**The Increasing Power of the European Parliament: Negotiating the EU-India Free Trade Agreement**

**Abstract**

Since the Lisbon Treaty increased the legal role of the European Parliament (EP) in EU trade policy, there has been a debate about the extent to which these legal competencies have translated into actual influence over the content and outcome of EU trade negotiations. Using the case study of the on-going trade negotiations between the EU and India, this article argues that the impact of the EP has indeed been significant. Through two-level game analysis, which extends its domestic focus to include the EP as a domestic constituent, it demonstrates how the EP has affected the EU win-set in ways that have both hindered and facilitated agreement at the international level between the EU and India. It also shows how the EP has affected the negotiating dynamics and how the EU negotiators have had their preferences somewhat compromised by the EP in their attempt at reaching an agreement with India.

**Keywords:** European Union, European Parliament, trade, negotiations, India, two-level game

**1. Introduction**

Since 2007 the European Union (EU) has been engaged in negotiations with India to conclude a free trade agreement (FTA), the so-called Broad-based Trade and Investment Agreement (BTIA). BTIA is motivated by the EU’s need to improve its competitiveness and aim to gain increased market access in Asia, and by India’s desire to continue its gradual process of liberalization. If concluded, BTIA will be the biggest single trade agreement in the world, merging the markets of around 1.7 billion people. Both parties have much to gain from the agreement. For the EU, India is its ninth largest trading partner in goods and sixth largest in services (European Commission 2015a). BTIA will be the first agreement it concludes with an emerging global economic power. India’s population of more than 1.2 billion people and its constantly growing middle class provide a significant market for EU products. It does however have relatively high levels of protection against EU imports, which would be lowered by BTIA. For India, the EU is its largest trading partner, catering for 13% of its trade (ibid.), and it represents a single market of nearly 500 million consumers with a high average income. EU tariffs towards Indian exports are generally low, but for some products, such as agriculture and textiles, India still faces protectionist barriers, which would be reduced with BTIA. In addition, the EU provides a potential market for skilled Indian workers in the service sector (Modwel and Singh 2012: 17).

The BTIA negotiations take place against the backdrop of a significant institutional change within the EU. The Lisbon Treaty, which entered into force in 2009, extended the powers of the European Parliament (EP) by granting it with ratification authority of all trade agreements and the right to be kept informed by the European Commission during the course of trade negotiations between the EU and third parties (TFEU, Articles 207, 218). The well-established and deeply institutionalised Council-Commission relationship, which has dominated EU trade negotiations since the beginning of the EU’s long history of concluding trade agreements (e.g. Elsig 2002; Meunier 2005; Woolcock 2005), has thus been replaced by a new inter-institutionalised constellation, which includes the EP.

However, there is a debate about the extent to which these legal competencies have translated into actual influence and the ability of the EP to impact the content and outcome of trade negotiations (e.g. Devuyst 2013; Kleimann 2011; Leeg 2014; Shaohua 2015; Van den Putte et al. 2014, 2915; Woolcock 2012). On one hand it is suggested that the new powers do not significantly impact EU trade negotiations since the EP still lags behind the Council in terms of its legal role, and since it lacks the necessary technical expertise and experience to engage effectively in trade negotiations (e.g. Kleimann 2011: 13; Leeg 2014; Woolcock 2012: 57). On the other hand, it is argued that the EP is indeed influencing EU trade negotiations, not least since the agenda is becoming more politicized, but also because its increased powers have made the EP more assertive to express its views and even refuse to ratify agreements that do not reflect its preferences, as was seen with its rejection of the Anti-Counterfeiting Trade Agreement (ACTA) in 2012 (e.g. Devuyst 2013; Shaohua 2015; Van den Putte et al. 2014: 4).

Despite this broad academic debate about parliamentary influence, there are surprisingly few theoretical analyses of EU trade negotiations that incorporate the role of the EP. The theoretical approaches most commonly used, such as principal-agent and two-/three-level game analyses (e.g. Delreux 2008; Dür and Elsig 2011; Dür and Zimmerman 2007; Frennhoff Larsén 2007; Meunier 2005), tend to focus on the relationship between the Commission and the Council, which has traditionally been seen as the key determinant of EU trade negotiations (e.g. Elsig 2002; Meunier 2005; Woolcock 2005). The arrival of the EP as a new player in EU trade negotiations has so far not significantly altered this theoretical focus. There is, however, an increased recognition of the need to do so (e.g. Mortensen 2009; Ripoll Servent 2014; Young and Peterson 2014).

This article responds to this need by using two-level game analysis, which extends its domestic focus to include the EP as an additional domestic constituent to that of the Council, to analyze the BTIA negotiations between the EU and India. It contributes to the debate about the EP’s impact on trade negotiations by showing how and to what extent it has influenced the negotiations. It looks at how the EP has affected the contours of the EU win-set in three key areas of the negotiations – market access, the inclusion of political and social clauses, and IPR provisions for pharmaceuticals – and thus the potential for the EU and Indian negotiators to reach an agreement. It demonstrates how in the area of market access the impact of the EP has been minor due to the strong convergence in preferences within the EU. However, regarding the inclusion of political and social clauses the EP has significantly reduced the EU win-set, thereby hindering an agreement with India, while in the area of IPR provisions for pharmaceuticals, it has facilitated an overlap between the EU and Indian win-sets by tipping the balance of the EU win-set in the direction of that of India. The article also shows how the increased impact of the EP has affected the negotiating dynamics both internally and externally, highlighting how the negotiators have increased their interactions with the EP, and how they have had their preferences somewhat compromised when trying to reach an agreement with India.

The article is based on academic literature, EU official documents, reports published by NGO and business organisations, media coverage, as well as 12 semi-structured interviews with members of both the EU and the Indian negotiation teams, officials from the Commission’s Directorates-General (DGs) for Trade and Agriculture, the EP, and the Trade Policy Committee (TPC), each lasting around on hour with the promise of anonymity. It contributes to the wider literature on EU trade negotiations, and specifically to the debate about the impact of the EP. It also sheds empirical light on the BTIA negotiations. Theoretically it expands the domestic level of the two-level game approach to EU trade negotiations by adding the EP as a domestic constituent, thus widening the analytical focus beyond the well-established Commission-Council interactions.

