU were established in the early 1960s. Since the 1990s, cooperation between the two increased and their relationship was institutionalised.⁷ In 2004, the European Commission (Commission) proposed the establishment of 'an ambitious strategic partnership between the EU and India.'⁸ The EU identified India as a 'strategic partner', as it increasingly strengthened its position on the international scene, was booming economically and encompasses a vast territory and population.⁹ These 'strategic partnerships' have become one of the key features of European foreign policy as a way for the EU to assert itself while allowing emerging powers like India to build up their status as global players. In the context of this partnership, the EU seeks to deepen economic ties with India through bilateral dialogue on intellectual property rights, trade defence instruments, technical barriers to trade, sanitary and phytosanitary measures, and customs cooperation.¹⁰ The strategic partnership called for an EU-India Action Plan. This plan was presented at the EU-India summit in 2005. Both parties agreed to several commitments, including some aimed at developing trade and investment since, 'while trade and investment flows between India and the EU have been increasing, they remain below potential.'¹¹ Therefore, negotiations towards a broad-based FTA expanded the strategic partnership.¹²

An EU-India FTA would have an impressive scale, creating a market of more than 1.5 billion consumers.¹³ A High Level Trade Group made up of government representatives and business leaders was set up and issued a report recommending several liberalisation measures to be used as a blueprint for FTA negotiations.¹⁴ At the end of 2006, the Commission requested negotiating mandates from EU Member States for bilateral trade agreements with India, Korea and ASEAN.¹⁵ These partners were selected based on the size of their market, the rhythm of their economic growth and the existing level of protection against EU exports. The negotiations were authorised in April 2007 and represented the start

⁶ High Level Trade Group, 'Report of the EU-India High Level Trade Group to the EU-India Summit', (2006) http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_130306.pdf <accessed 17 August 2013>, 2.

⁷ I. Goddeeris, 'EU-India Relations', (2011) *Leuven Centre for Global Governance Studies Policy Brief* 16, 5.

⁸ European Commission, 'Commission Proposes a New Strategic Partnership Between the EU and India', (2004) Press Release IP/04/759, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/04/759&format=HTML&aged=0&lg=da&guiLanguage=en> <accessed 17 August 2013>.

⁹ European Commission, 'An EU-India Strategic Partnership', (2004) Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee COM(2004) 430. See, for a critical analysis of the strategic partnership, D. Allen, 'The EU and India...', *supra* note 4, 571-586.

¹⁰ High Level Trade Group, 'Report of the EU-India High Level Trade Group...', *supra* note 6, 7-8.

¹¹ Council of the European Union, 'The India-EU Strategic Partnership Joint Action Plan', (2005) Press Release 11984/05 (Presse, 223), http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/er/86130.pdf , <accessed 17 August 2013>.

¹² G. Sachdeva, 'India and the European Union: Broadening Strategic Partnership Beyond Economic Linkages', (2008) 45 *International Studies* 341, 360.

¹³ G. Khandekar and J. Sengupta, 'EU-India Free Trade: Make or Break', *FRIDE Agora Asia-Europe Policy Brief* 10, 2.

¹⁴ Council of the European Union, 'The India-EU Strategic Partnership Joint Action Plan', *supra* note 11; High Level Trade Group, 'Report of the EU-India High Level Trade Group...', *supra* note 6, 11.

¹⁵ European Commission, 'European Commission Requests Negotiating Mandates for Bilateral Trade Agreements with India, South Korea, ASEAN', (2006) Press Release, http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_131470.pdf <accessed 17 August 2013>.

of a new generation of FTAs that would be implemented after the multilateral WTO Doha Round talks had failed to produce satisfactory results in time.¹⁶ Moreover, the mandates were part of the 'Global Europe – Competing in the World' (Global Europe Strategy) trade policy framework introduced a year earlier.¹⁷ The FTAs were to be driven by competitiveness and would be comprehensive and ambitious in coverage, targeting the highest possible degree of trade liberalisation, including services and investment.¹⁸ The Global Europe Strategy marked a shift in the EU's policies towards trade by emphasising competition and corporate-driven growth rather than development objectives. Hereby, the EU seems to have changed the balance from providing assistance for human development and poverty reduction projects to facilitating economic cooperation and trade.¹⁹ Moreover, as a result of the Global Europe Strategy, FTA negotiations also include issues for which, partly because of diverging interests between developed and developing countries, WTO negotiations are proving very difficult. These include services and investment liberalisation, and intellectual property rights protection.²⁰ Negotiations on these matters raised concerns from some civil society members with regard to the negative implications that unbridled liberalisation in these sectors could bring about.

In the case of India, the offensive interests of EU export to the growing middle and upper classes in India are clear: among its 1,2 billion inhabitants, there are 69 billionaires (USD), 153,000 millionaires (USD) and a middle class of more than 200 million people.²¹ Concerning its level of protectionism, it can be observed that India's current tariff structure is still elevated compared to the EU's and offers very high levels of protection to the agricultural, automobile, textile and clothing sectors.²² In June 2007, the first round of negotiations on a broad-based bilateral trade and investment agreement took place. The prospects of the negotiations looked positive as the political and economic adjustments necessary for liberalisation seemed relatively easy to attain.²³ However, while the EU-Korea FTA already entered

¹⁶ S. Raihan, 'European Union-India Bilateral Free Trade Agreement: Potential Implications for the Excluded Low-Income Economies in Asia and Africa', in M. Mikic (ed.), *Challenges and Opportunities for Trade and Financial Integration in Asia and the Pacific* (Studies in Trade and Investment of the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP), 2009), 70.

¹⁷ European Commission, 'Global Europe: Competing in the World: A Contribution to the EU's Growth and Jobs Strategy' (2006) Communication from the European Commission.

¹⁸ European Commission, 'European Commission Requests Negotiating Mandates for Bilateral Trade Agreements with India, South Korea, ASEAN', *supra* note 15.

¹⁹ European Commission, 'Global Europe', *supra* note 17, 6. Note that FTAs play various roles in EU trade policy. FTAs with potential Candidate EU Member States, countries addressed in the European Neighborhood Policy and FTAs concluded primarily because of developmental goals also address market access concerns, but serve different goals than purely economically driven FTAs. See M. Cremona, 'The European Union and Regional Trade Agreements', in C. Herrmann and J.P. Terhechte (eds.), *European Yearbook of International Economic Law 2010* (Springer, 2010), 245-268.

²⁰ C. Wichterich and K. Menon-Sen, 'Trade Liberalization, Gender Equality, Policy Space: The case of the contested EU-India FTA', (2009) *WIDE Paper*, http://www.in.boell.org/downloads/Trade_Liberalisation_Gender_Equality_Policy_Space_the_case_of_the_contested_EU_India_FTA_.pdf <accessed 17 August 2013>, 4; S. Raihan, 'European Union-India Bilateral Free Trade Agreement...', *supra* note 16, 70.

²¹ G. Khandekar and J. Sengupta, 'EU-India Free Trade: Make or Break', *supra* note 13, 5.

²² S. Khorana and N. Perdakis, 'EU-India Free Trade Agreement: Deal or No Deal?', (2010) 11 *South Asia Economic Journal* 181, 191. Also see S. Khorana, N. Perdakis, W.A. Kerr & M. Yueng, *The Era of Bilateral Agreements: The EU and India in Search of a Partnership* (Elgar Publishing, 2010).

²³ M. Gasiorek *et al.*, 'Qualitative Analysis of a Potential Free Trade Agreement Between the European Union and India: Executive Summary', (2007) *CARIS-CUTS International Report*, 4.

(provisionally) into force on 1 July 2011, six years of negotiations have yet to produce an EU-India FTA. The latest update from the Commission notes that:

‘Both sides are aiming to find results which are mutually acceptable, so as to achieve an ambitious outcome which would give an important boost to trade between the EU and India.’²⁴

Fundamentally complementary interests between the EU and India in output, capital stock, human resources and trade in goods and services could have given leeway for an ambitious FTA, deepening economic ties and strengthening the Strategic Partnership.²⁵ However, the fact that the negotiations have been going on for such a long time might point to a more significant difference in interests than expected. Additionally, the Strategic Partnership not only requires the EU to deliver results on its trade promises, but also to fulfil the Partnership’s other objectives, such as: the promotion of stability, democracy, human rights, the rule of law and good governance; cooperation on fighting poverty, inequality, social exclusion, sustainable development, environmental protection and climate change; and enhancing economic interaction and securing a strengthened international economic order. Besides, Article 21 TEU obliges the EU to be guided by democracy, the rule of law and human rights in conducting its external policies, including the common commercial policy, under which EU-India trade relations fall. The EU agenda thus consists of both negotiating an ambitious trade agreement while according sufficient significance to other objectives and values.

