

# TWISTING THE DRAGON'S TALE INDIA'S PATH TO SUCCESSFUL SEZs? THE ANSWER MAY LIE IN CHINA

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*A flourishing group of SEZs, otherwise known as Special Economic Zone, seems to be a golden goal for every developing nation that aspires to be one of the giants in international trade. Both India and China had realized the same, possibly three decades back. What differs is the way these two countries have approached this issue. The reason why China is reaping the success now is because of appropriate policy measures that she adopted from time to time. But all is not well with the Chinese model either. India, on the other hand, had been a bit late in implementing the SEZ model. Initially it started emulating China but things just didn't work the way they were expected to. Till date she has not been successful in providing a flexible economic environment similar to that of the SEZs in China. An overview of the land laws, labour laws, and government policies clearly indicates why this is so. It is time to revisit our past and learn from our mistakes. There are a number of provisions of law that needs to be amended, reformulated and debated upon so that we can have a definite vision of our SEZs in future and meet our aspirations efficiently*

## I. INTRODUCTION

SEZs have existed in Asia for many years now. The reason why SEZs have become so popular in Asia is because this particular model of trade has resulted in a rapid growth in the industries and the economy augmented by the process of globalization and emergence of international organizations like the World Bank and the IMF. We have particularly chosen to study India and China in this regard because both these nations have made remarkable transformations

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within their economies. It is believed that the success of SEZs in China, which introduced this model way back in the 1970s, prompted India to introduce the same policy in 2000. India has therefore closely emulated China's policies aspiring to achieve similar results. However one needs to be cautious about wholesale importation of China's methods. India must acknowledge and take into account the vast differences between the two countries when crafting its own policies.

The main purpose of SEZs in India is to serve the promotion of exports. The Commerce Ministry of India has shown great confidence regarding its growth. The Commerce and Industries Minister, Mr. Kamal Nath claims that exports will ultimately grow by five times, GDP will rise 2%, and will generate around 30 lakh jobs across India.<sup>1</sup> The government also claims that these SEZs will attract Foreign Direct Investments (FDI), enable transfer of modern technology and will create incentives for infrastructure. India has also received a good response from these SEZs, so far. Fifteen of the SEZs that are presently operational have been able to maintain an amount close to US\$ 780 million and have created over 100,000 jobs.<sup>2</sup> But this humble success has been grossly overshadowed by the phenomenal prosperity of China's limited SEZs. Shenzhen, one of the first and the biggest SEZs in China, has transformed itself from a fishing village to one of the world's most rapidly growing cities.<sup>3</sup> Today, it is home to China's state of the art technology leaders like Huawei and ZTE. According to official estimates, its economy grew at an annual rate of 16.3% from 2001-2005. India, on the contrary, has decided to encourage a number of small enclaves instead of allotting huge areas of land. Several newspaper reports are indicative of the fact that as many as 267 projects have already been cleared 'in principle' by the government. Out of these 150 proposals have won final approval. India has also come up with a central legislation governing the SEZs in 2005 and subsequent rules in 2006. But there is a down side to this as well. Land has been a serious constraining factor for India's development process. This process of land acquisition has already deprived thousands of peasants and has brought the poor landless labourers at the brink of grave poverty and unemployment. Apart from forceful land acquisition and displacement of peasant population, improper and inadequate compensation has also been a major problem for the Indian Government.

## II. THE CHINESE MODEL

The Chinese economy, in 1979, had just emerged from a hazardously closed economic policy prescribed by Mao Zedong, and was still reeling from its after-effects. In 1979, Deng Xiaoping committed the Chinese economy to reform, believing, as a true Communist would, that the economy is the base of all society, and in it lays the answer to the majority of society's woes.

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<sup>1</sup> *SEZ and Land Acquisition*, FACTSHEET FOR UNCONSTITUTIONAL ECONOMIC POLICY 2.

<sup>2</sup> Lauren Fulton, *India's Way of Crafting SEZs*, available at <http://hir.harvard.edu/articles/1523/> (Last visited on August 22, 2007).

<sup>3</sup> *Id.*

Deng Xiaoping's version of "market socialism" envisaged a slow, controlled opening of the Chinese economy to the outside world. Having no experience of the capitalist system, and unable to concede ideological defeat to it, the Chinese government decided to incorporate some aspects of it, within a communist economic structure. Strangely enough, it worked. Four large coastal areas were allocated to become special economic zones - Shenzhen, Zhuhai, Shantou, and Xiamen in the Guangdong and Fujian Provinces. In March, 1984, Hainan Island along with certain coastal-port cities was designated as SEZs. Those cities included Dalian, Qinghuangdao, Tianjin, Yantai, Qingdao, Lianyungang, Nantong, Shanghai, Ningbo, Wenzhou, Fuzhou, Guangzhou, Zhanjiang, and Beihai. Subsequently, China also declared the three river-delta areas to be open economic zones, and listed additional areas as special development areas.<sup>4</sup>

The primary objective of the policy was to focus on the export-oriented industry. The basic idea was to encourage both domestic and foreign companies and investors to build upon the land reserved in this manner, and make products that would be suitable mainly for exports, and therefore earn foreign exchange. The policy was two pronged, and ingenious. Foreign Investment Enterprises (FIEs) would not only pay for the land they would use, and its development, but also increase the number of exports from China, therefore leading to an overall increase in customs duties levied on these products, and all the currency so collected would land in the coffers of the PRC.

