

Normative Power Europe? The European Union in the Negotiations on a Free Trade Agreement with India

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This article examines the European Union (EU) as an actor in international trade negotiations and calls into question constructivist notions of the European Union as a 'Normative Power'. The article argues out of an institutionalist perspective that the distribution of competences between Commission, Council and European Parliament (EP) in EU trade policy systematically privileges strategic and economic interests over normative objectives. Drawing on a principal-agent approach, it analyses the case of the EU-India negotiations on a free trade agreement. Results suggest that the close cooperation between Council and Commission before and during the negotiations prevent EU trade policy to be more guided by normative objectives. The European Parliament, as the voice of normative concerns, could influence negotiations, due to the EP's new powers in the ratification process. However, since the EP is institutionally excluded from the agenda-setting-process and can hardly control the Commission during the bargaining process, its capacities to set the negotiation goals ex ante are very constrained. Only when negotiations are in full play can the EP try to kick questionable demands off the EU's trade agenda and strive for normative aims. Therefore, issues like the inclusion of human rights and labour and environmental clauses seemed to have gained some importance, while economic development concerns hardly seem to influence the EU's trade negotiations.

1 INTRODUCTION

The view of the EU as a different type of international actor has gained wide currency in academic literature. In particular Ian Manners' concept of 'Normative Power Europe' (NPE) shaped the notion of the EU as an actor that gives priority to value-based objectives over self-related interests in its external relations.¹ While the concept originally emerged in the context of classical foreign and security policy, recent research also examined the normative dimension of EU foreign trade policy, with quite different results.²

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¹ I. Manners, *Normative Power Europe: A Contradiction in Terms?* 40 J. Com. Mkt. Stud., 235–258 (2002).

² See, for example, the special issue on, *The social dimension of EU trade policies*, 14 Eur. For. Affairs Rev. 5 (2009); H. Zimmermann, *How the EU Negotiates Trade and Democracy: The Cases of China's Accession to*

International trade policy indeed seems to constitute an ideal area for Europe to promote norms and values on a global level. Recently, the EU has shifted its trade strategy towards bilateral free trade agreements (FTAs), due to the enduring logjam of the Doha Development Round. This bilateral approach offers the advantage that the EU as the world's biggest trade power is in a much better position vis-à-vis negotiation partners to determine the content of an agreement than in a multilateral framework. Furthermore, the Lisbon Treaty introduced the European Parliament (EP) as a new relevant player in EU trade policy, because international trade agreements now need the consent of the Parliament in order to be ratified.³ Since the EP has proven to constitute a strong advocate for normative objectives in the past, experts expected EU trade policy after Lisbon would lay particular emphasis on normative goals.⁴ However, the EU's current FTA negotiations with emerging markets are accompanied by intense criticism and clamour of civil society groups. They accuse the EU to pay only lip service to altruistic objectives, while really pursuing a corporate-driven trade strategy irrespective of the consequences for developing countries.⁵ Thus, in what follows I intend to examine whether the European Union really acts as a 'Normative Power' in international commercial negotiations under the post-Lisbon distribution of competences.

The present article challenges the view of a particular normative dimension of EU foreign trade policy. It aims to demonstrate that the institutional framework of EU trade policy systematically privileges strategic and economic goals over normative ones. The article proceeds as follows. The first section describes the normative identity that a vast amount of literature and official EU documents attribute to the European Union in its external relations. Next I analyse the institutional structure of EU trade policy-making in different phases of international negotiations. I draw on a principal-agent framework to show that after the Lisbon Treaty, Council and Commission are still in a better position vis-à-vis the Parliament to determine the outcome of negotiations. Section four surveys the diverging preferences of the relevant institutional players in foreign trade policy. I argue that while the EP has various incentives to pursue normative

the WTO and the Doha Round, 13 *European For. Affairs Rev.* 2, 255–280 (2008); M. Behrens & H. Janusch, *Great 'Normative Power': The European and American Trade Approaches with Chile and Mexico*, 17 *European For. Affairs Rev.* 3, 367–386 (2012); A. Storey, *Normative Power Europe? Economic Partnership Agreements and Africa*, 24 *J. Contemp. Afr. Stud.* 331–346 (2006).

³ Before the Lisbon treaty the European Parliament has been regularly requested for assent to trade agreements, even though there were no legal obligations to do so. Therefore, parliamentary rejection of a trade treaty was never a credible political option.

⁴ L. Richardson, *The post-Lisbon Role of the European Parliament in the EU's Common Commercial Policy: Implications for Bilateral Trade Negotiations*, EU Diplomacy Paper, 20–23 (2012).

⁵ P. Eberhardt & D. Kumar, *Trade Invaders. How Big Business is Driving the EU-India Free Trade Negotiations*, Corporate Europe Observatory (2010).

objectives, the Commission and the Council tend to give economic and strategic concerns priority. Since the latter two remain the crucial players shaping EU trade policy, their goals are likely to prevail in the event of clashing interests. Section five tests this hypothesis in the case of the EU-India FTA negotiations, which seems to be particularly suitable to examine the EU's seriousness in promoting normative objectives, as India represented one of the firmest opponents to the inclusion of 'non-trade issues' to commercial policy inside the World Trade Organization (WTO). Hence, it can be anticipated that the EU will be confronted with similar strong resistance in bilateral talks. Therefore, normative objectives are likely to clash with strategic and economic interests in the course of the negotiations. If the EU should be regarded as a normative actor, value-based objectives must be the key factor shaping its behaviour.

