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Abstract

After a brief discussion on the uneasy relationship between Regional Trade Agreements and the WTO, the implications of the “deep” integration that the EU is seeking with India are discussed, and the respective positions, interests and concerns of the partners in the long drawn out negotiations are examined. The challenges for India in plunging into such “deep” territory, unprecedented in its history of bilateral or multilateral negotiations are posed alongside the hoped for gains.

Introductory Background

There has been in the last two decades a proliferation of Regional Trade Agreements (RTAs), of which Free Trade Agreements (FTA) and Bilateral Investment Treaties are the most common. The WTO website states, “As of 15 May 2011, some 489 RTAs, counting goods and services notifications separately, have been notified to the GATT/WTO. Of these, 358 RTAs were notified under Article XXIV of the GATT 1947 or GATT 1994; 36 under the Enabling Clause; and 95 under Article V of the GATS. At that same date, 297 agreements were in force”.¹ According to another source, “more than 90% of the members of the WTO are participants in FTAs”.²

The pairings are between developed countries, between developing countries, between countries and existing regional economic and geopolitical unions or associations (like the EU, ASEAN, NAFTA, and MERCOSUR) and between North-South countries. Accounting for more than half of world trade, these are more the rule than an exception, as the

GATT/WTO (Art. XXIV) would have it. It is widely believed that the complexities of negotiating in a multilateral context in the WTO and the serious deadlock that obtains in its latest cycle of multilateral trade talks, the Doha Development Round, is responsible to a large extent for favouring the bilateral or plurilateral mode of deal making.

The EU has been particularly active in seeking so called “deep” integration Bilateral Trade and Investment Agreements (BTIA) more commonly known as FTAs to push their agenda of trade expansion and investment opportunities for their multinational companies, going beyond trade liberalisation to secure market openings in service sectors like banking and insurance, retail trade, business services including legal and accountancy; government procurement; increased protection of intellectual property rights (IPRs) in geographical indications; data exclusivity in the drugs and pharmaceutical sector that go beyond the TRIPS (trade related aspects of IP rights) agreement negotiated in the last Uruguay Round in the WTO.

The last FTA of this genre it concluded recently is with Korea which may set a precedent of sorts. Details of various types of agreements and economic partnerships the EU has negotiated or is negotiating can be seen in EU (trade) section of its website.³ With respect to India, the EU declared that with its “high growth and relatively high market protection” it is an “obvious partner for one of the new generation FTAs launched as part of the Global Europe strategy in 2006”.⁴ It opened a dialogue with India in 2007, hoping to secure a deal by 2009. But after more than a dozen rounds of negotiations, the deal has still to be signed.

India too has been busy seeking and securing FTAs or other types of agreements with suitable partners. To mention some, it has concluded or is actively negotiating FTAs or Comprehensive Economic Partnership

Agreements (CEPA) or Trade Agreements/ Treaties with ASEAN (in goods), SAFTA, Singapore, Korea, Japan, Gulf Co-operation Council (GCC), Nepal, Indonesia, Thailand, South Africa, Mauritius, Chile, MERCOSUR, etc.⁵

None of these FTAs, CEPAs, Treaties, or Trade Agreements as they may be called is as ambitious in scope and coverage as the proposed FTA (also named BTIA: Broad based Trade and Investment Agreement) with EU, for reasons of the “deep” integrative nature of its provisions, implications of which are discussed below. The Indian Commerce Minister has stated that "The India-EU Broad-based Trade and Investment Agreement (BTIA) negotiations are in their final leg. Thirteen rounds of negotiations have been held so far. ...These negotiations cover Trade in Goods, Sanitary &Phyto-sanitary Measures and Technical Barriers to Trade, Trade in Services, Investment, Intellectual Property Rights and Geographical Indications, Competition Policy, Customs and Trade Facilitation, Trade Defence, Dispute Settlement, Government Procurement and Sustainable Development. Negotiations are being carried out".⁶

It does not help that the negotiations seem to be conducted in secrecy, the discussions and progress made in successive rounds not being officially divulged on the Indian side (whose public and media ironically learns about them second hand from international media and via the European Parliament). This non-transparency raises suspicions amongst the NGOs, with exaggerated fears that the interests of the millions of poor people are endangered because, for example, access to affordable life-saving medicines will be denied.

This “new generation” FTA therefore raises several interesting issues and questions worthy of discussion which are expounded in this Paper.

Research Issues

- Is the EU pushing for a Doha Development Agenda (DDA) plus deal? A look at the basic nature, and implications, of a North-South accord?
- The economic argument for “deep” integration if definitive welfare gains are to be procured from FTAs.
- What are the implications for India of entering into a process of “deep” integration (beyond trade barriers and within its borders) with EU? Possible gains, and possible risks of constraining its development policy space, especially relating to the unorganized sectors of its economy, and the political fallout.
- Is this “beyond trade” focus posing problems for Indian negotiators, who have to tread on a fine tight rope, weighing the pluses and minuses, chief amongst which seems to be the outcry of various NGOs? Several “difficult” issues still remain, e.g tariff cut offers for cars, wines, and spirits; trade restrictions linked to social and environmental issues; chapter on IPR; legislative reform in India concerning insurance, postal, financial, retail, legal and accountancy services; effective protection of major EU Geographical Indication (GI) names; negotiating investment protection guidelines; Mode 1 and Mode 4 market access obstacles to Indian personnel in supplying services to different member states in the EU.^{7,8}

