Investment in the EU India FTA and Access to Agricultural Land

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~80% of farmers own 2 hectares or less land
They own ~ 40% of total agricultural land
11% of rural households are landless, though 75% of the Indian workforce resides in rural areas
Average monthly income of rural farming households in 2006 was 503 INR
Land-based Investment Trends in India and Impact on Agricultural Land

- An increase of 3,400,000 hectares of non-agriculture land between 1994-2004 (shift from agriculture/forest land)

- Maharashtra lost 1,000,000 acres of agriculture land in the last ten years (close to a third of its total)
60 million displaced by development projects; 75% still awaited rehab in ‘06 (Asher, Mumtaz ‘06)

Special Economic Zones (SEZs): 114,000 farming families estimated to be displaced and 82,000 farm working families over 122,000 hectares of land (Sharma, Goswami ‘06)
Significant number of people live in forested areas and depend on forest products where mineral resources primarily found (most marginalized populations);

Mining sector growing faster than other sectors (highest sectoral growth in 2010-11 over manufacturing and electricity, DIPP Annual report)

Indian mining sector rife with reported human rights violations—land grabs. Odisa: 74,000 hectares being mined, 2.1 trillion Indian rupees worth of investment, but with 73% of the adivasi population living below the poverty line and 53% of Dalit population BPL there.
Automobile industries (7%); housing & real estate, metallurgical industries, construction activities (6%); cement and gypsum products (4%); petroleum and natural gas (3%) (DIPP Annual report)
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EU-India FTA: Problematic Definition of Investment

- “every kind of asset established or acquired….”

- Property (movable/immovable); intellectual property

- concessions to search for, extract or exploit oil and other minerals and other natural resources
Foreign companies treated alike or better in terms of establishment, acquisition or expansion of investments in listed sectors (being negotiated)

Will foreigners be allowed to buy agricultural land, plantation property under NT? Right now, GoI can acquire land and lease it to these investors
' [...] shall provide for the highest possible level of legal protection and certainty for European investors in India, provide for the promotion of the European standards of protection and seek to increase Europe's attractiveness as a destination for foreign investment [...]'. 
Investment Protection

Up to now under bilateral investment treaties only—India has 22 BITs with EU

FTA will be negotiated with the highest level of protection (Germany) for foreign investors

Ensure neither party, directly or INDIRECTLY, nationalises or expropriates an investment

Loss of profits must be dealt with in accordance with due process of law and on PAYMENT OF ADEQUATE COMPENSATION

“Fair and Equitable” Treatment clause in BITs: includes “legitimate expectations” of the foreign investor (access to water, land, natural resources necessary for the investment)
Compensation to Corporations/Investors

- Compensation, restitution or other settlement “for losses owing to war, armed conflict, state of emergencies, civil disturbances…”

(On going social struggles against several existing or proposed projects on lands across India)
**Question of “indirect expropriation”**

- Indirect = series of govt actions that results in the equivalent of taking back/or retaining an asset

- RosInvest v. Russia. Tribunal found Russia to have violated its obligations under the UK BIT because series of measures taken against company (VAT, repeat offender fines etc.) seen as indirect expropriation.
Public Interest Exception?

- non-discriminatory actions by the govt which are “necessary to achieve legitimate public policy objectives such as the protection of public health, safety and the environment, “do not constitute expropriation

- Will a public interest exception be there in the investment chapter for expropriation??
Dispute Settled Outside Country: “Investor to State Dispute Settlement”

- Company can file a complaint to a third party tribunal outside the country for compensation for losses, challenging govt actions (total cases to date: 390)

- Small coterie of judges/lawyers in tribunals, often from same law firms advising on investment disputes

- International Centre for Settlement of Investment Disputes (245 cases to date); UNCITRAL (109 cases)
Out of 197 concluded cases, 40% decided in favor of State; 30% decided in favor of foreign companies; 30% outcomes secret. 164 cases still pending.

- highly secretive tribunals; not independent as many of the arbitrators from corporate sector
Chevron vs Ecuador

- Chevron charged by National Court to pay $9 billion USD for contamination of Amazon jungle and destroying its communities (dumping crude oil and wastewater in 70s, 80s, 90s)

- UNCITRAL Tribunal awarded Chevron $700 million plus interest in compensation for 13 year proceedings in $27 billion claim by company for violation of “access to justice” in US-Ecuador BIT
Actions taken by Argentina during its financial crisis (2000-2001) challenged by water companies

ICSID tribunal ruled that Argentina’s “necessity” did not merit actions taken on Suez and Vivendi because the State itself contributed to its state of emergency and could have used other means to satisfy its essential interests
EU Raw Material Initiative

- EU looking for rare earths, bauxite etc. (long list of minerals for EU manufacturing, India as one key country for this)

Much of India’s mineral wealth in disempowered Adivasi communities; vulnerable populations (small producers, dependent on natural resources)
EU responsible for ½ of world FDI globally, World Investment highly oligopolistic, Mergers and acquisitions unabated. EU investment to India double that of Indian investment into EU: POWER

Agriculture: 10 companies control 66% of proprietary seeds, 90% of agrochemical sales, 75% of biotech industry revenue (3 European companies control 49% of agrochemicals: Bayer, Syngenta, BASF)

100% FDI in agriculture production including seeds, plantation, horticulture and cultivation of vegetables (3 European Cos control 49% of agrochemical industry)

Monopoly/Oligopoly power, basis of (cultural, physical) survival, livelihoods, costs of ag inputs?
At a time when land acquisition law and rehab. rules being reformulated--access to land becoming one of the biggest struggles across the country.

What impact will the FTA have on Indian laws, regulations, measures (local, state, centre) regarding access to land and rehab.?

“Chilling effect”—Govts modify proposed rules/laws to accommodate international trade and investment treaties (ex. Indian Patent Law; introduction of biosafety regimes (Biotech Regulatory Authority of India, Seed Bill))
Repatriation:

Full and free transfer of capital and return on investment, except due to laws related to:

- social security,
- public retirement,
- employees insurance programmes

......but what about people and communities who have none of these?
Whose Rights Matter in the FTA?

- Will Indian State defend human rights, public/community interests or investors’ interest in a treaty specifically giving investors protection?

- What lessons from land-based struggles? (Vedanta, Orissa Mining Corporation, Ministry of Environment and Forests, Adivasis of Niyamgiri Hills; POSCO, Lafarge) (Biofuels?) (SEZs?)
Right to Food

Access to land, agriculture credit/credit for rural women, adaptation to climate change, resilience of agricultural communities?

Empirical evidence that developing countries use corporate savings and other investment regulations for domestic banking systems to create access to credit etc---UNCTAD TDR 2008

Requirements of Investors: Govt support for infrastructure and energy needs (more displacement? Env/social costs?)
People’s Rights?

- Remove Investment chapter? (no conclusive evidence that investment treaties attract investment..China; Angola)
- Narrow definition of investment and scope of agreement (not GATS-style)
- No Investor to State
- Investor Obligations (social, environmental—do no harm, extra-territorial obligations)
- Govt Right to Regulate
- Restrictive/precise language on investor rights
Thank you!

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