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# **“You Say Nano, We Say No-No:” Getting a “Yes” Instead for Special Economic Zones in India**

*Sumeet Jain\**

*Abstract: Special Economic Zones (SEZs) have the potential to be valuable instruments of economic growth and development in India. Yet, as a result of the resistance facing them, SEZs in India have not delivered economic benefits to their fullest potential. For this reason, reducing the resistance facing SEZs is critical to their success. This article seeks to reduce this resistance by devising a consensus-building plan based on a regulatory negotiation approach. The article first shows that the past and present resistance facing India’s economic zones is a product of the lack of public input in the design of their policy. It then presents a platform for understanding the proponents’ and opponents’ arguments by distilling the current legislation and regulation governing India’s SEZ policy into a cohesive operational framework. Next, the article examines proponents’ and opponents’ arguments pertaining to the operational framework of the SEZ policy. Finally, the article seeks to retroactively counterbalance the lack of public input in the design process of India’s SEZ policy by suggesting two sets of reforms to the operational framework. One set of reforms—procedural reforms—suggests securing greater opponent involvement in the establishment and operation of SEZs. The other set—substantive reforms—recommends rules that will further opponent interests through, not despite, the establishment and operation of SEZs.*

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INTRODUCTION

“[Y]ou say Nano, we say no-no,” bellowed Mamata Banerjee, a prominent leftist politician<sup>1</sup> in West Bengal,<sup>2</sup> during a protest aimed at halting production of Tata Motors’ Nano.<sup>3</sup> The protest against the production of the Tata Nano was directed at the establishment of the factory in Singur, West Bengal.<sup>4</sup> Tata Motors’ Singur facility was established in a Special

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<sup>1</sup> Leftists’ concerns in India are represented not only by well-known leftist political parties, such as the Communist Party of India (Marxist), but also a broad spectrum of non-political organizations and individuals. Leftists place a heavy emphasis on economic egalitarianism, and, as a result, often oppose unchecked capitalism and globalization. Leftists in India particularly disapprove of the “land grabs” and displacement that accompany SEZs. Nivedita Menon, *‘End of the Left’ in India? Statement by Leftists After Recent Election Results*, KAFILA (May 24, 2011), <http://kafila.org/2011/05/24/end-of-the-left-in-india-statement-after-recent-election-results/>; see also *Cash Cows*, ECONOMIST, Oct. 14, 2006, at 45–46, available at [http://www.economist.com/world/asia/displaystory.cfm?story\\_id=E1\\_RDPTNTJ](http://www.economist.com/world/asia/displaystory.cfm?story_id=E1_RDPTNTJ).

<sup>2</sup> See Biography of Mamata Banerjee, ALL INDIA TRINAMOOOL CONGRESS, <http://www.aitmc.org/theleaderspeaks.php> (last visited Nov. 30, 2011).

<sup>3</sup> Mehul Srivastava, *For Tata in India: Industry vs. Farms*, BUS. WK. (Aug. 27, 2008, 12:16 PM), [http://www.businessweek.com/magazine/content/08\\_36/b4098000380054.htm](http://www.businessweek.com/magazine/content/08_36/b4098000380054.htm). Priced at U.S. \$2,500 and dubbed the “People’s Car,” the Nano is Tata Motors’ most eagerly awaited project. *Id.*

<sup>4</sup> Mehul Srivastava, *Why Indian Farmers are Fighting Tata’s Nano*, BUS. WK. (Aug. 27, 2008, 10:06 AM), <http://www.businessweek.com/globalbiz/content/aug2008/gb20080827>

Economic Zone (SEZ),<sup>5</sup> an area where economic incentives are offered to investors with the objective of attracting investment.<sup>6</sup> Ultimately, the protests forced Tata Motors to abandon plans to manufacture the Nano in Singur.<sup>7</sup>

Sadly, the protest in Singur is only one of several high-profile protests against India’s SEZs.<sup>8</sup> These protests have a twofold detrimental effect on the country’s SEZ policy. First, social barriers, such as threats to safety, mounted by the protests undercut the economic benefits that SEZ legislation and regulation provide.<sup>9</sup> Second, political pressure generated by the protests leads to legislative and regulatory uncertainty that undermines legal predictability and economic stability in SEZs.<sup>10</sup> As a result of the social barriers and legislative and regulatory uncertainty plaguing them, India’s SEZs have not delivered economic benefits to their fullest potential.<sup>11</sup>

In light of these dynamics, addressing the cause of these problems—the popular resistance facing SEZs—is critical to the success of India’s SEZs. The popular resistance facing India’s SEZs is largely a product of

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\_001413.htm. The protesters demand that Tata Motors return the 400 acres of land requisitioned for the Singur factory to local farmers. *Talks over Tata Nano Car Deadlock*, BBC NEWS (Sept. 5, 2008, 3:12 PM), [http://news.bbc.co.uk/2/hi/south\\_asia/7599466.stm](http://news.bbc.co.uk/2/hi/south_asia/7599466.stm).

<sup>5</sup> *Tata May Bid Adieu to Singur SEZ*, INDIAN REALTY NEWS (Aug. 31, 2008), <http://www.indianrealtynews.com/sezs-india/tata-may-bid-adieu-to-singur-sez.html>.

<sup>6</sup> Kwan Yiu Wong & David K.Y. Chu, *Export Processing Zones and Special Economic Zones as Generators of Economic Development: The Asian Experience*, 66 GEOGRAFISKA ANNALER: SERIES B, HUM. GEOGRAPHY 1, 3 (1984).

<sup>7</sup> *Tata Abandons Cheapest Car Plant*, BBC NEWS (Oct. 3, 2008, 3:45 PM), [http://news.bbc.co.uk/2/hi/south\\_asia/7651119.stm](http://news.bbc.co.uk/2/hi/south_asia/7651119.stm) (Ratan Tata, Chairman of Tata Group, stated, “[w]e have little choice but to move out of Bengal.”).

<sup>8</sup> Protests against SEZs have occurred nationwide. See, e.g., NANDIGRAM: WHAT REALLY HAPPENED? (2007), available at <http://insafindia.org/wp-content/uploads/2010/07/nandi.pdf> (Nandigram, West Bengal in March 2007); *Farmers Block Traffic on NH8 in Protest against Gurgaon SEZ*, ONEINDIA NEWS (May 13, 2007, 9:09 PM), <http://news.oneindia.in/2007/05/13/farmers-block-traffic-on-nh8-in-protest-against-gurgaon-sez-1179070736.html> (Gurgaon, Haryana in July 2008); Satish Nandgaonkar, *Land Protest in Maharashtra*, THE TELEGRAPH (Oct. 5, 2008), [http://www.telegraphindia.com/1081005/jsp/nation/story\\_9929646.jsp](http://www.telegraphindia.com/1081005/jsp/nation/story_9929646.jsp) (Raigad, Maharashtra in October 2008); Raju Nayak, *Goa Protests Can Dampen New Year Party*, EXPRESS INDIA (Dec. 27, 2007) <http://www.indianexpress.com/news/goa-protests-can-dampen-new-year-party/254583> (Panjim, Goa in December 2007); *Protest Against Coastal Zone Notification*, THE HINDU (Aug. 10, 2007), <http://www.hindu.com/2007/08/10/stories/2007081061370900.htm> (Cuddalore, Tamil Nadu in August 2007).

<sup>9</sup> See *infra* text accompanying note 78.

<sup>10</sup> See *infra* notes 79–81 and accompanying text.

<sup>11</sup> See Lauren Fulton, *India’s Way: Crafting Special Economic Zones*, 28 HARV. INT’L REV., Winter 2007, at 7, available at <http://hir.harvard.edu/ethnic-conflict/indias-way> (“India has great potential to achieve further prosperity. An effective SEZ program will draw more funding from the private sector for infrastructure improvement and generate more employment opportunities for its large population.”).

the lack of public input in the design of the policy.<sup>12</sup> This article seeks to retroactively counterbalance the lack of public input in the design process of India's SEZ policy by devising a consensus-building plan based on a regulatory negotiation approach. In so doing, this article is comprised of four parts. Part I tracks the historical failure of economic zones<sup>13</sup> in India arising out of autocratic rulemaking by the Central Government. Part II presents a platform for understanding the proponents' and opponents' arguments by distilling the current legislation and regulation governing India's SEZ policy into a cohesive operational framework. Part III examines proponents' and opponents' arguments pertaining to the operational framework of the SEZ policy. Part IV seeks to reconcile these views by suggesting two sets of consensus-building reforms to the operational framework. The first set of reforms—procedural reforms—focuses on securing greater opponent involvement in the establishment and operation of SEZs. The second set of reforms—substantive reforms—focuses on introducing rules that will further opponent interests through, not despite, the establishment and operation of SEZs.

## I. TROUBLED HISTORY OF ECONOMIC ZONES IN INDIA

Autocratic rulemaking by the Central Government, characterized by a lack of public input, over India's policy on economic zones is largely culpable for their lack of success. Initially, under India's socialist economic mandate, economic zones were employed without consideration of commercial feasibility. Presently, under India's recent neoliberal economic mandate, economic zones are being employed without regard for leftist concerns. This centralized rulemaking is a common hallmark throughout the history of India's economic zone policy. To date, the Indian experience with economic zones can be divided into four periods: (i) 1965–1977, (ii) 1977–1991, (iii) 1991–2000, and (iv) 2000 onwards. As a result of centralized rulemaking in each period, success has eluded India's economic zones.

### A. 1965–1977: The Initial Experiment with Economic Zones

The Indian government's disregard for pro-business interests contrib-

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<sup>12</sup> See Sonila Swaminathan, People's Memorandum on Special Economic Zones in India, FOCUS ON THE GLOBAL SOUTH—INDIA PROGRAMME (Sept. 13, 2006, 2:38 AM), [http://focusweb.org/india/index2.php?option=com\\_content&do\\_pdf=1&id=830](http://focusweb.org/india/index2.php?option=com_content&do_pdf=1&id=830) [hereinafter People's Memorandum on SEZs in India].

<sup>13</sup> "Economic zone" is the general term used to describe an area in which the government gives businesses incentives to engage in various types of economic activity. AMITENDU PALIT & SUBHOMOY BHATTACHARJEE, SPECIAL ECONOMIC ZONES IN INDIA: MYTHS AND REALITIES 3 (2008). This term encompasses (i) special economic zones (SEZs), (ii) export processing zones (EPZs), (iii) industrial zones, (iv) enterprise zones, (v) information processing zones, (vi) financial services zones, (vii) commercial free zones, and (viii) free ports. *Id.* at 4–6.

uted to the failure of the country’s first economic zones. India’s initial experimentation with economic zones was chiefly a product of Prime Minister Jawaharlal Nehru’s socialist legacy.<sup>14</sup> Under Nehru, the government adopted a plan of self-sufficient industrialization.<sup>15</sup> This plan was implemented by adopting a model of import-substitution industrialization (ISI)<sup>16</sup>—a set of trade protectionist measures aimed at developing domestic industry.<sup>17</sup> Specifically, India employed an outward-looking ISI model—a set of measures aimed at developing domestic industry by simultaneously restricting imports and promoting exports.<sup>18</sup> The government restricted imports by requiring “scrutiny and approval by the Central Government of every individual case of participation [of] foreign capital and management in industry.”<sup>19</sup> At the same time, it boosted exports through a “systematic pro-

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<sup>14</sup> The tone of India’s socialist economy was set shortly before India’s independence in 1947. The “Bombay Plan” of 1945, a set of proposals from leading Indian industrialists for the development of India’s post-independence economy, suggested that “the State should exercise in the interests of the community a considerable measure of intervention and control.” PURSHOTAMDAS THAKURDAS ET AL., MEMORANDUM OUTLINING A PLAN OF ECONOMIC DEVELOPMENT FOR INDIA (PARTS ONE AND TWO) 90 (1945). India’s post-independence economic policy followed the Bombay Plan’s call for a socialist economy. The preamble of the Constitution of India, promulgated in 1950, defines India as a “socialist . . . republic.” INDIA CONST. pmb. Consistent with this preambular mandate, Article 39, a directive principle of state policy, requires the state to ensure that “ownership and control of the material resources of the community are so distributed as best to subserve the common good” and “operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.” *Id.* at art. 39(b)–(c). To achieve these ends, Jawaharlal Nehru, the first Prime Minister of India, declared it necessary to “make the State more and more the organizer of constructive industry, and not the private capitalist or anyone else.” Jawaharlal Nehru, Prime Minister of India, The Only Right Approach, Speech Delivered at the Constituent Assembly (Legislative) (Apr. 7, 1948), in JAWAHARLAL NEHRU, INDEPENDENCE AND AFTER: A COLLECTION OF SPEECHES 1946–1949 175 (2d ed. 1971). Under the initial chairmanship of Nehru, India’s economic plans were laid out in “seemingly socialistic” Five-Year Plans. Jona Aravind Dohrmann, *Special Economic Zones in India—An Introduction*, 106 ASIEN 60, 61 (2008); see also Asoka Mehta, *Jawaharlal Nehru—Social Justice and National Development*, in INDIAN ECONOMIC THOUGHT AND DEVELOPMENT 3, 5–6 (Ashok V. Bhuleshkar ed., 1969). The coupling of Nehru’s socialist economic policies with Gandhi’s model of *swadesi*—self-reliance—made striving for self-sufficient industrialization the hallmark of Indian economic policies in the years following independence. Dohrmann, *supra*, at 61. India’s movement for self-sufficient industrialization resulted in protectionism of domestic industry through “legally comprehensive” government controls over foreign trade. B.R. SHENOY, INDIAN ECONOMIC POLICY 49 (1968).