Research Methodology and Sources

For our research, we scanned relevant published material (on the web, in journals, press articles) including views expressed by officials involved in

the negotiations; analyses made by various NGOs; *ad hoc* reports appearing in the media; studies made by research centres attached to multilateral organizations like the ADB, European Commission, or independent bodies like Oxfam, CEPII-CIREM, CARIS (Sussex), CUTS International. Efforts were also made to interview some of the researchers/spokespersons/ officials in Delhi and Brussels to obtain fresh insights and latest information on the status of official negotiations.

In the following section, we recapitulate briefly the current scene on regional trade agreements and their co-existence with WTO, and examine the nature of “deep” integration, with special reference to the EU-India FTA. While there may not be anything new here, the idea is to set the stage for the particular context of EU-India FTA; we hope the discussion and insights obtained in the following sections on the respective negotiating positions and interests of the partners, particularly India's concerns and the current state of play of the negotiations, does to some modest extent answer the “what's new” question in this paper.

Brief Background on the 'Uneasy' Relationship between WTO and RTAs

As an exception (though many, noting the statistics on the multitude of RTAs mentioned above, may now call it the rule rather than an exception), to the central pillar of the multilateral trading system, the MFN rule of non-discrimination - Article I of GATT, Article II of GATS – member states can enter into regional trading agreements (RTAs) within which they can accord to each other mutually preferential trading arrangements. This is subject to specific conditions “which are spelled out in three sets of rules: Paragraphs 4 to 10 of Article XXIV of GATT (as clarified in the Understanding on the Interpretation of Article XXIV of the GATT 1994)

provide for the formation and operation of customs unions and free-trade areas covering trade in goods ; the so-called Enabling Clause (i.e., the 1979 Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries) refers to preferential trade arrangements in trade in goods between developing country Members; and under Article V of GATS governs the conclusion of RTAs in the area of trade in services, for both developed and developing countries”.⁹

Amongst the several conditions set out in Art XXIV, the more significant ones relate to ensuring that the duties and “other regulations of commerce” in the proposed free trade area “shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area”, and that such duties and other regulatory measures “are eliminated on substantially all the trade between the constituent territories in products originating in such territories”. Though it was only later that Jacob Viner brought the refinement of trade creation (through the elimination of tariff and non-tariff barriers within the area) and trade diversion or distortion (by, for example, according selective preferences to inefficient partner suppliers relative to world supplies) into the discussion, this substantial coverage condition did evoke the hope that the RTA would be, globally speaking, trade creating.¹⁰

However, despite much discussion and debate, mostly indecisive, there is no agreed interpretation of what would constitute “substantially all the trade”, but the EU view in its RTAs has generally been that “liberalization should extend to at least 90% of existing trade between the members of an RTA. This 90% coverage can be split unevenly between RTA members, in order to reflect development asymmetries”.¹¹ A period of 10 years to achieve this is stipulated in the “The Understanding on the Interpretation

of Article XXIV of the GATT 1994”¹² and is thus considered not unreasonable by the Committee on Regional Trade Agreements (CRTA) or the Committee on Trade and Development (CTD) for South-South accords, that examine the notified RTAs.

As we shall see, this issue of substantial coverage, agreeing on negative lists of exclusion in the goods sector and positive lists of offers in services is one of the key stumbling blocks to a successful conclusion of the negotiations.

The WTO acknowledges that its “rules say regional trade agreements have to meet certain conditions. But interpreting the wording of these rules has proved controversial, and has been a central element in the work of the Committee on Regional Trade Agreements. Under a transparency mechanism introduced in 2006, this committee considers “RTAs falling under Article XXIV of General Agreement on Tariffs and Trade (GATT) and Article V of the General Agreement on Trade in Services (GATS)”. Thus its remit is limited to a “consideration” of the proposed RTA, chiefly from the perspective of ensuring transparency. This is an admittedly weak tool of control and in fact case law confirms the overriding jurisdiction of the Dispute Settlement Mechanism as “the only forum for testing the legitimacy of RTAs”.¹³ It is also argued by some experts that “a distinction should be made between, on the one hand, the legality of the regional arrangement as such and, on the other hand, the legality of concrete trade policy measures adopted by the RTA. The latter should be the subject of strict surveillance and sanctioning, notably via WTO dispute settlement. In contrast to the line taken by the WTO's Appellate Body, it would, however, not be advisable for the WTO dispute settlement system to get into questions of the overall legality of specific regional arrangements. The overall compatibility of regional arrangements with WTO rules is better

suited for diplomatic transparency and peer review exercises in the CRTA on the basis of the clarified benchmarks.¹⁴

There will be plenty of fodder in the EU-India FTA, what with the number of instances where the EU is pushing India to go the “extra mile”, be it in tariff reductions in goods or relatively more market access and national treatment privileges in services and investment than that conceded under GATS provisions, discussed further below, that may irk its other trading partners whose companies will feel that they are rendered uncompetitive. Also, the chapters relating to implementation and dispute settlement may go beyond just duplicating WTO provisions and thus sow the seeds of discord and confusion. In this context, we explored the possibility of an MFN type of clause in the FTA in our discussions with officials in Delhi.