3. INTERESTS AT STAKE IN THE FTA TALKS

A. ECONOMIC POTENTIAL

Economically, India and the EU are vastly different countries.²⁶ While India’s population more than doubles the EU’s, its GDP is almost a tenth of the EU’s: 1.825 trillion USD versus 16.36 trillion USD. India’s agricultural sector is comparatively much more important, but the domestic services sector also accounts for more than half of national GDP. In the EU, services account for 71.8% of GDP.²⁷ EU-India trade was worth nearly 80 billion euro in 2011, and shrunk to 75 billion in 2012. While India is currently Europe’s ninth trade partner, the EU is India’s largest trading partner.²⁸ Although India’s average tariff dropped from 79% in 1990 to 17% in 2005, current tariffs are still high when compared to the EU’s average tariff (2%).²⁹ Moreover, there are substantial non-tariff barriers to trade with India.³⁰ At the same

²⁴ European Commission, ‘Overview of FTA and Other Trade Negotiations’, (2013)

http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf <accessed 19 August 2013>.

²⁵ High Level Trade Group, ‘Report of the EU-India High Level Trade Group...’, *supra* note 6, 3-4 and 11.

²⁶ See, for an overview of economic interests, D. Chakraborty and A. Kumar, ‘EU-India Bilateral Trade and Investment Agreement: Opportunities and Challenges’, in L. Peral and V. Sakhuja (eds.), *The EU-India Partnership: Time to Go Strategic?* (EUISS and ICWA, 2012), 57-74.

²⁷ CIA, *The World Factbook*, <https://www.cia.gov/library/publications/the-world-factbook/> <accessed 19 August 2013>.

²⁸ European Commission, ‘India EU Bilateral Trade and Trade with the World’, (2013) Statistics, http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113390.pdf <accessed 19 August 2013>.

²⁹ S. Powell ‘The EU-India FTA: Initial Observations from a Development Perspective’, (2008) *Traidcraft Policy Unit Policy Report*,

http://www.traidcraft.co.uk/Resources/Traidcraft/Documents/PDF/tx/policy_report_eu_india_FTA2.pdf <accessed 17 August 2013>, 10; Y. Decreux and C. Mitaritonna, ‘Economic Impact of a Potential Free Trade Agreement

time, Indian exports face up to the heavily regulated European market, which is complicated by divergences in the regulatory framework between EU Member States.

Research commissioned by the Commission into the potential economic effects of an EU-India FTA showed that both parties' exports would be boosted: Indian exports as a result of a depreciation of its currency following an increase in trade, which would reinforce the competitiveness of Indian producers; EU exports from better access to the Indian market.³¹ Moreover, each partner's market share in the other's market would increase. Furthermore, simulations showed that because of the comparatively higher level of protectionism, India's market opening would be significantly greater than the EU's. However, while the EU's terms of trade would improve drastically, their gains would be limited as India is not one of the EU's largest trading partners; the EU's lesser liberalisation would prove more favourable for India as the EU is India's largest trading partner.³² A second commissioned report concluded that trade diversion is a serious risk when an FTA does not provide for substantial, deeper integration; in the case of a more profound FTA, technological changes, spill-overs between companies, niche specialisation and economies of scale can provide substantial gains.³³ Moreover, in line with the aforementioned objectives of the FTA, positive effects of deeper integration are more likely to clearly benefit both parties.³⁴

B. EUROPEAN AND INDIAN TRADE INTERESTS

The 2010 follow-up communication of the Commission to the Global Europe Strategy, '*Trade, Growth and World Affairs*', sums up the broad lines of the EU external trade agenda:

'Cutting tariffs on industrial and agricultural goods is still important, but the brunt of the challenge lies elsewhere. What will make a bigger difference is market access for services and investment, opening public procurement, better agreements on and enforcement of protection of IPR, unrestricted supply of raw materials and energy, and, not in the least, overcoming regulatory barriers including via the promotion of international standards.'³⁵

Moreover, according to the Commission, the economic progress of emerging economies such as India is attributed to growing trade and progressive liberalisation. As a result, millions

(FTA) between the European Union and India', (2007) *CEPII-CIREM Report*, 9-10; World Trade Organization, *Trade Policy Review Report by India*, (2011) WT/TPR/G/249, 67-68.

³⁰ European Commission, 'Bilateral Relations: Countries: India', (2013) <http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/india/> <accessed 17 August 2013>. See, for an example relating to the setting up of a warehouse to gain access to the Indian market: S. Khorana and N. Perdakis, 'EU-India Free Trade Agreement...', *supra* note 22, 198-199.

³¹ Y. Decreux and C. Mitaritonna, 'Economic Impact...', *supra* note 29, 16 and 24.

³² *Ibid.*, 26.

³³ M. Gasiorek *et al.*, 'Qualitative Analysis of a Potential Free Trade Agreement...', *supra* note 23, 2. Also see T. Achterbosch, M. Kuiper and P. Roza, *EU-India Free Trade Agreement: A Quantitative Assessment* (LEI Wageningen UR, 2008), 63.

³⁴ P. Holmes and A. Shingal, 'Potential Benefits from a Deep EU-India Free Trade Agreement', (2009) 7 *Asia Europe Journal* 43, 61.

³⁵ European Commission, 'Trade, Growth and World Affairs: Trade Policy as a Core Component of the EU's 2020 Strategy', (2010) Communication from the European Commission, 4.

of people were lifted out of poverty and a growing middle class was created. Nevertheless, the Commission notes that the success of these economies is also partly the result of 'unnecessarily high barriers to EU exports' while with the benefits of liberalisation also come responsibilities, such as helping to maintain a global regime based on openness.³⁶ Thus, the EU's 'rejection of protectionism at home must be accompanied by activism in creating open markets and fair conditions for trade abroad.'³⁷ As concerns India, and in consistency with the aforementioned economic analyses, the EU will seek the reduction or abolition of non-trade barriers in addition to traditional tariff reductions. Examples of such non-tariff barriers include: quantitative restrictions; import licensing; mandatory testing and certification for a large number of products; complicated and lengthy customs procedures;³⁸ sanitary and phytosanitary measures on mineral water and live cattle and poultry; reciprocity concerning temporary admission of products in transit;³⁹ and market access restrictions to the Indian banking, retail and government procurement sectors.⁴⁰ In short, the EU's interests in an FTA with India underline the core arguments of the external policy of the Global Europe Strategy: creating market access through the lowering of non-tariff barriers, allowing access to resources and tapping into new areas of growth such as intellectual property, services, investment, public procurement and competition.⁴¹

On the other side of the table, Indian goals and objectives in the FTA negotiations are to be seen in the light of the economic developments in the region. Asia is in a process of economic integration and there are many FTAs at different stages of completion. Such integration might mean that in the future, the EU could face more challenges to establish a presence in those countries.⁴² India is also looking for new markets in Asia, Africa and Latin America and, in order to counter the effects of the global financial and economic crisis, it has developed a strategy called the Focus Market Scheme aimed at decreasing its reliance on traditional markets like Europe and the United States.⁴³ Furthermore, if the EU's bilateral approach with regard to ASEAN members proves successful⁴⁴ (as appears to be the case), India may want to assess how preferential the FTA with the EU will be, as it will face competition from these countries within the EU market.⁴⁵

4. BONES OF CONTENTION

We now turn to five contentious issues of the EU-India FTA negotiations that have attracted critical reflections or even outright protests from civil society, and have (at least partly) given

³⁶ European Commission, 'Global Europe', *supra* note 17, 6.

³⁷ European Commission, 'Trade, Growth and World Affairs', *supra* note 35, 6.

³⁸ European Commission, 'Bilateral Relations: Countries: India', *supra* note.

³⁹ D. Lecuyer and C. Vadcar, 'Inde: de l'Intérêt pour l'Union Européenne de Négocier un Accord Ambitieux', (2007) 506 *Revue du Marché commun et de l'Union européenne* 172, 175-176.

⁴⁰ S. Khorana and N. Perdakis, 'EU-India Free Trade Agreement...', *supra* note 22, 192.

⁴¹ European Commission, 'Global Europe', *supra* note 17, 6-7.

⁴² G. Khandekar, 'Asia as a Geo-Economic Hub', in A. Martiningui and R. Youngs (eds.) *Challenges for European Foreign Policy in 2012: What Kind of Geo-Economic Europe?* (FRIDE, 2011), 63-71.

⁴³ G. Khandekar and J. Sengupta, 'EU-India Free Trade: Make or Break', *supra* note 13, 3.

⁴⁴ European Commission, 'Overview of FTA and Other Trade Negotiations', *supra* note 23.