2 A 'NORMATIVE POWER' IN INTERNATIONAL TRADE POLITICS?

In the last decades, a considerable amount of literature has conceptualized the EU as a unique international actor. Many authors built hereby on Duchêne's seminal 'civilian power'-concept, which described the EU as a power that accomplishes its objectives by others than the traditional means of power politics.⁶ In recent times, particularly Ian Manners' much discussed concept of 'Normative Power Europe' reinforced this view of the European Union in global affairs. According to Manners, not self-centred national interests are crucial for the formulation of EU's external policies, but universal values and principles. The EU would virtually be predisposed by its internal structure and historic evolution to act in a normative way in world politics. For him, the EU constitutes a 'new type of entity with actor quality', that differs from states fundamentally. The most important factor shaping the role of the EU in international relations is therefore 'not what it does or what it says but what it is'.⁷ From the broad normative basis of the EU Manners identifies five core norms that are fundamental for the European Union: *peace, liberty, democracy, rule of law and human rights*. Additionally, he detects four minor norms: *social solidarity, anti-discrimination, sustainable development and good governance*. These norms that are constitutive for the EU's own identity would be transmitted into the international system by its external policies. In this sense, the EU would constitute a force for good in the world.⁸ Manners notion enjoyed great popularity in the academic debate, however it was also contested in many ways. Youngs, for example, pointed out the secondary role normative power plays to

⁶ F. Duchêne, *Europe's Role in World Peace*, in *Europe Tomorrow: Sixteen Europeans Look Ahead* (ed. Mayne, Fontana, 1972).

⁷ Manners, *supra* n. 1, at 252.

⁸ *Ibid.*

strategic action.⁹ Hyde-Pryce questioned the NPE-theory alike out of a realist perspective, since it would neglect the all underlying dynamics of military and economic power in world politics.¹⁰ Others criticized the concept lacks sufficient precision and seems to be rather a political than analytical concept as it has a striking similarity to the image the EU uses to describe its own international identity.¹¹

And in fact, the EU tries to present itself as a global actor with mainly altruistic motives. The Lisbon Treaty enumerates in Article 10(a), which principles should determine the EU's external actions: 'The Union's actions on the international scenes shall be guided by the principles which inspired its own creation...and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the UN charter and international law'.¹² Furthermore, the Lisbon Treaty embeds all EU external policies in a common framework of principles and objectives. Besides Human Rights and Democracy targets Article 3(5) and 21 TEC contain explicitly specific objectives for EU trade policy: the EU should 'encourage the integration of all countries into the world economy', ensure the 'sustainable development of the Earth' and contribute to 'free and fair trade'. EU trade policy is therefore explicitly related to development and ecological aspects and should aim to foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty'.¹³

Furthermore, Pascal Lamy succeeded during his term in office as trade commissioner from 1999 to 2004 in installing his concept of 'managed globalization' as the ideological framework of EU trade policy. The doctrine subordinated trade policy to a series of principles like multilateralism, social justice and sustainable development. Moreover, it introduced an informal moratorium for opening negotiations for bilateral trade agreements.¹⁴ But with Peter Mandelson's taking office in 2006 a reformulation of EU trade policy goals occurred, which found its expression in the strategy paper 'Global Europe: Competing the World'.¹⁵ It announced a series of new FTAs with booming markets in Asia and

⁹ R. Youngs, *Normative Dynamics and Strategic Interests in the EU's External Identity*, 42 J. Com. Mkt. Stud. 415–435 (2004).

¹⁰ A. Hyde-Price, 'Normative' Power Europe: A Realist Critique, 13 J. Eur. Pub. Pol. 217–234 (2006).

¹¹ H. Sjursen, The EU as a 'Normative' Power: How Can This Be?, 13 J. Eur. Pub. Pol. 235–251 (2006).

¹² Available at http://europa.eu/lisbon_treaty/full_text/ (accessed 20 Feb. 2014).

¹³ *Ibid.*

¹⁴ S. Meunier, *Managing Globalization? The EU in International Trade Negotiations*, 45 J. Com. Mkt. Stud. 912 (2007).

¹⁵ European Commission, *Global Europe: Competing the World*, COM (2006).

Latin America, that should improve the market access for European corporations through the lowering of non-tariff barriers, ensure the supply with raw materials and create new growth opportunities in fields like intellectual property, services, investment and public procurement. The new generation of free trade agreements represented a strategic approach in the beginning race with the United States (US) and others for market access to emerging economies. Yet, the document still stressed the importance of social and ecological standards for the EU and emphasized that Europe will take into account the development needs of partner countries. When Karel de Gucht became Trade Commissioner in 2010, 'Global Europe' again was replaced by a new strategy called 'Trade, Growth and World affairs'.¹⁶ It basically set the same priorities, but stroke with an even more aggressive intonation. Consequently, besides a passage announcing to include a sustainable development chapter in all trade treaties, the document paid little attention to normative objectives.

However, the EU's verbal commitment to normative objectives in its external policies seems to be reflected in concrete action, at least since 1995, when the European Union decided to include a so-called essential clause on human rights and democracy in all its international agreements. Furthermore, the EU consistently insisted on including non-trade issues in WTO-negotiations and appears therefore to be their strongest advocate on the international scene.¹⁷ Nevertheless, the EU has increasingly been criticized to not walk the talk. For some, the EU's alleged commitment to value-based objectives in trade policy constitutes only a rhetorical reaction to the (re-)politicization of trade policy as a result of the failure of the WTO meeting in Seattle in 1999. The Commission would try to confront upcoming doubts about the legitimacy and course of EU trade policy by paying lip service to a post-modern trade agenda and by pretending to listen more closely to demands of NGOs.¹⁸

Therefore, it remains ambiguous which role normative aspects really play in European foreign trade policy. Two different types of goals can be distinguished here a normative actor in trade policy is supposed to pursue: On the one hand, it should shape trade agreements in a way that supports the economic progress of its partner countries, since it is oriented in the values of social solidarity and sustainable economic development. On the other hand, a normative actor would use trade policy to support human as well as worker's rights and environmental standards by including respective clauses in trade agreements. While the first type

¹⁶ European Commission, *Trade, Growth and World Affairs: Trade Policy as a Core Component of the EU's 2020 Strategy*, COM (2010).

¹⁷ A. Falke, *EU-USA Trade Relations in the Doha Development Round: Market Access versus a Post-modern Trade Policy Agenda*, 10 *Eur. For. Affairs Rev.* 1, 8–11 (2005).