The structure of the article is as follows: First, the application of two-level game analysis is explained. Second, the extent to which there is an overlap between the win-sets of the EU and India is determined by looking at the areas of market access, the inclusion of political and social clauses, and IPR provisions for pharmaceuticals. The preferences of the EU negotiators, the Member States in the Council, the EP and India are identified through process tracing, and the change in their respective positions during the course of the negotiations is explored. Third, the negotiating dynamics both within the EU and between the EU and India are analysed. Finally, a number of conclusions are drawn.

**2. The Application of Two-Level Game Analysis**

Several analyses of EU trade negotiations have adopted Putnam’s (1988) two-level game approach to explain the conduct and outcome of the negotiations (e.g. Frennhoff Larsén 2007; Meunier 2005; Woolcock 2005). The main argument of two-level game analysis is that any international agreement is dependent on domestic agreement within the negotiating parties. Consequently, during an international negotiation there are parallel domestic negotiations taking place. These international (Level I) and domestic (Level II) negotiations, or games, are closely linked both through the negotiator, who takes part in both games, and through the ratification requirement, as no international agreement can enter into force without domestic ratification (Putnam 1988). The two-level game analyses of EU trade negotiations demonstrate how the EU negotiators – most often sees as the Commission – operate both internationally at Level I, when they negotiate with a third party, and domestically at Level II, when they have to reach an agreement between the constituencies within the EU that can serve as terms of reference in the international negotiations.[[1]](#footnote-1)

In most of these analyses the focus of the Level II game is on the negotiations between the EU Member States in the Council. The analyses demonstrate how the EU’s ‘single voice’ is the result of intense internal negotiations where the Member States have to agree on a joint position. They highlight how the EU negotiators engage in these negotiations to identify agreements and possible compromises between the Member States. This focus on the relationship between the EU negotiators and the Member States has been further intensified by the numerous principal-agent analyses of EU trade negotiations (e.g. Dür and Elsig 2011), which explain the EU negotiating position as a result of tensions between the Member State principals and the negotiating agent, i.e. the Commission, and which are seen to be compatible with the domestic level of the two-level game approach.[[2]](#footnote-2) However, this article demonstrates how the Council negotiations only provide part of the domestic game, and that the EP also is a key domestic constituent with which the EU negotiators have to engage to ensure ratification of the final agreement. The Level II analysis is consequently extended to include the EP. While negotiating with India at Level I, the EU negotiators are also engaged in domestic negotiations with the Council *and* the EP at Level II, and the EU negotiators need to find a win-set – i.e. all the possible negotiating outcomes that are acceptable to the domestic constituents (Putnam 1988: 437) – that *both* of them will ratify. For an international agreement to be reached, the EU and the Indian win-sets need to overlap, and the contours of the win-sets are affected by the preferences and positions of the domestic constituents (Putnam 1988: 440). This analysis demonstrates how the EP has exercised influence over the BTIA negotiations, by both increasing and restricting the EU win-set.

The inclusion of the EP as a domestic constituent is consistent with Young and Peterson’s (2014) two-level game based policy sub-system approach, in which they add the EP and societal actors, such as firms and NGOs, to the Member States as actors having a significant impact on EU trade negotiations (ibid.: 40). Societal actors undoubtedly have a strong influence through their lobbying and interactions with the institutional actors (Dür 2008; Heron and Siles-Brügge 2012). Yet, for analytical clarity, the two-level game model adopted here limits its domestic focus to the institutional actors of the EP and the Council, which both are linked to the international level, via the EU negotiators, through their ratification authority. By following the formal interactions of the EU negotiators, it is clear that they move between their Level I negotiations with India and their Level II negotiations with the EP and the Council.[[3]](#footnote-3) The influence of societal actors is thus mainly studied through the influence they exercise on the preferences and positions of the institutional actors.

The EU negotiators in the BTIA negotiations consist of the chief negotiator and his negotiating team in DG Trade. Although the main aim of the negotiators is to reach an agreement with India at Level I and to get it ratified by the Council and the EP at Level II, they also often have an interest in making sure that the agreement corresponds to their own preferences. Putnam (1988: 456) argues that negotiators rarely behave simply as agents who act on behalf of their constituents, but that they have independent preferences that might diverge from those of the domestic constituents. Following the logic of functional rationality (e.g. Egeberg 2002), the preferences of the EU negotiators are aligned with those of the institution where they are based, i.e. DG Trade, and are consequently focused on extensive trade liberalization (Woolcock 2012: 51). In the BTIA negotiations, the negotiators played a key role from the very beginning. The EU and India have a longstanding relationship and during an EU-India Summit in 2005 both parties expressed a political commitment to deepen their trade relationship, and a High Level Trade Group (HLTG) was set up to explore this idea (HLTG 2006). The HLTG consisted of senior trade experts from both parties, and the work was led by the DG Trade official who later became the EU’s chief negotiator in the BTIA negotiations, Ignacio Garcia Bercero, and the Joint Secretary of the Ministry of Commerce and Industry, Dr Rahul Khullar, who became the first Indian chief negotiator. The HLTG met regularly during 2006 to identify converging interests as well as sensitivities. At the EU-India summit in October 2006, it presented its final recommendations of negotiating a BTIA (ibid.). The summit endorsed the proposal, and asked both parties to undertake the necessary steps to start negotiations. For the EU negotiators this meant initiating negotiations with its two domestic constituents at Level II to start identifying a win-set, and then alternating between the Level II and Level I negotiations to try and get the EU and the Indian win-sets to overlap.

