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The Evolving and Multilayered European Union-India Investment Relations - Regulatory Issues and Policy Conjectures

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The Evolving and Multilayered EU–India Investment Relations—Regulatory Issues and Policy Conjectures

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Abstract: *India and several EU member countries share a rich history of investment collaborations. The collaboration has been cemented with several formal agreements with individual EU members, and the recent negotiations with the trade bloc since June 2007 on a broad-based Bilateral Trade and Investment Agreement (BTIA) can be considered as a culmination of this process while ongoing WTO negotiations on Mode 3 commitments remain essential in terms of market opening. The present article analyzes the multi-layered regulation of foreign investment against the backdrop of the evolving EU-India economic relations. The 2009 Treaty of Lisbon gave a new competence to the EU which will impact ongoing negotiations with India whose global standing has been significantly changing in recent years. The economic vibrancy, coupled with large market size, has earned India greater relevance in several international forums, thereby making the future EU—India investment treaty one of the most promising investment agreements.*

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I Introduction

The recent trade and investment dynamics indicates that increasing cohesion between developed and developing countries is the order of the decade.[1] While capital and technology transfer, banking, and financial services are among the areas that the North can offer to the South, in return it enjoys the benefits of labour cost advantage (both in case of manufacturing labour and professional service personnel), and land and mineral resources from the latter. The recent growing economic relationship between the EU and India needs to be analysed in this broader canvas. Although the European countries enjoy a long history of trade relationship with India, the recent economic liberalisation and diversification undertaken by the latter, especially in terms of service sector growth,[2] infrastructure development (especially telecom sector)[3] and tariff reform,[4] improves its economic importance to the former considerably. The current discussion to enter into the EU–India preferential trade agreement (PTA),[5] encompassing trade in merchandise, as well as services and investment issues, is an acknowledgement of this phenomenon. It illustrates the mutual interest that

1 The globalisation process has deepened considerably over the last two decades, as reflected from the cross-border trade and investment flows. The recent globalisation drive has been markedly different from the earlier period in two respects. First, the importance of the developing countries, especially in Asia, has been growing steadily in world trade and investment patterns. For instance, the total share of merchandise exports coming from Africa, Asia (excluding Japan), Community of Independent States (CIS) (excluding Russia), Middle East, and South and Central America has increased from 28.47% of global export in 1999 to 39.93% in 2009 (Authors' calculations based on *International Trade Statistics* 2010 (Geneva, WTO) data). Similarly, the share of developing countries in world FDI inward flows have increased from 18.59% in 1989–1991 to 42.93% in 2009 (Authors' calculations based on various issues of *World Investment Report* (Geneva and New York, UNCTAD) data). This increasing importance of the developing countries both on trade and investment fronts are not mutually exclusive; rather, the FDI inflows often play a major role in boosting exports from the host country. China is a major case in point of this phenomenon. Second, the number of PTAs notified to the WTO, which stood around 100 in the early 1990s, but reached 511 as of 24 January 2012. Interestingly, instead of the North-North and South-South Regional Trade Agreements (RTAs) witnessed during the 1980s and the earlier period, the recent regionalisation drive has been marked with emergence of several North-South RTAs. See UNIDO, *Industrialization, Environment and the Millennium Development Goals in Sub-Saharan Africa* (UNIDO, 2004).

2 See B. Eichengreen and P. Gupta, 'The Service Sector as India's Road to Economic Growth?', (2010), ICRIER Working Paper No. 249, New Delhi.

3 M.J. Kim and R. Nangia, 'Infrastructure Development in India and China: A Comparative Analysis', available at http://www.pbrc.soka.edu/Resources/Documents/KimNangia.pdf, accessed on 24 January 2012.

4 While the peak duty on Indian import was around 40% in 1999–2000, the same has come down to around 10% in the recent years. Ministry of Finance, 'Economic Survey 2009–10', Government of India, New Delhi. However, neighbouring countries sometimes complain that several non-tariff barriers on their exports still remain, thereby leaving room for securing greater access through deeper integration by entering into RTAs. See A. Bhattacharyya and D. Chakraborty, 'India's Cross-Border Infrastructure Initiatives in South and Southeast Asia', (2011) 46(2) *International Spectator* 93–109.

5 The current paper uses the term preferential trade agreements rather than regional trade agreement or free trade agreement (or even bilateral and regional trade agreements). As stated by Lester and Mercurio, many of the so-called Free Trade Agreements (FTAs) favour certain countries in trade relations and are basically discriminatory rather than 'free trade.' The term PTAs encompasses many different kinds of bilateral and regional trade agreements, and underscores their common denominator which is to establish preferences for the signatories over other in trade relations. See S. Lester and B. Mercurio (eds), *Bilateral and Regional Trade Agreements: Commentary and Analysis* (Cambridge University, 2009), at 4–5.

these two economic and democratic giants would have in formally and substantially reinforcing their ties by legal instruments.[6]

Trade and investment dynamics might be boosted further by the recent reforms in the EU. The Treaty of Lisbon came into force on 1 December 2009, amending the former EU and European Community (EC) treaties. Among key improvements, the Treaty of Lisbon abolishes the EC and replaces it with the EU, endowing the latter with full legal personality.[7] The new EU has the ambition to be a more prominent global actor, with the creation of a new European external relations service with EU delegations around the world, and the EU's High Representative, which is assigned greater importance. The Treaty of Lisbon extends the scope of external trade policy to issues of investment. For the EU itself and its trading partners, the extension of 'trade' policy to include investment is an important development and will impact the international investment regime.[8] On the other hand, India has recently been very active on investment front and has so far negotiated several bilateral agreements on investment.[9] This illustrates the willingness of the Indian policy makers to attract foreign direct investment (FDI) into the country. However, that eagerness is essentially unilateral, and demonstrates the quest for a progressive and controlled liberalisation, which might be a challenge for EU negotiators.

A brief note on the trade and investment-related reforms undertaken by India over the last two decades will not be inappropriate here. The Indian economy witnessed a sluggish growth pattern for a long time since the adoption of import-substituting economic model after independence in 1947.[10] However, major macroeconomic and external trade imbalance had set the stage for a structural adjustment programme in 1991, which facilitated trade and industrial policy reform.[11] The political economic factors also played a crucial role in determining various aspects of the entire reform process.[12] Following the reforms, the Indian economy increasingly became outward-oriented since the mid-1990s and has grown at around 8% for a considerable period

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6 See the preliminary study provided in 2007 by S. Baroowa, 'The Emerging Strategic Partnership between India and the EU: A Critical Appraisal', (2007) 13(6) *European Law Journal* 732–749.

7 Prior to the entry into force of the Treaty of Lisbon on 1 December 2009, the EU did not have the legal capacity to sign up to international agreements. Arts 216–218 of the Treaty on the Functioning of the European Union (formerly the EC Treaty) amends this—Treaty of Lisbon OJ 2008 C 115/1. Before that, 'European Union' was the official name. In order to facilitate the reading, we use the name even when disputes occurred before 2009.

8 The new comprehensive European investment policy may enable the EU to utilise its leverage to negotiate favourable terms with non-Member States and consistency in protection standards worldwide, leading to an even (as well as a superior) playing field for EU investors. This horizon, however, is darkened by technical but important issues of investment treaties implementation and the uncertain future of existing investment treaties signed by Member States. See J. Chaisse, 'Promises and Pitfalls of the European Union Policy on Foreign Investment—How Will the New EU Competence on FDI Affect the Emerging Global Regime?' (2012) 15(1) *Journal of International Economic Law* 15–35.

9 See, P. Ranjan, 'International Investment Agreements and Regulatory Discretion: Case Study of India', (2008) 9 *Journal of World Trade and Investment* 209–210.

10 J. Williamson and R. Zagha, 'From the Hindu Rate of Growth to the Hindu Rate of Reform', (2002) Working Paper No. 144, Center for Research on Economic Development and Policy Reform, Stanford University.

11 V. Joshi and I.M.D. Little, *India's Economic Reforms, 1991–2001* (Oxford University Press, 1996).

12 R. Mukherji (ed), *India's Economic Transition: The Politics of Reforms* (Oxford University Press, 2007).

of time.[13] On the investment front, given the labour-intensive nature of the economy, securing FDI and technology from abroad emerged as the major cornerstone of the new economic reforms undertaken by the country since 1991, and a number of major policy and procedural reforms, including the creation of new special economic zones (SEZs), were undertaken to facilitate this process.[14] These reforms, coupled with India's large market size, caused India's share in global FDI inflows to increase from 0.79% in 2005 to 3.11% in 2009. FDI inflow to the country, however, suffered in the aftermath of global recession, and the corresponding figure stood at 1.98% in 2010.[15] On the other hand, profits earned in the vibrant domestic market and comfortable Balance of Payments (BOP) position of the country enabled several Indian entities to invest abroad since the late 1990s. Systemic upward revision of the outward investment limit by the Reserve Bank of India deserves mention in this regard.[16] As a result, India's share in global FDI outflows has grown from 0.34% to 1.35% over 2005–2009. EU has played a crucial role in this regard both as a host to Indian outward investment[17] and a major source of inward investment to India.[18]

It is strongly felt that the ongoing EU–India PTA negotiation, once completed, would considerably facilitate their bilateral trade and investment flows. In this background, the present analysis attempts to analyse the role of the investment issues in the evolving EU–India economic relationship. The paper is arranged along the following lines. The next section covers the evolving legal and policy issues in the wake of the India–EU relationship. The key issues pertaining to EU–India relations are dealt in the second section. The third section discusses the bilateral investment relationship between the EU and India. The fourth section deals with the recent trends in preferential trade policies of both parties. International investment agreements (IIAs) are primarily protective, that is the vast majority of commitments are intended to protect established investment, whereas only a minority of bilateral investment treaties (BITs) contain liberalisation commitments. BITs remain important to protect

13 India's share in global merchandise export has doubled from 0.62% in 1999 to 1.44% in 2010. The increase in India's service export has been even steeper, with its global export market share increasing from 1.00% to 3.34% over the same period. A similar growth pattern is noticed in India's import as well, and the high domestic growth rate makes it a lucrative market for the trade partners. Over the decade, the country has integrated itself closely with the global production network, resulting greater trade flows in intermediate and semi-processed goods across categories. India's trade with the EU has increased considerably over the period. Gems and jewellery, garments and clothing, etc. are among India's major exports to the EU, while several machinery and equipment products are imported from the former. See A. Barua, D. Chakraborty and P. Chakraborty, 'Trade and Industrial Performance since the WTO Reforms: What Indian Evidences Suggest?' in A. Barua and R.M. Stern (eds), *The WTO and India: Issues and Negotiating Strategies* (Orient Blackswan, 2010), at 142–169.

14 A. Virmani, 'Foreign Direct Investment Reform', (2004) Occasional Policy Paper, ICRIER, New Delhi.

15 However, the developmental impact of the FDI received varies widely across sectors. For details, see C. Chakraborty and P. Nunnenkamp, 'Economic Reforms, FDI, and Economic Growth in India: A Sector Level Analysis', (2008) 36(7) *World Development* 1192–1212.

16 See D. Chakraborty and A. Guha, 'Should India Opt for Full Capital Account Convertibility? Some Exploratory Results', (2007) 42(1) *Foreign Trade Review* 1–27.

17 The Tata Steel-Corus merger in 2006 is a case in point. For details, see 'TATA & CORUS: A Case of Acquisition', available at http://www1.ximb.ac.in/users/fac/Amar/AmarNayak.nsf/dd5cab6801f1723585256474005327c8/060eac2cc3faa40265256c78003ff893/$FILE/Tata%2°Corus.pdf, accessed on 24 January 2012.

18 The investments from the EU has taken place both as greenfield investments as well as acquisition of existing shares. For details, see 'Secretariat of Industrial Assistance Newsletter', Department of Industrial Policy and Promotion, Government of India, various issues.

investment but are not capable to address the needs of inventors, which are to avoid protectionism and secure broad market access. However, the World Trade Organisation (WTO) General Agreement on Trade in Services (GATS) also contains elements both of the national and most-favoured-national treatments, and it relies on the use of both positive lists of commitments and negative lists of exemptions for different purposes. The transition and implementation challenges of future EU–India FDI-related, multilayered regulation are discussed in the fifth section. Finally, some conclusions are drawn on the basis of the key features of the EU–India negotiations.

II The Evolving Legal and Policy Context of the India–EU Relations

India, since early 2000, has witnessed a growth path hitherto unprecedented. The gross domestic product at factor cost has grown at a rate higher than 8% for most part of this period, barring few quarterly exceptions (mostly during post-2008 recessions). Although the reigning government was voted out from office in the general election of 2004, policy stability was not interrupted, which improved the FDI attractiveness index of the country.[19] The standing of India as host to FDI inflows improved further, owing to two conscious policy measures implemented by the government over the last decade. First, the country had set up a number of SEZs, which increased the exports originating from these territories considerably.[20] Second, infrastructure augmentation (both road and ports) in general, and at the strategic locations in particular, has been undertaken both through budgetary resources[21] and by means of external funding.[22]

India has clearly been on the rise in recent times (see Section II, part A), while the EU strengthened its political unity during the same period. Indeed, the individual EU states are individually perceived to regulate investments for themselves to and from their territories within Europe.[23] This view only partially reflects the reality of

[19] While India's inward FDI potential index was 91 in 2000, the same improved to 84 in 2006. Various issues of *World Investment Report*, UNCTAD.

[20] At present, there are more than 125 SEZs in India. In addition, approval for setting up SEZs has been granted for around 580 locations, while the number of in-principle approvals is 154. While in 2003–2004, the share of SEZ exports in India's total exports was 4.7%, the same has increased to 29.7% during 2010–2011 (April–December). Ministry of Finance, Government of India, *Economic Survey 2010–11* (Oxford University Press, 2011).