¹⁸ Zimmermann, *supra* n. 2, at 259.

of objectives solely depend on own commitment, the inclusion of human rights and social standards in a commercial deal is likely to trigger resistance from negotiation partners and hence, might be accompanied by costly trade-offs. But as a value-based foreign policy can always interfere with strategic and economic interests, it is decisive for the characterization of a normative international actor to see how it behaves in the case of conflicting interests. If the EU wants to do justice to its own aspiration in the negotiations with India to at least some extent, normative aspects should play a decisive role.

3 FOREIGN TRADE POLICY-MAKING IN THE EUROPEAN UNION

The constructivist notion of ‘Normative Power Europe’ shows some serious weaknesses that limit its usefulness as a theoretical concept. First, it suffers from ill-defined criteria, which prohibits a uniform application of the concept to different empirical cases. Second, the ‘Normative Power’-approach therefore runs the risk to serve rather as an identity creating concept for the sui generis international actor EU, than to constitute a real phenomenon. Third, the approach seems to completely disregard the multilevel nature of EU politics and the varying distribution of competences in different policy areas. To treat the EU as a unitary actor in foreign affairs seems to be misleading, given the fundamentally different modes of policy-making, for example, in the Common Foreign and Security Policy and the EU’s Foreign Trade Policy. What is required to analyse the EU’s performance as a normative power is an institutional explanation that takes into account the political processes in each policy field.

In EU trade policy, the complex relationship between the different institutions and its impact on international negotiations can be best described by the principal-agent approach. This theory, which originated in the new economics of organization, was first applied by Mark Pollack to the Study of EU politics.¹⁹ Central to this concept is the observation that in public policy-making, authority to negotiate agreements is often delegated from principals to agents that should act on their behalf. Since the former are usually confronted with problems of limited resources, the delegation to agents is a promising possibility to reduce transaction costs. However, with the handing over of negotiating power, principals always run the risk that their agents pursue objectives, which differ from their own. The principal-agent model assumes that agents have preferences that are systematically different from those of the principal and agents will try to use their given autonomy to push through their own interest. This phenomenon called ‘agency

¹⁹ M. Pollack, *Delegation, Agency, and Agenda Setting in the European Community*, 51 *Intl. Org.* 99–134 (1997).

slack' is mostly caused by information asymmetries in favour of the agents, which are in a better position than their principals to stay on top of things during the course of negotiations. This again can lead to a 'bureaucratic drift', meaning that the outcome of negotiations does not coincide with the principal's original preferences. In order to reduce the risk of 'agency slack' principals can deploy different instruments to control the agents' actions: *ex ante*, *ad locum*, and *ex post* control mechanisms.²⁰ The stronger the oversight mechanisms available to the principal are, the more principals can determine the outcome of a possible agreement. However, if the room for manoeuvre of the agent is too restricted, the possibility of reaching an agreement at all is smaller, since making concessions to the negotiating partner is getting more difficult. The specific arrangement of the principal-agent relationship is therefore crucial for the dynamics of a bargain process.

In the case of the EU the Commission represents the agent outlined above. Foreign trade policy has been among the first policy areas that were completely transferred to the European level. The early establishment of a custom union with a common external tariff made a coherent representation in the international system indispensable. Hence, the negotiation competence in international trade negotiations was early delegated to the Commission. According to the 'collusive delegation' argument, the transfer of negotiation authority to the Commission took place first of all to insulate EU trade policy from societal influence and protectionist pressure. The principal-agent relationship in the EU was therefore intentionally designed in a manner that granted the agent a high degree of autonomy in order to pursue a liberal trade policy.²¹

The Council and the EP conjunctively fulfil the role of the principal. However, their abilities to control the agent during the bargaining process vary significantly in the three phases of international negotiations. In the agenda-setting phase, the Council possesses the competence to award a negotiation mandate to the Commission, after the latter has submitted a respective proposal. Hence, the Council can exercise *ex ante* control by authorizing or contesting the authorization of an agent and by specifying the mandate. The EP by contrast has no formal powers in this process. It merely can make its views on the negotiating objectives known to the Commission through non-binding resolutions and reports. Hence, its capabilities to determine negotiation targets *ex ante* are very limited. The second phase constitutes the actual negotiation phase, when the Commission alone is bargaining with the third state on behalf of the whole

²⁰ T. Delreux & B. Kerrmanns, *How Agents Weaken their Principals' Incentives to Control: The Case of EU Negotiators and EU Member States in Multilateral Negotiations*, 32 J. Eur. Integration 361 (2010).

²¹ S. Meunier, *Trading Voices: The European Union in International Commercial Negotiations* (Princeton U. Press 2005).

European Union. During this phase, the Commission is monitored by the so-called Trade Policy Committee (TPC), a control body of the Council consisting of Member States representatives. It can exert *ad locum* control by directly attending international negotiations and regular meetings with EU negotiators. In this way the Member States can stay informed and refine instructions during the negotiation process. The Committee on International Trade of the EP (INTA) has not the same status as the TPC, since the Commission is only required by the Lisbon Treaty to report regularly to the INTA, while the TPC should assist the Commission during negotiations. Thus, the EP cannot engage equally in the bargaining process. Members of the European Parliament (MEPs) usually neither can attend international negotiations nor directly consult with EU negotiators. Therefore, the EP hardly can exert *ad locum* control. Eventually, ratification represents the final phase of the negotiation process. Since Lisbon the international trade agreements need the consent of the EP in order to be ratified. As a result, the ex post control mechanism of non-ratification now is exercised by the Council as well as by the Parliament. Therefore, the EP can exercise pressure on the Commission and set conditions for its approval to a negotiated agreement. In this way, the EP could influence the agenda-setting and the course of negotiations in a more informal way, since the EU negotiators have to take into account the views of the EP in all phases in order to not endanger the ratification of the agreement.²² Normative objectives, like development concerns, may have gained increasing importance in EU trade policy.

