ROSA LUXEMBURG STIFTUNG

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DEVELOPMENT OPPORTUNITIES OR CHALLENGES: LOOKING AT THE PROPOSED FREE TRADE AGREEMENT BETWEEN INDIA AND THE EUROPEAN UNION

A SUMMARY REPORT

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Since 2007, India and the European Union (EU) have engaged in active negotiations on an ambitious and comprehensive Bilateral Trade and Investment Agreement (BTIA), or a Free Trade Agreement (FTA) in generic terms, that includes tariff removal on goods, liberalisation of services, investment, and government procurement among many other issues. The negotiations had seen an impasse since 2013 after the relative reluctance of the newly elected Indian government to pursue the FTA and shifts in the EU's trade priorities. The multiple demands of the EU were also seen as problematic by Indian negotiators. However, with the recent shift in the geo-political context for both India and the EU, and the apparent rekindling of interest in FTAs on the Indian side, the FTA talks have been revived since May 2021, with an official relaunch in June 2022.

Even though India is seen as a major economic power, it remains a developing country with high poverty and multi-faceted inequality, with specific vulnerabilities of certain segments of its population. Given the extensive scope of the proposed agreement and the deep liberalisation foreseen, there are major concerns about the impacts of such an FTA on access to livelihoods, food security, industrial development, and access to resources, services, and medicines in India. There are concerns also about impacts on the regulatory policy space of the Indian government. These aspects will have critical implications on the development trajectory of India and its people, and its ability to meet its key development objectives and in particular the Sustainable Development Goals. It is therefore critical to assess the impact of such an agreement and its multiple and inter-linked provisions on India and its people. The FTA is also expected to create impacts on other developing countries that India and the EU have current trade relations with. Such an analysis becomes even more pertinent in the context of the high inequality between India and the EU in terms of their economic and social conditions. The FTA will also have major influence on India's economic and social policy in general and on its trade policy in other bilateral, regional and multilateral spaces.

> This report aims to capture some critical aspects of the negotiations, the proposed outcomes and their impacts on development considerations in India. It includes an analysis based on available texts, data and information, while drawing on insights of key stakeholders and placing the assessment in a longer-term policy context. The report points out, where possible, the dynamics between different interest groups within India and the impact on vulnerable constituencies. The report also uses key findings to link to the broader policy context in India as well as examine implications for its trade policy in the future.

The report focuses both on the EU's public proposals,[1] which now include several new chapters compared with the negotiating proposals during 2007-2013, as well as on other reports and information related to India's demands and positions especially in the first phase of the negotiations. While some earlier analyses of the FTA talks are available in the public domain, the recent documents and positions have largely not been analysed by academics, policy analysts or civil society organisations (CSOs) or are not publicly available. This report also aims to fill that vacuum to a certain extent.

1 All EU proposals discussed in this report are available at https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/india/eu-india-agreement/documents_en (Accessed: 9 December 2022).

A.

BACKGROUND AND KEY FEATURES OF THE PROPOSED FTA

The broad-based FTA negotiations, originally started in 2007, were revived in 2021 aiming for a "balanced, ambitious, comprehensive and mutually beneficial" trade agreement. Separate negotiations were launched on an investment protection agreement and an agreement on geographical indications (GIs).

The EU is India's third largest trading partner, accounting for EUR 88 billion worth of trade in goods in 2021 or 10.8% of total Indian trade, after the US (11.6%) and China (11.4%). The EU is the second largest destination for Indian exports (14.9% of the total) after the US (18.1%), ahead of China at fourth (5.8%). On the other hand, India is the EU's 10th largest trading partner, accounting for a much lower share of 2.1% of EU total trade in goods in 2021, well behind China (16.2%), the US (14.7%) or the UK (10%). Trade in both goods and services has been increasing. The EU is one of India's largest partners in total trade in services, valued at EUR 28 billion in 2020. Trade in services between the EU and India increased by 76% between 2010-20, comprising 15% of total imports of services by India over 2015-20 (Delegation of the European Union to India and Bhutan 2021). EU exports of goods to India between fiscal years (FY) 2000-20 grew by over five times from EUR 6.7 billion to EUR 36 billion. In FY 2020, 85% of the EU's exports to India consisted of manufactured goods and machinery. The EU has also been increasing its investments in India and its stock reached EUR 87.3 billion in 2020.[2]

However, the trading partners present quite a stark contrast in economic might. The EU's gross domestic product (GDP) of EUR 12.5 trillion accounts for 17.8% of world GDP while India's GDP of EUR 2.32 trillion is merely 3.3% of global GDP. On the other hand, India is a vastly populous country of 1.37 billion accounting for 17.8% of the world population, which puts significant pressure on its per capita income, while the EU's 447.7 million population is only 5.8% of the global population. India's high poverty and inequality rates are also in contrast to the EU's.

Starting from the India-Sri Lanka Agreement of 1998, India's FTAs in their modern manifestation have generally been with developing countries. However, India has been increasingly exploring trade agreements with developed countries and also shifting to more comprehensive agreements compared with its earlier goods-only or goods-plus-services agreements. India already has FTAs with advanced economies such as Japan and South Korea, and has recently signed a limited agreement with Australia. It has been negotiating FTAs with the EU, European Free Trade Association (EFTA), Canada, and New Zealand for quite some time now.[3] However, India has been more cautious about regional FTAs. It pulled out of the 16-nation Regional Comprehensive Economic Partnership (RCEP) in 2019 and has opted out of the trade pillar of the Indo-Pacific Economic Framework (IPEF), an ambitious initiative launched by US President Joe Biden in 2022. India has failed to make much gains from its current FTAs and analysis shows that in spite of a generally cautious approach, India has often made much more commitments compared with some of its FTA partners (Biswajit 2018). However, India's traditionally cautious approach to FTAs seems to have undergone a major transformation in recent times, with the country negotiating several agreements at once and at rapid speed. The revival of the EU-India FTA talks is reflective of this policy shift.

As far as the EU-India FTA negotiations are concerned, the EU has offensive interests in several areas where it wants ambitious market liberalisation, including in agricultural products, automobiles, retail, financial and insurance services, e-commerce, investment, and government procurement as well as intellectual property rights (IPRs) provisions related to pharmaceuticals and agriculture that go well beyond the commitment under the TRIPS Agreement of the WTO. India has offensive interests in information technology (IT)-related services; getting visa access for its workers in the EU under the services chapter; in garments, leather, gems and jewellery, automobile and machine parts, and a few other industrial products. Getting standard and technical trade barriers addressed across the agriculture, manufacturing and services sectors is another major interest for India.

2 Data is taken from https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/india_en (Accessed: 9 November 2022).

3 Initial exploration for a US FTA has not progressed much. See: Mattoo 2022.

However, India has defensive interests in many of the EU's core demand areas. Since the EU's demands are more expansive and ambitious, and involve deep policy implications, it seems its proposals will drive the negotiations and are likely to have a greater influence on the final impact on the Indian people and policy space. The Indian response to the EU proposals is not yet clear and even though India has been submitting responses and proposals during the negotiations, these are not publicly known as yet.

B.

THE GEO-POLITICAL DYNAMICS UNDERPINNING THE FTA NEGOTIATIONS

The earlier phase of the FTA negotiations and the current phase have been influenced by major shifts in the geo-political context, for both India and the EU specifically, but also on a global basis.

For India, the political border conflicts with China have triggered a quest for Western allies who can give it political support and seal such relationships with trade and economic ties. For the EU, and in fact for Western countries in general, the emergence of China as a major economic competitor has also made alternative alliances that consolidate economic and trade relationships beyond China a necessity. The emergence of the IPEF is an effort in this direction. India also hopes to attract the potential displaced Western trade and investments from China. For the EU, Brexit has also made it more important to find FTA partners like India that can offer additional access to large markets. After Brexit, both the EU and the UK have been proactively pursuing trade agreements across the globe. The recent invasion of Ukraine by Russia has also increased the EU's need for partners that can provide alternative sources of energy and raw materials, both for industrial production and agriculture. In that respect, the urgency of an EU-India FTA has apparently increased on both sides.

The internal political dynamics within India and historical inequalities in its domestic economic, social and political power relations remain an issue in Indian trade policymaking. While all FTA negotiations are conducted behind closed doors, trade policymaking in India is highly centralised. There is no role for state governments even on matters on the state list such as agriculture, and on the joint list such as health.[4] Significantly, and in a visible difference from the EU system, there is no need for parliamentary ratification of FTAs in India. The Indian system makes it easy to pursue FTAs with limited consultation with stakeholders, state governments and the parliament. While industry, especially large industry bodies, gets some information and is consulted to a certain extent, the outreach to smaller or more vulnerable constituencies such as farmers, workers, patient groups, indigenous communities, women and others remains extremely limited. Their ability to engage also remains weak.

While the political dynamics outside and within India may make it increasingly smoother for ambitious FTAs such as the EU-India FTA to go through easily, the EU's negotiating demands on the substantive issues, which were already problematic before for India during the first phase of talks, have increased manifold. With several new chapters on sustainability, energy and raw material, and state-owned enterprises, and new ambition in conventional chapters, the EU's global approach to FTAs and what it wants from these is clear. But whether India is able to deliver and benefit from such commitments remains the big question, which warrants an in-depth analysis of some of these provisions.

4 The division of jurisdiction between the centre and the states over issues of critical interest to policymaking is organised under three lists known as the Central List, the State List and the Concurrent List.

BOX 1

PROJECTIONS BY A EUROPEAN PARLIAMENTARY RESEARCH SERVICE (EPRS) STUDY, 2020[5]

Gains (compared with a baseline of 2014 without the FTA) from increased trade for the EU and India will be EUR 8-8.5 billion each (a roughly 0.03% and 0.3% increase with respect to the baseline) (Table 3, EPRS 2020). These projections are made on the basis of a 90% import tariff cut in most sectors (except motor vehicles, agriculture and some others) and a homogeneous and symmetric reduction of non-tariff measures (NTMs) by 3% for both goods and services.

The removal of NTMs will play a significant role as alternative scenarios cut the gain by more than half to gains of EUR 3.67 billion for the EU and EUR 3.74 billion for India when no reduction is assumed in NTMs.

The potential FTA is expected to increase exports from the EU-28 to India by about 52-56%, while exports from India are projected to increase by between 33-35% (Table 7, EPRS 2020; the higher figures are with deeper tariff cuts). Again, without addressing NTMs, EU exports will rise by 32% whereas Indian exports will rise by only 15%.

The effect of foreign direct investment (FDI) and Brexit is not considered in this model. Brexit is expected to lower the gains for India and increase heterogeneity in gains across the EU Member States. If FDI was considered, the EU will likely gain more from FDI than India.

For the EU, the sectors that show the largest increases (in absolute terms) in exports are basic metals (which shows a massive increase), electric equipment, electronics and optical products, and chemicals. For India, the textiles, apparel and leather sector accounts for the biggest increase in exports, followed by chemicals, basic metals and tradable services (Figure 23, EPRS 2020).

Tariff revenue loss from the FTA under deep tariff cuts will be EUR 0.91 billion for the EU, and a mammoth EUR 1.86 billion for India.

5 Source: EPRS (2020): "Assessing the potential impact of an EU-India trade agreement: Cost of Non-Europe Report", www.europarl.europa.eu/RegData/etudes/STUD/2020/642841/EPRS_STU(2020)642841_EN.pdf

C.

ANALYSIS OF SOME KEY ISSUES

While India is expected to make some gains in trade volumes under an FTA with the EU, the losses in tariff revenue, the distribution of gains and losses from the FTA and the impact on policy space may be of great concern. Box 1 provides some interesting projections by the European Parliamentary Research Service (EPRS 2020). The EPRS study (henceforth EPRS (2020)) also points out that there may be impacts on redistributive issues of gains from trade and impacts on inequality, including employment and social impacts, environmental impacts, development impacts and impacts on poverty. The numbers from these projections have to be read with caution given the dependence of the results on the very specific set of assumptions or parameters. But some of the broader trends indicated in the study, such as the critical importance of NTMs, are corroborated by the analyses in the following sub-sections by sectors or cross-cutting issues.

1/ AGRICULTURE, FOOD SECURITY AND LIVELIHOODS

Agriculture and forestry is a major economic activity in India, accounting for 40.2% of employment[6] and 18.75% of GDP (2019). It is a gender-sensitive sector and accounts for a higher share in women's employment at 48.3% compared with men's at 37.5%. Apart from livelihoods, it remains the key source of food security for the billion-plus Indian population. Moreover, agriculture in India is more than a commercial pursuit, and has intrinsic links to India's cultural heritage and history. However, the agriculture sector remains somewhat backward given the lack of resources, both natural and financial, inadequate infrastructure related to production, storage and marketing, and the presence of small and often disorganised farm-holdings. Even though India has a trade surplus in agriculture, trade in agriculture is less important compared with that in services or manufacturing, and accounts for only 11.6% of India's total merchandise exports and 4.5% of merchandise imports (Government of India (2022).

6 ILOSTAT. All data related to India's employment situation cited in this report is taken from this database.

INCREASE IN VALUE OF INDIA'S EXPORTS TO EU AND EU'S EXPORTS TO INDIA (2006-2020, $ MN, 2020)

	INDIA'S MARKET IN EU (VARIATION IN VALUE) ($ MN, 2020)	EU'S MARKET IN INDIA (VARIATION IN VALUE BETWEEN 2007-2020)
Industry and manufactures	3573	7947
Primary products	807	5128
Vehicles industry	87	1802
Textile, leather and clothing	83	783
Products of agrofood industry	39	321
Products from animal origin	7	150
Cereals	2	133
Other crops	1	80
Fisheries	0	2

Table 1 – Source: CEPII-CIREM 2007

Under the proposed Chapter 1 on goods, the FTA will apparently involve the *reduction or elimination of import duties* and will consider further broadening the scope of such duty cuts/removals in the future. Further, under a standstill clause (Article 6) India cannot increase its customs duties above the base rates prescribed in its Schedule of Commitments. Apparently the EU wants tariff cuts/removals to cover more than 92-97% of all Indian goods (agricultural and industrial). India has been very cautious regarding the liberalisation of agriculture under its FTAs. But market access in agriculture is a core demand of the EU in its FTA talks with India and clearly India is expected to concede significant access to its agricultural markets, including in beverage and dairy, which in turn will mark a massive and possibly irreversible shift in its trade policy.