<sup>15</sup> JALEEL AHMAD, IMPORT SUBSTITUTION, TRADE AND DEVELOPMENT 3 (Edward I. Altman & Ingo Walter eds., 1978).

<sup>16</sup> Aradhna Aggarwal, *Performance of Export Processing Zones: A Comparative Analysis of India, Sri Lanka and Bangladesh* 7 (Indian Council for Research on Int’l Econ. Relations, Working Paper No. 155, 2005), available at <http://www.icrier.org/pdf/wp155.pdf>.

<sup>17</sup> AHMAD, *supra* note 15, at 3.

<sup>18</sup> Aggarwal, *supra* note 16, at 7.

<sup>19</sup> GOV’T OF INDIA, INDUSTRIAL POLICY RESOLUTION ¶ 10 (1948), available at <http://www.dcmsme.gov.in/policies/iip.htm>.

gramme” of export promotion.<sup>20</sup>

India first employed economic zones under this systematic program of export promotion. These first economic zones were categorized as Export Processing Zones (EPZs), a type of economic zone aimed at incentivizing investors to participate in export businesses.<sup>21</sup> EPZs achieved this objective by providing a variety of fiscal incentives to export-oriented businesses, such as exemption from import duty on raw materials and capital goods.<sup>22</sup> Asia’s first EPZ was established in 1965 in Kandla (Gujarat).<sup>23</sup> In 1973, the Indian government launched a second EPZ in Mumbai (Maharashtra).<sup>24</sup> Unfortunately, the cumbersome nature of the EPZ policy made painfully obvious the lack of input from pro-business constituents. First, the fiscal incentives and the facilities offered for operating in EPZs were not attractive enough to motivate investors to participate.<sup>25</sup> Second, a highly centralized structure in which zone authorities had “limited powers” led to a rigid and nonnegotiable system.<sup>26</sup> Third, entrepreneurs had to acquire multiple individual clearances before beginning operations.<sup>27</sup> Fourth, “[d]ay-to-day operations were subjected to rigorous controls.”<sup>28</sup> In particular, the Central Government’s restrictions on imports, which in turn restricted the importation of foreign capital, suffocated growth in EPZs.<sup>29</sup> Consequently, “EPZs

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[W]hile it should be industrial that participation of foreign capital and enterprise, particularly as regards industrial technique and knowledge, will be of value to the rapid industrialization of the country, it is necessary that the conditions under which they may participate in Indian industry should be carefully regulated in the national interest. Suitable legislation will be introduced for this purpose. Such Legislation will provide for the scrutiny and approval by the Central Government of every individual case of participation [of] foreign capital and management in industry.

*Id.*

<sup>20</sup> PLANNING COMM’N, THIRD FIVE YEAR PLAN ch. 8, ¶ 10 (1961) (India), *available at* <http://planningcommission.gov.in/plans/planrel/fiveyr/3rd/3planch8.html>.

<sup>21</sup> PALIT & BHATTACHARJEE, *supra* note 13, at 4.

<sup>22</sup> CENT. BD. OF EXCISE & CUSTOMS, MINISTRY OF FIN., EXPORT PROCESSING ZONE SCHEME (India) [hereinafter EXPORT PROCESSING ZONE SCHEME], *available at* [http://121.241.246.157/customs/cs-manual/manual\\_22%28c%29.htm](http://121.241.246.157/customs/cs-manual/manual_22%28c%29.htm) (last visited Nov. 30, 2011).

<sup>23</sup> SEZ DIV., MINISTRY OF COMMERCE & INDUS., GUIDELINES FOR DEVELOPMENT OF SPECIAL ECONOMIC ZONES (SEZs) 2 (Oct 27, 2010) (India) [hereinafter GUIDELINES FOR DEVELOPMENT OF SEZs], *available at* <http://www.sezindia.nic.in/writereaddata/Instructions/Instruction%20No.65.pdf>.

<sup>24</sup> Aggarwal, *supra* note 16, at 7.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> MINISTRY OF ENVT & FORESTS, TECHNICAL EIA GUIDANCE MANUAL FOR INDUSTRIAL ESTATES, annexure II at ii (2009) (India), *available at* [http://moef.nic.in/Manuals/TGM\\_Industrial%20Estates.pdf](http://moef.nic.in/Manuals/TGM_Industrial%20Estates.pdf) (“there were insular policies, focused on import minimiza-

were not able to emerge as effective instruments for export promotion on account of multiplicity of controls and clearances, absence of world-class infrastructure and an unstable fiscal regime.”<sup>30</sup> A lack of input from pro-business constituents largely shoulders the blame for the commercial infeasibility of the EPZ policy.

#### B. 1977–1991: Increasing Reliance on EPZs

A disregard for pro-business interests in the EPZ policy persisted between 1977 and 1991. In the first half of this period, the government appointed various committees to review the performance of EPZs.<sup>31</sup> These committees correctly identified many of the handicaps facing the EPZ policy, notably infrastructural deficiencies and a lack of access to foreign raw materials and capital.<sup>32</sup> The committees even made “several concrete recommendations” to improve the performance of the EPZs.<sup>33</sup> Still, the policy regime remained “virtually static.”<sup>34</sup>

Later during this period, however, the government relaxed import restrictions. Fueled by India’s failure to significantly increase export volume through ISI policies, official thinking in the late 1970s began veering round to the view that ISI could no longer deliver satisfactory economic growth.<sup>35</sup> Instead, policy-makers believed that export-oriented industrialization (EOI), an outward policy of encouraging exports and removing import restrictions,<sup>36</sup> held far greater potential.<sup>37</sup> The belief that ISI policies should be replaced by EOI policies originated from the thought that import liberalization would aid export promotion by facilitating the infusion of foreign technologies and capital into domestic industry.<sup>38</sup> Thus, transitioning from

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tion (vs. trade enhancement through export promotion”).

<sup>30</sup> K. NARINDAR JETLI & VISHAL SETHI, *INFRASTRUCTURE DEVELOPMENT IN INDIA: POST-LIBERALISATION INITIATIVES AND CHALLENGES* 117 (2007). FDI policy was especially restrictive. In fact, according to the Business Environment Rating Index, a ranking of investment climate in forty-three countries, Indian EPZs placed last for FDI. Aggarwal, *supra* note 16, at 7.

<sup>31</sup> Aggarwal, *supra* note 16, at 8.

<sup>32</sup> *See id.* (The committees identified several handicaps: “the absence of a policy, absence of implementation authority to centrally co-ordinate and control the zones, procedural constraints, infrastructural deficiencies, limited concessions and limited powers of the zone authorities to take actions on the spot resulting in inordinate delays.”).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> B. Uday Shankar, *Some Recent Trends in the Indian Economy*, SOC. SCIENTIST, Dec. 1982, at 32, 33.

<sup>36</sup> KARL E. CASE & RAY C. FAIR, *PRINCIPLES OF MACROECONOMICS* 442–43 (7th ed. 2004).

<sup>37</sup> *See* Shankar, *supra* note 35, at 33.

<sup>38</sup> *See* GOV’T OF INDIA, *INDUSTRIAL POLICY STATEMENT* ¶ 15 (1977), available at <http://www.dcmsme.gov.in/policies/iip.htm> [hereinafter *INDUSTRIAL POLICY STATEMENT (1977)*].



an outward-looking ISI framework to an EOI one, the Industrial Policy Statement of 1977 advanced import liberalization<sup>39</sup> and vigorous export promotion.<sup>40</sup> To promote exports, the government vowed to consider “favourable proposals” from private investors to enhance export-oriented manufacturing capacity, such as establishing EPZs.<sup>41</sup> Accordingly, the government approved the establishment of four more EPZs in 1984 in Noida (Uttar Pradesh), Falta (West Bengal), Cochin (Kerala), and Chennai (Tamil Nadu).<sup>42</sup>

However, falling victim to the unchanged burdensome laws that hindered the progress of the Kandla and Mumbai EPZs,<sup>43</sup> none of the EPZs established in 1984 were successful at export promotion.<sup>44</sup> As an additional means to promote exports, the Industrial Policy Statement of 1980 suggested the supplementary strategy of “sympathetically consider[ing] requests for setting up 100% export oriented units” (EOUs).<sup>45</sup> This scheme accorded individual EOUs the flexibility to be established beyond the boundaries of EPZs, while still receiving fiscal benefits<sup>46</sup> provided to units in EPZs.<sup>47</sup> However, since EOUs were also subject to the burdensome laws governing EPZs, “striking success . . . eluded” the EOU scheme as well.<sup>48</sup> Although import restrictions were loosened, the same cumbersome controls and clearances that burdened India’s first EPZs continued to hamper the EPZ and EOU schemes. The continued use of commercially infeasible EPZ and EOU policies suggests that a lack of input from pro-business constituents

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<sup>39</sup> See *id.* (“[T]he progress that we have made in the industrial field should now enable us to selectively dispense with import quotas and quantitative restrictions, while retaining the protection given through tariffs.”); see also Shankar, *supra* note 35, at 33.

<sup>40</sup> See INDUSTRIAL POLICY STATEMENT (1977), *supra* note 38, ¶ 16.

Exports of manufactures are an important and growing segment of our export trade. Government will consider favourable proposals for export-oriented manufacturing capacity in fields where such investment is likely to be internationally competitive . . . . In the case of wholly export-based activities, Government will also be willing to consider exemption from customs/excise duties on inputs . . . .

*Id.* See also Shankar, *supra* note 35, at 33.

<sup>41</sup> See INDUSTRIAL POLICY STATEMENT (1977), *supra* note 38, ¶ 16.

<sup>42</sup> Aggarwal, *supra* note 16, at 8.

<sup>43</sup> See *supra* text accompanying note 30.

<sup>44</sup> See Aggarwal, *supra* note 16, at 8.

<sup>45</sup> GOV’T OF INDIA, INDUSTRIAL POLICY STATEMENT ¶ 23 (1980), available at <http://www.dcmsme.gov.in/policies/iip.htm>.

<sup>46</sup> See EXPORT PROCESSING ZONE SCHEME, *supra* note 22 and accompanying text.

<sup>47</sup> CENT. BD. OF EXCISE & CUSTOMS, MINISTRY OF FIN., EXPORT ORIENTED UNIT SCHEME (India), available at [http://121.241.246.157/customs/cs-manual/manual\\_22%28b%29.htm](http://121.241.246.157/customs/cs-manual/manual_22%28b%29.htm) (last visited Nov. 30, 2011). Since most of the six EPZs in India were located in “industrially backward regions,” EOUs had an incentive to establish their facilities beyond the boundaries of existing EPZs. See Aggarwal, *supra* note 16, at 8.

<sup>48</sup> 1 PLANNING COMM’N, SEVENTH FIVE YEAR PLAN ¶ 6.45 (1985) (India), available at <http://planningcommission.nic.in/plans/planrel/fiveyr/7th/vol1/7v1ch6.html>.

persisted.

### C. 1991–2000: Liberalizing EPZs

As part of a massive dose of liberalization in 1991, the Indian government tried to attract foreign direct investment (FDI) by restructuring the EPZ policy without regard for leftist concerns. When India’s economy felt the ripple effects of the Gulf War, the Indian government sought loans from the World Bank.<sup>49</sup> In return, the World Bank demanded liberalization of the Indian economy.<sup>50</sup> Ultimately, India was forced to adopt a set of free market policies in 1991.<sup>51</sup> These free market policies gave rise to a new understanding that attracting FDI was “in the interest of the country’s industrial development.”<sup>52</sup> As India’s economic agenda towards EOI transformed from a grudging acceptance to a full embrace, the 1991 Statement of Industrial Policy maintained import liberalization, maintained export promotion, and relaxed restrictions over FDI.<sup>53</sup> Additionally, as part of a set of measures aimed at attracting FDI, the government broadened the scope of the EPZ and EOU schemes in 1992, 1994, and 1996. In 1992, the EPZ and EOU schemes were broadened to include the agriculture, horticulture, and aqua-culture sectors.<sup>54</sup> In 1994, these schemes were further expanded to include trading, re-engineering, and reconditioning units.<sup>55</sup> In 1996, the EPZ and EOU schemes were once again enlarged to include infrastructure, non-conventional energy, electronics, software, and a few other sectors having a significant export potential.<sup>56</sup> During this period of liberalization, leftist interests were left vulnerable to full-blown proliferation of EPZs and EOUs.

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<sup>49</sup> Dohrmann, *supra* note 14, at 62. The Indian government was prompted to seek loans from the World Bank only upon reaching near insolvency after foreign transfers from the Gulf Region dried up. *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> GOV’T OF INDIA, STATEMENT OF INDUSTRIAL POLICY ¶ 24 (1991), available at <http://www.dcmsme.gov.in/policies/iip.htm>. The Government of India welcomed foreign investment, reasoning that it would bring the “attendant advantages” of technology transfer, marketing expertise, introduction of modern managerial techniques, and new possibilities for promotion of exports. *Id.*

<sup>53</sup> *Id.* ¶¶ 24–26. To invite FDI in “high priority industries, requiring large investments and advanced technology,” the 1991 Statement of Industrial Policy granted automatic approval for (i) FDI in these select industries, so long as the total foreign investment in the industry was not greater than 51%, and (ii) technology agreements related to high priority industries within specified parameters. *Id.* ¶¶ 25, 28.