⁴⁵ S. Sharma, 'The EU-India FTA: Critical Considerations in a Time of Crisis', (2009) Centad Working Paper, 15.

rise to official reactions.⁴⁶ The first issue concerns the Indian services sector and Indian interests in liberalising access to the vast EU services market. Secondly, the production of generic medicines in India is at loggerheads with the EU's interests in intellectual property protection. Thirdly, we turn attention to the Indian dairy sector and the consequences for European produce sectors. Next, some issues concerning diverging non-trade interests are addressed. Lastly, we examine transparency issues in the trade negotiations.

A. LABOUR STANDARDS AND GATS MODE 4 LIBERALISATION

As the Indian economy is characterised by growth that relies on domestic consumption and currently trades less than the average country, India's interests in an FTA with the EU are manifold.⁴⁷ However, the country's trade policy is fairly constrained by its concerns for the poorer part of its population. More than half of India's population is under the age of 25, necessitating a growth strategy centred on job-creation rather than one centred on export-led one. These demographics and its education system have provided India with a skilled, competitive, English-speaking work force, of which Europe will be short in the near future.⁴⁸ This adds to why tariff reductions alone will not make the EU-India FTA sufficiently economically interesting for India. In line with EU practice, this resulted in the inclusion of provisions on the abolition of non-tariff barriers such as standards, mutual recognition or licensing requirements.⁴⁹

India has a comparative advantage in services trade.⁵⁰ The services sector is of crucial importance to the country. It constitutes approximately 56% of Indian GDP.⁵¹ Growth in India's services sector has been exceptional, with services exports rising the fastest of the twenty largest services exporters between 1994 and 2003 and exceeding 17% growth per year.⁵² As to the growth of imported services during the same period, India comes second after China.⁵³ The IT industry is an important part of the services sector⁵⁴ and its share in services exports grew from 19% in 1997-1998 to 41% in 2006-2007.⁵⁵ In 2007, 92% of all services exports related to software, travel, transportation, management or architecture and engineering.⁵⁶ India's trade in services with the EU amounted to more than 22 billion euro in 2011.⁵⁷

These structural elements of the Indian economy mean that India is particularly interested in the liberalisation of services under Modes 1 and 4 of GATS. GATS defines four modes of

⁴⁶ For a more general overview of contentious issues in EU-India FTA negotiations, see S. Khorana and M. Garcia, 'European Union-India Trade Negotiations: One Step Forward, One Back?', (2013) 51 *Journal of Common Market Studies* 684.

⁴⁷ T. Achterbosch, M. Kuiper and P. Roza, *EU-India Free Trade Agreement...*, *supra* note 33, 19.

⁴⁸ High Level Trade Group, 'Report of the EU-India High Level Trade Group...', *supra* note 6, 2-3.

⁴⁹ S. Sharma, 'The EU-India FTA: Critical Considerations in a Time of Crisis', *supra* note 45, 5.

⁵⁰ P. Holmes and A. Shingal, 'Potential Benefits...', *supra* note 34, 61.

⁵¹ CIA, *The World Factbook*, <https://www.cia.gov/library/publications/the-world-factbook/> <accessed 19 August 2013>.

⁵² P. Holmes and A. Shingal, 'Potential Benefits...', *supra* note 34, 58.

⁵³ *Ibid.*

⁵⁴ G. Sachdeva, 'India and the European Union...', *supra* note 12, 342.

⁵⁵ P. Holmes and A. Shingal, 'Potential Benefits...', *supra* note 34, 58.

⁵⁶ *Ibid.*

⁵⁷ European Commission, 'Bilateral Relations: Countries: India', *supra* note 30.

services supply, according to which commitments are made by WTO Members. While Mode 1 concerns services supplied from the territory of one Member into the territory of another, Mode 4 refers to the supply of services by a service supplier of one Member through the presence of natural persons of that Member in the territory of another.⁵⁸ In Mode 4, it is thus the service supplier who moves to the other State, while the recipient of the service does not. It is important to note that the scope of Mode 4 is limited to service suppliers who move temporarily, and, as stipulated in the GATS Annex on Movement of Natural Persons, it does not concern access to local labour markets. Thus, it is to be distinguished from economic immigration, although fears exist that Mode 4 may be used as a backdoor for such purposes.⁵⁹ Practically, the liberalisation of Mode 4 service supplies facilitates the free movement of independent professionals – like software engineers – by committing to measures such as more relaxed visa requirements or labour market tests by which the presence of certain foreign service suppliers is regulated.⁶⁰ As India's skilled services labour force is growing very fast, India puts a stronger emphasis on better market access for services suppliers through Mode 4 liberalisation than market access for goods in trade negotiations.⁶¹ At first glance, EU interests might seem similar to India's considering the former's level of highly skilled services providing work force and its consequent offensive interests;⁶² however, the EU does not, in the WTO or in other FTAs, seem willing to liberalise extensively with regard to Mode 4.⁶³ India's interest in the liberalisation of Mode 1 service supplies, which could have an impact on the use of call centres and down-the-line software engineering,⁶⁴ has similarly not attracted enthusiasm from the EU: its offers regarding Mode 1 in the Doha Round (or Doha Development Agenda, DDA), too, have been limited.⁶⁵ But the EU does have interests in the Indian services sector, more specifically in obtaining additional market access to the banking, health, insurance, education and construction sectors; in consolidating market access in IT and telecom; and in tapping into the still very protected retail, legal, accountancy, postal and distribution services sectors.⁶⁶ Thus, both parties have a shared interest in reaching agreement on provisions liberalising trade in services.⁶⁷ However, the European Economic and Social Committee (EESC), a consultative body of the EU, voiced concerns regarding Mode 4 liberalisation. It held that negotiators consulted large businesses but neglected other societal stakeholders. The EESC recommended that the Commission consult trade unions to clarify questions on labour guarantees and Mode 4 liberalisation, for example through eased visa requirements. It also called for an impact assessment on different Mode 4 scenarios before the agreement is concluded in order to evaluate the impact on the quality and quantity of work in different sectors and Member

⁵⁸ Art I:2 (a) and (d) GATS.

⁵⁹ R. Leal-Arcas, 'The European Union and New Leading Powers: Towards Partnership in Strategic Policy Areas', (2008) 32 *Fordham International Law Journal* 345, 392-395.

⁶⁰ S. Khorana and N. Perdakis, 'EU-India Free Trade Agreement...', *supra* note 22, 193.

⁶¹ G. Khandekar, 'The EU-India Summit: On the Threshold of Change', (2012) *FRIDE Agora Asia-Europe Policy Brief* 8, 2.

⁶² R. Leal-Arcas, 'The GATS in the Doha Round: A European Perspective', in K. Alexander and M. Andenas (eds.), *The World Trade Organization and Trade in Services* (Martinus Nijhoff, 2008), 53.

⁶³ B. Hoekman, A. Mattoo and A. Sapir, 'The Political Economy of Services Trade Liberalization: A Case for International Regulatory Cooperation?', (2007) 23 *Oxford Review of Economic Policy* 367, 375.

⁶⁴ M. Gasiorek *et al.*, 'Qualitative Analysis of a Potential Free Trade Agreement...', *supra* note 23, 4.

⁶⁵ B. Hoekman, A. Mattoo and A. Sapir, 'The Political Economy of Services Trade Liberalization: A Case for International Regulatory Cooperation?', (2007) 23 *Oxford Review of Economic Policy* 367, 375.

⁶⁶ S. Khorana and N. Perdakis, 'EU-India Free Trade Agreement...', *supra* note 22, 193-194.

⁶⁷ M. Gasiorek *et al.*, 'Qualitative Analysis of a Potential Free Trade Agreement...', *supra* note 23, 4.