CHANGE IN TRADE FLOWS FOR KEY AGRICULTURAL PRODUCTS

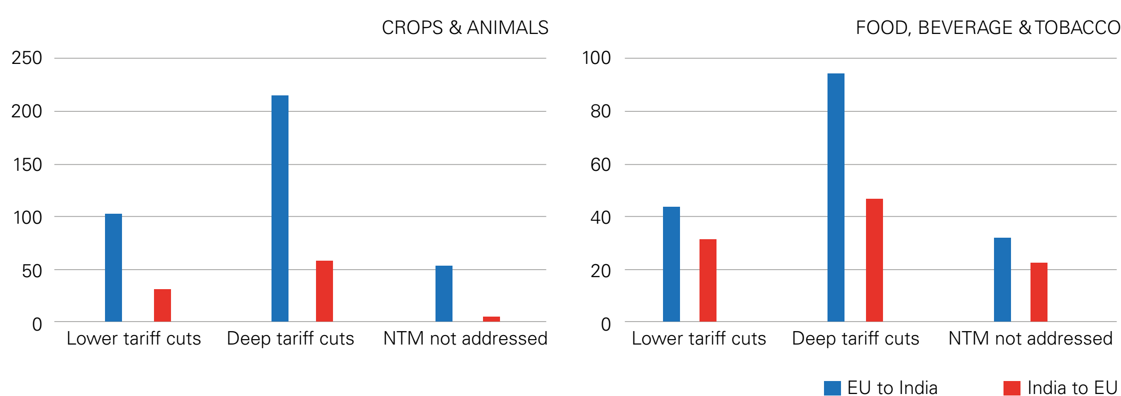


Figure 1: Source: By author, based on data from EPRS 2020, Table 34 (Annex)

Projections made by the European Commission's own studies in 2007 showed massive deficits for India in agricultural trade after the EU-India FTA. Projections for 2020 (Decreux / Mitaritonna 2007) as compared to 2006, the base period, show a high increase in EU's agricultural exports to India in cereals (USD 133 million), agro processed food (USD 321 million), products of animal origin (USD 150 million), and in other crops (USD 80 million) (see Table 1). India gains much

lower (USD 39 million in agro processed food) or negligible amounts in products of animal origin, cereals and other crops (USD 7, 2 and 1 million respectively). Even after UK's share is taken out in a post Brexit scenario, these numbers are likely to be high.

The study by EPRS (2020) cited above projects that the EU's exports of crops and animals to India will increase by 102% or 215% depending on Indian tariff cuts of 20% or 40% (Figure 1). In comparison, Indian exports will increase only by 31.73% or 58.91% (related to EU tariff cuts of 10% or 40%). When non-tariff measures (NTMs) are not addressed, Indian export growth in crops and animals falls to 5.46%. In food, beverage and tobacco, the EU's exports will increase by 44% or 94% depending on Indian tariff cuts of 30% or 60%. In comparison, India's exports will increase only by 32% or 47% (related to EU tariff cuts of 40% or 60%). However, in this study, the exact breakup between products and sub-sectors is not clear and difficult to compare.

The threat to agricultural livelihoods and to the food processing industry, as well as the dependence on imported food, risk undermining India's food security and food self-sufficiency. The EU is aggressive in its demands not only for wines and spirits, but for dairy products, cereals, meat and poultry products, as well as fisheries (the latter sector comes under non-agricultural market access or NAMA negotiations). European processed food can not only impact the growth of India's food processing sector but also impact farmers who supply the raw materials (for example, wheat flour for pasta). Impacting livelihoods of farmers also impacts their direct access to food.

DAIRY

Dairy is another sector where the EU wants significant tariff cuts by India, especially in skimmed milk powder, whole milk powder, whey and a variety of cheeses. While cutting duties on milk powder and whey will hurt small dairy farmers, elimination of duties on cheeses will significantly hurt the budding dairy processing industry. India may face a repeat of the vegetable oil story where in spite of being a leader in oilseed production, India's ability to process and produce vegetable oil was permanently eroded by ill-planned and premature liberalisation of the oil sector after India's accession to the World Trade Organisation (WTO) and implementation of commitments to remove quantitative restrictions on imports. From the 2007 projections quoted above, it is clear how subsidised EU products will penetrate the Indian market. In products of animal origin (which include dairy products), the EU is projected to gain an export market of USD 150 million in India between 2006 and 2020 whereas India is to gain only USD 7 million worth of business in the EU.

It is not surprising that Amul, India's largest dairy cooperative owned jointly by 3 million farmers, has repeatedly written to the Indian government urging them not to cut duties on dairy products, which will threaten the livelihoods of 8 million dairy farmers in India and also hamper the growth potential of the dairy processing industry. In an interview with Amul, the cooperative shared a document on the EU-India FTA which was submitted to the Indian Minister of Commerce & Industry on 22 March 2021. In the document Amul states that the EU is amongst the largest cheese players in the global market and controls 34% of the global cheese trade, producing nearly 500 different varieties of cheese (nearly half of them with GIs), and that it is difficult to keep track of imports and related tariffs. On the one hand, India is trying to export mozzarella cheese and the government is implementing production-linked incentive (PLI) schemes to support the Indian dairy industry. "At the same time allowing duty concession on import of cheese, would result into killing of the very objective of devising this PLI," the letter said.

The combination of duty cuts and recognising EU's agricultural GIs (see below) is likely to adversely impact the domestic dairy sector. India's dairy sector is a sensitive sector which the government has promised, even recently, to protect in its multiple FTAs. This was a major reason behind the Indian government's decision to pull out of the RCEP, and is apparently a difficult issue even in India's initial FTA talks with the US.

EXPORT TAXES

The EU also wants India to completely remove its export taxes (proposed Chapter 1, Article 7). This may force India to give up export bans on food, which it uses often to maintain food security of the country. The EU's demand is in line with the current push at the WTO to eliminate export restrictions, and the EU's quest for agricultural raw materials seems to be a major factor driving such demands. At the WTO, India has strongly defended its use of export measures.

IMBALANCES BETWEEN THE EU AND INDIA

Interestingly, the EU retains a number of advantages in the field o f agricultural trade. First, its import tariffs are already much lower compared with India's except in dairy (see Table 2). The EU's average bound tariff on agricultural products is 12.6% and average MFN applied tariff[7] is 11.7%. In comparison, India's average bound tariff is 113.1% and average MFN applied tariff is 39.2% on agricultural products. So the EU will not have to reduce its tariffs by much and India will not get much additional market access in the EU under the FTA.

AGRICULTURAL TARIFFS IN EU AND INDIA (2021)

	AVG. FINAL BOUND DUTIES		AVG. MFN APPLIED DUTIES	
	EU	INDIA	EU	INDIA
Animal products	17,0	104,5	17,0	32,5
Dairy products	39,9	63,8	39,5	35,7
Fruit, vegetables, plants	11,8	101,2	10,9	33,6
Coffee, tea	5,9	133,1	5,9	56,3
Cereals & preparations	17,3	114,1	14,5	37,3
Oilseeds, fats & oils	5,7	165,1	5,7	53,4
Sugars and confectionery	24,6	126,2	24,3	51,5
Beverages & tobacco	20,3	120,4	19,9	76,3
Cotton	0,0	110,0	0,0	26,0
Other agricultural products	4,2	105,6	3,1	29,0
Average Agricultural Tariffs	12,6	113,1	11,7	39,2

Table 2 – Source: World Tariff Profiles 2022 (WTO)

7 The MFN applied tariff is the actual level of tariff that is applicable to all WTO Member States at each point in time. This must be below the Bound (maximum) Tariff Rates notified to the WTO.

Second, high quality standards and technical barriers (non-tariff barriers or NTBs/NTMs in sum) pose difficulties for Indian exporters, resulting in rejection of consignments, massive material losses at EU ports and restricted access to EU markets. These NTBs are unlikely to see much reduction under the FTA. Chapters 4 and 5 proposed by the EU on Sanitary & Phyto Sanitary (SPS) and Technical Barriers to Trade (TBT) envisage that standards as notified under the WTO's SPS and TBT Agreements will be maintained. These standards are much higher in the EU than in India. According to WTO data, the EU has 952 SPS measures in place compared with 272 in India. Further, it is unclear whether there can be any easing of processes such as certification which will make it easier for Indian exporters to reach the EU markets. For example, Paragraph 2, Article 16 of the proposed Chapter 4 suggests that India's SPS measures will be accepted as equivalent to the EU's if India "objectively demonstrates to the importing Party (EU) that its measures achieve the importing Party's appropriate level of SPS protection". But this condition may almost be impossible for India to meet in reality.

Third, the EU is under no obligation in this bilateral FTA to give up its massive agricultural subsidies, which amounted to USD 85,909 million in 2018 as a sum of Current Total Aggregate Measurement of Support (CTAMS) and Green Box (GB).[8] In comparison, India gives out USD 27,487 million.[9] The EU particularly uses the GB to give what are allegedly trade-distorting subsidies (Sengupta 2021) and has shifted its subsidies from the Amber Box to the GB over time. The EU also enjoys an extra allowance in its AMS entitlement amounting to Final Bound AMS of USD 85,475 million (2018 valuation in USD). This combination of GB and FBAMS allows it to subsidise to a much greater extent if needed compared with India. This will give EU companies significant control in Indian agricultural markets once Indian tariffs are reduced or removed under the FTA. This anomaly has also been pointed out by Amul in its March 2021 letter to the Ministry of Commerce & Industry. Amul said that "the EU is providing very high subsidy on exports of dairy products to their producers which is resulting into lower prices especially of milk powder and fat based product like Ghee and butter. They can dump such subsidized product at lower rate if the market access is granted to them. Unfortunately, under FTA, India cannot negotiate on these subsidies but we must remember this while negotiating any FTA especially related to any of agriculture products".

In essence, since FTAs target mainly tariffs, the EU will retain two of its most effective protection measures, i.e., subsidies and NTBs, while India will be expected to eliminate its most effective protection tool in the form of import tariffs.

INVESTMENT

There are also parallel negotiations between the EU and India on investment (see section C.iv below on natural resources). While India does not allow foreign direct investment (FDI) in agricultural cultivation, allied sectors such as dairy and plantation are open to FDI. Even if the FTA does

8 CTAMS is the Amber Box support (trade-distorting subsidies subject to cuts under the WTO Agreement on Agriculture (AoA)) above the de minimis (i.e., minimum subsidies allowed). It does not include either the Blue Box or Development Box support. Subsidies in the Green Box are supposed to be non-trade-distorting according to the AoA, but some components (Paragraph 5-13) have been heavily criticised for creating trade-distorting effects on global agricultural markets.

9 Calculations are based on data provided by Canada to the WTO, "Update to Canada's Analytical Tool on Domestic Supports", JOB/AG/190, 7 December 2020.

not include FDI in cultivation, the increasing pressure on productive natural resources through increased market access in other areas and strong investor protection will likely add to the resource grab. In addition, the EU is attempting to facilitate mining by European companies through the Energy and Raw Material chapter of the FTA (Chapter 14). All these will have an adverse impact on farmers' access to productive resources including community resources, and will specifically constrain the access of small, indigenous, and women farmers who already suffer from unequal access to such resources and often depend on community-owned resources. A study by the Transnational Institute and others (2012) has documented how the EU has facilitated land grabs across the globe, including within the EU itself, through a mix of policies and encouragement to EU corporations, including the use of trade and investment agreements (TNI et al. 2012).

INTELLECTUAL PROPERTY RIGHTS AND AGRICULTURE

In addition to the demands regarding tariff reduction and investment, the EU has proposed several provisions related to intellectual property rights (IPRs) that are going to be of major concern for India. The WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) had already made a failed attempt to bring in patents on living organisms. However, it was successful in requiring patents on agrochemicals which confer monopoly rights on the patent holder. The TRIPS Agreement has resulted in increased corporate control across the globe over knowledge and technology not only in fields such as pharmaceuticals, but also in traditional medicines, traditional knowledge and agriculture.

But the EU's proposal in the FTA talks with India under the chapter on IPRs (Chapter 10) goes far beyond even the TRIPS Agreement. First, it proposes a maximum of five years' extension on patent terms on agrochemicals on the grounds of time lost due to the administrative process of obtaining the patent. Second, it suggests data exclusivity (DE) for ten years on agrochemicals. This means that even for those products which are off-patent, marketing rights cannot be given by a marketing authority for this period to a generic producer using the same data. This would severely limit the scope for Indian agrochemical companies to provide cheap supplies, leading to significant cost implications for Indian farmers. While agrochemicals may be problematic from a sustainability perspective, Indian farmers are currently dependent on chemical pesticides due to heavy use of chemical fertilisers and farm technology that makes crops vulnerable to pest attacks.

The EU has also suggested that India join the UPOV 1991 treaty. This treaty was championed by a global alliance of seed breeders and protects the interests of multinational seed breeding companies. The treaty makes it mandatory for Member governments to recognise the rights of seed breeding companies and is heavily biased against the interests of Indian farmers who traditionally save, reuse and exchange seeds. Women play an important role in this traditional system as seed protectors. The 1978 version of UPOV had somewhat softer provisions and recognised some rights of farmers to use seeds. But the 1991 version which succeeded it and which the EU asks all its partner countries to sign on to, is far more aggressive. A study has shown that signing on to UPOV 1991 can make seeds four times more expensive (The Berne Declaration 2014).

After having had a sui generis system that allowed greater flexibility to the government and farmers, India enacted the Protection of Plant Varieties and Farmers' Rights Act in 2001 to

implement the commitments under the TRIPS Agreement. This Act recognises seed rights of multinational breeders. However, as a 2019 legal case revolving around a registered potato variety in India's Gujarat state showed, the application of law as well as public sympathies still lie with farmers. In this case, Pepsico India had sued nine farmers for alleged use of its registered potato variety. However, due to public outrage over what was seen as a move to undermine the natural rights of farmers over their seeds, it was forced to withdraw the case.10 In 2021, its registration of the variety was also revoked by the Protection of Plant Varieties and Farmers Rights' Authority (PPV&FRA).11. Such actions may become impossible if India were to accede to UPOV 1991 under EU's demands. It is also interesting to note that several countries have not joined UPOV 1991, in order to protect their farmers' rights. These include Norway, which has a per capita GDP 40 times that of India (Peschard 2021).

GEOGRAPHICAL INDICATIONS

Besides the FTA talks, the EU is negotiating a separate and parallel agreement with India on geographical indications. This shows the EU's major interest in securing a GI deal even if the FTA negotiations were to stall or fall through. Based on the report from the first round of talks,[12] both sides discussed the EU's request for protection of GIs under the bilateral agreement, India's request for protection of non-agriculture GIs, India's requirement to register authorised users for each GI, and the EU's request "to provide high level (Article 23+ TRIPS) of protection beyond wines and spirits". The next round of talks was supposed to be held on 3-7 October 2022 but no report is publicly available yet.

This issue is of particular interest to the EU but having failed to make much headway in the WTO, it has consistently pushed for the recognition of its GIs in its FTAs. This had been a major area of conflict between the EU and India in the earlier phase of the negotiations when the EU had demanded automatic recognition of its GIs after signing of the FTA. The EU is expected to push hard for high-level protection of its 130 GIs, including on 14 types of cheeses. This will threaten the development of many food-related processing industries, including dairy and alcoholic beverages, in India. Indian dairies, many of them small, have just started to produce cheeses such as Cheddar, Buffalo Mozzarella, Feta, Emmental, Gruyere, Gouda etc. Apart from the growing domestic market, these have future export potential as they are often sold as purely vegetarian cheeses.[13] As India has diverse agro-ecological zones, it holds the potential to develop these products much further. If European GIs are recognised in India, this will significantly threaten the future growth of these products and hurt the commercial interests of the Indian dairy industry as it will not be able to use the protected terms or even similar names in branding the Indian

10 For a clear analysis of the case, see https://360info.org/you-say-potato-i-say-property-rights (Accessed: 9 December 2022).