<sup>54</sup> Aggarwal, *supra* note 16, at 9.

<sup>55</sup> *Id.*

<sup>56</sup> 2 PLANNING COMM’N, NINTH FIVE YEAR PLAN, ¶ 5.4 (1997) (India), available at <http://planningcommission.nic.in/plans/planrel/fiveyr/9th/vol2/v2c5.htm>.

D. 2000–Present: The Emergence of SEZs

The Central Government continued to ignore leftist interests as the EPZ scheme was replaced with the SEZ scheme. India's EPZ scheme evolved into the current SEZ scheme out of the realization that attracting FDI required India to develop "well-functioning infrastructure."<sup>57</sup> In early 2000, Murasoli Maran, India's then-Minister of Commerce and Industry, visited SEZs in China.<sup>58</sup> Inspired by the infrastructural developments that SEZs generated in China, Mr. Maran introduced the concept of SEZs to the Indian economy in March 2000 through the annual update to the Export and Import (EXIM) Policy of 1997–2002.<sup>59</sup> Section 9A.1 of the updated EXIM Policy of 1997–2002 defines an SEZ as "a specifically delineated duty free enclave [which] shall be deemed to be foreign territory for the purposes of trade operations and duties and tariffs."<sup>60</sup> A fairly detailed set of guidelines, including provisions relating to a proposed administrative regime, follow this definition.<sup>61</sup>

The Foreign Trade Policy (FT Policy) of 2004–2009 echoed the provisions listed in the updated EXIM Policy of 1997–2002.<sup>62</sup> Under both the updated EXIM Policy of 1997–2002 and FT Policy of 2004–2009, incentives and other facilities were offered to SEZ developers and SEZ units on an *ad hoc* basis "through various notification[s] and circulars issued by the concerned [Ministries and Departments]."<sup>63</sup> This procedure did not inspire confidence in investors to commit resources to SEZs.<sup>64</sup> To provide legal predictability, India's Parliament saw the need to legitimize and streamline SEZ guidelines and procedures through legislation.<sup>65</sup>

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<sup>57</sup> Dohrmann, *supra* note 14, at 62. Note, however, that the EOU scheme continues to operate separately from the SEZ scheme. PALIT & BHATTACHARJEE, *supra* note 13, at 129.

<sup>58</sup> P. ARUNACHALAM, SPECIAL ECONOMIC ZONES IN INDIA: PRINCIPLES, PROBLEMS AND PROSPECTS 1–2 (2008).

<sup>59</sup> *Id.* at 2. See also DEP'T OF COMMERCE, MINISTRY OF COMMERCE & INDUS., EXPORT AND IMPORT POLICY ch. 9A (1997, update effective Apr. 1, 2000) (India) [hereinafter UPDATED EXIM POLICY (1997)], available at <http://exim.indiamart.com/indian-exim-policy/special-economic-zones.html>.

<sup>60</sup> UPDATED EXIM POLICY (1997), *supra* note 59, ch. 9A.1.

<sup>61</sup> See *id.* ch. 9A. The updated EXIM Policy of 1997–2002 lays out the structure of how the central and state governments shall approve applications for SEZs, and how they shall monitor performance of these zones. See *id.* ch. 9A.5–9A.7.

<sup>62</sup> See generally DEP'T OF COMMERCE, MINISTRY OF COMMERCE & INDUS., FOREIGN TRADE POLICY ch. 7 (2004) (India), available at <http://dgftcom.nic.in/exim/2000/policy/chap-07.htm>.

<sup>63</sup> Press Release, Dep't of Commerce, Ministry of Commerce and Indus., SEZ Bill to Give a Big Push to Exports and FDI (May 10, 2005), [http://commerce.nic.in/pressrelease/pressrelease\\_detail.asp?id=1492](http://commerce.nic.in/pressrelease/pressrelease_detail.asp?id=1492) (India).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* ("To provide a long-term and stable policy . . . , a Central Act for Special Economic Zones [was] found to be necessary in line with international practice."); GUIDELINES FOR DEVELOPMENT OF SEZs, *supra* note 23, at 2 (SEZ legislation and regulation was passed with

In May 2005,<sup>66</sup> the Parliament of India passed the Special Economic Zones Act (SEZ Act)<sup>67</sup> to “provide for the establishment, development and management of the Special Economic Zones . . . .”<sup>68</sup> The SEZ Act received presidential assent, and thereby came into force in June 2005.<sup>69</sup> Section 55 of the SEZ Act permits the Central Government to promulgate rules for carrying out the provisions of the Act.<sup>70</sup> Accordingly, the Central Government passed the Special Economic Zones Rules<sup>71</sup> (SEZ Rules) on February 10, 2006 to carry out the provisions of the SEZ Act.<sup>72</sup> The Central Government designed this legislation and regulation largely without public input.<sup>73</sup> Still, by September 2010, 585 SEZs had been formally approved<sup>74</sup> and forty-two SEZs had earned in-principal approval<sup>75</sup> under the SEZ Act. Additionally, the existing EPZs were converted into SEZs.<sup>76</sup>

However, following the lack of public input in India’s SEZ policy, the policy faces nationwide protests.<sup>77</sup> These protests have a twofold detrimental effect on the SEZ policy. First, social barriers, such as threats to safety, mounted by the protests against SEZs undercut the economic benefits that SEZ legislation and regulation provide. Ratan Tata, Chairman of Tata Group, explained that Tata Motors had to abandon its Singur facility

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an intent to “signal the Government’s commitment to a stable SEZ regime . . . .”).

<sup>66</sup> Dep’t of Commerce, Ministry of Commerce and Indus., Introduction to SEZs in India, SPECIAL ECONOMIC ZONES IN INDIA, <http://www.sezindia.nic.in/about-introduction.asp> (India) (last visited Nov. 30, 2011).

<sup>67</sup> Special Economic Zones Act, No. 28 of 2005, INDIA CODE (2011), available at <http://indiacode.nic.in>.

<sup>68</sup> *Id.* pmb1. See also GUIDELINES FOR DEVELOPMENT OF SEZs, *supra* note 23, at 2.

<sup>69</sup> Special Economic Zones Act, pmb1 (India).

<sup>70</sup> *Id.* § 55.

<sup>71</sup> *Special Economic Zones Rules, 2006*, GAZETTE OF INDIA, § II(3)(i) (Feb. 10, 2006), available at [http://www.sezindia.nic.in/writereaddata/rules/SEZ\\_Rules\\_July\\_2010.pdf](http://www.sezindia.nic.in/writereaddata/rules/SEZ_Rules_July_2010.pdf).

<sup>72</sup> *Id.*

<sup>73</sup> People’s Memorandum on SEZs in India, *supra* note 12 (“The SEZ Act was passed in haste without much public debate. There was no public consultation; participation and debate on the SEZ Act facilitated by the Ministry. Even in Rajya Sabha the Upper House of Indian Democracy has passed this bill with a one day discussion undermining many of the objections.”).

<sup>74</sup> Dep’t of Commerce, Ministry of Commerce and Indus., List of Formal Approvals Granted under SEZ Act, SPECIAL ECONOMIC ZONES IN INDIA, <http://www.sezindia.nic.in/writereaddata/pdf/ListofFormalapprovals.pdf> (India) (last visited Nov. 30, 2011) [hereinafter List of Formal SEZ Approvals Granted].

<sup>75</sup> Dep’t of Commerce, Ministry of Commerce and Indus., List of In-principal Approvals Granted under SEZ Act, SPECIAL ECONOMIC ZONES IN INDIA, <http://www.sezindia.nic.in/writereaddata/pdf/Listofin-principleapprovals.pdf> (India) (last visited Nov. 30, 2011) [hereinafter List of In-Principal SEZ Approvals Granted].

<sup>76</sup> G. Srinivasan, *Special Economic Zone Act: ‘Provides the Right Combination of Facilities,’* THE HINDU BUSINESS LINE (Nov. 29, 2005), <http://www.thehindubusinessline.com/2005/11/29/stories/2005112902031100.htm>.

<sup>77</sup> See *supra* note 8 and accompanying text.

because it “[could not] run a factory with police around all the time.”<sup>78</sup> Thus, despite the preferential economic treatment offered to investors in SEZs, social barriers render operating in SEZs prohibitively inefficient. Second, political pressure generated by the protests against SEZs leads to legislative and regulatory uncertainty that undermines legal predictability and economic stability in SEZs. In response to widespread protests, the Indian government has frequently revised India’s SEZ policy. In the five years since the SEZ Rules have come into effect, there have been thirteen amendments.<sup>79</sup> More disturbingly, the SEZ policy was placed on a “go-slow”<sup>80</sup> upon recommendation by the Parliamentary Standing Committee on Commerce to suspend approvals.<sup>81</sup> Such legislative and regulatory uncer-

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<sup>78</sup> *Tata Abandons Cheapest Car Plant*, *supra* note 7 (internal quotation marks omitted).

<sup>79</sup> See *Special Economic Zones (Amendment) Rules, 2006*, GAZETTE OF INDIA, § II(3)(i) (Aug. 10, 2006), available at <http://www.sezindia.nic.in/writereaddata/rules/dated-10-8-06-amending-sez-rules06.pdf>; *Special Economic Zones (Second Amendment) Rules, 2007*, GAZETTE OF INDIA, § II(3)(ii) (Mar. 16, 2007), available at <http://www.sezindia.nic.in/writereaddata/rules/sez-snd-amend-rules2007.pdf>; *Special Economic Zones (Second Amendment) Rules, 2007*, GAZETTE OF INDIA, § II(3)(ii) (Oct. 12, 2007), available at [http://www.sezindia.nic.in/writereaddata/rules/Third\\_Amendment-3rd\\_October\\_2007.pdf](http://www.sezindia.nic.in/writereaddata/rules/Third_Amendment-3rd_October_2007.pdf); *Special Economic Zones (Amendment) Rules, 2008*, GAZETTE OF INDIA, § II(3)(ii) (Nov. 14, 2008), available at [http://www.sezindia.nic.in/writereaddata/rules/SEZRules2008\\_Amendment\\_.pdf](http://www.sezindia.nic.in/writereaddata/rules/SEZRules2008_Amendment_.pdf); *Special Economic Zones (Amendment) Rules, 2009*, GAZETTE OF INDIA, § II(3)(i) (Feb. 3, 2009), available at [http://www.sezindia.nic.in/writereaddata/rules/SpecialEconomicZone%20Amendment\\_%20Rules2009.pdf](http://www.sezindia.nic.in/writereaddata/rules/SpecialEconomicZone%20Amendment_%20Rules2009.pdf); *Special Economic Zones (Second Amendment) Rules, 2009*, GAZETTE OF INDIA, § II(3)(ii) (May 20, 2009), available at [http://www.sezindia.nic.in/writereaddata/rules/SezRules2009%20\\_SecondAmendment.pdf](http://www.sezindia.nic.in/writereaddata/rules/SezRules2009%20_SecondAmendment.pdf); *Special Economic Zones (Third Amendment) Rules, 2009*, GAZETTE OF INDIA, § II(3)(i) (Aug. 3, 2009), available at [http://www.sezindia.nic.in/writereaddata/rules/Final3\\_Rule\\_Amendment.pdf](http://www.sezindia.nic.in/writereaddata/rules/Final3_Rule_Amendment.pdf); *Special Economic Zones (Amendment) Rules, 2010*, GAZETTE OF INDIA, § II(3)(i) (June 14, 2010), available at [http://www.sezindia.nic.in/writereaddata/rules/SEZ\\_Rule\\_amendment\\_10.pdf](http://www.sezindia.nic.in/writereaddata/rules/SEZ_Rule_amendment_10.pdf); *Special Economic Zones (Second Amendment) Rules, 2010*, GAZETTE OF INDIA, § II(3)(i) (July 12, 2010), available at <http://www.sezindia.nic.in/writereaddata/rules/rules1.pdf>; *Special Economic Zones (Third Amendment) Rules, 2010*, GAZETTE OF INDIA, § II(3)(i) (Sept. 7, 2010), available at <http://www.sezindia.nic.in/writereaddata/rules/rules2.pdf>; *Special Economic Zones (Fourth Amendment) Rules, 2010*, GAZETTE OF INDIA, § II(3)(i) (Sept. 28, 2010), available at <http://www.sezindia.nic.in/writereaddata/rules/Rule4.pdf>; *Special Economic Zones (Fifth Amendment) Rules, 2010*, GAZETTE OF INDIA, § II(3)(i) (Nov. 10, 2010), available at <http://sezindia.nic.in/writereaddata/rules/Rule5.pdf>; *Special Economic Zones (Sixth Amendment) Rules, 2010*, GAZETTE OF INDIA, § II(3)(i) (Dec. 16, 2010), available at <http://sezindia.nic.in/writereaddata/rules/Rule6.pdf>.

<sup>80</sup> *Govt to Go Slow on IT SEZ Approval*, TIMES OF INDIA (Nov. 8, 2006, 11:37 PM), <http://timesofindia.indiatimes.com/articleshow/374329.cms>.