States.⁶⁸ Concerns on labour standards are based on the fact that India has yet to ratify four fundamental International Labour Organisation Conventions, despite being a founding member of the organisation.⁶⁹ The situation is precarious especially in relation to child labour, as India has not ratified the 1973 Minimum Age Convention or the 1999 Worst Forms of Child Labour Convention.⁷⁰ India's claims that its constitution covers the remaining labour rights cannot remedy this: as national laws are restricted, state laws vary considerably and even for rights enshrined in ratified conventions, practice is not consistent with obligations and discrimination still exists in employment and wages.⁷¹

EU offers on Mode 4 liberalisation in the DDA seem to have taken these concerns into account. The conditional offers contain market access commitments on short-term residence permits for specialist service providers, but these permits are subject to EU working conditions, minimum wages and collective wage agreements and the EU could refuse entry on grounds of public security or risk of abuse.⁷² It remains to be seen whether and how the EU-India FTA would deviate from these provisions. For the EU, they could certainly be a way to circumvent India's waning interest in including provisions on fairer labour standards in the FTA.⁷³ But, as Article 21 TEU requires the EU to be guided by its internal principles and to foster the sustainable economic and social development of developing countries, it might be argued that the EU should not agree to exempt labour rights from the FTA in order to act in accordance with its own goals, repeated in the Global Europe Strategy: 'As we pursue social justice and cohesion at home, we should also seek to promote our values, including social and environmental standards and cultural diversity, around the world.'⁷⁴ Moreover, the EU-Korea FTA, mandated simultaneously with the EU-India FTA, does include provisions on labour standards, amongst which is a commitment to ratify fundamental International Labour Organisation conventions.⁷⁵ Although Korea has hitherto not ratified any of the four fundamental conventions,⁷⁶ the very inclusion of these provisions in a chapter also dealing with the environment and sustainable development makes it more difficult for India to renounce the inclusion of these provisions in the FTA. Positive effects for Korea from the

⁶⁸ European Economic and Social Committee, 'Opinion of the European Economic and Social Committee on the Role of Civil Society in the Free Trade Agreement Between the EU and India', (2011) REX/316 CESE 1612/2011, 4-5.

⁶⁹ D. Gupwell and N. Gupta, 'EU FTA Negotiations with India, ASEAN and Korea: the Question of Fair Labour Standards', (2009) 7 *Asia Europe Journal* 79, 86.

⁷⁰ International Labour Standards Division, 'List of Ratifications of International Labour Conventions: India', <http://webfusion.ilo.org/public/applis/appl-byCtry.cfm?lang=EN&CTYCHOICE=0330&hdroff=1> <accessed 17 August 2013>.

⁷¹ ECORYS, CUTS International and CENTAD, 'Trade Sustainability Impact Assessment for the FTA Between the EU and the Republic of India', (2009) Final Report TRADE07/C1/C01 – Lot 1, 396; D. Gupwell and N. Gupta, 'EU FTA Negotiations...', *supra* note 69, 86.

⁷² R. Leal-Arcas, 'The Resumption of the Doha Round and the Future of Services Trade', (2007) 29 *Loyola of Los Angeles International and Comparative Law Review* 339, 393-394.

⁷³ See, for an overview of issues related to this: D. Gupwell and N. Gupta, 'EU FTA Negotiations...', *supra* note 68. See, on India's refusal to include provisions on labour standards: Economic Times Bureau, 'Labour Pangs Likely to Hold Up India-EU Free-Trade Agreement', (2009) *The Economic Times* 7 November 2009, http://articles.economicstimes.indiatimes.com/2009-11-07/news/28434950_1_india-eu-trade-india-and-eu-india-eu-free-trade-agreement <accessed 17 August 2013>.

⁷⁴ European Commission, 'Global Europe', *supra* note 17, 5.

⁷⁵ Art. 13.4, Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, O.J., 2011, L 127/6.

⁷⁶ International Labour Standards Division, 'List of Ratifications of International Labour Conventions: Republic of Korea', <http://webfusion.ilo.org/public/db/standards/normes/appl/appl-byCtry.cfm?hdroff=1&CTYCHOICE=1450&Lang=EN> <accessed 17 August 2013>.

inclusion might also mitigate Indian resistance to a similar provision.⁷⁷ According to a sustainability impact assessment commissioned by the Commission, such positive effects could potentially bolster the profile of India's market and products, while the quality of work may also be improved by defining core labour standards.⁷⁸ Additionally, as many foreign buyers looking to export Indian goods impose labour standards, exports may rise through the adoption of such standards.⁷⁹

India's refusal to include labour standards in the FTA may not be motivated by substantive, unbridgeable concerns, but rather by the 'sensitivity and prestige in not wanting to be subjected to any pressure on these issues where trade relations are involved'.⁸⁰ It thus remains to be seen whether provisions, even if sufficiently vague, will be acceptable for India. Since there is a risk of deteriorating labour conditions through the conclusion of the FTA⁸¹ and considering its obligations flowing from EU law, the EU might not give in on this matter. Moreover, concluding the agreement requires the consent of the European Parliament (EP), who has expressly asked the Commission to include a list of minimum standards corresponding to the eight core International Labour Organisation Conventions.⁸² With regard to India, the EP asked that, as a minimum, these eight conventions and four priority conventions be included in the FTA.⁸³ As the integration of India in the global market may impose improved standards in any case,⁸⁴ perhaps a diplomatic twist might trigger an outcome.

B. INTELLECTUAL PROPERTY PROTECTION AND GENERIC MEDICINES

A second contentious issue relates to intellectual property protection, on which the negotiations in the EU-India FTA have drawn the general public's attention after leaked drafts revealed that provisions on intellectual property protection were extensive, affecting the pharmaceuticals sector, and could go beyond WTO obligations under the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement. This was surprising: India repeatedly took positions in the World Intellectual Property Organization (WIPO) and the WTO indicating that it was not willing to commit to an agreement beyond TRIPS.⁸⁵ Moreover, in the past, the EU preferred to seek compliance with TRIPS and other intellectual property conventions rather than press for deeper commitments in its FTA negotiations.⁸⁶ But this

⁷⁷ D. Gupwell and N. Gupta, 'EU FTA Negotiations...', *supra* note 69, 95.

⁷⁸ ECORYS, CUTS International and CENTAD, 'Trade Sustainability Impact Assessment...', *supra* note 71, 142 and 274.

⁷⁹ *Ibid*, 237.

⁸⁰ D. Gupwell and N. Gupta, 'EU FTA Negotiations...', *supra* note 69, 91.

⁸¹ ECORYS, CUTS International and CENTAD, 'Trade Sustainability Impact Assessment...', *supra* note 71, 276.

⁸² European Parliament, 'Resolution of 25 November 2010 on Human Rights and Social and Environmental Standards in International Trade Agreements, (2009) 2009/2219(INI), 15(a).

⁸³ European Parliament, 'European Parliament Resolution of 11 May 2011 on the State of Play in the EU-India Free Trade Agreement negotiations', (2011) 2011/2620(RSP), 30.

⁸⁴ ECORYS, CUTS International and CENTAD, 'Trade Sustainability Impact Assessment...', *supra* note 71, 276.

⁸⁵ C. Correa, 'Negotiation of a Free Trade Agreement European Union-India: Will India Accept Trips-Plus Protection?', (2009) *Oxfam Deutschland and Evangelischer Entwicklungsdienst Analysis*, http://www.oxfam.de/files/20090609_negotiationofafreetradeagreementeuindia_218kb.pdf <accessed 17 August 2013>, 3.

⁸⁶ S. Woolcock, 'European Union Policy Towards Free Trade Agreements', (2007) *ECIPE Working Paper* N.03/2007, 9.

practice may have changed: the patent protection term, for example, was extended in the EU-Colombia and Peru and EU-Korea FTAs.⁸⁷

Civil society's protests are linked to India's pharmaceutical sector, which has been called 'the pharmacy of the developing world',⁸⁸ as Indian companies develop and produce generic medicines that are being used by many aid organisations. For example, nearly 80% of generic medicines for the treatment of AIDS are sourced from India.⁸⁹ As a result, the cost of treatment fell significantly from 10,000 to 100 USD per person per year.⁹⁰ But because India does not always recognise patents, it is believed that pharmaceutical companies have been pressuring the EU to demand stricter rules on intellectual property protection⁹¹, extracting commitments that go beyond WTO obligations.⁹² Such commitments could include so-called data exclusivity protection measures, according to which pharmaceutical companies can exclusively retain the rights to their test results for periods of up to ten years (delaying generic medicines), or a practice referred to as 'ever-greening', in which slight alterations to medicine are sufficient to allow a new patent (prolonging intellectual property protection).⁹³ Aid organisations such as Oxfam, Médecins Sans Frontières and Unitaid have voiced concerns regarding such provisions in the EU-India FTA. Concerning the negotiations between the EU and the Andean region, the EU-Latin American and Caribbean Alliance for Access to Medicines Network carried out impact studies assessing the effects of intellectual property rights protection in FTAs. According to these studies, extension of the patent and trial data protection would significantly increase medicine spending. The negotiations with the Andean region did not include provisions on data exclusivity and data protection, but in the case of India, the impact of such provisions would be substantial and would especially affect the poorest part of the population.⁹⁴

The sustainability impact assessment report on the EU-India FTA recognised this concern by stating that commitments should not impair the capacity to promote access to medicines in line with TRIPS flexibility, and by explicitly reiterating that foreign pharmaceutical companies would be legally allowed to charge higher prices to recuperate research and development

⁸⁷ Art 223(4) of the former, Article 10-35(2) of the latter. See: M. El Said, 'The European Union Free Trade Agreements (EU FTAs) and TRIPS-Plus: Challenges and Opportunities for the Ukraine', (2010) Paper presented at the UNDP Seminar on Intellectual Property Rights and Access to Essential Medicines: Challenges and Opportunities in Free Trade Agreement Negotiations, Multilateral Instruments and National Laws, 21-22 June 2010, Kiev, Ukraine, 4-5.