11 See: Protection of Plant Varieties and Farmers' Right Authority, Ministry of Agriculture and Farmers Welfare, Government of India. Available at: https://plantauthority.gov.in (Accessed: 9 December 2022).

12 Report of the First Round of Negotiations on Geographical Indications between the European Union and India, June-July 2022. Available at: https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/d4b5ba84-eff8-4850-ac0c-a89a1a6c9298/details (Accessed: 9 December 2022).

13 An enzyme called rennet used by cheesemakers in the EU and other Western countries to curdle the cheese is commonly sourced from the fourth stomach of young animals (typically cows, but sometimes sheep, goats, or pigs). Cheese produced in such a manner is considered non-vegetarian by Indian vegetarians, especially those who practice vegetarianism based on religious beliefs.

versions. The inability to show the likeness to a growing domestic consumer segment will have major adverse consequences in terms of the growth potential. Moreover, India currently does not have many GIs, especially in unprocessed agricultural products, and Indian farmers' ability to match the EU's resources in getting GIs recognised in the EU will be extremely limited.

SUSTAINABLE FOOD SYSTEM (SFS)

The EU has proposed a stand-alone chapter on sustainable food systems (Chapter 17) which is in line with similar chapters in its recent FTAs with New Zealand, Chile (revised agreement), and Colombia. The EU is bringing similar language into the agricultural negotiations at the WTO as well, as indicated by the recently agreed WTO Ministerial Declaration on Emergency Responses to Food Insecurity (WTO document WT/MIN(22)/28 – WT/L/1139). Such language is drawn apparently from Sustainable Development Goal 2 (SDG 2). In particular, the EU seems to have drawn ideas from SDG 2.5, which covers more of the environmental dimension of sustainable development.[14] This resonates also with the efforts at the WTO to bring in "sustainability and trade" issues either as cross-cutting issues or in specific negotiating tracks. However, while the concept of SFS is fast gaining ground, the EU's approach and interpretation remains extremely problematic.

First, the framework as proposed by the EU in the FTA talks with India seems to bring in additional standards and technical barriers (such as labelling) that would work against Indian exports and ultimately justify standards as a determinant of access to export markets. It also aims to enhance access for EU products into the Indian market. Meeting EU-defined sustainability standards may constitute another set of non-tariff barriers and also imply higher compliance costs for India. For example, meeting the requirements of "animal welfare" may raise the cost of production of dairy and meat products and make these uncompetitive.

Second, it will even limit the policy tools available to India to support domestic agriculture including the use of public food programmes and implies a major intrusion into India's domestic policy space that will have major consequences for the structure and growth of India's agricultural production that goes well beyond the realm of trade.

Third, the EU will be imposing its own concept of an SFS, overriding India's freedom to define what an SFS may mean to itself. The EU's proposed SFS chapter defines a sustainable food system as "a food system that delivers food security, safety and nutrition for all in such a way that the economic, social and environmental bases to generate food security and nutrition for future generations are not compromised". This means that "it is profitable throughout (economic sustainability); it has broad-based benefits for society (social sustainability); and it has a positive or neutral impact on the natural environment (environmental sustainability), including on climate change." This is a highly problematic definition as, for example, being "profitable throughout" may imply that small farmers have to be always profitable or the government may have to maximise taxes and minimise subsidies, both of which are inimical to the interests of the millions of small farmers in India. This also goes against the mandate of SDG 2, which promotes incomes

14 Sustainable development is agreed to have three dimensions, namely economic, social and environmental. Developing countries have particularly argued for realising the economic dimension in order to ensure a recognition of economic objectives that can deliver on poverty reduction, job creation, income growth and economic development, which are critical needs across developing countries.

and productivity of small farmers, including specific vulnerable farming constituencies such as women, indigenous communities and so on.

Finally, these commitments, although couched in the language of cooperation, exchange of information, expertise and experiences, impose more obligations and may ultimately lead to hard legal commitments. The SFS chapter suggests setting up an Action Plan (Article 8, Chapter 17) and a Subcommittee (Article 9, Chapter 17) on Sustainable Food Systems, under the Committee on Sanitary and Phytosanitary Measures. The Subcommittee is to monitor "the establishment and implementation of the action plans" and "will review the plans, notably in the light of progress achieved, and will inform the Committee on Sanitary and Phytosanitary Measures". The SFS provisions are thus clearly linked to the setting of food standards within a domestic context and would slowly push in hard commitments which may work against the interest of Indian producers (including dairy) and exporters who are already grappling with the current standards.

FISHERIES

The fisheries sector is a critical sector from a food security and livelihood perspective[15] that provides employment to 1.09 million people in India. Subsidies for India's largely small fishers are already under threat at the WTO's fisheries subsidies negotiations. According to EPRS (2020), fisheries exports from the EU will increase by 542.87% (when India lowers tariffs by 70%) and 967.56% (when India lowers tariffs by 90%) as a result of the FTA. India currently has a 30% average applied import duty compared with 11.5% applied in the EU. The reduction in import tariffs under the FTA, as well as provisions in the separate investment agreement that could protect the rights of EU trawlers to access to Indian waters and accord them full national treatment, will be disastrous for the entire fisheries sector in India.

FARMERS' CONCERNS

There are major concerns within the farmers' community about India's forthcoming FTAs including the EU-India FTA. Indian farmers also feel disadvantaged from a lack of access to credit, land, water and other natural resources, technology and marketing facilities. Moreover, for Indian farmers, farming is not just a commercial venture but is also a cultural pursuit tied to land rights, and they are mainly interested in accessing domestic markets rather than in exporting abroad. In a joint statement released to the President and the Prime Minister of India, the Samyukta Kisan Morcha, a network of over 192 farmers' organisations representing more than 2 million farmers, said, "In 2021 EU exported Euro 197 billion of agricultural products. In Agri-trade they have a trade surplus of Euro 47 billion. EU gave Euro 54.4 billion in subsidies in 2019. EU is the second largest exporter of wheat, third-largest exporter of chicken, the third largest exporter of milk products, and a successful exporter of other meat, eggs, vegetables, processed vegetables, dry fruits and nuts, cereals and beverages, and spirits. FTA with the EU will have serious implications on the farmers' community and the Indian economy." The letter also expressed concerns that "investment protection agreements and e-commerce will have immense implications for agricultural policy and practices in developing countries. Investment protection will affect the resource access of the farmers".

15 Fisheries trade is usually not included under agricultural trade but under industrial trade.

In a recent interview (Joy 2022), Vijoo Krishnan, Joint Secretary of All India Kisan Sabha (AIKS);' a farmers' organisation representing 11.7 million farmers in India, said "this move in favour of the unequal FTAs is not a course correction in the interest of Indian people, especially the farmers and the small enterprises. The sovereign right to have in place import duties, tariffs and quantitative restrictions must not be compromised. [...] The government should ensure that Indian farmers are protected from cheap imports, monopoly in the name of intellectual property rights must be curbed and no compromise on agricultural subsidy, food security as well as public stockholding programmes. Any let up in these will sound the death knell for Indian farmers".

It remains to be seen whether the Indian government concedes to the expansive demands made by the EU on agriculture and dairy. If so, it would go against its often repeated and even recently stated policy (Jayaswal 2022) not to do so.

2/ SOME CONCERNS RELATED TO MANUFACTURING IN INDIA AND IMPLICATIONS FOR SMALL INDUSTRIES

India's industrial sector accounts for 23.9% of employment (2019) and 27% of GDP (2021), with unemployment ranging between 9% and 20% in 2020-21, up from an average of 6.5% in 2019. The EU is a major market for Indian industry and represents an attractive market opportunity. This is why there is interest among several sections of Indian industry in an FTA with the EU, especially in export-oriented sectors such as textiles and garments, leather products, chemicals, gems and jewellery, and machine parts. Some of them want to make up for the expected loss of GSP preference margins, which India enjoyed so far as a developing country but will be withdrawn from 1st January 2023, through the FTA. Even though Indian producers are mainly confined to lower value segments, Indian industry also hopes to get better integrated into global value chains through this FTA. FDI in manufacturing is largely open (see Annex, page 58) and India is interested in receiving FDI that creates local jobs and value addition and promotes exports. On the other hand, the EU is demanding market access in industrial products especially on cars and car components, chemicals, industrial machinery, and electronic and electrical equipment.

NON-AGRICULTURAL TARIFFS IN EU AND INDIA (2021)

	EU	INDIA	EU	INDIA
	AVG. FINAL BOUND DUTIES		AVG. MFN APPLIED DUTIES	
Fish & fish products	12	135,7	11,5	30,0
Minerals & metals	1,9	38,3	2	11,8
Petroleum	3,2	-	2,5	9,2
Chemicals	4,6	39,6	4,5	10,3
Wood, paper, etc.	0,7	36,6	0,9	10,5
Textiles	6,5	27,3	6,5	25,5
Clothing	11,5	37,7	11,5	24,1
Leather, footwear, etc.	4,1	34,6	4,1	14,6
Non-electrical machinery	1,7	28,6	1,8	8,2
Electrical machinery	1,9	27,8	2,1	10,3
Transport equipment	4,5	35,7	4,7	31,1
Manufactures, n.e.s.	2,0	33,5	2,1	11,9
Average Non-agr Agricultural Tariffs	4,1	36	4,1	14,9

Table 3 – Source: World Tariff Profiles 2022 (WTO

The question is whether the FTA will confer additional access to the EU market in real terms and whether Indian industry is competitive enough to make use of it. As in the case of agriculture, the lower level of average tariffs in the EU gives it an advantage. FTAs primarily target tariffs but the EU will hardly need to reduce its already lower import tariffs compared with India. India's average bound tariff is 36% and average MFN applied tariff is 14.9% on non-agricultural products (Table 3). In comparison, the EU's average bound tariff and average MFN applied tariff are both at 4.1%. Moreover, 28.6% and 34.6% of EU non-agricultural imports already enter duty-free or at less than 5% import duty, respectively. Therefore, while India will have to concede access to its own market by reducing tariffs, it cannot expect much additional access into EU markets from tariff cuts. With a proposed coverage of 92-97% of goods under the FTA, drastic tariff reduction can have serious impacts on Indian manufacturing.

While the EU has lower tariffs, its main protection tool is non-tariff measures such as standards and technical barriers. According to WTO notifications as of 30 June 2022, the EU has 1,487 TBT (general) and 890 SPS (general) measures in place compared with India's 273 TBT (general) and 268 SPS (general) measures. Indian industry has already found it difficult to meet the EU's standards and technical requirements. Moreover, additional non-tariff barriers in the form of labour and environmental standards can also affect the Indian industries, especially small-scale ones. Among the texts proposed by the EU, the ones on sustainable development, energy and raw material and SFS can impose additional standards on Indian industry. The FTA must aim for effective Mutual Recognition Agreements (MRAs) that target such technical barriers to trade. However, MRAs between the two partners may be quite complicated to achieve as the EU is expected to be extremely cautious on this front.

According to the pre-Brexit study by CEPII-CIREM cited earlier (CEPII-CIREM 2007), textile, garments and leather are the only Indian sectors which would have benefitted under the FTA and even then, their total gain of USD 3,573 million would fall far short of the gain of USD 7,947 million the EU was supposed to make in manufactures and USD 1,802 million in vehicles (see Table 1 above). EPRS (2020) projects that in sectors making significant gains, textiles, garments and leather show a gain of EUR 5,426 million. However, this comes down to EUR 3,614 million when NTMs are not addressed. The chemicals and electrical equipment sectors show gains of EUR 2,009 million and EUR 699 million respectively. But again, these come down to EUR 1,190 million and EUR 109 million if NTMs are not addressed. All these are modest gains especially in an already growing export scenario.

The vehicles industry in India is one of the few successful sectors and provides employment to 1.36 million people. Its development was enabled by a specific policy of high tariffs combined with an open FDI policy which attracted investment from the US, Japan, Germany, Italy, France, the UK and South Korea and resulted in transfer of technology. In no other Indian FTA has the final automobile products sector been opened up. The industry had earlier expressed serious concerns about duties being reduced under the FTA with the EU, at least by half, in many segments which could face severe threat from EU car manufacturers. It argued that the proposed tariff reduction under the FTA will affect the scope for investment and therefore output growth and job creation. The available projections (see Box 2, page 24) seem to corroborate this apprehension.

BOX 2

PROJECTIONS FOR TRADE IN MOTOR VEHICLES

The projections in the CEPII-CIREM study showed that in the vehicles sector, the EU's share in the Indian market would have increased from 26% to 82.5%, with an absolute increase of USD 1,802 million in trade value between 2006 and 2020 had the FTA gone through earlier. In exchange, India's share in the EU market would have remained almost constant at 1.3% and India would have gained only USD 87 million worth in exports by 2020.

The projections by EPRS (2020) suggest that in the motor vehicles sector, the EU will increase its exports to India by EUR 638 million (or share by 45.57%) with deeper tariff cuts (90%), while this increase is EUR 339 million (or share by 24.21%) with more moderate cuts (50%). Indian exports will increase by EUR 298 million (or 13.83%) under deeper cuts, compared with EUR 189 million (or 8.80%) with moderate cuts. In both cases, India is to face a significant increase in its trade deficit.

According to Sugato Sen, former Director-General of the Society of Indian Automobile Manufacturers (SIAM)[16] cutting Indian duties of around 60% for the EU does not make sense given the tariff-FDI policy combination the government has successfully pursued in the past. In addition, the EU wants access for its big and high-value cars, whereas Indian companies are unlikely to make much inroads into the EU given the high investment costs and after-sales expenses to access the EU markets. He also stated that no two FTAs can be treated as equivalent; so if India opens up to Japan, South Korea, ASEAN or even the UK, it does not mean it should give the same concessions to the EU, which is a much bigger competitor. Standards, including the possible ban of Internal Combustion Engines or ICE in the EU countries (Kable 2022), also remain a major impediment to Indian car exports to the EU. Sen pointed out that a standard argument used that liberalising under FTAs will make the Indian automobile industry "more competitive", is not valid. While Indian cars have fewer features, this "inefficiency" is compatible with the requirements and pockets of the Indian consumer base. He also pointed out that for obvious reasons, Indian, Japanese and Korean companies operating within the Indian automobile industry were more opposed to giving such concessions to the EU compared with European ones.