[21] For instance, initiatives like the National Highways Development Project, Golden Quadrilateral, etc. deserves mention here.

[22] For instance, a multimodal high axle load dedicated freight corridor between Delhi and Mumbai, covering an overall length of 1483 km, is scheduled to be constructed with the financial help of Japanese investors. The Japan External Trade Organisation plays a key role in this project. For details, 'Concept Paper on Delhi-Mumbai Industrial Corridor', Department of Industrial Policy and Promotion, Government of India, available at http://dipp.nic.in/dmic/DMIC_Concept_Paper%28English%29.pdf, accessed on 24 January 2012.

[23] FDI regulation is multilayered, and some aspects of the EU law may impact foreign investment in the EU market, the regime which has not been affected by the coming into force of the Treaty of Lisbon on 1 December 2009. The free movement of capital is determined by Art 63(1) TFEU, which clearly states that '[w]ithin the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.' Hence, not just an intra-Community liberalisation of capital movements has been achieved, but it also leads to rather contentious *erga omnes* liberalisation. Art 64 TFEU gives the EU the competence to adopt measures with regard to the establishment of foreign investors in the Union. This includes adoption of internal EU legislation and conclusions of IIAs, such as the EU PTAs. See S. Hindelang, *The Free Movement of Capital and Foreign Direct Investment—The Scope of Protection in EU Law* (Oxford University Press, 2009), at 448.

investment regulation in the EU until now. Investment regulation in the EU is today a patchwork of various national, EU and multilateral rules, applicable on different issues and involving various stakeholders. But the transfer of new power from the national states to the EU will change the situation. This constitutes a major development because it pushes back the new frontier of the common commercial policy (CCP) giving birth to a new broad external economic policy. An analysis of the current trends is provided here in order to enable a better understanding of the significance of the upcoming changes in the EU and their impact on the legal and policy context of the EU–India negotiations (see Section II, part B).

A India on the Rise as an Economic Power

The changing perspective of Indian foreign policy also played a key role in shaping the country's PTA agenda. A major proportion of India's trade partners are from the East and Southeast Asian regions. India's integration with these trade partners, however, was quite limited during the 1980s. Since the initiation of the economic reforms in 1991, India has adopted a 'Look East Policy' to correct this imbalance. This policy is geared towards developing strategic relations with East and Southeast Asia in general, and Asian tigers in particular.[24] The political ambitions of India are now leaving more space to economic ambitions as the transformations of Indian economy are considerable.

The economic vibrancy, coupled with large market size, has recently earned India a more prominent role in several international forums, including regular invitations for the G8 forum and leadership on behalf of the developing countries at the WTO.[25] The vibrancy is likely to continue in the coming future given several major advantages that India possesses, namely growing civil application of nuclear power (ie future energy security), vast natural resource base, considerable supply of skilled workforce at reasonable wage conditions (ie abundance of cheap raw materials for production), etc. Nuclear power at present is only a moderate source of electricity in India, where six nuclear power plants generate more than 4780 MW of electricity.[26] The country has already entered into bilateral agreements on civilian nuclear energy technology cooperation with leading economies like France, United States,[27] UK and Canada. In addition, the country is rich with deposits of several key mineral resources like coal, iron ore, manganese, mica, bauxite, petroleum, thorium, etc.[28] Finally, literacy rate in India has increased from 52.21% in 1991 to 64.84% in 2001, as revealed from census figures. There has been a considerable increase in the number of students taking admission in the specialised and technical courses since inception of WTO, helping the country get transformed in a knowledge

[24] I. Saint-Mezard, 'India and East Asia: Through the Looking Glass', in N. Thomas (ed), *Governance and Regionalism in Asia* (Routledge, 2009), at 173.

[25] A. Narlikar, 'India and the World Trade Organization', available at http://www.oup.com/uk/orc/bin/9780199215294/smith_ch15.pdf, accessed on 20 April 2011.

[26] *Hindustan Times*, 'India's 20th Nuclear Power Plant Goes Critical', 27 November 2010, New Delhi.

[27] It is expected that the United States may support India's membership in the Nuclear Suppliers Group in the aftermath of the Indo–United States deal. This would facilitate import of nuclear reactors for civilian applications in the country. See A. Sasi, 'US May Back India's Bid to Enter Nuclear Suppliers Group', *The Hindu Business Line*, 6 November 2010.

[28] For details, see 'Mineral Resources in India', available at http://nos.org/316courseE/L-21%20MINERAL%20RESOURCES%20IN%20INDIA.pdf, accessed on 20 April 2011.

economy.[29] Moreover, the steady supply of English-speaking skilled workforce has contributed further in maintaining the edge enjoyed by the country in the service sector. All these factors (individually as well as collectively) contribute significantly in boosting the standing of the country in global canvas on one hand, and in attracting FDI inflows on the other.

Nevertheless, the areas of concern associated with the growth process are not to be discounted. For instance, the service sector export from India has been growing rapidly over the last decade, but the recent opposition from the affected quarters in the West (especially the EU and the United States) against outsourcing of projects to Indian business process outsourcing is one major area of concern.[30] Second, so far, India's growth story has been primarily urban-centric, and there is a growing need to further broad-base the same by developing tier-two cities and townships in the country. However, existing infrastructural bottlenecks slow down the process. Third, equally important is the development of SEZs in strategic locations with suitable backward and forward linkages. But the recent land acquisition attempts for several SEZs have met popular protests in different parts of the country over compensation and other issues.[31] A major challenge for policy makers would be to sort out this discord through speedy negotiation, which otherwise may send a wrong signal to the foreign investors as well. Fourth, the enhanced economic activities also led to over-exploitation of natural resources,[32] which needs to be curbed for maintaining long-term environmental sustainability. On the other hand, delays in clearing foreign projects on environmental grounds might bear negative repercussions from economic standpoints. The POSCO deal in iron and steel sector, which got delayed by 5 years, is often cited in this regard.[33] Finally, demand for stronger macroeconomic management has emerged as another area of concern, with inflation reaching a high level during the most part of 2011.[34] If the price level rise continues, the cost advantage so far enjoyed by India might wear off.

B EU on the Rise as a Political Power

The expansion of international trade, essentially through the General Agreement on Tariffs and Trade of 1947 (GATT 47), made the CCP into one of the Community's most important policies. At the same time, the successive enlargements of the Community and the consolidation of the common market strengthened the Community's position as a centre of attraction and influence for trade negotiations, conducted bilaterally with other countries and multilaterally during the GATT era (1947–1994),

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[29] This transition is perhaps duly reflected in the growing number of patent applications in the country. Over 1995–2004, the number of patent applications by residents has increased by 365%. *Business Standard*, 'India ranked 12th in patent filing', 17 October 2006. See also S. Baroowa, 'The Emerging Strategic Partnership between India and the EU: A Critical Appraisal', (2007) 13(6) *European Law Journal* 739.

[30] For details, see, N. Banik, 'India's Exports: Is the Bull Run Over?', (2007) 3(2) *Asia-Pacific Trade and Investment Review* 47–66.

[31] For details, see, J.A. Dohrmann, 'Special Economic Zones in India—An Introduction', (2008) 106 *ASIEN* 60–80.

[32] For instance, see K. Lahiri-Dutt, 'Illegal Coal Mining in Eastern India: Rethinking Legitimacy and Limits of Justice', (2007) 42(49) *Economic and Political Weekly* 57–66.

[33] See *Economic Times*, 'Posco Gets Green Signal with 28 Riders', 1 February 2011, New Delhi.

[34] See G. Choudhury, 'No Respite: Inflation at 16-Year High, Interest Rates May Go Up', *Hindustan Times*, 20 April 2011.

and thereafter (1995 onwards) in the WTO period. The evolution of the CCP, which shows a strong and progressive increase in the EU competence,[35] simultaneously presumes an accepted erosion in the sovereignty of the EU Member States.[36] The rise to power of the commercial policy as a significant sector of the EU external action concretised itself in the evolution of its legal competence in this field. Because the sectors negotiated at the international level were increasing, the stake for the EU was to increase its competence. That objective has been achieved as much through the jurisprudence of the Court of Justice of the European Union as well as the Treaty amendments.

As part of the triad with North America and East Asia in investment matters,[37] Europe is one of the most relevant sources and destinations for investment. Yet the EU is itself just emerging as a player in investment matters. The EU Member States showed a great keenness to retain national control over foreign investment rather than see the same moves into EU competence. *Inter alia*, this was showcased at the Nice Summit (2000), where EU Member States agreed to amend Article 133 of the Treaty of Rome (which governs the Union's CCP) by extending EU competence to a number of 'new' areas. In a few sensitive sectors, such as audio-visual services (eg '*l'exception culturelle*')[38] and investment, EU Member States did not agree on handing over 'shared' or 'mixed'[39] competence to the EC. With the ratification of the Treaty of Nice, investment was one of a few most sensitive issues that remain subject to the rules and procedures of intergovernmentalism, as opposed to the 'community approach.' One of the consequences of this is that investment was covered by a plethora of BITs between individual EU Member States and third parties.[40] BITs were considered to be the single most important tool in investment relations between countries.

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35 See eg P. Messerlin, 'The European Community Commercial Policy', Working Paper June 2010 Groupe d'Economie Mondiale, Presses de Sciences Po (2010), at 30–32.

36 The scope of the CCP has been subject of political and legal debate for a long time. See eg M. Cremona, 'The Completion of the Internal Market and the Incomplete Commercial Policy of the European Community', (1990) 15 *European Law Review* 283–297. See also J. Chaisse, 'Adapting the European Community Legal Structure to the International Trade', (2006) 17(6) *European Business Law Review* 1615–1635, 1633.

37 See P. Gugler and J. Chaisse, 'The Patterns and Dynamics of Asia's Growing Share of Foreign Direct Investment', in J. Chaisse and P. Gugler (eds), *Expansion of Trade and Foreign Direct Investment in Asia—Strategic and Policy Challenges* (Routledge, 2009), at 1–22.

38 This could be defined as an exemption for cultural goods and services developed towards the end of the Uruguay Round negotiations. In the context of economic institutions, Canada and the EU (with France at the forefront) had 'written "exception culturelle" on their flags when they fought in 1993 against the inclusion of audiovisual media into the regime of the new WTO. Although the "cultural exception" doctrine proved to be a very effective public relations slogan, its precise meaning has not been clear. Proponents invoked it in order to argue that culture must not be subject to the laws of free trade. Opponents, however, suspected that the "cultural exception" doctrine was no more than disguised protectionism.' See C.B. Graber, 'The New UNESCO Convention on Cultural Diversity: A Counter-balance to the WTO', (2006) 9 *Journal of International Economic Law* 553–574, 554.

39 International negotiations over such issues require the direct participation of both the EU and Member State, and result in mixed agreements. Mixed competence issues have grown more prominent in recent years, largely as the result of 'new' international trade agendas, but also because of the EU's increased activism in international social accords, environmental treaties and consumer protection agreements. See M. Klamert and N. Maydell, 'Lost in Exclusivity: Implied Non-Exclusive External Competences in Community Law', (2008) 13 *European Foreign Affairs Review* 493–513, 493–494.

40 T. Baert, 'The Euro-Mediterranean Agreements', in G. Sampson and S. Woolcock (eds), *Regionalism, Multilateralism and Economic integration—The Recent Experience* (United Nations University Press, 2003), at 116.

> *"The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action."*

Figure 1. Article 207 Treaty on the Functioning of the European Union
Source: *Treaty on the Functioning of the European Union (TFEU).*

By proposing in 2006 a 'Minimum Platform on Investment' (MPoI), the Commission sent a signal that it wants to acquire all the competences needed to negotiate investment deals.[41] This 'MPoI' intended to serve—rather like national model BITs—as a standardised negotiation proposal for ongoing and future PTA negotiations with third countries. But the Treaty of Lisbon extends the CCP to the second most important field of international economic relations, namely FDI (Articles 206 and 207 TFEU).[42] Albeit subject to unanimity, the EU competence is broad and exclusive,[43] thereby enabling it to conceive what could be the main features of a new model of European investment agreement (Figure 1).

The shift from national to supranational level, as discussed above, is in itself a major legal development. It has been explained that the EU is likely to employ its significant bargaining power when negotiating IIAs to improve, for instance, the standards of investment protection or to develop new forms of all-encompassing agreements.[44] Neither the 2008 Economic Partnership Agreement with the CARIFORUM states nor the 2010 signed agreement with South Korea addresses the core investment protection issues of minimum standards of treatment, expropriation and compensation, nor does it provide recourse to investor-state arbitration procedures. The latter outcome reflects the legal situation before December 2009, and the shared competency between Member States and the EU in matters of investment regulation. As stated by the Commission, 'a comprehensive common international investment policy needs to better address investor needs from the planning to the profit stage or

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41 In November 2006, the Council of the European Union adopted the 'Minimum Platform on Investment' for EU PTAs with third countries (Minimum Platform on Investment, Council of the European Union, 15375/06, 27 November 2006). As explained at that time, the EU was already determined to expand its CCP powers to cover also investment issues. See N. Maydell, 'The European Community's Minimum Platform on Investment or the Trojan Horse of Investment Competence', in A. Reinisch and C. Knahr (eds), *International Investment Law in Context* (Eleven International Publishing, 2008), at 204–206.