It seems however that the Indian side is using the carrot of extra concessions to EU players as a bargaining chip to secure its own concessions. Nevertheless, in the interest of transparency and moving firmly on the multilateral route as the main highway, we find the suggestion that there be a “sunset clause” in RTAs to eventually merge after a sunset period—“RTAs with WTO disciplines with the extension of RTA preferences to all WTO members” worthy of consideration.¹⁵

Implications of a North South Accord¹⁶

North South free trade accords, existing or under discussion, have been subjected to scrutiny particularly from the perspective of jeopardising the development processes of the weaker developing country. Organisations, including NGOs, sympathetic to the third world are particularly critical. For instance, reviewing the annual Trade and Development Report (2007) the Third World Network said “such agreements may offer transitory gains

in terms of market access and higher foreign direct investment, but they may also limit government action that can play an important role for the medium-and long-term growth of competitive industries”.¹⁷ Traidcraft Exchange, a UK based organisation warns that “developing countries entering into trade agreements with richer country partners which lock down far-reaching liberalisation and de-regulation commitments have faced serious risks to their vulnerable sectors-such as small farmers, small and medium enterprises (SMEs) and workers-as well as reduced flexibility to implement national policies”, and even cautions against agreeing to apparently harmless interim provisions like transparency in government procurement which have a “Trojan horse effect”.¹⁸

Comparing the trade gains across time and country between South-South and North-South agreements, an F.R.E.I.T study finds that “the percentage increase in bilateral trade is higher for South-South agreements than for North-South agreements.... allowing for lags and multilateral resistance, a four-country North-South agreement raises bilateral trade by 53% while the analogous South-South impact is 107%. It cites other studies on North-South agreements including Cieslik & Hagemeyer (2009), “who study EU-MENA trade deals and find they raise exports from the EU to MENA but not in the opposite direction”.¹⁹

However, the same study argues that there “exist potential welfare gains” by the poorer partner too in such North-South agreements, the underlying argument being that there is technology embodied in the goods and services supplied by the richer partner, which leads to productivity improvements and long term gains for the latter economy. This takes the discussion towards the interlinked issues of “deep” integration that usually characterise North-South agreements, which we look at in the next section.

“Deep” Integration

It is well accepted that preferential trading arrangements unlike multilateral non-discriminatory liberalization entail both gains (trade creation) and losses (trade diversion).²⁰ For instance, where initial tariffs are high, their selective removal to the benefit of partner countries of the FTA may have serious trade diverting effects, shutting out imports from more efficient suppliers from [in] non-partner countries who will continue to face higher tariff barriers. It is in this context, and in the quest to tip the balance in favour of trade creation that the argument for a “deep” integration in free trade agreements is advanced in today's interconnected world of business where just reducing trade tariffs without addressing non-tariff barriers may not do much in creating trade. Price alone is only one of the famous 4Ps of marketing, and simply offering a lower one post-tariff removal may not increase demand if the product itself, and its quality, is not up to acceptable “world” standards. For that to happen, the firm must benefit from “trade induced productivity improvements driven by technological changes, spillovers between firms, niche specialisation and economies of scale”.²¹

“Deep” North-South accords are supposed to have the potential of providing such benefits to suppliers from the South, either explicitly through transfer of technology inherent in greenfield start-ups through foreign direct investment or indirectly by the transmission effect of vendor-vendee relationships that would inform the development of ancillary industries. Another study notes that “if an FTA is to succeed we wish to see the emergence of private and public arrangements that can reduce transactions costs, enhance certainty and predictability of behaviour and create markets that are contestable and free of adverse externalities. The role of an FTA in promoting this deep integration is then to remove unnecessary regulatory obstacles to trade and to creating a

facilitating environment in which mutually advantageous private contracts and market-led institutional arrangements can flourish”.²²

Going beyond goods and manufacturing sectors, the potential for gains by mutually according market access and national treatment in the service sectors, provided there is associated liberalisation in foreign direct investment and easing of trade impeding and non-transparent rules and regulations operating 'behind the border’ in the respective domestic economies is, on the one hand real enough but on the other a formidable challenge. This is certainly the case in the proposed EU-India FTA.

Negotiating Positions and Interests of EU and India

Perhaps the most scholarly and detailed case made out for the EU pushing for a deep integration with India is the CARIS/CUTS International study.²³ Its “central findings” clearly suggest that addressing areas such as “government procurement, services, investment, trade facilitation, trade defence, standards, intellectual property and competition policy” are key if the FTA is to be trade creating. Provided impediments relating to “procedural issues, labour laws, levels of corruption, and overlapping jurisdictions between state and central governments and so on” are improved, there is potential for “substantial benefit from deeper integration”. Its gravity modelling indicates that FDI in-flows from EU could increase by 27%. Commissioned as it was by the European Commission, DG Trade, it is not surprising that the study does not make any recommendations with regard to the equally formidable “behind the border” impediments—market access issues, Technical Barriers to Trade (TBT), inter-state mobility, etc.—that come in the way of Indian supply of Mode 1 and 4 services to the EU. These are elaborated by us further below.