EXPORT TAXES

As mentioned under section i above, the EU wants export taxes removed completely (Chapter 1, Article 7) in order to get access to India's raw material including minerals, which could threaten the domestic industry's access to cheap raw material. The EU's policy document "The Raw Materials Initiative" (2008) openly suggests using all agreements including FTAs to acquire raw material from developing countries, most notably India and China. Apart from the control over important minerals, industries such as leather may also be affected.[17] The Indian government currently imposes a 25% export tax on raw leather which has ensured the domestic availability of the material and promoted the growth and international competitiveness of the leather industry. The experience of Kenya is instructive in this regard; the country had imposed a 40% export duty on raw leather, but its buoyant leather industry was devastated when it was compelled to remove the export tax at the EU's behest (Traidcraft et al. 2010).

India's trade policy has often compromised on policy space to develop high-value industries in exchange for gains in a few small sectors. The negotiations are often highly unbalanced. For example, in the EU-India FTA, the proposed tariff reduction for at least 95% of products or tariff lines will have serious implications for India's industrial sector, including its small and medium enterprises. India is keen to grow markets for textiles and garments, leather, gems and jewellery, chemicals, small automobiles and machine parts. However, Indian industry is not yet competitive enough compared with European producers even in some of these sectors, as well as most other manufacturing segments. Such concessions in the FTA may thus take away the domestic producers' legitimate access to a growing market within India and could result

16 Interview with Sugato Sen, former Director-General of the Society of Indian Automobile Manufacturers (SIAM), 10 October 2022.

17 See research by the Third World Network on the impact of removal of export taxes. Available at: www.twn.my/title2/par/Export_Taxes.doc (Accessed: 9 December 2022).

in large-scale job loss and closure of manufacturing units including in small and medium-scale industries.

India is also looking to get more foreign investment from the EU in manufacturing. The EU has been increasing its investment into India, for example in industrial machinery and machine tools, chemicals, drugs and pharmaceuticals, and automobiles. The automotive industry accounts for 9% of European investments in India, chemicals another 5%. But lowering duties may not be the best way to attract further investment into these sectors, as in the case of the automobile industry.

It is interesting to note that developed-country parties such as the EU which are asking developing countries such as India to cut tariffs, themselves used very high import tariff rates when they were industrialising. The US used tariffs that went to as high as 35-50% while the EU used rates between 13-23% when their per capita incomes were at levels similar to those of today's developing countries (Akyuz 2005). Premature liberalisation may hamper India's capacity to design its own industrial policy and instead bring de-industrialisation in some sectors, as had happened when India signed the Information Technology Agreement (ITA) under the WTO and opened its tele-communications equipment manufacturing sector (Chaudhuri 2013).

SOME IMPLICATIONS FOR INDIAN MICRO, SMALL AND MEDIUM ENTERPRISES (MSMES)

The Indian MSME sector operates across a large range of industries. In fact, sectors such as textiles and garments, leather, handicraft, gems and jewellery, machinery and parts, and automobile parts are proliferated by MSMEs. According to Anil Bharadwaj, Executive Director of the Federation of Indian Micro and Small & Medium Enterprises (FISME), [18] while FISME members are hoping to get greater market access into the EU and compete better with other suppliers to the EU market, they are particularly concerned about government procurement (see section C.vi below), standards, and the EU's data privacy law (General Data Protection Regulation or GDPR) which came into effect in 2018. Without addressing these concerns, the benefits from the FTA may not materialise at all.

According to FISME, MSMEs find it difficult to compete with the higher product standards in the EU. As FISME pointed out, the institutional capacity is lacking in India, first in rule-making bodies, second in testing laboratories, and third in human resources to develop standards and then build the capacities of MSMEs to implement such standards. Without upgradation of such capacity within India, Indian MSMEs will be in the same position as African MSMEs where, as a result of the EU-African Union FTA, only EU companies could benefit due to the higher standards and technical barriers in the EU. The EU's technical barriers (such as laboratory and machinery requirements that are only from the EU) are stringent and imply massive costs for Indian MSMEs. Indian MSMEs do not even know of the standards required by the EU sometimes (e.g.,maximum chemical residue levels in leather products). In addition, labour standards as demanded by the EU are often problematic for MSME sectors such as handicrafts where whole families are involved. These standards do not take into account the distinctive labour relations in certain segments of production. FISME's suggestion is that the EU should start with soft regulations regarding

18 Interview with Anil Bharadwaj, 28 October 2022.

standards, and progressively raise the standards over the next 15-20 years as Indian capacities are built.

Indian MSMEs also often face higher duties on their imported inputs but are faced with competition from FTA partners after duty cuts on final products (referred to as an inverted duty structure). While this has been somewhat addressed in recent years, some anomalies still remain, making it unprofitable for Indian MSMEs to export.

In addition, FISME pointed out that the EU has passed the GDPR but India has no such data protection law at the moment. This is used by EU companies as grounds for not transferring technology to Indian MSMEs even when they have the capacity to manufacture products such as machinery and parts. Also, in the exchange of commercial information, European companies are protected while Indian ones are not.

Indian MSMEs also face critical barriers posed by intellectual property rights held by EU companies such as patents and marketing rights (in medicines and agrochemicals), design protection (in cars, apparel, etc), and geographical indications (e.g., European cheeses, wines, oils) while being unable to use such protection themselves. Just registering an intellectual property is not enough and MSMEs do not have the resources to market their brands properly. They also lag behind European multinationals and MSMEs in access to credit and infrastructure (e.g., in marketing, storage, transport and shipment). Further, preferential treatment given to MSMEs in India, for example in public procurement (see section C.vi below) or competition policy, may have to be withdrawn under the FTA. Indian MSMEs also have a relatively large number of women entrepreneurs who may be weaker in terms of financial resources, time availability and technical knowledge. Several MSME entrepreneurs have repeatedly complained about lack of information on FTAs and the lack of "a level playing field". In addition, contrary to popular belief, the EU exports not only high-value-added industrial products to India but also low-value-added products and intermediates, often produced in the Eastern European Member States. For example, the Indian car components and food processing sectors, which are dominated by MSMEs, may face competition from Eastern European producers.

The chapter proposed by the EU on SMEs (Chapter 13) is targeted mainly towards sharing information regarding the provisions of the FTA with the SMEs of both parties. While lack of information does pose a major challenge to Indian MSMEs in using FTAs, the provisions in this chapter are largely cosmetic and are unlikely to give them any special preference or real advantage in bridging the immense divides in access to finance, technology, know-how, marketing and meeting product standards.

3/ SERVICES TRADE LIBERALISATION AND THE ILLUSORY BENEFITS FOR INDIA

Services represent the largest and a fast-growing sector for India, accounting for 54.27% of GDP in 2021, though with a lower share in employment at 33.3%. Led by the IT and IT-enabled services (ITES) sub-sectors, the service sector is seen as India's main offensive interest in the country's FTA negotiations. However, India's service sector growth and expected gains are confined to very few segments. For the Indian people, the key issues related to services are income generation, job creation, as well as access to services and security. So, it is important to look at the EU's demands and India's expectations in services with respect to these dimensions.[19]

THE FOUR MODES OF SERVICES TRADE

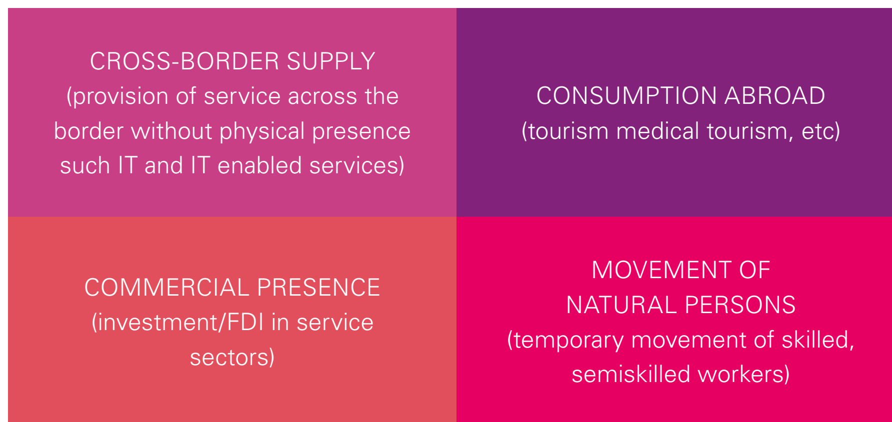


Figure 2 – Source: author

Services trade liberalisation under the FTA will be under the four modes of service supply (see Figure 2). Out of these, the EU's main interest is in Mode 3 or investment in India's service sectors. In particular, the EU is interested in sectors such as banking, insurance, pension, construction, e-commerce, and retail in which the EU has competitive advantage at a global level. India's greatest interest lies in Mode 4 or the movement of its skilled or semi-skilled workers to the EU. India has pushed for the opening up of Mode 4 under the General Agreement on Trade in Services (GATS) at the WTO and has often justified its engagement in FTAs on the ground of

19 For a more detailed analysis of relevant issues, see Sengupta / Ashutosh 2009.

seeking further liberalisation under Mode 4. It also has an interest in expanding the market for its IT and ITES sectors across all four modes.

THE EU'S OFFENSIVE INTERESTS

India has an open FDI policy in most manufacturing and service sectors (see Annex 1 below). Entry of FDI up to the prescribed limits is either automatic or needs government approval. FDI in several service sectors of interest to the EU such as construction, wholesale retail, and e-commerce is already fully open). However, the EU is keen to get access to 100% FDI in banking, insurance, pension and multi-brand retail segments where FDI limit is lower. The EU is already a major investor in India across manufacturing and services. Its investment increased from EUR 63.7 billion in 2017 to EUR 87.3 billion in 2020. This is significant but way below European investments in China (EUR 201.2 billion) or Brazil (EUR 263.4 billion).[20]

India has always followed a cautious policy on financial sector liberalisation, which had protected it to a large extent from the contagion effect of the global financial crisis of 2008. Liberalisation of banking and finance-related services will have critical implications on income, but also on security and access to services. Foreign banks, including European ones, operating in India have tended to be concentrated in urban areas and do not offer services such as no-frills accounts which are low-balance accounts specifically meant to cater to poorer citizens. Further, they have contributed to crowding out of public investment, especially from rural and other backward regions (Singh 2010). Pension and insurance are also sensitive policy issues in India given that financial resources of very vulnerable populations are tied to these sectors.

The multi-brand retail sector in India is another major area of interest for the EU. The retail sector is a highly sensitive sector in India that provides employment for over 29 million people or 8.55% of employment, the second largest share after agriculture. It is also gender-sensitive, with women accounting for 12.56% of total employment in the sector. Some 92% of this sector is informal, with numerous hawkers and vendors operating alongside neighbourhood stores and larger-scale organised retail shops. Small informal operators including women have already been adversely impacted by organised larger stores, with vendors and hawkers facing a 10-15% decline in sales according to rough estimates provided by Shaktiman Ghosh, President of India's National Hawker Federation. The progress of e-commerce especially during the COVID-19 pandemic has increased the challenge manifold and the e-commerce segment is set to see still further growth.[21]

During the earlier phase of the FTA negotiations, the EU had demanded the complete liberalisation of multi-brand retail in order to facilitate the entry of European supermarkets. However, this has been a politically sensitive issue for India. India implemented FDI liberalisation up to 51% in multiple-brand retail in 2012 under the United Progressive Alliance (UPA) government. However, the current ruling Bhartiya Janata Party (BJP) was opposed to this policy decision and there was opposition in several states that the BJP was holding. When the National Democratic Alliance (NDA), of which the BJP is the major partner, came to power at the centre in 2014, the

20 Data taken from: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/india_en (Accessed: 9 December 2022).

21 Indian e-commerce is set to grow by 84% to USD 111 billion by 2024 as it gains from demand created by the coronavirus pandemic's impact (BS reporter 2021).

government partially reversed the decision and placed the approval under the mandate of state governments. Any further liberalisation of this sector under the FTA and allowing national treatment of new investments will take away such decision-making ability of the state governments. The employment impact of retail sector liberalisation can be severe on India even after taking into account the sector's falling shares due to competition from e-commerce.

Another service sector that may face a critical employment challenge is waste management, another large employer with a primarily informal setup that where 18.77% of workers are women. The EU has significant interest in this sector. While the waste management system in India, which relies heavily on manual labour, needs to be upgraded in terms of technology and work conditions, this also raises sensitivities because of the major employment implications. The expected increase in use of labour-saving technology as a result of European investments is likely to cause losses to workers who have very limited skills to shift to other work.

Professional services such as accountancy and legal services are a key interest area for the EU as well. However, the Indian Bar Council and other professional associations have been strongly opposed to liberalisation. Reciprocity is also an issue as Indian professionals are unlikely to get similar access into the EU (see below) (Bhan 2022).

Another issue that arises is that of investor protection, as the EU will seek protection by the Indian government of rights of European investors in the services sector. As mentioned earlier, negotiations on a separate agreement on investment have been going on in parallel. (For more analysis on investor protection, see section iv below.)

INDIA'S OFFENSIVE INTERESTS

The IT and ITES sector, a primary interest for India, uses mostly Mode 1 or cross-border supply but faces a number of NTMs in the EU. It also has interest in Mode 3 and Mode 4. A Federation of Indian Chambers of Commerce & Industry (FICCI) survey (FICCI 2009) points out that "the main impediment[s] in the expansion of services to the EU were visa and consular issues, non-clarity of taxation and cross border transaction laws as applicable to Indian service providers". Negotiations in the earlier phase had reached a major roadblock because of EU reservations related to security and privacy of data guided by the EU's Data Protection Directive of 1995. The EU has high standards for certification of equivalence and considers India data-insecure. Its General Data Protection Regulation has updated and unified data privacy laws across the EU. This will make access for Indian IT companies even more difficult. According to EPRS (2020), India can expect a gain of EUR 944 million in tradable services after the FTA but this falls to a net loss of EUR 32 million if NTMs are not addressed (the study does not take FDI into account).

India also has some offensive interest to invest in the EU in service sectors such as banking and professional services such as accountancy, legal services and so on. However, while FDI in the EU is largely open, there are significant NTMs in the EU such as economic needs tests (ENTs), other visa barriers as well as a lack of harmonisation of policies across the Member States. The lack of Mutual Recognition Agreements (MRAs) between the two partners is a major challenge. Further, the competitiveness and the skills required to capture markets in the EU are lacking in

India. The expected gains from the FTA are thus not very clear and may be limited at best. For example, Indian banks may be able to get business only from non-resident Indians (NRIs) in the EU and Indian legal professionals will find it very difficult to operate in the EU. It is also important to remember that any demand for further access into the EU will mean having to make concessions in return.