Likewise, the increased internal complexity of EU trade policy-making improves the Commission's bargaining position vis-à-vis negotiation partners through the so-called 'paradox of weakness'. As the entry into force of an agreement depends on the approval of the EP, the Commission can credibly refer to the danger of rejection by the Parliament, in order to get the counterpart to make concessions and push through its own positions. This is why the internal complexity makes the EU a difficult and efficient negotiating party.²³ Hence, the EU seems to have excellent preconditions to take a hard-line on the inclusion of human rights, labour and ecological standards in bilateral negotiations with India, which has proven to be one of the firmest opponents of including such issues in trade agreements inside the WTO.

²² S. Woolcock, *The Treaty of Lisbon and the European Union as an Actor in International Trade*, ECIPE Working Paper, 12 (2010).

²³ Meunier, *supra* n. 21.

4 PREFERENCES OF EU INSTITUTIONS IN EU TRADE POLICY

The extension of competences for the EP fuelled expectations among experts the Parliament would strengthen the position of normative aspects in trade policy.²⁴ This is due to the fact, that the EP consistently presented itself as the voice of normative objectives in EU external policies. For instance, in a resolution of May 2010 on EU Policy Coherence for Development the EP re-emphasized the linkage between trade and development policy. It entailed more than twenty proposals for more sustainable trade and recalled that ‘all EU policy areas with an external impact must be designed to support and not contradict the fight against poverty and the achievement of the Millennium Development Goals, as well as the fulfilment of human rights, including gender equality and social, economic and environmental rights’.²⁵

There are several reasons why the EP seems to be more receptive for normative issues in trade policy than the Council or the Commission. First, due to the non-binding nature of EP resolutions the Parliament never ran the risk to endanger a commercial agreement by voicing normative objectives. In case of resistance from the negotiation partner, the Commission could still bypass the resolutions and pursue economic and strategic objectives. With the ratification competence of the EP however, parliamentarians are now likewise confronted with costly trade-offs. As the economic and political costs of non-ratification are high, it cannot be taken for granted that a majority in the EP is willing jeopardize an agreement due to normative shortcomings.

Second, the institutional setting puts the EP in a disadvantaged position regarding the capacity to assess the economic consequences of the conclusion of a free trade agreement in detail. The ‘Trade Policy Committee’ of the Council is staffed with trade experts from the national states and has a high level of technical knowledge at its disposal. Likewise the Commission’s DG Trade has over 600 experts in different thematic sections and is able to provide profound economic expertise. The INTA committee by contrast consist only of a secretariat, a moderate number of MEPs, their staff, and some advisers. As a badly informed principal tends to draw on ideological constructs it is likely that the EP emphasizes the importance of non-trade issues during negotiations.²⁶

Third, MEPs are influenced by a much wider range of interest groups than the representatives of the Council and the Commission. The delegates not only

²⁴ H. Zimmermann, *Drachenzähmung. Die EU und die USA in den Verhandlungen um die Integration Chinas in den Welthandel* (Nomos, 2007) ; Richardson, *supra* n. 4.

²⁵ European Parliament, *The EU Policy Coherence for Development and the ‘Official Development Assistance Plus Concept’*, EP (2010).

²⁶ T. Gehring, *Die Europäische Union als komplexe internationale Organisation. Wie durch Kommunikation und Entscheidung soziale Ordnung entsteht* (Nomos, 2002).

have to rely much more on information provided by non-governmental organizations but also have to take their demands more serious. Since MEPs depend on support of their respective voters for their re-election, they need to listen more closely to different interest groups' requests. Generally speaking, societal organizations receive more attention from left-wing and green deputies, while industrial representatives gain a more sympathetic hearing from conservative and liberal MEPs.²⁷ However, some issues like core labour standards and sustainable development seem to have a broad majority in the Parliament.

The importance of normative objectives for other EU institutions seems to be much lower. In case of the Commission, the distance to national publics and parliaments, the absence of re-election considerations and the financial autonomy from lobby groups make it to a great extent immune against pressure of interest group. Hence, the Commission has first of all an apolitical and technocratic approach to trade policy. As an executive organ it therefore has a strategic interest in the conclusion of FTAs, regardless of particular economic interests of lobby groups or normative objectives of civil society organizations. The Council by contrast represents the preferences of the Member States. Their interests again are shaped by the demands of the key branches of their respective national economies. Therefore, the Council tends to champion specific economic interests of the most influential industrial sectors.²⁸

The key question for explaining the EU's foreign trade objectives is, whether the Commission, the Council respectively the Member States or the EP can enforce its interests against the other institutional players. The above-noted remarks suggest that Commission and Council still dominate EU trade policy with their strategic and economic objectives. The EP's ability to determine the negotiation goals beforehand is very limited, as it only possesses informal *ex ante* control mechanisms. Likewise, it is disadvantaged in its capacity to exert *ad locum* control compared to the TPC. Nevertheless, the Parliament could veto unwelcome objectives of the Commission by threatening with rejection of the agreement and thus exert *ex post* control. Therefore, the EP can only be characterized in EU trade policy as a veto-player or 'incomplete principal'.

5 THE CASE OF THE EU-INDIA-FTA NEGOTIATIONS

The EU's motives for taking up negotiations with India were first of all long-term economic and geopolitical interests. Nevertheless, the Commission declared that it wanted to use the bilateral negotiations on new free trade agreements specifically

²⁷ Richardson, *supra* n. 4, at 21.