One would expect the negotiations for a EU-India FTA to have dialogues and road-blocks where the North would be typically pushing for such market opening and institutional reforms in the South, and the South, especially NGOs sympathetic to Third World concerns, would be shrilly crying, “Halt the talks!” with their backs against the wall warding off the non-trade related demands that “invade the development policy space” of the emerging economy.²⁴ Views of trade policy experts with aligned views are cited, e.g. Panagariya who expresses the concern that “in regional arrangements between countries with uneven bargaining power, smaller, developing countries fear that deep integration can become an instrument for extracting concessions of all kinds not just in trade but in other “non-trade” matters by their larger, more powerful counterparts. The agenda for deep integration is likely to be determined by rich, developed countries” and cites the one way extraction of concessions from Mexico by the US in NAFTA.²⁵

Some NGOs also turn in scholarly reviews calling in question the wisdom of India giving in to demands for market access and higher foreign equity caps in sectors like banking, insurance, multi-brand retailing etc. that could seriously act to the detriment of development policy goals especially in the rural areas.²⁶ The one-side nature of trade between the two is apparent from the fact that the EU accounts for “21% of India's total exports and 16% of India's total imports, (whereas) India accounts for a more limited but rapidly growing share of EU trade: 2.4% of EU's total exports and 1.9% of the EU's total imports; India ranked 10th in the list of the EU's main trading partners in 2008, up from 15th in 2002”.²⁷

We do indeed find, unsurprisingly, that the EU has ambitions to go “deep” into several non-trade issues in its quest for market access and national treatment in service and investment sectors, plus some extra-curricular

ones like government procurement, environment and human right issues it has thrown in for good measure. On services, investment, IPRS and other miscellaneous concerns, EU's thrust can best be appreciated by the detailed submission of the European Services Forum to the EU Trade Commissioner on "European Services Industry Priorities on EU-India FTA".²⁸ Their priorities include:

- "Calls for the removal of all equity caps that may remain in India; the removal of all nationality or residency requirements for members of executive boards of branches, subsidiaries and joint-ventures; the negotiation of Mutual Recognition Agreements of diplomas and qualifications in professional services"
- "Our companies need to be able to send to India their personnel to their subsidiaries and other commercial presences (intra-corporate transferees–ICT) as well as to their clients for temporary periods on a specific contract basis.
- "The FTA negotiations on services with India–should also put the stress on post-establishment measures, as the problem of most EU companies is now that of being granted a fair and equitable treatment compared to Indian companies (tax case, licenses case, Universal service case)"
- "Lack of clarity and ambiguity in Foreign Direct Investments rules (i.e. restrictions applied to FDI that do not apply equivalently to Indian companies). We urge therefore the European Union to provide you with the necessary mandate to negotiate investment access and protection in India."

- “The demand of road, rail, ports, inland waterway and other public transport infrastructure, of energy, broadband telecommunication network and drinking water networks, etc. will increase exponentially in the coming decades. The experience and expertise of European companies in these fields would be an important asset to help fulfilling this demand, provided that the public procurement market in India will be open accordingly. The FTA negotiations with India are the right instrument towards this endeavour and ESF strongly supports better access to India public procurements at all levels, in all public entities, for relevant services sectors.”

The annex to this letter goes into considerable detail of the specific demands sector by sector, issue by issue including of easing administrative hurdles like clearance from the Foreign Investment Promotion Board (FIPB).

Discussions with the officials in the Ministry of Commerce further led us to believe that the EU has particular ambitions in the following:

- Banking services; more banking branches; binding FDI at 74%, whereas the present cap is 49%. Another hurdle is the preference of India's central bank, the Reserve Bank of India, for subsidiaries of foreign banks, rather than branches, holding that “as branches are part of the head office, assets attributable to it can easily be transferred by the branch to the foreign head office. Further the management of a branch does not have a fiduciary responsibility to the branch's local clients. In fair weather it may not be of much relevance but in times of crisis, the distinction between the branch and the rest of the bank, and the legal location of assets and liabilities, may well become very important”.²⁹

- Insurance services, FDI limits to 49% from the present 26%; binding autonomous liberalisation that might take place; Opening multi brand retailing. Presently 100% foreign equity is permitted only in single brand retailing.
- Abolishing cargo preference for ships flying Indian flag; commitments for foreign shipping lines to offer maritime transport services.
- Commitments in air transport services for airport operations and ground handling.
- Commitments in liberalisation of Accountancy, accounting and book-keeping services.
- Partial opening of legal services, which is stoutly resisted by the Bar Council of India. The legal services sector is currently closed to foreign lawyers and consultants, and in any case liberalisation would require legislative changes.
- Environmental services, involving commitments in Mode 3 for waste and sewage disposal services currently run by municipal bodies.
- Incorporating an “umbrella clause” that would require each state to observe all investment obligations entered into with investors from the other state, implying for example that a private EU investor can sue a public body like a municipal authority for alleged violations of the service contract

It is also significant to note that the EU is pressing for the negative list approach in service negotiations, i.e. specific listing of sectors that will not

be liberalised as “this way of negotiating obliges the negotiators to review together all service sectors and produce greater liberalisation results and greater clarity”, meaning all other sectors, even those for example inadvertently not included in the list will be liberalised. It is exactly for the opposite reason that India is pressing for a positive list approach, listing specific sectors which, after exercising its mind, it is ready to liberalise.