As mentioned above, India has major interest in securing more access for its workers in the EU under Mode 4 and it remains a sensitive issue as well.[22] The EU currently has very high barriers to any movement of workers under Mode 4. There are entry barriers in terms of border measures related to immigration regulations, and domestic regulation in the form of accreditation and licensing requirements. EU FTAs limit any liberalisation under Mode 4 only to professionals and this is not extended to other worker groups. There are several natural restrictions to working in the EU as well. The EU tends to source its workers either from the EU region itself or from countries with similar language and culture, or with geographical proximity (Eurostat 2007). Given the current economic and political environment in the EU especially after Brexit and the restrictions in place, expansion of visas for a wide category of workers seems extremely unlikely. From older documents of the European Parliament, it is clear that the EU has always been cautious on promising too much in this chapter (European Parliament 2009), a stance unlikely to change now. The only gain for India may be limited to employees of business process outsourcing (BPO) companies, which are physically located in the EU under Mode 3.

In all its trade agreements, India focuses primarily on the benefits for its service sector. However, India has been unable to actually gain much from such focus, either at the WTO or in FTAs such as the RCEP where its demands regarding services liberalisation were firmly opposed. In reality, much of the expected gains from services liberalisation turns out to be illusory, but now major concessions in sectors like agriculture may have to be offered in exchange for such gains.

22 The UK-India FTA negotiations faced a major roadblock over the migration issue (BS Web Team 2022).

4/ SOME IMPLICATIONS FOR NATURAL RESOURCE CONSERVATION AND SUSTAINABILITY

Trade and investment agreements, especially North-South ones, have been criticised by civil society organisations and environmental activists for being tools of resource extraction from developing countries. The EU has also been criticised for using investment-related provisions coupled with disciplines on export taxes that secure expansive rights for its companies to facilitate resource grabs. European companies' (including UK companies before Brexit) tendency to undermine national environmental rules and laws[23] in developing countries and the EU's own policy approaches corroborate this.

The EU's 2008 Raw Materials Initiative (European Commission 2008) lays out the European Commission's plan to "set out a strategy for tackling the issue of access to raw materials in the EU".[24] This strategy has three pillars which aim to ensure fair and sustainable supply of raw materials from global markets, sustainable supply of raw materials within the EU, and resource efficiency and supply of "secondary raw materials" through recycling. It identifies India among others as a key country which is trying to protect its raw materials. The report says: "Increasingly, many emerging economies are pursuing industrial strategies aimed at protecting their resource base to generate advantages for their downstream industries. This is apparent in the proliferation of government measures that distort international trade in raw materials. These include export taxes and quotas, along with subsidies, price-fixing, dual pricing systems, and restrictive investment rules. Over 450 export restrictions on more than 400 different raw materials (e.g. metals, wood, chemicals, hides and skins) have been identified. China, Russia, Ukraine, Argentina, South Africa and India are among the key countries involved in applying such measures, while in many cases also benefiting from reduced or duty-free access to the EU market for related finished products, placing many EU industrial sectors at a competitive disadvantage." Section 2.1 of the document on "Access to raw materials on world markets at undistorted conditions" suggests that "access to primary and secondary raw materials should become a priority in EU trade and regulatory policy".

23 See, for example, https://en.m.wikipedia.org/wiki/Shell_Nigeria and www.ejolt.org/2015/08/vedanta-case-india (Accessed: 9 December 2022).

24 See European Commission on policy and strategy for raw materials: https://single-market-economy.ec.europa.eu/sectors/raw-materials/policy-and-strategy-raw-materials_en (Accessed: 9 December 2022).

The recommendations suggest that the EU should "promote new rules and agreements on sustainable access to raw materials where necessary"; "work towards the elimination of trade distorting measures taken by third countries in all areas relevant to access to raw materials"; and "act against the protectionist use of export restrictions by third countries". "In determining its actions, the EU will take as priority those export restrictions that pose the greatest problems for EU user industries or give their domestic downstream industries an unfair competitive advantage on international markets." The EU's demands in terms of investment, export taxes and raw materials and energy thus seem to be clearly shaped by its search for raw materials.

INVESTMENT PROTECTION

While manufacturing and mining activities in India are largely open to investment, a critical issue relates to investor protection. The provisions in International Investment Agreements (IIAs) have created massive challenges for policy space of governments by allowing a very high level of rights for investors without matching obligations and accountability. In particular, the now infamous Investor-State Dispute Settlement (ISDS) provisions in these IIAs have allowed investors to directly sue governments[25] in secret international arbitration cases even for policy changes made in the public interest, thereby leading to a chilling effect on policymaking. Investor protection however is sought by the EU under the mandate of the Lisbon Treaty to secure protection for its companies involved, among others, in energy and raw material extraction.

INDIA'S NEGOTIATIONS OF VARIOUS INTERNATIONAL INVESTMENT AGREEMENTS (IIAS)

LIST OF COUNTRIES WITH WHOM NEGOTIATIONS ARE ONGOING	LIST OF COUNTRIES WITH WHOM NEGOTIATIONS ARE AT A PRELIMINARY STAGE
Switzerland, Argentina, Morocco, Mauritius, Russia, Israel, Tajikistan, Uzbekistan, Qatar, Ukraine, Mexico, Saudi Arabia, United Arab Emirates, Iran, Canada, US (Investment Incentive Agreement), Azerbaijan, Cambodia, Peru, Sri Lanka	Mongolia, Thailand, Philippines, Australia, Oman, Egypt, Turkmenistan, Armenia, Ethiopia, Zimbabwe, Kuwait, Hong Kong, Ivory Coast, San Marino, Zambia, European Union, Asia-Pacific Trade Union

Table 4 – Source: MOI (2021)

In the meantime, India has faced about 29 ISDS cases[26] while another eight have not proceeded to arbitration. India has lost many[27] of these cases starting with the White Industries case in

25 This marked a shift from the state-to-state dispute settlement which is usually followed in other trade agreements including in the WTO and is driven by many other considerations beyond the profit motive of investors.

26 Ministry of External Affairs, Government of India (2021): "India and Bilateral Investment Treaties", 10th report presented to the Parliament.

27 According to the Ministry of External Affairs' 2021 report on "India and Bilateral Investment Treaties", "India has won 4 arbitration, lost 2 arbitrations, received adverse award in 3 arbitrations out of which all three cases are pending challenge to the arbitral award at the seat of arbitrations. In 1 dispute the investors withdrew their claim and 3 disputes have been resolved amicably. 8 disputes are still active at different stages of arbitration and in another 14 disputes, the claimants did not pursue the matter after the initial request under BIPA. 2 new notices have been received" (Paragraph 2.3, page 17).

2011. The most recent one of interest is the Cairn Energy case[28] related to retrospective taxation, where Cairn Energy used the UK-India bilateral investment treaty (BIT) to sue India and won the case. India was threatened with seizure of assets in nine countries and had to settle the case for USD 1.06 billion. As in other countries, the BITs have clearly eroded India's policy space[29] including to implement a flexible tax policy and design sectoral policies, protect natural resources and land rights of vulnerable populations,[30] and ensure public health. In response to continual losses in BIT cases, India has developed a model BIT with certain safeguards in terms of scope and dispute settlement.[31] It has also terminated 76 of its total 86 BITs (some had expired) and started renegotiations on 37 (see Table 4). Only six are now in force while another four are yet to come into force.[32]

India had individual investment treaties with 22 EU Member States which stand terminated. The first phase of the EU-India FTA negotiations had attempted to replace all these bilateral treaties with a single investment chapter in the FTA. However, the perspectives of India and the EU differed significantly including around India's new model BIT. Currently, the investment negotiations are being pursued on a parallel track to the FTA talks.

The first round of negotiations took place in June 2022, and the second round was held in early October 2022. The EU's proposed text on investment protection diverges substantially from India's model BIT and includes the following problematic provisions:

a. A broad definition of investment (Article 1.1) is provided that could even include IPRs on seed varieties for example and that differs quite widely from the "enterprise"-based definition in India's model BIT.

b. The scope is expansive and includes all measures by a government and does not provide the exemptions contained in India's model BIT, such as for matters relating to public procurement, taxation, public services provided by state enterprises, compulsory licences and measures by local governments.

c. The EU's proposal includes "national treatment" (NT) for foreign investors (Article 2.3) that would allow them to be treated on par with domestic investors; and Most Favoured Nation (MFN) treatment (Article 2.4) that would allow European investors to be treated no less favourably than investors from other countries with which India may have similar agreements. The MFN clause has been quite problematic in the history of BITs and for

28 See UNCTAD: https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/691/cairn-v-india (Accessed: 9 December 2022).

29 For an account of India's experience with BIT cases, read Dhar 2015.

30 The Indian state of Andhra Pradesh was sued by a UAE company called Rakia in 2016 for USD 44.71 million under the newly signed India-UAE BIT when the government cancelled bauxite mining licences following protests by indigenous groups over land grab and environmental damage. See UNCTAD: https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/767/rakia-v-india (Accessed: 9 December 2022).

31 India's model BIT has safeguards such as keeping public procurement, taxation, public services provided by state enterprises, compulsory licences and measures by local governments out of the purview of ISDS; and allowing domestic courts to decide on disputes for a five-year period before a dispute can be taken to an international arbitration court. See: www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf (Accessed: 9 December 2022).

32 Ministry of External Affairs, Government of India (2021), see above.

India, as it has been used by investors to cherry-pick the most favourable clauses from any BIT the country may have signed. Notably, India's model BIT includes NT but not MFN.

d. "Fair and equitable treatment" (FET) and "full protection and security" (Article 2.6.1) to foreign investors is again quite expansive with very limited exemptions and must take into account the "legitimate expectation" of an investor. India's model BIT does not include FET.

e. Expropriation (Article 2.8), which covers nationalisation or takeover by a government through physical expropriation or by policy change, is prohibited with limited exemptions.

f. The dispute settlement section (Section 3) allows ISDS under the ICSID Convention or the UNCITRAL Arbitration Rules. The provision in India's model BIT allowing for exhaustion of domestic remedy in national courts for five years is not included. Further, the Indian model BIT allows ISDS only on alleged breach of the substantive investor protection clauses. Under the second round of negotiations however, the EU has proposed a multilateral investment court system for investment related arbitrations. The EU has been proposing the MIC in several of its FTAs and investment treaties with the objective to set up a permanent body to decide investment disputes. India's position on the MIC is not yet clear. The MIC is designed, in principle, to address the issue of conflict of interest stemming from the current fluid arbitration system where an arbitrator in one case involving a party can become a lawyer for the same party in another case. However, it fails to address some of the key concerns related to investment treaties and investment disputes such as the expansive definition of investment, and more importantly, the key principle of the ISDS itself which allows private companies to sue governments for critical policy decisions.

g. Articles 2.2.1 and 2.2.2 provide a right to regulate but are weak in legal terms and do not override problematic provisions elsewhere in the text. Article 2.2.2 provides the right to regulate only for "legitimate" policy objectives, which has been interpreted in a WTO dispute to mean widely recognised state practice. If this interpretation is followed in an investment dispute, this would mean that best practice regulations that have not yet been widely adopted such as large health warnings for alcohol or specific and new environmental regulations may still be considered as expropriation and would be prohibited under the agreement.

h. It is important to note that the Indian model BIT chapter on investor obligations – which requires, for example, that foreign investors comply with domestic laws on corruption, disclosures and transparency – is missing from the EU's proposal. This chapter would go a long way towards balancing the rights and obligations of investors, preventing invocation of investor protection for misuse of natural resources, and promoting environmental protection (along with human and labour rights, public health objectives etc).

It is unclear what the final agreement will cover, including the form of dispute settlement and the safeguards India suggested in its model BIT. The more expansive the protection for foreign investors, the more India will be constrained from adopting policies to protect its natural resources and

raw materials and pursue environmental conservation. In addition, its ability to raise resources through a flexible tax policy that can fund such environmental conservation and other development policies may also be challenged. Policy space may thus be compromised in return for inking an investment agreement whose benefits are unclear. According to an Indian Ministry of External Affairs report (2021), "causality between BIT and investment inflows appear to be weak and insignificant as per various studies" (Paragraph 3.10, page 25), though it may arguably be useful as a signal to encourage investors.

Further, as discussed under section C.ii on manufacturing, and consistent with the analysis of the EU's Raw Materials Initiative, the proposal by the EU on removal of all export measures including export taxes will also complement work by EU companies to extract and export raw material including minerals out of India.

ENERGY AND RAW MATERIAL

The proposed Chapter 14 of the FTA on Energy and Raw Material will impose several constraints on India's policy space related to domestic production, use and trade of energy and raw material products or services including those related to renewable energy, and can constrain future growth in these segments. These include constraints on the right to grant exclusive rights to any company to trade (Article 4), and on allowing any subsidy on energy products or raw materials for domestic industry (Article 5). In addition, any regulation of domestic price would have to be clearly defined, transparent, non-discriminatory and proportionate (Article 6). Article 7.4 suggests that any company granted an authorisation may be asked to pay a financial contribution or a contribution in kind, but this "shall be fixed in such a manner so as not to interfere with the management and the decision-making process of the entity which has been granted an authorisation". Since what will constitute an interference with the management and the decision-making process of the entity is not clear, this may even, in an extreme case, force India to hand over its raw materials to EU companies for free.

The chapter further suggests that EU companies must be granted non-discriminatory access to energy transport infrastructure (Article 10) and "access to and use of the electricity network for renewable electricity generation facilities located within its territory on reasonable and non-discriminatory terms and conditions" (Article 12). These would severely undermine the objectives of initiatives such as Make in India[33] under which the government has promised a new policy to provide power connection within a mandated time frame of 15 days instead of 180 days.

Article 13 further constrains India's ability to adopt or maintain any measure including local content requirements affecting the other party's products, service suppliers, investors or enterprises; or to require an entity of the other party to form a partnership with a domestic entity to be authorised to be active in the area of renewable energy production and related value chains. Again, this could adversely impact the Make in India programme, which has made local content requirements one of its key policy thrusts. Interestingly, Article 13 could nullify the EU's own demands for labour standards and environmental impact assessments as it disallows "any measure" that affects the other party's products, services etc.

33 See Make in India: www.makeinindia.com (Accessed: 9 December 2022).

THE EU'S USE OF "SUSTAINABILITY"

The EU-India FTA negotiations are taking place amid a growing focus on the relationship between trade and issues such as environment and climate change. The EU has projected a global leadership role in this regard with its unilateral measures on a Carbon Border Adjustment Mechanism (CBAM), EU's vision of a Green New Deal, and now its push for sustainability provisions in its FTAs and the WTO. The EU does these most often in the name of the Sustainable Development Goals or the climate conventions. However, developing countries have often read these as efforts to limit their economic growth and extend European control over markets, rather than as a genuine effort to enable developing countries to meet objectives of the SDGs or attain "sustainability".