**3. Overlap of Win-Sets**

To determine the extent to which the EP has affected the win-set of the EU, and how this in turn has impacted the potential for an agreement between the EU and India, the preferences of the key actors need to be identified. Looking at the three key areas of market access, the inclusion of political and social clauses, and IPR provisions for pharmaceuticals, this section identifies the preferences of the institutional actors involved in the Level II game, i.e. the Council and the EP, and those of India at Level I, as well as those of the EU negotiators themselves. As in most studies (Hix and Højer 2013: 174), the EP is treated here as a unitary actor given that it gives its consent to trade agreement by a simple majority (TFEU, Article 218), and because it is generally perceived as such by the EU negotiators who don’t engage in the intra-EP discussions between the different political groups (Interview, Commission Official, 7/3/2013). While recognizing that the EP is not a unitary actor in reality, it acts with enough unity to treat it that way. Similarly, it is the Indian preferences as presented by the Indian negotiating team that form part of the analysis, as the diverging preferences of India’s domestic constituents are dealt with in *its* domestic game at Level II, which is beyond the scope of this study. For the Council on the other hand, it is generally necessary to identify the preferences of the individual Member States as it takes decision by qualified majority voting or by consensus (Hix and Højer 2013: 174),[[4]](#footnote-4) even if, as is illustrated below, there is great convergence in preferences between them in the this particular case.

It is demonstrated how the preferences of these actors shape the contours of the win-sets, and whether overlaps between the EU and Indian win-sets have been achieved. In the case of market access, the impact of the EP has been minor due to the strong convergence in preferences within the EU. In the case of the inclusion of political clauses the influence of the EP has reduced the EU win-set, and thereby made an EU-India agreement less likely. The case of IPR provisions for pharmaceuticals demonstrates, on the other hand, how the EP facilitated an overlap between the two win-sets by tipping the balance of the EU win-set in the direction of that of India.

***3.1. Market Access***

Given India’s economic strength and attractiveness as an export market, the EU’s main aim is to gain increased access to this market for its industrial products (e.g. automobiles and automotive components), agricultural products (e.g. whiskey, poultry, dairy, oils, pasta), and services (e.g. retail, legal, financial and postal) (Khorana and Garcia 2013: 8; Khandekar and Sengupta 2012: 5). Unlike many other FTA negotiations, the EU has very few defensive interests vis-à-vis India. There are certain products such as rice, sugar, fruits and vegetables for which the Mediterranean states have expressed some defensive tendencies, but in comparison with other negotiations these are negligible as it is recognized that the threat posed by India is limited (EP 2013: 30; Interview, Commission official, 8/3/2013).

As a result of these homogenous market liberalization interests, there are few distributional consequences between the Member States, and the Council is institutionally united in its approach, which is very similar to the pro-liberalization stance taken by the EU negotiators. The division, which is often seen between the more liberalized focused Commission negotiators and some of the more protectionist Member States in the Council (e.g. Da Conceiçao 2010; Meunier 2005), is to a great extent absent in these negotiations.

This interest in gaining greater market access in India is also shared by the EP (European Parliament 2011a; interview EP official, 8/3/2013). This is in line with its general support of DG Trade’s liberalization agenda and its disposition to support market openings for EU business (van den Putte et al. 2014: 6-7). Even if there are diverging views between the MEPs, overall the EP tends to back the promotion of free trade (Armanovica and Bendini 2014: 21). There are, in other words, no strong preferential divides between the negotiators, the Council and the EP in this case.

For India BTIA is the most ambitious deal it has ever negotiated in terms of coverage (Commission 2013a). While initially, when a future agreement was discussed in the HLTG, it pushed strongly for the negotiation of an FTA and the extensive liberalization that that involves, it has become more defensive and less willing to open up its market during the course of the negotiations (Interview, Commission official, 7/3/2013). Its much higher tariffs (an average of 14.5% compared to the EU’s 4.1%) means that India will have to make bigger adjustments than the EU (European Parliament 2013: 29). The EU’s interest in accessing the Indian market in the areas where Indian duties are particularly high, such as automobiles, dairy and wines and spirits, is thus being met by resistance. India is concerned that European carmakers will enter the Indian market and capture a significant market share, while India is still in the process of developing its own domestic automobile industry (Khorana et al. 2010: 11). Similarly for dairy, India is worried that further liberalization will lead to a surge in heavily subsidized EU products, which will have a detrimental effect on small farmers (Modwel and Singh 2012: 15). The reason for India’s resistance to reducing tariffs on wines and spirits is mainly cultural (Interview, Commission official, 8/3/2013). In addition, the Indian negotiators have not been able to meet the demands expressed by the EU negotiators in terms of market access for services as India’s domestic constituents are worried about the threat this will pose to Indian service providers, particularly in the areas of retail, legal and financial services (Winand et al. 2015: 2; Khandekar and Sengupta 2012).

However, India has also expressed strong *offensive* preferences in the area of services for which India has a competitive advantage. It is predominantly interested in liberalization under Mode 4 of GATS, through which skilled Indian workers will be able to temporarily provide services in the EU (Wouters et al. 2014: 855). India’s service sector, particular in IT, is growing fast, and it has a large number of skilled professionals who want access to the EU market (ibid.). Even if the EU generally has been reluctant to move beyond GATS commitments in bilateral agreements (Jure and Lavenex 2014: 13), the EU negotiators initially expressed a willingness to further liberalize the movement of people in BTIA because of the recognized need for skilled workers within the EU. But following the recession and the increase in unemployment, Mode 4 liberalization has become a sensitive issue and the EU negotiators have not been able to meet India’s far-reaching demands (Mukherjee and Goswami 2011). The sensitivity stems from the politicization of the issue and the perceived link with immigration policy in many of the Member States, in particular the UK, which would be a key destination for high skilled workers from India (Siles-Brügge 2013: 608). Making concessions on Mode 4 is seen to conflict with the UK’s aim to cap non-EU economic migration (Migration Watch UK 2010). However, the EU negotiators, again reflecting DG Trade’s general liberalization ambitions, are in favour of liberalization in this area (ibid.: 611). They are strongly supported by the EP, which several times has stressed that an ambitious FTA with India cannot be realized without commitments to Mode 4 (e.g. European Parliament 2009; 2011a; 2013). It has stressed how Member States need to open up their Mode 4 services to allow India to ‘benefit from their comparative advantage, notably in the IT service sector (European Parliament 2013: 15). With the support of the EP, the negotiators are trying to trade away this remaining ‘pocket of protection’ among some of the Member States in exchange for liberalization of the Indian retail, legal and financial services (Siles-Brügge 2013: 611). However, so far India has not agreed to this, as it sees the EU offer as too restrictive. India wants its professionals to receive EU wide permits and not be constrained by quotas and caps set by individual Member States (Ranjan Mishra 2015) – something which is difficult for the EU to offer since it does not have an integrated market for services.