<sup>81</sup> In its eighty-third report, the Parliamentary Standing Committee Report “recommend[ed] that no further SEZs should be notified till the SEZ Act and the Rules made thereunder have been amended to meet the public concerns with regard to various provisions contained in the said Act and Rules.” DEP’T RELATED PARLIAMENTARY STANDING COMM. ON COMMERCE, PARLIAMENT OF INDIA, EIGHTY THIRD REPORT ON THE FUNCTIONING OF SPECIAL ECONOMIC ZONES ¶ 6.5 (2007), available at <http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20Commerce/Report%20SEZ1.htm>. In its eighty-

tainty undermines the economic stability and legal predictability that is supposed to attract investment in SEZs in the first place.<sup>82</sup> As a result of the social barriers and the legislative and regulatory uncertainty facing them, SEZs in India have not delivered economic benefits to their fullest potential. Ultimately, the lack of public input in the operational framework, and the ensuing protests, restrict SEZs in India from realizing their economic potential.<sup>83</sup>

## II. OPERATIONAL FRAMEWORK FOR SEZS

The SEZ Act and SEZ Rules together create an operational framework for SEZs that can be divided into three stages. Initially, the SEZ Developer (Developer)<sup>84</sup> must earn approval for a proposed SEZ. Next, the Developer must transform the approved SEZ into an operating entity by securing land and SEZ Units (Units).<sup>85</sup> Finally, as the SEZ becomes operational, Developers and Units may begin to take advantage of incentives associated with SEZs.

### A. The Approval Process for SEZs

SEZs may be established jointly or severally by the Central Government, a state government, or any private entity.<sup>86</sup> The application procedure varies for each of these prospective Developers. A private entity may sub-

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seventh report, the next report pertaining to SEZs, the Parliamentary Standing Committee regretfully noted that the Government approved and notified some SEZs despite the Committee's recommendation in the eighty-third report to suspend the policy altogether. DEP'T RELATED PARLIAMENTARY STANDING COMM. ON COMMERCE, PARLIAMENT OF INDIA, EIGHTY SEVENTH REPORT ON ACTION TAKEN BY GOVERNMENT ON THE RECOMMENDATIONS/OBSERVATIONS OF THE COMMITTEE CONTAINED IN ITS 83<sup>RD</sup> REPORT ON THE FUNCTIONING OF SPECIAL ECONOMIC ZONES (SEZs) ¶ 6.5 (2008), available at <http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20Commerce/87th%20report.htm>. The Committee proceeded to reiterate its recommendation to suspend the SEZ policy. *Id.*

<sup>82</sup> Shaveta Gupta, *Special Economic Zones: A Smoldering Issue*, in SPECIAL ECONOMIC ZONES: GLOBAL AND INDIAN EXPERIENCES 241, 242, 246–47 (Prabha Shastri Ranade ed., 2007); see also Sunil Bharti Mittal, Founder, Chairman, and Group Managing Director, Bharti Enterprises, India's New Entrepreneurial Classes: The High Growth Economy and Why It Is Sustainable, Remarks at the Annual Lecture at the Center for the Advanced Study of India at the University of Pennsylvania (Nov. 10, 2005), available at [http://casi.ssc.upenn.edu/system/files/Mittal\\_2006.pdf](http://casi.ssc.upenn.edu/system/files/Mittal_2006.pdf) (“I personally believe that for an entrepreneur the important need is stable policies . . .”).

<sup>83</sup> Fulton, *supra* note 11.

<sup>84</sup> A “Developer” is a private entity or state government that has been granted a letter of approval to develop an SEZ. Special Economic Zones Act, No. 28 of 2005, § 2(g), INDIA CODE (2011), available at <http://indiacode.nic.in>.

<sup>85</sup> A “Unit” is business unit operating within an SEZ. *Id.* § 2(zc).

<sup>86</sup> *Id.* § 3(1).

mit a proposal either to the Board of Approval (Board)<sup>87</sup> or to a state government.<sup>88</sup> If submitted to a state government, the government must forward the private entity's proposal and its recommendation to the Board within forty-five days from the date of receipt.<sup>89</sup> Alternatively, a state government may submit its proposal for an SEZ directly to the Board.<sup>90</sup> The Central Government cannot independently make and submit an SEZ proposal; but, it may *suo moto*<sup>91</sup> establish an SEZ for which a proposal has been previously submitted by a state government.<sup>92</sup>

However, an SEZ may only be established upon receiving approval from the Board. The Board is comprised of up to nineteen members.<sup>93</sup> Most of these members are nominated by the Central Government.<sup>94</sup> The state government where the proposed SEZ is being developed has authority to nominate only one member.<sup>95</sup> Interestingly, all the acts of the Board are decided by a "general consensus of the Members present."<sup>96</sup> Three main

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<sup>87</sup> *Id.* § 3(4).

<sup>88</sup> *Id.* § 3(2).

<sup>89</sup> *Id.* § 3(6); *Special Economic Zones Rules, 2006*, §4, GAZETTE OF INDIA, § II(3)(i) (Feb. 10, 2006), available at [http://www.sezindia.nic.in/writereaddata/rules/SEZ\\_Rules\\_July\\_2010.pdf](http://www.sezindia.nic.in/writereaddata/rules/SEZ_Rules_July_2010.pdf).

<sup>90</sup> Special Economic Zones Act, § 3(4) (India).

<sup>91</sup> "On their or its own initiative, without external prompting or explicit demand." *Suo moto Definition*, WORDWEB ONLINE, <http://www.wordwebonline.com/en/SUOMOTO> (last visited Nov. 30, 2011).

<sup>92</sup> Special Economic Zones Act, § 3(4) (India).

<sup>93</sup> *Id.* §§ 8(2)(a)–8(2)(i).

<sup>94</sup> The Central Government has the authority to nominate: (i) a Chairperson, "an officer not below the rank of an Additional Secretary to the Government of India in the Ministry or Department of the Central Government dealing with Commerce;" (ii) two Members, "officers not below the rank of a Joint Secretary to the Government of India nominated . . . to represent the Ministry or Department of the Central [Government] dealing with revenue;" (iii) a Member, an "officer not below the rank of a Joint Secretary to the Government of India to be nominated to represent the Ministry or Department of the Central [Government] dealing with economic affairs;" (iv) up to ten Members, officers "not below the rank of a Joint Secretary to the Government of India" nominated "to represent the Ministry or Department of the Central Government dealing with commerce, industrial policy and promotion, science and technology, small scale industries and agro and rural industries, home affairs, defense, environment and forests, law, overseas Indian affairs and urban development;" (v) a Member, "a nominee of the State Government concerned;" (vi) a Member, "the Director General of Foreign Trade or his nominee;" (vii) a Member, "the Development Commissioner concerned;" (viii) a Member, either a Professor from the Indian Institute of Management or the Indian Institute of Foreign Trade; and (ix) a Member, "an officer not below the rank of Deputy Secretary to the Government of India dealing with [SEZs] in the Ministry or Department of the Central Government dealing with commerce. *Id.* §§ 8(2)(a)–8(2)(i).

<sup>95</sup> *Id.* § 8(2)(e). Initially, the Central Government did not want state governments to have any say in the approval process. However, to garner the support of the left-wing parties, the Central Government allowed one state government nominee to be a member of the Board. Dohrmann, *supra* note 14, at 66.

<sup>96</sup> Special Economic Zones Act, § 8(6) (India).

requirements must be met for approval of SEZ proposals. First, Developers are required to meet minimum area requirements. “SEZs for multi-product”<sup>97</sup> must have at least 1,000 hectares.<sup>98</sup> Similarly, “SEZs for specific sector”<sup>99</sup> must reserve at least 100 hectares.<sup>100</sup> Identically, “SEZs in a port or airport”<sup>101</sup> must reserve at least 100 hectares.<sup>102</sup> Second, Developers are required to meet minimum processing area requirements. SEZs for multi-product,<sup>103</sup> SEZs for specific sector,<sup>104</sup> and SEZs in a port or airport<sup>105</sup> must reserve at least 50% of the area for processing activities. Third, after a meeting in September 2006, the Board placed minimum investment requirements upon Developers.<sup>106</sup> SEZs for multi-product must show a minimum investment of ₹10,000,000,000 (approximately \$195,465,200), or minimum net worth of ₹2,500,000,000 (approximately \$48,866,300). Similarly, SEZs for specific sector must show a minimum investment of ₹2,500,000,000 (approximately \$48,866,300), or minimum net worth of ₹500,000,000 (approximately \$9,773,260).<sup>107</sup>

If the Board approves a proposal, it communicates the approval to the

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<sup>97</sup> An SEZ for multi-product is an SEZ where Units may be set up for (i) manufacture of goods falling in two or more sectors, (ii) rendering of services falling in two or more sectors, or (iii) any combination thereof, including trading and warehousing. *Special Economic Zones (Amendment) Rules, 2009*, § 2, GAZETTE OF INDIA, § II(3)(i) (Feb. 3, 2009), available at [http://www.sezindia.nic.in/writereaddata/rules/SpecialEconomicZone%20\\_Amendment\\_%20Rules2009.pdf](http://www.sezindia.nic.in/writereaddata/rules/SpecialEconomicZone%20_Amendment_%20Rules2009.pdf).

<sup>98</sup> *Special Economic Zones Rules, 2006*, § 5(2)(a), GAZETTE OF INDIA, § II(3)(i) (Feb. 10, 2006), available at [http://www.sezindia.nic.in/writereaddata/rules/SEZ\\_Rules\\_July\\_2010.pdf](http://www.sezindia.nic.in/writereaddata/rules/SEZ_Rules_July_2010.pdf).

<sup>99</sup> An SEZ for specific sector is an SEZ meant exclusively for one or more (i) products in a sector, or (ii) services in a sector. *Id.* § 2(1)(zb).

<sup>100</sup> *Id.* § 5(2)(b).

<sup>101</sup> An SEZ in a port or airport is an SEZ existing in a port or airport for (i) manufacture of two or more goods in a sector, (ii) manufacture of goods falling in two or more sectors, (iii) trading and warehousing, or (iv) rendering services. *Id.* §2(1)(zc).

<sup>102</sup> *Id.* § 5(2)(b).

<sup>103</sup> *Special Economic Zones (Second Amendment) Rules, 2007*, § 2, GAZETTE OF INDIA, § II(3)(ii) (Oct. 12, 2007), available at [http://www.sezindia.nic.in/writereaddata/rules/Third\\_Amendment-3rd\\_October\\_2007.pdf](http://www.sezindia.nic.in/writereaddata/rules/Third_Amendment-3rd_October_2007.pdf). The original SEZ Rules required that SEZs for multi-product must reserve only 25% of area for processing activities. *Special Economic Zones Rules, 2006* § 5(2)(a) (India). A prior amendment increased the minimum processing area requirement for SEZs for multi-product to 35%, but permitted the Central Government to relax the requirement to 25% on recommendation from the Board. *Special Economic Zones (Amendment) Rules, 2006*, § 2, GAZETTE OF INDIA, § II(3)(i) (Aug. 10, 2006), available at <http://www.sezindia.nic.in/writereaddata/rules/dated-10-8-06-amending-sezrules06.pdf>.

<sup>104</sup> *Special Economic Zones Rules, 2006*, § 5(2)(b) (India).

<sup>105</sup> *Id.*

<sup>106</sup> PRESS INFO. BUREAU, LIST OF AUTHORISED ACTIVITIES IN NON-PROCESSING AREA OF SEZs TO BE NOTIFIED annex 2 (2006) (India), available at <http://pib.nic.in/archieve/others/2006/sep06/E2006210906.pdf>.

<sup>107</sup> *Id.*



Central Government.<sup>108</sup> The Central Government must then issue a Letter of Approval within thirty days of receiving the approval from the Board to either the state government or private entity that submitted the proposal.<sup>109</sup> However, issuance of a formal Letter of Approval does not automatically make an SEZ operational.

### B. Making the SEZ Operational

SEZs are made operational through a two-step process. First, the Developer must complete the land acquisition process. To complete the land acquisition process, the Developer must produce a certificate from the state government or another authorized agency verifying that the Developer has legal possession and irrevocable rights to develop the land and that the land is free from all encumbrances.<sup>110</sup> Since the SEZ Act is silent on the land acquisition regime to be utilized by Developers, the Land Acquisition Act of 1894 (Land Acquisition Act), which allows acquisition of land for “public purpose” or for “a company,”<sup>111</sup> is used to acquire land for SEZs.<sup>112</sup> Second, Units must obtain authorization to operate within the SEZ. Authorization for various operations occurring within the SEZ is granted by the Approval Committee.<sup>113</sup> The Approval Committee is comprised of nine

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<sup>108</sup> Special Economic Zones Act, No. 28 of 2005, § 3(9)(a), INDIA CODE (2011), available at <http://indiacode.nic.in>.

<sup>109</sup> *Special Economic Zones (Second Amendment) Rules, 2007*, § 4, GAZETTE OF INDIA, § II(3)(ii) (Mar. 16, 2007), available at <http://www.sezindia.nic.in/writereaddata/rules/sez-snd-amend-rules2007.pdf>.

<sup>110</sup> *Id.* § 5.

<sup>111</sup> Land Acquisition Act, No. 1 of 1894, INDIA CODE (2011), available at <http://indiacode.nic.in>.

<sup>112</sup> Dohrmann, *supra* note 14, at 75. See PALIT & BHATTACHARJEE, *supra* note 13, at 105.