On the one hand, the EU is increasing pressure to open up India's raw material and energy sectors with the help of investment provisions, removal of export taxes, and the chapter on raw material and energy. The FTA rules can be used to cause environmental damage, natural resource drain and loss of biodiversity, and increase the push for chemical fertilisers and pesticides. But on the other hand, in an apparent reversal of roles, the EU is pushing so-called "sustainability" standards through the chapters on sustainable food systems, raw material and energy (Article 8 on assessment of environmental impact), and sustainable development, and the separate investment protection agreement (Article 1.1a on investment and sustainable development). Even if this latter effort was genuine, the EU is aiming to set sustainability standards without addressing the damaging provisions proposed elsewhere in the agreement. In any case, there is a major concern among several experts and CSOs that such sustainability clauses are basically being used to raise non-tariff barriers and set standards in a way that increases market access for EU products and services while blocking off reciprocal access in EU markets for Indian products and services. Further, they will limit policy space within India to design and implement its own concept of sustainability which is in keeping with its own natural resource supplies. This will exacerbate the already evident tendencies among the Indian industrial elite to mine and export raw material to the highest bidder abroad. While there may be genuine interest groups within the EU who would like the EU to play a more important role globally to address sustainability issues, bringing such contradictory provisions into a trade agreement may be to the ultimate detriment of the developing-country partner. It would perhaps be better to raise some of these issues under the India-EU cooperation agreement (1994) which was upgraded to a strategic partnership (2004) rather than in a legally binding FTA. Further, if the EU were so keen to address sustainability issues in India, it could facilitate the transfer of environmentally sound technologies by waiving relevant terms of the TRIPS Agreement.

Abhijit Das, trade policy expert and recently retired Head of the Centre for WTO Studies, a think-tank set up under the aegis of the Indian Ministry of Commerce, told the author in an interview[34] that "the provisions in the India-EU FTA are likely to result in India becoming overwhelmingly import dependent in climate-friendly products, along with digital products. Further, it is apprehended that the FTA could result in a grab for India's resources, both natural and digital. It would, therefore, be no exaggeration to argue that the FTA could open the doors for Colonisation 2.0."

34 Interview with Abhijit Das, 9 October 2022.

5/ TRIPS-PLUS INTELLECTUAL PROPERTY RIGHTS AND IMPACT ON ACCESS TO MEDICINES

In spite of making strides in health services and medicine development, India continues to suffer from an uneven and weak healthcare system, with large inequalities in access to medicines, testing, and hospital care not only across economic groups, but also across gender and rural-urban lines. Compared with about 25% in the EU, private out-of-pocket health expenditure is about 75% of total health expenditure in India.

The development of the generic pharmaceutical industry has however been an important achievement in India, not only in economic but also in development terms. The government had actively facilitated the growth of the domestic industry by allowing certain policy sops, an important one of which was protection from imposing strong intellectual property standards. In particular, the Indian Patents and Designs Act of 1970 had recognised process patents on medicines but not patents on products. This meant that while a technology could be patented, a final product could not, and it was possible to manufacture each medicine through multiple processes. This enabled the domestic industry to produce a large enough supply of medicines to cater not only to the Indian people but also to other countries. Over time India became "the pharmacy of the world" and it currently "contributes more than 20% by volume of the global generics market and 62% of the worldwide demand for vaccines. India's domestic pharmaceutical market size was recorded at $42 billion in 2021 and is projected to expand to $120 billion by 2030" (Adil 2022).

However, as a result of the WTO's TRIPS Agreement, India had to enact an updated patent law in 2005 (The Patents Act 1970) which specifically recognised patent rights over medicinal products. This recognition of product patents has already started weakening the generic pharmaceutical industry and threatening access to medicines in India. The increasing monopoly control over critical medicines exerted through the patent system is pushing out generics from the market, and has resulted in sharp increases in prices and limited availability. This process has largely been to the benefit of multinational pharmaceutical corporations situated in the West including in the US, the EU, and Switzerland. Instead of encouraging innovation, strong protection of intellectual property (IP) in the field of medicines has been found to have failed in delivering medicines for diseases and conditions that mainly affect developing and least developed countries.

THE EU'S CURRENT PROPOSALS

The EU's proposal on intellectual property rights in Chapter 10 includes several provisions that go beyond the scope of the TRIPS Agreement. Interestingly, several of these "TRIPS-plus" provisions had already been heavily criticised by civil society organisations and patient groups in India and abroad and had been dropped by the EU during the first phase of the FTA negotiations.

The first of these is *patent-term extension* (PTE) by a maximum of five years (Article 33, Paragraph 3), which will extend the duration of patent protection and its monopoly. This is proposed on the grounds of covering for time lost due to the administrative process to obtain a patent. This is a TRIPs plus demand, as under the TRIPS Agreement, governments do not have to extend patent terms. In addition, the definition under Paragraph 4 includes "any substance or **combination** of substances" (emphasis added). India currently does not allow patents on combinations, and this provision seems to be a form of indirect pressure to bring about implicit obligations to grant patents on combinations. Also, each of multiple patent applications on a single drug may get extended and result in a longer total patent extension on that drug. Remdesivir is a case in point which has three patents in India which will expire in 2029, 2031 and 2035 respectively. Under the proposed provision, each patent can enjoy an extension of up to five years.

According to Roshan Joseph of the medical humanitarian organisation Médecins Sans Frontières (MSF),[35] "Mainly PTEs, or Supplementary Protection Certificates as it is called in Europe, will increase the medicine prices for governments and people by expanding monopolies if and when regulatory agencies take the requisite time to protect public safety and public health by carefully assessing medicines' safety, efficacy and quality. Furthermore, the above justification for imposing PTEs ignores the role companies themselves often play in prolonging the review duration – for example, by failing to provide quality data or respond to queries regarding dossiers in a timely manner. Any delay in regulatory approval due to a lack of capacity or resources within a drug regulatory agency should be mitigated by empowering regulatory agencies and expanding their resources rather than providing additional market exclusivity to drug companies that have already benefited sufficiently." The EU also has to learn "from the example of imatinib mesylate where PTEs led to a ten year delay in European countries for importing or producing generic versions of imatinib mesylate, a medicine used to treat leukaemia, resulting in a price that was up to three times more expensive than the equivalent generic price in India", Joseph said.

The second point of concern is the return of *data exclusivity* (DE) under Article 36 which was earlier withdrawn by the EU. DE of 8-11 years as proposed by the EU (Paragraph 3) implies that over this period, marketing rights cannot be given by a marketing authority to a generic producer by using the clinical trial data of the originator company, even for products which are off-patent. For this period, an effective monopoly is thus retained even without a patent. An important point to note is that even compulsory licences (CL), a flexibility permitted by the TRIPS Agreement to ensure medicine supply in case of need, cannot be issued in this period. This again goes beyond

35 Interview with Roshan Joseph, Trade and Intellectual Property Analyst, MSF Access Campaign, 21 October 2022.

the scope of the TRIPS Agreement. Further, Paragraph 2 suggests that the relevant authority will not even accept applications from other companies for the first eight years. Generic companies, who are unable to afford costly clinical trials, often use data submitted by the originator company to obtain marketing rights in case that company has failed to get a patent. Blocking such options will not only delay the entry of cheap generics into the market but will also necessitate repeated clinical trials involving wastage of both financial and health resources. As Joseph from Medecins Sans Frontieres described, "this is unethical as it would involve withholding a drug that has already proven to be effective and the proposed provision is a backdoor way for multinational pharmaceutical companies to get a monopoly and to continue to charge exorbitant drug prices, even in the absence of patent protection while getting around the public health safeguards in India's patent law".

Paragraph 4 also allows an extended term of one year (over an initial 10 years) if "the marketing authorisation holder obtains a marketing authorisation for one or more new therapeutic indications". India currently does not allow monopolies for new use of a medicine. For example, baricitinib, a breast cancer medicine, has also been used to treat COVID-19. Such medicines can get an extra year of DE protection under the proposal and can stay free from generic competition for an additional period.

EXAMPLES OF THE IMPACT OF DATA EXCLUSIVITY[36]

- The example of colchicine, a therapeutic agent that has been used for more than 3,000 years to treat gout, clearly illustrates the impact DE can have on access to medicines. Although a tablet formulation has been widely available as a generic prescription drug since the 19th century, the US Food and Drug Administration accepted a one-week trial of the drug and granted DE. URL Pharma, the pharmaceutical company concerned, then enforced its exclusivity rights, and as a result the price rose over 50 times from USD 0.09 to USD 4.85.

- In Jordan, where data exclusivity was introduced as part of the US-Jordan FTA, a study found that of 103 medicines registered and launched since 2001 that currently have no patent protection in Jordan, at least 79% have no competition from a generic equivalent as a consequence of data exclusivity.

36 Médecins Sans Frontières 2011.

Article 35 on "*trade secrets*" again goes beyond the TRIPS Agreement in the scope of the obligations. TRIPS Article 39.2 provides that "natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices". So, the only obligation is to provide a forum such as a court to IP owners who may feel practices are contrary and cases are then judged by the court under India's common law. But under the proposal by the EU (Article 35, Paragraph 1), the obligation is much stronger where the government itself has "to prevent, and obtain redress for, the acquisition, use or disclosure of a trade secret". Further, Article 35, Paragraph 3 of the EU proposal has an expansive coverage of what is "contrary to honest commercial practices" compared with TRIPS. Under the provisions of Paragraph 4.c, India may also need to create a new law.

Finally, Section 3 on *enforcement* remains extremely problematic. Demands by CSOs and patient groups to withdraw adverse provisions under this section have not been heeded by the EU. There is a critical shift in the approach towards IPRs in this section as now the government enforcement mechanism is obligated to defend and uphold private IP rights. According to the TRIPS Agreement and India's patent law, an IP holder can use the court system to defend his or her rights, but under the EU proposal, the government has to step in to "ensure" patent rights of private entities. The provisions suggested by the EU will make the enforcement system much more stringent, with much higher obligations on the Indian government.

Article 44 of the current text seeks to allow ex-parte (prior) orders by triggering enforcement measures such as an "interlocutory injunction" even before commencement of proceedings on the facts of the patent infringement case (Paragraph 1, Article 44). This covers even cases of a (generic) company "intending to market a product", which is currently allowed by Indian law. Under the proposal, the IP holder may be allowed to ask for an injunction even if a company only makes an application to conduct a clinical trial as it will be seen as proving the latter's intention to market a product. In addition, such measures can be enforced even on an "intermediary whose services are being used by a third party" (Paragraph 1, Article 44), which will lead to a chilling effect even on humanitarian agencies which use generic medicines for their work. Paragraph 2 (Article 44) extends such measures for even "suspected" infringements to the entire distribution channel,[37] which is currently not covered by Indian law.

The grounds for triggering such injunctions are in fact quite weak, and Paragraph 4 reduces the weightage of evidence required for such actions by saying the applicant has to provide "any reasonably available evidence". This is a weaker condition compared with the current Indian law, which asks for "reasonable evidence". Under the Indian Patent Act (Section 13, Clause 4), grant of a patent is not proof of validity of the patent and the patent can be challenged and revoked. But the EU is proposing that an injunction can be granted to stop delivery of low-cost medicines, for example, even without an examination of the validity of the patent.

37 Paragraph 44.2: "Each Party shall ensure that its judicial authorities may, at the request of the applicant, order the seizure or delivery up of goods suspected of infringing an intellectual property right, so as to prevent their entry into or movement within the channels of commerce" (emphasis added).

Border measures are another critical enforcement issue. Article 54 of the EU proposal extends the ability of a third country to enforce IP rights in case of "suspected" violations of patents if an IP holder requests "customs authorities to suspend the release of or detain suspected goods". It also now applies to both exports and imports of medicines. In comparison, the scope of border measures under the TRIPS Agreement extends on a mandatory basis only to pirated copyright and counterfeit (Article 51, TRIPS Agreement) and is applicable only to imports. Individual Members "may enable such an application to be made in respect of goods which involve other infringements of IPRs" but this is not obligatory on all Members. One may recall the WTO trade dispute complaints (DS408, DS409) between the EU, the Netherlands and India over "alleged violation of multilateral trade rules by illegally confiscating generic drugs exported by Indian pharmaceutical companies in transit through Europe to destinations in Latin America, Oceania and Africa" (UNCTAD 2020). Brazil and India asked for consultations with the EU and Netherlands, with several other countries joining in. There was an amicable understanding that the EU would no longer intercept generic medicines in transit unless "there is adequate evidence to satisfy customs authorities that there is a substantial likelihood of diversion of such medicines to the EU market and that the EU would amend the relevant laws accordingly" (UNCTAD 2020). Article 54 as now proposed by the EU will breach this understanding.

Another point of concern is the inclusion of IPRs under the definition of investment (Article 1.2, Paragraph f.5) in the investment protection agreement proposed by the EU. This will confer super-normal rights to IP-holding EU companies in India that can be defended by the investment agreement, including by the use of ISDS.

Overall, the EU's proposal on IPRs marks an ambitious and aggressive departure from TRIPS standards and will clearly impact access to medicines in India and the world. India has, so far, not agreed to any TRIPS-plus provisions in its FTAs and is known for its position on using and extending flexibilities from TRIPS provisions (including its joint proposal with other countries on a TRIPS waiver for COVID-19 medical products). It remains to be seen how the Indian government responds to the EU's demands. If it does agree to TRIPS-plus standards, then these will apply not only to the EU but to all countries as domestic IP standards and laws are automatically extended to all countries.

6/ LIBERALISATION OF GOVERNMENT PROCUREMENT[38] AND IMPACT ON POLICY SPACE FOR DEVELOPMENT

Government procurement (GP), or the purchase of goods, services and construction works made by a government, accounts for a significant 10-30% share of GDP in most countries. This is why it represents a lucrative market, especially for multinational corporations (MNCs) which are scouting for additional market access offshore. The Government Procurement Agreement (GPA) in the WTO was set up at the behest of a few developed countries but still remains focused largely on transparency and efficiency. It is limited in terms of offering market access, which is a voluntary commitment even for Members. While the EU and all its Member States are signatories to the GPA, India has remained outside and has the status of an observer.

The EU has major interest in GP markets of its FTA partners. European interests are in the areas of construction work, services, surrounding architectural, legal, accounting and construction business, medical and pharmaceutical devices and services, and office and computing equipment. These account for about 50% of government procurement in the EU. Europe is a world leader in the export of services, as well as in sectors such as construction, pharmaceuticals, public utilities and transport equipment.

However, in developing countries, GP is a major policy tool to address development needs and is often used to redress inequalities. The government may offer preferential treatment to certain groups, regions and industries in order to promote development of socially and economically disadvantaged groups; support women-oriented enterprises and disadvantaged ethnic groups; develop backward regions and so on. Countries can use offsets[39] (conditions requiring local development or local content), price preferences (giving an advantage to a group even if their price is higher by a certain percentage) and other preferential measures.