⁸⁸ R. Malpani, 'The EU-India Free Trade Agreement: Is it the End of the World as We Know It?', <http://blogs.oxfam.org/en/blog/12-02-09-eu-india-free-trade-agreement-it-end-world-we-know-it> <accessed 17 August 2013>.

⁸⁹ Médecins Sans Frontières, 'EU India Free Trade Agreement: Investment and Intellectual Property Chapters Threaten Access to Medicines', (2011) *Médecins Sans Frontières Briefing Note*, http://www.msfaccess.org/sites/default/files/MSF_assets/Access/Docs/Access_Briefing_IPInvestChpFTA_ImplicationsHealth_Full_ENG_2011.pdf <accessed 17 August 2013>, 1.

⁹⁰ S. Boseley, 'Does EU/India free trade agreement spell the end of cheap drugs for poor countries?', (2012) *The Guardian*, <http://www.guardian.co.uk/society/sarah-boseley-global-health/2012/feb/10/hiv-infection-pharmaceuticals-industry?INTCMP=SRCH> <accessed 17 August 2013>.

⁹¹ *Ibid.*

⁹² Health Action International, 'EU-India FTA Poses a Serious Threat to Access to Affordable Medicines in the Developing World', (2010) Press Release, <http://haieurope.org/wp-content/uploads/2010/12/27-Apr-2010-Press-release-EU-India-FTA-poses-a-serious-threat-to-ATM-in-the-developing-world.pdf> <accessed 17 August 2013>.

⁹³ S. Sharma, 'The EU-India FTA: Critical Considerations in a Time of Crisis', *supra* note 45, 33-34.

⁹⁴ Health Action International, 'EU-India FTA Poses a Serious Threat...', *supra* note 92.

costs.⁹⁵ The Commission responded to civil society concerns by issuing a Q&A document on access to medicines in the negotiations. The document states that the intellectual property provisions in the FTA will not weaken 'India's right and capacity to manufacture and export life-saving medicines to other developing countries facing public health problems.'⁹⁶ It adds that, although the Commission believes in the importance of data exclusivity, it will be flexible and will take into account the position of India as producer of essential generic medicines. Furthermore, the Commission declares it is 'doing a lot to promote access to medicines in developing countries', through funding projects and programmes; participation in the World Health Organization; the WTO debate on TRIPS concerning public health; and a tiered pricing mechanism for the supply of cheaper medicines to developing countries (which allows EU companies to sell products much more cheaply to developing countries).⁹⁷ In two letters to Médecins Sans Frontières, EU Trade Commissioner De Gucht stressed that the purpose of the enforcement measures on intellectual property protection is to tackle products infringing copyrights, not generic medicines, and that the provisions of the FTA will not target legitimate trade in generic medicines.⁹⁸ The letters focus strongly on the difference between generic medicines that violate intellectual property rights and those that do not, but this might not alleviate concerns as to the impact of the FTA's provisions on the production and export of generic medicines. Echoing these concerns, the EP in its resolution of 11 May 2011 asked, 'the Commission not to request data exclusivity in the context of intellectual property rights negotiations [...] and to recognise that data exclusivity would have far-reaching consequences for the production of generic medicines and is therefore detrimental to developing countries' access to medicines and public health policy.'⁹⁹ More recently, after the twelfth EU-India summit, in a press release by the Head of the EU Delegation to Thailand addressing an open letter from Thai civil society organisations on the matter, it was reaffirmed that the EU 'recognizes India's right to issue compulsory licensing for medicines and has no intention of weakening India's capacity to manufacture and export medicines to other developing countries,' while adding that the EU is open to a constructive dialogue with civil society organisations and other stakeholders.¹⁰⁰

C. SUBSIDISED AGRICULTURE AND THE DAIRY SECTOR

⁹⁵ ECORYS, CUTS International and CENTAD, 'Trade Sustainability Impact Assessment...', *supra* note 71, 261 and 266.

⁹⁶ European Commission, 'EU-India FTA Negotiations and Access to Medicines Questions and Answers', (2010) http://trade.ec.europa.eu/doclib/docs/2010/may/tradoc_146191.pdf <accessed 17 August 2013>.

⁹⁷ Reg. 953/2003, intended to avoid trade diversion into the EU of certain key medicines.

⁹⁸ K. De Gucht, 'Reply from the European Commissioner for Trade to MSF (Médecins Sans Frontières) Regarding Access to Medicines of 7 December 2010', (2010)

http://trade.ec.europa.eu/doclib/docs/2010/december/tradoc_147167.pdf <accessed 17 August 2013>; K. De Gucht, 'Reply from the European Commissioner for Trade to MSF (Médecins Sans Frontières) Regarding Access to Medicines of 25 May 2010', (2010) http://trade.ec.europa.eu/doclib/docs/2010/may/tradoc_146192.pdf <accessed 17 August 2013>.

⁹⁹ European Parliament, 'European Parliament Resolution of 11 May 2011...', *supra* note 83, 26.

¹⁰⁰ D. Lipman, 'The EU Fully Recognizes India's Right to Issue Compulsory Licensing for Medicines and has No Intention of Weakening India's Capacity to Manufacture and Export Medicines to Other Developing Countries, including Thailand', (2012) Press Release, http://eeas.europa.eu/delegations/thailand/documents/news/20120210_01_en.pdf <accessed 17 August 2013>; additionally, see, on access to medicine, intellectual property protection and trade: WTO, WIPO and WHO, *Promoting Access to Medical Technologies and Innovation: Intersections between Public Health, Intellectual Property and Trade*, 2012, 251p.

Civil society has also pointed to the EU's offensive interests with regard to agriculture. As could be expected from DDA negotiations and as evidenced by the EU's internationally-contested agriculture subsidization, agricultural negotiations would not be easy. At the moment, European agricultural imports from India are over five times larger than its exports to India, even though EU tariff rates on such imports are relatively high.¹⁰¹

With regard to the Indian dairy sector, which includes the production of raw milk and value-added products like butter and cheese, the demand for products has been rising and domestic dairy farmers are able to produce competitive products because their production costs are low.¹⁰² Many of the 90 million workers in the dairy sector are landless.¹⁰³ The Indian dairy market is targeted by EU dairy producers and lower tariffs on agricultural and dairy products could have serious implications for Indian dairy farmers; their products risk competitive pressures from cheap EU imports, which the EU heavily subsidises and protects.¹⁰⁴ Heavy protests from the Indian dairy sector were to be expected, as experience shows. After import quotas for skimmed milk powder were removed in 1999, imports from Europe jumped, and while no tariffs existed on skimmed milk powder, India imported 130,000 tons of skimmed milk powder from the EU. A bit later, though, the Indian government reinstated tariffs after the Indian dairy industry complained that domestic producers could not compete with subsidised imports.¹⁰⁵

Indian politicians seem to have been reminded of the EU's agricultural sensitivities when considering drastically lowering tariffs for subsidised European agricultural products, and resultantly, some dairy products have been added to the list of 'sensitive products'.¹⁰⁶ Additionally, India's other FTAs only marginally address agriculture in practice, if at all. India thus has strong defensive agricultural interests to protect the means of support of weaker parts of its population. This policy is unlikely to change fundamentally in the case of a deal with the EU.¹⁰⁷ The sustainability impact assessment did not include an analysis of the dairy sector as they 'do not constitute an important share of trade between the EU and India [...]'. Given the limited number of sectors and issues to be analysed, a choice has to be made.¹⁰⁸ According to some civil society actors, negotiations could be stalled on this subject as it appears important to negotiators.¹⁰⁹ In contrast and after consultations with relevant officials, drafters of a qualitative report on the FTA's economic impact predicted that agricultural

¹⁰¹ T. Achterbosch, M. Kuiper and P. Roza, *EU-India Free Trade Agreement...*, *supra* note 33, 21; S. Khorana and N. Perdikis, 'EU-India Free Trade Agreement...', *supra* note 22, 195-196.

¹⁰² S. Powell 'The EU-India FTA: Initial Observations from a Development Perspective', *supra* note 29, 13.

¹⁰³ P. Eberhardt and D. Kumar, 'Trade Invaders: How Big Business is Driving the EU-India Free Trade Negotiations', (2010) *Corporate Europe Observatory and India FDI Watch Report*, 21.