42 See Appendix 2.

43 The EU now holds exclusive competence over FDI, which is interpreted to include the classical standards of investment protection. However, the absence of a definition of 'FDI' in the Treaty still leaves scope for disagreement. For further discussion, see J. Chaisse, 'Promises and Pitfalls of the European Union Policy on Foreign Investment—How Will the New EU Competence on FDI Affect the Emerging Global Regime?' (2012) 15(1) *Journal of International Economic Law* 15–35.

44 The 'negotiation mandate' for the EU–Canada/India/Singapore PTAs was approved by the General Affairs Council on 12 September 2011. This confidential document confirms the trend that the EU will negotiate broad encompassing PTAs to replace narrow and conventional BITs. See J. Chaisse, 'Promises and Pitfalls of the European Union Policy on Foreign Investment—How Will the New EU Competence on FDI Affect the Emerging Global Regime?' (2012) 15(1) *Journal of International Economic Law* 15–35.

from the pre- to the post-admission stage. Thus, our trade policy will seek to integrate investment liberalisation and investment protection.'[45] The most important change that will benefit EU investors might be the shift from post-establishment to pre- and post-establishment rights granted to foreign investors which represent the two main approaches to the admission of foreign investment that can be recognised in the BITs. 'Entry' provisions erode the host state's control over the admission of foreign investment into its territory.[46] They may affect the capacity of the host state to prioritise certain investments over others, and undermine its negotiating power *vis-à-vis* incoming investors, which in turn is crucial for negotiating terms and conditions that maximise the investment's contribution to sustainable development.

International investment law is not a system. There is no multilateral investment agreement with a unique tribunal in charge of resolving disputes, but rather a patchwork of agreements and provisions that address the regulation of investment.[47] It is against this backdrop that the EU will have to exert its competence that will develop either on a bilateral or multilateral basis. It is certain that the EU Commission has already singled out a number of countries with which it intends to initiate bilateral negotiations, and hence test its new competence. But the EU may also be willing to sharpen the bilateral and multilateral agenda through the negotiations of ambitious PTAs. Beyond bilateral and regional venues, one can also anticipate that the EU will become a more important player and impact rule making in different multilateral forums, such as the WTO, the Organisation for Economic Co-operation and Development (OECD), and the International Monetary Fund (IMF). For instance, in 2007/2008, the control of sovereign wealth funds (SWFs) emerged as an important issue[48] and prompted a series of protectionist reactions throughout the world.[49]

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[45] EU, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards a Comprehensive European International Investment Policy, COM(2010)343 final, Brussels, 7 July 2010, 5.

[46] In its 2010 Communication, the Commission points out that the existing European BITs relate to the treatment of investors 'post-entry' or 'post-admission' only. It is perfectly true. This implies that Member States' BITs provide no specific binding commitments regarding the conditions of entry, neither from third countries regarding outward investment by companies of our Member States, nor vice versa. But the European Commission observes that '[g]radually, the European Union has started filling the gap of "entry" or "admission" through both multilateral and bilateral agreements at EU level covering investment market access and investment liberalization,' and illustrates this in a footnote because at the multilateral level, GATS provides for a framework for undertaking commitments on the supply of services through a commercial presence (defined as 'Mode 3' by GATS Art I). At the bilateral level, the EU has concluded negotiations with South Korea on a PTA, which includes provisions on market access for investors and establishments.

[47] On the attempts at crafting multilateral disciplines on investment, see P. Sauvé, 'Multilateral Rules on Investment: Is Forward Movement Possible?' (2006) 9(2) *Journal of International Economic Law* 325–355. See also D. Collins, 'A New Role for the WTO in International Investment Law: Public Interest in the Post-Neoliberal Period', (2009) 25 *Connecticut Journal of International Law* 1–35.

[48] SWFs raise concerns because they show the importance that States can have in the global economy, and this may be considered as detrimental to the role of market forces. These State SWFs may not decide for economic reasons to invest but rather for political purposes, and could have political project. See, for further analysis, J. Chaisse and D. Chakraborty, 'Emerging Sovereign Wealth Funds in the Making—Assessing the Economic Feasibility and Regulatory Strategies', (2011) 45(4) *Journal of World Trade* 837–880

[49] See eg R. Gilson and C. Milhaupt, 'Sovereign Wealth Funds and Corporate Governance: A Minimalist Response to the New Mercantilism', (2008) 65 *Stanford Law Review* 1345–1369. See also E.M. Truman, 'Possible Policy Responses to Sovereign Wealth Funds', in E.M. Truman (ed), *Sovereign Wealth Funds: Threat or Salvation?* (Peterson Institute of International Economics, 2010), at 57–68.

Because SWFs have an international scope, the EU decided to cooperate with the other recipient countries on one hand, and with the SWFs and their creators on the other. The EU strategy was well in line with its tradition of preferring multilateral bodies rather than a unilateral approach. The option taken by the EU was important because it provided support to the work done by the IMF[50] and the OECD.[51] Even if the new competence may ensure a greater scope of action to the EU within the IMF and the OECD, these *fora* only serve to negotiate soft law rules. The most important consequences of the new competence may be seen at the WTO. Of course, the WTO has not directly tackled the broad issue of foreign investment rules. Instead, GATT and the WTO have dealt with a narrow set of very specific issues, which has left nations to formulate their own policies through BITs. However, the WTO incorporates two agreements[52] that address investment issues directly: the Agreement on Trade-Related Investment Measures (TRIMs)[53] and most importantly the GATS. The GATS often deals with investment issues of all the existing WTO agreements because although it does not focus officially with investment, it covers FDI through

[50] The EC is not a member of the IMF. However, the creation of the Euro gave a strong impetus to the coordination at IMF. EU Member States have set up a multilayered structure of coordination, composed of a Brussels-based committee and an informal group of Member States' officials who gather in Washington. See C. Nicolas, 'European Coordination at the World Bank and International Monetary Fund: A Question of Harmony?' Brussels, ADS Consultants Report 1–20 (2006), at 8–10.

[51] Since 1960, the EU Commission has had the status within the OECD of a quasi-Member. The signatory states decided that the Commission of the European Community 'shall participate in the work' of the OECD. See OECD, Supplementary Protocol No. 1 to the Convention on the OECD, 14 December 1960. The members of the EC delegation, thus, sit in the OECD's various specialised committees which monitor the work of the secretariat that has significant importance for the EU investment policy. For instance, the OECD guidance on recipient country policies towards SWFs was published in October 2008 and are very relevant to the EU investment policy. These guidelines draw on the OECD's extensive work on the treatment of foreign investment in OECD economies. OECD work also draws on the OECD Guidelines for Corporate Governance of State Owned Enterprises.

[52] See R.D. Thrasher and K.P. Gallagher, '21st Century Trade Agreements: Implications for Development Sovereignty', (2010) 38 *Denver Journal of International Law and Policy* 313–349, 388–340. However, three further agreements (the Agreement on TRIPs, the Government Procurement Agreement (GPA), and the Agreement on Subsidies and Countervailing Measures) have only indirect effects on investment. The Agreement on Government Procurement deals with public procurements and services because GATS excludes public procurement services. The GPA requirements deal with investment once they apply to procurement of foreign products or services, as well as to goods or services produced by locally established foreign suppliers. The Agreement on Subsidies and Countervailing Measures deals with subsidies. Because the Agreement includes in its definition of subsidies a number of commonly used investment incentives, it does not address this subject in terms of discrimination between foreign and domestic investment. For this reason, this Agreement tackles investment directly, but it does not build up any significant incompatibility between foreign and domestic investment. Among these three provisions, the TRIPs are the most interesting. It provides protection for intangible assets that form the basis of the activities of multinational corporations. It further requires that Members provide effective legal procedures and remedies for the enforcement of such rights.

[53] The TRIMs Agreement has constituted a significant net step forward in the investment area at the multilateral level. From the substantive point of view first, but it unambiguously and explicitly put investment policies on the multilateral agenda. It addressed investment measures that were trade-related in the good sector and which violated Art III (National Treatment) or Art XI (general elimination of quantitative restrictions). See T. Brewer and S. Young, 'Investment Issues at the WTO: The Architecture of Rules and the Settlement of Disputes', (1998) 3(1) *Journal of International Economic Law* 457–470, 462. Because in the field of goods, the EC had the competence to negotiate and the new change in competence does not bring anything new here. The Treaty of Lisbon will, however, change the situation in trade in services as we will discuss.

commercial presence[54] mode of supply, and that possible modification by the new competence will be analysed.

III The Bilateral Level: Investment Policy and Treaty Practice

Contemporary international rules of FDI are one of the fastest growing areas of international economic regulation. Although national laws and policies still constitute the most concrete and detailed part of the legal framework of FDI, the current system has become increasingly dependent upon international treaties: BITs have precisely become the core of the current framework for FDI protection.[55] More than 2700 bilateral agreements[56] have been concluded since the early 1960s, with most of them in the 1990s. A significant proportion of these BITs are being concluded by at least one EU country.[57]

This 'treatification'[58] shows the significant recalibration of international investment law over the last couple of years, which is explained (Section III, part A) and complemented by the specific economic and regulatory drivers of EU–India relations (Section III, part B). BITs seek to promote investment flows between two countries by establishing international obligations concerning the entry and/or treatment of investment by nationals of one state in the territory of the other state. This makes them essential for FDI protection but also marks the limits of their impact on FDI liberalisation, which is a major area of concern for both the EU and India.

A BIT Practice between India and the EU Countries

According to the United Nations Conference on Trade and Development (UNCTAD) studies and statistics, the network of IIAs has been expanding considerably over the last decade, in 2011 to almost 3000 BITs, whereas fewer than 400 BITs existed by the end of the 1990s.[59]

Table 1 summarises the current level of Indo–EU cooperation in the area of investment. At present, 19 EU Member States have an operational BIT[60] with India, and the same signed with Greece is yet to be implemented. Negotiations for entering into BIT with four new EU Member States are currently going on. Appendix 1A shows a chronological account of the entry of various EU-centric BITs by India and their key provisions. Understandably, the first EU member to enter into BIT was UK in 1995, followed by Denmark and The Netherlands. On the other hand, newer EU members

[54] The four modes of supply under GATS are cross-border supply, consumption abroad, commercial presence and the movement of natural persons.

[55] In so doing, they may take the protection of foreign investment beyond the requirements of general international law (stemming, for instance, from customary international law or the general principles of law). See J.W. Salacuse, 'The Emerging Global Regime for Investment', (2010) 51 *Harvard International Law Journal* 427–472, 429–430.

[56] For an excellent online compendium of BIT, see the U.N. Conference on Trade and Development, Investment Instruments Online: Bilateral Investment Treaties, available at http://www.unctadxi.org/templates/DocSearch.aspx?id=779, accessed on 2 December 2010).

[57] See R. Anca, 'Foreign Investors in the EU—Which "Best Treatment"? Interactions Between Bilateral Investment Treaties and EU Law', (March 2008) 14(2) *European Law Journal* 237–238.

[58] See J.W. Salacuse, 'The Treatification of International Investment Law', (2007) 13 *Law and Business Review of the Americas* 155–166, 155.

[59] See UNCTAD (2010) *World Investment Report 2010* (UNCTAD/WIR/2010) 22 July 81.

[60] BIT may also be called bilateral investment promotion and protection agreement.

Table 1. India's Bilateral Investment Treaties with EU Member States

Type of agreement involving India and EU members	Name of EU countries
Bilateral investment promotion and protection agreements (in force in 2007)	Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Hungary, Italy, The Netherlands, Poland, Portugal, Romania, Spain, Sweden, Slovak Republic, UK
India has signed bilateral investment promotion and protection agreements, but the agreement is not yet in force	Greece
Negotiations on bilateral investment promotion and protection agreements are underway	Latvia, Lithuania, Malta, Slovenia
Double Taxation Avoidance Agreements	Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Malta, The Netherlands, Poland, Romania, Spain, Sweden, UK

Source: Constructed by authors from Government of India documents.

like Cyprus, Hungary and Slovakia have entered into similar agreements with India only recently.[61]

FDI flows between two countries can be substantially enhanced by signing Double Taxation Avoidance Agreements (DTAA), which enables them to avert simultaneous taxation of the same economic activity. It is observed from Table 2 that India already has entered into operational DTAA involving 19 EU member countries. It is observed from Appendix 1B that the agreements involving several countries have been modified at times in line with the demands of the evolving business environment. The earliest DTAA had been signed with Sweden in 1958, followed by the ones with Denmark and West Germany in 1959. On the other hand, DTAA has been signed with Spain in 1993, Bulgaria in 1994 and Cyprus in 1995. In other words, for several new entrants to the EU, their investment collaboration with India predates their entry in the bloc.

In terms of substance, practice shows that nearly all IIAs cover the following nine topics (see details in Table 2): (1) definitions and scope of application; (2) investment promotion and conditions for the entry of foreign investments and investors; (3) general standards for the treatment of foreign investors and investments; (4) monetary transfers; (5) expropriation and dispossession; (6) operational and other conditions; (7) losses from armed conflict or internal disorder; (8) treaty exceptions, modifications and terminations; and (9) dispute settlement.

In terms of substance, India and EU member countries' practice allows the identification of standard features in their respective BITs. BITs are often negotiated on the basis of 'model BITs' developed by capital-exporting countries and promoted by them as templates for agreement.[62] The agreements tend to adopt either the

[61] In this sense, P. Ranjan, 'Non-Precluded Measures in Indian International Investment Agreements and India's Regulatory Power as a Host Nation', (2011) 2(1) *Asian Journal of International Law* 1–38.

[62] A model BIT represents the set of norms that the relevant state holds out both to be reasonable and acceptable as a legal basis for the protection of foreign investment in its own economy. For the texts of model BITs used by France, Germany, UK and the United States, see R. Dolzer and S. Christoph, *Principles of International Investment Law* (Oxford University Press, 2008), at 360–429.