But we were agreeably surprised to find that India too is on the offensive in negotiating gustily, blow for blow, for its own set of market opening and market “functioning” demands in the EU space. The EU is a \$16 trillion market and India in particular wants significant opportunities for its professionals, primarily in the information technology sector but also for its architects, engineers, teachers, chefs, etc. India also wants increased market access for its goods. It has demands in GATS Modes 1 and 4. Specifically, India has the following main requests in Mode-1:

1. Data empanelment issues to be sorted out so that Indian companies are considered data secure and are not discriminated against on grounds of data security. This is particularly so in the case of companies that are considered data secure by American companies that utilize their services.
2. Removal of local presence and residency requirements: Many EU countries require Indian companies providing offshore services in various sectors, especially information technology, to have subsidiaries or representative offices and/or have some company personnel resident in those countries or in the EU. This may provide comfort to the clients but adds to their cost, with a negative bearing on their competitiveness.

3. Commitments by all major countries in EU in several sectors of interest to India, like (i) medical, dental, paramedical personnel, (ii) R&D and other services related to energy distribution, (iii) duplicating, mailing list compiling and some other similar support services, (iv) collection agency and credit reporting services, (v) construction and related engineering services, (vi) hospital, tourism and travel related services.

India perceives market access in Mode-4 as a major benefit that it would like to derive from the FTA, and therefore desires ambitious outcomes in this mode. It wants that the ceiling of 40,000 for commercial service suppliers (CSS) and independent professionals (IP) proposed by EU should not have restrictions imposed by labour market tests (LMT) and economic necessity tests (ENT). To enable India to get commercial value from this offer, and to prevent backdoor ENTs and LMTs, it has the following demands:

- a. Commitments in the various sectors of its interests under the categories of CSS and IP.
- b. Extension of Mutual Recognition Directive to India or at least centralised evaluation of qualification criteria for CSS/IP.
- c. Secondary mobility (free movement throughout EU) for CSS/IP.
- d. Removal of requirement of nationality, residency, bona fide service contract, of contract with final consumer and six years' prior experience for IP.
- e. Interstate mobility throughout EU with a fast track application procedure to issue a single permit combining work permit, visa and

residence for ICT. This would entail liberalization of the Schengen visa regime. In other words, India would like EU to give this commitment as an IOU and bind the ICT directive when it comes into force. This arrangement should also be made applicable to CSS.

- f. Clear identification of limitations by member states, if any, on various sectors/sub sectors.
- g. Division of the ceiling of 40,000 among major states like UK, Germany, France, Italy, Denmark, Netherlands, Sweden, Spain and Poland and removal of 20% safeguard clause which would place restrictions on sectors/sub-sectors of interest to India as a backdoor ENT measure.

India's Concerns and the End-Play in the Negotiations

Indian negotiators do realise that the EU-India FTA talks have them treading on dangerous ground hitherto not explored before either in previous multilateral negotiations in the WTO or prior RTAs. We list below some of the major concerns in this context and the state of play in the negotiations:

- Civil society groups and some political parties point to the lack of transparency in the conduct of negotiations, particularly on the part of the Indian government. A particular area of concern is that EU's pressure on IPR issues will curtail the production of cheap generic drugs, especially HIV/AIDS drugs which India exports to Africa. There are fears that drug companies would be required to conduct expensive clinical trials, which could significantly curb the number of

generic products made in India. Availability of cheap drugs is important for the poor in India and it would find it politically very difficult to give any ground on this issue. In the debates in European Parliament, Karel de Gucht, Member of the Commission gave an assurance on May 9, 2011 that this FTA—its intellectual property rights chapter, its investment chapter or any other chapter—would not undermine the capacity of India to promote, produce or export generic medicines, including through compulsory licenses. Despite this assurance, according to Monika Ermert of Intellectual Property Watch, several MEP including Green Party Member Ska Keller continue being concerned about its possible negative effects on access to affordable drugs for the poor if the FTA were implemented in its current form.³⁰

At a session organized by *Médecins Sans Frontières* at the 10th International Congress on AIDS in Asia and the Pacific (10th ICAAP) held in Busan, Korea in August 2011. Kajal Bhardwaj, Independent Legal Researcher on HIV, health and human rights from India informed that "India is a key drug supplier to the world with 92% of patients on ARVs in low-and middle-income countries using generic drugs coming mostly from India. Also, 67 % of exports of medicines from India go to developing countries, and 75-80% of all medicines distributed by the International Dispensary Association are manufactured in India. However, in its FTA with India, EU is asking for strong Intellectual Property Protection which could stop the flow of affordable and life-saving medicines for millions of patients in developing countries." At the same conference, John Rock, adviser with APN+(Asia Pacific Network of People Living with HIV/ AIDS) voiced his concern at the Community Forum--"the community is concerned about the free trade agreement (FTA) currently under negotiation between India and European Union, which threatens the

production of generic medicines which will among others affect HIV patients. The EU-India draft FTA, as it stands, places trade interests over human rights; there is an immediate need for global action to ensure affordable access to treatment".³¹