This shows that there is a big gap between the EU and the Indian win-sets. The main reason being that the EU wants greater access to the Indian market than India is willing to offer. Both sides have made concessions – India by lowering its tariffs, and the EU by lowering its requests for market access – but it is still long before the two win-sets overlap. It is also clear that there is strong convergence in market access interests between the EU negotiators and their domestic constituents, and only on the issue of service liberalization under Mode 4 are the EU preferences of the negotiators and the EP somewhat compromised by certain defensive interests within the Council, which in turn has led to a slight restriction of the EU win-set, moving it further away from that of India. As a result of the relative convergence in preferences within the EU, it is difficult to attribute any significant impact on the EU win-set to the EP. It remains to be seen whether it will have any supportive impact on the efforts of the negotiators to try and convince the Member States to move towards India’s demands on Mode 4. Either way, the overall gap between the win-sets on market access looks difficult to reduce.

***3.2. Inclusion of Political Clauses***

The EU has been including clauses on human rights and social and environmental standards in its trade agreements between the EU and third parties since the 1990s (European Commission 1995), and they are now a key component of EU trade policy (Articles 207 TFEU and Article 21 TEU). There are however varying preferences within the EU on the depth and level of flexibility these provisions should take depending on the commercial interests it has with the different third parties (Woolcock 2014). The negotiators are often seen to prioritize trade liberalization over binding norms that might restrict free trade and market openings (e.g. Sicurelli 2015; Wouters et al. 2014). This approach tends to be supported by the majority of the Member States in the Council, while the EP takes a much stricter approach and insists on the inclusion of legally binding political clauses in EU trade agreements (e.g. Leeg 2014; Ripoll Servent 2015; Sicurelli 2015). These internal divisions in preferences are clearly seen in the BTIA negotiations.

From the beginning of the negotiations India has expressed opposition to any linkage between political issues and trade, and it strongly disapproves of the inclusion of political issues in BTIA (Modwel and Singh 2012: 15). It fears that legally binding clauses regarding human rights, environmental issues and labour standards might reduce India’s competitive advantage, and the EU’s persistence on including these clauses is seen as interference in India’s domestic affairs. Instead, India argues that such issues should be discussed in other for a. As explained by a member of the Indian negotiating team: ‘As a democracy it is fundamentally difficult for India to sell to our parliament that a third country is going to monitor our environment and labour standards. We do not shy away from any discussion at any multilateral forum either on the environment or on labour. We prefer to take it to that route rather than bring it in to the trade route’ (Interview, 8/3/2013). This is a preference that India so far has not been willing to compromise.

The negotiators who are aware of India’s concerns suggested at the very start of the negotiations that an exception should be made for India from the horizontal commitment to include human rights clauses into all EU trade agreements. The suggestion had the political support from Trade Commissioner Mandelson who argued: ‘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 for other agreements’ (cited in Johnson 2007). Although some Member States, such as the Netherlands, insisted on the inclusion of a Human Rights clause (Wouters et al. 2014: 862), the main focus in the Council has so far been on the economic aspects of the agreement, and the political aspects have received little attention and low priority (Interviews, TPC Officials, 7/3/2013, 8/6/2015; Commission Official 7/3/2013; Leeg 2014: 347). This is in line with the general argument that the Member State preferences are shaped mainly by interests of their national economic and industrial sectors (Meunier 2005). However, the negotiators’ position triggered the EP – which is concerned about minority rights, religious persecution and violence, death penalty, and children’s and women’s rights in India – to refer to a recently passed resolution declaring that the EP is not ‘prepared to give its assent to new international agreements that do not contain a human rights and democracy clause’ (European Parliament 2006), which meant the negotiators could not move ahead with a solely economic negotiation (Leeg 2014: 348). Since then, the EP has continuously stressed its commitment to the inclusion of political clauses. In 2009 it passed a resolution stating that an ambitious and legally binding sustainable development chapter must form part of BTIA if the EP were to give its consent (European Parliament 2009). Yet, the negotiators, who were faced with India’s stark opposition to such chapters, and keen to reach an agreement, indicated that they would be ready to accept less of a commitment from India. They instructed Trade Commissioner de Gucht to ask MEPs ‘to remain realistic’ and understand ‘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’ (European Parliament 2011c). In response to this plea, the EP adopted a new resolution in 2011 insisting on the inclusion of ‘legally binding clauses on human rights, social and environmental standards and their enforcement’ (European Parliament 2011a). It stressed how India should not be an exception to the EP’s pledge not to pass FTAs ‘without high commitments on labour and environmental standards’ (European Parliament 2013: 16). It also demanded that any future FTA between the EU and India allows for the suspension of the agreement in case of a violation of such clauses (European Parliament 2014: 14).

This shows that the negotiators have tried several times to expand the EU win-set to create an overlap with that of India, but that they have been stopped in this attempt by the EP. The EP has a diametrically opposed position to India’s on this issue, and it has made it very clear that it will never accept the exclusion of far-reaching political clauses. By insisting on these issues, the EP has reduced the EU win-set and the flexibility of the negotiators to meet India’s demands, and there is consequently still a significant gap between the two win-sets. At this stage one cannot know whether these political clauses will receive greater attention by the Member States later on in the negotiation process, and evoke a commitment to such clauses, but so far the Council negotiations have focused on technical issues, and the EP has thus been the only actor to pull back the negotiators, and hindered them in their attempt at compromising and moving towards the Indian position.