<sup>113</sup> The Approval Committee may discharge the following functions:

- (a) approve the import or procurement of goods from the Domestic Tariff Area, in the Special Economic Zone for carrying on the authorised operations by a Developer;
- (b) approve the providing of services by a service provider, from outside India, or from the Domestic Tariff Area, for carrying on the authorised operations by the Developer, in the Special Economic Zone;
- (c) monitor the utilisation of goods or services or warehousing or trading in the Special Economic Zone;
- (d) approve, modify or reject proposals for setting up Units for manufacturing or rendering services or warehousing or trading in the Special Economic Zone [other than the grant of licence under clause (e) of sub-section (2) of section 9] in accordance with the provisions of sub-section (8) of section 15;
- (e) allow, on receipt of approval under clause (c) of sub-section (2) of section 9, foreign collaborations and foreign direct investments (including investments by a person outside India) for setting up a Unit;
- (f) monitor and supervise compliance of conditions subject to which the letter of approval or permission, if any, has been granted to the Developer or entrepreneur; and
- (g) perform such other functions as may be entrusted to it by the Central Government or the state government concerned, as the case may be.

Special Economic Zones Act, No. 28 of 2005, § 14(1), INDIA CODE (2011), available at <http://indiacode.nic.in>.

members.<sup>114</sup> Most of these members are nominated by the Central Government.<sup>115</sup> The state government where the proposed SEZ is being developed has authority to nominate only two members.<sup>116</sup> Here, too, all the acts of the Approval Committee are decided by a “general consensus of the Members present.”<sup>117</sup> The Approval Committee bases its decision to approve the operation of Units on two key elements: the Unit must achieve positive net foreign exchange earnings,<sup>118</sup> and the Developer must confirm the availability of space and infrastructural support demanded by the Unit.<sup>119</sup>

### C. Incentives Offered by SEZs

Once an SEZ is operational, the Developers and Units can take advantage of the incentives offered. Developers receive fiscal incentives. Most notably, Developers receive an exemption from payment of: (i) income tax under Section 80-IAB of the Income Tax Act of 1961 (Income Tax Act) for ten consecutive years;<sup>120</sup> (ii) Minimum Alternate Tax under Section 115JB of the Income Tax Act;<sup>121</sup> (iii) service tax under Chapter V of the Finance Act of 1994 (Finance Act) on taxable services provided to a Developer;<sup>122</sup> (iv) sales tax under the Central Sales Tax Act of 1956 (Central Sales Tax Act) on sale or purchase of goods;<sup>123</sup> (v) customs duty under the Customs Act of 1962 (Customs Act) and the Custom Tariff Act of 1975 (Custom Tariff Act) on goods imported by Developers for authorized operations;<sup>124</sup> and (vi) excise duty under the Central Excise Act of 1944 (Central Excise Act) and Central Excise Tariff Act of 1985 (Central Excise Tar-

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<sup>114</sup> *Id.* § 13(2).

<sup>115</sup> The Central Government has the authority to nominate: (i) a Chairperson, the Development Commissioner, (ii) two Members, officers of the Central Government, (iii) two members, officers of the Central Government to represent the Ministry or Department dealing with revenue, and (iv) a Member, an officer of the Central Government to represent the Ministry of Department dealing with economic affairs. *Id.* §§ 11(1), 13(2)(a)–(d).

<sup>116</sup> *Id.* § 13(2)(e).

<sup>117</sup> *Id.* § 13(5).

<sup>118</sup> *Special Economic Zones Rules, 2006*, § 53, GAZETTE OF INDIA, § II(3)(i) (Feb. 10, 2006), available at [http://www.sezindia.nic.in/writereaddata/rules/SEZ\\_Rules\\_July\\_2010.pdf](http://www.sezindia.nic.in/writereaddata/rules/SEZ_Rules_July_2010.pdf).

<sup>119</sup> *Id.* § 18(2)(ii).

<sup>120</sup> Special Economic Zones Act, at Second Schedule (Modifications to the Income Tax Act of 1961), §(f)(2) (India). A Developer can only receive the income tax exemption for ten consecutive years within fifteen years from the date of commencement of operations in the SEZ. *Id.*

<sup>121</sup> *Id.* at Second Schedule (Modifications to the Income Tax Act of 1961), §(h). This tax is levied on companies on the basis of their “book profits” at 7.5%. PALIT & BHATTACHARJEE, *supra* note 13, at 146.

<sup>122</sup> Special Economic Zones Act § 26(1)(e) (India).

<sup>123</sup> *Id.* § 26(1)(g).

<sup>124</sup> *Id.* § 26(1)(a).

iff Act).<sup>125</sup> Additionally, state governments are given the freedom to enact any legislation granting Developers exemption from any state taxes, duties, or levies.<sup>126</sup>

Similarly, Units also receive a set of incentives. First, Units receive fiscal benefits. Most notably, Units receive an exemption from payment of: (i) income tax under Section 10AA of the Income Tax Act;<sup>127</sup> (ii) service tax under Chapter V of the Finance Act on taxable services provided to a Unit;<sup>128</sup> (iii) sales tax under the Central Sales Tax Act on sale or purchase of goods;<sup>129</sup> (v) customs duty under the Customs Act and the Custom Tariff Act on goods imported and exported by Units for authorized operations;<sup>130</sup> (vi) excise duty under the Central Excise Act and Central Excise Tariff Act;<sup>131</sup> and (vii) capital gains tax during transfer of assets involved in shifting from urban areas to SEZs.<sup>132</sup> Additionally, state governments are given the freedom to enact any legislation granting Units exemption from any state taxes, duties, or levies.<sup>133</sup> Second, SEZs provide Units with possible relief from India's restrictive labor laws.<sup>134</sup> While SEZ regulation does not overtly exempt Units from labor laws,<sup>135</sup> the SEZ Rules empower the Development Commissioner to "step up with a firm hand in industrial disputes" with a view to continue operations.<sup>136</sup> Third, SEZs equip Units with

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<sup>125</sup> *Id.* § 26(1)(c).

<sup>126</sup> *Id.* § 50(a).

<sup>127</sup> *Id.* at Second Schedule (Modifications to the Income Tax Act of 1961), §(c)(1). For the first five years from commencement of operations, the Unit is exempt from paying income tax on 100% of export profits. For the next five years, the Unit is exempt from paying income tax on 50% of export profits. For the next five years, the Unit may deduct 50% of retained export profits from its income tax liability. *Id.*

<sup>128</sup> *Id.* § 26(1)(e).

<sup>129</sup> *Id.* § 26(1)(g).

<sup>130</sup> *Id.* § 26(1)(a)–(b).

<sup>131</sup> *Id.* § 26(1)(c).

<sup>132</sup> *Id.* at Second Schedule (Modifications to the Income Tax Act of 1961), §(d)(1). This exemption on capital gains tax requires that one year before or three years after the transfer, the Unit (i) purchased machinery or plant for operations in the SEZ, (ii) acquired land or building or constructed building for operations in the SEZ, (iii) shifted the original asset and transferred establishment of such undertaking to the SEZ, and (iv) incurred expenses on certain authorized purposes. *Id.*

<sup>133</sup> *Id.* § 50(a).

<sup>134</sup> PALIT & BHATTACHARJEE, *supra* note 13, at 131.

<sup>135</sup> The SEZ Act does not allow modifications to any of India's Central Acts or Rules regarding trade unions, industrial and labor disputes, welfare of labor, conditions of work, provident funds, employers' liability, workers' compensation, and maternity benefits. Special Economic Zones Act, § 49(1) (India). Thus, India's labor laws "clearly" remain intact in SEZs. PALIT & BHATTACHARJEE, *supra* note 13, at 131.

<sup>136</sup> PALIT & BHATTACHARJEE, *supra* note 13, at 131. The SEZ Rules empower the Development Commissioner to declare SEZs as public utility services under the Industrial Disputes Act of 1947. *Special Economic Zones Rules, 2006*, § (5)(g), GAZETTE OF INDIA, § II(3)(i) (Feb. 10, 2006), available at <http://www.sezindia.nic.in/writereaddata/rules/>

modern and convenient “plug and play” infrastructure.<sup>137</sup>

### III. DEBATE SURROUNDING SEZS

Much of the debate about the viability of SEZs in India is rooted in the operational framework of SEZs. Pointing to benefits generated by SEZs, proponents of India’s SEZ policy lend support to several legislative and regulatory provisions. Conversely, opponents of the SEZ policy make compelling arguments that legislative and regulatory shortcomings render the SEZ policy injurious to the national economy.

#### A. Proponents’ Assertions in Favor of SEZs

Proponents of India’s SEZ policy base their support on three economic predictions that have been witnessed in SEZs internationally.<sup>138</sup> First, SEZs efficiently attract FDI. Additionally, SEZs promote infrastructural development. Finally, SEZs create employment.

##### 1. SEZs Attract FDI

SEZs are considered “ideal” for attracting FDI.<sup>139</sup> The incentives SEZs offer to Developers and Units elicit investment from foreign sources. As described in the operational framework section above, Developers re-

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SEZ\_Rules\_July\_2010.pdf. The Industrial Disputes Act prohibits conditions for strikes and lock-outs on employees of public utilities. Industrial Disputes Act, No. 14 of 1947, §22, INDIA CODE (2011) available at <http://indiacode.nic.in>. Thus, by being declared as public utilities, SEZs will be shielded from strikes and lock-outs.

<sup>137</sup> Nachammai Raman, *India Tries to Tame its Red-Tape Jungle*, CHRISTIAN SCI. MONITOR (Jun. 16, 2005), <http://www.csmonitor.com/2005/0616/p01s04-wosc.htm> (readily available “plug and play” infrastructure allows expedited and cost-effective establishment of Units).

<sup>138</sup> See PRESS INFO. BUREAU, *supra* note 106 (predicting that SEZs would “trigger a large flow of foreign direct investment as well as domestic investment in infrastructure and productive capacity leading to creation of new employment opportunities”); see also Herbert Jauch, *The Case of Export Processing Zones (EPZs) in Namibia*, in SPECIAL ECONOMIC ZONES: GLOBAL AND INDIAN EXPERIENCES, *supra* note 82, at 177; Vijaya Katti & Arpita Subhash, *SEZ; Case of Mauritius EPZ*, in SPECIAL ECONOMIC ZONES: GLOBAL AND INDIAN EXPERIENCES, *supra* note 82, at 151; Tatsuyuki Ota, *Special Economic Zones in China’s Economic Development as Compared with Asian Export Processing Zones*, in SPECIAL ECONOMIC ZONES: GLOBAL AND INDIAN EXPERIENCES, *supra* note 82, at 71; Anandan Pillai & Pheba Anandan Pillai, *Shenzhen SEZ; Role Model for Emerging SEZs*, in SPECIAL ECONOMIC ZONES: GLOBAL AND INDIAN EXPERIENCES, *supra* note 82, at 134; Pheba Anandan Pillai, *Comparative Study of Exports Processing Zones’ Performance: India, Sri Lanka and Bangladesh*, in SPECIAL ECONOMIC ZONES: GLOBAL AND INDIAN EXPERIENCES, *supra* note 82, at 106; Vandana Singh, *Jebel Ali Free Trade Zone: An Oasis in Desert*, in SPECIAL ECONOMIC ZONES: GLOBAL AND INDIAN EXPERIENCES, *supra* note 82, at 169.

<sup>139</sup> PALIT & BHATTACHARJEE, *supra* note 13, at 7. Typically, FDI is accompanied with advanced technology. *Id.* at 8. Thus, as linkages develop between the SEZ and urban areas, technology is transferred to urban areas. *Id.*

ceive a variety of fiscal benefits.<sup>140</sup> As additionally explained above, Units receive fiscal benefits, relief from India's restrictive labor laws, and established infrastructure.<sup>141</sup> Adoption of such free market principles in SEZs attracts FDI.<sup>142</sup> Empirical evidence supports this hypothesis. Total FDI inflow into SEZs as of March 2008 was ₹54,900,410,000 (approximately \$1,073,112,000).<sup>143</sup> Additionally, proposed FDI inflow into SEZs was ₹322,273,600,000 (approximately \$6,299,327,600).<sup>144</sup> These actual and proposed FDI inflows are evidence of SEZs' ability to attract FDI.

## 2. SEZs Promote Infrastructure Development

SEZs are recognized as "potent instruments for building infrastructure."<sup>145</sup> By offering fiscal incentives in SEZs, "governments expect private Developers to come forward for building infrastructure."<sup>146</sup> Two provisions in the operational framework ensure that SEZs will generate such infrastructural benefits for the Indian economy.<sup>147</sup> First, minimum processing area requirements compel Developers to build infrastructure on some portion of the land occupied by the SEZ.<sup>148</sup> Second, minimum investment re-

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<sup>140</sup> See *supra* Part II.C.

<sup>141</sup> See *supra* Part II.C.

<sup>142</sup> See Sumeet Jain, Note, *Tightening India's "Golden Straitjacket": How Pulling the Straps of India's Job Reservation Scheme Reflects Prudent Economic Policy*, 8 WASH. U. GLOBAL STUD. L. REV. 567, 567 (2009) ("The 'Golden Straitjacket,' a set of free market policies implemented by national governments, is golden because it attracts foreign investors, and is a straitjacket because deviation from it will repel foreign investors."). See also THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 89 (1999).