- At the insistence of Indian negotiators the EU seems to have withdrawn the data exclusivity demand. However, there is concern that this withdrawal may not ensure that supply of cheap medicines in India and beyond is not affected. The FTA will more than likely sanction European "investors to challenge Indian regulation at international arbitration tribunals -with a track record of favouring the investor-by claiming that their IPRs have been affected"—according to an email from Katrien Vervoort of Oxfam Belgium. Such concern is shared by most development organisations. The FTA puts "us at risk of litigation or court orders that prevent us from delivering medicines to patients," says Michelle Childs from Médecins Sans Frontières, an organisation that sources more than 80 per cent of its HIV medicines from manufacturers of generics in India. European pharmaceuticals might also try to shield their patents from being utilised by the Indian generic industry if, as the largest groups at the European Parliament requested to the European Commission, the FTA includes "a binding state-to-state dispute settlement mechanism and provisions on mediation on non-tariff barriers to trade, as well as an effective safeguard clause".³²
- India is also concerned about the Singapore issues being included which focus on government procurement, investment policy and competition policy. Developing countries including India had opposed these issues which led to their final removal from the Doha Round. Now they are sought to be introduced via the FTA route. Also, EU may want India to harmonise its competition law with EU competition law

which may not be in sync with India's development needs. It is also feared that the dispute settlement clause could create problems for India since it would enable foreign companies to sue the central government, state governments and local bodies in India.

- Given India's federal character, policies and procedures relating to investment would need to be synchronized with state governments. Often there are differences of approach between federal and state policies and this could pose ticklish problems. Regulatory arrangements in India are not adequate in respect of various sectors and the Government of India would need to put in place a number of regulatory and institutional arrangements.

Here, a brief description of the nature of the Indian federal system would be germane to an analysis of the negotiation for the FTA. The Indian system does not require prior parliamentary approval or ratification for international agreements of this nature. The Indian Constitution has three separate lists of subjects allocated respectively to the Union (Union list), to States (State list) or to both (Concurrent list). Both the Union and States have powers to legislate on subjects in the Concurrent list. In the case of conflict between Union law and State law on the same subject, the Union law would prevail. Policies relating to foreign trade and investment fall in the Union list, but state governments are actively involved in the implementation of many of these policies, since issues like land, infrastructure, water, sanitation, security, urban planning, health, environment etc. fall in their jurisdiction. Another important factor is that for the last 15 years the central governments have been coalitions of a large numbers of parties, not necessarily having the same political agenda, and this situation looks likely to continue in the foreseeable future.

Coalition partners often tend to view central policies through the prism of the possible impact of such policies on their political fortunes in states of interest to them. As mentioned below, the recent furore over FDI in the retail sector, opposed even by some parties in the ruling coalition is an example. For these reasons the Central government has necessarily to keep various political compulsions in mind and tread cautiously in negotiations of international trade and investment agreements.

- Opening up India's legal services to foreign companies would however require legislative changes. Given the powerful legal lobbies in India opposed to it, this may prove difficult, if not impossible.
- The federal government in India and state governments often follow different policies in respect of government procurement. Harmonising them could present problems or at least prolong negotiations between the federal government and states. But before that, the more critical call has to be made whether India is at all willing to liberalise, even in small steps starting from transparency in procurement and tender procedures, etc.
- Many sectors like construction and health are subject to local laws and regulations enacted by state governments. Harmonizing them with the requirements of the FTA may present problems.
- FDI in multi-brand retail faces opposition in India for fear of hurting or eliminating small retailers, numbering about 12 million.³³ Government of India recently took a decision allowing FDI in multi-brand retail to the extent of foreign investors taking up 51% of ownership. FDI in single brand retail which was hitherto permitted to the extent of 51%

will now be allowed up to 100%. These decisions have certain conditions attached, i.e. (i) at least 50% of the investment should be in back end infrastructure, (ii) such investment is permitted only in cities with a minimum population of 1 million (at present 53 in number), (iii) FDI-backed retailers will have to source 30% of all their products from the small scale sector. Every state in the country would have the right to follow its own policies and laws in regard to FDI-backed retail presence. This decision faced stiff resistance from political parties, including some in the ruling coalition. The decision to permit 51% FDI in multi-brand retail has been put on hold for now (the decision allowing 100% FDI in single brand retail stands). The government has indicated that it would initiate the process of bringing about a consensus among political parties to allow this decision to be implemented. It is not clear how soon it would succeed.³⁴

- There is serious concern in India about the proposed inclusion of legally binding clauses on human rights, social and environmental standards and their enforcement with measures in the event of infringement. European Parliament probably has an important role in influencing the stand taken by EU negotiators on these issues.
- There are fears that freeing agricultural imports will lead to a surge of heavily subsidised EU produce into the Indian market and will adversely impact the livelihood of small and marginal farmers. The most likely outcome here would be heavy exclusion of products likely to adversely affect domestic suppliers. India is reported to have proposed a negative list of about 150 agricultural goods and about 250 manufactured products.