***3.3. IPR Provisions for Pharmaceuticals***

The pharmaceutical industry is the EU’s fifth largest industrial sector, and it contributes significantly to the EU’s external trade (EFPIA 2015). Although the EU is facing increasing competition in this sector from emerging markets, such as India, it still has a significant comparative advantage in the area of pharmaceutical research and development. It is thus keen to strengthen intellectual property protection and ensure adequate legal protection of new pharmaceuticals in its FTAs with third parties.

In the BTIA negotiations, the negotiators, who are working within DG Trade’s remit to promote liberalization and fair global competition based on EU compatible rules and standards (European Commission 2006a), proposed strict IPR regulations in pharmaceuticals that would go beyond the WTO’s TRIPS agreement, including an extension on patent terms and data exclusivity (Correa 2009: 3). This proposal was supported by the Member States in the Council. Germany in particular has been vocal on this issue and has often complained about India’s relative lack of patent protection (Sheperd and Wauters 2013). The pharmaceutical industry is very well organized and active at both EU and national levels (e.g. Dür and De Bièvre 2007), and it has made the case for strong IPR protection to maximize the value of the new market access to India and ensure that innovative pharmaceutical companies in the EU are well protected and compensated for their investment in research and development (EFPIA 2011).

India, on the other hand, has always been unwilling to commit to agreements beyond TRIPS (Correa, 2009). It has a strong generic pharmaceutical industry, which produces the vast majority of generic medicines that are used by development NGOs across the world, and it is often referred to as the ‘pharmacy of the developing world’ (Wouters et al. 2014:859). Its lax rules on IPR and patents have enabled huge productions of generic medicine at affordable prices, which has benefitted both the Indian pharmaceutical industry and developing countries. The EU proposal for the inclusion of stronger IPR provisions on patents and data exclusivity was consequently rejected by India as it feared it would threaten India’s freedom to produce and export low-cost lifesaving medicines (Correa 2009: 3). However, the pharmaceutical lobby was very strong and the EU proposals for extensive TRIPS-plus IPR provisions remained on the table (Wouters et al. 2014: 858), and it was not until the mobilization of NGOs and the public outrage at the effect that BTIA could have on the production of generic medicines that the negotiations have changed direction. These NGOs from both India (e.g. Forum against FTAs and India FDI Watch) and the EU (e.g. Oxfam, WIDE, Médecins Sans Frontières, Unitaid) found a sympathetic institution and effective access point for their lobbying in the EP, which is strongly in favour of ensuring access to medicines for developing countries, and which has influenced several EU trade negotiations on health matters (Koivasulo and Watt 2014: 580).

Echoing the concerns of these NGOs, the EP raised its objections to the extensive provisions on IPR suggested by the negotiators. It has long defended calls not to seek TRIPS-plus standards when it may affect access to medicine in developing countries (e.g. European Parliament 2007), and it became a vocal defender of India’s interests in this aspect of the BTIA negotiations (e.g. European Parliament 2011a). Although the negotiators initially had strong preferences for an extensive regulatory framework on IPR, they took the arguments of the EP on board. Following its objections, the negotiators realized that they had to compromise on the IPR provisions. They called on Trade Commissioner de Gucht to address the EP, and he stressed that the FTA would not ‘interfere with the trade of generic medicines in transit […] nor making export of medicines from India to other developing countries difficult’ (European Parliament 2011b). However, there was still scepticism expressed in the EP. The negotiators then had to emphasize that ‘the FTA will not require any changes in Indian IPR legislation regarding pharmaceuticals’ and that the ‘EU fully acknowledges India's right and capacity to manufacture and export life-saving medicines to other developing countries’ (European Commission 2013b). The opposition expressed by NGOs and channelled through the EP thus contributed to the withdrawal of the draft provisions on patent term extension and data exclusivity – a move that has been welcomed by the EP (Interview, EP official, 8/3/2013).

This shows how initially there was a gap between the positions of India and the EU negotiators (who were supported by the Member States). However, the pressure from the EP led the EU negotiators to revise their position, thus expanding the EU win-set to the extent that it overlapped with that of India. With its increasing power over trade negotiations, the EP was able to successfully voice the concerns of a huge number of development NGOs, and thus influence the result of the negotiations. Although this involvement by the EP made the internal negotiations more difficult and time consuming for the EU negotiators, it facilitated international agreement at Level I, albeit slightly beyond the preferred outcome of the EU negotiators. This can be likened to Putnam’s (1988: 454) notion of ‘reverberation’, whereby Level I negotiators find allies at their opponent’s domestic table, which can help ‘tipping the domestic balance and thus influence the international negotiations’. Even if the Indian negotiators did not interact directly with the EP,[[5]](#footnote-5) there was a convergence in preferences on this particular issue between India and the EP. Through this synergy of interests, the EP pushed the EU negotiators to revise their proposal to respond to some of India’s concerns, and an overlap of the two win-sets has been created.

**4. Negotiating Dynamics**

The previous section shows how the win-sets are shaped by the preferences of the relevant domestic constituents, and how the contours of the win-sets are important for understanding Level I agreements, or the lack thereof. This section analyses how the negotiating dynamics have changed both domestically and internationally with the increased power of the EP. It looks at the interactions of the EU negotiators and how they try to pursue their own pro-liberalization preferences, but also how they have a strategic interest in the conclusion of BTIA. It shows how the negotiators are placed in a new situation in which they have to spend more time with the EP domestically, and in which their ability to pursue their own interests vis-à-vis India is reduced.