<sup>143</sup> DEP'T OF COMMERCE, MINISTRY OF COMMERCE AND INDUS., INVESTMENT PROPOSED AND MADE IN SEZs NOTIFIED UNDER SEZ ACT AS OF 31.3.2008 (2008) (India) [hereinafter DEP'T OF COMMERCE, MINISTRY OF COMMERCE AND INDUS.], available at <http://www.nsez.gov.in/nsezwebsite/Resources/Employemnt/investment-proposed-and-made-in-sez-notified-under-to-SEZs.pdf>. Of this total FDI, Units have accounted for ₹29,099,710,000 (approximately \$568,798,000) and Developers have accounted for ₹25,800,700,000 (approximately \$504,313,920). *Id.*

<sup>144</sup> *Id.* Of this total proposed FDI inflow, Units have accounted for ₹111,485,000,000 (approximately \$2,179,143,860) and Developers have accounted for ₹210,788,600,000 (approximately \$4,120,183,740). *Id.*

<sup>145</sup> PALIT & BHATTACHARJEE, *supra* note 13, at 175. However, it is important to understand that "SEZs are not instruments for developing backward areas." *Id.* at 173. In fact, "poor locational choices can have disastrous outcomes for these zones." *Id.* Therefore, "it is naïve to assume that generous fiscal incentives will help in overcoming the heavy transaction costs of operating in far-flung remote corners of the country." *Id.*

<sup>146</sup> PALIT & BHATTACHARJEE, *supra* note 13, at 8. As linkages begin to develop between the SEZs and urban areas, infrastructural developments are also expected to occur outside the zonal boundaries. *Id.*

<sup>147</sup> See ARUNACHALAM, *supra* note 58, at 21 (predicting that SEZs in India will "offer high quality infrastructural facilities and support services").

<sup>148</sup> See *supra* text accompanying notes 103–105.

quirements induce Developers to invest in infrastructure.<sup>149</sup> By requiring Developers to meet certain area and financial thresholds regarding development of infrastructure, these two stipulations ensure that a significant fraction of total investment made in SEZs is devoted to infrastructure. Since total investment in SEZs as of March 2008 amounted to a healthy ₹693,495,730,000 (approximately \$13,555,428,650),<sup>150</sup> India’s SEZ policy is expected to bear sizeable investment in infrastructure.

### 3. SEZs Create Employment

SEZs are noted for their ability to create new employment opportunities.<sup>151</sup> For India, a country with a labor surplus, such employment creation is a policy priority.<sup>152</sup> SEZs have a dualistic employment generation effect. SEZs create direct employment for individuals employed in Units operating within the SEZ.<sup>153</sup> As of March 2008, SEZs had directly employed 97,993 individuals<sup>154</sup> and proposed direct employment was 2,448,246.<sup>155</sup> What is more, SEZs create indirect employment for individuals engaged in industries and services which support the activity within SEZs, such as trucking of goods to SEZs.<sup>156</sup> As of March 2008, SEZs had indirectly employed 220,506 individuals and proposed indirect employment was 2,455,196.<sup>157</sup> In all, SEZs have generated substantial employment and are predicted to continue generating employment in increasing amounts.

### B. Opponents’ Arguments Against SEZs

Opponents of India’s SEZ policy base their contentions on three unwanted consequences of the policy. First, SEZ development leads to unjust and inequitable seizure of agrarian land. Second, land acquisition for SEZs promotes underhanded real estate dealing. Lastly, the Indian government will suffer a net financial loss on the SEZ policy.

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<sup>149</sup> See *supra* text accompanying notes 106–107.

<sup>150</sup> DEP’T OF COMMERCE, MINISTRY OF COMMERCE AND INDUS., *supra* note 143. Total investment includes FDI and total domestic investment.

<sup>151</sup> PALIT & BHATTACHARJEE, *supra* note 13, at 7. The “employment benefits are particularly strong if the zones promote activities utilizing relatively low-skilled labour, since the latter not only comprise bigger chunks of developing economy workforces, but also figure dominantly among the poor.” *Id.* However, there are examples of workers being trained for upgrading their skills. *Id.* at 8. Thus, SEZs may also contribute to skills development.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 7.

<sup>154</sup> See DEP’T OF COMMERCE, MINISTRY OF COMMERCE AND INDUS., EMPLOYMENT IN SEZs NOTIFIED AFTER SEZ ACT, 2005 AS OF 31.3.2008 (2008) (India) [hereinafter EMPLOYMENT IN SEZs], available at <http://www.nsez.gov.in/nsezwebsite/Resources/Employemnt/Emp-in-Govt-State-private-established-prior-to-SEZs.pdf>.

<sup>155</sup> *Id.*

<sup>156</sup> PALIT & BHATTACHARJEE, *supra* note 13, at 7.

<sup>157</sup> EMPLOYMENT IN SEZs, *supra* note 154.

### 1. SEZs Displace Agrarian Communities

In a largely agrarian economy,<sup>158</sup> it is no surprise that the staunchest critics of SEZ policy are those defending the “sacred tie between the tiller and the land.”<sup>159</sup> Given that agrarian viewpoints were excluded from the development of SEZ policy, it is even less of a surprise that agrarian grievances are the fiercest criticisms of the SEZ policy.<sup>160</sup> Agrarian communities object to SEZs for fear of displacement. Displacement has two components. First, agrarian communities are losing their land to Developers at prices “well below” prevailing market rates.<sup>161</sup> Second, along with losing their land, these communities lose their livelihoods.<sup>162</sup> Ultimately, displacement of agrarian communities banishes them to irrecoverable poverty.

Due to predicted mass displacement of agrarian communities, India’s SEZ policy has been called “one of the greatest land grabs in modern Indian history.”<sup>163</sup> As of September 2010, SEZ development is set to occupy approximately 94,000 hectares.<sup>164</sup> Total cultivable land area<sup>165</sup> at the inception of SEZ policy in India in 2005 was approximately 182,570,000 hectares.<sup>166</sup> While current SEZ development threatens only 0.05% of total cultivable land in India, it is estimated that this land acquisition will displace 1,000,000 individuals.<sup>167</sup> Accordingly, agrarian resistance to SEZs is

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<sup>158</sup> *The World Factbook—India*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/in.html> (last visited Nov. 30, 2011) (The agricultural sector accounts for 18.5% of India’s GDP.). See also ARUNACHALAM, *supra* note 58, at 221 (The agricultural sector accounts for 56.7% of the country’s workforce.).

<sup>159</sup> ARUNACHALAM, *supra* note 58, at 219.

<sup>160</sup> *Id.* at 220.

<sup>161</sup> *Id.*; see also Karishma Vaswani, *Anger over India’s Special Economic Zones*, BBC NEWS (Oct. 18, 2006, 10:57 PM), <http://news.bbc.co.uk/2/hi/business/6054754.stm> (Facing the prospect of losing his farmland at substandard market prices to Developers, Sadhu Pingre Dashrath, a farmer for over 40 years, explains, “[t]hey want to steal it at a fraction of the cost it’s worth.”).

<sup>162</sup> Sriram Ananthanarayanan, *New Mechanisms of Imperialism in India: The Special Economic Zones*, 22 SOCIALISM & DEMOCRACY 35, 51 (2008) (“Some estimates show that there will be only one job created for every four taken away.”).

<sup>163</sup> ARUNACHALAM, *supra* note 58, at 226.

<sup>164</sup> List of Formal SEZ Approvals Granted, *supra* note 74 (As of September 2010, 63,684 hectares had been granted to formally approved SEZs.). See also List of In-Principal SEZ Approvals Granted, *supra* note 75 (As of September 2010, 30,402 hectares had been granted to SEZs that had received in-principal approval).

<sup>165</sup> Cultivable land “consists of net area sown, current fallows, fallow lands other than current fallows, culturable waste and land under miscellaneous tree crops.” DEP’T OF AGRIC. & COOPERATION, MINISTRY OF AGRIC. CONCEPTS & DEFINITIONS 3 (India), available at [http://eands.dacnet.nic.in/PDF\\_LUS/Concepts\\_&\\_Definitions.pdf](http://eands.dacnet.nic.in/PDF_LUS/Concepts_&_Definitions.pdf) (last visited Nov. 30, 2011).

<sup>166</sup> *India Cultivable Land Falls Marginally*, FIN. EXPRESS (Mar. 10, 2008, 3:48 PM), <http://www.financialexpress.com/news/indias-cultivable-land-fallsmarginally/282603>.

<sup>167</sup> Devinder Sharma & Bhaskar Goswami, *The New Maharajas of India*, COUNTERCURRENTS.ORG (Dec. 17, 2006), <http://www.countercurrents.org/gl-sharma171206>

rooted in the reality that even a *de minimis* impact on the amount of cultivable land “is likely to have a deleterious effect on a large number of people.”<sup>168</sup>

The current SEZ land acquisition scheme, governed by the heavy-handed terms of the Land Acquisition Act,<sup>169</sup> shouldered the blame for the displacement of these agrarian communities. Promulgated during the colonial era, the Land Acquisition Act retains principles of forcible land seizure used under British rule.<sup>170</sup> Thus, a transaction under the Land Acquisition Act often grants a favorable deal to the acquirer and coerces the seller into an unfavorable one.<sup>171</sup> Once the government decides that a tract of land is needed for “public purpose” or for “a company,” the owner of that land is forced in most cases to accept subpar government-determined monetary compensation in exchange for his or her land.<sup>172</sup> Government-determined

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<sup>168</sup> Ananthanarayanan, *supra* note 162, at 53. It is feared India’s SEZ policy will recreate “a scene from a Jetson’s comic, with one part of the country living in growth bubbles high above the ground, while below will be the teeming masses, hungry and seething that they are not part of that growth.” Manjeet Kripalani, *Townships vs. Naxalism: Which India Will Win?*, BUS. WK. (May 9, 2008), [http://www.businessweek.com/globalbiz/blog/eyeonasia/archives/2008/05/townships\\_vs\\_na.html](http://www.businessweek.com/globalbiz/blog/eyeonasia/archives/2008/05/townships_vs_na.html).

<sup>169</sup> See *supra* text accompanying notes 111–112.

<sup>170</sup> Kannan Kasturi, *SEZs: A History of Injustice and Abuse*, INDIA TOGETHER (Oct. 1, 2007), <http://www.indiatogether.org/2007/oct/eco-sezhist.htm>. The Land Acquisition Act was framed with the purpose of legitimizing the colonial British government’s quick, easy, and cheap seizure of land. *Id.*; see also Land Acquisition Act §4, No. 1 of 1894, INDIA CODE (2011), available at <http://indiacode.nic.in> (the Land Acquisition Act permitted the Indian government to acquire land for “public purpose”). To further quick, easy, and cheap seizure of land, “public purpose” was left undefined. Kasturi, *supra*. Instead, it was sufficient for the government to simply declare “public purpose.” *Id.* The end of colonial rule did not bring any significant change to India’s land acquisition laws. *Id.* In fact, during the Nehruvian period, the breadth of government land acquisition increased. *Id.* To promote Nehru’s industrialization efforts, land was increasingly being acquired for private industry. In the landmark judgment of *R.L. Arora v. State of Uttar Pradesh*, (1962) 2 S.C.R. Supl. 149 (India), the Supreme Court sought to curtail this broadening of land acquisition for public purpose. The Supreme Court held, “[the Land Acquisition Act did not contemplate] that the Government should be made a general agent for companies to acquire lands for them in order that the owners of companies may be able to carry on their activities for private profit.” *Id.* However, the legislature promptly reversed this judicial holding; the 1962 Amendment to the Land Acquisition Act allowed the government additionally to acquire land for a company. Kasturi, *supra*.

<sup>171</sup> Kasturi, *supra* note 170.

<sup>172</sup> Once a tract of land appears to the appropriate government to be needed for a “public purpose” or for “a company,” the government may send an officer to conduct a preliminary investigation into the area, survey, and value of the land. Land Acquisition Act, § 4 (India). Once a tract of land is declared to be needed for a “public purpose” or for “a company” after completion of the preliminary investigation, the appropriate government shall direct a Collector to take order for acquisition of the land. *Id.* § 7. Where applicable, the Collector shall hear objections over the area, survey, or value of the land to the Collector. *Id.* § 11. However, the Collector’s final assessment into the area, survey, and value of the land overrides any



monetary compensation is almost always well below the prevailing market rate.<sup>173</sup> The result of such transactions forces agrarian communities into a disadvantageous position.<sup>174</sup>

The fact that SEZs are primarily being established on agricultural land intensifies the displacement of agrarian communities. In principle, SEZs can be situated on non-agricultural land. However, infrastructure in India is clustered around agricultural land. Therefore, establishing SEZs on non-agricultural land would require a “massive private investment in infrastructure.”<sup>175</sup> In avoiding this investment in new infrastructure by instead establishing SEZs on agricultural land, Developers have been accused of “piggy-back[ing] off the existing infrastructure—roads, power, water supply—assiduously created for agriculture via public investment over the six decades since independence.”<sup>176</sup>

Opponents argue that the land acquisition scheme of India’s SEZ policy violates Article 21 of the Constitution of India.<sup>177</sup> Article 21 declares that “no person shall be deprived of his life or personal liberty except according to procedure established by law.”<sup>178</sup> In *Olga Tellis v. Bombay Municipal Corp.*,<sup>179</sup> the Supreme Court of India found that the right to life enumerated under Article 21 encompasses the right to livelihood.<sup>180</sup> In coercing agrarian communities to sell their land, the Land Acquisition Act strips these communities of their means of livelihood. Therefore, opponents accuse the SEZ policy of depriving agrarian communities of their right to livelihood implicitly contained in Article 21 of India’s Constitution.