- So far 13 rounds of negotiations have been held. The issue of this FTA appears to have been somewhat sidelined by the debt crisis in the EU; however, there is a growing sense of fatigue and frustration in some European countries at the slow progress of negotiations. It has been reported that Germany's Head of Foreign Trade Berend Diekmann stated in November 2011 that there was a complete logjam in talks and that there was no way the treaty could be concluded before the EU-India summit.³⁵
- Both sides seem to realise, at least theoretically, that the deeper the integration, the more beneficial it would be for strengthening trade and investment relationship. However, there also seems to be recognition that on a number of issues it would not be possible to evolve agreed positions easily or quickly, not least of all obtain any semblance of political consensus in a hurry on the Indian side for any concessions its officials may grant on a quid pro quo basis (as the recent uproar on the change in policy for multi-brand retailing demonstrates). Considering that nearly four and a half years have gone by since negotiations were launched, we obtained the impression from our discussions with the Indian officials that it would be better to “do the doable”, and conclude the agreement on the basis of whatever common ground can be found in the period till the EU-India Summit on February 10, 2012.
- In return for meaningful concessions by EU on issues from the “difficult to do” EU basket, Indian Government might also be prepared to dilute its opposition to issues like increasing the FDI limits on insurance services, and to lowering of import duties on high-end cars, wines and spirits which are of main concern to EU. With regards to cars, Japan and South Korea have made similar demands, but India is unlikely to immediately agree to give in to their demands.

- Not many amongst the general public perhaps realise that signing an FTA with the EU at the official level is not the end of the story. After the conclusion of negotiations, the agreement would require ratification by 17 parliaments in the EU before it is put into effect. This could be a long drawn out process unlikely to be completed in less than two years!

Concluding Remarks

We have after a brief discussion on the relationship between regional trading arrangements and the WTO looked at how, and why, the EU-India FTA negotiations have dragged on for more than four years; and each side has a wish list of what it wants from the other. We have seen that the popularly understood misgivings of a North-South accord from the perspective of an emerging economy do not quite apply in the more complex framework of the EU-India negotiations, and that the aggressive stance of the EU in pushing its WTO+ agenda is vigorously matched by India's own “deep” demands!

Indeed, we found it particularly interesting that India too is using the deep integration lever as its dominant negotiating strategy for Mode 1 and 4 entry in the EU area. It matched blow by blow, as it were, EU's demands going into “touch me not” territory like government procurement, liberalisation in agriculture and sensitive service sectors like banking and insurance, human rights, labour standards, environmental issues etc. with its own deep thrusts. These called for removal of local presence and residency requirements of its skilled personnel pan-EU, with sectoral commitments from member states, mutual recognition of qualifications and the like, as we have seen, highlighting indeed the systemic

incompetence of the EU to accede to such “deep” integration in its space even if it wanted to in some cases.

It could be argued that even if asking, even insisting, for such “high hanging fruit” is political posturing, small “doables” could be won incrementally by either side. This would then have a “Trojan horse” effect in the positive sense if the policy change entailed is applied across the economy, with trade creating effects. The recent decision of the Indian government to allow FDI in multi-brand retailing would have been an excellent example to cite, but alas it seems to have backfired because of the political uproar the announcement caused, and the policy change has been put on hold.

This example raises however another question: Should not the executive arm of the Indian political system (which, as we mentioned, is empowered to negotiate international deals without consulting the Parliament) re-examine the wisdom of negotiating behind closed doors, often chosen as the preferred mode based on the argument that negotiations of a sensitive nature involving multiple give and take across different sectors and subjects are best conducted in camera? Actually we understood from our discussions with Indian officials that they do informally consult with some NGOs, and bodies like the Reserve Bank of India for instance did issue discussion papers on the presence of foreign banks, etc. but these were sporadic and seem to be less and less frequent lately, consequently causing amongst NGOs much anxiety and negative speculation as to the government's intentions in negotiating secretly as discussed earlier. Could then building up public opinion in favour of the proposed policy change before introducing it been more effective, or would that too have back fired politically? Devesh Kapur's piece in this context appears to us persuasive where he argues that “at the very least, the government should have first mobilised the farmer constituency to create a policy demand. Then, in

response to farmer rallies, with farmers railing against middlemen, it could have presented itself as a responsible government riding to the rescue with a policy package in which retail foreign direct investment (FDI) was one additional arrow in the policy quiver....”³⁶ Hindsight may thus suggest that putting in place a systematic process of on-going consultations and debate in the public domain, especially with the more important NGOs and concerned lobby groups having voice, could have served as a mutually influencing feedback loop between the government negotiators and the public, and also ensure acceptance of policy changes finally negotiated. Admittedly this is no simple choice, as this consultative mode does carry its own political risks, including compromising the negotiator in revealing his limitations.

In closing, we note that despite formidable hurdles, there is considerable keenness by both sides for the successful completion of negotiations. On the Indian side, concluding a deal with the EU is accorded perhaps higher priority than for any other preceding bilateral or regional level trade talks - it is the Prime Minister's Office that is the driving force behind the Ministry of Commerce that actually negotiates. On EU's side too the political will to conclude the agreement, and be content to limit its content to the “doable” steps, seems to be strong. At the EU-India Summit on February 10, 2012, the Indian Prime Minister and the European Commission President felt that considerable progress had been made in resolving market disputes over the course of negotiations and that the contours of the final agreement were emerging. They agreed to expedite discussions.