***4.1. Level II Negotiations***

4.1.1. The Council of the EU

The dynamics of the deeply institutional relationship between the EU negotiators and the Member States in the Council have not changed with the increased powers of the EP. According to Articles 207 and 2018 of the TFEU it is still the Council that authorises the negotiations to start by providing the negotiators with a mandate. The negotiators then ‘conduct these negotiations in consultation with a special committee’, i.e. the Trade Policy Committee (TPC), which shall ‘assist’ the negotiators. And in the end the Council authorises the signing of the international agreement and ratifies it. The dynamics of the negotiations within the Council are often analyzed along these three stages of the mandate, the discussions in the TPC, and the ratification, focussing on the balance between Commission negotiating autonomy and Member State control (e.g. Delreux 2008; Dür and Elsig 2011).

For the mandate in the BTIA negotiations, the negotiators prepared the proposal based on the HLTG report, and presented it to the Council in December 2006. It recommended a comprehensive FTA aimed at improving market access for goods and services and covering ‘substantially all trade’ (European Commission 2006b). The mandate thus reflected the offensive preferences of the Member States, but it was very broad in nature and left any specific details and political aspects out of the proposal. The negotiators thus reduced the scope for any potential protectionist reservations at this stage (Interview, Commission official, 7/3/2013). Furthermore, at the same time as asking the Member States to adopt this mandate proposal, the negotiators also asked them to adopt the mandates for FTA negotiations with ASEAN and South Korea (European Commission 2006b). This way the negotiators promoted a comprehensive approach, and the discussions in the Council focused on broad questions rather than details for the individual trading partners. Therefore, there was little reason for the Member States to object, and the negotiators could enter the Level I negotiations with India with a relatively broad mandate.

The subsequent TPC negotiations reflect the strong institutional relationship and well-established working procedures that have developed between the Commission negotiators and the Member States over time. The TPC brings together the negotiators and technical experts from the Member States on a weekly basis to allow the Member States to review progress and to push their interests and raise objections, thus setting the terms of reference for the negotiators at Level I. During the first few years of the BTIA negotiations, they were discussed frequently in the TPC. Yet, given the strong convergence in market access preferences and lack of defensive interests, these negotiations have proceeded smoothly and caused few difficulties for the negotiators, making the principal-agent based question of whether the autonomy of the negotiators is reduced due to Member State control irrelevant. The TCP meetings consequently serve more to update the Member States on progress (or lack thereof) in the negotiations with India, than to debate any diverging interests (Interview, Commission official, 7/3/2013). This has lead to a significantly different dynamic from those negotiations in which there are strong divergence in preferences, and where the negotiators have to work hard to find compromises and to get the Member States to agree to a joint position.

Even if the ratification process is far away given the lack of win-set overlap, it is clear that the delay in the negotiations is not due – as in many other negotiations – to any difficulties in the Council negotiations at Level II. Even if the Member States might have to settle for an agreement that is less far reaching than initially hoped, there are no threats of non-ratification.

4.1.2. The European Parliament

While the EU negotiators’ relationship with the EP is far less developed and institutionalized than that with the Council, this section shows how it is increasing in importance and how an inter-institutional working relationship is evolving.

Prior to the Lisbon Treaty, the EP played a limited role during trade negotiations (Woolcock 2012: 56). There was no legal obligation for the Commission to ask for the EP’s assent, and even if in practice it often did ask for it (ibid. 60), the lack of legal ratification powers reduced the ability of the EP to effectively threat to reject an agreement. But since the Lisbon Treaty the EP gives its consent to all EU trade agreements (TFEU, Article 218)[[6]](#footnote-6). The Treaty also obliges the Commission to ‘report regularly to […] the European Parliament on the progress of negotiations’, and to keep it ‘fully informed at all stages of the procedure’ (TFEU, Articles 207, 218). This requirement to consult the EP is further strengthened with the *Framework Agreement* (European Communities 2010) which states that ‘The Commission guarantees that it will apply the basic principle of *equal treatment* for Parliament and the Council, especially as regards access to meetings and the provision of contributions or other information’ (ibid. §9) and that ‘Parliament shall be immediately and fully informed at all stages of the negotiation and conclusion of international agreements’ (ibid. §23).

Although the EP lags behind the Council in terms of legal powers as it does not have the right to approve the mandate, and it is only the Council which has an ‘assisting’ role during the negotiations (TFEU, Articles 207, 218), it has already exercised a significant influence on the EU negotiators, and it is clear that the Treaty obligations and the threat of a potential ratification failure have affected the negotiating dynamics.

The BTIA negotiations started two years before the Lisbon Treaty entered into force, and it shows how the negotiators have had to adapt their behaviour, and how they are faced with an increasingly powerful domestic constituent, whose preferences they cannot ignore. Already during the initial treaty discussions about providing the EP with increased powers, the specialist International Trade Committee (INTA) was established in 2004 to give more attention to trade negotiations. This committee took an early interest in the EU-India negotiations and has adopted numerous resolutions on the matter. Building on its new Treaty powers, the EP then set up a Regular Monitoring Group to keep informed about progress in the negotiations with India. The group consists of representatives of the seven political groups within INTA. These MEPs invite the negotiators on a monthly basis for an ‘informal in camera discussion’ (Interview, EP official, 8/3/2013).

The negotiators themselves have also been proactive in establishing direct inter-institutional relations with the EP. They are providing technical assistance and regular briefings for the INTA members and to the MEPs’ assistants and policy advisors. As expressed by a DG Trade official: ‘…you need to make sure that you have the Member States on board, you keep quite regular exchanges of information with them, but if at any time you neglect the Parliament you may come for a nasty surprise at the end of the process’ (Interview, 7/3/2013). Given the political nature of many of the issues discussed in the BTIA negotiations, the negotiators are acutely aware of the importance of involving the EP. As explained by the same official: ‘Any information that we currently give to the Member States also goes to the EP. We discuss more frequently with the Member States […] but when you really feel that you are coming to some hard political choices, I would say probably it is even more important to engage the key MEPs than it is to engage the Member States’ (ibid.).