Table 2. Common Elements of International Investment Treaties

Policy area	Legal scope
Definition of investment	Broad and open-ended definition of foreign investment is usually adopted.
Market access	Entry and establishment are subject to national laws and regulations (Admission clause).
	Bilateral investment treaties usually do not affect the right to regulate the admission of foreign investors.
Post-admission provisions	Fair and equitable treatment of foreign investors.
	Principle of national treatment for foreign investors, but often subject to qualifications and exceptions.
	Most favoured nation treatment, subject to a variety of exceptions.
Investor protection	Right of the host country to expropriate foreign investors, subject to the condition that expropriation is non-discriminatory and accompanied by adequate compensation.
	Guarantee of free transfer of payments, of capital and returns, related to foreign investment, often qualified by exceptions in case of balance of payments problems.
Dispute settlement	State-to-state dispute settlement provisions, and most often also investor-to-state dispute settlement.

Authors' elaboration.

investment control or the selective liberalisation model. Lawyers commonly refer to existing EU countries' investment treaties as materialising the 'European approach towards FDI regulation.' Compared with the US model BIT, it is clear that the national treatment (NT) and most favoured nation (MFN) provisions of model BITs do not refer to the establishment, acquisition or expansion. Similar wording has been incorporated, for instance, in the model BITs of Germany, France and The Netherlands.[63] BITs of the EU Member States, as well as the Indian ones,[64] do not grant the NT as far as admission is concerned. It is, therefore, not surprising that the EU is more willing to adopt the positive list approach to the entry of FDI with respect to third countries. The BITs concluded by the Member States of the EU with the third states are similar in their structure and their common option in favour of the admission clause model, which constitutes a major difference compared with the US or Canadian BITs.

B Economic and Regulatory Drivers of the EU–India Relations

These diverse provisions are important to reassure EU and India's investors that they will be able to reap the benefits of their investment in a foreign country, and no trend denies such an approach, although general evidence on the extent to which investment decisions are influenced by investment treaties is mixed[65] but deserves a careful

[63] The MFN condition in the European model BITs is usually qualified as regards a membership in a customs, economic or monetary unions in the sense that the privileges that apply to the members of such unions do not have to apply to third countries. This means that the Members of EU, resp. European Monetary Union, are in fact more than the MFNs.

[64] See P. Ranjan, 'International Investment Agreements and Regulatory Discretion: Case Study of India', (2008) 9 *Journal of World Trade and Investment* 209–240.

[65] The extent to which BITs actually attract increased flows of FDI is disputed. According to Salacuse & Sullivan, entering a BIT with the United States would nearly double a country's FDI inflows. However,

Table 3. Foreign Direct Investment (FDI) Inflow in India from EU Member States

Country	2000	2006	2007	2008	2009	2010	2011 (Jan–Sept)
Belgium	0.28	0.76	0.10	0.34	0.11	0.15	0.46
Cyprus	0.02	0.51	2.76	4.17	5.93	4.38	4.08
France	2.77	0.77	0.65	1.46	1.10	3.55	1.94
Germany	3.01	2.77	1.78	2.38	2.20	0.94	6.17
Italy	4.72	0.51	0.15	1.06	0.55	0.87	0.50
The Netherlands	4.43	4.46	3.50	3.06	3.06	5.42	4.55
Sweden	2.06	0.05	0.43	0.29	0.91	0.13	0.13
UK	2.28	15.53	2.47	5.01	1.72	3.57	12.45
Share of EU (27) in India's overall FDI inflow	20.01	26.09	12.66	19.14	16.80	21.49	32.15
Total FDI inflow in India	123.54	503.85	797.35	1397.68	1309.82	960.15	1016.14

Source: Authors' calculation from SIA Newsletter data.
(Per cent and Rs. Millions).
(Per cent and Rs. Billions).

examination within the bilateral framework. The existence of investment agreements with the EU Member States brings about the obvious question on their effectiveness. Table 3 compares the importance of the EU Member States in India's overall FDI inflow (expressed as a percentage of total FDI inflow).

It is observed that, overall, EU (27) investment in India is subject to considerable amount of seasonal fluctuations, and a similar trend occurs at individual country levels as well (including the big four investors, ie France, Germany, UK and The Netherlands). The only exception is Cyprus, investment from which is experiencing an increasing trend over the period, arguably owing to tax-related reasons.

On the other hand, outbound investment from India is on the rise over the last decade, and EC has evolved as a major destination for key Indian investments. It has been observed that Indian FDI outflow to EU has increased from US$97 million to US$5.4 billion over 2001–2008. The major investment locations have been the UK, Belgium, The Netherlands and Germany, while the investments generally flowed to sectors like information technology, automobile and pharmaceuticals.[66]

Gopalan and Rajan analysed Indian outbound investment over 2002–2008 category-wise. First, the analysis reveals that India's approved outward FDI towards EU countries like The Netherlands (15%) and UK (6%) is much smaller as compared with several upcoming economies (eg Singapore, 22%). The study concluded that '. . . over 50 percent of India's approved FDI appears to have been flowing towards the financial centres (regional and offshore).' Second, analysing merger and acquisitions over 2000–2007, the study note that 'Canada emerges as the top host country for India's outbound acquisitions with a 34 percent share, followed by the United States with a 24 percent share . . . Apart from these, around 16 percent of India's

entering BITs with other OECD countries had no significant effect on FDI. See J.W. Salacuse and N.P. Sullivan, 'Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain', (2005) 46 *Harvard International Law Journal* 67–127, 105, 111. For a new methodology, see J. Chaisse and C. Bellak, 'Do Bilateral Investment Treaties Promote Foreign Direct Investment? Preliminary Reflections on a New Methodology', (2011) 3(4) *Transnational Corporations Review* 7–8.

[66] See, for details, A. Mukherjee and R. Goswami, 'Upcoming BTIA: Prospects and Challenges', (2010) 2(4) *Diplomatist Plus* 36–39.

acquisitions have been aimed at resource-rich countries (Russia, Egypt, Australia and South Africa) and the rest to the United Kingdom and Europe (17 percent).'[67] However, a number of acquisitions by Indian firms in the EU Member States have taken place since then.[68]

On the other hand, regarding the selection of partner countries, the Commission clearly announced that the EU 'should go where its investors would like to go, just as it should pave their way abroad, through the liberalisation of investment flows.'[69] During last year, many investors have focused on China as the driver for global economic recovery. There are countries other than China that are experiencing significant economic growth, thereby contributing to the global recovery. The growth of many Asian countries[70] and several of their South American counterparts offers important export opportunities for the EU but might also become the best locations for European investments. As pointed out by Marc Bungenberg, '[i]f the EU and its member states want to succeed in a competition of systems between Europe, China, Japan and the USA—and probably in the near future also India and Brazil—the EU has to adjust to the challenges of globalization. Nation states, as well as regional areas of integration, have to react to the situation that capital and establishments of firms can without any obstacles freely cross borders, invest internationally and buy raw materials for private production as well as for public needs on international markets.'[71] Not surprisingly, the EU Commission names in its communication China, India, Russia and the Mercosur countries as priority partners with whom to begin broad investment negotiations to test the new investment competence. Also included in the list of imminent negotiations partners are Canada and Singapore, which share liberal policies towards FDI and have a considerable experience in terms of investment negotiations through the North American Free Trade Agreement (NAFTA) or other FTAs.

The first draft mandates for EU investment negotiations[72] with these countries are expected to be proposed by the Commission in the end of 2011 and will help a better understanding of EU ambitions. It is known that the mandate (which is, however, a

[67] S. Gopalan and R.S. Rajan, 'India's Foreign Direct Investment Flows: Trying to Make Sense of the Numbers', (2009) ISAS Insights No. 79, available at http://kms1.isn.ethz.ch/serviceengine/Files/ISN/104219/. . ./a9c9ea30. . ./80.pdf, accessed on 24 January 2012.

[68] For instance, the Indian firm, Suzlon, now holds 90.72% stake in German energy company, Repower, since the acquisition in 2009. See 'Suzlon Completes Acquisition of Martifer Stake in Repower', available at http://www.suzlon.com/images/Media_Center_News/130_Suzlon%20%20Completion%20June.pdf, accessed on 24 January 2012. Similarly, in 2008, India's largest media entity, The Times Group, has acquired Virgin Radio Holdings Ltd and its subsidiaries in the UK from SMG Plc. See S. Sen, 'Times Group Buys UK's Virgin Radio for Rs 448 cr', available at http://articles.economictimes.indiatimes.com/2008-06-01/news/27697315_1_uk-s-virgin-radio-media-brands-radio-station, accessed on 24 January 2012.

[69] EU, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards a comprehensive European international investment policy, COM(2010)343 final, Brussels, 7 July 2010, at 6.

[70] See eg J. Chaisse and P. Gugler (eds), *Expansion of Trade and Foreign Direct Investment in Asia—Strategic and Policy Challenges* (Routledge, 2009), at 304.

[71] M. Bungenberg, 'Going Global? The EU Common Commercial Policy After Lisbon', (2010) 1 *European Yearbook of International Economic Law* 125.

[72] The Commission will lead the negotiations according to this mandate given by the Council. The Council must approve the Commission's negotiating mandate before talks can begin. The European Parliament is fully informed at all stages of the negotiations and will have to give its consent to the outcome of the negotiations.

'restricted' document and not open for public examination), which will be given to the Commission, can be more or less broad and will grant the Commission certain flexibility that will in turn impact the substance of the negotiations.[73] This underlines the EU's policy to focus rather than diversify its plans to negotiate BITs and not to reopen concluded treaties where it has nothing additional to offer.

IV The Multilateral Level: Diverging Interests in the WTO GATS Commitments

The Doha Round of the WTO was launched in 2001 with the objective to address several issues raised by the member countries at the Fourth Ministerial. At that point, the developed countries were insistent on greater market access reforms in their developing counterparts. On the other hand, the developing country concerns focused on speedy resolution of the remaining implementation issues, ensuring special and differential treatments, provision of affordable public health policy and livelihood security for their poorer sections, etc. The Doha Development Agenda incorporated 21 subjects under the work programme and was supposed to be concluded by January 2005. However, the deadline has been long missed, with a deadlock witnessed in the negotiation process after the Cancun Ministerial in 2003.[74] The negotiations since the Hong Kong Ministerial in 2005 are yet to bear fruit, as several countries still have certain reservations on the December 2008 draft on agricultural and non-agricultural reform modalities, as circulated by the WTO. In particular, the request-offer approach under GATS was supposed to enable member countries to open up their service sectors in line with their preparedness, without experiencing trade instability. However, in practice, this flexibility has led to limited revised offers from the member countries,[75] rather providing them incentives to wait for the same from others. These limitations considerably enhance the incentives for a WTO member to join a PTA immensely, and the EU and India are not immune to this trend.[76] However, the present analysis intends to focus on the specific issue of GATS Mode 3 commitments, which directly impact FDI flows between the two entities.

Indeed, the establishment of a commercial presence relates substantially and directly to investment issues, and the following analysis attempts to see how EU GATS Mode 3 commitments may be affected by the Treaty of Lisbon. Services obligations that contemplate a 'commercial presence'[77] of foreign service providers

[73] See K. Nicolaïdis, 'Minimizing Agency Costs in Two-Level Games: Lessons from the Trade Authority Controversies in the United States and the European Union', in R. Mnookin and L. Susskind (eds), *Negotiating on Behalf of Others—Advice to Lawyers, Business Executives, Sports Agents, Diplomats, Politicians and Everybody Else* (Sage Publications, 1999), at 87–126.

[74] See D. Chakraborty and A.U. Khan, *The WTO Deadlocked: Understanding the Dynamics of International Trade* (Sage, 2008).

[75] See B. Gootiiz and A. Mattoo, 'Services in Doha: What's on the Table?' (2009), World Bank Policy Research Working Paper 4903, Washington DC.

[76] As we will discuss *infra* in Section V.

[77] The commercial presence can directly be linked to the two criteria of GATS, market access and NT, in the sense that governments can either restrict market access by limiting the issue of banking licences in total, irrespective whether or not banks are owned by non-residents or residents. Alternatively, the number of foreign banks allowed to set up subsidiaries can be restricted, thus affecting NT. The three other modes of supply (cross-border supply, consumption abroad and movement of natural persons) affect the operational part of banking business, for instance, whether foreign banks are allowed to provide services in local currency or from which services they are excluded compared with local banks.

necessarily imply that the providers will be able to make investments necessary to enjoy the benefits of such commercial presence. Hence, if we focus on the substance and the purpose of this mode of supply, the commercial presence mode of supply is, for all practical purposes, a multilateral agreement on investment.[78] GATS plays a very important role because it seeks to liberalise and open national economies to investment, which is a key issue for India in the current negotiations (Section IV, part A). The EU is, however, facing a difficult challenge as it remains impossible to provide with the same level of commitments all over the common market which remains fragmented (Section IV, part B).

A India's Appetite for GATS Commitments

Historically, India has been quite keen to negotiate the liberalisation of Mode 4 of GATS at the WTO forums, given the steady outward movement of Indian professionals, namely software engineers, doctors and nurses, etc., both to the developed and developing countries. Only in the post-Doha period, several Indian firms started moving to foreign countries, and the number of merger and acquisitions has increased in recent years. As a result, Mode 3 has increasingly secured a greater space in Indian negotiating agenda. Presently, the country has submitted requests to both developed and developing countries for greater access in these markets.