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objections. *Id.*

<sup>173</sup> ARUNACHALAM, *supra* note 58, at 225. That recorded transactions invariably undervalue real market rates in India’s land black market only exacerbates the discrepancy between the government-determined monetary compensation and prevailing market value. Kasturi, *supra* note 170.

<sup>174</sup> ARUNACHALAM, *supra* note 58, at 226. The displacement of agrarian communities is especially worrisome, as India has historically failed to provide resettlement to displaced persons. *Id.* at 228.

<sup>175</sup> Aseem Shrivastava, *SEZs: The Problem*, COUNTERCURRENTS.ORG (Feb. 19, 2008), <http://www.countercurrents.org/shrivastava190208.htm>.

<sup>176</sup> *Id.*

<sup>177</sup> People’s Memorandum on SEZs in India, *supra* note 12.

<sup>178</sup> INDIA CONST. art. 21.

<sup>179</sup> (1985) 2 S.C.R. Supl. 51 (India).

<sup>180</sup> *Id.* In *Olga Tellis*, some pavement and slum dwellers in Bombay challenged the decision of the State of Maharashtra and Bombay Municipal Corporation to forcibly evict them. The petitioners’ main argument was that the forcible eviction deprived them of their right to livelihood, which is “comprehended in” the right to life contained in Article 21 of the Constitution of India. The Supreme Court agreed with petitioners’ argument. The Court explained, “[t]he right to live and the right to work are integrated and inter-dependent and, therefore, if a person is deprived of his job as a result of his eviction from a slum or a pavement, his very right to life is put in jeopardy.” *Id.* Thus, the Supreme Court held that the right to life contained in Article 21 does indeed encompass the right to livelihood.

## 2. SEZs Bring About Underhanded Real Estate Dealings

Lax land utilization requirements make the SEZ policy susceptible to underhanded real estate dealings. As described in the operational framework section above, in exchange for procuring cheap land under the SEZ policy, Developers of various types of SEZs are required to reserve 50% of total area for processing activities.<sup>181</sup> Once the minimum area for processing has been reserved, Developers may utilize the remainder of the area for property development. Many suspect that these lax minimum processing area requirements encourage property dealings under the guise of SEZ dealings—Developers hoping to acquire cheap land need simply meet the minimum processing area requirements then lease<sup>182</sup> the remaining land at highly profitable rates to make significant profits.<sup>183</sup> Early empirical evidence supports this suspicion. Noida, an SEZ outside Delhi, has witnessed real estate speculation caused by spiraling land prices.<sup>184</sup> This trend in land prices fuels speculation that Developers are earning profits upwards of 10,000% through underhanded real estate dealings.<sup>185</sup>

## 3. SEZs Inflict a Financial Loss on Government

Easily attainable eligibility requirements for Units create a perverse incentive for business units to cause a decrease in India’s fiscal revenue by relocating from tax-paying urban areas to tax-free SEZs without adequate repayment in the form of additional FDI. As explained in the operational framework section above, the SEZ Rules require only that a Unit achieve positive net foreign exchange earnings, rather than meeting an export target.<sup>186</sup> This readily attainable requirement creates a perverse incentive for business units to relocate from urban areas to SEZs.<sup>187</sup> Rahul Bajaj, chairman of the Bajaj Group, one of India’s largest business conglomerates, agrees that “any rational businessman would conclude he is better off being

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<sup>181</sup> See *supra* text accompanying notes 103–105.

<sup>182</sup> The Special Economic Zones Act, No. 28 of 2005, §11(9), INDIA CODE (2011), available at <http://indiacode.nic.in> (Developers are not allowed to sell land in an SEZ).

<sup>183</sup> See Swaminathan S. Anklesaria Aiyar, *SEZs: The Good, Bad and Ugly*, ECON. TIMES, (Aug. 30, 2006, 1:22 AM), [http://economictimes.indiatimes.com/article\\_show/msid-1937596,prtpage-1.cms](http://economictimes.indiatimes.com/article_show/msid-1937596,prtpage-1.cms). Some governmental entities seem to share the suspicion that the SEZ policy encourages disguised property dealings. First, the Central Bank classifies loans to SEZs as “real estate” lending. *Id.* Second, former Finance Minister P. Chidambaram “obliquely hinted” that SEZs had more to do with real estate than industrial development. ARUNACHALAM, *supra* note 58, at 224.

<sup>184</sup> Ananthanaryanan, *supra* note 162, at 50.

<sup>185</sup> Shrivastava, *supra* note 175.

<sup>186</sup> See *supra* note 118 and accompanying text.

<sup>187</sup> See *Cash Cows*, *supra* note 1. Even Rahul Bajaj, chairman of Bajaj Auto, a premier Indian business conglomerate planning to manufacture in an SEZ, admits that this lax target is “too generous.” *Id.* at 46.

in a [sic] SEZ.”<sup>188</sup> Since Units need only achieve positive net foreign exchange earnings, these Units, upon meeting their meager foreign exchange targets, may continue supplying domestic markets.<sup>189</sup> The final result is that the Indian government incurs a net financial loss on the SEZ plan by sustaining greater losses to tax revenue than gains to FDI. In fact, empirical evidence supports this hypothesis. The Central Board of Excise and Customs has estimated that, as of January 2010, India had suffered revenue losses because of SEZs of ₹1,750,000,000,000 (approximately \$34,206,411,260).<sup>190</sup> A collaboration of various Indian government ministries and departments, in turn, has determined that the total FDI inflow into SEZs as of the end of 2009 was only approximately ₹112,000,000,000 (\$2.29 billion).<sup>191</sup> Given that some of this FDI may have been diverted from urban areas to SEZs, the net loss incurred by the government through the SEZ plan might be larger than these figures indicate.

#### IV. SUGGESTED REFORMS TO THE SEZ POLICY

An examination of the proponents’ arguments demonstrates that SEZs hold potential to be valuable instruments of economic growth and development in India. However, the resistance arising from the opponents’ concerns limits this potential. Since much of the resistance facing SEZs stems from the operational framework’s inability to address opponent interests, legislative and regulatory reforms that make the SEZ policy widely agreeable are necessary for its success. Such consensus-building reforms will be best designed by applying regulatory negotiation, a process in which representatives of affected parties collectively develop rules and regulations.

The most significant advantage offered by regulatory negotiation is the “legitimacy benefit.”<sup>192</sup> Regulations that have been developed through negotiation earn greater procedural and substantive legitimacy. Procedurally, a regulation is more likely to earn widespread legitimacy when a greater proportion of affected constituents are involved in the process of designing the regulation. The mere act of participating in the design of a regulation reduces a party’s will and ability to attack or resist that regulation.<sup>193</sup> In-

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> Manshi Asher, *Five Years After SEZs: Chronicle of Revenues Forgone*, INFOCHANGE (Dec. 2010), <http://infochangeindia.org/governance/analysis/five-years-after-sezs-chronicle-of-revenues-forgone.html>.

<sup>191</sup> *Special Economic Zones*, NAT’L PORTAL OF INDIA (Jan. 11, 2011), <http://india.gov.in/sectors/commerce/index.php?id=13>.

<sup>192</sup> Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENV. LAW J. 60, 63 (2000).

<sup>193</sup> Neil Eisner, *Regulatory Negotiation: A Real World Experience*, 31 FED. BAR NEWS J. 371, 373 (1984).

Participation in the process would let everyone see how difficult it is to draft a

deed, “regardless of whether the horse under design turns out to be a five-legged camel or a Kentucky Derby winner, the resulting rule would have a validity” unachievable through regulation that was not negotiated.<sup>194</sup> Substantively, a regulation is more likely to earn widespread legitimacy when it is better informed and balanced. First, the representation of affected constituents facilitates more holistic fact collection.<sup>195</sup> In regulation that was not negotiated, authorities primarily rely on theoretical information.<sup>196</sup> In contrast, negotiated regulation allows constituents to present supplemental empirical information.<sup>197</sup> Such holistic fact collection, in turn, leads to the creation of more informed regulations. Second, the representation of affected constituents reveals the true interests of the parties. Regulatory negotiation offers a unique opportunity for constituents to maximize their respective interests by prioritizing interests and making concessions.<sup>198</sup> A centralized regulatory authority often makes ill-judged concessions, because it is unaware of the constituents’ prioritization of interests.<sup>199</sup> Regulatory negotiation avoids this pitfall by allowing “careful tradeoffs necessary for an enlightened regulation.”<sup>200</sup> Thus, a more transparent view of the constituents’ interests offers the possibility of more balanced regulations. More substantively informed and balanced regulation, as is promised through regulatory negotiation, is less likely to be objectionable. The legitimacy benefit of regulatory negotiation is derived from this procedural and substantive acceptance.

It is neither feasible nor prudent to repeal the existing SEZ policy, engage in regulatory negotiation, and reinstate a new SEZ policy. Nevertheless, it is both feasible and prudent to amend the current SEZ policy to retroactively reflect a more negotiation-based approach. In line with the regulatory negotiation approach, this article suggests two sets of legislative and regulatory reforms. The first set of reforms—procedural reforms—focuses on securing greater opponent involvement in the establishment and operation of SEZs. The second set of reforms—substantive reforms—

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rule, especially on a controversial subject. Even if the parties did not reach a consensus, they would be less likely to attack a rule issued by the agency. Indeed, if the parties could not reach a consensus, it would be difficult for them to complain that they could do a better job than the agency.

*Id.*

<sup>194</sup> Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 31 (1982–83).

<sup>195</sup> Eisner, *supra* note 193, at 373 (“Because of the representation of each affected interest, it should be easier for the agency to gather the necessary factual support for its rulemaking.”).

<sup>196</sup> See Harter, *supra* note 194, at 30.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 7.

focuses on introducing rules that will further opponent interests through, not despite, the establishment and operation of SEZs. Admittedly many of these suggested reforms diminish the economic incentives investors will experience in SEZs. However, this reduction in incentives is a necessary compromise to eliminate the more burdensome social barriers and legislative and regulatory uncertainty generated by the widespread protests facing SEZs.

#### A. Procedural Reforms

Quelling the popular resistance facing SEZs hinges largely on the implementation of legislative and regulatory reforms that would facilitate greater participation of opponents in the establishment and operation of SEZs. First, state governments should exercise greater control over the Board. Second, the Board should engage in a case-by-case determination of minimum processing area requirements for prospective SEZs. Together, these procedural measures ensure the involvement of affected state constituents in the establishment and operation of an SEZ. Furthermore, these measures act as a safety valve, providing state constituents the tools to balance the advantages promised by SEZs against the harm done through displacement of agrarian communities and underhanded real estate dealings.

##### 1. Greater State Government Control over the Board

To address opponents' concerns over the displacement of agrarian communities,<sup>201</sup> state governments should have more control over the Board, the body regulating the establishment and operation of SEZs.<sup>202</sup> Insufficient state authority in the establishment and operation of SEZs has been listed as a factor for SEZs' underperformance.<sup>203</sup> Thus, increasing state governments' authority in this area is necessary to improve the performance of SEZs.

Currently, the distribution of authority between the Central Government and state governments in establishing and operating SEZs is inversely related to the stake each government has in the enterprise. The Central Government has less of a stake than state governments in the establishment and operation of an SEZ. First, because the employment, FDI, and infrastructural benefits of SEZs occur directly within the state, a state government benefits more than the Central Government from the successful establishment and operation of the SEZ. Second, because resistance to a particular SEZ is typically localized, a state government stands to lose more than the Central Government from the establishment and operation of un-

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<sup>201</sup> See *supra* Part III.B.1.

<sup>202</sup> See *supra* text accompanying note 87.

<sup>203</sup> See Prabha Shashtri Ranade, *Special Economic Zones: An Overview*, in SPECIAL ECONOMIC ZONES: GLOBAL AND INDIAN EXPERIENCES, *supra* note 83, at 3, 17.

wanted SEZs. Yet, the Central Government is able to exert more authority than is a state government in the establishment and operation of SEZs, because the majority of the members on the Board are nominated by the Central Government.<sup>204</sup> Therefore, although the Central Government stands to gain and lose less through SEZs than do state governments, the Central Government holds more authority than state governments in establishing and operating the SEZ.

Instead, authority between the Central Government and state governments in establishing and operating SEZs should be redistributed to reflect the stake each government holds. Redistributing authority requires changing the composition of the Board to include more state government nominees than Central Government nominees. Allowing state governments to control decisions of the Board should lead to the establishment and operation of a greater proportion of successful SEZs. When deciding to establish and operate an SEZ, state governments will be more likely than the Central Government to accurately balance the benefits to employment, FDI, and infrastructure against the harm of popular resistance. State governments have an incentive to accrue employment, FDI, and infrastructural benefits. But, this incentive is counterbalanced by state governments’ incentive to cater to the views of their electorates. This competing set of interests induces a more precise cost-benefit analysis over the establishment and operation of an SEZ. A more accurate analysis should generate a greater proportion of popularly-supported SEZs.

## *2. Case-by-Case Determination of Minimum Processing Area Requirements*

To address opponents’ concerns over the occurrence of underhanded real estate dealings under the guise of SEZ dealings,<sup>205</sup> a case-by-case determination of land utilization requirements should supplement existing minimum processing area requirements. The current land utilization requirements—the lax minimum processing area requirements discussed in the operational framework section above<sup>206</sup>—leave the SEZ policy susceptible to underhanded real estate dealings. Thus, there is a need for more stringent land utilization requirements. However, to avoid undue hardship that would result from across-the-board increases in the minimum requirements, case-by-case determinations are required.