In order to facilitate their policy, the governments of these provinces formulated tax rules that allowed tax holidays, breaks, and phased taxation policies for such investors. The prospect of cheap labour, and easy access to certain resources, served as further incentives for such investment. The Central Government aided the process by adopting the new Constitution in 1982, which, for the first time, allowed Foreign Direct Investment (FDI) in the country.<sup>5</sup>

The PRC has since passed three basic statutes designed to regulate foreign direct investments in China: the Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment (Equity Joint Venture Law or EJV Law), enacted in 1979 and amended in 1990; the Law of the People's Republic of China on Sino-Foreign Co-operative Enterprises (Contractual Joint Venture Law or CJV Law), enacted in 1988; and the Law of the People's Republic of China Concerning Enterprises with Sole Foreign Investment (Sole Foreign Investment Enterprises or SFIE Law), enacted in 1986.<sup>6</sup> All three are meant to regulate, as well as promote Foreign Investment. All three include protectionist clauses, which do not extend to Chinese investors.

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<sup>4</sup> Brink & Li, *China on the Horizon: Exploring Current Legal Issues*, 28 J. MARSHALL L. REV. 567 (1995).

<sup>5</sup> Baker, *Forgotten Legal China*, 17 Hous. J. INT'L L. 364 (1995).

<sup>6</sup> WANG & HO, CHINESE LAW (1999).

These laws are significant, because they represent an increasingly open economy. The reason they exist today is because the rules laid down in these statutes are essentially derived from the regulations that originally governed the Special Economic Zones. China used the Special Economic Zones as a social and economic laboratory in which new, controversial approaches to the challenges of modernization could be tested, before their application to the mainland.<sup>7</sup>

After the central leaderships' directive in 1979 (made by the NPCSC) assigning special trading rights to Guangdong province, its legislature began to formulate the rules that would implement its status as an SEZ. In August 1980, the legislation was promulgated as an ordinance referred to as the Regulations on the Special Economic Zones in the Guangdong Province.<sup>8</sup> These regulations later formed the skeleton of every other set of regulations that gave effect to, or described the laws within Chinese SEZs. The Rules that govern the administration of SEZs are formulated at the level of the local legislature.

### A. LAND USAGE LAWS

Article 10 of the Chinese Constitution<sup>9</sup> states

*“All urban land shall belong to the State. All rural and suburban land shall be collectively owned, except that owned by the State in accordance with the law”*

The PRC practices socialist public ownership of Land.<sup>10</sup> This means that there are essentially two kinds of land in the PRC – Collectively owned land (land owned, used, and developed by collectives, or communes) and land that is owned by the State. Any land that is unclaimed, or is disputed, is considered to be state owned land. The State has the right to requisition land for various purposes, and in doing so, must pay compensation to the collectives.<sup>11</sup> No unit or individual may seize, buy, sell land or make any other unlawful transfer of land.<sup>12</sup> That is to say, in China, land cannot be freely transacted, and is subject to restriction.

In the PRC, therefore, land-users, and landowners can be completely different parties. Ownership is an absolute right, whereas land-use right is a right derived from the right of ownership. Land-use right consists of four rights – the right to use, possess, profit, and manage.<sup>13</sup>

<sup>7</sup> Ann Fenwick, *Evaluating China's Special Economic Zones*, originally published in FOLSOM & MINAN, *LAW IN THE PEOPLE'S REPUBLIC OF CHINA: COMMENTARIES, READINGS AND MATERIALS*, 257 (1989).

<sup>8</sup> *Id.*

<sup>9</sup> Adopted in 1982 and amended in 1988 and 1993.

<sup>10</sup> See Art. 2, Land Administration Law, 1988.

<sup>11</sup> *Id.* In relevance to SEZs, see Art. 5, Hainan Province Land Management Measures, 1988.

<sup>12</sup> Art. 2 Land Administration Law, 1988.

<sup>13</sup> WANG & HO, *CHINESE LAW* (1999).