India's public procurement is very much used as an active development policy tool to support small industries or MSMEs, village enterprises ("khadi"), women's development corporations, women's self-help groups (SHGs), local producers, and public sector enterprises or undertakings (PSUs). The government may allow foreign tenders as needed though foreign companies do not have a legal right to the market. The government gives preferential treatment to MSMEs and

38 Government procurement (GP) is also referred as public procurement (PP) in the literature.

39 Offsets are defined in the EU proposal as "any condition or undertaking that encourages local development or improves a Party's balance-of-payments accounts, such as the use of domestic content, the licensing of technology, investment, counter-trade and similar action or requirement" (Article 1, Chapter 9)

khadi and village enterprises (KVEs) through the waiving of tender fees and awarding contracts to other than the lowest bidder, and applies a 5-15% price preference for small-scale industries. There is reservation for MSMEs including KVEs of up to 25%; PSUs (e.g., 10% purchase preference); women's groups; and scheduled castes, scheduled tribes and other minority groups. Indian railways (under the central government) have commissioned earthen cups to help small-scale potters, bought bedsheets from khadi, a major village enterprise with large numbers of women workers, and also procured from PSUs, helping to generate and maintain employment of reserved and backward castes and communities such as Dalits and Muslims. State governments have also used GP in a similar manner. For example, the Education Department in Tamil Nadu state bought eggs, spices and other ingredients for school midday meals from women's SHGs. Tamil Nadu and Maharashtra purchase uniforms from women's groups.

In 2017, as part of the Make in India initiative, a government order[40] amended rules on all purchases including goods, works and services related to public procurement in order to enhance local content requirements so as to promote manufacturing and production of goods and services in India, and increase local income and employment. Class 1 local suppliers with local content equal to or more than 50% and Class 2 local suppliers with local content between 20-50% enjoyed certain preference margins. Moreover, a recent order in 2020 allows ministries and departments to raise local content requirements above 50% and Class 1 local suppliers now enjoy a margin of preference of 20% in procurement by different ministries over Class 2 and non-local suppliers (Ranjan Mishra 2020). "The order also mandates that countries that do not allow Indian companies to participate in their government procurement for any item shall not be allowed to participate in government procurement in India for all items related to that nodal ministry or department, except for the list of items published by the ministry or department permitting their participation."

THE EU'S CURRENT PROPOSALS

In the earlier phase of the FTA negotiations, the EU had apparently agreed to drop demands for liberalisation of state and local government procurement. However, in the current text (proposed Chapter 9), the EU has listed procurement by central government entities (Section 1), sub-central government entities (Section 2), and other entities (Section 3). The ministries and departments to be included in each section are to be negotiated between the two parties. The list includes procurement of goods, services, and construction services above or equal to a certain threshold value for each party that is mutually agreed. Central government entities could in principle include the highly sensitive railways sector which the EU had marked as a sector of interest earlier, as

40 The Public Procurement (Preference to Make in India) Order 2017 (as amended on 28.05.2018) (PPP-MII Order) was issued pursuant to Rule 153(iii) of the General Financial Rules 2017 as an enabling provision to promote domestic value addition in public procurement. The policy aims at incentivising production linked through local content requirements, thereby encouraging domestic manufacturers' participation in public procurement activities over entities merely importing to trade or assemble items. This Order is applicable to procurement of goods, services and works (including turnkey works) by a central ministry, department, their attached, subordinate offices, autonomous bodies controlled by the Government of India, government companies, their joint ventures and special purpose vehicles. As per the Order, purchase preference is given to local suppliers who meet the minimum local content requirement. Further, various ministries and departments have been designated as nodal for notifying minimum local content for the relevant product categories. See: https://pib.gov.in/Pressreleaseshare.aspx?PRID=1563772#:~:text=As%20per%20PPP%2DMII%20Order,for%20the%20relevant%20product%20categories (Accessed: 9 December 2022).

well as PSUs and even the Public Distribution System (PDS), which is a key public policy tool for procurement and distribution of food throughout the country. In principle, this could imply that India will have to procure from European suppliers at par with Indian farmers for the PDS. What this would imply for the Minimum Support Price (MSP) is not clear as it is a specific tool to support Indian farmers. In an interview, K.V. Biju, National Coordinator of the Rashtriya Kisan Mahasangh,[41] an Indian farmer's alliance with around 1.8 million farmer members, expressed concerns about procurement by the PDS being liberalised through the EU-India FTA and Indian farmers losing their access to the PDS at an assured MSP.

Article 4 under Chapter 9 provides for non-discrimination and stipulates that "both parties shall accord immediately and unconditionally … treatment no less favourable than the treatment the Party, including its procuring entities, accords to its own goods, services and suppliers" (Paragraph 1, Article 4). Under Paragraph 2, parties cannot discriminate between local suppliers either depending on the extent of their foreign affiliation or if they are offering goods and services of the other party. Paragraph 3 provides national treatment, i.e., same treatment as given to another national entity, in GP to any company that has invested (has commercial presence) in the other country. A point to note is that the Indian model BIT does not allow government procurement to be covered under investment protection (Article 2.6, model BIT), which means foreign investors do not have a right to the GP market. According to the report on the second round of negotiations, non-discrimination remains a major area of focus where no agreement is reached yet.

While EU companies can definitely access the Indian market, the question remains, however, as to whether Indian companies will have the same access in the EU's GP market given the high non-tariff barriers that are imposed (Sengupta 2012). A 2012 study by Das (2012) showed that of the EUR 2,088 billion EU GP market, only EUR 309 billion is above the threshold that is open to foreign suppliers, and of this, only 3.5-4.2% is accessible to non-EU suppliers, of which the US takes the largest chunk. Results from another unpublished study (2011)[42] show that only 0.02% of Germany's GP market was open to non-EU countries in 2008-09. NTBs related to the tendering process, language used, time schedules, and technical standards may keep out already weaker Indian companies from competing segments.

In a provision that elicits major concern, Article 7 on offsets says: "With regard to covered procurement, a Party, including its procuring entities, shall not seek, take account of, impose or enforce any offset." This means that for segments being opened up to EU companies, India cannot implement any local development measures. Articles 4 and 9 together will mean domestic industry cannot be given preference, which in turn will limit the benefits available to domestic suppliers through backward and forward linkages. This will severely undermine the use of GP as a public policy tool for India's economic development. Further, there is no general exception for specific preferential policies. Carveouts for specific constituencies may have to be negotiated hard by India. Such carveouts may have to be granted to the constituency on both sides, e.g., women-owned entities, whereas they may have very different economic clout to access these

41 Interview with K.V. Biju, 16 October 2022.

42 Jadavpur University, in collaboration with the Centre for WTO Studies (2011): "Size of US and EU Public Procurement Markets Accessible to Non-Nationals", presentation based on unpublished paper, made at workshop on "Public Procurement Legislation in India: National and International Perspective", organised by the Centre for WTO Studies, IIFT, 4 June 2012, New Delhi.

markets. In the last phase of negotiations, India had apparently fought for a carveout for MSMEs, but whether that would apply equally to MSMEs on both sides in a liberalised GP framework is not clear.

According to FISME,[43] the FTA can work only if preferential treatment for Indian MSMEs is protected. Further, if there is reciprocal protection for both Indian and EU MSMEs, then definition becomes an issue as India's preferential treatment covers only micro and small enterprises, whereas the EU's definition will include medium enterprises as well, which will have much more economic power to compete. Even small enterprises in the EU are more competitive than Indian ones in some sectors. In addition, state- and local-level procurement should be kept out of the FTA at any cost. Since many states do not give the 25% reservation for Indian MSMEs, opening their markets to EU companies will be extremely unfair. FISME's primary position is that GP liberalisation should not be part of the FTA in the first place.

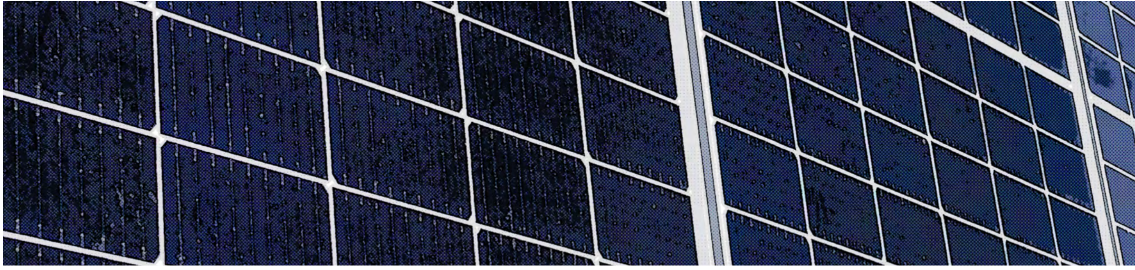
India had a policy of not liberalising government procurement under any trade agreement including FTAs, and has not till date joined the plurilateral GPA at the WTO. However, in its recent FTA with the United Arab Emirates (UAE), India has opened up its GP market apparently with a view to making inroads into the UAE's GP market. However, the same principle is unlikely to work with the EU as reciprocal access is doubtful. Further, the EU's market power is much larger than that of the UAE in terms of competing in the Indian GP market.

Finally, India's use of GP to promote local content under the Make in India initiative and give preferential market access to those who cannot get access otherwise will be severely undermined if the EU proposals get agreed under the FTA. In addition, after failed attempts to pass a law that governs public procurement in India in 2012 and 2015, how the EU demands will relate to India's future GP Act is also not clear. The 2012 Bill had provisions that allowed preferences for domestic industry and marginalised constituencies, policy options that the EU's current proposal severely limits. Agreeing to the EU's proposed terms will mean India will already limit its policy space with regard to a future GP Act. While Indian procurement is riddled with corruption and a lack of transparency, opening up to unequal FTA partners in a manner that compromises national policy space is not the best solution.

In sum, opening the GP market to the EU under this FTA may pave the way for the entry of European companies into India's large GP market without reciprocal access for Indian companies. Most important, the use of the GP market as a tool for economic and social development in India may be severely compromised if India agrees to the terms set by the EU. According to the report on the second round of negotiations, "all the text has by now been discussed and the majority of it has already been agreed. Still, the most important elements of the text remain to be negotiated, including, inter alia, the non-discrimination principle"[44].

43 Interview with Anil Bharadwaj, Executive Director, FISME, 28 October 2022.

44 See page 3 of https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/699968b1-d8a6-480a-8792-5478679fcccb/details?download=true (Accessed: 9 December 2022).



7/ CONTROL OVER THE DIGITAL ECONOMY WITH IMPLICATIONS FOR INDUSTRIALISATION, JOBS AND POLICY SPACE

The e-commerce chapter (Chapter 8) proposed by the EU is new and is consistent with the EU's push for liberalisation of e-commerce in the WTO and in the EU's other FTAs. It demands ambitious coverage that goes beyond mere trade to regulatory issues. It is to be noted that India is in the process of designing a national digital policy and its various components, and is starting to implement clear rules and policies on the sector.

Right at the onset of the EU proposal, the *objective* (Article 1, Chapter 8) itself is to "address unjustified barriers to trade enabled by electronic means" and to "ensure an open online environment for businesses". If India agrees to this objective, it may be taking on very broad commitments that go well beyond the current state of liberalisation. FDI in e-commerce in India is largely open in the business-to-business (B2B) segment, and digital marketing platforms such as Amazon already have a massive and growing physical presence in India, a phenomenon of much concern to Indian traders' groups (Mint 2021). But under Article 8.1, for example, India may additionally need to include FDI in business-to-consumer (B2C) e-commerce, liberalise government procurement, and allow labour-saving digital services such as driverless cars. India may even need to impose a permanent ban on customs duties on electronic transmissions, which it has opposed at the WTO. India's own Equivalent Levy of 6% on all online trade/e-commerce done in India by organisations that do not have "physical taxable presence" in India (Waziri 2022) may also face a challenge.

An important point to note is that while Article 3 provides "the right to regulate", this reaffirmation of the right to regulate does not override problematic provisions elsewhere in this text.

Article 6 on *cross-border data flows*, under which the Indian government would not be able to require data to be stored locally, has a number of problematic implications. For example, the Indian government may require data to be stored locally for tax, security and privacy, financial regulation or other reasons.[45] This provision would also reduce foreign and domestic investment in local data centres and digital infrastructure and undermine digital industrialisation.[46]

45 See pages 9–12 of www.twn.my/MC11/briefings/BP3.pdf (Accessed: 9 December 2022).

46 For example, see https://unctad.org/system/files/official-document/ser-rp-2021d1_en.pdf (Accessed: 9 December 2022).

In addition, according to IT for Change, a CSO that works on technology-related issues, "developing countries' main problem with cross-border free flow of data has related to expropriation of economic value of their data, leading to fears of digital colonization. While some jurisdictions have already created legal economic rights over data, others are actively considering them. Economic rights to data, for instance, exist in the EU's Digital Markets Act and its draft Data Act. However, the rights and guarantees of data access provided in these laws seem to be at cross purposes with the EU's stance at global trade forums where it promotes global free flow of data" (IT for Change 2022). The EU fails to take into account other developing countries' need to recognise certain economic rights over data, not only for traders and SMEs, but also for farmers and other communities. IT for Change goes on to add that "the draft report of Government of India's Committee of Experts on Non-Personal Data Framework proposes collective economic rights over data for groups and communities. Similar ideas are shaping up in a few other countries like Rwanda and South Africa, in terms of national ownership of a country's data. Discussions on cross-border data flows need to accommodate such new developments around data related economic rights of individuals, small enterprises, groups, and communities, including national communities".

Article 8 on "ban on *tariffs on electronic transmissions*", or, in other words, ban on customs duties on electronic transmissions, is totally against India's position at the WTO. India has in fact fought to get the existing WTO ban that is renewed every two years removed as it means losses of billions of dollars in potential tariff revenues. In addition, the framework proposed by the EU is not only "between the parties", unlike in FTAs such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) or even the proposals put forward in the WTO's optional plurilateral e-commerce negotiations.[47] This would thus permanently prevent India from imposing any customs duties on any electronic transmissions from anywhere (including non-EU countries such as the US and China and non-WTO Members such as Lebanon and Iran). It also goes beyond the existing WTO moratorium on customs duties on electronic transmissions, which is temporary (WTO 2019 / WTO 2022). Agreeing to this would cause a tariff revenue loss and may undermine digital industrialisation in India.[48] It is to be noted that India lost USD 1.5 billion in tariff revenue in 2020 from the WTO's temporary moratorium. The EU in fact treats electronic transmissions as transfers of services and not of products. The increasing "servicification" of products into services, a large portion of which is digital, also makes it easy to bypass customs duties. Therefore, new kinds of tax regimes have to be designed and India must protect the policy space to do so.

Article 10 on *electronic authentication* steps deep into India's policy space to regulate. The provision would imply a deregulation of electronic transactions, leaving it to the companies and consumers to determine the level of cybersecurity involved. Only one particular (pre-designated) category of transactions may be exempt from this provision (Article 10.3), and even then only if the regulations meet four criteria, i.e., they should be "objective, transparent and non-discriminatory and only relate to the specific characteristics of the category of transactions concerned".

47 Revised WTO plurilateral ecommerce draft consolidated text: www.bilaterals.org/?wto-plurilateral-ecommerce-draft-45155 (Accessed: 9 December 2022). India is not participating in the WTO plurilateral e-commerce negotiations: www.wto.org/english/tratop_e/ecom_e/joint_statement_e.htm (Accessed: 9 December 2022).

48 For example, see www.southcentre.int/wp-content/uploads/2022/06/RP157_WTO-Moratorium-on-Customs-Duties-on-Electronic-Transmissions_EN.pdf (Accessed: 9 December 2022).

Agreeing to this provision would undermine consumer and privacy protection measures; for example, in online banking and credit card security, measures to stop identity theft by requiring ID numbers to be encrypted in transit; critical cybersecurity infrastructure (such as for oil and gas pipelines);[49] ensuring IT systems are interoperable for efficiency and cost savings (e.g., between hospitals and insurance companies);[50] and even the EU's own regulations.[51] In addition, even the WTO's plurilateral e-commerce negotiations do not set any criteria to use the exemption for the single category of transactions.

The EU has in fact allowed more flexibility in some of its other FTAs, such as the FTA with Japan, where no criteria have to be met in the one category where there is an exception. It says, "each Party may require that, for a particular category of transactions, the method of authentication meets certain performance standards or is certified by an authority accredited in accordance with its laws and regulations."[52]

Article 11 provides for a "ban on requiring *transfer or access to source code* except as listed". Again, this intrudes into India's regulatory policy space. While there are exceptions for government procurement, competition law, intellectual property law, online safety and the general, security and prudential exceptions, there are no exceptions for other areas[53] such as taxation (where the US government requires access to source code); court-ordered access to source code (e.g., for DNA matching in criminal cases and for breathalysers as has occurred in the US); car safety or medical device safety; and assessment of source code security in critical infrastructure such as nuclear power plants (even the CPTPP has this exception[54]). This can even impact indigenous rights or gender-based and other forms of discrimination. For example, the

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49 The US government has reported cyber intrusions among US natural gas pipeline operators, which heightened Congressional concern about cybersecurity in the US pipelines sector. The White House, Congressional representatives and regulators (both Democrat and Republican) have all expressed concern at these cybersecurity risks and proposed mandatory regulations to address them. The US did not regulate and the largest US fuel pipeline was hacked in 2021 because of a failure to use multifactor authentication, causing it to be shut down for the first time in its 57-year history, resulting in shortages across the country's east coast and higher fuel prices etc as well as the pipeline operator Colonial having to pay a USD 4.4 million ransom (Turton / Mehrotra 2021).

50 For such examples, read www.twn.my/announcement/TWN_esignatures2018-9.pdf (Accessed: 9 December 2022).

51 For example, the European Banking Authority has a regulatory technical standard at https://eba.europa.eu/regulation-and-policy/payment-services-and-electronic-money/regulatory-technical-standards-on-strong-customer-authentication-and-secure-communication-under-psd2 which includes requirements such as the following: "Account servicing payment service providers, payment service providers issuing card-based payment instruments, account information service providers and payment initiation service providers shall ensure that, when exchanging data via the internet, secure encryption is applied between the communicating parties throughout the respective communication session in order to safeguard the confidentiality and the integrity of the data, using strong and widely recognised encryption techniques" (Article 30.1). Similarly, the Single Euro Payments Area (SEPA) has requirements to use ISO 20022 XML etc.; see https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32012R0260 (Accessed: 9 December 2022).

52 See European Commission on the EU-Japan agreement chapter-by-chapter: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/japan/eu-japan-agreement/eu-japan-agreement-chapter-chapter_en (Accessed: 9 December 2022).

53 For more information on the problematic impacts described here, please read www.twn.my/MC11/briefings/BP4.pdf (Accessed: 9 December 2022).

54 See New Zealand Ministry of Foreign Affairs and Trade: www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text-and-resources (Accessed: 9 December 2022).

New Zealand government's Waitangi Treaty tribunal found that even with the CPTPP's additional exceptions to the equivalent source code provision, it is not confident that source code could be checked for discrimination against the Maori and is concerned that such source code provisions inhibit the government from protecting indigenous rights and interests[55]. Many other FTAs such as the US-Mexico-Canada FTA and the Japan-US Digital Trade Agreement, and even the EU's own FTAs with Indonesia, Chile and Mexico have broader exceptions (e.g., for legitimate public policy objectives) to source code provisions than suggested for this FTA.

Article 14 on *open government data* implies that if agreed, where the Indian government chooses to make data public, it must endeavour to ensure to the extent practicable that the data is not subject to discriminatory use conditions. This implies that such data must be available to anyone in the world and not just those in India and the EU. In effect, even US companies can use it to make valuable applications and then sell them back to India for a profit. Paragraph 3 also proposes cooperation to "enhance and generate business opportunities" (including for foreign companies) to use this government data. This could in principle confer massive advantage to European companies. There are also requirements about the format and updating the data etc which may be difficult and/or expensive for the Indian government to implement.

In a recent article, the Indian Minister of State for Information Technology, Rajeev Chandrasekhar, stated that the government "will share anonymised data sets collected and harmonised under the upcoming National Data Governance Framework with **Indian** start-ups and researchers to innovate systems and create better policy solutions" (Bhardwaj 2022) (emphasis added). "It is an estimated opportunity of more than $200-$500 billion, if leveraged properly," Chandrasekhar added. Such massive opportunities for Indian businesses could potentially be lost if India accedes to the EU's demands on government data.

Traders' groups in India have always been opposed to e-commerce liberalisation but have been gradually losing their influence on policymaking. On the other hand, Indian consumers and industry may feel more open digital markets benefit them. According to Parminder Jeet Singh, Executive Director of IT for Change, "if you ask many industry leaders in private about the macro digital economy scene and future in India in geopolitical terms, they are frank and clear that India is fast losing out in what is now a bipolar US-China race. If anything has to be done to really develop the Indian digital industry at par with US and China, a lot of drastic and far-sighted policy decisions have to be urgently taken. But, in all public assertions the Indian industry, also being western venture capital driven, puts its stake almost entirely in the dominant global digital economy model as it exists. They therefore tend to support digital economy liberalisation under FTAs and other trade negotiations."[56]

However, the larger development policy perspective requires a deeper scrutiny of the implications of the EU demands. The Indian government plans to bring in rules and laws related to the National Data Governance Framework very soon. The government is also set to bring in a revised version of the Data Protection Act which will supersede the IT (Information Technology) Act and is also amending the Information Technology Rules 2021 (ETtech 2022). If India agrees to the

55 See: https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_178856069/CPTTP%20W.pdf (Accessed: 9 December 2022).

56 Interview with Parminder Jeet Singh, 28 October 2022.

provisions suggested by the EU before these are in place, it will not only be a complete shift from its position in the WTO and previous FTAs, but also pre-empt India's attempts to design its own digital policy. The EU proposals would entail making major, irreversible commitments that will place India's digital economy completely under the control of digital MNCs in the EU. They will also affect the policy space for future digital industrialisation and limit India's revenue earnings. In the era of a massive shift towards the digital economy, making such commitments will also render India's cautionary stance on goods and services liberalisation totally ineffective.

D.

IMPLICATIONS FOR INDIA'S POLICY SPACE FOR TRADE AND DEVELOPMENT

This quick analysis of the proposed EU-India FTA, especially the proposals made by the EU, has highlighted several challenges for India. If India accedes to the EU's demands, the biggest challenge will be to India's policy space for sustainable development, in all its three dimensions: economic, social and environmental. The newer areas under such trade deals represent an even deeper intrusions into India's regulatory space.

In the field of agriculture and food security, India will have to sacrifice key sectors and livelihoods therein, agree to TRIPS-plus IPRs that will compromise its policy space to ensure farmers' rights over seeds, and forgo implementing its own framework of a sustainable food system. In manufacturing and services, India may have to give up policies to support sub-sectors that are critical for growth and employment, such as automobiles, retail, and finance, in return for only limited gains from a few sub-sectors like textiles and garments, leather, machine parts and chemicals, and that too only if NTMs are addressed comprehensively. Indian MSMEs, in particular, may face massive loss of policy support from the government. The use of government procurement as a development tool for MSMEs and local industry, in addition to supporting women-owned enterprises, village enterprises and backward communities, may be compromised if India agrees to the EU's ambitious demands on GP liberalisation. The EU's demands on e-commerce will significantly and irreversibly impact India's policy space for designing its own digital economy and digital industrialisation pathways, with immense impacts on future economic growth and incomes, job creation and even national security. If it agrees to the EU's demands on TRIPS-plus IPRs, India will seal the fate of its generic pharmaceutical industry and compromise access to medicines in India and across the developing world. By allowing the EU's demands on raw material and minerals, India will again erode its policy flexibility to develop and shape this sector. Finally, India has to examine the interface between the proposed investment protection agreement with the EU and its capacity to use policy tools for taxation, revenue generation, and protection of public health, environment, and human and labour rights. The EU's push for bringing sustainability issues into the trade ambit also has to be examined thoroughly from the lens of national policy space for economic, social and environmental development.

In the words of trade policy expert Abhijit Das, the "India-EU FTA is likely to result in limited gains for India in trade, but almost unlimited damage from provisions on sustainability and digital trade. It will deprive the government of policy tools to nurture a vibrant domestic economy producing digital products and climate-friendly goods."

Further, the loss of tariff revenue has to be an important consideration for India. Based on projections made by EPRS (2020), the estimated loss of USD 1.86 billion in tariff revenue has to be taken into account especially since the projected gain is dependent on several factors including the ability to effectively address NTMs.

The FTA in its entirety poses a major risk of increasing inequalities within India, across rural-urban areas, poor-urban populations, along gender lines, and across communities. The agreement will benefit those who are already in superior economic and social positions, who can influence the outcomes of such negotiations. At the same time, it will adversely impact those who are weaker such as small farmers, low-skilled and semi-skilled workers, MSMEs, patient groups, indigenous populations, and women as a class by further withdrawing their access to natural resources, critical services, medicines, finance and so on. Given the largely informal nature of the Indian labour

market, and the lack of skills and financial resources to shift between sectors and sub-sectors, adjustment costs for workers in loss-making sectors may be very high.

The study by EPRS (2020) points out that during previous waves of liberalisation in India, "the effects of trade liberalisation on poverty and inequality are complex and that the outcome is not unambiguously pro-poor. These effects are indeed context-specific and may impact several dimensions of inequality (e.g. inequality between factors of production and the distribution of income between the labour and capital shares, across consumers via price effects, across wage and skill levels, and along the gender dimension). Relatedly, there may be 'adjustment costs' in the absence of policy intervention".[57] The constraint on policy space for development, for example to protect vulnerable constituencies, is likely to add to the inequalising effects.

Further, the FTA may impact not only India's policy space for sustainable development, but also its policy flexibility in future trade negotiations both in the multilateral and bilateral or regional fora. First of all, agreeing to take on commitments on e-commerce, government procurement, TRIPS-plus provisions impacting both agriculture and medicines, or even on sustainability will go against India's stated positions in the WTO and in most other FTAs. While India has opened GP to the UAE, agreeing to open GP to the EU will substantially expand India's commitments. India has significant FTAs coming up with the UK, the US, Canada and New Zealand, and a comprehensive one with Australia (with which it currently has a limited agreement). Even though India has currently opted out of the trade pillar of the IPEF, it may choose to rejoin in the near future. India also needs to remember the history of its trade negotiations and issues that it fought hard to defend. Its withdrawal from the Regional Comprehensive Economic Partnership (RCEP) is an important lesson.

India has been fighting the EU, the US and many other developed countries on many of these issues at the WTO. These will also influence the discussions on WTO reform, special and differential treatment (S&DT) as well as individual tracks of negotiations. India needs to use its FTAs to get its Northern partners to agree to its positions and demands at the WTO, such as on agriculture (including the permanent solution on public stockholding), TRIPS, S&DT and so on, rather than squeeze itself into a corner where it will be forced to make further commitments at the WTO that developed countries want.

The EU-India FTA may mark a permanent shift in India's trade policy towards a more ambitious agenda, with the inclusion of non-trade issues and getting deep into governance-related issues. India needs to think very clearly whether such a shift will be beneficial to its economy, society, and polity.

57 See EPRS 2020. Similar apprehensions were also expressed in earlier impact assessment studies. See Ecorys et al. 2009.

E.

IN LIEU OF A CONCLUSION

The second phase of the EU-India FTA negotiations has just begun. There is a need for further research and analysis to understand what such an FTA will mean for a country like India. But even from the cursory look provided in this paper, the concerns emerge very clearly.

The EU will do well to learn from its past negotiations with India. The Indian government has been cautious in its negotiations in the past and in spite of the shift in the geo-political dynamics, the value of evaluating substantive provisions with a deeper and longer-term lens is immense.

Even though FTAs are being used as a geo-political tool, the shift in production and trade structures, impact on workers and citizens, on the environment and access to services, and finally the impact on regulatory freedom in economic, social and political governance, will have to be dealt with in concrete terms. For India, this FTA represents a litmus test, more so than its FTAs with the UK, Australia, Canada and New Zealand.

Whether India is ready to commit to such a monumental shift in its economic, development and trade policy remains to be seen.

INDIA'S FDI LIMITS ACROSS MAIN SECTORS/ SUB-SECTORS (2020)

SECTOR/SUB-SECTOR	ALLOWED FDI LIMIT	ROUTE	SECTOR/SUB-SECTOR	ALLOWED FDI LIMIT	ROUTE
Banking, private	74%	Automatic up to 49%	Print media	26%	Govt
Banking, public	20%	Govt	Broadcasting	26-100%	
Insurance company	49%	Automatic	Agriculture, allied and plantation	100%	Automatic
Insurance intermediaries (including insurance brokers, re-insurance brokers, insurance consultants, corporate agents, third party administrator, surveyors and loss assessors and such other entities, as may be notified by the Insurance Regulatory and Development Authority of India from time to time)	100%	Automatic	Agricultural services	100%	Automatic
Pension	49%	Automatic	Other agriculture	Prohibited	
White label ATM operations and other financial services	100%	Automatic	Mining and petroleum and natural gas (except in PSUs)	100%	Automatic
Infrastructure companies in securities markets, namely, stock exchanges, commodity exchanges, depositories and clearing corporations, in compliance with SEBI Regulations	49%	Automatic	Construction	100%	Automatic
Credit information companies	100%	Automatic	Retail wholesale	100%	Automatic
Pharmaceuticals greenfield	100%	Automatic	Retail e-commerce	100%	Automatic only for B2B, not B2C, for marketplace, not inventory
Pharmaceuticals brownfield	100%	74% automatic, rest govt approval	Retail single brand	100%	Automatic

Medical devices	100%	Automatic	Retail multi-brand	51%	Govt (state govt)
Railways	100%	Automatic	Defence industry subject to industrial licence under the Industries (Development & Regulation) Act, 1951 and manufacturing of small arms and ammunition under the Arms Act, 1959	100%	Automatic up to 74% Government route beyond 74% wherever it is likely to result in access to modern technology or for other reasons to be recorded

Source: FDI Circular, Government of India (2020)

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