¹⁰⁴ The average of EU tariffs on agricultural products is 14,9%, compared to 3,8% on industrial goods. Dairy product tariffs are on average 64,1%, with a peak of 231%. S. Khorana and N. Perdikis, 'EU-India Free Trade Agreement...', *supra* note 22, 191.

¹⁰⁵ S. Powell 'The EU-India FTA: Initial Observations from a Development Perspective', *supra* note 29, 14.

¹⁰⁶ S. Khorana and N. Perdikis, 'EU-India Free Trade Agreement...', *supra* note 22, 191.

¹⁰⁷ T. Achterbosch, M. Kuiper and P. Roza, *EU-India Free Trade Agreement...*, *supra* note 33, 19 and 62.

¹⁰⁸ ECORYS, CUTS International and CENTAD, 'Trade Sustainability Impact Assessment...', *supra* note 71, 415.

¹⁰⁹ *Ibid*, 420.

liberalisation would not prove to be a breaking point for the conclusion of the FTA.¹¹⁰ In any case, the EU seems to be pushing towards an agreement on agriculture.¹¹¹

D. SHARED VALUES AND THE TRADE NEGOTIATIONS

A Strategic Partnership is to be built on shared values as well as shared economic interests.¹¹² India committed to the Non-Aligned Movement (NAM) during the Cold War,¹¹³ but adhered to a more neo-realist approach towards international relations since the 1990s.¹¹⁴ This is reflected in an inclination to favour the hard power model of the United States more than the EU's soft power model.¹¹⁵ Moreover, the EU has a low profile in Indian public debate. Anglo-American media largely shapes India's image of Europe¹¹⁶ and there has been negative reporting on the EU in issues dealing with climate change and trade disputes in, among others, the automobile and pharmaceutical industries.¹¹⁷ As India is more accustomed to bilateral action with particular EU Member States, it expects the EU to act in the same way as these Member States do.¹¹⁸ However, things do not work that way in EU internal decision-making. Moreover, some Member States have pushed for certain provisions in the FTA that have been poorly received by India and resulted in stalled talks. For example, the Netherlands pressed for the inclusion of a human rights clause. Such claims find support in Articles 2, 3(5) and 21(1) TEU, which require the EU to uphold and promote human rights in its relations with the wider world. Article 207(1) TFEU reaffirms this for the Common Commercial Policy. The Strategic Partnership between the EU and India was to be guided by, amongst others, the promotion of human rights and should co-ordinate and harmonise positions on major multilateral human rights conferences and conventions. The Commission stated that the FTA should engage India in human rights topics in a mutually respectful and constructive way: regular human rights reports with recommendations for the EU-India human rights dialogue should be produced and India should start regular human rights discussions with EU officials.¹¹⁹ The EESC has called on the Commission to make sure the FTA complies with human rights, asserting that it is essential that such a clause be attached to the FTA.¹²⁰ Likewise, the EP declared that a human rights clause is an essential element of the FTA, including explicit mention of the persecution of religious minorities and human

¹¹⁰ M. Gasiorek *et al.*, 'Qualitative Analysis of a Potential Free Trade Agreement...', *supra* note 23, 4.

¹¹¹ A. Sen, 'India-EU Meet: India to Resist Move to Open Multi-Brand Retail & Other Sectors to Foreign Investments', (2012) *The Economic Times* 26 June 2012, http://articles.economictimes.indiatimes.com/2012-06-26/news/32424922_1_india-eu-ambassador-eu-trade-commissioner <accessed 17 August 2013>.

¹¹² European Commission, 'An EU-India Strategic Partnership', *supra* note 9, 2.

¹¹³ A. Coulon, 'EU-India Understandings on Major Global Political Issues: Where do we Stand?', in K. Voll and D. Beierlein (eds), *Rising India-Europe's Partner?* (Mosaic Books and Weißensee Verlag, 2006), 343-344.

¹¹⁴ C. Jaffrelot, 'India and the European Union: The Charade of a Strategic Partnership', (2006) *SERI Sciences Po Working Paper*, 5.

¹¹⁵ A. Coulon, 'EU-India Understandings...', *supra* note 113, 344.

¹¹⁶ R. Jain, 'India and the European Union: Perceptions and Policies', (2009) Paper presented at the European Studies in Asia (ESIA) Network Public Panel on EU-Asian Relations: Policies and Perceptions of the EU in Malaysia, Asia-Europe Institute, University of Malaysia, http://www.asef.org/images/docs/1114-Prof._Rajendra_K_Jain_Presentation.pdf <accessed 17 August 2013>, 1.

¹¹⁷ R. Jain and S. Pandey, 'The European Union in the Eyes of India', (2010) 8 *Asia Europe Journal* 193, 202.

¹¹⁸ J. Stefan-Bastl, 'The Future of EU-India Strategic Relations', in K. Voll and D. Beierlein (eds), *Rising India-Europe's Partner?* (Mosaic Books and Weißensee Verlag, 2006), 355.

¹¹⁹ European Commission, 'An EU-India Strategic Partnership', *supra* note 9, 2, 2.1.1 and 2.1.6.

¹²⁰ European Economic and Social Committee, 'Opinion...', *supra* note 68, 7.

rights defenders in India and the current human rights situation in Kashmir.¹²¹ Nevertheless, in its 2010 communication *'Trade, growth and world affairs'*, the Commission only speaks of encouraging partners to promote the respect of human rights¹²², while the earlier Global Europe Strategy does not mention human rights at all. Human rights protection thus does not seem to be a priority for the Commission, at least not for DG Trade.¹²³

India's position throughout the negotiations has been that human rights conditions as well as environmental standards or non-proliferation clauses should not be included or connected to the FTA.¹²⁴ According to Rajendra Jain, a prominent Indian author, the EU needs to change its attitude and seek to cooperate with the emerging economies rather than demanding compliance with its values.¹²⁵ Another author, though, claims that India should see a human rights clause as a means of improving its international profile. He argues that India should implement the international conventions it has signed up to rather than point fingers at the EU.¹²⁶

Is an FTA the place for provisions that do not relate to trade, and can the EU use its economic power to effectively force values upon its trade partners? Article 21 TEU seems to require the EU to do the latter to some extent, but it might not require the inclusion of human rights clauses in the FTA proper (see *infra*, on EU-Korea).¹²⁷ The EP adopted a resolution on this issue, calling on the EU not to see trade as an end but as a tool.¹²⁸ It 'firmly support[ed] the practice of including legally binding human rights clauses in the EU's international agreements' and as the existing sustainability impact assessment does not address human rights, requested the Commission to commission impact assessments on human rights.¹²⁹ Moreover, the EP called on the Commission to include a list of minimum standards that FTA partners must adhere to, which, for human rights, must correspond to the list of conventions set out in Annex III of the EU Regulation on the scheme of generalised tariff preferences.¹³⁰ Practice reveals that many FTAs concluded by the EU include human rights provisions, although the formulation in the various FTAs differs considerably.¹³¹ Article 1 of the 2012 FTA with Colombia and Peru provides that respect for fundamental human rights (as well as

¹²¹ European Parliament, 'Resolution of 26 March 2009 on an EU-India Free Trade Agreement', (2009) 2008/2135(INI), 43.

¹²² European Commission, 'Trade, Growth and World Affairs', *supra* note 35, 15.

¹²³ See also A. Paasch, 'Human Rights in EU Trade Policy – Between Ambition and Reality', (2012) *Ecofair Trade Dialogue Discussion Paper*, 8.

¹²⁴ G. Khandekar, 'The EU and India: A Loveless Arranged Marriage', (2011) *FRIDE Policy Brief* n.90, 2.

¹²⁵ R. Jain, 'India and the European Union: Perceptions and Policies', *supra* note 116, 5.

¹²⁶ G. Khandekar, 'The EU and India: A Loveless Arranged Marriage', *supra* note 124, 5.

¹²⁷ See, on this subject, L. Bartels, 'The Application of Human Rights Conditionality in the EU's Bilateral Trade Agreements and Other Trade Arrangements with Third Countries', (2008) Study for the Directorate-General for External Policies of the Union, Policy Department External Policies.

¹²⁸ European Parliament, 'Resolution of 25 November 2010...', *supra* note 82, 1.

¹²⁹ *Ibid*, 13 and 19(b).

¹³⁰ *Ibid*, 15(a). Annex III of Council Regulation (EC) 732/2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 includes which include the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Suppression and Punishment of the Crime of Apartheid.