The Special Economic Zones in China, under a series of ordinances in 1988, have the right to specify procedures for the acquirement of land-use rights. A SEZ enterprise or individual only has the right to use the land upon approval but not the right to its ownership.<sup>14</sup>

In Shenzhen, for example, transfer of land-use right refers to the acts through which the Shenzhen Municipal People's Government assigns the state-owned land-use right to the land user for a certain number of years by means of auction, invitation to bid or reaching an agreement through consultations while the land user pays the fees for assignment of land-use right to the Municipal Government.<sup>15</sup> The Municipal Government is responsible for the overall planning of the Special Economic Zone.<sup>16</sup> A land user unit or individual only has the right of use of its allotted piece of State owned land and is not authorized to alter the purpose of usage of the land without approval.<sup>17</sup> The laws also state many other controlling mechanisms, such as the total time for which the land-use rights may be in force<sup>18</sup>, fines for failure to develop the land<sup>19</sup>. Finally, if a transferee fails for two consecutive years to meet the time limit stipulated in the land use contract for handling of investment and construction matters, the Municipal Government has the right to dissolve the land use contract, recover the land use rights and, depending on the investment situation, claim compensation.<sup>20</sup>

Again, in Xiamen, all the enterprises must observe the overall construction program of the SEZ in the use of land, and the construction projects and their overall distribution that have been approved must not be changed without authorization.<sup>21</sup> Other SEZs have similar rules with regard to planning of the use of land in them

It is important to note that the PRC recognizes no case law. So, all disputes arising from the rules and legislations mentioned above, are adjudicated upon, not by a judge, but by councils that are placed under the Municipal Governments, such as the Land Administration Department in Shenzhen.<sup>22</sup>

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<sup>14</sup> Art. 9, Regulation for the Administration of Land Use in the Xiamen Special Economic Zone, 1984.

<sup>15</sup> Art. 2, Regulations of Shenzhen Special Economic Zone on Assignment of Land-Use Right, 1998.

<sup>16</sup> Art. 3, Regulations of the Shenzhen Special Economic Zone on Land Management, 1988.

<sup>17</sup> Art. 4, Regulations of the Shenzhen Special Economic Zone on Land Management, 1988.

<sup>18</sup> Art. 14, Regulations of Shenzhen Special Economic Zone on Assignment of Land-Use Right, 1998.

<sup>19</sup> Art. 56, Regulations of Shenzhen Special Economic Zone on Assignment of Land-Use Right, 1998.

<sup>20</sup> Art. 17, Art. 4, Regulations of the Shenzhen Special Economic Zone on Land Management, 1988.

<sup>21</sup> Art 3, Regulation for the Administration of Land Use in the Xiamen Special Economic Zone, 1984

<sup>22</sup> See Chapter VII, Regulations of Shenzhen Special Economic Zone on Assignment of Land-Use Right, 1998

The combined effect of all the regulations on land-use rights in Special Economic Zones in the PRC is an extraordinary degree of control over the way in which the land is utilized and developed. Indeed, land-use right may be sold, transferred, leased, mortgaged or used for other economic activities in accordance with law.<sup>23</sup> Even in these cases, the law requires additional registration, fees, and a renewal of the land-use contract<sup>24</sup> through a long process. The nature of the land-usage is always pre-determined by a municipal authority before the land-use right is granted, and the developer must always conform to the original plans made in agreement with the authority. The municipal authorities may exercise the power of unilaterally terminating the contract, if they feel that the development plans are not in accordance with the agreed plans. Ultimately, investors, whether they are Chinese or not, must submit to the demands and constraints imposed upon them by the municipal governments.

### *B. LABOUR LAWS WITHIN SEZs*

Protection of labour within SEZs, so often used to criticize their existence, is currently quite extensive in China. While many critics often claim that the wages paid in Shenzhen and in other SEZs in China are exploitative,<sup>25</sup> one must be careful in the assessment of these claims. As compared to the wages paid in developing nations, these wages may seem pitiful, and inadequate, but in comparison to the rest of China, Shenzhen provides higher wages for those working in export oriented industries. This can be attributed to the relatively protectionist policy of the SEZs towards their workers.<sup>26</sup>

The difference between SEZ labour regulations and labour regulations in other parts of China is that the SEZ regulations are adapted to market economic systems, while the other parts of China have at least two parallel labour relation systems, one for Chinese enterprises under the planned economic system and one for FIEs under a market economic system.<sup>27</sup> In the SEZs there has been established a labour market of mutual selection between employers units and employees.

As previously stated, the various SEZ provinces have some latitude in the rules and regulations which will control their zones. In Guangdong, all SEZ enterprises, except state-owned SEZs, have the autonomous rights to determine wage formats, standards, and methods of distribution. Guangdong Regulations

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<sup>23</sup> Art. 4, Regulations on Land Administration of SEZs in Guangdong Province, 1991.

<sup>24</sup> See Chapter III, Regulations of Shenzhen Special Economic Zone on Assignment of Land-Use Right, 1998.

<sup>25</sup> Bhaskar Goswami, *SEZs, Lessons from China*, available at [www.indiatogether.org/2007/feb/opi-sezschina.htm](http://www.indiatogether.org/2007/feb/opi-sezschina.htm) (Last visited on 15<sup>th</sup> Sep 2007)

<sup>26</sup> See Measures of the Shenzhen Municipality on Implementing the People's Republic of China's Law on Trade Unions, 2003.