In case of Mode 3, India's multilateral reform agenda at present focuses explicitly on procedural issues in different countries. The first area of concern involves incorporation-related regulations. For instance, with respect to banking and other financial services in the EU, India notes that '[s]everal member-states of the EC insist on incorporation of a bank subsidiary in that particular state for authorization to render financial services. A bank subsidiary incorporated in any one of the states should be accepted as incorporated within the EC for authorization in the entire EC.'[79] Second, economic needs test (ENT) often functions as a major barrier for Indian investments abroad. For instance, in case of tourism and travel-related service in the EU, India requests removal of the local ENT requirement for opening of bars, cafes and restaurants in Italy. Third, specific mode of service provision sometimes functions as a barrier. For architectural services, the focus of the Indian negotiations to EU is on the removal of the requirement to provide service through Sociétés d'exercice libéral (SEL) or Sociétés civiles professionnelles (SCP) only. Fourth, restriction on FDI inflow and permission of majority shareholding is another area of concern. In case of computer and related services, India expects the EU to permit majority shareholding through FDI (minimum 51%) for acquisition of companies. Fifth, residency or citizenship requirement often curb market access for India. For instance, in Malaysia, medical or dental service can be supplied only by a natural

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The conditions and limitations both for market access and NT could be entered in the schedules of commitments, again specific to sector and mode of supply. This so-called positive list approach of enumerating the specific sectors and modes of supply to be covered contrasts with the traditional WTO approach based on general principles. GATS uses, in large part, the selective liberalisation approach to provide access to foreign service suppliers, that is to foreign investors in the field of services.

78 See D. Collins, 'A New Role for the WTO in International Investment Law: Public Interest in the Post-Neoliberal Period', (2009) 25 *Connecticut Journal of International Law* 1–35, 12–14. See also M. Matsushita, P.C. Mavroidis and T. Schoenbaum, *The World Trade Organization—Law, Practice and Policy* (Oxford University Press, 2003), at 531.

79 For details, see 'India's Requests to EC', available at http://www.commerce.nic.in/trade/ec.pdf, accessed on 24 January 2012.

person, thereby limiting Indian entry in several sectors there.[80] Finally, restriction on the scale of operation is one major barrier. For instance, in Malaysia, there exists a restriction on minimum number of beds (100) in joint venture hospitals, which discourages entry of medium-sized players from India.

India has been eager to negotiate liberalisation of Mode 4, both unilaterally as well as being member of the G24 framework. The Indian concerns on this front have so far focused on the following issues. First, condition of nationality, clubbed with residency and citizenship requirement, is a major threat for India's services exports. Accounting service in the EU is a case in point, where residency requirement for and after grant of licence is an area of concern for Indian accountants. Similarly, in case of engineering services and integrated engineering services, the condition of nationality for practice of profession is a major barrier for Indian professionals. Second, quantitative restriction is another area of concern. The case of health professionals in the EU market deserves mentioning here. Third, ensuring transparent regimes for visa and work permit (including multiple entries), as well as their renewal, is of utmost importance. Fourth, India strongly calls for the removal of the condition of wage parity requirements in horizontal commitments, which take the cost advantage away from it. The case of computer and related industry in the United States deserves mention here.[81] Fifth, a similar negotiating agenda for India is to ensure that temporary Indian professional workers are not subject to social security taxes and other similar charges, if any.[82] Sixth, recognition of qualifications of Indian professionals as part of additional commitments in the key markets is another major negotiating agenda. For instance, accounting service, engineering and integrated engineering service, and computer and related service in the case of EU can be mentioned. Seventh, often India's developed trade partners link investment issues under Mode 3 with movements of professionals under Mode 4. De-linking of these two issues generally feature among all of India's requests on horizontal commitments.[83] Last but not the least, India often calls for maintaining a minimum time lag between circulation of a specific regulation and its entry into force in the importing country, so as to provide a representative adjustment period to the exporting economy.

India's strong negotiating interest on Mode 4 at the WTO is, however, yet to bear fruit as the request-offer approach has delayed the pace of the negotiations. Hence, in the recent period, India is moving towards comprehensive agreements for promotion of trade in services in general, and addressing the aforesaid areas of concern in particular. For instance, in the India–Singapore Comprehensive Economic Cooperation Agreement (CECA), India has followed a positive list approach to ensure trade reform. The agreement incorporates a separate chapter on Mode 4 reform by removing LMT (Labour Market Test) and ENT as preconditions for business visitors, intracorporate transferees, short-term service suppliers and professionals. India–Singapore CECA has also taken care of other Indian concerns by removing salary benchmarking and social security contributions requirement in the host country. The

[80] For details, see 'India's Requests to Malaysia', available at http://commerce.nic.in/trade/Malaysia.pdf, accessed on 24 January 2012.

[81] For details, see 'India's Requests to US', available at http://commerce.nic.in/trade/usa.pdf, accessed on 24 January 2012.

[82] For details, see 'India's Requests to Canada', available at http://commerce.nic.in/trade/canada.pdf, accessed on 24 January 2012.

[83] For example, see 'India's requests to Australia', available at http://commerce.nic.in/trade/australia.pdf, accessed on 24 January 2012.

agreement also attempts to ensure transparency of regulations, including changes in the same and speedy disposal of visa applications.[84] Similarly, a separate chapter on movement of natural persons have been included in the recently concluded Indo–Japan Comprehensive Economic Partnership Agreement (CEPA), which responds to the major Indian concern by noting that 'neither Party shall impose or maintain any limitations on the total number of visas to be granted in the Parties to natural persons of the other Party.'[85] The Indo–Korea CEPA has also incorporated a chapter on movement of natural persons, which underlined the role of maintaining transparency and agreed to 'allow reasonable time between publication of final regulations affecting the temporary entry of natural persons and their effective date.' In other words, it can be concluded that India's PTA strategy has been reasonably successful in responding to the areas of concern in developed and advanced developing country markets, which the multilateral negotiations are yet to solve.

B EU as a Fragmented Market for Services

Before the Treaty of Lisbon, trade in services was part of the shared competences, which are competences shared between the Union and the Member States. These come in two types: (1) concurrent competences and (2) complementary competences.[86] Trade in services was part of the concurrent competences, which cover areas of competence where the Union and the Member States both have authority to act.[87] However, as soon as the Union acts in these areas of competence, the Member States lose their competence to act in that specific area. In other words, in a context of parallelism between this full-fledged competence and the right for Member States to maintain and conclude agreements legally co-exist under the condition that individual agreements comply with Community law and other relevant international agreements.

In practice, there has been a shared competence between the Community and the Member States in some services, such as cultural and audio-visual services, and education services, as well as social and human health. Therefore, national policies towards trade in services differ not only *vis-à-vis* non-Member States but also between Member States. The result of this situation is that GATS negotiations were complex and could only result in many schedules.[88] As a matter of fact, EU Member

[84] S. Chaudhuri, 'Mode 4: India Singapore CECA', available at http://www.wto.org/english/tratop_e/serv_e/. . .e/. . ./chaudhuri_e.ppt, accessed on 24 January 2012.

[85] 'Comprehensive Economic Partnership Agreement between the Republic of India and Japan', available at http://commerce.nic.in/trade/IJCEPA_Basic_Agreement.pdf, accessed on 24 January 2012.

[86] Complementary competences, which are areas of competence where the Union and the Member States both have authority to act. However, the Union can only act non-legislatively to support the competences of the Member States.

[87] Competence based on ex-Art 133(5) EC to negotiate international agreements on trade in services, subject to the provisions of para 6 of that same article. This competence is not dependent on the previous exercise of existing internal powers, as this aspect only plays a role in determining the extent to which the Community external powers would be exclusive and in triggering or not unanimity voting.

[88] Under GATS, all schedules have two sections. First, 'horizontal' commitments, which stipulate limitations that apply to all of the sectors included in the schedule; these often refer to a particular mode of supply, notably commercial presence and the presence of natural persons. Any evaluation of sector-specific commitments must, therefore, take the horizontal entries into account. In the second section of the schedule, the 'sector-specific section' contains entries that only apply to a particular sector (12 sectors, representing about 160 subsectors, can be distinguished under the GATS). In determining a country's sector-specific commitment, consideration must also be given to the overall horizontal commitments. The 'horizontal commitments' are those commitments that apply across the board to all

States submitted their own specific schedules of commitments under the GATS. Their different policies regarding FDI in services are bound under the GATS. Unlike commitments made in GATT, commitments submitted in the GATS by each EU Member State differ from those submitted by the other Member States. As far as FDI is concerned, the comparison of EU Member States' commitments regarding the commercial presence shows in fact that these countries are allowed to apply different regulations regarding market access and NT for the establishment of foreign companies, as well as for the ability of foreign companies to employ foreign citizens. Each EU Member State has submitted schedules of specific commitments for service sectors and subsectors, which it was willing to make commitments for, guaranteeing the right of foreign suppliers to provide the service. No EU Member State was forced to make any commitments for any sector it wanted to remain protected from foreign competition. This practice does not mean that tensions or oppositions existed between Member States and the EU Commission; on the contrary, it has been observed that 'the practice appears to be very smooth, with all Member States recognising that the EU should speak with one voice and that the Commission should be the sole negotiator and spokesman.'[89] For example, only very few countries have undertaken commitments in the audio-visual sector. For services that were committed, EU Member States were allowed to set limitations specifying the level of market access and the degree of NT they were prepared to guarantee. For each services sector or subsector included in the list, the commitments separately addressed each of the four modes of supplying a service. The schedules consist both of horizontal and sectoral sections. The horizontal section contains entries that apply to all the sectors subsequently listed in the schedule. Horizontal limitations often refer to a particular mode of supply, particularly commercial presence and the movement of natural persons. The 'sector-specific section' contains entries that only apply to a particular sector. The EU certified in 2006 a schedule of commitments revising the previous one of 2003, and this covers 25 Member States.[90] The new schedule of commitments was not the direct result of the Treaty of Nice (concurrent competence) but was the consequence of the 2004 Enlargement, but it also resulted in reinforced commitments.

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the services sectors listed in the country's 'Schedule of Specific Commitments.' These commitments are usually written at the beginning of the schedule. They can refer to economic considerations that may be applicable to all the services sectors and subsectors listed in the schedule. All WTO Member States are expected to have a 'Schedule of Specific Commitments' under the GATS. This is the list of commitments for every selected service sector that WTO members came up with during negotiations. WTO members opened up their market in an asymmetric way, reflecting their perceptions about how open (or, conversely, how closed) an economy should be to foreign investment. This serves as a guarantee to service providers in other countries that market entry conditions will not become less restrictive, as they can only be improved. A Mode 3 request, offer or commitment, like those for the other modes, be for a specific sector or subsector, or be horizontal.

89 See Voy. P. Eeckout, 'External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law' (General Report), Fédération Internationale de Droit Européen, 22nd Congress, (November 2006), at 9. This is confirmed by Dermott Cahill, see D. Cahill, 'External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law' (Irish Report), Fédération Internationale de Droit Européen, 22nd Congrès, Cyprus, (2006), at 5.

90 WTO, Communication from the European Communities and its Member States—Certification—Draft consolidated GATS Schedule, S/C/W/273, 9 October 2006.

The situation has been clarified by the Treaty of Lisbon, which extends the scope of trade policy to investment. That being said, the theoretical shift in terms of competence is not likely to be translated into a single approach towards services liberalisation. As pointed out by Piet Eeckout, it would seem that the EU members 'accept that they no longer have sufficient expertise in WTO matters to play an independent role, and therefore do not object to the Community handling its and their affairs.'[91] The EU is still on the way to completing the stage of a free trade area in services. For the time being, it is neither a full free trade area nor a customs union. The overall internal market for services is not yet working efficiently up to the desired level. In January 2004, the Commission made a proposal for a directive on services in the internal market. The services directive was finally adopted by the European Parliament (EP) and the Council in December 2006. This directive is aimed at eliminating obstacles to trade in services. Its full implementation should remove red tape and significantly facilitate the establishment of service providers at home and abroad. It should also significantly facilitate the cross-border provision of services into other EU countries. In addition, the directive strengthens the rights of service recipients, in particular consumers, and should ensure easier access to a wider range of services.

As a result, even if the EU could negotiate trade in services without any right for Member States to oppose a commitment, future negotiations will not automatically result in a list of commitments applicable to all EU countries, but will still be a patchwork of commitment with exceptions for relevant EU countries. Even in the recent Economic Partnership Agreement (EPA), every country chooses the sectors and the level of liberalisation (limitations). Different commitments do not hinder regional cooperation. The EU is well aware of the fact that it is engaged in a global race for attracting FDIs and for protecting its own investments abroad. The WTO is not the best forum for doing so in the current state of affairs. Progress is, therefore, likely to be made through bilateral venues. Hence, the most important or most promising trade partners have been singled out by the EU Commission and will pose the first tests for the EU investment policy.

V Sharpening the Bilateral and Multilateral Agenda through PTAs?

The main limitation of the current WTO negotiations is that the basket is presently focusing on the lowest common denominator, and thereby bypassing several key reform questions. For instance, three key Singapore issues, namely trade and investment, competition policy, and government procurement, have not been included in the present negotiating fold. However, these issues feature significantly in majority of the recently concluded PTA negotiations,[92] including the same by several developing countries. Second, mutual recognition of standards despite the efforts of agencies like CODEX are not yet complete, which gets reflected in the high number of cases lodged at the WTO on the SPS-TBT (Sanitary and phytosanitary measures, and Technical

91 'The Court may have denied that, in legal terms, the WTO Agreement wholly comes within the scope of the common commercial policy [as under the Treaty of Nice]; the practice, however, is based on an acceptance that all WTO trade matters are to be dealt with by the Community.' P. Eeckout, 'External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law' (General Report), Fédération Internationale de Droit Européen, 22nd Congress, (November 2006), at 9–10.