The interaction between the negotiators and the EP has thus increased significantly, making the domestic negotiations more complex and time consuming for the negotiators. Through this interaction, the EP has been able to exercise considerable influence over the BTIA negotiations, both by expanding and restricting the EU win-set, and by restricting the ability of the negotiators to push their own interests.

***4.2. Level I Negotiations***

At Level I the EU negotiators meet with their Indian counterparts in regular negotiating rounds, alternating between Brussels and New Delhi. Between 2007 and 2013 there were 12 full rounds, and in between them were smaller meetings at expert-level focusing on specific aspects of the negotiations. Since 2013 there has however been a stand still in the negotiations due to different levels of ambitions and expectations, as clearly illustrated by the gaps in the win-sets. Yet, both parties have expressed an interest in resuming talks to eventually try to bridge these gaps and reach an ambitious BTIA (Commission 2015b; Vincenti 2015).

The international context of any EU trade negotiation matters, and the characteristic of the negotiating partner in relation to the EU clearly impacts on the negotiating dynamics (Da Conceicao-Heldt and Meunier 2014). Two-level game analysis accounts for the influence of the power and preferences of the third party on the negotiations, an aspect which has often been overlooked by other analyses of EU trade negotiations (ibid.), and for the impact of the domestic game on the dynamics of the international negotiations. Before exploring these dynamics and how they affect the EU negotiators, particular focusing on the impact of the EP, the BTIA negotiations are set in the context of the increasingly symmetrical relationship between the EU and India.

The EU has generally been seen as a very powerful and influential negotiator with strong institutional capacity and memory, which together with its economic strength, has given it a significant advantage over many of its negotiating partners (Woolcock 2005: 297). However, the BTIA negotiations reflect a new generation of trade negotiations in which the EU faces economically stronger counterparts, such as Canada, Japan, South Korea and the US, and the asymmetrical nature that has dominated many of the EU’s international trade negotiations (Duchesne and Morin 2013: 6) cannot be seen in this case. The EU’s relative strength has declined following the euro crisis, while India’s economy continues to expand. The EU sees India as a key player in the Asian market, and BTIA would help strengthen EU competitiveness in the global market and enhance its role as a global actor (Khandekar and Sengupta 2012). For India, the EU is however no longer seen as relevant as it used to. India suffered less from the economic crisis in 2008, and it is integrating further into the growing Asian market. For example, its trade with the EU is growing at a slower rate than its trade with other Asian countries such as China and Korea (Winand et al. 2015: 2). In addition, the EU has so far had low priority for the new Modi government, which frequently expressed its opposition to BTIA during the previous government led by Prime Minister Singh (Winland et al. 2015: 8-9). Naturally the Indian economy would benefit from BTIA, and the EU is an attractive market for specific sectors of the Indian economy, but it is clear that it will not be committed to an agreement beyond its own terms. In addition, India is recognized as a ‘tough negotiating counterpart’ and a ‘hardliner with a defensive strategy’ (Ramdasi 2010: 35). As a result, the BTIA negotiations take place in a context of relative equal bargaining power.

Given this level of symmetry, it is clear that the EU negotiators will meet resistance in the areas where there are strong divergences in preferences between the EU and India. In the case of market access, the EU negotiators have had to work hard to get India to gradually meet at least some of the EU demands. Although they have succeeded in lowering many of the tariffs in India’s initial offer, the deal on the table is still far from the preferences of both the Council and the EP. However, the Indian negotiators feel that they have already conceded a lot and they will not be pushed into making further concessions without their own domestic support (Interview, representative of the Indian negotiating team, 9/3/2013). This firm stance by India is reflected upon by one Commission official: ‘As time goes by we have lowered our expectations, dropped some products…. our demands have been watered down just by force of nature’ (Interview, 8/3/2013). For the EU negotiators it is thus a question of trying to maintain an offensive approach and push for further tariff reductions at Level I in an attempt to widen India’s win-set, while at the same time seeking to widen the domestic win-set by convincing their own constituents that soon they will have reached the best possible offer they can get from India, and that the Member States and the EP have to lower their expectations (Interview, Commission official, 7/3/2013). This shows how the negotiators are ready to compromise on their market access preferences in order for an agreement to be reached.

Although the impact of the EP is limited in this case as there is such strong convergence in market access preferences within the EU, it reinforces the contours of EU domestic win-set. As shown above, this does not make it any easier to reach an agreement with India, as the negotiators now have two domestic constituents that have to be persuaded to meet some of he concerns expressed by India in order for the two win-sets to move closer to each other. In the words of Putnam (1988: 444): ‘Glancing over his shoulder at Level II, the negotiator’s main problem in a homogenous conflict is to manage the discrepancy between his constituents’ expectations and the negotiable outcome’. From the negotiators’ point of view, this is a very different dynamic from that of defending a package deal of both defensive and offensive interests vis-à-vis a negotiating partner that is dependent on the EU market, and where the negotiators can present a ‘take it or leave it’ offer (Bretherton and Vogler 2006: 79).

The case of the inclusion of political clauses – where there is still a big gap between the win-sets due to the insistence of the EP to include such clauses, and India’s strong resistance to mixing political aspects with trade issues – illustrates how the EU negotiators initially were willing to accommodate India’s concerns, but have had to change their approach as the EP has made it clear that it will not ratify an agreement without meaningful and legally binding political clauses. The EP has consequently made it harder for the negotiators to pursue their strategic interest in reaching an agreement with India. They are in a situation where they have to push these political clauses in the Level I negotiations, trying to convince India to agree to their inclusion, while India is adamant that BTIA focuses solely on economic issues, and that it cannot be expected to change its domestic policies to meet the norms set by the EU (Khandekar 2012). The EU negotiators are severely restricted in their ability to change India’s win-set given that their usual carrot, i.e. access to the EU market, is not available to them to same extent as in more asymmetrical negotiations. It is no longer a question of the EU offering or withholding access to its market as a bargaining tool, and it is clear that the so called ‘hands-tied’ argument (Schelling 1960), i.e. referring to a domestic constituent’s – in this case the EP’s – threat not to ratify the agreement, has so far been an ineffective bargaining chip vis-à-vis India, and it is difficult to see how the two win-sets will overlap on this point.