<sup>27</sup> Baker, *Forgotten LEGAL CHINA*, 17 HOUS. J. INT'L L. 389 (1995)

relating to FIEs are very strict in regards to labour contracts. They require: (1) the existence of a labour contract; (2) the contract must be in writing; (3) it must be examined and approved by the labour administration department; and (4) an examination fee must be paid.<sup>28</sup> The regulation further states that a labour contract shall not take effect prior to examination and approval, and once approved, it must be strictly observed. No interference by either the enterprise or employee is allowed, as it is more of a trilateral rather than bilateral agreement. The Guangdong Regulations require timely payment of wages to the employees.<sup>29</sup> Distribution must be made each month and late payment will bear an interest rate of one percent each day starting from the sixth day after the payday. Further, the average wage in the FIEs must equal at least 120% of those in the state-owned enterprises, despite the fact that Article 4 of Guangdong Regulation on FIEs allows FIEs to determine their wage plans.<sup>30</sup>

The Xiamen SEZ labour regulations are much simpler. They allow the enterprises to determine the form and standards of compensation. They require, however, that the enterprise take out a liability policy with an insurance company designated by the municipal government.<sup>31</sup>

The success of these policies is reflected in the fact that all the SEZs have a strong workforce which consist of locals, as well as a significant percentage of migrants from other parts of China – so much so, in fact, that all SEZs in China are facing the problem of providing living space for these migrant populations.

### C. WHY THEY WORK

While we feel that India is affording similar incentives of tax holidays, breaks and subsidies, the current SEZ policy does very little to control what happens within SEZs and omits to protect the workers once the SEZ is set up. Chinese SEZs are carefully planned municipalities, with exact divisions of resources. The Chinese envisaged development of the SEZs in two ways:

Firstly, those acquiring the land-use rights were required to develop it according to plans that were approved by the municipalities. It was mandatory to do so under the land-use laws mentioned above. Significantly, SEZs in China make it mandatory that 80% of the land must be used for production, while only 20%

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<sup>28</sup> Art. 2, 4 Labor Regulations Governing the Special Economic Zones in Guangdong Province (1986-1994)

<sup>29</sup> *Id.*

<sup>30</sup> Baker, *Forgotten Legal China*, 17 Hous. J. INT'L L. 389.

<sup>31</sup> Regulations on Labor Management in the Xiamen Special Economic Zone (1985-94).

may be used for facilities for supporting people's livelihoods.<sup>32</sup> A major concern of those opposing SEZs in India is that only 25% of the land may be used for productions purposes, which allows the rest of the land to be used for business, which may not be export-oriented at all.

Secondly, the municipal authorities in the various zones had the responsibility of developing basic infrastructure within the SEZs.<sup>33</sup> In order to do this, they used the land development funds, which are composed of the profits earned from giving land-use rights. For example, in Shenzhen, the land development funds are composed of land development and municipal accessory facilities fee, land use fee, increment fee of land value and other profits on the land.<sup>34</sup> In Guangdong Province in general, payments collected from the sale of land-use rights are to be used for municipal construction and land development.<sup>35</sup> The same applies to Hainan.<sup>36</sup>

Initially, the cost of infrastructure development was very high, and very few FIEs took the chance of investing in the SEZs. In 1987, it was estimated that the trade deficit of SEZs was US \$714 million.<sup>37</sup> At the same time, For example, between 1985 and 1991, foreign investment in Guangdong province accounted for more than 20% of the national total.<sup>38</sup> The commitment of the government to the development of these zones, and the long-term strategies employed to maintain the level of inflow allowed the government to change its policy in the 1990s, without damaging the growth of these sectors.

The amount of tax revenue demanded from these sectors was significantly increased in the 1990s.<sup>39</sup> This was accompanied by a near saturation of allotted land in the SEZs, as well as the open door policy being expanded to other regions of China. A natural consequence of this was a spillover effect, and companies moved towards other parts of China.

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<sup>32</sup> Art. 5, Fujian Province, Regulations on Encouraging Foreign Investment in the Development and Management of Whole Tracts of Land, 1991. *See also* Regulations on Land Administration of SEZs in Guangdong Province, 1991.

<sup>33</sup> Art. 1, Regulations of Shenzhen Special Economic Zone on Supervision of Planning Land, 2001; Art. 5, Regulations on Land Administration of SEZs in Guangdong Province, 1991; Art. 2, Hainan Province Land Management Measures, 1988.

<sup>34</sup> All of these are collected from the investors seeking to use the land.

<sup>35</sup> Art. 7, Regulations on Land Administration of SEZs in Guangdong Province, 1991.

<sup>36</sup> Art. 28 Hainan Province Land Management Measures, 1988.

<sup>37</sup> Karen Mckenney, *An Assessment of Special Economic Zones* available at <http://www.ndu.edu/library/ic6/93S94A.pdf> (Last visited on September 15, 2007).

<sup>38</sup> Litwak & Quang, *Balanced or Unbalanced Growth: Special Economic Zones as Catalysts of Transition*, 26 JOURNAL OF COMPARATIVE ECONOMICS 15 (1998).