92 See M. Proksch, 'Regional and Bilateral Trade Agreements and Investment Treaties and IPR', Paper presented at the WIPO/ESCAP Colloquium on Intellectual Property, 6–8 November 2006, Bangkok.

barriers to trade) front. The unfinished negotiation on trade facilitation, which has been included in the WTO fold at a later stage, presently provides limited comfort.[93] On the contrary, several PTAs have performed commendably on mutual recognition of each other's standard, thereby leading to considerable amount of trade certainty.[94] Third, the request-offer approach under the GATS was supposed to enable member countries to open up their service sectors in line with their preparedness, without experiencing trade instability. However, in practice, this flexibility has led to limited revised offers from the member countries, rather providing them incentives to wait for the same from others. All these limitations considerably enhance the incentives for a WTO member to join a PTA immensely, and the EU and India are not immune to this trend.[95] As a result, India and the EU have both engaged in diverse but dynamic PTA negotiations. One of the striking characteristics of the present legal situation in international investment rules is the diversity of approaches and legal architectures. In many cases, countries are simultaneously parties to bilateral, regional, plurilateral and multilateral agreements.

The delay in conclusion of the multilateral reform process makes the gains through bilateral trade reform all the more lucrative for the WTO members, which is confirmed by the sharp increase in the number of notified PTAs to the WTO since Cancun Ministerial (Section V, part A). These agreements can be binding and non-binding, with and without commitments on admission, with and without provisions on corporate behaviour, use top-down and bottom-up architectures, and be part of or outside the context of broader trade agreements. While this diversity of approaches does raise important issues of policy coherence, it also reflects the variety of ways in which participating countries have managed to find a balance of advantage and mutual benefits in rule making on this front (Section V, part B). This can help one anticipate what the contents of the future India–EU PTA could be, or at least which are the key issues in the current negotiations (Section V, part C).

A Recent Trends in Preferential Treaty Practices

The EU, in addition to its participation in the Doha Round, has developed a network of bilateral trade agreements with numerous partners of the whole world.[96] In recent years, the EU has concluded the partnership agreements and cooperation with its neighbours of the Mediterranean area, and with Russia and the republics of the old Soviet Union. Two key features of the bloc can help shed light on its ongoing negotiations with India: first, the EU trade and investment policy is closely related to its development policy; second, the new role granted to the EP in the approval of the European trade policies.

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93 For recent negotiating perspectives on scenario on trade facilitation, see S. Priya, 'Trade Facilitation in WTO and beyond', (2010), Discussion Paper No. 4, Centre for WTO Studies, Indian Institute of Foreign Trade, New Delhi.

94 For instance, the provisions for mutual recognition of standards under ASEAN and NAFTA deserve mention. Among the EU-centric RTAs, EU–Chile and EU–South Africa agreements can be cited.

95 As we will discuss *infra* in Section V.

96 The Commission presented new guidelines for European trade policy in a Communication released in 2010. See, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions—Trade, Growth and World Affairs—Trade Policy as a core component of the EU's 2020 strategy, COM(2010) 612 final.

The EU trade policy relates to its development policy through the framework of its generalised system of preferences (GSP).[97] Indeed, the EU grants a duty-free access of customs or an access to reduced tax at its market with the majority of the imports coming from the developing countries. The EU goes even further with the 49 poorest countries of the world, whose entirety of exports[98] benefits from a market access of the duty-free EU of customs. The EU developed a new strategy of trade and development with its 78 partners of the African, Caribbean and Pacific Group of States (ACP), which aims at integrating them in the worldwide economy. The EU has also concluded with South Africa a trade agreement that will lead to the liberalisation of the exchanges. She currently negotiates a free trade agreement with the six members of Gulf Cooperation Council (GCC). Recently, the EU has concluded agreements with South Korea, Mexico and Chile, and tries to negotiate an agreement of liberalisation of the exchanges with Mercosur.

Since the coming into effect of the Treaty of Lisbon on 1 December 2009, the EP exerts a much more active role in the approval of the European trade policies. The Council, representing the Member States of the EU, can approve a new policy only when the Parliament grants its consent. Although the EP still discovers the extent of its new powers—more particularly through the renewal of the GSP, which constitutes the first substantial case of parliamentary commitment, of the beginning to the end, in the development process of an important trade policy—it is receptive with the concerns of the farmers. Consequently, the approach of the Commission to the trade negotiations with third countries was criticised in a 2011 resolution adopted by the EP.[99] This resolution affirms that the EC was to stop making concessions that can cause harm to the European farmers within the framework of international trade agreements negotiations, and warns against the effects of the trade negotiations with the Mercosur countries and the agreement recently concluded with Morocco.

There is no tangible evidences of EU plans to threaten the countries to remove some of them from its GSP list to incite them to conclude the negotiations, but such changes remain a possibility. One can imagine that the apparent enthusiasm of the Commission and certain Member States on a more rigorous 'graduation' in the new GSP (which derives advantages with certain countries considered to be too competitive for certain products) could be a way of putting pressure on countries, such as India and Brazil, in the current PTA negotiations. To turn the GSP into a less attractive alternative could encourage the beneficiary countries to enter into a PTA relationship.

India, on the other hand, is a relatively new player in the regionalisation drive. In the 1990s, it was part of the South Asian Association for Regional Cooperation (SAARC) Preferential Trading Arrangement, the South Asian trade initiative, which

[97] Council Regulation (EC) No 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011, and amending Regulations (EC) No 552/97, (EC) No 1933/2006 and Commission Regulations (EC) No 1100/2006 and (EC) No 964/2007.

[98] With the only exception of the weapons. See Communication of 7 July 2004 from the Commission to the Council, the European Parliament and the European Economic and Social Committee on 'Developing countries, international trade and sustainable development: the function of the Community's generalised system of preferences (GSP) for the ten-year period from 2006 to 2015', COM(2004) 461 final - Official Journal C 242 of 29.9.2004.

[99] European Parliament resolution of 8 March 2011 on EU agriculture and international trade (2010/2110(INI)).

has been upgraded to South Asian Free Trade Area (SAFTA) in recent period. However, the bloc has witnessed limited trade success, owing to several factors including non-economic ones.[100] In the post-WTO period, the country was reliant more on the multilateral reform process for securing a greater market access. From 2003 onwards (ie after failure of the Cancun Ministerial), however, India started active negotiation in the PTAs involving developing countries. The experience of Indo–Lanka PTA, Indo–Association of Southeast Asian Nations (ASEAN) PTA, India–Chile PTA, Indo–Mercosur PTA, etc. support this contention. Only in the recent period, the country has gained the level of confidence to negotiate PTAs with developed countries like Australia, Canada, the EU, Japan, New Zealand, etc. In addition, India in the recent period has shown inclination to go for a deeper integration by signing a comprehensive treaty (ie embodying provisions for trade in merchandise, services, investment, competition policy, etc.) instead of a simple PTA in merchandise products. The experience of India–Singapore CECA, India–South Korea CEPA and India–Japan CEPA can be mentioned in this context. In a previous publication,[101] the authors have analysed several India-centric PTAs, and concluded that India's approach towards preferential trade can be depicted as a three-pronged PTA strategy: it can compensate for the loss in the goods sector through gain in services or the same within the goods sector; loss in some sectors (due to tariff reduction) is to be compensated through effective market access of other products in which India has a potential advantage; or identification of India's specific interest in the partner country (which may be commercial, regional development or political). Hence, many of the Indian PTAs are WTO-plus in the sense that they incorporate provisions on completion policy, trade and investment, etc. The recent pragmatism shown in the Indian PTA approach enhances its standing as a potential partner of the EU, which is quite keen in entering into investment agreements with partner countries.

B Towards New Forms of All-Encompassing Preferential Agreements?

As mentioned in the earlier section, regionalism presently occupies a special position in the economic diplomacy space of both the EU and India. The deepening of trade relationship is generally associated with freer investment regulations, leading to integrated production networks. India's PTA strategy initially focused on South Asia, graduating from which it now focuses on entering into the same with other developing countries like Chile, Israel, etc. on one hand, and trade blocs like ASEAN, Mercosur, Southern African Customs Union (SACU) and GCC on the other.[102] While the trade blocs in the initial period mostly involved PTA in merchandise products, the more recent negotiations involve economic partnership agreements (eg CEPA with Japan, CEPA with South Korea) covering services and investment. Notably, the recent comprehensive PTA partners of India include Singapore, Japan, Australia and South Korea, with considerable focus on investment. In other words, Indian PTAs focus

[100] See D. Chakraborty and D. De, 'Trade Performance and Integration Experience of SAFTA: A Review of Issues', in I.A. Saradgi, S.K. Sahni and R.N. Srivastava (eds), *SAARC: Socio-Economic Transformation* (Foundation for Peace and Sustainable Development, 2008), at 79–104.

[101] J. Chaisse, D. Chakraborty and B. Nag, 'The Three-Pronged Strategy of India's Preferential Trade Policy—A Contribution to the Study of Modern Economic Treaties' (2011) 27(1) *Connecticut Journal of International Law* 109–154.

[102] See J. Chaisse, D. Chakraborty and B. Nag (2011), *op cit*, for the detailed discussion on Indian trade blocs.

more on ensuring investment inflow, although investing abroad is assuming greater importance in recent period.

On the other hand, the EU for quite some time has been focusing on EPAs (eg EU–ACP EPAs), which also takes into account the development requirement of the Southern partner, while protecting self-interest. For instance, in the EU–Mercosur Interregional Framework Cooperation Agreement, investment receives a major focus, but the role of Intellectual Property Rights (IPR) promotion in investment promotion is also strongly acknowledged. Similarly, cooperation agreement has been reached between the EU and the six Central American countries, where cooperation on IPR front has been included as a major provision. Euro-Mediterranean Association Agreements also acknowledge the need to promote private investment and develop the financial services sector. It can be argued that the EU is adopting the prudent step to link IPR issues and outward investment through the PTAs, while the same might not be possible under the present multilateral negotiations.

Of course, it may be objected that the provisions of, for instance, the Euro-Mediterranean agreements[103] on investment are limited. There is general hortatory language on the 'promotion and protection' of investment by harmonising and simplifying procedures, and through the conclusion of investment protection agreements and agreements preventing double taxation (Article 50). This absence of concrete provisions is, in part, owing to the political debate within the EU on the question of competence,[104] which has influenced the Union's lack of position in multilateral as well as regional investment agreements between 1998 and 2005, when these PTAs were negotiated. The Communication 'Global Europe: Competing in the World'[105] from 2006 underlined that trade policy can contribute to creating growth and jobs in Europe. It developed the EU approach that openness to others, and their openness to the EU, is critical in European competitiveness. On this basis, the European Commission proposed a new generation of competitiveness-driven bilateral PTAs with key partners, in which economic criteria constitute a primary consideration. Since 2006, the EU has been engaging in a number of PTAs negotiations with partners as diverse as Ukraine, GCC, Canada and India.[106] As a matter of fact, regional and plurilateral agreements[107] are also popular means of formalising international rules on investment.[108]

103 The EU concluded seven Euro-Mediterranean Association Agreements between 1998 and 2005 with the Arab Republic of Egypt, the State of Israel, the Hashemite Kingdom of Jordan, the Republic of Lebanon, the Kingdom of Morocco, the Republic of Tunisia and the People's Democratic Republic of Algeria. For an update, see EU, Communication from the Commission to the Council and the European Parliament—Tenth Anniversary of the Euro-Mediterranean Partnership: A work programme to meet the challenges of the next five years, COM(2005) 139 final.

104 See T. Baert, 'The Euro-Mediterranean Agreements', in G. Sampson and S. Woolcock (eds), *Regionalism, Multilateralism and Economic Integration—The Recent Experience* (United Nations University Press, 2003), at 116.

105 See EU, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 4 October 2006 'Global Europe: Competing in the world', COM(2006) 567 final.

106 For a full up to date list, see European Commission Trade Directorate web site: http://ec.europa.eu/enterprise/policies/international/facilitating-trade/free-trade/index_en.htm#h2-2.

107 See eg S. Lester and B. Mercurio (eds), *Bilateral and Regional Trade Agreements—Commentary and Analysis* (Cambridge University Press, 2009).

108 Investment negotiations will, however, always be dependent on the advances in other areas regulated by PTAs. A few years ago, India was interested only in opening trade in merchandise products and enhancing investment, but it is now increasingly focusing on the need to include services as well as part

If the EU competence is expanding, it should not result in a perpetuation of investment treaty practices,[109] but must look beyond FDI regulation. Legal innovation may and should emerge because there is no reason to maintain a divide between trade and investment issues, and the needs are real for many European investors. This means that the negotiations between the EU and India rightly address both trade and investment matters, the result of which should be a broad PTA. However, the dispute mechanism should remain different for either trade or investment matters. If trade disputes are likely to remain in the ambit of a state-to-state dispute settlement mechanism, the investment chapter should provide with an investor-state dispute settlement mechanism. Indeed, the EU Commission declared that 'the future EU agreements including investment protection should include investor-state dispute settlement.'[110] By this, the EU clearly affirms its will to adhere to the existing efficient system of investor-state dispute settlement as India does in its own investment treaties.[111]

In terms of substance, a new generation of EU IIAs could cover IPR, which the EU is very much willing to better protect as demonstrated by the recent *Anti-Counterfeiting Trade Agreement*. Protection and IPR violations remain the source of some 8% of all recorded violations in the EU. Of course, the definition of 'investment' in most BITs may already expressly include intellectual property (IP) rights. This reflects the importance of protecting such intangible assets in many investment operations. IP may be a significant strategic asset, and is all the more important in the light of the rapid development of advanced industries, such as biotechnology and pharmaceuticals, which rely on patent and know-how protection. However, BITs typically do not address the issue of IPR beyond the definition of investment, that is they do not include specific provisions on IPR that may appear in the future EU investment agreements in order to better protect its interests abroad.