Of course it is difficult to know whether the EP would actually commit to its rejection of any agreement that does not have meaningful political clauses if it would mean that the whole BTIA project would be jeopardized. Yet, as the EP has already demonstrated that it can and will reject an agreement that does not sufficiently reflect its preferences, as the case of ACTA, a threat of veto has definitely become more credible (Van den Putte et al. 2014: 4).

Finally, in the case of IPR provisions for pharmaceuticals, where there was initially a gap between the two win-sets due to India’s rejection of the EU’s proposal for strict IPR regulations, reflecting the preferences of the negotiators and the Member States in the Council, the EP succeeded in expanding the EU win-set by identifying synergies between its own and India’s interests. Given the EU negotiators’ strategic interest in reaching agreement, they were willing to compromise their own preferences as well as putting pressure on the Member States to accept the arguments made by the EP. An overlap of the win-sets was achieved through the process of ‘reverberation’, albeit beyond the preferences of the negotiators, and it is clear that the negotiating dynamic at Level I has been affected by the increased institutional power of the EP at Level II.

This case shows how the EP has given development NGOs effective access to the decision-making process. These NGOs have been actively lobbying on the issue of access to medicines in developing countries for a long time, and they have established strong links with the European Commission and organized high profile public campaigns (Dür and De Bièvre 2007). Yet, this did previously not translate into influence over EU trade policy, due to the more effective counter lobbying by the European pharmaceutical industry aimed at preventing a weakening of the protection of IPR. The latter was able to provide the detailed and precise information that the Commission needs to prepare its proposals, as well as influencing the positions of several of the Member States (ibid.). However, with the increase in power of the EP, NGOs have been provided with an additional and increasingly effective channel of influence. The EP has always been open to the demands of NGOs and has frequently voiced their concerns on trade related matters, but before it was granted veto power its concerns could largely be ignored. The BTIA negotiations show how the negotiators now take the concerns expressed by the EP into serious consideration, and thus in turn provide NGOs with greater influence over the negotiations.

**5. Conclusions**

Through the use of two-level game analysis, this article shows how the EP has exercised significant influence over the BTIA negotiations by affecting the EU win-set, and thereby the potential for an international agreement to be reached between the EU and India. It explains how the EP has significantly reduced the EU win-set concerning the inclusion of political and social clauses, thereby hindering an agreement with India, while it has expanded the EU win-set in the area of IPR provisions for pharmaceuticals, thus facilitating an international agreement. It also demonstrates how the EP has affected the negotiating dynamics both internally and externally, highlighting how the negotiators have increased their interactions with the EP significantly, and how they have had their preferences somewhat compromised by the EP in their attempt at trying to reach an agreement with India.

Theoretically the article extends the two-level game analysis to include the EP as an additional domestic constituent. Even if the strong homogeneity in preferences between the Member States and the negotiators might be unique to this case, as other negotiations might expose greater preference divergence, it is clear that approaches that focus mainly on the dynamics in the Council negotiations will overlook the influence of the EP on the negotiation process. This article shows how the preferences of the EP need to be taken seriously, and how the EP can exercise influence over EU trade negotiations. This influence can only be expected to increase as the EP’s experience and expertise of trade negotiations deepens, and as the trade agenda becomes more and more politicized.

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1. Sometimes three-level game analysis is used with the argument that there is a third level of negotiations domestically within the Member States. However, this approach is not adopted here as, first, Putnam’s claim that the negotiator provides the link between the negotiating levels needs to be respected. Most three-level game analyses break this link by focusing on the Commission as the link between the international and EU level negotiations, and the national representative as the link between the EU-Level and the domestic negotiations (Frennhoff Larsén 2007). Second, although many trade negotiations in the past could be likened to a three-level game as any agreement had to be ratified both by the Council *and* by the national parliaments, this is no longer the case since the Lisbon Treaty moved the ratification requirement from the national parliaments to the EP for agreements of exclusive EU competence (Ripoll Servent 2014: 570). Consequently most formal ratification takes place at the EU domestic level. [↑](#footnote-ref-1)
2. While principal-agent and two-level game approaches can complement each other (e.g. Ripoll Servent 2014; Young 2012; Young and Peterson), principal-agent analysis is not adopted here as 1) its key assumption of divergence of preference between principals and agent does not reflect the strong unity in preferences between the EU negotiators and the Member States in the BTIA negotiations. 2) In order to include the EP in the model the other key assumption of a clear contractual relationship between agent and principal would have to be relaxed. [↑](#footnote-ref-2)
3. The EU negotiators (which are based in DG Trade) also formally interact internally with other DGs of the Commission. However, in the case of the BTIA negotiations there is strong convergence in interest between the Directorate-Generals due to the small number of defensive interests expressed by DG Agriculture and the limited involvement of DG Development (Interviews, Commission official, 7-8/3/2013), and the negotiators can be seen as representatives of the Commission as a whole. Consequently, these internal interactions do not form part of this analysis. [↑](#footnote-ref-3)
4. Even when decisions are taken by qualified majority voting, there is a general practice in the Council to try and find a consensus (Woolcock 2005). [↑](#footnote-ref-4)
5. To the Indian negotiators it is clear that they negotiate with the EU negotiators, and there are no direct contacts between them and the EP (Interview, Member of the Indian negotiating Team, 8/3/2013). Similarly there are limited interactions between MEPs and their Indian counterpart, since India is one of few countries that does not have a standing group of MPs who have relations with the EP (Interview, EP Official, 8/3/2013). [↑](#footnote-ref-5)
6. For a comprehensive overview of the process and discussions leading to the agreement to increase the legal powers of the EP with the Lisbon Treaty, see Devuyrst 2013. [↑](#footnote-ref-6)