<sup>39</sup> *Id.*

By the end of the 1990s, the PRC had completed a successful experiment in attracting Foreign Investment. It had unexpectedly moved from a completely closed and inaccessible economy to the most powerful one in Asia. There have been externalities – mass migration into SEZs, environmental degradation, and an increasing income inequality – but the standard of life in China has improved. Life isn't as bad as it was in 1979.

## II. THE INDIAN EXPERIENCE SO FAR

### A. INDIA LACKED A SOLID START

India initiated the process of industrial growth immediately after political independence. It announced its first Industrial Policy resolution (IPR) in the Year 1948, till the 1970s, India followed a restrictive trade policy. The slow development in creating a strong Export base (as that of China) could be attributed to several faulty policy implementations on the part of the Indian Government.

India started its experimentation with exports by establishing a few small Export Processing Zones (EPZs)<sup>40</sup>. The first zone was setup in Kandala, a highly backward region of Kutchh in Gujarat in the year 1965. The second Zone came up in Santa Cruz, eight years later.<sup>41</sup>

The laws governing these zones were very rigid. Day-to-day operations were subjected to rigorous control. Zone authorities had restricted powers and the entrepreneurs had to acquire individual clearances from various state governments and central government departments in India. Custom procedures for bonding, bank guarantees and movement of goods were stringent as well. The absence of a distinct policy and the absence of a central implementation authority to coordinate and control these zones also acted as handicaps. The FDI policy was also highly restrictive. In fact the FDI climate in India was worst in comparison to other developing countries.<sup>42</sup> Apart from these, the package of policies and incentives were also not very attractive.

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<sup>40</sup> The standard definition applied by international organisations (See, World Bank, 1992 and UNIDO, 1995) states that an Export Processing Zone (EPZ) is an industrial area that constitutes an enclave with regard to customs' tariffs and the commercial code in force in the host country. The main difference between SEZ and EPZ is that the former is an integrated township with fully developed infrastructure whereas the EPZ is just an industrial enclave.

<sup>41</sup> Aradhana Aggarwal, *Special Economic Zones: Revisiting the Policy Debate*, ECONOMIC AND POLITICAL WEEKLY 4533.

<sup>42</sup> As per the 'Techno-Economic Potential Survey of Tamil Nadu' Draft Reports Vol III, Case studies (mimeo) Bombay 1976, the business environment rating index which compared the relative investment climate of 43 countries on the basis of 18 independent factors Indian zones were placed at the bottom for FDI.

To overcome these hurdles the government appointed various committees that pointed out these anomalies that affected the EPZs resulting in inordinate delays<sup>43</sup>

Post 1980, the government decided to step up its production by establishing four more zones in 1984. These were at Noida (Uttar Pradesh), Falta (West Bengal), Cochin (Kerala) and Chennai (Tamil Nadu). Later on the Vishakapatnam SEZ came up in Andhra Pradesh in 1989.<sup>44</sup> However the policy management remained virtually the same. No action was taken by the state to remove the existing rigidities in the laws that have been governing these EPZs.

This phase was followed by massive economic and policy reforms in 1991. A total of 146 circulars on EPZs/EOUs were issued by the Central Board of Excise and Custom, DGFT and RBI within a span of 10 years (1991-2000).<sup>45</sup> But now the zonal authorities were equipped with adequate powers, providing additional fiscal incentives, simplifying policy provisions and providing greater facilities. However these reforms could not manage to maintain a sustainable growth in manufacturing. The government was still crippled with old problems, for example, lack of government commitment to the programme, piecemeal policy reforms, poor regulation and site selection and failure to provide world class infrastructure,<sup>46</sup>

## *B. INDIA'S PREDICAMENT WITH LABOUR LAWS*

Like in many other countries, relaxation of labour laws were not a compulsory feature of the EPZs which means, all labour laws could be applied to these zones. The labour laws operating in India were widely different from each other. These included: The Minimum Wage Act, 1948; The Factories Act, 1948; Equal Remunerations Act, 1976; Industrial Disputes Act, 1947; Workmen's Compensation Law (Workman's Compensation Act, 1923 and Workmen's Compensation Rules, 1924), Industrial Employment Act, 1946, Trade Unions Act, 1926 and the Social Securities Act. The differences and the varying specifications enumerated by each of these Acts not only make it difficult for the entrepreneurs to implement them separately but it also hampers the autonomy of these companies. For example the Factories Act provides clauses ranging from safety, health and welfare conditions, working hours, leave, holiday, overtime, female and children employment etc. Right to form Trade Unions under the Trade Union Act also acted as a deterrent against investment.

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<sup>43</sup> Aradhana Aggarwal, *Performance of Export Processing Zones: A Comparative Analysis of India Bangladesh and Sri Lanka*, 8 INDIAN COUNCIL FOR RESEARCH ON INTERNATIONAL ECONOMIC RELATIONS (2005).

<sup>44</sup> But it could only become operational in 1994.