¹³¹ L. Bartels, 'The Application of Human Rights Conditionality...', *supra* note 127, 17-18.

democratic principles and the rule of law) constitutes an essential element of the agreement; however, the only sanction provided is taking 'appropriate measures in accordance with international law'.¹³² According to a study commissioned to help the EP evaluate this FTA, the enforceability is robust and there is no lack of power to act against insufficient progress of human rights violations; rather, the question is whether the EU will be ready to do so.¹³³ It has been correctly observed that the enforceability is much less strongly worded than in the Cotonou Agreement.¹³⁴ Interestingly, in the case of EU-Korea relations, the FTA only refers to human rights in its preamble, but a version of the aforementioned 'essential clause' can be found in the EU-Korea framework agreement.¹³⁵ It appears, therefore, that Treaty obligations and internal political pressure do not necessarily lead to an extensive human rights clause in the actual FTA, but that such an inclusion depends on the wider (strategic) relationship between the parties. However this may be, the EP and the Commission have disagreed on this matter, causing the former to adopt a resolution stating that the EU's policy triggered criticism of a 'double standard' in deciding to enforce human rights provisions in FTAs. The EP cited that it applies sanctions inconsistently by treating countries differently when their human rights and democratic accounts are alike.¹³⁶ The EP's stronger position in the treaty-making process post-Lisbon might influence the outcome of this debate considerably.¹³⁷

E. EFFICIENT TRADE NEGOTIATING AND TRANSPARENCY

Last but not least, civil society actors have raised a fairly fundamental critique that can link to some of the previously discussed issues: the lack of transparency during the negotiations does not allow sufficient consultation and impact assessment in social fields by non-corporate stakeholders and civil society organisations.¹³⁸ Lack of transparency and participation in EU trade negotiations is a commonly raised concern. It exacerbates fears that such negotiations cater mostly for important economic actors, while they are supposedly for the benefit of all market participants.¹³⁹ The concerns are amplified by the new generation of EU FTAs, which more directly impact non-economic issues.¹⁴⁰

¹³² Art 8(3), Trade Agreement Between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part.

¹³³ C. Stevens, J. Kean, L. Bartels and S. Woolcock, 'European Union: "Trade Agreement" with Colombia and Peru', (2012) Study for the Directorate-General for External Policies of the Union, Directorate B Policy Department, 22 and 48-49.

¹³⁴ A. Paasch, 'Human Rights in EU Trade Policy...', *supra* note 123, 14.

¹³⁵ Framework Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, signed on 10 May 2010, O.J. 2013, L20/2.

¹³⁶ European Parliament, 'Resolution of 4 September 2008 on the Evaluation of EU Sanctions as Part of the EU's Actions and Policies in the Area of Human Rights', (2008) 2008/2031(INI), 7. The European Commission withdrew development funds from Palestina, suspended aid to Russia and Belarus and held formal consultations with Togo, Niger, Guinea-Bissau, the Comoros, Côte d'Ivoire, Haiti, Fiji, Liberia, Zimbabwe, the Central African Republic and Mauritania. It did not follow civil society and the European Parliament's call for measures against Israel, Algeria and Viet Nam. See A. Paasch, 'Human Rights in EU Trade Policy...', *supra* note 123, 13-14.

¹³⁷ L. Richardson, 'The post-Lisbon Role of the European Parliament in the EU's Common Commercial Policy: Implications for Bilateral Trade Negotiations', (2012) *College of Europe Department of EU International Relations and Diplomacy Studies: EU Diplomacy Papers* 5/2012, 24.

¹³⁸ See, for a plea of a civil society monitoring instrument, European Economic and Social Committee, 'Opinion...', *supra* note 68, 9-10.

¹³⁹ M. Maes, 'Civil Society Perspectives on EU-Asia Free Trade Agreements', (2009) 7 *Asia Europe Journal* 97, 99.

¹⁴⁰ *Ibid.*, 100.

Whereas the EU and India have agreed to keep the negotiations confidential, other stakeholders such as the EESC¹⁴¹ have voiced concerns about the process. This critique is based on the right of access to EP, Council and Commission documents as established by Article 42 of the Charter of Fundamental Rights of the European Union and EU Regulation 1049/2001.¹⁴² According to the Corporate Europe Observatory (CEO), a research and campaign group targeting privileged access of corporations to European policy-making, the Commission even discriminates civil society stakeholders by favouring corporate lobby groups. It is to be noted that in CEO's analysis, the involvement of corporations and their lobbyists in the negotiations of the FTA is not limited to the EU: Indian corporate structures appear to have been linked in an equally close manner to the negotiations.¹⁴³ In the case at hand, DG Trade sent seventeen documents related to the EU-India FTA in full to lobby groups such as Business Europe and the Confederation of the European Food and Drink Industry, while CEO itself received only censored versions of these documents.¹⁴⁴ CEO states that the censored sections 'relate to allegedly sensitive information about priorities and strategies in the on-going trade talks with India including issues such as tariff cuts, services, investment and government procurement liberalisation and health standards.'¹⁴⁵ Twelve of the documents in question were reports from the Market Access Advisory Committee, the steering committee of the Market Access Strategy that is part of the Global Europe Strategy. In the Committee, members of the Commission, the Member States and European businesses exchange information and develop strategies to remove barriers to trade.¹⁴⁶ According to CEO, such selective openness implies that the Commission is breaking EU transparency rules. CEO hence brought an action for annulment before the EU General Court on 15 February 2011.¹⁴⁷

The general rule under EU transparency rules is that the public is to have access to the documents of the institutions and that refusal of access is the exception to the rule.¹⁴⁸ Institutions do enjoy a wide discretion in considering whether access to certain documents challenges the public interest, meaning that, aside from assessing compliance with procedural rules and the duty to motivate a decision (including an accurate depiction of the facts), the European Courts' review is limited to judging whether a manifest error of assessment of the facts or a misuse of powers is made by EU institutions.¹⁴⁹ In the *WWF v Council* case, the Council refused to grant access to a document submitted by the Commission relating to the WTO negotiations after the failed Cancún Ministerial Conference.

¹⁴¹ European Economic and Social Committee, 'Opinion...', *supra* note 68, 4.

¹⁴² Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access To European Parliament, Council and Commission documents, O.J. 2001, L 145/43.

¹⁴³ P. Eberhardt and D. Kumar, 'Trade Invaders...', *supra* note 103, 28-33.

¹⁴⁴ Corporate Europe Observatory, 'European Commission Sued for Giving Privileged Access to Corporate Lobby Groups in EU-India Trade Relations', (2011) Background Briefing, <http://www.corporateeurope.org/sites/default/files/sites/default/files/article/lawsuit%20backgrounder.pdf> <accessed 17 August 2013>, 2.

¹⁴⁵ *Ibid*, 1.

¹⁴⁶ European Commission, 'Market Access: Export from EU', (2013) <http://ec.europa.eu/trade/creating-opportunities/trade-topics/market-access/export-from-eu/> <accessed 17 August 2013>.

¹⁴⁷ Case T-93/11, Stichting Corporate Europe Observatory v Commission [2013], <http://curia.europa.eu> <accessed 17 August 2013>.

¹⁴⁸ Case T-211/00 *Kuijer v Council* [2002] ECR II-485, paras 55-56.

¹⁴⁹ Case T-14/98 *Hautala v Council* [1999] ECR II-2489, paras 71-72; Case T-211/00 *Kuijer v Council* [2002] ECR II-485, para. 53; Case T-264/04, *WWF v Council* [2007] ECR II-911, para. 40.

The decision to refuse access was challenged but the Court of First Instance did not find that the Council made a manifest error of assessment because negotiations took place in a sensitive context and were characterised by the difficulty to reach an agreement. In this instance, access to the document could have undermined relations and decreased chances of reaching an agreement with countries referred to in the document. The negative impact on public interest via the international relations of the EU and its financial, monetary and economic policy was reasonably foreseeable and not purely hypothetical, according to the Court.¹⁵⁰ Furthermore, CEO stated that as all requested documents are in the public domain (having been transmitted to corporate representatives), the exception on international relations of Article 4(1)(a) third indent of Regulation 1049/2001 is inapplicable.¹⁵¹

However, in its judgment of 7 June 2013, the General Court did not agree with the classification that all documents are in the public domain:

‘The documents in question were provided, not by way of general information, but within the framework of a limited technical exchange and with the sole purpose of enabling all of the participants to fulfil their roles as advisers to the Commission, through the work of the advisory committee and of the working groups, on issues of obvious special interest to all of the private sector entities involved in that process of consultation, reflection and information exchange.
[...] In those circumstances, the Commission’s dissemination of the documents at issue cannot be regarded as having been intended to, and liable to, make those documents known to the public, that is to say, to an indeterminate group of persons, considered in general and in the abstract.’¹⁵²

Because the General Court considers that the exception does apply, the Commission is not required to balance the protection of public interest against the applicant’s interest: the exceptions of Article 4(1)(a) of Regulation 1049/2001 are mandatory and thus oblige refusal of access when the exceptions apply.¹⁵³ Additionally, the General Court held that there is no discriminatory treatment between CEO and the companies and trade associations who were given access to the documents, because there is no comparable situation.¹⁵⁴ The claims of CEO were thus dismissed. The NGO has appealed the findings of the General Court before the European Court of Justice.¹⁵⁵

¹⁵⁰ Case T-264/04, WWF v Council [2007] ECR II-911, para. 41.