²⁸ Meunier, *supra* n. 21.

for a fundamental appreciation of social standards and aspects of sustainable development in trade policy.²⁹ The EU-India FTA negotiations seem to be an ideal test case for the EU's seriousness in promoting its own norms and values through its trade relations. While the EU is already India's biggest trading partner, India is of increasing economic importance to the EU as its currently tenth largest trading partner with annual growth rates of bilateral trade of over 11% since 2001.³⁰

The economic data can easily explain the motivations of both behind forming a free trade area. However, the EU and India differ considerably in their understanding of international relations, which complicates reaching an agreement between them. In contrast to the EU's normative aspirations in foreign policy, India prefers a more realist understanding of world politics. With its economic rise, India acts increasingly self-confident in international relations and promotes pragmatically and unideologically its own national self-interest. Especially in the area of trade, India cares solely about economic gains and views non-economic aspects of trade agreements as an illegitimate interference in domestic matters.³¹ The crisis-torn European Union on the other hand is trying to use its external economic policies to create growth and employment, which is why its interest in striking a profitable trade deal with one of the biggest emerging markets might have further intensified over the last years at the expense of normative goals. As India constitutes one of the firmest opponents to the inclusion of 'non-trade issues' into commercial policy, economic and strategic interests were likely to clash with normative objectives. It is decisive for the characterization of the EU as an international actor to see, how it behaved in such situations. In order to reconstruct the negotiation process I drew on academic literature, official EU documents, media coverage and publications of various NGOs.

5.1 AGENDA SETTING PHASE

In 2006 a so-called High Level Trade Group (HLTG) made up of government representatives and business leaders presented a report about the potential profits of a FTA between the EU and India. It recommended aiming at a deep integration in the form of a bilateral trade and investment agreement (BTIA) in the negotiations. The report essentially provided the basis for the core points of the Commission's negotiation mandate: (1) Liberalization of substantially all trade with a starting

²⁹ F. Bossuyt, *The Social Dimension of the New Generation of EU FTAs with Asia and Latin America: Ambitious Continuation for the Sake of Policy Coherence*, 14 Eur. For. Affairs Rev., Special Issue, 703 (2009).

³⁰ S. Khorana & M. Garcia, *European Union-India Trade Negotiations: One Step Forward, One Back?*, 51 J. Com. Mkt. Stud. 694 (2013).

³¹ G. Khandekar, *Understanding India*, FRIDE, Agora Asia-Europe 3 (2012).

point of reduction in 90% of tariffs in all goods over seven years, with cuts in the remaining 10% of tariffs to be negotiated as sensitive products or completely excluded (2) WTO Plus liberalization of services that includes 'substantial sectoral coverage measured in terms of number of sectors, volume of trade' and 'all four modes of supply'. (3) Current levels of market opening in services as a starting point for negotiations, rather than WTO bound rates and elimination of 'substantially all discrimination between the parties'. (4) Negotiations on investment, trade facilitation, competition and public procurement, intellectual property, sanitary and phytosanitary (SPS) measures, technical barriers to trade (TBT) and dispute settlement.³²

This negotiation agenda corresponded with the general objectives outlined in the Commission's 'Global Europe Strategy'. Therefore, the Member States also backed the strategy to aim at a comprehensive agreement from the beginning. The drafting of the negotiation mandate took place in close consultation between Council and Commission.³³ In this way, the Commission could adjust its overall strategy to specific concerns of the Member States and at the same time shield, that particular interests dominate the agenda. Hence, the Member States could exert significant ex ante control through the Council's competence to award and specify the negotiation mandate to the Commission. Nevertheless, the negotiation agenda was not dominated by the interests of single Member States, but reflected the general trade strategy of the EU.

In order to give the negotiation agenda the finishing touch, the Commission consulted closely with the European economy. For that purpose, as early as February 2007 DG Trade sent questionnaires to key industrial organizations to obtain information on their problems regarding the export of goods and services, business start-ups and the procurement of raw materials. Subsequently, hundreds of exclusive meetings between the Commission and industrial representatives and multinationals took place. Evidently, economic interest groups assisted the Commission with their technical expertise during the agenda setting phase in specifying the EU's demands vis-à-vis India. Therefore, NGOs criticized the Commission to have entered a symbiotic relationship with economic interests groups, while concerns of civil society would hardly be heard in Brussels. As non-governmental organizations could not come up with similar valuable expertise like industrial lobby groups, they were not equally integrated in the process of preference formation. The 'Civil Society Dialogue' was criticized in that context by societal organizations to be a sheer PR exercise with no real impact on decision-making. Industrial lobby groups had by contrast the possibility to consult

³² S. Sharma, *The EU-India FTA. Critical Considerations in a Time of Crisis*, Centad. Consortium for Trade & Development (2009).

³³ Eberhardt & Kumar, *supra* n. 5.

about political decisions directly with representatives of the Commission and Member States in so-called market access working groups.³⁴

Even though economic interest groups obviously have been privileged in the process of preference formation, also normative claims made it on the agenda. The leaked draft for the negotiating mandate contained the demand for a chapter on sustainable development. This suggests that the Commission took into account the position of the EP and various Member States on this matter already during the agenda setting phase. The Parliament strongly supported the inclusion of social and environmental issues in trade agreements from the beginning. Among the Member States was a certain disagreement about the relevance of social and ecological clauses in trade treaties. The United Kingdom proved to be the strongest proponent of such clauses. France, Belgium and Denmark as well supported unreservedly a sustainability chapter. Other states, like Spain and Poland by contrast warned not to overload trade agreements with social and ecological clauses. Conclusions of the Council hardly mentioned these aspects, which indicates that they were of low importance for it. However, Germany that held the Council presidency at the time of the start of negotiations, welcomed the inclusion of such a sustainable development chapter as well, albeit less euphorically than Finland, which was in charge before.³⁵ In the end, the Commission was obviously willing to include such demands in the negotiation agenda, as long as they would not disturb its commercial and strategic objectives.

But India rejected firmly to talk about non-trade issues in the FTA negotiations. From the point of view of India labour and environmental standards have the potential to reduce its comparative advantage vis-à-vis industrial countries. Therefore the Indian government insisted that these aspects should stay out of trade agreements and rather be discussed in other forums like the ILO.³⁶ Likewise the 'human rights and democracy' clause led to a controversy even before the start of negotiations, as India urged the EU to remove this clause from the agenda. India's commerce minister Kamal Nath even called this issue a possible deal-breaker. As a result, the Commission soon stepped back from its non-trade objectives and insinuated that the agreement should be restricted to mere economic aspects. On the basis that the EU-India cooperation agreement of 1994 already addresses human rights issues, the Commission pushed for an exception for India. The spokesman for trade commissioner Peter Mandelson consequently declared: „Given how much both countries get out of it, we feel we should forge ahead on the basis of strict economic criteria, leaving more political considerations

³⁴ *Ibid.*

³⁵ Bossuyt, *supra* n. 29, at 714.