<sup>45</sup> Aradhana Aggarwal, *Export Processing in India* 6 (Working paper no. 148 on file with Indian Council for Research on International Economic Relations).

<sup>46</sup> *Supra* note 4 at 4534.

### C. LAND ACQUISITION

Land acquisition has been a serious issue pertaining to SEZs in India. There is no specific provision in the SEZ Act that talks about the ownership of the land taken by the state for the purpose of setting up SEZs. While acquiring the area of land as above, the legal right and possession of the land shall vest with the developer and he is also given a leasehold right over that area for a period not less than twenty years<sup>47</sup>. The identified area shall be contiguous and vacant and it shall have no public thoroughfare.<sup>48</sup> It is evident from most of the SEZs across the country that a vast area of land remains unused and yet is included under the SEZs. This Section therefore encourages encroachment of excess land which could have otherwise been used by the original landholders. As per Section 3(13) the developer may allocate space or built up area or provide infrastructure services to the approved units in accordance with the agreement entered into by him with the owner of such units. The state is not made a party to this agreement. In such cases, government is merely guided by principles like promotion of exports of goods and services, promotion of investments from domestic and foreign sources and creation of employment opportunities, development of infrastructure facilities etc.

The process of land acquisition for building SEZs in India is governed by the Land Acquisition Act 1984. The Act has resulted in large scale land acquisition by developers, displacement of farmers or poor landholders who are compelled to be satisfied with a meagre compensation and are left with no alternative livelihood to fall back upon.

The process of acquisition is essentially carried out in two ways, firstly any interested person<sup>49</sup> can go out in the market and acquire it from the owner by negotiating a price with him, or the government may acquire the land on behalf of the investor and then transfer it to him in exchange of some prearranged price. Under ideal circumstances the first method is an efficient one. Ronald Coase, the propounder of the famous "Coase theorem" said that the initial distribution of property rights doesn't matter as long as free buying and selling of assets are possible without transaction costs.<sup>50</sup> It's also an efficient idea considering the fact that the property will ultimately be owned by a person who has adequately compensated the seller. As is evident in this case there is no coercion on the part of the buyer and the seller freely consents to the terms of the agreement. Unfortunately, this utopian idea is bound to create problems in cases of government

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<sup>47</sup> Rule 7(1), Special Economic Zones Rules 2006.

<sup>48</sup> Sec. 7(2) of the Land Acquisition Act 2005.

<sup>49</sup> Note that, "person interested" as defined in Section 3(b) of the Land Acquisition Act, for the purpose of acquisition includes all persons claiming an interest in compensation to be made because of the acquisition of land under this Act-, and a person shall be deemed interested in land if he is interested in an easement affecting the land.

<sup>50</sup> Abhirup Sirkar, *Development and Displacement, Land Acquisition in West Bengal*, ECONOMIC AND POLITICAL WEEKLY 1439.

intervention in India. This is so primarily because because India unlike China, is a democratic nation where the government has to function under several checks and balances.. Secondly, the government does not have the capacity to satisfy an individual to the same effect as in the first case by adequately compensating him. The issue of speculative hold of land also acts as a hindrance in this regard.<sup>51</sup> Thus to mitigate this problem, and at the same time, to protect the investors, the government has to intervene. This is a common problem with all the Indian states now. But while doing so the government also has to keep in mind that if the owners are small and scattered, they cannot bargain effectively with big industrial houses.

So far the state governments (especially the West-Bengal government) have completely failed to perform this role. On the contrary they have gone overboard in appeasing the investors by providing land electricity water etc. at a highly subsidized rate, thereby giving them an unfair leverage over the poor and dispossessed farmers.

#### *D. LAND ACQUISITION ACT 1984—A CRITICAL ANALYSIS*

Under Section 35(1) of this Act any waste and arable land can only be acquired for public purpose or for the purposes of any company. If the government is satisfied after a preliminary inspection, then it may direct a collector to acquire and use such land as it may deem fit.

The above provisions of law clearly points out the element of force associated whenever the government is involved in cases of land acquisition. There is no provision in this Act that states that land shall not be occupied against the will of the landowners. The Act does not even provide any option under which the landowner can bargain with the government regarding the price of the land.

The Act allows use and procurement of land by any company only if it is engaging itself in any industry or work which is for a public purpose.<sup>52</sup> However, the reality is that “public purpose”, in the form of compulsory takings in India today, is in effect any purpose the government of the day chooses to use the land for.<sup>53</sup> The law needs to define “public purpose” with a fair degree of coherence. The contemporary course of action under which the government is blatantly and vehemently executing the process of land grab under the existing provision of law

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<sup>51</sup> Speculative land hold is a problem that occurs when a single piece of land is held by several land holders and all of them might not be equally eager to sell off their land due to several reasons. Once the investor personally negotiates with the landholder his bargaining position deteriorates vis-à-vis the next seller. Therefore with subsequent investments he becomes more eager to buy off the remaining pieces of land or else his entire investment will be wasted. Anticipating this, a speculative seller of land will hold out his land in an expectation of a higher price

<sup>52</sup> See Section 40(1) (aa).