Endnotes:

1. WTO Website: http://www.wto.org/english/tratop_e/region_e/region_e.htm
2. Proliferation of Free Trade Agreements and Development Perspectives”.Mitsuo Matsushita, Law and Development Institute Inaugural Conference, Sydney, October 2010.
3. [://ec.europa.eu/trade/creating-opportunities/bilateral-relations](http://ec.europa.eu/trade/creating-opportunities/bilateral-relations)
4. Europa web site, extracted 3/6/2011
5. list is not exhaustive, see Commerce Ministry's website, <http://commerce.nic.in> for details,
6. As reported in the Overseas Indian Facilitation Centre website, July 11, 2011. <<http://www.oifc.in/Article/India-EU-BTIA-Negotiations-are-in-their-Final-leg-Anand-Sharma>>.
7. Some of these issues are mentioned in and quoted from EU Commissioner Karel de Gucht 's response to questions in the European Parliament (May 9, 2011)
8. The General Agreement on Trade in Services (GATS) distinguishes between four modes of supplying services: Mode I:cross-border trade, Mode 2:consumption abroad, Mode 3: commercial presence, and Mode 4: presence of natural persons. WTO website.
9. WTO website : http://www.wto.org/english/tratop_e/region_e/regrul_e.htm
10. Viner, Jacob, 1950, The Customs Union Issue (Carnegie Endowment for International Peace: New York).
11. Rémi Lang, Renegotiating GATT Article XXIV – a priority for African countries engaged in North-South trade agreements, extracted from web:<http://www.uneca.org/atpc/Work%20in%20progress/33.pdf>. This paper gives a lucid review of issues relating to WTO negotiations on Art XXIV and the interactions between the CRTA and the Dispute Settlement Mechanism
12. WTO web site, ibid 7
13. Shadikhodjaev, Sherzod. “Checking RTA Compatibility with Global Trade Rules: etc. Journal of World Trade 45, No.3 (2011):529-551. This article makes a comprehensive analysis of the concerned issues related to checking compatibility of RTAs with WTO Rules.
14. See <http://www.worldtradelaw.net/articles/devuystwtorta.pdf>

15. Lee, Yong-Shik. Reconciling RTAs with the WTO Multilateral System: Case for a New Sunset Requirement. . . : Journal of World Trade 45, no.3 (2011): 629-651
16. Most of the observations and comments in this section are the authors' own interpretation of feedback obtained in discussions with senior officials of the Government of India and its Embassy in Brussels
17. Third World Network. <<http://www.twinside.org.sg/title2/FTAs/info.service/fta.info.service109.htm>>
18. Traidcraft. EU-India FTA: Initial Observations from a Development Perspective, September 2008
19. Alberto Beha, Laia Cirera i Crivillé. The impact of North-South and South-South trade agreements on bilateral trade. September 2010
20. Terms attributed to Viner, J., 1950. The Customs Union Issue. Carnegie Endowment for International Peace, pp: 41-55;
21. Centre for the Analysis of Regional Integration at Sussex (CARIS) and CUTS International. "Qualitative analysis of a potential Free Trade Agreement between the European Union and India". June 2007
22. Holmes & Shingal. Potential Benefits from a Deep EU-India Free Trade Agreement. Springer-Verlag, Nov. 2008
23. Ibid 18
24. See for example, Monica Elmert. "Does EU-India FTA Serve Mutual Interests? Policymakers, NGOs Disagree". Intellectual Property Watch, that expresses fears of back-door entry of WTO+ clauses regarding data exclusivity and lack of transparency in the negotiations.
25. Arvind Panagariya. The Regionalism Debate: An Overview. November 1998
26. See for example Madhyam briefing papers notably written by Kavaljit Singh,
27. Taken from Europa website <http://eeas.europa.eu/delegations/india/eu_india/trade_relation/index_en.htm>
28. Letter no. ESF 10-28 dated 10/12/2010 of European Services Forum on "European Services Industry Priorities on EU-India FTA" addressed to Mr. Karel de Gucht, EU Commissioner for Trade. Extracted from the web.
29. Discussion Paper-Presence of foreign banks in India. RBI website <www.rbi.org.in>

30. Thorny Issues remain in EU-India trade talks. Monica Ermert, Intellectual Property Watch, 10 May, 2011
31. Citizen News Service, Sept ; 2011, <http://www.citizen-news.org/2011/09/patient-is-more-important-than-patent.html>
32. EU-India FTA - the data exclusivity dilemma by Javier Delgado Rivera. 14 July 2011. <http://www.publicserviceeurope.com/article/609/eu-india-fta-the-data-exclusivity-dilemma>
33. Corporate Catalyst India. Web: www.cci.in
34. Several media reports in the month of December 2011
35. Reported for example in the Hindu of November 16, 2011. web: www.thehindu.com
36. Devesh Kapur. A government without statecraft, Quoted in Business Standard, 12 December, 2011

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