³⁶ Sharma, *supra* n. 32.

for other agreements'.³⁷ This approach triggered a serious debate in the EP and among Member States. The Parliament had positioned itself as early as 2006 in a resolution and declared 'that it is no longer prepared to give its assent to new international agreements that do not contain a human rights and democracy clause'.³⁸ Thus, the EP clearly exerted *ex ante* control regarding the inclusion of political clauses in the agreement. Anyways, in the first negotiation round in July 2007 political and social clauses were not discussed.³⁹ Hence, for the Commission neither the 'essential clause' nor labour and ecological standards did constitute indispensable elements of an agreement. Only pressure from the EP and some Member States prevented the Commission from withdrawing those aspects even before the start of negotiations.

On the 23 April 2007, the Council officially awarded the negotiation mandate to the Commission. Remarkable was the fact that the EU classed India as a peer trading partner and demanded a symmetric tariff reduction. This reciprocity was grounded not in current economic terms but in India's enormous development potential. Within seven years 90% of all customs barriers should be cut, with only few exceptions for especially weak sectors of the Indian economy. But even economists, that favoured the FTA, argued in support of transition periods of fifteen up to twenty years in many sectors considering the substantial development differences of the two economies.⁴⁰ Questionable from a 'Normative Power'-Perspective as well was the EU's demand for a stand-still-clause that pre-empts any possibility to increase tariffs again. This would tie the Indian government's hands in case tariff reductions in certain sector would lead to unbearable effects on vulnerable groups of society. Other dubious demands included tariff reduction in the dairy and poultry sector that could destroy the livelihood of especially vulnerable groups of the Indian society like small farmers and landless. Furthermore, the requested liberalization in the retailing industry would give foreign supermarket chains access to the Indian market. Thus, millions of people run the risk of losing their basis of living as retailing is to this day a major income source for the urban poor. Highly controversial was as well the claim of the EU for a reinforcement of patent protection in the pharmaceutical sector, since India is the world's biggest producer of generic medicine that ensures the access to affordable medicine for millions of people in the third world.⁴¹ Following this, NGOs criticized a FTA in this form would not only endanger the

³⁷ J. Johnson, *EU-India Trade Pact Stumbles on Human Rights Rider*, Financial Times 5 Mar. 2007.

³⁸ European Parliament, *Resolution on the Human Rights and Democracy Clause in European Union Agreements*, EP (2006).

³⁹ R. Bhuyan, *EU May Not Put Human Rights Condition for FTA*, Business Standard, 6 Jul. 2007.

⁴⁰ S. Khorana & N. Perdakis, *EU-India Free Trade Agreement: Deal or No Deal?*, 11 S. Asia Econ. J. 7 (2010).

⁴¹ Sharma, *supra* n. 32.

sustainable development of India, but also threaten social and economic human rights as well as undermine the objective of poverty reduction.

But societal groups were not able to carry in their concerns, as the EP seemed to be the only EU institution that attaches real importance to their demands. The Commission and the Council by contrast paid little attention to these aspects. As the formulation of the negotiation mandate under the Lisbon Treaty still takes place in close cooperation between those two organs, development issues played a minor role in the EU negotiation agenda. A normative redefinition of commercial interests in favour of development policy objectives is therefore hardly feasible in this constellation. Since trade agreements now need to obtain approval of the European Parliament, human rights clauses as well as social and ecological standards by contrast seem to gain in importance to the Commission. However, when confronted with resistance from the negotiation partner, the Commission seems to be all too easily willing to drop these objectives from the agenda.

5.2 NEGOTIATION PHASE

The first round of negotiations took place in July 2007 in Brussels. In December 2007 both negotiating partners tabled their initial offers in New Delhi. India objected especially to the planned reciprocity in tariff reduction, due to the low initial tariff levels of the EU. Furthermore, the envisaged liberalizations in the finance and retailing sector as well as the required tightening of patent protection in the pharmaceutical industry likewise caused conflict between the negotiating parties from the very beginning. The most controversial issues were nevertheless the political aspects of the agreement. India declared that the agreement would be endangered if non-trade issues would not be left out of the negotiations. Therefore economic interest groups started to exert pressure on the Commission to separate political and social questions strictly from trade policy.⁴²

But the EP evolved as an increasingly strong advocate of social provisions in the planned FTA with India. After the 2008 EU-India-Summit in Marseilles the EP passed a new resolution in 2009, which sent a clear message to the Commission. The EP considered an ambitious and legally binding sustainable development chapter to be an essential part of the agreement.⁴³ Hence, only an agreement containing such a clause would have a chance to be ratified. This disabled the Commission to just drop its normative demands in case of resistance, like it did in the Doha-round negotiations. Due to the EU's continued commitment to non-trade issues in the negotiations as well as major differences in

⁴² H. Hauschild, *Kinderarbeit bremst Einigung der EU mit Indien*, Handelsblatt 9 Nov. 2009.

⁴³ European Parliament, *Report on an EU-India Free Trade Agreement*, EP (2009).

economic questions, the planned conclusion of the talks at the 2009 New Delhi summit failed. As a result, trade commissioner Karel de Gucht travelled in March 2010 to India in order to explain the Commission's hard-line on normative issues. He expressly pointed to the EP's new competences in the ratification process and made clear that a majority in Parliament considered these issues an indispensable element of the agreement.⁴⁴ Thereby, the Commission could credibly refer to ratification problems in order to take a hard line on the inclusion of political clauses in the trade agreement.