<sup>53</sup> Sebastian Morris, Ajay Pandey, *Towards Reform of Land Acquisition Framework in India*, ECONOMIC AND POLITICAL WEEKLY 2086.

clearly points out that the intention of the legislature was to leave public purpose undefined and allow it to be challenged under the court of law. Since the Indian courts are already overburdened with so many cases, to not define public purpose would again amount to refusing justice to the homeless masses. Therefore, there is little the common man can do to prevent the Government from depriving him of their only source of livelihood under the guise of an undefined and unknown 'public policy.'

Unlike in other countries that practice compulsory takings, in India the taker decides the "fair value", which is akin to "I cut the cake and choose the piece too".<sup>54</sup> This process is also unfair. In India the process of valuation of land is undertaken by licensed valuers who are more likely to be biased towards the government; moreover most of the important land decisions and valuation exercises are internal to the government.<sup>55</sup> Therefore chances of corruption are also high.

Coming back to the provisions for compensation as provided under this Act, Section 23 talks about the matters that needs to be decided while determining the compensation. This includes the market value of the land on the date of publication of the notification. This section also provides for reimbursements for any damage sustained by the person interested in such land by the reason of taking of any standing crop or trees which may be on the land at the time of collectors' taking of possession of the land or by injuriously affecting his other property (movable or immovable), in any other manner, or his earnings; or due to diminution of the profits of the land and lastly, if the person interested is compelled to change his residence or place of business.

Although these provisions may sound adequate on paper, their implementation unfortunately lies in a dismal state. The issue of determining the market price of the land is also problematic. Secondly the market of the agricultural land in most of the Indian states being thin, it often becomes difficult to get proper estimates of the market value of these lands.

Another problem relating to this is perhaps far more critical in nature. The Act while compensating the landowners does not take into consideration, the plight of the landless labourers or workers who are employed by them. For an owner farmer, the ownership of the land gives him opportunity to earn, and employ others under him. For this class of people who don't have any ownership over the land on which they cultivate, things get even worse, because they firstly lose their job and secondly they get no compensation from the government.

In addition to this, legislators conveniently choose to neglect certain matters while determining the compensation. For example section 24 of the Land Acquisition Act says, that

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<sup>54</sup> *Id* at 2087.

<sup>55</sup> *Supra* note 17 at 2086.

*“the court shall not take into consideration any disinclination of the person interested to part with the land acquired; any damage sustained by him, which, if caused by a private person and would not tender such person liable to a suit; any damage which is likely to be caused to the land acquired, or in consequence of- the use to which it will be put; any increase to the value of the land acquired likely to accrue from the use to which it will be put when acquired; any increase to the value of the other land of the person interested likely to accrue from the use to which the land acquired will be put;”*

By doing this, the legislation basically alienates the people from the fundamental rights guaranteed under the Art. 21 of the Constitution of India.

### *E. SEZ IN INDIA—AS IT STANDS TODAY*

After having declared, (1997-2000) EXIM policy for setting up SEZs in India, the ministry of commerce and Industry (Department of Policy and Promotion) came up with the Industrial Park Scheme, 2002, with the object of developing industrial infrastructure, carrying out integrated manufacturing activities including research programmes<sup>56</sup>. The application of this scheme was however extended from 1<sup>st</sup> of April 1997 to 31<sup>st</sup> of March 2006.

The applications for setting up these parks were subjected to certain basic criteria for automatic approval. It is important to note that these parks could be setup with minimum investment of 50% on infrastructure development and the minimum share of expenditure imposed was only 60%. The rest of the expenditures would be incurred by the state<sup>57</sup>.

In India, the individual entrepreneurs are free to identify any area that they find suitable for establishing an SEZ and forward the proposal to either the state government concerned or the Board of Approval.<sup>58</sup> In case the state Government wishes to set up an SEZ it may directly forward the application to the Board<sup>59</sup> for approval. But the state government cannot *suo motu* decide what industries are to be developed in SEZs or on the long-term returns strategy.

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<sup>56</sup> Under Para 2 (f), infrastructure development includes roads, water supply, sewage, common effluent treatment facility, telecom network, generation and distribution of power, air conditioning and such other facilities as are common use for industrial activities.

<sup>57</sup> Para 6 (e) Industrial Park Scheme 2002.

<sup>58</sup> Section 3, Special Economic Zones Act 2005. Rule 4, Special Economic Zone Rules 2006.

<sup>59</sup> Board means the Board of approval established under Section 8 of the SEZ Act.