Indiscriminately increasing minimum processing area requirements for all SEZs will be unduly burdensome upon many Developers. For example, Mukesh Ambani, a prominent Developer, will be unable to develop viable SEZs if more stringent minimum processing area requirements are imposed.

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<sup>204</sup> See *supra* note 94 and accompanying text.

<sup>205</sup> See *supra* Part III.B.2.

<sup>206</sup> See *supra* text accompanying notes 103–105.

He explains that to remain competitive with SEZs in Dubai and China in attracting international business units, he must offer comparable lease terms on the industrial processing area.<sup>207</sup> Offering comparable lease terms to the SEZs in Dubai and China forces Mr. Ambani, in turn, to incur a loss on the industrial processing area.<sup>208</sup> Therefore, Mr. Ambani does not derive his financial incentive to develop SEZs from leasing the industrial processing area. Rather, Mr. Ambani derives his financial incentive to develop SEZs from leasing the non-processing residential area.<sup>209</sup> Thus, imposing higher minimum processing area requirements for all SEZs will extinguish the financial incentive for Developers like Mr. Ambani.

Instead, a more nuanced system of imposing minimum processing area requirements is necessary. Accordingly, a case-by-case determination of minimum processing area requirements will be an effective means of imposing more stringent land utilization requirements. Under this system, upper limits for minimum processing area requirements in each type of SEZ would be introduced. A Developer would bear the burden of proposing reasons for being exempted from this upper limit. Upon reviewing the Developer's proposal, the Board would have the freedom to impose a less stringent minimum processing area requirement. In making this determination, the Board would examine the profitability of the SEZ's processing area: the more profitable the non-processing area in comparison to the processing area, the lower would be the minimum processing area requirements. Critically, however, the Board would not have the freedom to reduce the minimum processing area requirements below existing levels. A policy in which SEZs are by default required to meet stricter land utilization requirements will reduce the scope for underhanded real estate dealings. At the same time, to avoid undue hardship on particular SEZs, case-by-case determinations will provide exemptions from this stricter requirement.

#### B. Substantive Reforms

To effectively reduce popular resistance against India's SEZs, procedural reforms must necessarily be complemented by substantive reforms that transform the SEZ policy into a mutually beneficial initiative. To achieve such acceptance, substantive reforms must take the shape of rules that promote opponents' interests. To reverse the pressing fear that SEZs will displace agrarian communities, employment targets should be imposed upon Units, and the inclusion of previous landowners in SEZs' development and operation should be incentivized. Additionally, to diffuse the concern that SEZs will result in financial losses for the government, export targets should be imposed upon Units. This set of substantive safeguards

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<sup>207</sup> Aiyar, *supra* note 183.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

transforms India’s SEZ policy into an initiative that also promotes its opponents’ interests.

### 1. *Employment Targets for Units*

To remedy the displacement of agrarian communities,<sup>210</sup> employment targets should be imposed upon Units. Employment targets will reduce displacement of agrarian communities by relieving the second component of displacement—the loss of livelihoods.<sup>211</sup> Thus, the imposition of employment generation targets upon Units would partly address popular protests provoked by the loss of livelihoods. In fact, rather than merely quelling the hostility against SEZs, providing employment benefits to agrarian communities may even provide a positive incentive for these communities to facilitate the establishment of SEZs.

One effective scheme for imposing employment targets upon Units could be a point scheme modeled upon the Black Economic Empowerment (BEE) initiative in South Africa.<sup>212</sup> Under such a scheme, Units would be required to meet a minimum “Community Employment” points threshold to be eligible to operate in an SEZ. Each Unit would accrue points for taking various employment-related measures. For example, Units would accrue points for employing individuals from local agrarian communities, and could earn additional points for involving these employees in management and for developing these employees’ skills.<sup>213</sup> Under this scheme, Units would have flexibility in deciding which employment-related measures to implement to meet the minimum “Community Employment” points thresh-

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<sup>210</sup> See *supra* Part III.B.1.

<sup>211</sup> See *supra* text accompanying note 162.

<sup>212</sup> See Sumeet Jain, *Affirmative Action: An Evolving Remedy*, in 2006 TRANSFORMATION AUDIT: MONEY AND MORALITY 44, 47–49 (Susan Brown ed.), available at [http://www.ijr.org.za/publications/pdfs/TA\\_Money\\_and\\_Morality\\_Final.pdf](http://www.ijr.org.za/publications/pdfs/TA_Money_and_Morality_Final.pdf). The South African scheme promoting employment equality, BEE, is characterized as a system of incentives. *Id.* at 47–48. Under BEE, private businesses bidding for government tenders receive additional points for taking employment-equalizing initiatives benefiting historically disadvantaged racial groups. In particular, the BEE initiative awards private businesses with points for (i) hiring employees belonging to historically disadvantaged racial groups, (ii) hiring managers belonging to historically disadvantaged racial groups, and (iii) developing the skills of employees belonging to historically disadvantaged racial groups. *Id.* at 48.

<sup>213</sup> Since individuals from local agrarian communities are likely to lack skills required in higher categories of employment, skills development programs will be especially beneficial in improving the long-term employment prospects of individuals from these communities. See *Number of Literates & Literacy Rates*, OFF. REGISTRAR GEN. & CENSUS COMMISSIONER, INDIA, [http://www.censusindia.gov.in/Census\\_Data\\_2001/India\\_at\\_glance/literates1.aspx](http://www.censusindia.gov.in/Census_Data_2001/India_at_glance/literates1.aspx) (last visited Nov. 16, 2010) (rural literacy rate only 58.7%). Accordingly, the point system rewards Units for engaging in skills development programs. The number of points a Unit accrues for engaging in skills development programs could be governed by the amount of money the Unit spends on these skills development programs per employee from local agrarian communities.



old. Thus, this point scheme will contribute to the employment welfare of individuals from local agrarian communities, without imposing rigid employment-related requirements that would repel investors.

2. *Incentivizing the Inclusion of Previous Landowners in SEZ Development and Operation*

To further remedy the displacement of agrarian communities cited by opponents,<sup>214</sup> the SEZ land acquisition scheme should be transformed to incentivize the inclusion of previous landowners in the development and operation of SEZs. As expressed in opponents' views, the current SEZ land acquisition scheme, governed by the heavy-handed terms of the Land Acquisition Act, makes little progress in including previous landowners as beneficiaries of SEZs.<sup>215</sup> Replacing the current SEZ land acquisition regime<sup>216</sup> with a land acquisition regime that converts previous landowners into stakeholders in the emerging SEZ development will alleviate the displacement of agrarian communities. Remarkably, this idea has received support from both ends of the political spectrum.<sup>217</sup> An inclusive SEZ land acquisition scheme could take the form of a point system for Developers or of a fractional land return system.

a. Point System for Developers

An inclusive SEZ land acquisition scheme could take the form of a point system for Developers modeled upon the BEE initiative in South Africa.<sup>218</sup> This point scheme for Developers is similar to the point scheme suggested above for Units. Under such a scheme, Developers would be required to meet a minimum "Community Inclusivity" points threshold to be eligible to operate in an SEZ. Developers would accrue points for taking various measures that include previous landowners in the development and operation of the SEZ, such as employing these previous landowners, involving them in management, and extending equity ownership to them.

This point system for Developers addresses both components of dis-

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<sup>214</sup> See *supra* Part III.B.1.

<sup>215</sup> *Id.*

<sup>216</sup> Discarding the current SEZ land acquisition regime does not necessitate repealing the Land Acquisition Act; it merely requires that the Land Acquisition Act be precluded from application in SEZ land acquisition.

<sup>217</sup> Dohrmann, *supra* note 14, at 75–76. Sitaram Yechury, a senior member of the Communist Party of India, has called for substitution of the Land Acquisition Act with a new law which ensures that the owners of acquired land become stakeholders in future projects. *Id.* At the same time, Mukesh Ambani, a prominent Developer, is also of the opinion that individuals previously possessing an interest in acquired land should be made future "shareholders" of some sort" in the emerging SEZ. *Id.* at 76.

<sup>218</sup> See *supra* note 212 and accompanying text.

placement: inadequate compensation for land and the loss of livelihoods.<sup>219</sup> First, by providing an alternative ownership interest, extending equity ownership in SEZs to previous landowners partially rectifies the inadequate compensation received for land. Second, providing employment opportunities will prevent the loss of livelihoods. Extending equity ownership provides the additional benefit of arming previous landowners with an active interest in the success of an SEZ. To ensure that previous landowners maintain an active interest in the success of SEZs, Developers should be unable to meet the minimum points threshold without extending significant equity ownership to previous landowners.

#### b. Fractional Land Return System

Alternatively, an inclusive SEZ land acquisition scheme could be based upon a fractional land return system. Under this system, once an SEZ has been developed, Developers will be required to return a certain fraction of the developed land to the previous landowners.<sup>220</sup> This system functions on the premise that land in an SEZ is far more valuable than agricultural land. Accordingly, although the Developer returns only a fraction of the SEZ land to the previous landowner, the value of the returned land in the SEZ is expected to exceed the value of the larger agricultural land acquired prior to the development of the SEZ. Thus, the expectation is that both the Developer and the previous owners of the SEZ land will benefit from the development of the SEZ. By providing previous landowners with land more valuable than what they previously owned, the fractional land return system addresses the first component of displacement—inadequate compensation for land.<sup>221</sup> Even more, because the previous landowners will have an interest in the land in the SEZ, they will have an incentive to maximize the value of that land by making the SEZ successful.

### 3. *Export Targets for Units*

To mitigate the financial loss incurred by the Government on the SEZ policy,<sup>222</sup> Units should be subject to meeting export targets. The current SEZ operational framework requires only that Units achieve positive net foreign exchange earnings.<sup>223</sup> However, to ensure that the fiscal benefits available within SEZs are availed of only by Units providing adequate repayment in the form of additional FDI, the net foreign exchange target

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<sup>219</sup> See *supra* Part III.B.1.

<sup>220</sup> Reliance successfully secured land for the development of SEZs on the condition that the previous landowners will receive 12.5% of the land back upon the development of the SEZ. PALIT & BHATTACHARJEE, *supra* note 13, at 107.

<sup>221</sup> See *supra* text accompanying note 161.

<sup>222</sup> See *supra* Part III.B.3.

<sup>223</sup> See *supra* text accompanying note 118.

should be replaced with an export target. An export target would require that Units export a significant proportion of their total output. Since meeting an export target places burdens upon a non-exporting business unit, the perverse incentive for business units to relocate from urban areas to SEZs is vitiated. Thus, the Indian economy would be less likely to experience a reduction in fiscal revenue without a corresponding gain in FDI.

### CONCLUSION

SEZs have developed into “possibly the toughest challenge” that Indian policy-makers have faced.<sup>224</sup> On one hand, the potential benefits that SEZs promise are vital to India’s developing economy. On the other hand, pushing India’s current SEZ mandate against the popular resistance it faces bears the risk of dismantling the SEZ policy altogether. Yet, opinions on SEZs need not be so polarized.

With consensus-building reforms, SEZs are capable of delivering a positive-sum outcome. By employing several of the reforms suggested in this article at a micro level and in an informal manner, Navin Raheja, a Developer, smoothly earned approval for his SEZ.<sup>225</sup> Understanding the general proposition that earning popular approval is critical to the success of his SEZ, Raheja hired a local advertising agency to make educational and inspirational movies about the SEZ.<sup>226</sup> Further, parallel to the suggestion of incorporating local concerns when deliberating SEZ proposals by replacing the Central Board of Approval with a State Board of Approval,<sup>227</sup> Raheja acquired a truck loaded with chairs and refreshments to hold impromptu discussions about his SEZ proposal with local village councils.<sup>228</sup> In addition, consistent with the proposal of placing employment targets upon SEZs,<sup>229</sup> Raheja assured the local agrarian communities that his SEZ would create jobs for two persons per family.<sup>230</sup> Finally, in line with the recommendation to include previous landowners in the development of the SEZ,<sup>231</sup> Raheja promised to make the previous landowners equity owners.<sup>232</sup> Once Raheja earned the local agrarian communities’ support, the land transfer process was completed within twenty-four hours.<sup>233</sup>

Procedural and substantive reforms formally ensuring that all SEZ Developers and Units exhibit the same level of inclusivity as did Raheja in de-

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<sup>224</sup> PALIT & BHATTACHARJEE, *supra* note 13, at 105.

<sup>225</sup> *Id.* at 106.

<sup>226</sup> *Id.*

<sup>227</sup> *See supra* Part IV.A.1.

<sup>228</sup> PALIT & BHATTACHARJEE, *supra* note 13, at 106.

<sup>229</sup> *See supra* Part IV.B.1.

<sup>230</sup> PALIT & BHATTACHARJEE, *supra* note 13, at 106.

<sup>231</sup> *See supra* Part IV.B.2.

<sup>232</sup> PALIT & BHATTACHARJEE, *supra* note 13, at 106.

<sup>233</sup> *Id.*

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veloping and operating SEZs would play a vital role in quelling the popular resistance facing India’s SEZs. Therefore, such consensus-building reforms are necessary for India to maintain a sustainable SEZ policy.