Development objectives by contrast did not play a significant role for the Commission during the negotiations. Demands of the EP and NGOs concerning this matter did not find a sympathetic ear with the Commission and hence, could hardly influence the agenda of EU negotiators. Instead, EU representatives cooperated closely with the European industry in various forums like chambers of commerce, the European Business Group (EBG) and the European Business and Technology Centre (EBTC). Furthermore, the Commission exchanged information with the European industry in market access working groups on a regular basis.⁴⁵ The Council respectively the Member States were able to keep a close eye on the course of negotiations, since Member States representatives could attend both consultations with industrial organizations and the actual negotiations with India. In this way, the Council could exert a strong *ad locum* control over the Commission's performance. The EP by contrast could initially neither participate in consultations with the Industry nor in the actual trade talks. Therefore, members of the international trade committee INTA accused the Commission to not inform them adequately about the current state of negotiations. In their eyes, the Commission would have not yet adjusted to the new balance of power under the Lisbon treaty.⁴⁶ Upset by the Commission's bearings in the negotiations, MEPs of the INTA committee threatened the EP could reject the agreement, if the Commission would not fulfil its obligations.⁴⁷ As a result of this dispute, the Commission signed a framework agreement with the EP in October 2010, giving the Parliament unprecedented rights of information, access to meetings of the Commission and conditional access to negotiations and related consultations.⁴⁸ However, the EP's capacity for *ad locum* control remained limited, especially in comparison with the powers of Member State representatives.

⁴⁴ H. Hauschild, *EU verärgert Indien mit Sozialstandards*, Handelsblatt 16 Mar. 2010.

⁴⁵ Eberhardt & Kumar, *supra* n. 5.

⁴⁶ W. Balsen, *Aufstand in Brüssel*, Frankfurter Rundschau, 23 Mar. 2010.

⁴⁷ Hauschild, *supra* n. 44.

⁴⁸ D. Kleimann, *Taking Stock: EU Common Commercial Policy in the Lisbon Era*, CEPS Working Documents (2011).

The European Economic and Social Committee (EESC) as well criticized the Commission in a report of April 2011. It considered the negotiations to be highly intransparent and stated that they would neglect the development implications of the agreements. Furthermore, the Commission would not consult equally with economic and societal interest groups.⁴⁹ Thus, the Committee's rapporteur Madi Sharma called the negotiations 'wrong and not transparent' and demanded an immediate stop of the talks until the social consequences of the FTA would be better scrutinized.⁵⁰ However, the Commission did not regard the EESC as a serious veto-player, due to its mere consultative character.

In view of the obvious privileging of economic interests and the non-transparent conduct of negotiations significant resistance arose in the European and Indian civil society. Groups like 'Forum against FTAs' and 'India FDI Watch' called for protests in India and demanded an immediate stop of negotiations. Meanwhile, NGOs like Oxfam, Misereor, WIDE and '*medecins sans frontieres*' (MSF) turned to the public in Europe in order to raise awareness about negative consequences of the FTA for poor sections of the Indian population. In this way they urged the EP to oppose normative questionable demands even more clearly. Echoing the concerns of civil society, the EP for instance demanded in a resolution of 2011 that the Commission should give up its insistence on 'data exclusivity' in the pharmaceutical sector, as this would have 'far-reaching consequences for the production of generic medicines and it is therefore detrimental to developing countries' access to medicines and public health policy'.⁵¹ Due to the public pressure and criticism of the EP, the Commission lastly withdrew its disputed demand and assured that 'the intellectual property provisions in the FTA will not weaken India's capacity to manufacture and export life-saving medicines to other developing countries facing public health problems'.⁵² But the issue took an unexpected turn again in March 2013 when an allegedly leaked negotiation text was published by an NGO specialized in intellectual property policy. The document suggested that the EU continued to pressure India into signing on to an IPR regime that goes far beyond the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS-Agreement) of the WTO.⁵³ If the document proves to be authentic, the Commission secretly had placed this issue again on the agenda, after calming down

⁴⁹ European Economic and Social Committee, *The Role of Civil Society in the FTA between EU and India*, EESC (2011).

⁵⁰ *EESC slams Commission on EU-India FTA*, Corporate Europe Observatory, 21 Apr. 2011.

⁵¹ European Parliament, *Free Trade Agreement with India*, EP (2011).

⁵² European Commission, *EU-India FTA Negotiations and Access to Medicines. Questions and Answers*, EC (2010).

⁵³ P. Chatterjee, *Leaked IP Chapter Of India-EU FTA Shows TRIPS-Plus Pitfalls For India*, *Expert Says*, Intellectual Property Watch, 12 Mar. 2013.

the public debate. It further indicates that the EP's capacities to exert *ad locum* control are very limited. If the Parliament is willing to reject in the ratification phase an agreement entailing harmful IPR-provisions remains to be seen. But the inclination of the EP to reject a profitable agreement seems to be rather low, particularly in the case of issues that are difficult to assess without expert knowledge.

On 12th September 2011 the Council expanded the negotiation mandate of the Commission to investments aspects. Again normative questionable demands emerged like the 'investor-to-state' dispute settlement. It could restrict the policy scope of the Indian government, since it allows foreign companies to sue the Indian state over legislation that is detrimental for the enterprise's investment.⁵⁴ Likewise, the demand to open the retailing sector for foreign investors raises concerns given the particular vulnerability of jobholders in this segment. When the Indian cabinet met this demand and decided to liberalize retailing in November 2011, it triggered an unexpected massive storm of protest in the country. On 1 December, millions of small traders in all big cities kept their shops closed. As a result, the Indian government had to put the proposal for the moment on ice.⁵⁵ Thereby, India failed to meet one of EU's central demands, which is why the conclusion of the agreement had to be postponed again.