It is also worth noting that the central government may allot area for processing units for manufacturing activities or rendering services and a non-processing area for activities other than the same.<sup>60</sup> Rule 11(10) allows the using the remaining land for construction of schools hospitals, hotels, residential buildings, recreation and entertainment facilities etc. This has encouraged the Developers and the Co-Developers to go in for real estate businesses, which are against the mandates and objectives of the Act.<sup>61</sup>

The Indian Government does not give any specifications for activities to be conducted in particular areas. The Zone may have two or more units for manufacture trading and warehousing, which can in turn be subdivided into several sectors according to the convenience of the developer and the entrepreneurs.<sup>62</sup> However the respective states have put up a minimum processing area for different types of SEZs.

There is no specific prohibition imposed under the SEZ Act or the SEZ Rules that prevents the land user from changing the use to which the land can be put. The law does not provide any specific control mechanism as far as the land use is concerned except the regulation on the minimum area to be maintained for different export processing units. Moreover unlike in China the land use rights are not forfeited by the government in case of a delay in construction or failure to develop the infrastructure. So it can be safely said that the SEZ laws in India are much more liberal in comparison to China and it has reasons to be so.

The ultimate goal is to attract as many investors as possible and Indian government is all set to go overboard with its plans. As of now, about 237 projects have been sanctioned in 19 states (occupying around 86,107 hectares of land) 63 of these been already notified, 23 are operational and 18 of them are in the IT sector.<sup>63</sup> The Legislature is also planning to come up with some desirable amendments to the Land Acquisition Act, keeping in mind numerous instances of violence over SEZ in Singur & Nandigram (West Bengal).

The SEZ Act has also gone a long way in removing some major Labour Law rigidities. The SEZs have been included as a Public Utility service under the Industrial Disputes Act 1947.<sup>64</sup> Therefore the Prohibitions of strikes and Lockouts under the Industrial disputes Act 1947 is also applicable for public utility service

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<sup>60</sup> Section 6 Special Economic Zones Act, 2005. The same *Idea* is being reiterated by Rule 5(2)(a) of the SEZ Rules. However, it has also earmarked only 25 percent of the area for development of processing unit. The rest of the 75 percent of the area is dedicated to the non-processing unit.

<sup>61</sup> It is agreed that certain amount of infrastructure development is an essential requirement for any SEZ but allocating 75 percent of the land for such purposes clearly defies logic. The state could have reserved at least 50 percent of the land for export processing and the remaining 50 percent for development of infrastructure.

<sup>62</sup> Rule 5, Special Economic Zone Rules 2006.

<sup>63</sup> *Id.*

<sup>64</sup> See Rule 5(5) (g) of the SEZ Rules 2006.

SEZs.<sup>65</sup> No person employed under this rule shall go on strike in breach of contract without giving prior notice of such strike to the employer within six weeks before striking or within fourteen days of giving such notice or before the expiry of the date of strike specified in such notice or during the pendency of any conciliation proceedings before the conciliation officer and seven days after the conclusion of such proceedings.<sup>66</sup> The conciliation officers are charged with the duty of mediating and promoting the settlement of industrial disputes.

Although the normal Labour Laws of the land still continue to apply to such units in the Special Economic Zones, the respective state governments may delegate the power of the labour commissioner to the development commissioner of SEZs that are declared as public utilities.<sup>67</sup>

### III. CONCLUSION

In summary, we believe that Special Economic Zones are in fact, efficient vehicles by which an economy might progress. However, in order for them to function as such, they must be carefully planned, controlled and developed. The laws that govern SEZs in India today are woefully inadequate. The policies behind these laws are illogical. There is no clear vision of what Special Economic Zones are going to do for us. Instead, there are a range of measures that allow companies to exploit both land and labourers for their own benefit, taking away more from the economy, than contributing to it.

We do not suggest that the People's Republic of China does not exploit its workers or its land. However, the laws that allow for this exploitation are far more just and humane than those that currently govern SEZs in India. This is particularly shameful, considering the difference in the forms of governance in the two countries. One would think that a democratic country such as India would have more regard for its workers and its land-owners, and strive to be more responsible in the measures it employs on its way to economic development. Sadly, it is not so. The PRC has been able to protect its workers better, exploit its land more, and develop at a far faster rate than India.

The underlying reason for this is a clear goal, and a definite commitment to the achievement of that goal, on the part of the PRC. Even a cursory glance at the various statutes that govern SEZs in India and in China will demonstrate this. SEZs in China are committed to export-oriented production, whereas Indian SEZs can be made to further 'public purpose', which could mean anything, from building

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<sup>65</sup> RAJKUMAR S. ADUKIA, MANUAL SEZ FT&WZ, IFC DEVELOPERS 45 (2006).

<sup>66</sup> *Supra note 27.*

<sup>67</sup> RAJKUMAR S. ADUKIA, MANUAL SEZ FT &WZ, IFC DEVELOPERS 115 (2006).

a small-car factory, to an entertainment park. The provisions that follow these goals are also in stark contrast. For all the complicated provisions contained in the Indian SEZ Act, the various ordinances issued by the SEZ provinces in China are stricter, concise and far more efficient.

We believe that the Indian policy with respect to SEZs, as well as the laws that give it a meaningful construction, must be rethought to have a definitive vision and ironclad protectionist measures.