¹⁵¹ The CEO had previously launched an action for annulment against the European Commission on the ground of refusal of access to documents on EU-India FTA negotiations against an implicit Commission decision, but as the European Commission adopted an express decision before the General Court decided the case, the action was devoid of purpose. The CEO claimed that the Commission infringed Regulation No 1049/2001 and the Treaty ‘by constructively rejecting a confirmatory application without giving any reasons or without giving reasons to the standards required by the Treaty and by the Court. Third, it submits that by failing to reply to the confirmatory application the Commission infringed an essential procedural requirement and/or committed an error of law’. See Case T-395/10, Stichting Corporate Europe Observatory v Commission, O.J. 2011, C 173/10.

¹⁵² Case T-93/11, Stichting Corporate Europe Observatory v Commission [7 June 2013].

¹⁵³ Case T-264/04, WWF v Council [2007] ECR II-911, paras 44-45. Additionally, see Case T-42/05, Williams v Commission, [2008] ECR II-00156 and Case T-529/09, In ‘t Veld v Council, O.J. 2012, C 184/9 (appeal is pending, Case C-350/12 P).

¹⁵⁴ Case T-93/11, Stichting Corporate Europe Observatory v Commission [2013]. In the words of the General Court: ‘the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.’

¹⁵⁵ Pending Case C-399/13 P, Stichting Corporate Europe Observatory v Commission.

From a more general perspective, it is clear that negotiations on FTAs contain sensitive information, disclosure of which risks adversely affecting the negotiating process. Hence, it seems fair that a certain level of secrecy is upheld. However, flagrant, asymmetrical access to documents can hardly be reconciled with the principles of democracy and rule of law. Moreover, criticism of secretive trade negotiations is rising. Increased participation from civil society can only be encouraged and, although it remains to be seen whether this will lead to more actual openness, the Commission appears to be more transparent with regard to the FTA negotiations with the United States.¹⁵⁶

Apart from transparency on negotiations, it must again be noted that a deep and wide trade agreement not only impacts economic issues, but also has an effect on social and environmental matters. As concluded by the EESC, '[t]his alone is sufficient to warrant a further examination by the [Commission], particularly given that [...] the EU has a legal responsibility to assess the impacts of its external policies at home and on others.'¹⁵⁷ An objective, impartial and in-depth examination of the impact of an FTA on economic and non-economic issues undoubtedly increases transparency. The Commission previously explained in its communication '*Trade, Growth and World Affairs*' that consultation with civil society is a fundamental part of its policy-making, and that it will 'step up a gear in embedding impact assessments and evaluations in trade policy making.'¹⁵⁸ It has attempted to remedy civil society considerations by developing and applying a sustainability impact assessment, which is to examine the economic, social and environmental implications of the EU's bilateral, regional or multilateral trade negotiations. The sustainability impact assessment is conducted by external consultants and should include comprehensive consultation of stakeholders.¹⁵⁹ In the case of India, it led to a 2009 report by ECORYS, CUTS International and CENTAD.¹⁶⁰

However, these impact assessments are far from perfect. The criticism from civil society on these assessments indicated that they only have a marginal influence on the negotiation policy; are often conducted after a certain negotiating route has already been taken, leaving no leeway to return to these steps; only focus on a few sectors; and neglect gender issues and the role of large and powerful corporations.¹⁶¹ The EP, too, has pointed out that it would prefer the use of sustainability and impact assessments before, during and after the conclusion of an FTA, and asks negotiators to take these assessments more widely into account.¹⁶² The Commission has again addressed some of these issues by promising to carry out more impact assessments on new trade initiatives, during trade negotiations with particular attention to wide consultation and involvement of civil society, and after conclusion to monitor the FTA impact.¹⁶³ It will also prepare an impact analysis for the EP and the

¹⁵⁶ See European Commission, 'Transatlantic Trade and Investment Partnership (TTIP)', (2013) <http://ec.europa.eu/trade/policy/in-focus/ttip/> <accessed 17 August 2013>, where the Commission published its initial position papers and much more information on the TTIP negotiations.

¹⁵⁷ European Economic and Social Committee, 'Opinion...', *supra* note 68, 6.

¹⁵⁸ European Commission, 'Trade, Growth and World Affairs', *supra* note 35, 14.

¹⁵⁹ European Commission, 'Sustainability Impact Assessments', (2013)

<http://ec.europa.eu/trade/analysis/sustainability-impact-assessments/> <accessed 17 August 2013>.

¹⁶⁰ ECORYS, CUTS International and CENTAD, 'Trade Sustainability Impact Assessment...', *supra* note 71.

¹⁶¹ M. Maes, 'Civil Society Perspectives on EU-ASIA Free Trade Agreements', *supra* note 139, 103.

¹⁶² European Parliament, 'Resolution of 25 November 2010...', *supra* note 82, 19(a).

¹⁶³ European Commission, 'Trade, Growth and World Affairs', *supra* note 35, 14.

Council after negotiation but before signing the FTA. In addition to this and since the Lisbon Treaty entered into force, the role of the EP in the treaty-making process has increased considerably. The Commission must report regularly on the progress of negotiations,¹⁶⁴ the EP must be informed immediately and fully at all stages of the procedure,¹⁶⁵ and most importantly, the EP must consent to the FTA.¹⁶⁶ This may induce civil society actors to not just present their concerns through official channels at civil society dialogues organised by DG Trade,¹⁶⁷ but also call upon members of the EP who may 'translate the social agenda' better into the trade agenda.¹⁶⁸ Nonetheless, the width and depth of the new generation FTAs make an impact assessment of an FTA not only extremely complicated, but also subject to many diverging interests. In that sense, it is to be reiterated that free trade is not a goal, but a means to attain a raised standard of living, sustainable development and protection of the environment.¹⁶⁹

In the light of these elements, and despite the Commission's good intentions, it remains that more transparency and scrutiny of the negotiation process is necessary. A balance between the negotiation-specific or technical reasons to adhere to strict confidentiality on the one hand, and transparency and openness on the negotiating positions on the other hand, should be struck. Both negotiating partners could benefit from more openness, as supplying correct information on contentious issues may ease claims and protests voiced against an FTA. At the very least, protests will not be based on aged, incomplete or leaked information and hearsay. In some of the contentious issues dealt with above, increased transparency could have played a beneficial role.

5. CONCLUDING REMARKS

In all trade negotiations, 'some sectors gain and some lose, and within the sectors, some people gain and some lose.'¹⁷⁰ As those who lose can be expected to mobilise politically to some extent, trade negotiations will always flare tempers. The impact of an FTA on many lives is substantial. Civil society has an important role as society's watchdog, helping to strike a balance between the greater good and individual or sectoral dramas. This article has made a critical inquiry into five 'bones of contention' regarding the EU-India FTA negotiations, including the response from the EU to these concerns. Especially the last issue, transparency of trade negotiations, is of general concern. Increased transparency would not only address legitimate claims from civil society concerning the secret nature of negotiations, but also reduce exaggerated fear mongering by providing correct information. Although imperfect, the EU's reaction to the issue of access to medicines shows that the Commission is aware of the issue. As concerns labour standards, it remains to be seen how the EP's enhanced role in the EU treaty-making procedure as a result of the Lisbon Treaty will

¹⁶⁴ Art 207(3), TFEU.

¹⁶⁵ Art 218(10), TFEU.

¹⁶⁶ Art 218(6), TFEU.

¹⁶⁷ L. Paulus, 'The EU-India Free Trade Agreement Negotiations: Gender and Social Justice Concerns. A memo for Members of the European Parliament', (2009) *WIDE*,

http://www.in.boell.org/downloads/MEP_Memo_final_892009.pdf <accessed 17 August 2013>, 8.

¹⁶⁸ L. Richardson, 'The post-Lisbon Role of the European Parliament', *supra* note 137, 24.

¹⁶⁹ Preamble of the Marrakesh Agreement Establishing the World Trade Organization.

¹⁷⁰ ECORYS, CUTS International and CENTAD, 'Trade Sustainability Impact Assessment...', *supra* note 71, 16.

effectively affect this problématique. Similarly, the EP's stance on the inclusion of human rights clauses in FTAs may limit the Commission's room for manoeuvre in these and future negotiations. Considering the vast amount of trade agreement negotiations, the India case may provide plenty of insights into what is to come.



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