Likewise, India continued to reject firmly the inclusion of social and environmental standards into the trade treaty. Since the EP had made them an essential precondition for its approval to an agreement, the Commission had to insist on including such clauses. Therefore the negotiations seemed to have stalemated in 2010. In order to break this logjam, the Commission tried to strike a balance between the demands of the EP and India. Trade Commissioner Karel de Gucht specified in a plenary debate of the EP how this compromise should look like. He asked the Parliamentarians 'to remain realistic' and explained '(...) we (...) need to be clear that a sustainable development chapter which would allow the use of trade restrictions linked to social or environmental issues will not be acceptable to India'.⁵⁶ Hence, the sustainable development chapter should not provide sanctions but rely on cooperation and dialogue.

Nevertheless, in a new resolution of May 2011 the EP continued to insist on legally binding human rights and social clauses.⁵⁷ In the end, however it is highly probable that the vast majority of MEPs would eventually accept the

⁵⁴ K. Singh, *For a Fair, Free Trade Pact with Europe*, The Hindu, 16 Apr. 2012.

⁵⁵ S. Sharma, *EU-India Free Trade Agreement: 'Don't Trade Away Our Lives' Say Activists*, Institute for Agriculture and Trade Policy (2012).

⁵⁶ European Parliament, *Plenary Debate on the State of Play of the EU-India Free Trade Agreement Negotiations 09.05.2011*, EP (2011).

⁵⁷ European Parliament, *supra* n. 51.

Commission's approach and settle for non-binding clauses. It does not seem likely that the majority of conservatives, liberals and social democrats is willing to reject an agreement after years of tough negotiations, even if the sustainability chapter would not provide sanction possibilities. Compared with the strong and legally binding labour and environmental clauses in the newest US FTAs, the EU's soft approach to social standards seems not very convincing and does not support the thesis of a unique normativity of European external policies.

Before the 12th EU-India summit in February 2012 a group of twenty-four MEPs from the ranks of the Greens, Social democrats and the Left sent a letter to trade commissioner de Gucht demanding an immediate break in the negotiations, in order to give time to perform a human rights impact assessment of the agreement. De Gucht for his part announced indeed to shelve the talks, if again no progress would be achieved.⁵⁸ But it seems that this announcement only served to pile the pressure on India. Due to a reform of the GSP, India's membership in the trade preference system of the EU was at stake at this time. As India's exports to Europe would then be confronted with full tariff rates, the EU put substantial economic pressure on its weaker negotiation partner to push through self-related commercial interests.

In February 2012 massive protests of HIV-activists, farmers, milk producers, retailers, unions as well as development, agricultural and health organizations re-emerged around the 12th negotiation round in New Delhi.⁵⁹ However the talks remained mainly unaffected by these clamours and both sides were optimistic to conclude the negotiations until the end of the year. Merely technical aspects like tariff cuts on auto-mobiles, wines and spirits remained unresolved. 'Non-trade issues' by contrast did not seem to constitute roadblocks any more. After a meeting of Karel de Gucht and the Indian trade minister Anand Sharma in June 2012 both sides reaffirmed their intention to conclude talks in autumn of the same year. But again the EU and India subsequently failed to sort out their differences. On 15 April 2013 the Indian commerce minister Sharma and de Gucht met again for a ministerial dialogue in Brussels. Sticking points remained EU demands to raise the equity cap on FDI in the Indian insurance sector and to cut tariffs in the automobile industry. India on the other hand request greater access for its service sector in the European market and a data secure status from the EU. In the end, both sides could not resolve their differences but considered the consultation as moving in the right direction.⁶⁰ The last ministerial meeting for the time being took place in June 2013 and again both sides could not reach an agreement. The

⁵⁸ S. Keller, *EU-Indien-Gipfel mit Drohgebärden*, Heinrich-Böll-Stiftung 7 Dec. 2012.

⁵⁹ Sharma, *supra* n. 55.

⁶⁰ *India-EU FTA talks gain momentum*, The Hindu, 16 Apr. 2013.

meeting was considered to be the last chance to conclude the deal before the Indian general election in 2014. After June it would be too close to the elections for the Indian government to make concessions on critical issues.⁶¹

6 CONCLUSION

This article has challenged the widely held view that the EU acts as a normative actor in its external relations. Constructivist notion of 'Normative Power Europe' seem to disregard that the institutional system through which interests are channelled have a determining influence on the actual policy outcomes. The results of the case study suggest that the EU acts only in a very limited way as a normative power in trade policy, since the particular principal-agent structure in that field leads to a privileging of economic and strategic interests over normative objectives. The strengthening of the EP through the Lisbon treaty could just slightly improve the standing of normative goals. But since its capabilities to exert *ex ante* and *ad locum* control are still very limited, the EP is hardly capable of determining the European trade agenda beforehand. It solely can pass resolutions with political demands, but cannot participate in the process of specifying the technical economic details of the negotiation mandate. The Commission and the Council remain therefore the dominating players shaping the agenda in EU Trade Policy. In this institutional setting it is hardly feasible that EU trade policy becomes an instrument of development policy. In the case of the FTA with India, EU negotiators entered into negotiations with a range of highly questionable demands that clearly served European economic interests but could have disastrous impacts for poor sections of the Indian society. During the bargaining process the Commission insisted firmly on these objectives, not taking into account civil society protests or criticism of the EP. The example of the dispute over intellectual property rights in the pharmaceutical industry demonstrates, how difficult it is for the EP to keep track of the course of negotiations on highly technical issues and effectively exert *ad locum* control.

The inclusion of political, social and environmental clauses into EU trade agreements by contrast seems to have become more likely. Since the Commission now needs the consent of the EP to any negotiated agreement, it has to stick to these demands even when confronted with resistance from the negotiation partner. However, the development chapter in the envisaged agreement with India is likely to be not legally binding and hence, could turn out to constitute only a fig

⁶¹ Sidhartha, *India to EU: Can't Sweeten Trade Pact*, The Times of India, 20 Jun. 2013.

leaf for the EU's aggressive trade agenda. In the end, as MEPs only can approve or reject an agreement as a whole, they seem not willing to jeopardize a lucrative treaty for such shortcomings. Hence, the EU's commitment to normative objectives ends, when they are in conflict with the underlying economic and strategic goals.