This trend imposes a new landscape in IPR protection that third countries must take into account. Besides, EU companies often complain about the lack of a level playing field in certain key sectors, in Asia for instance. This issue might be addressed through a new generation of EU agreements as admitted by the European Commission.[112] One can imagine that TRIPS-plus ('TRIPS' means Trade-Related aspects of

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of any integration exercise. In particular, liberalisation of Mode 4 of services trade is an integral part of the negotiation exercise in which India is involved and commitments made by EU on this will affect investment market access. For a detailed analysis of India PTAs drivers and determinants, see J. Chaisse, D. Chakraborty and B. Nag (2011), *op cit*.

109 See *supra* Section I.

110 EU, European Commission, Proposal for Regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries, COM(2010)344 final, Brussels, 7 July, 2010, at 10.

111 It means that any disputes between a state and a foreign investor can be settled by international arbitration. That solution, which enables the investor to access an international tribunal, is the alternative to the domestic courts of the host state, which would have to settle the case if BITs did not exist. On the importance of such a mechanism, see P. Ranjan, 'Non-Precluded Measures in Indian International Investment Agreements and India's Regulatory Power as a Host Nation', (2011) 2(1) *Asian Journal of International Law* 2.

112 'It is important that a common international investment policy not only enables the execution of a direct investment itself—the acquisition of a foreign enterprise or the establishment of one—but also that it enables and protects all the operations that accompany that investment and make it possible in practice: payments, the protection of intangible assets such as Intellectual Property Rights, etc.' See EU, European Commission, Proposal for Regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries, COM(2010)344 final, Brussels, 7 July 2010, at 8.

Intellectual Property Rights) provisions, particularly encompassing geographical indications, may appear in future EU PTAs. The aim will be to extend protection to all products that have protection in the EU. This has been the goal of its approach at the WTO forums, and it is likely to seek such protection as an element of its 'removal of barriers to trade' strategy.[113]

C Key Features of the Future India–EU PTA

The old BITs are, thus, evolving towards new forms of all-encompassing preferential arrangements that include IP and liberalisation of trade and services, apart from the classical rules for investment protection. The change in competence may reverse the growing and unnatural substantive divide between investment-related provisions in PTAs (as concluded by the EU), and those of traditional, national BITs (concluded by EU Member States). According to the Federation of Indian Chambers and Industries (FICCI) estimates, the India–EU PTA would more than double the exchanges between India and the EU, reaching more than US$207 billion by 2015. The Indian Minister of State for Commerce and Industry has recently noted that the negotiations are at an advanced stage.[114] It is expected that the negotiations will be concluded in the coming months.[115] However, despite strong mutual interest and considerable progress, the negotiation is still stuck over several areas of concern. The major negotiating roadblocks are noted in the following.

First, India and the EU have been negotiating since 2007, but until now have failed to agree on the inclusion of the social subjects like the environment and the standards of work contained in this PTA. Recently, the EU Parliament has expressed their interest in securing commitments from India in these areas, which is a continuation of their earlier standpoint. For instance, since 2008, the EU has been advocating for greater environmental responsibilities to be undertaken by more advanced developing countries, in effect targeting Brazil, China and India.[116] Also, the recent attempt to link human rights issue in Kashmir with the PTA discussion is not welcomed by the Indian negotiators.[117] Second, EU insistence on TRIPS-plus IP right protection is another major area of concern for India. The Confederation of Indian Industries (CII, undated) notes that if stronger data exclusivity provisions are incorporated in the PTA, then 'that would limit access to the clinical test data submitted by pharmaceutical companies to regulatory agencies to prove that a new drug is safe and effective. Without access to such data, manufacturers of low-price generic drugs would have to spend additional time and money before their medicines could be brought to market.'[118] Third, India has been unhappy in recent period with The Netherlands and

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113 See M. Handler and B. Mercurio, 'Intellectual Property', in S. Lester and B. Mercurio (eds), *Bilateral and Regional Trade Agreements—Commentary and Analysis* (Cambridge University Press, 2009), at 315–322.

114 Press Trust of India, 'India-EU FTA Negotiations at Advanced Stage: Scindia', 2 August 2011, available at http://www.bilaterals.org/spip.php?article20019.

115 *The Hindu*, 'India, EU Free Trade Pact by Year End', 26 July 2011, Chennai.

116 EU, 'Directive of the European Parliament and of the Council amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading system of the Community', 23 January 2008, Brussels.

117 *The Nation*, 'Linking Kashmir to Trade', 15 June 2011, Pakistan, available at http://www.bilaterals.org/spip.php?article19690.

118 Confederation of Indian Industries (undated), 'India-EU BITA Negotiations: A Status Update', avail-

certain other EU markets for their repeated seizures of Indian generic drugs on patent infringement grounds during transit to Latin America. The EU action forced India to move to dispute settlement body in 2010, which remained a hindrance in conclusion of the PTA.[119] However, the problem has been partially sorted out in a recent meeting between the two parties, where the EU has agreed to conform to an agreed set of guidelines to ensure greater and immediate legal certainty for producers and traders. Nevertheless, the EU in return has 'sought an assurance that India would refrain from further steps in the ongoing dispute.'[120] Fourth, the EU expects considerable tariff reform by India in several product categories. For instance, the application of special additional duties and other state-level local restrictions on sales in the wine and spirit segment has caused major discord between the two parties, leading to two WTO dispute cases.[121] Tariff reduction and procedural simplification in this sector has been a long-standing EU demand. The EU expects a similar tariff cut in automobile products[122] and also wants duty-free import of wheat in India.[123] However, the subsidies provided under Common Agricultural Policy (CAP) of the EU causes India not to undertake any hurried commitment in cereals or dairy sector. Fifth, decision on the number of sensitive products to be kept under the PTA is still pending. CII (undated) has noted that India wants the EU to eliminate tariff on 95% of its exports, while the EU demands a similar action from India on 98% of its exports. Moreover, India is trying to remove chemical, pharmaceuticals and textiles from the EU's negative list, which is still under negotiation.[124] The inability to reach a common ground on these issues, covering agriculture, industry and IP, is delaying the process.

PTA should allow the liberalisation of the trade in the services, a strong area of Indian economy, which however presently meets obstacles like complex and non-transparent visa regulations in several EU Member States. While greater investment opportunities have been welcomed by the EU, opening up of the services sector, especially in the Mode 4 segment, has got limited assurances.[125] This is particularly important because India expects to compensate any losses incurred in the area of merchandise trade, especially in pharmaceuticals, with the gains in services trade. In other words, limited interest from the EU countries in services negotiations contributes in hardening India's stance in merchandise negotiations. Investment negotiations become an unwilling victim in the process.

able at http://newsletters.cii.in/newsletters/mailer/trade_talk/pdf/India-EU%20BITA%20Status.pdf.

119 For details, see DS 408, 'European Union and a Member State—Seizure of Generic Drugs in Transit', complaint by India.

120 For details, see Government of India, Ministry of Commerce Press Release, 'India EU Reach an Understanding on Issue of Seizure of Indian Generic Drugs in Transit', 28 July 2011, available at http://commerce.nic.in/pressrelease/pressrelease_detail.asp?id=2807.

121 For details, see DS 380, 'India—Certain Taxes and Other Measures on Imported Wines and Spirits'; and DS 352 'India—Measures Affecting the Importation and Sale of Wines and Spirits from the European Communities.'

122 *Economic Times*, 'EU Seeks Huge Duty Cuts on Auto, Wines in Its FTA with India', 17 July 2011, New Delhi.

123 *Business Standard*, 'India Won't Consider EU's Demand on Duty-Free Wheat Import', 26 June 2011, New Delhi.

124 Confederation of Indian Industries (undated), 'India-EU BITA Negotiations: A Status Update', available at http://newsletters.cii.in/newsletters/mailer/trade_talk/pdf/India-EU%20BITA%20Status.pdf.

125 Sidhartha, 'European Union not Keen to Relax FTA Visa Curbs', 15 August 2011, *Times of India*, New Delhi.

In the chapter on investment of the agreement, the EU seeks to impose more severe rules on the protection of the IP. These measures, if they were to be adopted, would enable European companies to sue India before international arbitration as soon as they consider their investments threatened by the laws or the policy of India. International arbitration has accepted the idea that 'the restrictive notion of property as a material "thing" is obsolete and has ceded its place to a contemporary conception which includes managerial control over components of a process that is wealth producing.'[126] As a result, a pharmaceutical group could, thus, sue the Indian government if it decided to exceed a medical patent, to control the prices of a patented drug or if it sought, by another means, to support access to less expensive generic drugs. This explains why Indian pharmaceutical companies and some non-governmental organisations expressed their concerns on this inclusion of the rights of the IP, which could affect the production and the export of the generic drugs.[127]

VI *En Lieu de Conclusion*: Transition and Implementation Challenges of the EU/India Investment Relationships

International investment regulation is an example *par excellence* for fragmentation in an important area of international economic law.[128] Despite this similarity in the structure and areas of substantial convergence, there are also areas characterised by wide variation in the substantive provisions. The current state of FDI regulation between India and the EU perfectly illustrates this statement as three layers (WTO, PTA, BITs) may apply and overlap. Even if the two parties would have a great economic interest in simplifying the legal framework, it essentially seems difficult to make substantive progress in these different negotiations. India and several EU member countries (eg UK, France, Germany, Portugal and The Netherlands) share a rich history of investment collaborations. The collaboration has been cemented with several formal agreements with individual EU members, and the recent negotiations with the trade bloc since June 2007 on a broad-based PTA can be considered as a culmination of the ongoing process. The proposed PTA intends to promote bilateral trade by removing barriers to trade in merchandise products and services and investment across all sectors of the economy. In addition to the 'WTO-covered' areas like SPS-TBT, services and trade facilitation, and 'WTO-plus'

126 *Methanex Corp. v United States*, Final Award of the Tribunal on Jurisdiction and Merits, 44 I.L.M 1345, 1372, 1457 (2005).

127 EurActiv, 'Indian Pharma Firms, NGOs Oppose EU Free Trade Deal', 17 March 2011, available at http://www.euractiv.com/health/indian-pharma-firms-ngos-oppose-eu-free-trade-deal-news-503025.

128 The scope of the investments covered by the BITs in some cases has been expressly limited to investments made in accordance with the domestic law of the host state, or to investments approved or duly registered by the host state. Another important aspect concerns the definition of the persons and companies that will be treated as investors of one of the parties. In this respect, BIT practice is marked by relatively important discrepancies, especially in regard to the definition of corporate nationality. The criteria most frequently used are the place of incorporation, the location of the registered office or seat of a company, and the nationality of the ownership or controlling interest. Some BITs rely on one of these as the sole criterion, whereas in other cases corporate nationality is defined on the basis of a combination of these criteria. At the same time, new cases are being lodged at an exponential rate not always resulting in converging interpretation of substantive provisions. See B. Boie, J. Chaisse and P. Gugler, 'The International Investment Framework—Regulatory Fragmentation Challenge in a Changing World Economy', in T. Cottier and P. Delimatsis (eds), *The Prospects of International Trade Regulation—From Fragmentation to Coherence* (Cambridge University Press, 2011), at 417–451.

Figure 2. The Matrix of Future EU–India Foreign Direct Investment (FDI) Regulation

areas like government procurement, investment and completion, are also among the issues to be discussed.[129]

It is against this background that we can suggest a matrix that summarises the determinants of the future EU–India FDI regulation, which is detailed below (Figure 2).

The current negotiations very much depend on a first legal challenge. There are indeed many legal as well as practical issues to be resolved in the near future. Of course, the provisions of the national BITs shall continue in effect for a certain period of time (frequently between 10 and 20 years) after the date of termination.[130] But the second (and key) challenge is to manage the transition (which fundamentally consists of replacing a set of agreements by a single one), simultaneously ensuring that the EU investors will not be without investment protection. The best option might be a progressive replacement of existing BITs between India and EU individual countries by the new agreement negotiated with the same partner country.[131] The discussion so

[129] See Ministry of Commerce, Government of India, available at http://www.commerce.nic.in/trade/international_ta_current_details.asp#b24, accessed on 21 April 2011.

[130] For example, Art 16.2 of Denmark-Tanzania Agreement (1999) states, 'The provisions of the Agreement shall remain in force for a further period of 15 years from the date of termination'; Art 15 of Italy-Tanzania Agreement states, 'The provisions of the Agreement shall continue in effect for 20 years after the date of termination.'

[131] A slightly different approach that would consist of keeping the existing BITs with a partner and complementing them by a EU negotiated pre-establishment focused agreement can be mentioned but is not a reasonable option. The legal regime applicable to a foreign country and the EU would consist of a variable set of BITs that do not grant the same rights. Even if the MFN clause could level the playing field, the resulting regime would still depend on the scope of the MFN obligation itself, which like any other substantial provision of the treaty is limited not only by the overall coverage of the agreement, but also by the wording introduced in the clause itself. Several aspects are relevant in this regard: first, whether the obligation applies to investments already established in the country, or whether it applies too to the ability of the investor to claim access to the host country; second, the language that allows the comparison between the treatment of investors from different countries; and finally, whether issues pertaining to investor-state dispute settlement procedures are covered by the MFN principle. See, L. Crema, 'Disappearance and New Sightings of Restrictive Interpretation(s)', (2010) 21 *European Journal of International Law* 681–700, 693.

far has shown that the Indo–EU agreement on services and investment would be quite beneficial for the former.

The post-recession phase creates an ambiguous scenario for European and Indian negotiators. While both governments are well aware of the complementarities and are eager to exploit them, the ability of the industry and service sector to compromise has eroded, which explains their reservations. The delay in the negotiation process is understandable from this perspective. But some countries seem to be more efficient (such as the Asian and Pacific countries engaged in the ambitious Trans-Pacific Partnership Agreement),[132] and it becomes even more urgent for India and the EU to conclude their negotiations. In this light, the EU–India decision to simultaneously negotiate merchandise-services-investment issues was a prudent one, so that the failure/delay in one sector does not negatively influence conclusion in another. It is, however, expected that the two parties will have to accelerate their talks in the coming months to reach a mutually beneficial agreement in 2012.

Nevertheless, the negotiation continues, and the conclusion of the trade deal in immediate future is not expected. It needs to be borne in mind that roadblocks in merchandise trade negotiations often delay the relatively stronger case for PTA in services and investment collaboration. The Indo–ASEAN PTA negotiation experience is a case in point, where disagreement over the size of negative list and rules of origin provisions delayed the entire negotiation process.[133] It needs to be understood whether similar forces have developed in the proposed Indo–EU Strategic Partnership Agreement, thereby delaying the process. The following issues need to be sorted out before conclusion of the negotiations:

- First, there has been concern over the extent of tariff reduction in the auto industry in particular both in India and EU, which needs to be factored in during the negotiation process. While Indian players are okay with gradual lowering of tariff on completely knocked down vehicles, they are uncomfortable in doing so for completely built-up ones.[134] On the other hand, the EU, given its technical supremacy, wants the tariff protection to go for auto products in general. Bypassing the protests of the auto lobby will be a major challenge for the EU–India PTA negotiations.
- Second, TRIPS provisions, especially relating to access to affordable medicine, have been the cornerstone of India's negotiating stance since the Doha Round.

[132] The first round of negotiations in the Trans-Pacific Partnership Agreement (TPP) was held in Melbourne in March 2010 among seven members: Australia, Brunei, Chile, New Zealand, Peru, Singapore and the United States. Instead of meeting around the topics of traditional PTA chapters like goods, services, investment or IP rights, officials were split into 'clusters.' Each cluster was tasked with thinking about how they might address cross-cutting, overlapping issue areas in an agreement. The TPP is a vital test from the perspective of innovations in investment rule making as the United States' negotiating interest has been incorporated into the TPP as a model agreement for the region. The TPP will essentially draw on the US BIT model rather than the existing Asian FTAs. See J. Chaisse, 'Foreign Direct Investment in the TPP—Innovations in Rule-Making?' in C.L. Lim, D. Elms and P. Low (eds), *The Trans-Pacific Partnership (TPP)—The Test for Quality in a 21st Century Trade Agreement* (Cambridge University Press, 2012), at 147–156.

[133] See D. Chakraborty and D. Sengupta, 'Integration Experience and Trade Performance of the Indo-ASEAN FTA: A Review of Issues', in P. Gugler and J. Chaisse (eds), *Competitiveness of the ASEAN Countries: Corporate and Regulatory Drivers* (Edward Elgar, 2010), at 207–237.

[134] *Economic Times*, 'Against Lowering of Customs Duty on Auto in FTA with EU: SIAM', 8 April 2011, New Delhi.

Hence, any agreement on this front, with potential public health concerns, needs to be drafted cautiously. While India may not mind to have a chapter on TRIPS provisions in the proposed agreement, it is clearly not in a position to accept an exclusive chapter on data exclusivity for drug manufacturers.[135]

- Third, the EU would be interested to see India relaxing some of stringent regulations on investment, covering export obligation and local content requirement.[136] However, given the widening current account deficit, the extent to which India would be accepting this move is subject to negotiations.
- Fourth, several non-trade social issues like child labour and environment have been brought up by the EU negotiating delegation at times, and arriving at a middle ground may emerge as a last minute challenge.[137]
- Last but not the least, the agricultural subsidies provided under the CAP in the EU are often considered to offer them unequal advantage over their Indian counterparts, a major section of whom happen to be small farmers. Although right from the beginning Indian negotiators promised to ensure livelihood security of poor farmers,[138] it puts additional pressure on them during the finalisation of the negative list.

One important lesson learnt by India from the recently concluded Indo–ASEAN PTA can be considered here as a parallel. The Indo–ASEAN PTA in merchandise took a long time to conclude, but the PTA in services and an investment agreement is yet to be signed. The underlying reason is that barring Singapore, other ASEAN countries hold limited investment interests with respect to India and are wary of deeper entry by Indian professional service providers. On the other hand, several EU countries have developed both-way investment relationship with India over the last decade and possess considerable merchandise goods complementarities, although liberalising movement of Indian professionals might still face reservations from domestic players. Therefore, the relationship between the EU and India needs to be viewed through this complex prism of cooperation and competition.

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135 *Business Standard*, 'India Will Not Provide Data Exclusivity: Anand Sharma', 30 March 2011, New Delhi.

136 K. Singh, 'Problems in Trade Talks with EU', *Hindu Business Line*, 18 February 2011, Chennai.

137 S. Arun, 'India Rejects EU Demand on Social Clauses in Trade Pact', *Hindu Business Line*, 11 March 2010, Chennai.

138 R. Jayaswal and G. Ganapathy Subramaniam, 'Farmers Get a Shield in India-EU FTA', *Economic Times*, 22 October 2007, New Delhi.

Appendix 1A India's Bilateral Investment Promotion and Protection Agreements with EU Partners (as of 24 January 2012)

Sl. No.	Country	Date of ratification/enforcement
1	UK	6 January 1995
2	Denmark	28 August 1996
3	The Netherlands	1 December 1996
4	Poland	31 December 1997
5	Czech Republic	6 February 1998
6	Italy	26 March 1998
7	Germany	13 July 1998
8	Spain	16 October 1998
9	Bulgaria	23 September 1999
10	Romania	9 December 1999
11	France	17 May 2000
12	Belgium	8 January 2001
13	Austria	1 March 2001
14	Sweden	1 April 2001
15	Portugal	19 July 2002
16	Finland	9 April 2003
17	Cyprus	12 January 2004
18	Hungary	2 January 2006
19	Hellenic Republic (Greece)	26 April 2007 (not yet in force)
20	Slovak Republic	16 June 2007

Major features of the BITs:

- The agreements apply to all investments made by the investors of each contracting party in the territory of the other contracting party in accordance with their laws and regulations.
- Under the agreement, investment has been defined to include every kind of asset established or acquired together with changes in the form of such investments in accordance with the national laws of the contracting parties. In particular, it includes the following:
  - Movable and immovable property as well as other rights such as mortgages, liens or pledges;
  - Shares in the stocks and debentures of a company and any other similar forms of participation in a company;
  - Rights to money or to any performance under the contract having a financial value;
  - Intellectual property rights, goodwill, technical processes and know how in accordance with the relevant laws of the respective contracting party;
  - Business concessions conferred by law or under contract, including concessions to search for and extract oil and other minerals.
- Investments and returns of the investors of each contracting party shall at all times be accorded fair and equitable treatment in the territory of the other contracting party.
- The agreements guarantee that the investments from the contracting parties shall receive treatment at least as favourable as the treatment which the host

country grants to investments by nationals and companies from any third State.

- Each contracting party shall permit all funds of an investor of the other contracting party related to an investment in its territory to be freely transferred, without unreasonable delay and on a non-discriminatory basis. Such funds may include:
  - Capital and additional capital amounts used to maintain and increase investments;
  - Net operating profits, including dividends and interests in proportion to their share-holdings;
  - Repayments of any loan, including interest thereon, relating to the investment;
  - Payment of royalties and service fees relating to the investment;
  - Proceeds from sales of their shares;
  - Proceeds received by investors in case of sale or partial sale or liquidation;
  - The earnings of citizens/nationals of one contracting party who work in connection with the investments in the territory of the other contracting party.

All such transfers shall be permitted in the currency of the original investment at the current exchange rate prevailing in the market on the date of transfer.

- The agreement contains elaborate provisions for resolution of disputes between the investor and a contracting party, as well as between the contracting parties. In the former case, flexibility is provided for settlement of disputes either under the domestic laws or under international arbitration. In the latter case, if the dispute relates to interpretation or application of the agreement, it shall, as far as possible, be settled through negotiations. If it is not settled within 6 months from the time the dispute arose, it shall be submitted to an Arbitral Tribunal. The decision of the tribunal shall be binding on both the contracting parties.
  - The agreement shall initially be valid for a period of ten years and thereafter continue indefinitely unless either of the contracting parties give a written notice of its intention to terminate the agreement. The agreement shall stand terminated one year from the date of receipt of such a written notice. In the event of termination of the agreement, investments made prior to the termination will continue to enjoy the provisions of the agreement for a further period of 15 years.

Source: Quoted from http://business.gov.in/doing_business/bipa.php.

Appendix 1B India's Double Taxation Avoidance Agreements with EU Partners

S.No.	Name of the country	Date of signing	Date of notification	Assessment year effective from
1	Austria	24.09.1963	05.04.1965	1963–1964
2	Belgium (O)	07.02.1974	06.06.1975	1975–1976/1976–1977
	Belgium (SP)	20.10.1984	02.03.1988	1988–1989/1989–1990
	Belgium (R)	26.04.1993	31.10.1997	1999–2000
3	Bulgaria	26.05.1994	09.05.1996	1997–1998
4	Cyprus	13.06.1995	26.12.1995	1994–1995
5	Czech Republic (O)	27.01.1986	25.05.1987	1986–1987
	Czech Republic (R)	01.10.1998	13.12.1999	2001–2002
6	Denmark (O)	16.09.1959	09.03.1960	1959–1960
	Denmark (R)	08.03.1989	25.09.1989	1990–1991/1991–1992
7	Finland (O)	23.06.1961	29.12.1961	1961–1962
	Finland (SP)	16.08.1983	22.10.1979	1976–1977
	Finland (R)	10.06.1983	20.11.1984	1985–1986
	Finland (amndg.)	09.04.1997	13.08.1998	2000–2001
8	France (O)	26.03.1969	18.02.1970	1970–1971/1971–1972
	France (R)	29.09.1992	07.09.1994	1996–1997
9	F.R.G. (O)	18.03.1959	13.09.1960	1958–1959
	F.R.G. (P)	28.06.1984	26.08.1985	1984–1985
	F.R.G. (R)	19.06.1995	29.11.1996	1998–1999
	G.D.R. (R)	26.07.1989	02.03.1990	1985–1986
10	Greece	11.02.1965	17.03.1967	1964–1965
11	Hungary	30.10.1986	13.03.1987	1989–1990
12	Italy (O)	12.01.1981	08.04.1986	1978–1979
	Italy (R)	19.02.1993	25.04.1996	1997–1998
13	Malta	28.09.1994	22.11.1995	1997–1998
14	The Netherlands	30.07.1988	27.03.1989	1990–1991
15	Poland (R)	21.06.1989	26.10.1989	1991–1992
16	Romania	10.03.1987	08.02.1988	1989–1990
17	Spain	08.02.1993	21.04.1995	1997–1998
18	Sweden (O)	30.07.1958	23.01.1959	1959–1960
	Sweden (R)	07.06.1988	27.03.1989	1990–1991
	Sweden (New)	24.06.1997	17.12.1997	1999–2000
19	UK (O)	16.04.1981	23.11.1981	1983–1984
	UK (Revised)	25.01.1993	11.02.1994	1995–1996

O Old Agreements R Revised Agreements
P Protocol SP Supplementary Protocol

- Section 9 of the IT Act provides for unilateral relief in the certain cases and circumstances specified therein. According to it, if any person who is resident in India in any previous year proves that in respect of his income accruing or arising in the previous year outside India on which he has paid tax in a country with which there is no Double Taxation Avoidance Agreements, he shall be entitled to the deduction from the Indian Income-tax, a sum calculated on such doubly taxed income at the Indian rate of tax or the rate of tax of the said country whichever is lower.
- There are specific instructions and also decided rulings/judgments which make clear that in respect of matters which are governed both by the Income-tax Act and the Double Taxation Avoidance Agreements (DTAA), provisions of DTAA would prevail.

- Whether there is no provision in the agreement for avoidance of double taxation on the subject matter, falling within the purview of Income-tax Act, the relevant provisions of IT Act would apply. In another ruling, Authority for Advance Ruling (AAR) has clarified and laid down that the specific provisions of DTAA will override the general provisions of IT Act.
- The relief of DTAA can be sought only when a person has paid the tax in one of the countries and the same income is liable to be taxes in another country. But if the person is exempt from taxation in one country then he cannot claim the benefit of DTAA to get scot-free from paying any tax.

Source: Quoted from http://www.incometaxindia.gov.in/publications/6_Advance_Rulings/Chapter07.asp.

Appendix 2 Title II Treaty on the Functioning of the European Union—Common Commercial Policy

Article 206
(ex Article 131 TEC)
By establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers.
Article 207
(ex Article 133 TEC)

1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.
2. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.
3. Where agreements with one or more third countries or international organisations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of this Article.

The Commission shall make recommendations to the Council, which shall authorise it to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules.

The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations.

4. For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority.

For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules.

The Council shall also act unanimously for the negotiation and conclusion of agreements:

(a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity;
(b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them.

5. The negotiation and conclusion of international agreements in the field of transport shall be subject to Title VI of Part Three and to Article 218.
6. The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation.