

**RIGHT TO FOOD IMPACT ASSESSMENT  
OF THE EU-INDIA TRADE AGREEMENT**

## Imprint

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# SUMMARY AND RECOMMENDATIONS

The European Union (EU) and the Government of India are currently negotiating a bilateral Free Trade Agreement (FTA) that aims to liberalise 'substantially all trade' between the two trading blocks on a reciprocal basis. Beyond trade in goods, the FTA will contain chapters on services, investment, public procurement, intellectual property rights and other areas. In all these areas, commitments are likely to go far beyond current commitments agreed on within the WTO. Officially, the EU Commission and the Government of India are aiming to conclude the agreement by February 2012. In these negotiations the European Commission (EC) is insisting on the principle of 'reciprocity', and seeking to avoid asymmetries in the level of commitments between the two parties. This logic of reciprocity has been criticised by Civil Society Organisations (CSOs), given the great imbalances between the EU and India regarding economic development, wealth, poverty and hunger.

## Trade-related human rights obligations

Chapter II shows that both the EU and India have a clear obligation under international law to respect, protect and fulfil all economic, social, cultural, civil and political human rights in all policy areas, including trade policy. For the EU, moreover, the Lisbon Treaty recognises this obligation through an explicit reference to trade policy. This means that, given their *duty of respect*, the State parties must not ratify any trade agreements obliging them to implement measures that would impact negatively on human rights. Given their duty of protection, states must not ratify any agreements making it more difficult for them to ensure that private actors comply with human rights. And given their *duty of fulfilment* States must refrain from ratifying any agreements that make it more difficult for them to fulfil human rights. These obligations apply not only to States' own populations, but also to people in other States. Consequently, States must not ratify any agreement that impedes another State's ability to uphold its human rights obligations.

## The approach of the Right to Food Impact Assessment (RFIA)

The first step for the EU and India in ensuring coherence between the FTA and these human rights obligations would be to conduct systematic and timely Human Rights Impacts Assessment (HRIAs) *ex ante*, meaning before concluding any trade agreement, and *ex post*, i.e. following a certain phase of implementation of the agreement. So far, the EU Commission and the Government of India have not responded positively to the call for a HRIA on the FTA. This is why MISEREOR, the Heinrich Böll Foundation (HBF), the Third World Network (TWN), Anthra and Glropolis decided to conduct their own civil society impact assessment with a focus on the right to food. In this Right to Food Impact Assessment (RFIA), the assessors have sought to follow the criteria and methodological steps proposed in the draft guiding principles by Olivier De Schutter, the UN Special Rapporteur on the Right to Food, as outlined in Chapter I. Starting from these principles, the RFIA first explored the normative content of the obligations of the EU (and its Member States) and India under the right to food. It incorporated human rights-based indicators into the impact assessment of the contentious provisions. And it followed the proposed methodological steps of 1) screening, 2) scoping, 3) evidence gathering, 4) analysis and 5) conclusions and recommendations.

## Hunger and poverty in India

Chapter III highlights the ongoing dramatic food insecurity that continues to prevail in India. On the one hand, according to the Forbes global list of billionaires for 2011 India has 55 dollar billionaires and about 100,000 dollar millionaires, which nourishes its popular image of a 'shining India'. On the other hand, however, India is ranked a lowly 119 out of 169 countries and territories on the United Nations Human Development Index, and remains home to more hungry and undernourished people than any other country in the world. According to the latest available FAO figures, 224 million or 26.9% of the Indian population were living in chronic hunger in 2006-2008. Given the increased food prices, this alarming figure is very likely even to have increased substantially. People most affected by hunger are children below five

years of age, women, the elderly and people with disabilities. By profession, agricultural workers, and small and marginal farmers are most affected. And by caste, scheduled tribes, scheduled castes and other backward castes are the most vulnerable. There are great regional disparities too. The United Nations Development Programme (UNDP) points out that the poverty rates in the eight northern and eastern Indian states of Bihar, Chhattisgarh, Jharkhand, Madhya Pradesh, Orissa, Rajasthan, Uttar Pradesh and West Bengal, which have a combined population of 421 million poor people, is higher than in the 26 poorest African countries.

### **FTA provisions relevant to agriculture, and the focus of the RFIA**

Chapter IV provides an overview of current trade relations between India and the EU in agriculture, and the likely provisions of a future FTA and their possible implications for agriculture and food security. While the value of current Indian agricultural trade and output is low, it is not low in terms of critical importance, because a vast number of farmers, each producing and trading small amounts, are engaged in and dependent on agriculture. Concerning trade in goods, the FTA will probably oblige India to eliminate more than 90% of all (agricultural and non-agricultural) applied tariffs toward the EU within a period of seven years. Moreover, a standstill clause might cap the tariffs even for the remaining sensitive products at the level currently applied. The goods chapter will probably impose discipline on export tariffs that are currently used by India to contain price volatility. CSOs often criticise the asymmetry of the fact that, while import and export tariffs would be disciplined, this would not be the case for agricultural subsidies or non-tariffs barriers (NTB) in the EU. The latter areas would be the very ones where India could significantly benefit from an agreement. Beyond trade in goods, the FTA is likely to contain provisions on services, for example in the retail sector, on investment protection, on Geographical Indications (GIs) and on Intellectual Property Rights (IPRs), possibly with respect to seeds. CSOs have also expressed concern that European vessels might be granted access to Indian fishing grounds.

Following a review of relevant studies and consultations with CSOs, the publishers focussed the RFIA on three main issues: 1) Concerning trade in goods, the RFIA assesses the likely impact on Indian small-scale producers of possible tariff cuts for dairy and poultry products (Chapter V). 2) Concerning services, the impact of European investment in the retail sector on street vendors, small retailers and indirectly on small-scale food producers is assessed (Chapter VI). 3) Concerning investment, possible implications for access to land by vulnerable groups in rural areas is assessed (Chapter VII). This selection is not meant to be exhaustive; it was made rather due to limited resources, and on the basis of preliminary evidence of possible threats to the right to food.

### **Likely impact of tariff cuts in the dairy sector**

Chapter V analyses the impact of possible tariff liberalisation in the dairy and poultry sectors, both of which are highly relevant to food security and livelihoods. With an estimated production of 112.5 million tonnes, India is the top milk producing coun-

try in the world. The relevance of the dairy sector to livelihoods and food security is tremendous. About 14.08 million farmers are currently involved in 135,439 village-level dairy corporative societies. About 75% of the estimated 70 million milk animals are owned by landless, marginal or small farmers. Thus, most rural milk-owning households own only one to three animals, and it is estimated that only around 15% of households own more than 4 milk animals. It is estimated that dairying accounts for a third of the gross income of rural households, and nearly half that of the landless. All in all, milk production provides employment opportunities for around 75 million women and 15 million men. Furthermore, milk is an important daily diet supplement and a source of protein, especially for children.

The success story of the Indian milk sector was made possible not least through strong public support and protection. During the 1990s the Indian Government protected its dairy sector with import quotas and by channelling all imports through the National Dairy Development Board (NDDB), and the Agriculture and Processed Food Exports Development Authority (APEDA). Due to WTO accession, India had to abolish quantitative restrictions in 1999. As India had bound tariffs for milk powder (SMP) at a zero level, the sector became exposed to the world market. As imports immediately increased, in 2000 India renegotiated a bound tariff in the WTO of 60% for all imports of Skimmed Milk Powder (SMP), which has been applied ever since. This 60% tariff allows virtually no imports at all to come in. Only within a quota of 10,000 tonnes was a lower tariff of 15% applied. This tariff rate quota (TRQ) was extended to 30,000 tonnes in 2009.

Within the FTA negotiations, the EU and Member States such as Germany have expressed a strong interest in opening up the dairy sector to European exporters. And within the Government of India too there seems to be some flexibility concerning the deregulation of at least some tariff lines in the dairy sector, such as SMP. If the EC claims were accepted, tariffs for EU imports would have to be cut to zero probably within seven years, and without any option for their re-introduction. A look at past trade data suggests that the Indian dairy sector might face a significant increase in European imports of milk powder: First of all, according to the Eurostat database, when the Indian Government abolished the import quotas for milk powder in 1999, EU SMP exports increased from 600 tonnes in 1998 to more than 25,000 tonnes in 1999. This is a drastic increase, even though the overall level of imports is still low compared to India's total volume of production. The reasons for this are manifold. However, the remaining administrative hurdles, the lack of established trade relations and the short period of opening go at least some way toward explaining why the absolute volume still remained low. Nonetheless the figures suggest that an elimination of tariffs is likely to be followed by an increase in imports. Secondly, since the extension of the TRQ from 10,000 to 30,000 tonnes in 2009, overall Indian imports of dairy products have actually tripled. So far the EU share of Indian imports has remained only at a low level of 4.4% for dairy products in general and between 12 and 15% for milk powder. This could change, however, if tariffs for the EU are cut to zero, especially since the EU will abolish its dairy (production) quota in 2013, which will lead to increased production and – as domestic consumption is stagnating – increased exports.

The fact that the sector possesses such a highly fragmented structure, which includes millions of small farmers, makes it especially highly sensitive even to small price changes. If price changes occur, the right to food of Indian small-scale milk producers may be seriously affected. Since international prices for milk powder are highly volatile and the Indian dairy sector is highly price-elastic, Indian dairy farmers may face a drastic decline in producer prices in times of low international prices. As EU agriculture is still highly subsidised, and the legislative proposal of the EC for the reform of the Common Agricultural Policy (CAP) even maintains the option of introducing export refunds particularly in times of low world market prices, EU exports are likely to even reinforce price depressions in such periods. Particularly small-scale producers, whose revenues barely cover production costs even now, would then find it increasingly difficult to repay loans for animals, buy feed and feed themselves adequately. Even the survival of farms may be under threat. Moreover, the partial substitution of national milk production with imported milk powder would disconnect national supply from growing national demand. Positive effects of this growing demand would not reach producers. As tariffs would be bound at zero vis-à-vis the EU, India would be deprived of the means to protect the market, even though it might need to do so in order to protect or fulfil the right to adequate food of farming families.

Poor urban consumers may benefit from such a development as long as international prices are low. However, a higher dependence on the world market might also increase the transmission of volatile international prices to the national level, and make it much more difficult for India to stabilise consumer prices during periods of international price hikes.

#### **Likely impact of tariff cuts in the poultry sector**

With a poultry population of 489 million birds and egg production of 59.84 billion in 2009-10, India ranks among the top three countries in the world in egg production. The relevance of poultry keeping to food security is similar to that of dairy farming. India's landless, marginal and small-scale farmers keep about 85% of the country's poultry stock. About 50% of the landless and marginal farmers at the bottom end of the smallholder spectrum supplement their livelihood through backyard poultry keeping. Backyard poultry is particularly important due to its risk diversifying effects. It constitutes one of the core support systems for subsistence farmers, providing them with supplementary income. Even though it does not generate huge income, it is capable of taking especially women forward into a positive spiral of events which may lift them out of poverty. Poultry production accounts for between 11 and 20% of the total cash income of traditional small producers. Furthermore, growth in the broiler industry is offering income opportunities for small- and medium-scale commercial poultry keepers, mostly through contract farming schemes. The Annual Report of the Department for Animal Husbandry, Dairying and Fisheries 2011 also underlines the importance of the poultry sector for the nutritional security of the rural poor.

The Indian poultry sector is protected by applied (and bound) tariffs of between 30 and 100%. This explains why Indian imports of poultry products are negligible, and did not increase following WTO accession. Poultry meat, the most sensitive product, is

even protected by a prohibitive tariff of 100%. In contrast, India's exports of poultry products increased from USD 110 million to USD 4,220 million between 1993-94 and 2008-09. Major destinations are the Middle East for table and hatching eggs, and the EU for egg powder.

As in the dairy sector, the abolition of import tariffs for European poultry products is one of the offensive interests of the EU in the FTA negotiations, as urban demand in India is increasing strongly. Indian exporters of egg powder might benefit from trade liberalisation if the high EU tariff of EUR 66.3 per 100 kg were to be eliminated. On the other hand, a definite elimination of the current Indian import tariff of 100% for fresh poultry meat might have a tremendous impact on Indian poultry producers for various reasons. The EU is the third largest exporting country of poultry meat in the world. Between 2000 and 2008, the EU increased its chicken exports by nearly 80%, and exports to developing countries also play an important role. To give one example, the export of poultry meat to West Africa has increased by more than 500% since 1995. Even without export refunds, European exporters are highly competitive internationally mainly due to price differentiation between the different parts of the bird. While fillets are sold at relatively high prices in the highly protected European market, the remaining parts such as legs are exported at very low prices, mainly as a lucrative alternative to expensive waste disposal. Indian experts point out that this EU supply would closely match the Indian consumer preference for legs.

The RFIA finds that the right to food would be threatened mainly for small-scale contract farmers involved in commercial broiler production. Their vulnerability stems from the investments they make on the basis of credits. This leaves them vulnerable to price decreases caused by EU imports. Interviewees indicated how difficult it is for them to repay their debts, especially given the current trend in prices for feed. Price fluctuations are often transmitted almost immediately to these farmers by their contractors. If EU imports were freed from import tariffs, they might increase drastically and undermine local prices. This would probably increase the burden of debt for many small-scale contract farmers to an extent that would threaten their livelihoods and their right to adequate food. Poor urban consumers would probably benefit from such a development, as they would have to pay less for poultry meat. On the other hand, a flourishing poultry sector in rural areas, but also in peri-urban zones, could have the potential to help not only create jobs, but also increase the availability of cheaper eggs and poultry meat.

#### **Likely impact of FDI deregulation in multi-brand retail**

Chapter VI assesses the possible impact of an opening of multi-brand retail for EU investors on the right to food in India. After agriculture, retail is the second largest source of employment and livelihoods in India. Between 35 and 37 million people, or 7 to 8% of the total workforce, are currently employed in the sector, 55% of them in urban and 45% in rural areas. Currently, modern retail has a share of just 4.1% of the total turnover of the sector, which amounts to USD 322 billion. The vast majority of the workforce are engaged in the so-called unorganised sector: in around 12 million small outlets such as local *kirana* shops, owner –manned general stores, chemists, footwear shops,

apparel shops, *paan* and *beedi* shops, or as street vendors or 'hawkers'. According to the *National Hawkers Federation*, poverty and food insecurity are especially widespread among the latter group, which currently includes 10 million people. They usually possess low skills and lack the level of education required for the better-paid jobs in the organised sector. For the urban poor, hawking is an important and often the only means of earning a livelihood. Indirectly, retail also makes a major contribution to the livelihoods and food security of their suppliers in agriculture, since food and beverages account for 74% of revenues in the total retail market. And finally, unorganised retail is currently performing the very important role of providing affordable food for poor consumers.

At present, Foreign Direct Investment (FDI) is allowed without limit in wholesale and up to an equity share of 51% in single-brand retail. For multi-brand retailing, FDI is totally forbidden so far. As a result, European companies are only active in single-brand retail, such as Adidas/Reebok, Nike, Levi's and Benetton, or in wholesale, where the Metro Group, Carrefour and Tesco operate cash & carry markets. As India is acknowledged to be the most attractive market for global retailers, opening up multi-brand retail for EU FDI is a top priority of the EC in the FTA negotiations. Following a national debate on price inflation and inefficiencies in food value chains, and simultaneous pressure from the EC and the European Parliament (EP), India is very likely to open up multi-brand for FDI up to an equity cap of 51% through the FTA. The RFIA concludes that such a provision is likely to have a threefold impact on the right to adequate food in India:

The *first* and main impact relates to employment. Data from a government-sponsored study show that unorganised retail suffered a decline in turnover of about 14% and in profit of about 15% over a period of 21 months, following the establishment of domestic modern retail formats in the vicinity of the unorganised outlets. Moreover 151 such small outlets were reported to have been closed down over the same period, which constitutes a 4.2% annualised closure of retailers. The same study acknowledges that 'structural changes in retail will surely start affecting large numbers of small retailers at some stage, be it after one or two decades'. If global retail companies such as Metro, Carrefour and Tesco were allowed to establish supermarkets in India, this trend would be fast-tracked to a considerable degree.

In 2010, Carrefour itself forecast that the sales area of supermarkets would expand by either 525,000,000 or 600,000,000 sq. ft. (depending on the square footage assumed for a single employee) within five years if FDI were deregulated. As the current sales area of the organised sector is officially estimated at 31,000,000 sq. ft., the sales area of organised retail would increase by 1,793 or 2,035% within five years. Carrefour promises that such an expansion would lead to the creation 1.5 million direct jobs in organised retail. Assuming the average ratio of sales area to turnover for Carrefour in other Asian countries, the projected expansion in sales area would generate an annual turnover of USD 233.6 to 265.1 billion. In this scenario, by 2014 supermarkets would acquire a 43 to 48% share of the USD 543 billion in total turnover of the whole sector as expected by business organisations by that date, whereas the current

share of organised retail is only 4.1%. Our calculations show that, despite a massive growth in the sector, such an increased share of highly efficient modern retail would result in a net job loss of between 1.1 and 4.9 million jobs within five years.

Bearing in mind that the expansion of organised retail projected by Carrefour is far too optimistic, the loss of jobs is also likely to occur significantly more slowly. Nevertheless it will be significant, and hardest hit will be the social group of urban poor with low skills and very few alternative sources of livelihood, a large proportion of whom are women, in a context of largely jobless growth. Therefore, this would threaten their right to adequate food.

The *second* impact on the right to food may be felt by small-scale farmers who indirectly supply retail with food products. Agricultural markets in India are now continuously subject to tight regulation involving minimum prices for all agricultural products except fruits, vegetables and herbs, a public distribution system, public food reserves and the promotion of marketing cooperatives. The Government of India has announced that market regulations will be fundamentally reformed in tandem with the opening of multi-brand-retail for FDI, mainly by allowing retailers to directly purchase agricultural products from farmers. Thus, as market shares of retailers are expected to grow significantly, a big share of food supply chains may then be organised directly by supermarkets in the future. On the one hand, studies show that farmers contracted as suppliers by retailers often benefit from more stable demand and higher prices. On the other hand, only the most efficient and educated, with some capital and larger holdings, succeed in gaining access to modern, highly standardised supply chains, while small-scale producers may be further marginalised. Excluding Indian small-scale producers from market access, however, would threaten their right to adequate food. Moreover, as Indian food processing is poorly developed, there is a risk that European supermarkets might to a large extent fall back on their well established international sources for processed food, especially since import tariffs will be cut simultaneously.

The *third* impact relates to food consumption. One of the main expectations GoI attaches to the deregulation of multi-brand retail is that food price inflation would be contained. In fact a study showed that in Delhi, supermarkets seem to be cheaper especially with respect to dry food products, as these are easier to handle, procure and store. For fresh products, prices are sometimes lower as well, although the produce is of lower quality than in traditional outlets and wet markets. For many consumers in Delhi, modern retail therefore seems to be an attractive and cheaper alternative to kiranas and street vendors. With regard to poor consumers, however, the situation looks different. In traditional outlets, poor consumers are often able to negotiate lower prices than rich customers. And, even though many food items are offered at lower prices in supermarkets, these items tend to involve processed, labelled and packaged food, which are generally more expensive and less suitable for poor customers. The expansion of European supermarkets is unlikely to help realise the right to food of these vulnerable groups.



### Likely impact of increased investor protection on access to land

Chapter VII analyses the possible impact of the investment protection chapter on the right to food, with a focus on access to land. Land distribution in India is highly unequal. Small and marginal farmers with an average land holding of less than two hectares constitute 83.29% of farmers, but own only 41.14% of the total agricultural land. Eleven per cent of rural households in India are landless. The average monthly household expenditure among farming communities has been estimated to be 503 Indian rupees, or seven euros – a clear sign of poverty. Small and marginal farmers – especially among Adivasi or indigenous populations – often rely on their land for the subsistence of their families. Landless and forest dwelling communities in India are more dependent on common lands, which include grasslands, scrubs and forest lands. For most marginalised communities in India's villages these lands support livestock rearing, and the collection of roots, tubers, fruits and fuelwood, particularly in states like Maharashtra, Madhya Pradesh, Rajasthan and Gujarat. Lack of access to land is clearly one of the main reasons for hunger in India in rural areas.

As land laws are within the competence of the federal states, India still does not have a comprehensive national land policy. After Indian independence the land reforms agenda had four basic components: 1) the abolition of landlords, 2) allocation of land to the tiller, 3) consolidation of small land holdings, and 4) re-distribution of land above certain ceilings to the landless. However, due to the resistance of landed elites and a lack of political will, land reform still remains an unfinished business, even though the degree to which reforms have been implemented varies across the states. Today, though, virtually all state governments are taking measures to liberalise land legislations and policies so as to facilitate the conversion of agricultural land for non-agricultural uses, and free the buying and selling of land free from restrictions. Despite the legal protection of scheduled tribes and other forest dwellers, for example through the 2006 Forest Rights Act, many investment projects, especially in areas such as mining, agrofuels or dams, often go hand in hand with forced evictions of local communities. In some cases, European investors such as Vedanta Aluminium Limited or Lafarge Surma Cement Ltd. have been involved in such projects. Even though foreign investors are not allowed to buy land in India, the State can acquire land and offer it for the use of foreign companies under leasing arrangements, which can be embedded in investor-state agreements. In many cases, this land has been converted from agricultural to industrial land before being handed over to the companies.

India has already signed 21 bilateral investment treaties (BITs) with 22 of the 27 EU Member States. These investment agreements typically contain clauses on investment promotion and protection, national treatment and most-favoured nation treatment, protection against expropriation, compensation for losses, repatriation of investment (subrogation), investor-State dispute settlement and dispute settlement between States. As the competence to negotiate international agreements concerning foreign direct investments (FDI) has been shifted away from individual Member States and onto the EU since the Lisbon Treaty, the EU-India FTA will include an investment protection chapter. On 12th September 2011 the Council officially approved a negotiation mandate for

the European Commission. A comparison between the existing commitments of India under the BITs and its likely commitments under the FTA shows that the standards of investment protection will *first* of all harmonise the 21 existing BITs, secondly include the five Member States that did not yet sign BITs with India and *thirdly* probably involve a race to the top for investor protection. Investor protection is essential for economic development, as it provides a secure environment for investors on a legal basis. However, excessive investor protection can also conflict with States' obligations to protect human rights, including with regard to access to land and the right to food. The RFIA concludes that some of the likely provisions of the FTA investment chapter may turn out to be major obstacles for current or future land reform initiatives, beyond the internal obstacles that already exist and beyond the ones arising from existing BITs. For example, the prohibition of direct and indirect expropriation without compensation makes it very expensive for Indian states to acquire land that is currently being used by EU companies. In contrast to an earlier proposal of the EC from January 2011, the current mandate does not clarify the fact that regulatory measures to achieve legitimate public policy objectives do not constitute indirect expropriation. If this is not changed, the FTA will prescribe compensation in the context of land reforms, even though the Indian constitution does not.

In addition, the above-mentioned provisions of the FTA bear the risk of further weakening the position of local communities in their efforts to defend their existing access to land against large-scale investment projects by European companies. The obligation of fair and equitable treatment (FET), for example, extends India's obligation to provide investment protection to include the 'legitimate expectations' of an EU investor. This may happen for example in cases where the investor had expected to gain access to lease contracts over land that would be relevant to his business. According to what the EC has indicated there will be no public interest exemption from FET. Furthermore, in existing lease arrangements, as foreign investors often obtain land tenure for up to 99 years, any interference in the investment may be regarded as an indirect expropriation thereof and a breach of the FET obligation. Furthermore, the so-called umbrella clause may strengthen investor rights under investor-State contracts, which is the most current form under which land is leased out to investors. The umbrella clause might blur the distinction between investor-State contracts, which might contain those land leases, and the EU-India FTA. Any breach of the investor-State contract might then be considered a violation of the FTA, thus provoking claims for compensation.

Whereas the investment chapter is likely to provide the highest level of investor protection, principles and mechanisms for human rights protection such as Free Prior and Informed Consent (FPIC) will not be part of the agreement. The option of investor-State dispute settlement would allow companies to circumvent local and national courts and sue India directly under a variety of international institutional frameworks for violations of the FTA investment provisions. Investors' rights would thus prevail not only over the Constitution of India, but also over universal human rights such as the right to food, of which access to land is an essential element for the rural poor.

### Recommendations concerning the FTA between India and the EU

- Before signing any FTA, both the EU and India must conduct a comprehensive HRIA following the guiding principles of the UN Special Rapporteur on the Right to Food.
- Before concluding any agreement, a meaningful consultation of all stakeholders, particularly the most vulnerable, must be conducted, and all drafts of the agreement and negotiation documents must be made transparent and open for public debate.
- All tariff lines for poultry and dairy products should be exempted from tariff cuts. Nor should a standstill clause freeze them at the currently applied tariff. Scope must be maintained for policy responses to developments in supply and demand, and national and international prices.
- The FTA must allow for asymmetric treatment of the partners. A comprehensive HRIA should identify all products that can affect the right to food and other human rights, and therefore require further protection. The coverage of the FTA must leave enough space for all these products, be they agricultural or non-agricultural products.
- An effective and easily applicable Special Safeguard Mechanism (SSM) must be established, to enable India to react to sudden import surges. This SSM must include a volume and a price trigger.
- The FTA should not include provisions that would make it more difficult for India to maintain the existing ban on European FDI in multi-brand retail. India's policy space for restricting such FDI must be maintained whenever the right to food is found to be violated or threatened. Any possible opening of the sector must be reversible, in case of threats to the right to food.
- Any provision that limits Indian policy spaces for public interest land regulations to secure land tenure and to redistribute land to landless people under the rule of law must be avoided in the FTA. This would require, for example, a removal of investor-State settlement and of the umbrella clause, clear public interest exemption clauses from FET and from protection from direct and indirect expropriation. It would also require the inclusion of human rights principles and mechanisms such as Free Prior and Informed Consent (FPIC).
- A human rights clause in the agreement must allow for the revision of any provision that is found to violate or threaten human rights.
- A monitoring mechanism must be established that ensures continuous assessment of the human rights impact of the FTA regarding trade in goods. Any threat to the right to food must lead to a revision of the problematic provisions of the agreement.

# INTRODUCTION

The European Union (EU) and the Government of India are currently negotiating a bilateral Free Trade Agreement (FTA) that aims to liberalise 'substantially all trade' between the two trading blocks on a reciprocal basis. The agreement will affect not only trade in goods, but also services and investment, public procurement, intellectual property rights and other areas. Officially, the European Commission (EC) and the Government of India are aiming to conclude the agreement by February 2012. The slow pace of the negotiations, however, suggests that negotiations will continue into 2012.

The Government of India (GoI) and the EU claim that an FTA will increase trade and investment for both partners. Improved efficiency and accelerated growth would, so they argue, translate into welfare gains and poverty reduction in India as well. On the other hand, many NGOs and social movements are concerned that an FTA with the biggest economic trading bloc would aggravate poverty and hunger in India. They fear that the FTA might severely limit the policy space for India to realise the right to adequate food and other rights enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR), which has been ratified both by India and the Member States of the EU. According to the UN Food and Agriculture Organisation (FAO), 224 million people were already facing chronic hunger and malnutrition in 2006-2008, making India the country that is home to the largest number of hungry people anywhere in the world.

To obtain more empirical evidence on this question, MISEREOR, Anthra, the Heinrich Böll Foundation (HBF), and the Third World Network (TWN Glopolis), all of which are members of the Ecofair Trade Dialogue (<http://www.ecofair-trade.org>), decided to conduct a Right to Food Impact Assessment (RFIA). Based on an expert consultation, a review of relevant studies, field visits to dairy and poultry farmers in Andhra Pradesh and information provided by officials of the GoI and the EC, this RFIA assesses the possible impact of an FTA between India and the EU on the Human Right to Food in India. Methodologically, the RFIA follows the draft guiding principles on Human Rights Impact Assessments (HRIA) proposed by the UN Special Rapporteur on the Right to Food, Olivier De Schutter.

Following concerns expressed by possibly affected groups, NGOs and existing studies, the RFIA focuses on the likely impacts of possible FTA commitments in three areas: 1) tariff cuts for trade in agricultural goods, particularly dairy and poultry, 2) opening of the multi-brand retail sector to European Foreign Direct Investment (FDI) and 3) increased protection for European investors in areas likely to affect rural communities' access to land. This selection is not meant to be exhaustive. Other areas of concern, such as a possible tightening of corporate Intellectual Property Rights (IPRs) on commercial seeds, and the impact of possible market opening on traditional small fisheries, could not be dealt with due to limited resources.

The report is structured as follows: Chapter I, by Armin Paasch, outlines the approach and methodology applied in the RFIA. Chapter II, also by Armin Paasch, explains the trade-related human rights obligations of both India and the EU and its Member States. In Chapter III, Sagari Ramdas provides an overview of figures on hunger and poverty in India and the most vulnerable groups. Chapter IV, by Ranja Sengupta, provides an overview of the likely provisions of the FTA with possible implications for agriculture and food security. Chapter V, by Christine Chemnitz, assesses the likely impact of possible tariff cuts on the right to food of dairy farmers and poultry keepers. Chapter VI, by Armin Paasch, assesses the likely impact on the right to food caused by opening Indian multi-brand retail to EU investors. And Chapter VII, by Manshi Asher, Shalini Bhutani, Rhea Hoffmann and Armin Paasch, assesses the likely impact of the investment protection chapter on the right to food, with a focus on access to land.

The RFIA will be used to raise awareness among Members of the European Parliament (MEP), Members of the Indian Parliament, and the Indian and European Governments on the problematic provisions of the FTA from a Right to Food perspective. The findings are designed to help inform decision-makers during the process of negotiation and possibly ratification. The report will also be brought to the attention of UN Human Rights institutions such as the Human Rights Council (HRC), the Committee on Economic Social and Cultural Rights (CESCR) and the UN Special Rapporteur (SR) on the Right to Food.

The RFIA is a joint activity of European and Indian NGOs working in the areas of trade, agriculture, and human rights. On the European side, the main organisers of the RFIA are MISEREOR, HBF and Glropolis. In India the main organisers are Anthra, the Heinrich Böll Foundation India and TWN. We would like to thank Marita Wiggerthale (Oxfam Germany), Prof. James Harrison (Warwick University), Dr. Axel Harneit-Sievers (HBF India), Shalini Yog Shah (HBF India) and Shefali Sharma (IATP) for supporting the process by commenting on earlier drafts of this RFIA. And we would like to thank Prof. Vijay Paul Sharma, Prof.

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# I. APPROACH AND METHODOLOGY

Both the EU and India have a clear obligation under international law to respect, protect and fulfil human rights in all policy areas, including trade policy (see Chapter II). The EU Treaty recognises this obligation through an explicit reference to trade policy. As the UN Special Rapporteur on the Right to Food, Olivier De Schutter, argues, this obligation inherently implies an obligation to conduct systematic and timely Human Rights Impacts Assessments (HRIAs) *ex ante*, meaning before concluding any trade agreement, and *ex post*, i.e. following a certain phase of implementation of the agreement. In fact, without systematically assessing the possible implications of a given trade agreement, States will not be able to identify and thus avoid possible conflicts between the obligations of the agreement and its pre-existing human rights obligations. Accordingly, in its resolution of 8.11.2010 the European Parliament called on the European Commission (EC) 'to conduct human rights impact assessments in addition to sustainability assessments' (EP 2010: Paragraph 19).

To advise governments on how to conduct such HRIAs, the Special Rapporteur developed a set of 'draft guiding principles', which are currently subject to consultations with the UN organisations (De Schutter 2011). These guiding principles were informed inter alia by an expert consultation organised by MISEREOR, the Heinrich Böll Foundation (HBF), the Berne Declaration, the Canadian Council for International Co-operation (CCCI) and others under the auspices of De Schutter in June 2010 (Smaller 2010 and Harrison 2010). According to these principles, the institution commissioned by the government or parliament to conduct these HRIAs must be independent. The research teams will need to possess multidisciplinary expertise (including human rights expertise). The HRIA process itself must display a maximum degree of transparency and must involve, in an appropriate manner, all the relevant stakeholders within society, including those sections of the population potentially affected by the trade agreement. The results and recommendations of the HRIAs must be publicly debated. Decisions on the political consequences, for example regarding the trade mandates given to the negotiating executive bodies, should be debated in the responsible parliaments.

So far, the EU Commission and the Government of India have not responded positively to the call for an HRIA on the FTA. This is why MISEREOR, the Heinrich Böll Foundation (HBF), the Third World Network (TWN), Anthra and Glopolis have decided to conduct their own civil society HRIA. On the one hand, CSOs often have the advantage of having closer relations to representatives of vulnerable groups who might be affected by an FTA. On the other hand, CSOs clearly face additional challenges and constraints in such an undertaking, especially with regard to access to official documents, and access to resources.

Due to the completely non-transparent way in which the EU-India FTA is negotiated, CSOs do not have access to up-to-date official drafts of the agreement nor even possible negotiating mandates. In the case of India, not even the results of the sustainability impact assessments commissioned by the government have been published. Because of this, the authors' knowledge of the state of negotiations was largely limited to unofficial sources or leaked drafts of documents (see below under evidence gathering). The problem of transparency compounds the challenge of any *ex ante* impact assessment: as the final agreement is not yet available, the authors have sometimes had to start from the hypothetical assumption that a certain provision will be part of the agreement.

The **lack of resources**, despite the availability of some funds through the EU-funded *Ecofair Trade Dialogue*, required the assessors to limit the scope and sometimes the methodological ambition of the HRIA. In the face of these constraints, the publishers had to decide to limit the assessment to only a single human right. As the right to food was chosen as the focus, the publishers have called it a **Right to Food Impact Assessment (RFIA)**. This decision was taken in spite of the fact that threats to the rights to health, work, social security, information, democratic participation and others had also been articulated by various CSOs and UN institutions.

Within these constraints, in conducting the RFIA the authors nevertheless sought to follow the criteria and methodological steps proposed in the above-mentioned guiding principles of Olivier De Schutter. Starting from these principles, the RFIA first explores

the normative content of the obligations of the EU (and its Member States) and India under the right to food (see Chapter II.). It incorporates human rights-based indicators into the impact assessment of the contentious provisions (Chapters V, VI and VII). And it follows the proposed methodological steps of 1) screening, 2) scoping, 3) evidence gathering, 4) analysis and 5) conclusions and recommendations:

1) The assessment started with a **screening** phase, i.e. a preliminary analysis of which human rights are most likely to be affected by the agreement, as the basis to determine the elements to be fully assessed. The decision to focus on the right to food was taken for three reasons: *Firstly*, various Indian CSO representatives and studies had raised concerns regarding the likely impacts of a full range of provisions on agriculture and particularly on the access of small-scale food producers to markets and to land (see Chapter IV). *Secondly*, India is still home to the largest number of chronically undernourished people in the world, and small-scale food producers represent a majority among the food insecure in India. And *thirdly*, as explained above, the scarcity of resources required a clear focus on one human right in order to keep the assessment feasible.

Following the decision to focus on the right to food, the team of assessors undertook a preliminary review of available studies on the FTA. The assessors also entered into first expert consultations with CSO representatives and other experts, to identify those likely areas and provisions where the strongest impact on the right to food might be expected. They finally decided to focus on three main issues: 1) Concerning trade in goods, the RFIA assesses the likely impact of possible tariff cuts for dairy and poultry products on Indian small-scale producers. 2) Concerning services, the impact of European investment in the retail sector on street vendors, small retailers and indirectly on small-scale food producers is assessed. 3) Concerning investment, the assessment looks at possible implications for access to land by vulnerable groups in rural areas.

For the same reason of limited resources, even within the chosen scope of the right to food, not all contentious issues could be dealt with in depth. For example, the impact of a possible strengthening of Intellectual Property Rights (IPR) for European companies on commercial seed, or possibly increased access of European companies to fishing grounds in India, are only mentioned in Chapter IV, which gives an overview of the likely provisions with possible implications for agriculture and food security

2) The decision to focus on these three areas was followed by a **scoping** phase where for each of the areas a set of indicators and key questions was developed. These specific questions addressed the hypothetical causal chain from the respective provision of the FTA down to a possible threat to the right to food of the targeted social groups, according to the defined indicators. These questions and indicators, which are set out in the respective Chapters V, VI and VII, formed the basis for the subsequent phases of evidence gathering and analysis. The questions and indicators alike were modified in the course of the investigation, as the details of the areas became clearer. In the same scoping phase possible methodologies and researchers were discussed and identified that would be most appropriate for answering the key questions.

As in any *ex ante* impact assessment, scoping faces the problem that the final agreement is not yet available. In the case of this civil society assessment, the authors lacked access to up-to-date draft agreements and other official documents. For this, they relied on leaked parts of earlier drafts or mandates,<sup>1</sup> newspaper articles, civil society briefings of the EU Commission and conversations with government officials.

3) The phase of **evidence gathering** comprised four main activities: in-depth studies, a civil society consultation, field visits and interviews with experts and government officials. First of all, *in-depth studies* were commissioned on the three focus areas. Concerning trade in goods, Prof. Paul Vijay Sharma explored possible impacts on the dairy sector and Prof. Rajesh Mehta on the poultry sector based on in-depth sector analysis and plausibility considerations. With regard to services, Dharmendra Kumar and Vinay Ranjan reviewed available secondary literature, policy documents and supplemented their results with a qualitative analysis which aimed at understanding the main challenges faced by street vendors and small-scale farmers, given the increasing prevalence of supermarkets. As for investment, Manshi Asher and Shalini Buthani analysed existing legislation on land, land reform programmes, current European Foreign Direct Investment (FDI) and Indian investment policies in land-sensitive areas and investment policies, and Rhea Hoffmann compared the likely provisions of the investment chapter of the FTA with existing Bilateral Investment Treaties (BITs) between India and individual EU Member States. This group of researchers represents a wide range of disciplines encompassing agricultural economics, sociology, economic law and social work.

During a *civil society consultation* in April 2011 in Delhi, the preliminary results of these studies, as well as the perspectives of affected groups such as farmers, landless people, street vendors and adivasis, were presented and discussed along with the key questions and indicators developed beforehand (see programme in Annex 1 and participants in Annex 2).

In *field visits*, semi-structured interviews were conducted with individual small-scale producers of milk and poultry, producer groups and women's groups (see programme in Annex 3). The interviewed individuals and groups were chosen according to a) their involvement in either the dairy or the poultry sector and b) according to their farm size, caste and gender. All interviews were conducted in the state of Andhra Pradesh. Since Andhra Pradesh is among the most important dairy-producing states in India it was chosen as a valuable case study in itself, with the option of drawing conclusions for other regions of India.

Moreover, in-depth *expert interviews* were conducted with local representatives of dairy cooperatives and scientists. Finally, the gathered information was complemented by, and cross-checked against, interviews with additional experts and Indian government officials.<sup>2</sup>

4) Based on the results of these evidence-gathering activities, the RFIA team of assessors undertook an **analysis** to determine whether

1 See <http://www.bilaterals.org/spip.php?rubrique52&lang=en>.

2 No interviews were conducted specifically with EU officials. However, the authors of the RFIA did confront representatives of the European Commission, various members of the European Parliament and the German Government with the concerns of the RFIA, and took their responses into account in the analysis.

and to what extent the likely provisions of the FTA would have a positive or negative impact on the right to food in India. The analysis again was guided by the indicators and key questions developed in the scoping phase, and made explicit reference to the normative framework of human rights obligations under the right to food.

5) The chapters on each focal area conclude with **recommendations**, which are summarised in the summary.

As mentioned above, a civil society HRIA faces the twin challenges of restricted access to official data and resource constraints. This first of all required a narrowing of the focus to include just some key issues regarding the right to food. It also required some compromises in terms of methodology. For example, it was not possible to conduct field visits and systematic qualitative research on all aspects. A comprehensive HRIA would also require broader consultations involving more representatives of social groups possibly affected by the FTA. For this and other reasons, this RFIA is by no means meant to replace a future official HRIA to be commissioned by the EC and the Government of India on the basis of the guiding principles proposed by Olivier De Schutter. Nevertheless, the RFIA does provide substantial information and analysis on likely impacts of the FTA on the right to food, which should be taken into consideration both in the negotiations and in a future official HRIA.

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## II. THE RIGHT TO FOOD IN TRADE POLICIES

Without food, no human being can survive. Access to sufficient, healthy food is a basic precondition for any individual to fully develop their physical, mental and intellectual capacities and to conduct a life in dignity. It is thus self-evident that adequate food is a basic human right. The human right to adequate food forms part of Article 25 of the General Declaration of Human Rights of 1948 and Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) of the United Nations (UN), which became effective in 1976. All EU Member States and India have ratified this Covenant and hence obliged themselves to realise the right to adequate food in all policy areas, including trade policy.

### 1. The normative content of the right to food

General Comment No. 12, the authoritative interpretation by the UN Committee on Economic, Social and Cultural Rights (CESCR)<sup>3</sup> of 1999, defines the normative content of this right as follows:

'The right to adequate food is realised when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement.'

General Comment No. 12 places strong emphasis on the fact that the right to food requires not only access to food, but also the resources required to feed oneself. And obviously, food must be accessible to all human beings, including the vulnerable and disadvantaged and those living in remote communities. Furthermore the Comment stresses that food must be adequate:

'The *right to adequate food* shall therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients. The *right to adequate food* will have to be realised progressively.'(Italics in original)

In this sense the right to food includes:

'the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture; the accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.'

This means that the right to food shall not be understood in a narrow sense, which would only permit people not to die from hunger. Furthermore, General Comment No. 12 stresses the interrelatedness of human rights:

'Economic accessibility implies that personal or household financial costs associated with the acquisition of food for an adequate diet should be at a level such that the attainment and satisfaction of other basic needs are not threatened or compromised.'

### 2. States' obligations under the right to food

The Covenant is ratified by States. For this reason, States are the primary actor obliged to implement the right to food. According to General Comment No. 12, States have obligations at three levels: respect, protection and fulfilment. This means that States have to first of all respect the right to food, and must not adopt measures which may result in people being deprived of adequate food. Secondly, they have to protect people from negative interventions by third parties (e.g. individuals, corporations) that might deprive people of their right to food. And thirdly, they have to fulfil the right to food by taking action to strengthen people's access to food or resources for producing food.

The General Comment also makes clear that the right to food is not simply the right to be fed, but also the right to feed oneself, i.e. it includes access to the 'means for its procurement', such as land, water or seed. The right to food thus obliges the State 'to strengthen people's access to and utilisation of resources and means to ensure their livelihood, including food security'. Especially for those living in rural areas, access to productive

<sup>3</sup> The CESCR is the UN body of independent experts mandated to monitor implementation of the rights included in the ICESCR, on behalf of the UN Economic and Social Council (ECOSOC). The General Comments on these rights, which are published by the CESCR, are widely recognised as authoritative interpretations by Member States, and are often used by national courts.

resources is a key condition for enjoying the human right to adequate food. Yet access to resources alone is not a sufficient condition. People must also be enabled to feed themselves by utilising these resources.

To this end, States have to develop comprehensive national strategies which, according to the General Comment and the Voluntary Guidelines on the Right to Food of the FAO (FAO 2004), must include five elements: 1) identify the groups of people vulnerable to hunger and malnutrition, 2) monitor the quality of legislation, 3) design and implement policies for all vulnerable groups, 4) monitor this implementation and its effectiveness and 5) provide recourse options for people affected by hunger.

'The strategy should address critical issues and measures in regard to all aspects of the food system, including the production, processing, distribution, marketing and consumption of safe food, as well as parallel measures in the fields of health, education, employment and social security.' (Italics in original)

This means that market and trade systems must be taken into account too in order to realise the right to adequate food. Fair market conditions are a key part of an enabling environment, which States are obliged to create in order to implement the right to adequate food.

### 3. The international dimension of human rights

Traditionally, States clearly have strong obligations to people living in their own territory because they can have a decisive influence on the living conditions of those people. However this does not mean that States need not pay attention to the right to food or the other human rights of people living in other countries. Especially in times of globalisation, international economic and political relations have intensified considerably. The fact that human rights have an international dimension is clearly set out in Article 2 of ICESCR, which states that:

'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'

And Article 11 on the right to food, as well, stresses the international dimension:

'The States Parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international co-operation based on free consent [...] The States Parties to the present Covenant, recognising the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed.'

In General Comment No. 12, the CESCR states that:

'States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required. States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention and consider the development of further international legal instruments to that end.'

This paragraph makes it very clear that States not only have human rights obligations towards their own population, but also towards people living outside their state borders. States have to act according to these extraterritorial obligations during international negotiations on trade or other agreements.

### 4. Trade-related human rights obligations

Applying the three levels of human rights obligations – respect, protect and fulfil – to trade agreements, De Schutter suggests the following categorisation. Given their *duty of respect*, States must not ratify any trade agreements obliging them to implement measures that would impact negatively on human rights. Examples of possible violations mentioned by De Schutter include excessive tariff reductions where this would lead to the destruction of the livelihoods of small producers, and overly strict intellectual property rights if this were to make it more difficult to gain access to seed or medicines.

Given their *duty of protection*, States must not ratify any agreements making it more difficult for them to ensure that private actors comply with human rights, for instance by introducing protection for foreign investors that could negatively impact upon the human rights of domestic constituencies. Finally, given their *duty of fulfilment* States must refrain from ratifying any agreements that make it more difficult for them to fully uphold human rights, for instance through customs and taxation losses that might lead to an underfunding of social security systems. With respect to all three levels of obligation, De Schutter emphasises that these apply not only to States' own populations, but also to people in other States. Consequently, States must not ratify any agreement that impedes another State's ability to uphold its human rights obligations (De Schutter 2011, paragraph 8).

### 5. The specific status of human rights in EU trade policy

The EU's obligation to protect human rights in its foreign trade policy arises in the first instance from the obligations of its Member States under international law. All EU Member States have ratified the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the other key human rights agreements. Consequently, they must respect, protect and fulfil the rights enshrined therein in all policy fields. Moreover, the European Court of Justice takes the view that the EU itself must also comply with the general legal principles and human rights agreements that its Member States have ratified.<sup>4</sup>

<sup>4</sup> See Opinion 2/94, Accession of the European Community to the European Convention for the Safeguard of Human Rights and Fundamental Freedoms, [1996] ECR I-1759, Para. 33, as well as Case C-540/03, Parliament v Council, [2006] ECR I-5769, and: FIDH 2008, p. 7.

These human rights obligations are clearly recognised and enshrined in the Treaty on European Union. This Treaty defines 'respect for human rights' as one of the fundamental values 'on which the Union is founded' (Article 2). Article 3.5 also elevates these values, making them the basis for the Union's 'relations with the wider world'. This is reaffirmed in Article 21, which states explicitly:

'The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.'

Article 21 expressly obliges the EU to ensure 'consistency' with these principles in all areas of its external action. Moreover, concerning the common commercial policy of the EU, Article 207 of the Treaty on the Functioning of the European Union refers directly to these values and principles of the EU, and clearly stipulates: 'The common commercial policy shall be conducted in the context and principles of the objectives of the Union's external action' (see also Woolcock 2010: 13f.). We can therefore conclude that the EU has a clear obligation, both under international and under EU law, to also to also respect, protect and fulfil human rights in its foreign trade policy (see also Bartels 2009: 577-578).

## 6. The specific status of the right to food in India

India ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1979. It is therefore obliged under international law to respect, protect and fulfil the right to food enshrined in Article 11 of the Covenant in all policy areas. The Indian Supreme Court has confirmed on various occasions that national courts must apply the international human rights norms when they decide on human rights violations (FIAN India 2008: 7).

In the Constitution of India of 1950, only civil and political rights are recognised as directly justiciable 'fundamental rights'. Economic, social and cultural rights such as the right to food are only included in the provisions of 'Directive Principles of State Policy' (Article 37). The latter are therefore, at least originally, not immediately enforceable by Indian courts. Article 37 emphasises however, that 'the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws'. The clearest statement within these directive principles with regard to the right to food is to be found in Article 47, which establishes 'the duty of the State to raise the level of nutrition and the standard of living and to improve public health [...] among its primary duties [...]'.  
Furthermore, Article 21 of the Constitution guarantees the 'protection of life and personal liberty'. In a landmark judgement in 1996, the Supreme Court ruled that 'the right to life guaranteed in any civil society implies the right to food, right to water, right to decent environment, right to education, right to medical care and the right to shelter' (Supreme Court Case (SAC) 549).

According to FIAN, taking into account the various interpretations of the Supreme Court,

'one can safely say that the Government of India has a constitutional obligation resulting from Article 21 and Article 47 to take appropriate measures to ensure a dignified life with adequate food for all citizens. The right to food can be regarded as a fundamental right by virtue of interpretation' (FIAN India 2008: 20).

## 7. Human rights prevail

In his report on the World Trade Organisation (WTO), the UN Special Rapporteur on the Right to Food, Olivier De Schutter, draws attention to the fundamental problem of the fragmentation of international law (De Schutter 2009: 15-16). According to this view States are often exposed to conflicting obligations arising from various international agreements, for instance on international trade, investment, environment, labour rights or human rights. When such conflicts arise, States often tend to accord priority to those obligations whose violation would lead to sanctions, which is the case for instance with the dispute settlement mechanism of the WTO, though is only very rarely the case in the UN human rights system.

De Schutter counters this by emphasising that under international law human rights enjoy priority over all other legal obligations, such as those arising from trade agreements. He bases his argument on the UN Charter of 1945, which defines the promotion and encouragement of respect for human rights as one of the purposes of the UN (Article 1, Paragraph 3), and accords the obligations arising from the Charter precedence over all other international obligations of its Member States (Article 103). Moreover, according to Articles 53 and 64 of the Vienna Convention of the Law of Treaties, any international agreement should be considered void where it violates a 'peremptory norm of general international law', which without a doubt includes the Universal Declaration of Human Rights.

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# III. HUNGER, POVERTY AND VULNERABLE GROUPS IN THE INDIAN CONTEXT

Disparity between a tiny class of very wealthy Indians and a growing mass of human beings living in a permanent state of chronic hunger is deepening in India. According to the Forbes global list of billionaires for 2011, India has 55 dollar billionaires and about 100,000 dollar millionaires (Forbes 2011). India's double-digit GDP growth of the past decade, combined with a 300 million-strong middle class identified as the new engine for global growth, stands in stark contrast to the uncontested fact that the number of people living in conditions of endemic hunger and malnutrition is growing (ADB 2010: xxvii).

Hunger is usually understood as the discomfort associated with the scarcity of food. The FAO defines it specifically as the consumption of fewer than about 1,800 kilocalories a day – the minimum that most people require in order to live a healthy and productive life. The term 'undernutrition' signifies deficiencies in energy, protein, essential vitamins and minerals, or any or all of these. Hunger is often broadly categorised as either acute or chronic hunger. Acute hunger is a sudden shortage of food resulting from a human or natural disaster (wars, conflicts, famines, droughts or floods). Hunger is also seasonal, being related to cycles of food production. Chronic hunger is endemic, and is the silent killer. This kind of hunger is persistent, and is described as a prolonged state of malnourishment. It is less visible, less publicised, less dramatic, and affects those millions of families who are unable to meet their most basic nutritional need for all or some part of the year. Food for such families lacks essential nutrients, and people are chronically undernourished. It shows up as malnutrition, illness and shortened life expectancy. Chronic hunger weakens the immune system and makes people extremely vulnerable to all kinds of diseases (John and Bansari 2009: 9).

## 1. Estimates of hunger

India has more hungry and undernourished people than any other country in the world, as confirmed by the FAO report *The State of Food Insecurity in the World 2011*. In 2006-2008 224 million people, or 26.9% of the population, were living in chronic hunger. These are the latest official figures available (FAO 2011: 46). Given the increase in food prices, it is highly likely that this

alarming figure has even increased substantially since then. In 2008, the overall inflation rate was at a 13-year high of close to 12%, but price rises for certain food items including rice, some pulses, vegetables, fruits, tea and edible oils, have been even higher. According to a study by the NSSO, the high prices of food and fuel are likely to push 5% of India's population to the brink of starvation (Srinivas 2008).

In South Asia, India is ranked 67 of 122 countries on the Global Hunger Index 2011, which is below all the other major South Asian countries. The Global Hunger Index is an average of (i) the proportion of the population that is undernourished, on which India scores 21%, (ii) the prevalence of underweight in children under five, which is 43.5% for India and (iii) the proportion of children dying before the age of five, which is 6.6% for India.

Hunger in India has a clear gender and age bias. Women, children and old people are less likely to receive the full nutritious meals that they require, as compared to adult men. Amongst the hungry, children are the most vulnerable, and here once again India carries the dubious distinction of having the highest global burden of child malnutrition. According to UNICEF's *The State of the World's Children 2009*, about 30% of India's children are born underweight, and by the age of five, 44% are underweight and 48% are stunted due to chronic malnutrition. India accounts for nearly 30% of all global childhood deaths attributed to chronic malnutrition (UNICEF 2009: 83). The most recent National Family Health Survey (NFHS-3), conducted in 2005-06, reports that at an all-India level, 45.9% of children below the age of 3 were underweight or malnourished in terms of the standard weight-for-age criterion, as compared to 46.7% in 1998-99, which indicates a negligible decrease in this key indicator of child malnutrition over a seven-year period. Anaemia has also risen among children aged 6 to 36 months: 74% in this age group were anaemic in 1998-99 and 79% were anaemic in 2005-06 (Swaminathan 2008: 1).

Women are the next most vulnerable group. According to the NFHS-3 Survey, among married women aged 15 to 49 the prevalence of anaemia rose from 52% in 1998-99 to 56% in 2005-06.

No less than 58% of pregnant women suffer from anaemia. According to UNICEF, in 2009 one third of Indian women were underweight, and over half of married women were anaemic. The percentage of women who were underweight decreased only marginally, from 36.2% to 33.0% during the same period (Swaminathan 2008: 6).

Data from the National Nutrition Monitoring Bureau indicate that in 1993-94, 48.5% of adults had a Body Mass Index below the norm. These indicators suggest that approximately one-half of the Indian population is malnourished today.

## 2. Poverty and hunger

Poverty is the principal cause of hunger, and consequently of food insecurity. Poverty has been defined in several ways, and various methods of estimating poverty are in use. However in essence we are talking about severe deprivation. According to Amartya Sen, in India the poor are those citizens of India whose consumption standards fall well below the norms and whose income is lower than the poverty line (Sen 1982).

According to World Bank poverty estimates (International Fund for Agriculture Development 2011: 47), 75.6% of Indians earn less than USD 2 per day and 41.6% of the population lives below the international poverty line of USD 1.25 per day. Using a Multi-dimensional Poverty Index (MPI), the Oxford Poverty and Human Development Initiative 2010 (Alkire and Santos 2010: 1) estimated that 645 million people, or 55% of the country's population, are living in poverty. The MPI includes education, health (child mortality and nutrition) and living standard indicators. According to the MPI, a person is considered poor if they are deprived in at least 30% of the weighted indicators. The intensity of poverty denotes the proportion of indicators in which they are deprived. A person who is deprived in 100% of the indicators has a greater intensity of poverty than someone deprived in 40%. The MPI reveals that 81.4% of members of the Scheduled Tribes, 65.8% of members of the Scheduled Castes and 58.3% of members of the Other Backward Castes are poor, compared with 33.3% for the general population. The intensity of poverty is also very high among the 3 aforementioned caste groups, who are deprived in between 52.3% and 59.2% of the weighted indicators, on average.

When applied to 28 states in India, the MPI reveals that the top five states with the least poverty (Kerala, Goa, Punjab, Himachal Pradesh and Tamil Nadu) are home to only 4.5% of the poor, whereas the five poorest states (Bihar, Jharkhand, Madhya Pradesh, Chattisgarh and Uttar Pradesh) are home to more than 50% of India's poor. Eighty-one per cent of people are multidimensionally poor in Bihar – more than in any other state. Poverty is most intense in Bihar and Jharkhand, where poor people are deprived in 60% of the MPI's weighted indicators. Uttar Pradesh is home to the largest number of poor people – with 21% of India's poor residing here. West Bengal is home to the third largest number of poor people. On the other hand, multidimensional poverty is lowest for Kerala. The OPHI of Madhya Pradesh, which is equivalent to DR Congo in Africa, highlights that malnutrition contributes most to the MPI than any other indicator.

On the United Nations Human Development Index, India is ranked a lowly 119 out of 169 countries and territories. This is primarily due to poor social infrastructure in the areas of healthcare and education. The UNDP report too reconfirms that while economic growth has been stupendous, inequality is on the rise. UNDP points out that the poverty rates in the eight northern and eastern Indian states of Bihar, Chattisgarh, Jharkhand, Madhya Pradesh, Orissa, Rajasthan, Uttar Pradesh and West Bengal, which have a combined population of 421 million poor people, is higher than in the 26 poorest African countries (Times of India 2010). On the gender inequality index India stands at a meagre 122 among 138 countries, indicating persistent gender inequality. The recent 2011 census, which shows a highly skewed sex ratio in the 0-6 yrs age group (914 girls for every 1,000 boys of the same age, or 75.8 m girls and 82.9 m boys), reconfirms a growing bias against the girl child.

## 3. Poverty in India and calorie consumption

In 1979, a task force appointed by the Planning Commission of India defined the poverty line as a per-capita consumption expenditure level which meets the average per-capita daily calorie requirement of 2,435 kcal in rural areas, and 2,095 kcal in urban areas. The poverty line for subsequent years was estimated by adjusting the poverty line for the base year of 1973-74 for inflation. However this method was insensitive to the variations of price across states in India. The poverty estimates were subsequently revised in 1989, 1992, 1997, 2002, and there have been several critiques of the same.

One key criticism of poverty measurement in India has been that current poverty lines do not correspond to consumption norms of 2,400 kcal in rural and 2,100 kcal in urban areas, resulting in a huge underestimation of the proportion of people living below the poverty line (Mehta and Venkatraman 2000: 27), (Sen, P 2005: 43), (Srinivasan 2007: 43). According to various estimates, the number of people living below the poverty line in rural areas ranges between 37.2% (the official figure) and 87%, and in urban areas between 25.7% (the official figure) and 64.5% (Mehta et al. 2011: 13-36), (Patnaik 2010: 4), (GoI Ministry of Rural Development 2009: 14-18), (Deaton and Dreze 2008), (Ahmed et al. 2007).

## 4. Who are the hungry and the poor in India?

Seventy per cent of Indians (700 million people) depend on agriculture as the primary source of their livelihood (GoI 2005-06). Sixty-nine per cent of India's total area is described as dryland and 68% of agriculture is rainfed. Small farmers are the mainstay of Indian agriculture. The Government of India identifies farmers who own less than 2 hectares of land as small and marginal farmers. The former comprise 83.29% of all farmers in India, and collectively own 41.14% of the total agricultural land. Sixty-five per cent of farmers in India own only 20% of the country's total farmland, with an average holding size of 0.38 hectares. According to the 59th round of the National Sample Survey (NSSO 2005), 11% of rural households in India are landless. Some 75.38% of the entire female workforce is located in the agriculture sector. Agriculture and livestock rearing are intrinsically dependent on one



another, and the landless, small and marginal farmers own 75% of India's livestock.

Neoliberal growth policies since the 1990s saw the withdrawal of state support to agriculture and the liberalisation of markets, which in turn unleashed massive agrarian distress and crises in Indian agriculture (Sainath 2010). According to the NSSO (NSSO 2005: i), 48% of farmers in India are indebted and 40% of farmers want to quit farming. Over a quarter of a million farmer suicides occurred between 1995 and 2010 (GoI, The National Crime Records Bureau 2011). The period 2003-2010 witnessed a greater number of suicides than the preceding eight years, which is alarming, as the total number of farmers declined significantly in the same period. Two thirds of these suicides occurred in five states: Maharashtra, Andhra Pradesh, Karnataka, Madhya Pradesh and Chattisgarh (The Hindu 2011). In the wake of neoliberal reforms, farmers' income rose by 0.28%, whereas incomes in other sectors rose by 4%. The fall-out is that today half of those who suffer from hunger in India are, ironically, the small-scale farmers who grow India's food, and the rest are landless agricultural labourers and casual labourers and their families.

The average daily net per capita availability of foodgrain between 2005 and 2008 was a dismal 436 grams per Indian, less than the 440 g available in 1955-58. The consumption of pulses declined from 70 g in 1955-58 to around 35 g in 2005-08 (The Hindu 2011: 25). The proportion of rural households classified as 'agricultural / other labour' that did not get food every day of the year was relatively high compared to other households. In urban areas, households in the casual labour category had the highest percentage of not getting food every day relative to other households (NSSO 2007a). The average monthly per-capita expenditure (MPCE) of the household appears to increase with the size of the landholding. Households in the agricultural labour category in rural India and households in the casual labour category in urban India had lower levels of consumption of animal products (milk and milk products, eggs, meat and fish) (NSSO 2007b: 31).

In rural India, the category 'other' had the highest monthly per-capita expenditure, followed by Other Backward Castes (OBC), Scheduled Castes (SC) and Scheduled Tribes (ST), also known as Adivasis (NSSO 2007: 29). This is consistent with the OPHI index of poverty across caste categories. The report of the former UN Special Rapporteur on the Right to Food (United Nations 2006: 7) points to the high prevalence of hunger and malnutrition amongst scheduled castes and tribes, who comprise 25% of the rural population but 42% of the poor.

Adivasis, particularly those living in forest and hill areas, are extremely marginalised. Many of them have lost access to traditional forest livelihoods and food resources through the creation of forest reserves, and many remain without food ration cards or access to government services. They suffer disproportionately from displacement caused by development projects involving things such as dams, power plants, coal mines and mineral industries (see also Chapter VII).

To summarise, the vulnerable groups among the food-insecure in India include:

- children below the age of 5 (boys and girls)
- women
- the elderly
- people with disabilities
- agricultural labour, casual labour, small and marginal farmers
- by caste: scheduled tribes, scheduled castes, other backward castes
- by geographic location/ districts: eastern, central and northern Indian states: Orissa, Jharkhand, Chattisgarh, Madhya Pradesh, Assam, Uttar Pradesh, Rajasthan, Bihar, West Bengal

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# IV. LIKELY PROVISIONS OF THE FTA WITH A POSSIBLE IMPACT ON AGRICULTURE AND FOOD SECURITY

The European Union and India launched talks on a bilateral trade and investment agreement in 2007, and have announced their plans to seal what is being seen as the most ambitious bilateral trade agreement for India so far. The FTA includes chapters on goods (both agricultural and industrial commodities), services and intellectual property, and contains provisions that go way beyond the WTO or are WTO plus. In addition, there are chapters on areas left untouched in the WTO as these were considered sensitive for developing countries; namely investment, public procurement and competition policy. In addition, the EU wants a chapter on sustainable development, which would include provisions on labour and environmental standards. India has refused to include this so far, on the grounds that these are non-trade issues.

Agriculture is obviously a key part of the negotiations. Indian agriculture is one of the most protected in the world, and external agricultural trade remains low. However, India's growing rich and middle classes offer a rich business opportunity for European producers who are looking for buoyant developing country markets, given the stagnation in their own. Therefore, opening up agricultural trade is one of the core areas of the negotiations. EU wants access for its high-value agricultural products such as wines, spirits and beverages, dairy and poultry, but even other agricultural products such as wheat and fisheries. India, in return for supposed gains for its service sector, is being asked to open up agricultural trade to European exports.

However, India's numerous small producers, unlike their European counterparts, are crippled by low technology, as well as a lack of resources, infrastructure and state support. India does not have a big business-oriented agricultural model like developed countries. It is not surprising, therefore, that agriculture and food security emerge as critical issues in India's trade agreements, whether it be the WTO or its Free Trade Agreements. At the WTO, India has often taken strong positions to safeguard its farmers' livelihoods and food security, for example from imports of agricultural products from developed countries, which are often subsidised. Considering that the FTAs in general, and North-South FTAs in particular, are moving towards a WTO plus framework for agriculture, the impact of such liberalisation on this sector remains

critical. In addition, this particular FTA brings together many interlinked chapters, all of which can have a combined and cumulative impact not only on the way India trades, but also on its entire production and distribution systems.

## 1. Current agricultural trade between India and the EU

India's current agricultural trade is low and accounts for only 2.9% of its merchandise imports. Yet that is also because India still imposes quite a high applied tariff (duty) at a simple average of 31.8% (2009) on agricultural products, while its notified bound or maximum duty is 113.1%. On the other hand, Indian products face a much lower duty of 13.8% in EU markets for agricultural products. Again, India offers duty-free access only in fruits, vegetables and plants (21.7%) and vegetable oils (72.9%), while 60% of India's agricultural products can technically enter the EU duty-free.

However, even though the EU has low tariffs, it provides high subsidies to its agricultural producers, which work both as a protective instrument in its domestic market, and as a competitiveness enhancing instrument for EU's exporters. Indian products also face high non-tariff barriers (NTBs) like food and other standards, as well as technical barriers in the EU, making exports difficult, while NTBs are lower in India. Given the tariff and NTB structures in the two areas, the EU obviously has much more to gain in terms of tariff reduction, whereas India's gains lie in getting NTBs reduced, simplified and harmonised, and in the removal of EU subsidies, a much discussed issue even in the trade talks at the WTO.

India is not high on the EU's list of important partners, absorbing less than 0.5% of the EU's total agricultural exports. From the EU's perspective, India is ranked 12th among the most important EU suppliers, and 41st among EU export recipients. Total exports from India to the EU are equivalent to 2% of the EU's global agricultural imports. Basmati rice is India's top export to the EU, followed by other processed fruits and vegetables, fresh grapes, guar gum and dried & preserved vegetables.

Wheat, Scotch whiskey, raw wool and hides, and dried peas are some of the top exports from the EU to India. Other specialised products such as vegetable seeds, wine and olive oil are also exported to India. Wheat has been an area of interest for the EU, with exports fluctuating according to the tariff rates imposed by the Government of India. Whiskey exports have seen significant growth even though tariffs remain high, offering an aggressive area of interest for the EU in this FTA.

## 2. The provisions of the EU-India FTA and possible implications for agriculture and food security<sup>5</sup>

### 2.1. Trade in goods

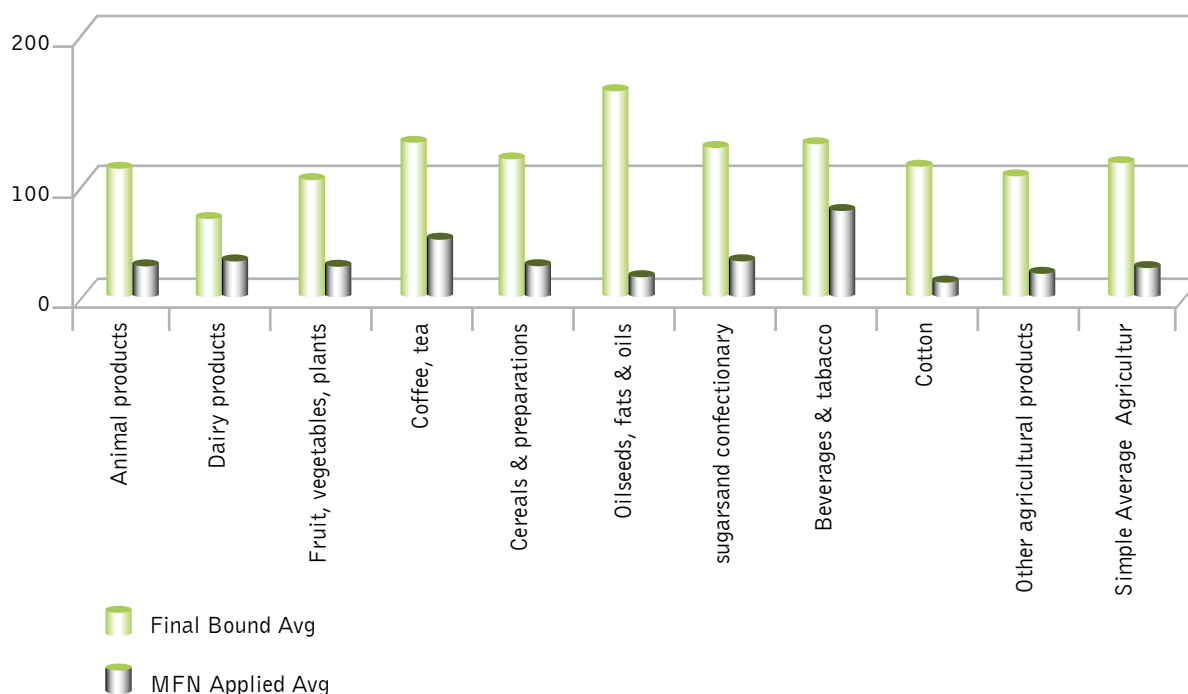
- **Tariff reduction:** The FTA aims to achieve zero applied tariffs on at least 90% of Indian tariff lines including agricultural and industrial products, with coverage likely to go up higher. As Fig. 1 shows, India's bound tariffs in agricultural products are much higher than actual tariffs. Therefore reducing bound tariffs, as per WTO commitments, would still give India significant space to protect its agricultural sector.

But this FTA (like other ones) involves the **total removal of applied (actual) tariffs** as opposed to **reducing bound (maximum) tariffs**. So there is going to be loss of actual protection in very real terms.

The FTA also apparently has a limited period for implementation of 7 years. This is much lower than India's other FTAs, including the one with Japan, where implementation periods run up to 10 and sometimes even 15 years. According to reports, India wants an asymmetrical package from the EU on agriculture in exchange for giving significant market access. This consists of longer implementation periods and asymmetrical coverage. However, the EU actually wants India to improve its offer on tariff line coverage, and increase its offer to 95%.

So India will have only 8-10% of products that can be exempted from the tariff cuts. There may even be a standstill clause on the exempted tariff lines, i.e. duties cannot be raised up to the ceiling level currently allowed within the WTO (bound tariffs). Whether the likely exceptions will leave enough policy space for India to protect India's agricultural products, which are sensitive from a livelihood as well as a food perspective, and its nascent industrial products, is a critical question.

**Fig. 1: Bound and Applied Tariff Rates in India for Agricultural Products (%) (2009)**

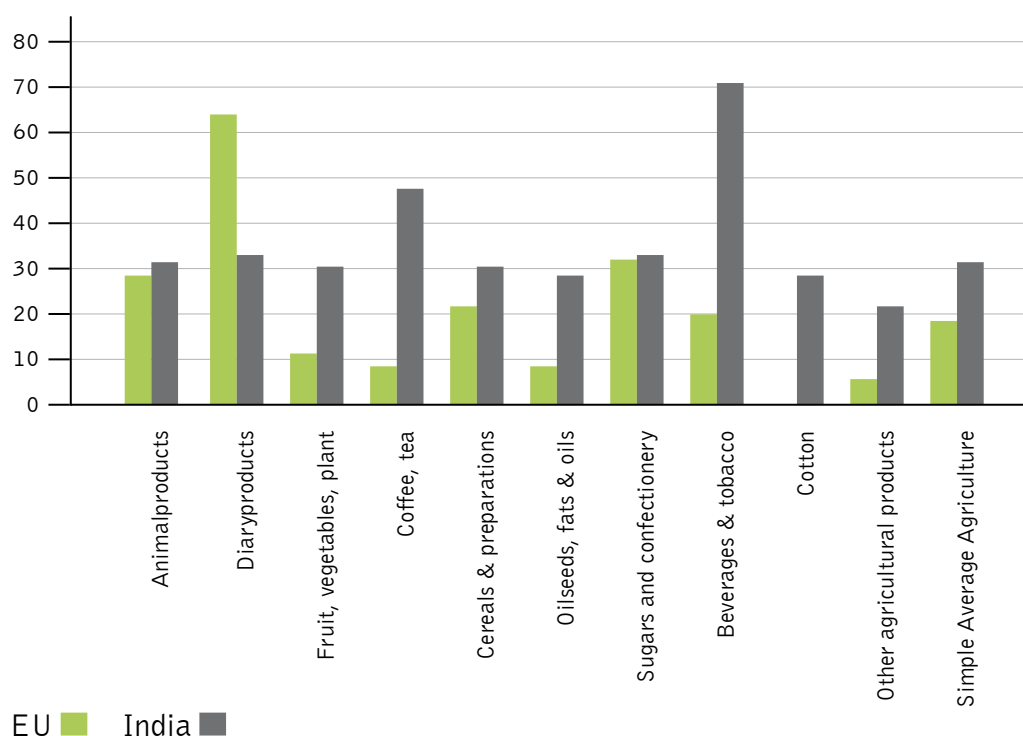


Source: Singh and Sengupta (2009)

<sup>5</sup> All information on the FTA has been taken from newspaper reports and the European Commission's briefing notes to CSOs.

- **Safeguards:** According to unverified information, there are no Special Products (SP)<sup>6</sup>. The Special Safeguard Mechanism (SSM), over which India took a strong stand in the WTO, is also much diluted. Apparently, the EU wants only a volume trigger<sup>7</sup> but not a price trigger<sup>8</sup>. According to reports, discussions are still continuing on safeguards such as SPs and the SSM.
- **Tariff revenue loss:** As India moves to zero tariffs, it will end up reducing duties much more than the EU, as Indian tariff levels are higher (see Fig. 2). Therefore, India is actually opening up much more than its developed counterpart. India will also lose tariff revenue that could have been spent on social sectors, food subsidies and various other social and food programmes.

**Fig. 2: Avg. MFN applied Duties for Agricultural Products (%): EU and India (2009)**



Source: Singh and Sengupta (2009)

- **Export measures:** These enjoy special treatment in EU FTAs. EU demands from its FTA partners that export measures be totally removed or at least capped at the current level, in order to secure access by European companies to raw materials. Disciplines on export restrictions, however, could have serious implications for food security, as India often imposes some taxes and bans on food exports to ensure domestic food supply. Though export cess applied to products including coffee, spices, tobacco and other agricultural commodities was repealed in 2005/6, India issues 'temporary' prohibitions on exports of 'essential' products. Export prohibitions have recently been issued for cotton, edible oils, milk powder, onions, pulses, rice, sugar and wheat (see Box. 1). Minimum export prices may also be temporary applied to 'essential' products. Various other export restrictions and quotas also exist. For example, 171 lines at the HS 8-digit level may only be exported if a licence is issued by the Directorate General of Foreign Trade (DGFT), on the approval of its Export Facilitation Committee.

<sup>6</sup> Special Products are those that enjoy protection on the grounds of protecting farmers' livelihoods, food security and rural development.

<sup>7</sup> Tariffs can be raised when the volume of imports crosses a certain threshold.

<sup>8</sup> Tariffs can be raised when import prices fall below a certain percentage of a referral period price.

## Box 1: India's Export Bans on Agricultural Products

### Onions

2010, December – 2011, September: India banned onion exports as prices peaked (70-80 Rs/kg) from time to time, lowered floor prices to USD 225 per tonne though the minimum export price of Bangalore Rose and Krishnapuram (two premium varieties) was fixed at USD 600 per tonne. In September 2011, India allowed the export of onions.

### Pulses

2006, June - India banned the export of pulses and exempted them from customs duty to check spiralling prices. The ban has stayed in place since, though it has been reviewed from time to time, along with allowing the import of pulses at zero duty. In 2011, March - India extended the ban till March 31, 2012. Export of Kabuli chana and organic pulses is allowed, with a ceiling of 10,000 tonnes.

### Rice

2007, October - India imposed a ban on non-basmati rice exports but lifted it following protests from exporters.

2008, April 1 - Indian banned the export of non-basmati rice to try and control soaring domestic food costs. The price for exports of aromatic basmati rice was also raised to USD 1,200 per tonne to discourage exports. In 2011, February 9, India eased the three-year ban on rice exports, allowing export of three varieties of non-basmati rice (Ponni Samba, Rosematta and Sona Masuri) at USD 850 a tonne, up to 1.50 lakh tonnes. As of March 11, 2011 India is unlikely to lift the ban on export of non-basmati rice in the wake of high food inflation and food security concerns.

### Sugar

2006, June 22 – India banned sugar exports to keep domestic supplies and prices under check and introduced an export quota of 500,000 tonnes under open licences in 2010, December.

### Wheat

India suspended wheat exports in early 2007, and was still unlikely to lift the ban as at February 2011, in the wake of high food inflation and food security concerns.

Source: India's Free Trade Agreements and Micro, Small and Medium Enterprises, TWN (2011)

- **Subsidies & non tariff barriers:** Non tariff barriers in the form of standards, sanitary and phyto sanitary measures and technical barriers (TBTs) are also being discussed. However most EU FTAs show that at least WTO standards have been affirmed and standards may even rise higher. Europe has very high standards, and Indian agricultural exports have often been rejected on quality and health grounds. The EU's Rapid Alert System has caused major problems for Indian exporters. The EU does not recognise India's certification system either, and is not expected to concede Mutual Recognition Agreements (MRAs) to ease these process requirements. On the non tariff barrier front, India apparently wants more from the EU on conformity assessment, which has been a major problem for Indian exporters in the past.

On the other hand, disciplines on EU agricultural subsidies are not on the agenda of the FTA negotiations. Under the Common Agricultural Policy (CAP) the EU is still spending over EUR 50 billion per year to support the agricultural sector. While, on the one hand, the EU has been reducing direct export

subsidies substantially over the last 15 years, it has simultaneously reduced internal producer prices and thereby ensured access of agribusiness companies and exporters to raw materials (Reichert 2011: 8). Around 40 billion yearly direct payments compensate farmers for these low producer prices and, in countries like Germany, make up around 40% of their incomes on average. The CAP reform, which is currently proposed by the Commission, will not change these policies, and even maintains the instrument of export subsidies to counter price depressions and increase international competitiveness. The EU refuses to include agricultural subsidies in FTA negotiations, which it justifies by pointing to the WTO, where reforms are still being discussed, though not much headway has been made recently.

**Irreversible commitments:** The FTA imposes legally binding commitments on India, and while a review mechanism will probably exist, global evidence shows that such mechanisms are always difficult to use for developing countries. This is because the agreements are negotiated as a package, and getting out of individual commitments proves to be difficult.

## 2.2. Issues beyond commodity trade

In addition, the FTA will contain chapters on Intellectual Property Rights (IPRs), investment, services and public procurement. These non commodity issues are able to actually impact food and agricultural production and distribution within India.

- **Services and public procurement:** According to sources, the EU is asking for investment access to retail services through the services chapter (Mode 3) in the FTA (The Economic Times, 2011). India currently bans FDI in multi-brand retail, though 51% FDI is allowed in single brand, and wholesale trading is open. The potential impact of such a deregulation of FDI in multi-brand retail on the right to food of street vendors, small retailers and small-scale food producers is discussed in detail in Chapter VI.
- In addition, if government procurement is liberalised to include market access to the EU, then special acquisition from farmers for the Public Distribution System (PDS) may become difficult, and European producers will have to be given equal treatment under this mechanism, which essentially provides price support to Indian farmers. Asking for access to the public procurement market of partners is among the priorities of the EU trade strategy. This is evident in *Trade, Growth and World Affairs*, published in November 2010 (EC 2010: 10), particularly with respect to emerging economies such as India. Whether India will agree to this demand remains to be seen, and even if it does, including the PDS may be politically too sensitive an issue for India. The key targets of the EU in public procurement seem to be the energy sector and port maintenance contracts (Action-Aid, Christian Aid, & Oxfam International 2008: 2). Railways are also an important point of interest.
- **Strong investment rights:** As the Lisbon Treaty shifts the responsibility for investment treaties away from the EU member States and onto the EU, the EC was mandated by the EU Council to negotiate on an investment chapter within the FTA (EC 2011). This mandate and additional sources indicate that this chapter will probably raise the level of investor protection to the highest standards currently found in Bilateral Investment Treaties (BITs), such as the one between Germany and India. The EU is likely to ask for additional market access, and performance requirements are being sought in order to impose discipline. A document outlining the European Commission's request to the European Council regarding the investment mandate for the EU-India FTA mentions that the 'agreement shall provide for the progressive abolition of restrictions on investment, with the aim to ensure the highest level of market access, and provide protection for investors and investment of both parties (EC 2011). CSOs fear that the investment chapter will create obstacles for the Government of India when GoI attempts to implement land reforms or take action against land evictions in the context of large investment projects in sectors such as mining. These concerns are discussed in detail in Chapter VII.
- **TRIPS plus Intellectual Property Rights and Geographical Indications:** Under the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement, patent protection must

be granted for a period of 20 years for products and processes in all areas of technology, provided that these are new, inventive and capable of industrial application. Pursuant to Article 27.3 (b) this also applies on a binding basis to micro-organisms as well as microbiological and non-biological processes for the production of plants or animals. One important concession to the developing countries under the TRIPS agreement was, however, that they can introduce instead of patent protection an 'effective *sui generis* system' more suited to the special development needs of the country in question. In the negotiations on the FTA, however, the EU from the outset pressed for an obligation to prescribe the standards of the Union for the Protection of Organic Varieties (UPOV) as amended in 1991 as the only possibility for a *sui generis* system (UPOV 1991). Such a provision would require India to allow the re-sowing, exchange and sale of commercial seeds only in exceptional cases and subject to the payment of license fees. India, where 85% of seed comes from exchange between farmers, is the only major economic power that has not yet signed an UPOV agreement (De Schutter 2009: 6). By mounting a broad campaign Indian farmers' organisations, NGOs and academics succeeded in having a law passed in 2001 – the Protection of Plant Varieties and Farmers' Rights Act – that made more or less exhaustive use of the scope for a *sui generis* system to protect farmers rights, setting an international precedent. Under this law farmers are expressly permitted to preserve, use, sow, re-sow, exchange and sell the products and the seed itself. Essential elements of this law would now be called into question if India were forced to implement the standards of UPOV 1991 as a result of the Free Trade Agreement (Suhai 2008: 11f. and 21f.). Right now it looks rather unlikely that the Indian Government will accept a UPOV obligation in the agreement, although the EU still seems to be exerting pressure in this direction (Bhutani 2011: 4f.)

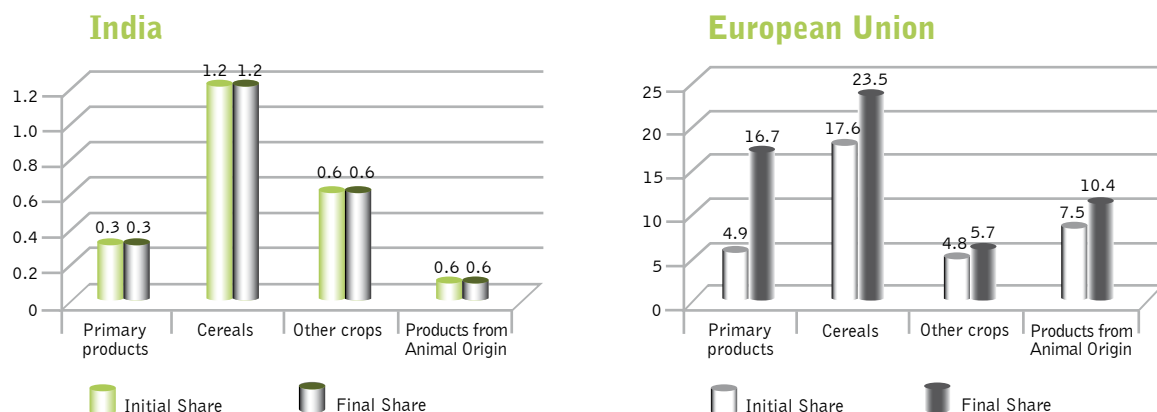
Moreover, the EU also wants its 190 agricultural **Geographical Indications** (GIs) to be recognised in exchange for recognition of India's non-agricultural GIs. A GI is the official stamp of protection for products originating from a particular region, with a special quality and reputation that goes back several decades or centuries. At the WTO, the EU is pushing for the multilateral GI recognition system, but that refers mainly to wines and spirits. The FTA can ease its path to including recognition of its meat and poultry and dairy products as well. Evidently, GI applications from the EU Member States in India that can obtain recognition through the FTA go much further and are mostly in the category of beverages such as beer and wine brands, processed meat and milk products, and various bakery items, including biscuits and pastries. This can also be a problem because India's underdeveloped IP system in agriculture cannot compete with the EU's well advanced system of IP recognition. India's food processing industry produces cheap products, but lags way behind in brand building and even in registering GIs. India limited GIs are mostly in the field of industrial products and handicrafts. The EU is apparently also attempting to get procedures simplified for easy registration of these GIs in India (Business Standard, August 2, 2011).

### 3. Projections of agricultural trade after the FTA

Impact assessment studies suggest very little gain in commodity trade for India. On the contrary, there is concern that a trade surplus in agriculture might turn into a trade deficit and a long-

term fall in agricultural employment (ECORYS, CUTS, CENTAD 2009: 89-90). A small increase in agricultural exports will be countered by a larger increase in agricultural imports.

**Figure 3: Projections of Shares in Primary Product Markets (2020)**

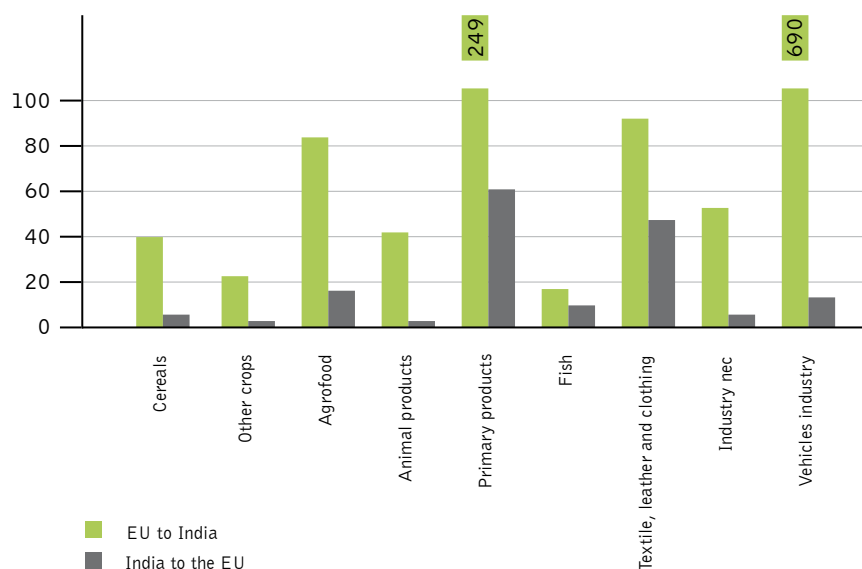


Source: Base on CEPII-CERM (2007) Projections

While India's share in EU's markets in primary products, cereals, other crops and products of animal origin will remain constant (at 0.3, 1.2, 0.6 and 0.1% respectively), the EU will increase its share in all these markets as a result of the FTA (CEPII-CIREM

2007: 18-19). For example, in primary products the EU's share will increase from 4.9% to 16.7% by 2020, and from 17.6% to 23.5% in cereals. In products of animal origin, the EU's share is projected to increase from 7.5% to 10.4% by 2020 (see Fig 3).

**Projection: Variations in Bilateral Trade in Primary Products post EU-India FTA (values, Goods, %)**



**Figure 4: CEPII-CIREM Projections (2020) in Bilateral Trade, EU-India FTA**

Figure 4 shows that India has little to gain in agricultural trade in absolute terms as well, especially compared to the EU (also see Box.2). This is true not only for processed food but also in all segments of agricultural production and trade. This includes cereals, agro-food, animal products, primary products and fish products. In spite of the European Commission's claims that the EU is interested only in beverages, wines and spirits, the opening up of trade can affect all segments. The EU has apparently signalled that provision by India of meaningful market access for wines, beer and spirits and for other areas of key offensive interest to EU such as dairy, poultry, cereals, fisheries, and processed agricultural products (PAPs), often by removing them from the negative list, is essential for the conclusion of the FTA. According to the EC's latest Civil Society Dialogue dated 10th November,

2011, the EU still has a serious interest in dairy, poultry, cereal, oils, beer, and pasta.

The asymmetric nature of this agreement is expected to hurt commodity producers in agriculture and industry, including dairy, poultry, wheat, sugar and confectionary, oilseeds, plantation products and fisheries (the latter is under NAMA). Apart from the EU's subsidised competitiveness in dairy and poultry products, the EU's global trade patterns show increasing exports in commodities such as wheat, oilseeds, plantation products – commodities that still enjoy high applied tariffs in India. The EU is also interested in selling wines and spirits to India, where India's current applied tariff is a high 70.8% (on beverages and tobacco).

## Box 2: Uneven Gains in Agricultural Trade in this FTA

Projections for 2020 also show that while the EU will gain USD 321 million in agro food products, India will gain only USD 7 million. Similarly, the EU will gain USD 133 million in cereals while India gains only USD 7 million. In products of animal origin, the EU gains USD 150 million compared to USD 1 million for India. In primary products the EU gains USD 5128 million while India gains USD 39 million.

Source: CEPII-CREM (2007), Table 5 and 6

**Combined impact of duty reduction and investment and the example of fisheries:** The proposed FTA contains various chapters covering goods trade issues to non goods trade issues. The combined impact of the multitude of chapters is perceived to be a threat to the small fisheries sector in India. A study by Susana Barria and Rohan Mathews (2010) raises concern that European vessels may be allowed access into Indian waters through the investment chapter, which would affect small-scale fish catchers and retailers. These communities have already had to fight to restrict access of foreign vessels to Indian waters after liberalisation, and their gains may be nullified by the FTA. To compound the threat, the EU has asked for tariff cuts on fish found in Indian waters, and there is a feeling that this will give rise to EU intervention in fish species such as tuna. This would provide another level of direct competition to fish retailers in India, as European companies catch fish from their waters and then sell these duty-free to the Indian buyers.

Fish retail is predominantly a domain of women, who can be affected adversely if there is an FTA intervention. Fish is also a cheap protein source for many communities in India, including fish catching and vending communities, and there may be an implication vis-à-vis their right to food. The EU-India FTA is expected to increase marine exports from India; however, Barria and Mathews find that the foreseeable beneficiaries would be larger fishing conglomerates and exporters. This would be due to the systemic marginalisation of small-scale fishworkers in the export market caused by the investment required. The paper also suggests that the investment provisions in the FTA could include access to coastal land for setting up any kind of economic opera-

tion, which can actually intensify pressure on access to coastal land and further threaten the livelihood and access to fish of local communities.

## 4. Negotiation process

The lack of consultation and transparency during the process of these negotiations has been a consistent worry to CSOs and development policy analysts. The lack of consultation with all stakeholders, especially vulnerable groups like farmers, indigenous groups, women, patients' groups, MSMEs, has been a feature of such FTA negotiations. In India and the EU, neither the draft text nor the impact assessment studies have been shared with stakeholders, state governments or with civil society, making independent analyses very difficult. Final sensitive lists are not made public, and there has been almost no effort on the part of the Government to prepare affected stakeholders for dealing with the impact of such agreements.

The political process surrounding such negotiations remains undemocratic and non-transparent. There is no parliamentary oversight and ratification of this or other FTAs in India. Even state (or provincial) governments are not consulted in this process, nor are their ratifications mandatory. This is in conflict with the fact that agriculture is a 'state subject' in India<sup>9</sup>. In Europe, while the European Parliament does have a ratification mandate, its ability to ask for changes in the text remains limited.

<sup>9</sup> Different areas fall under different lists, for which central or state governments have the authority to formulate policy. India has a central list, a state list and a concurrent list.

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# V. TRADE IN GOODS: LIKELY IMPACT ON DAIRY AND POULTRY PRODUCERS<sup>10</sup>

## 1. Introduction

The reason why the RFIA focused on the effects of the FTA on goods produced in the milk and the poultry sectors is the high pro-poor relevance of the two sectors. Both are characterised by highly fragmented and small-scale production systems. This might make both sectors highly sensitive to foreign imports, leaving most small-scale sector participants particularly vulnerable.

India is not only the world's largest producer and consumer of milk; it is also home to the largest number of small livestock keepers worldwide. Most of India's dairy is produced by small, marginal farmers and landless labourers. Thus, dairy is not just another sector of the economy; it is also a source of livelihood for the bulk of the rural poor. The same is true of the poultry sector. Poultry is one of the core support systems for subsistence farmers, providing them with supplementary income as well as a protein source for their diets. It is also an important source of savings. About fifty per cent of landless and marginal farmers at the bottom end of the smallholder spectrum supplement their livelihood through poultry keeping. Both sectors are among the most pro-poor anywhere in the economy, and both are of major importance from a gender empowerment perspective.

Concerns have been raised by farmers and civil society organisations that opening their markets to the highly subsidised European agricultural sector might cause tremendous negative impacts for Indian producers, especially since the EU is about to liberalise its milk market by 2013. The current quota system will be abolished and it is likely that the overall quantity produced will increase. Direct payments and export subsidies will still be available for European producers. Even under the recently released reform proposal of the European Commission, export subsidies are still included as a viable instrument to overcome EU market price depressions. In the process of communicating the FTA to European stakeholders, European negotiators have fought tirelessly for a liberalisation of the Indian milk and

the poultry sector, as this seems to be a particular interest for European producers.

This chapter will look at the structure of the Indian poultry and dairy sectors, at the trade relations between India and the EU, and at possible future developments in the European dairy and poultry sectors. It will first of all examine the plausibility from a producer perspective of whether the establishment of a free trade area between India and the EU might negatively affect the food security situation of small producers in India, and violate their human right to food. Secondly, from a consumer perspective it will explore whether the opening of the market might favour urban and rural consumers due to decreasing milk prices, and thus be conducive to the human right to food, while taking into account the fact that small producers are often net food consumers over a given year.

Methodologically the chapter combines a data and literature survey with the results of a qualitative empirical survey. In-depth interviews with producers, producer groups, cooperatives and scientific and CSO experts provide detailed knowledge on the importance and structure of the sector, and its relevance to food security. On this basis we consider the plausibility of possible outcomes, draw conclusions and make policy recommendations.

The chapter looks at the two sectors separately. It begins in section 2.1 with an overview of the structure, the relevance to livelihoods and the national policy of the dairy sector. It continues with an analysis of the trade structures and the possible influence on Indian national producer prices. Subsequently in sub-section 2.2 the same structure is used to analyse the poultry sector. In the third section indicators of threats to the right to food are discussed. Section four draws conclusions concerning whether possible threats to the human right to food might result from the EU-Indian Free Trade Agreement (FTA). Finally, section five highlights recommendations of civil society organisations.

<sup>10</sup> This chapter draws from the two background papers by Rajesh Mehta (on poultry) and Vijay Paul Sharma (on dairy) conducted for the Human Rights Impact Assessment process.

## 2. The socio-economic and policy framework of the dairy sector

### 2.1. The relevance of dairy production to food security

The dairy sector is tremendously relevant to livelihoods. Most of the milk in India is produced by small, marginal farmers and landless rural workers. According to the annual report of the Department of Animal Husbandry, Dairying & Fisheries (2010/11), about 14.08 million farmers are involved in 135,439 village-level dairy cooperative societies (Ministry of Agriculture 2011; 39). Hence, one of the most significant contributions of the dairy sector is in generating income and employment for millions across the countryside.

The Indian Agriculture Census of 2005/2006 shows that 83% of the farming community comprising small and marginal farmers have an average holding size of less than 2 hectares of land. According to the 59th Round of the National Sample Survey 2, 11% of rural households in India are landless (GOI 2007). However, taken together these groups own more than 60% of the country's livestock resources, and almost half of their income comes from livestock (Goswami 2007). About 75% of the estimated 70 million milk animals are owned by landless, marginal or small farmers. Thus, most rural milk-owning households own only one to three animals, and it is estimated that only around 15% of households own more than 4 milk animals (GOI 2007).

Dairying accounts for a third of the gross income of rural households, and nearly half that of the landless. It provides employment opportunities for around 75 million women and 15 million men (ibid.). The organised sector, which comprises private and government cooperatives and private dairies, has steadily increased its share of milk handling, and currently trades about one third of the marketable milk surplus. It is estimated that about 40 to 50% of Indian dairy farmers work with the organised sector (GAIN REPORT: 3). Furthermore, the annual report of the Department of Animal Husbandry, Dairying and Fisheries (Ministry of Agriculture 2011) outlines the importance of milk production for providing a particular source of income for female farmers, and thus for empowering women in a rural society that is dominated by rather uneven gender roles (GOI 2007).

Moreover, owning cows or buffaloes is not only a direct source of income for poor household. It is also a saving asset. Most interviewees saw the continuous income they receive from dairying as especially important, particularly because of its predictability.

Furthermore, the milk these animals produce is an important supplement to people's daily diet. Female interviewees in particular highlighted the importance of the fact that at least some of the milk is consumed at home. Milk consumption was seen as a particularly important source of protein for children. Given that hidden hunger (see Chapter III) is a major problem among children and women, protein and vitamin intake from the milk becomes particularly important.

### 2.2 Trends in supply and demand within the sector, and policy framework

In terms of value of output, milk is the single largest agricultural commodity in India. Dairy products account for 70% of the output of the livestock sector. In 2008/09 the value of dairy products alone was with slightly more than EUR 2 billion higher than the combined output from rice and wheat (EUR 1.9 billion) (Sharma 2011).

In recent decades milk production in India has experienced tremendous growth. Total estimated milk production in 2009-10 was 112.5 million tonnes (and is expected to surpass 116 million tonnes in 2010-11), which is more than double the figure of 55.7 million tonnes achieved in 1991-92 (Figure 1). According to India's National Dairy Development Board (2011), total dairy production is estimated to be growing at 4% annually, while consumption of milk is expected to increase at a higher rate than production in the near future. The major factors driving growth in milk consumption are increased demand due to population growth, rising household incomes, increased demand for value-added milk products, and the preference for liquid milk as a principal protein source (GAIN REPORT: 3). However, since rising incomes occur mainly among the urban middle class the increase in consumption among the poor is negligible (for more detailed information see Chapter III). All in all the increasing demand has led to an increase in consumer prices at wholesale level of more than 75% (NDDB 2011) over the last few years, making access to milk products even more difficult for the rural and urban poor. At the same time producer prices increased only slightly.

Those interviewed during the RFIA in 2011 in Andhra Pradesh reported that the price they received for a litre of milk varied between EUR 0.19 and EUR 0.29, depending on a) whether they sold their milk to public cooperatives or to private dairy enterprises, and b) the percentage of fat in the milk. Even though prices of milk have increased slightly in recent years, most interviewees reported substantial problems in keeping up their production. This was due to the increase in the cost of feed over the same period, which has driven production costs up substantially. This was the case particularly for very small-scale producers and landless livestock keepers, since both groups have to buy additional feed for their animals. The huge difference between trends in consumer and producer prices hints at the fact that price increases tend not to be passed on to rural producers, due to differences in market power.

This might be one reason why the total number of milk cows has been declining in recent decades. Between 1982 and 2003, the total number of cattle declined from 192.45 million to 185.18 million, i.e. by about four per cent, and this decline was more pronounced in local cattle. The 59th round of the National Sample Survey (NSSO) reports of 2002-03 shows that the average 'in milk bovine stock owned per 100 rural households' decreased for nearly all farm sizes between 1971 and 2002/03. However, the strongest decrease is shown for the landless holder, who experienced a decrease from 16 to just 1 animal. This decline was observed in cattle and buffalo populations in all the major states in India. This data indicates that it is becoming increasingly difficult for rural farmers to keep cattle and buffaloes.

However, in the same period total milk production increased further. The average milk production per cow almost doubled from 524 kg per year in 1980 to around 1000 kg in 2007, but still remained lower than the world average (2,038 kg). Growth in milk per cow and an increase in the number of crossbred cows have contributed to increased milk production in the country. However, according to several interviewees the economic situation becomes rather difficult and much more risky when farmers decide to buy a crossbred cow. Usually farmers have to obtain a loan in order to buy a crossbred cow for production purposes. This credit is often provided by the dairy processing company or local saving groups. However, if the next lactation season is not as successful as envisaged, the farmer starts to get caught in a downward spiral of credits – which often endangers not only the agricultural production assets but also the basis of the farmer's livelihood.

Another reason for the decreasing number of cows might be the far-reaching change taking place in recent years in the sector policy framework. Whereas in the 1970s and 1980s the Indian Government established a policy that was clearly in favour of small producers and cooperatives, this is no longer the case. Through the Operation Flood programme (which began in the 1970s) the government gave a boost to dairy development by linking-up rural producers with urban consumers through pricing, procurement, processing and marketing. With cooperatives acting as a catalyst, this process reduced transaction costs and major public investment in the milk processing sector.

Until 1990 private investment in the sector was strictly regulated. However, since then dairy policy has increasingly turned to favour private investors in the sector. Following a first liberalisation of the sector in the mid-1990s, the dairy industry was completely delicensed in 2003. The overall purpose of this policy was to encourage private investment flows of capital and new technology in the sector. Competition from the private sector was immediate, and took the form of sharp increase in capacities for milk processing, especially in areas where milk availability was relatively significant. Within a year of delicensing, over 100 new dairy processing plants emerged in the private sector. In 2006-07, the government

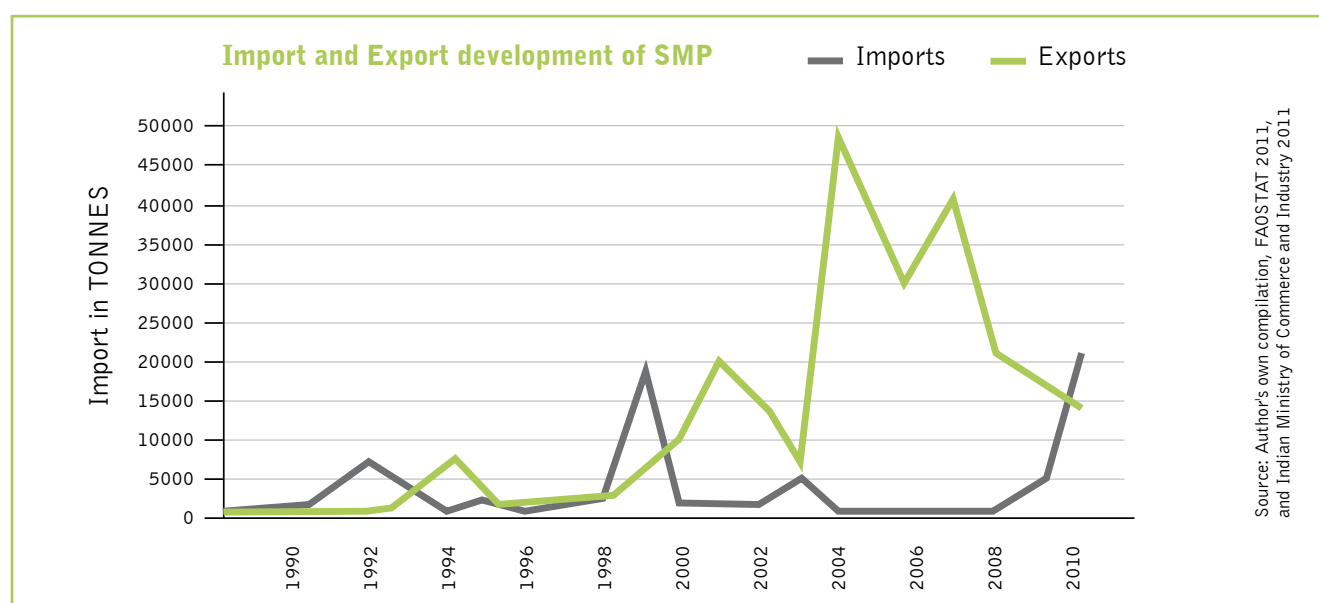
reduced the income tax rate for private dairy companies by 10%, but did not reduce it for cooperatives (Goswami 2007; 7).

During the post-liberalisation period there has been a pronounced increase in private-sector involvement in the dairy processing sector. The number of dairy processing plants in the cooperative sector increased from 194 in 1996 to 243 in 2010, whereas in the case of the private sector it more than doubled from 250 to 562. The private-sector share of total production increased from 49% in 1996 to about 66.8% in 2010, while the share of cooperatives and others declined from 51 to about 33% during the same period. According to various interviewees it is very difficult for the public cooperatives to compete with the private dairy processors. This is especially true given that cooperatives are designed and structured to integrate small and remote farmers in particular. Private processing enterprises can easily try to attract the larger producers with larger selling quantities, and thus at least reduce their transaction costs. According to several interviewees, the increasingly private structure of the sector seems to disfavour its inclusiveness, and thus the aim of achieving a pro-poor sector development structure.

### 2.3 Current trade and trade policies between India and EU in the sector

During the 1970s and 1980s India was a net importer of skimmed milk powder. Since milk is hardly traded at all as fresh produce, milk powder is the traded substitute. More than 45% of milk powder produced worldwide is traded internationally. Combined with butterfat and water it can easily be used as milk, especially in the processing industry.

Between 1993 and 1999 imports and exports kept edging each other out, and since 2001 India has been a net exporter of dairy products. Post 2003, exports have grown substantially, while imports have dipped (FAO 2011 and Goswami 2007: 4). Exports go mainly to India's Asian neighbours such as Bangladesh, China and Nepal, or to Arab states like UAE, Egypt, and Algeria. However, India's share of global dairy trade is 0.3 and 0.4 % for exports and imports respectively, which is almost negligible (Goswami 2007: 4).



During the 1990s the Indian Government protected its dairy sector using various instruments. First of all, imports were only allowed in subject to an import quota. Secondly, all imports and exports of dairy products were channelled through the National Dairy Development Board (NDDB), and the Agriculture and Processed Food Exports Development Authority (APEDA). No tariffs were established for milk powder imports in the previous GATT protocol. Import tariffs for butter oil were fixed at a level of 40%.

After India acceded to the WTO and had to convert all quantitative restrictions on trade into tariff equivalents, the Indian negotiators initially left the bound tariffs for milk powder (SMP) imports at a zero level. This fact did lead to an increase in skimmed milk powder (SMP) and butter oil imports in 1999, when quantitative restrictions were lifted. However, even though imports of skimmed milk powder increased drastically when the quantitative restrictions of the import quota were lifted (at the same time we note that butter oil imports increased drastically, even though import restrictions did not change), the increase still took place at a very low absolute quantitative level. According to the import/export database of the Indian Ministry of Commerce and Industry, the quantity of skimmed milk powder imported never exceeded 20,000 tonnes and butter oil never exceeded the limit of 15,000 tonnes.<sup>11</sup> Multiplied by a factor of five, these imports are equivalent to liquid milk imports of about 75,000 tonnes.

One reason why imports remained at a rather low absolute level might be that the structure of the Indian national market still was very restrictive for importers – all imports still had to be channelled through the NDDB and the APEDA. Another problem for the international exporters might have been that market relations were not yet established.

Even though this was occurring at a rather low level – the Indian Government did seem to acknowledge the pressure of the international milk market, and in 2000 India renegotiated a 60% bound tariff for all imports of SMP. Since then the Indian Government has established a tariff rate import quota which accounts for about 10,000 tonnes. Within the quota a tariff of 15% is applied, while outside of it imports face a 60% import tariff for milk powder. Looking at the trade data it seems that the bound tariff of 60% is prohibitive.

However, today there seems to be a renewed trend toward substituting national production with cheap milk powder imports. In 2009 the export of milk powder (including skimmed milk powder, whole milk powder, dairy whitener and infant milk foods), casein and casein products was prohibited by the Indian Government. At the same time the tariff rate import quota was increased to 30,000 tonnes. The Government argued that it was seeking to augment the availability of liquid milk and stabilise the prices of milk and milk products (Ministry of Agriculture: 42). As a result of this policy, imports of dairy produce have increased by more than 300% in the last few years (Sharma 2011). Furthermore, imports of butter oil, which is needed for mixing with SMP and water in order to finally obtain liquid milk,

peaked at a level of more than 21,000 tonnes in 2009. However, once again the increase for both imported goods took place at a very low quantitative rate in relation to Indian production overall.

Dairy products form a very small component of EU-India agricultural trade overall. The share of EU dairy exports (% of total agricultural exports) to India increased from 3.5% in 2000 to 4.4% in 2009. Far behind New Zealand (57%) and Australia (25%), the EU accounts for between 12 and 15% of Indian milk powder imports.

### 3. The socio-economic and policy framework of the poultry sector

#### 3.1. The relevance of poultry production to food security

The Indian poultry sector shows a dual production structure. On the one hand we find the capital-intensive industrial production of broilers, and on the other hand the low-input backyard production of traditional poultry. Both sectors are important from a poverty perspective, but in very different ways. Industrial broiler production offers jobs in rural areas. However, according to various sector model projections employment opportunities will not exceed a figure of between 20,000 and 35,000 jobs, even if Indian broiler production growth is very high (Pica-Ciamarra and Otte 2009). According to Pica-Ciamarra the major part of growth in the industrial sector involves the contract farming schemes, which take place on a large scale. According to the HRIA interviewees, this scheme entails a relatively high risk for the small producers who accept a contract.

The backyard poultry system shows very different opportunities for small producers. Backyard poultry's is particularly important because of its risk-diversifying effects. It constitutes one of the core support systems for subsistence farmers, providing them with supplementary income.

According to the 2006 National Sample Survey (NSS) Report on Livestock Ownership (Government of India 2006), the landless, marginal and small-scale farmers, who account for about 90% of the 107 million agricultural households in India, keep about 85% of the country's poultry stock. About 50% of the landless and marginal farmers at the bottom end of the smallholder spectrum supplement their livelihood through poultry keeping (Mehta 2011). The Annual Report of the Department for Animal Husbandry, Dairying and Fisheries (2011) also underlines the importance of the poultry sector for the nutritional security of the rural poor.

Since its units are small, smallholder poultry production will not generate huge income. However, it is capable of taking especially women forward into a positive spiral of events which may lift them out of poverty (Jensen and Dolberg 2003). Prmea Kumtakar (1999) and Vijay Kumtakar (1999) reported that income from traditional poultry production accounted for between 11% and 20% of the total cash income of rural small producers; the significance of that income was higher in landless families (in: Dolberg 2010).

Since poultry keeping is specifically a women's activity, backyard poultry farming is of tremendous importance from a gender and female empowerment perspective. According to the interviewees

<sup>11</sup> Import /export data were obtained from four different sources: from the Indian Ministry of Commerce and Industry, from Faostat, from Eurostat and from UN Comtrade. Comparing these data it becomes clear that they show some inconsistencies. While the data from the FAO and the Ministry of Commerce and Industry are largely the same, the EU export data from the Eurostat databank show much higher EU exports to India. For some years the figure for EU exports shown in the Eurostat database is double that for total Indian imports of SMP in the same year, as indicated in the databases of the Indian Ministry of Commerce and Industry, the FAO and UN Comtrade. Hence, all data have to be interpreted carefully.

of the HRIA, women use the income to pay for children's education expenses, medical emergencies and to overcome food shortages. Furthermore, according to several interviewees, the birds are of particular importance as a saving asset. If rather small amounts of money are needed a bird is sold on the market. Most interviewees also underlined the importance of the birds as a major source of protein for their diet.

### 3.2 Trends in supply and demand within the sector, and policy framework

With a poultry population of 489 million (Livestock Census 2003) and egg production of 59.84 billion in 2009-10, India ranks among the top three countries in the world in egg production (Ministry of Agriculture 2011). Poultry is one of the fastest growing sectors of Indian agriculture. It has been growing at a rate of 8-10% per annum, and poultry's relative share of total livestock production increased from 10% in 1996-97 to 14.2% in 2008-09 (Mehta 2011).

However, this spectacular expansion in India's poultry sector has so far contributed only marginally to poverty reduction and improved nutrition, particularly in rural areas (Pica-Ciamarra and Otte 2009). The reason for this is that the expansion of the poultry sector has taken place mainly in highly specialised poultry farms with capital-intensive production systems that are located close to large cities, many of them in the south of India. Industrial farms are constantly growing. Whereas in earlier years commercial broiler farms had on average several hundred birds (200 – 500 chicks) per growing cycle; these days, units with fewer than 5,000 birds are becoming rare, while units with 5,000 to 50,000 birds per cycle have become common.

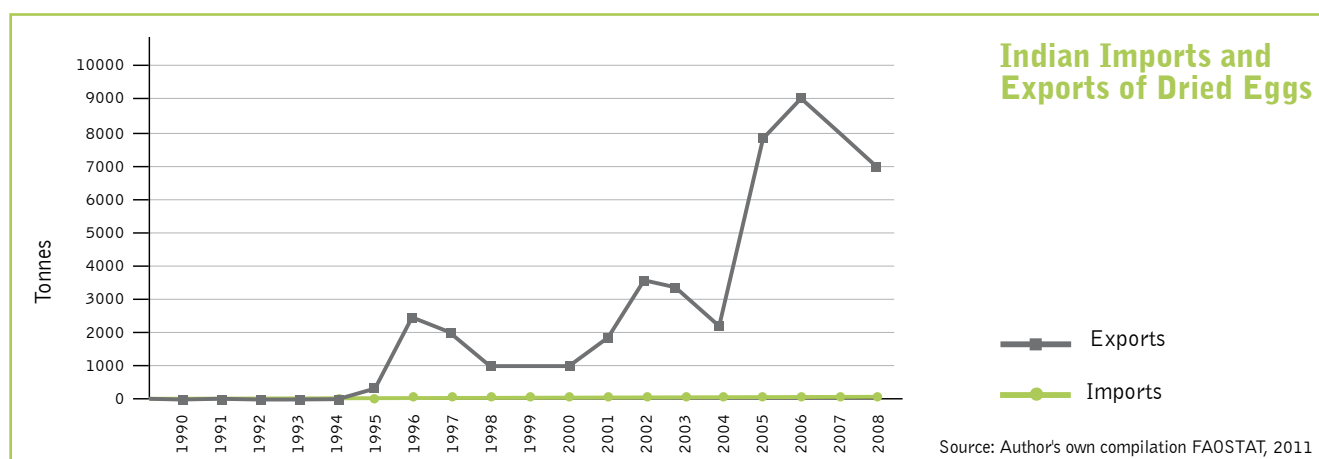
Much of the urban demand, as well as export sales, are met by production in large commercial farms in Andhra Pradesh, Maharashtra, Tamil Nadu, Haryana, Punjab and Dehli (Dolberg 2010). Today, the organised sector is producing more than 70% of the total output of the sector. Only between 25 and 30% is provided by backyard poultry (Mehta 2011). Yet it is not only the production side that tends to show a dual structure – the demand side too shows a big urban-rural divide in the level of consumption.

Dolberg (2010) states that average urban annual per capita consumption is 100 eggs, as compared with an average rural consumption of 15 eggs.

The second important poultry product is meat. Poultry is the major source of meat in India. Its share of total meat production was 28% in 2004, as compared with 14% in 1995. The relative decline in the price of poultry meat (as compared with other meats) is a result of higher productivity (attributable to technical factors) – increased feed conversion ratio, and lower period for production of poultry meat/eggs (Mehta 2011).

Backyard farming is important because of its highly capital-extensive nature, and the fact that it therefore helps small farmers diversify their risk. As well as using traditional breeds, farmers also breed their own chicken, and use crop and household waste as feed. The traditional birds are seen by consumers as being of high quality, and several interviewees told us that consumers are willing to pay a higher price for the traditional birds than for commercial broilers. Marketing chains in the traditional production sector are concentrated locally. It seems that traditional backyard birds are treated as a separate product from the industrial broiler, with very different prices and marketing chains.

When talking to small producers involved in industrial broiler production, several difficulties were mentioned. Since market power is distributed asymmetrically between small broiler producers and the large scale broiler processing industry, small farmers seem to have contracts that leave them with a relatively high risk. The investments required to establish a stable, and to buy chicken, feed and medicine for production, are high. Small producers told us that they obtained credits for their investments from saving groups or from the processing plant. Several interviewees said they felt uncomfortable with their production situation, since their whole livelihood is at risk due to the high loans. Among the small contract farmers there was a great fear of losing their production base, and thus of facing the inability to repay their credits. Furthermore, the rather weak marketing channels linking rural producers with urban consumers mean that small farmers are profiting only marginally from the tremendous increase in poultry demand in the country.



### 3.3 Current trade and trade policies between India and the EU in the sector

The poultry sector's share of India's total exports and imports is negligible. In 2009-10, only USD 78.48 million of India's total exports of USD 178.6 billion originated from the poultry sector. Within the sector, eggs and egg powder (of chicken) are the most important export commodities. There is almost no export of poultry meat. According to the annual report of the Department of Husbandry, Dairy and Fisheries (2011), poultry product exports

increased from nearly USD 110,000,000 in 1993-94 to about USD 4,220,000,000 in 2008-09. The major destinations of India's poultry exports are the Middle East (table and hatching eggs) and the European Union (egg powders). India has been exporting egg powder to European Union countries for more than 15 years. The volume of exports has been very volatile, basically due to changing sanitary and phyto-sanitary (SPS) standards of EU countries, over time (Mehta 2011).

#### India: Customs Tariff of Select Poultry Products: 2009-10

HS code	DESCRIPTION	Imp. Duty (%)
0105	LIVE POULTRY, THAT IS TO SAY, FOWLS OF THE SPECIES GALLUS DOMESTICUS, D	30
0407	BIRDS' EGGS, IN SHELL, FRESH, PRESERVED OR cooked	30
0408	BIRDS' EGGS, NOT IN SHELL, AND	30
Ex 1602	<b>PREPARED/PRESERVED MEAT, MEAT Offal of poultry of heading 0105</b>	
16023100	OF TURKEYS	30
16023200	OF FOWLS OF THE SPECIES GALLUS DOMESTICUS	100

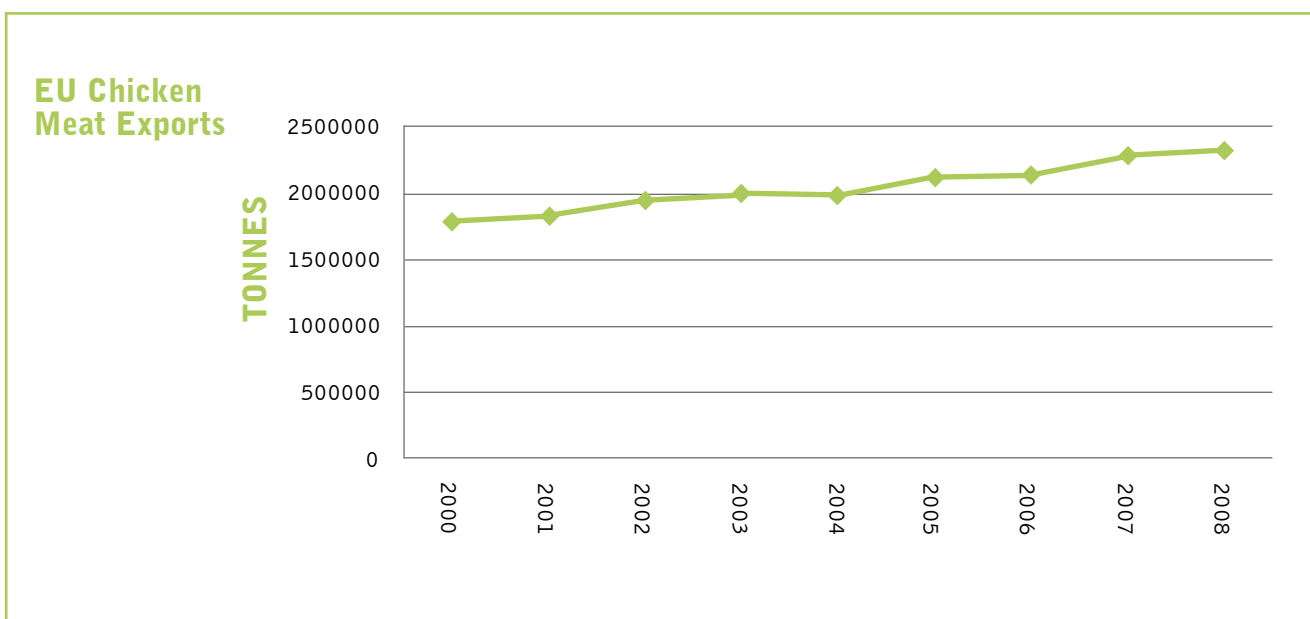
Source: GOI, Custom Tariff, <http://www.cbec.gov.in/customs/cst-0910/cst-main.htm> (in Metha 2011)

The Indian poultry sector is protected by applied (and bound) tariffs of between 30 and 100%. No increase in imports occurred either after India acceded to the WTO, or in recent times when the demand for poultry produce rose.

According to Mehta (2011) this is because there is no demand for egg powder in India. All egg powder plants that exist are estab-

lished with the direct intention of serving the EU market. Finally, probably the most sensitive product – poultry meat – is currently protected by a 100% tariff.

Even though overall EU chicken exports have increased, the Indian market was not an export destination – probably because it is well protected.





#### 4. FTA provisions on goods, and their possible positive or negative implications for trade in dairy and poultry products

Even though both negotiating partners, the EU and India, are able to exclude some socially sensitive products from tariff liberalisation, they are obligated to include 'substantially all goods'. This means that 90% of all tariff lines have to be included within the current negotiations. While implementing this RFIA we still don't know which tariff lines will be on the list of sensitive products. Information on the ongoing negotiation process is not published, and we have only some leaked versions of the negotiating text and the list of sensitive products.<sup>12</sup>

Nevertheless, judging by the communications on the negotiation process from the European Commission and from the German Ministry of Food, Agriculture and Consumer Protection, it is no secret that both hold a strong interest in obtaining access to both emerging Indian sectors. Given the importance of both sectors to the EU agricultural sector, the European Commission clearly has a strong incentive to negotiate the liberalisation of these sectors. Germany is among the strong drivers of a resolute negotiating position geared to achieving a maximum opening of tariff lines in both sectors.

According to interviews with experts of the Indian Ministry of Commerce and Industry, the European Commission insists that more than 90% of the tariff lines should be liberalised. Interviewees indicated that they proposed a list of sensitive products to the EU which mainly consisted of agricultural products. However, according to our interview partners the EU did not accept, and insisted on a further liberalisation of tariff lines, including those in the poultry and dairy sectors.

In order to gain market access for other products, the Indian Government is considering opening up the tariff lines for certain poultry products as well for SMP.

Hence this chapter of the present paper focused its analysis on the question of what would happen if certain tariff lines in the dairy and the poultry sectors were not defined as sensitive products, given how important they are for livelihoods.

##### 4.1 Likely effects of the EU-Indian FTA on the dairy sector

Working on the basis of plausibility, this part of the paper aims to outline some possible effects of the EU FTA on the Indian dairy sector. It is important in this instance to understand both sectors, both in the EU and in India. This is because it may be a combination of parallel political processes that could put pressure on Indian dairy production.

First of all, the EU has a strong interest in approaching new and emerging markets with its milk powder and its butter oil produce. Today the milk market is already of major importance for the EU, but as mentioned above the EU is about to liberalise its milk market in 2013. This will include abolishing the production quota. It is entirely possible that this will lead to an increase in production without any increase in consumption within the EU. Abolishing the quota will not only increase production; more particularly, it

will increase production by those market actors that are highly export-oriented, as well as being highly competitive on the world market due to their economies of scale combined with the high level of subsidies they often receive.

Today, with the production quota in place, the EU is already an important exporter of milk powder and – albeit on a very small scale – also exports its produce to the Indian market. An abolition of the tariff might, though, lead to an increase in EU exports to the Indian market.

A look at past trade data spanning two particular periods supports this assumption. First of all, when the Indian Government abolished the import quotas for milk powder in 1999 because of WTO regulations, no tariff equivalents were put in their place. On the contrary, the tariffs for milk powder stayed at zero per cent. This fact led directly to a strong increase in milk powder imports. In 1999 the imports jumped from 1,600 tonnes (the figure for 1998) to 16,908 tonnes. As mentioned above the data on skimmed milk powder trade between India and the world, and India and the EU, are not consistent. For several years the EU database indicates higher exports to India than the Indian Government indicates for their overall imports in those same years. However, in this example it is important to look very closely at the trend in EU exports: in 1999 exports increased from only 600 tonnes of SMP to more than 25,000 tonnes. Since the EU is by far not the largest exporter of milk powder to India, the EU data suggest a much higher overall level of imports by India in that year.

As mentioned in the previous section the total quantity of milk powder imports is still very small. This might have been due to various reasons. First of all, marketing relations do not simply arise of their own accord. They have to be established. Exporters need to know about the terms on which they sell their produce to the Indian market, and also need contacts to their buyers. This is the second reason that might have led to imports not increasing at a higher rate in 1999 – the import structures of the sector were still controlled by the government. This meant that all trading relations involved a huge logistical and administrative effort.

By the beginning of the new millennium the Indian Government had renegotiated the tariffs to a bound level of 60% for skimmed milk powder. In the following year milk powder imports already decreased substantially and stayed at a relatively constant level below 1,000 tonnes, except for a brief peak of 4,000 tonnes in 2003. Since then, the Indian Government has granted a tariff rate quota of 10,000 tonnes, which were allowed to enter the country at a tariff rate of 15%. In the meantime the structure of the sector has changed. Hence, when today's tariff abolition takes place, the administrative and logistical costs will be much lower for the exporters. Alongside imports of SMP the import of butter fat plays a major role, especially when it comes to pricing. Butter oil imports have always been protected at a level of 40%. Nevertheless, imports have always taken place, albeit at a relatively low level. In the 1999, when SMP imports increased sharply, imports of butter oil increased to more than 10,000 tonnes, even though protected by a 40% tariff rate.

12 For more Information on the negotiation process please see Chapter IV.

Secondly, when the Indian Government increased the tariff quota in 2009 from 10,000 to 30,000 tonnes, imports increased immediately to the maximum level allowed by the quota. At the same time imports of butter oil increased to a long-term peak of 21,000 tonnes. The fact that the EU increased its exports to India (albeit at a very low level) whenever possible, in response to increased tariff rate quotas, raises the concern that in case of free trade, the EU would increase its exports of milk powder to India on a large scale. This assumption is further supported by the fact that the EU belongs to those four countries that supply more than 74% of the highly concentrated export market for milk powder; namely Australia, New Zealand, the US and the EU (Braresh Jah 2007). While New Zealand and Australia are known as highly efficient milk producing countries, within the EU milk production receives tremendous direct or indirect subsidies.<sup>13</sup>

Based on these two examples we can conclude that, given the trend in EU milk production within the coming decade and the high level of direct payments European farmers receive, it seems likely that EU milk powder exports to India would increase substantially. Since the EU market is more or less saturated, and little increase in consumption can be expected, it is relatively clear that EU exports will increase. This is especially true as long as the EU still retains its right to subsidise its milk powder exports (as e.g. in 2009). Given its tremendous growth in demand, India will be a desirable market for EU exporters.

This raises three inter-related questions: a) Would EU exports lower Indian producer prices? b) Would EU exports lower the chances of Indian producers participating on certain markets? c) Would a greater import dependency possess the potential to destabilise national consumption due to higher variability of world market prices?

Regarding the first question, demand for milk in India is growing vigorously. Demand is currently outstripping production. This is more likely to lead to an increase in producer prices. However, bearing in mind the EU production projections for the coming years, a potential decrease in prices is at least imaginable. In 2007, using an agricultural sector model Braresh Jah calculated the impact of changing world market prices for different regions in India. He shows that with low world market prices, the producer price in all regions would be negatively affected due to cheap imports of milk powder. He assumes low world market prices (WMP) to be less than Rs 647 per quintal. Using the same model Braresh Jah shows that imports of milk products at a low international price (Rs 640 per quintal) would lead to a steep decline in the domestic price of milk. He also shows that since the supply of milk is highly price-elastic, a fall in producer prices for milk would result in a fall in the supply of milk in all the states chosen for his analysis. Since international prices of milk powder are highly volatile, and time and time again face periods of very low levels, it would be important for the Indian Government to have the option of protecting the Indian dairy sector in times of low prices. One of the worst possible effects of the FTA, though, would be that the Indian Government would no longer have the political latitude to increase its milk powder tariffs for EU imports. This – in combination with export subsidies, which the EU still sees as a legitimate means of stabilising its markets –

could lead to substantial increases of imports during certain low price periods. According to the analysis of Bah (2009), an increase in imports might well lead to decreasing producer prices. Even though this might only be for a relatively short period, it would be a major threat to Indian small-scale producers who – due to their particular characteristics as small farmers – have a very limited capacity to cope with even short-term price depressions. Given the structure of the sector, private processing enterprises and larger producers would most probably be able to cope better with times of price depression. Hence, it might be that not only single producers, but also the inclusive structure of the sector as a whole would come under pressure, since private processors would be able to gain from cheap imports, while the inclusive structures of the cooperatives would become increasingly uncompetitive.

Furthermore, we should consider butter oil imports and their importance for pricing: since producers are paid according to the percentage share of fat in their milk, a decreasing butter fat price caused by increasing imports puts direct pressure on milk prices. When in 2009 SMP imports and butterfat imports increased drastically due to the increase in the import quota, the Indian media vigorously debated the negative impact of butter oil imports. In 2009 *Thaindian News* calculated that even after taxes and freight costs, at Rs 135 imported butter oil was still about Rs 0.40 cheaper than the local produce.<sup>14</sup>

Regarding the second question, increasing demand for milk could offer a great opportunity for Indian milk producers to increase supply and benefit overall economic development in the country. Public investment in the dairy sector – especially in better marketing chains between rural producers and urban consumers – could transfer wealth from urban growth centres to rural areas. Substituting national milk production with milk powder imports would disconnect national supply from the growing national demand. Positive effects of this growing demand would not reach producers. The most positive assessment of this scenario is that producers would at least not lose market shares. Once again, imports would not only be a threat to the individual farmer, but would also put pressure on the overall inclusive structure of the Indian dairy sector. While private processors can easily buy cheaper milk powder and butter fat that are imported, the cooperatives rely on the products of their members. Hence, cheap imports increase the pressure on those production systems that are not as competitive as the private sector, due to their multifunctionality and the higher transaction costs associated with that.

Regarding the third question, if higher imports did lead to lower national prices, this would without doubt favour urban poor consumers – at least as long as international prices were low. However, a higher dependence on the world market might lead to increasingly volatile national milk prices, especially in urban areas. This might negatively affect consumption patterns of urban poor consumers. According to the RFIA interview partners in the processing sector, a strong dependence on imports makes long-term planning for the processing sector much more difficult. In the long run the sector can probably cope with varying price levels – what is particularly difficult, though, is the unpredictability of highly volatile milk prices.

<sup>13</sup> Oxfam (2009) reports a 50% dumping effect of milk prices caused by the existing subsidy system.

<sup>14</sup> [http://www.thaindian.com/newsportal/india-news/import-of-butter-oil-causing-crisis-in-indian-dairy-industry-naresh-gujral\\_100157222.html](http://www.thaindian.com/newsportal/india-news/import-of-butter-oil-causing-crisis-in-indian-dairy-industry-naresh-gujral_100157222.html)



#### 4.2 Likely effects of the EU-Indian FTA on the poultry sector

Regarding the trade in eggs, it is unlikely that the EU will export eggs to India in the event of a free trade agreement. According to Mehta (2007) there is no demand for egg powder in India. On the contrary, India is an egg powder supplier for the EU, and the egg producing industry might profit from the abolition of EU tariffs (EUR 66.3 /100 kg).

The other side of the coin is the abolition of tariffs for poultry meat. Today, poultry meat is not traded between the EU and India, because India is applying import tariffs of 100% on fresh meat. Nevertheless, it is likely that the EU will start exporting those parts of the chicken that are not consumed within the EU, which could be everything except for the fillet, if India were required to reduce its tariffs. The story behind all this is that European consumers have a strong preference for consuming the fillet of the bird. Hence, the cost of production is covered by the price of the fillet. From the perspective of the European producer, all the rest is unimportant, and should be sold for a break-even amount. This means the fillet is indirectly subsidising the production of the rest of the bird, since all other parts except the fillet can be sold at a price far below the production cost of the total bird. Hence, what producers do is to find the best option for selling the remaining parts of the bird. Since it is more reasonable for the producers to sell their chicken parts abroad than to pay for disposal of the waste, parts of the chicken are exported to developing countries. And this is what is happening. The EU is the third largest exporting country of poultry meat in the world. Between 2000 and 2008, the EU increased its chicken exports by nearly 80%, in which connection exports to developing countries play an important role. To give one example, the export of poultry meat to West Africa has increased by more than 500% since 1995.

The Indian market would be highly attractive for EU exporters, as urban demand is growing rapidly, and the price for poultry is not differentiated for the various pieces of the bird. Metha (2011) underlines the fact that this lack of product differentiation between different pieces of the bird is leaving Indian producers at a disadvantage compared with EU producers. According to Mehta (2011) the Indian sector would not be competitive if tariffs were abolished.

The potential of the EU to supply the Indian market depends very much on production trends in India, exchange rates, world market prices and Indian production prices. If we assume that imports will take place, then the EU has the potential to threaten an emerging sector. This is especially true since broiler production is located close to urban centres, which again have good international marketing structures. Thus, transport would not be a major challenge for EU suppliers. Current developments rather suggest that larger production enterprises of more than 5,000 birds would be more likely to be highly competitive. This is different for the small-scale contract farmers. As we heard from various interviewees, these farmers have invested a great deal to become a part of the emerging poultry market. However, transaction costs for large processing firms when purchasing from small farmers are much higher than buying the cheap imported parts of the bird. Small-scale contract farmers not only face the risk of being excluded from the market; they are also at risk of being unable to repay their credits. Since small-scale contract farmers are highly sensitive to prices and have a low capacity to cope with decreasing prices, all price depressions put them at direct risk. Since contract farming with small farm-

ers takes place on a very large scale (several thousand farmers are under contract), any threat to industrial broiler production also entails a high risk of threat to small contract farmers.

Given the very different structure of the sector, the impact on backyard poultry farming would be more indirect. First of all, consumers in India differentiate when consuming a broiler or a traditional breed. They are more willing to pay for a non-broiler bird. Secondly, market chains for broilers and backyard poultry producers are different. Broilers are sold to supply the urban demand. Backyard poultry lives from its locally concentrated marketing chains and the direct producer-consumer link. Thus, a direct impact of EU imports on rural backyard poultry production is rather unlikely. However, if instead of intensifying broiler production close to urban centres the Indian Government were to improve rural-urban marketing linkage, rural producers would gain an opportunity to participate in the growing demand for poultry meat in India.

#### 5. Possible indicators of threats to the right to food

Since we already discussed the high relevance of both sectors to pro-poor development as well as to food security for vulnerable groups, the overall question is now whether changes in the milk or the poultry market arising from the FTA would affect the human right to food. We will now take a twofold approach to this issue. First of all we will look at the producer perspective, and analyse whether the changes decrease farmers' access to food due to a) a decreasing ability to produce their own food or b) a decreasing ability to buy their own food. Secondly, we will briefly look at the consumer side, and analyse whether changes will increase food availability for rural and urban consumers due to decreasing product prices.

This analysis is based on plausibility and causal links. The main focus is on the production side. The analysis does not look directly at indicators of the human right to food, but rather concentrates on the unfolding economic situation of the producers. Answering these questions, however, does enable us to learn more about a possible threat to the human right to food.

Here are the main questions that raise the concern of a violation of the human right to food:

- 1) Is the sector under consideration of particular importance for livelihood security and poor producers?
- 2) Are the producers able to cope with changes in the market?
- 3) Is it likely that imports will increase in the future, thus changing the cost/ benefit situation of the producers?
- 4) How are prices likely to develop in the market under consideration? Regarding the effects of the FTA on consumers, we identified the following key indicators:
- 5) How will consumer prices for the product under consideration develop?

Would a dependence on the international market entail increasing price volatility? For a comprehensive analysis it is necessary to look

at the overall context in which the FTA takes place. How will international prices for dairy and poultry produce develop in the coming years? Do the results of our analysis change if prices for those agricultural products increase or become increasingly volatile?

## 6. Likely impact on the right to food of dairy and poultry producers

The basis of our analysis is to look at those two agricultural sub-sectors that are of particular relevance to pro-poor development. As we saw above, the poultry and dairy sectors are highly relevant not only to the income of small or landless producers, but also to gender empowerment, as they play a special role in the income of women in rural areas. They are relevant to those producers who have few alternatives for income generation, and little capacity to cope with external shocks or changes in the sector.

If we now assume that higher EU imports of milk and butter oil will take place as a result of the FTA, – how would this affect the right to food situation of the small market participants?

According to several interviewees, current producer prices barely cover the costs of production for most small producers. This is particularly true for those producers without land who have to buy additional feed for their animals. Since the cost of feed has increased drastically in recent years, the cost-benefit ratio, particularly for small and landless producers, shows a rather negative trend. Higher production costs in conjunction with decreasing producer prices would exclude millions of small producers from the market. This is especially so since most small producers are highly price-sensitive. Most do not have the capacity to withstand shorter or longer periods of low or highly volatile prices.

Regarding the Indian dairy sector, it is particularly important to note that a trend which favours the private processing enterprises over the cooperatives will have a far-reaching negative impact on the inclusive structure of the sector and thus on the market share of millions of small producers. This is exactly what cheap SMP and butter oil imports would do. They would favour the private processing sector (which could then purchase cheap imports from abroad) over the cooperatives, which also have to purchase from their members.

Furthermore, this would put particular pressure on all those who have to pay back credits they received from local saving groups or downstream actors. Since they often have to pay these loans back at high interest rates, a predictable market trend with rising prices is of major importance to them.

In the interviews we tried to discover more about the risk situation of the producers. Most who are owners of a crossbred cow told us that they bought it on credit. Now, since prices for feed have increased so drastically they are not generating sufficient revenues to pay back their loans. Most of them saw a tremendous risk to their livelihood.

For untrained rural persons there are few alternative off-farm job opportunities – in either rural or urban areas. Some interviewees stated that they went to work on construction sites, but all in all they saw their job opportunities as being highly precarious and irregular. The same is true for the rural jobs of landless workers. Most of our interviewees stated that with increasing prices

for feed, farmers have to decrease their other production costs. Hence, they try to save employment costs and rather do the work themselves or give it to another member of the family. Landless interviewees saw their opportunities for wage labour to be far lower than in earlier years. If the cost-benefit ratio were to decrease further due to falling producer prices, though, this would negatively affect not only rural producers but also the highly vulnerable rural landless workers. Once again the same is true for the 100 days of paid labour that are guaranteed by the Indian Government. Even though it is supposed to be guaranteed, most interviewees did not see it as a safe job opportunity.

Coping with risk is of major importance for many small as well as landless producers. Being part of the dairy production sector was seen by most of the interviewees as a major contribution to their safety net, i.e. makes them less vulnerable. This is because dairying is not just a source of income. Owning cows is also a means of saving, providing security and last but not least includes the possibility of producing fertiliser, which can be used on their farms, and sold.

If the inclusive structure of the cooperative model were to be broken up it is likely that milk production would concentrate around urban centres in highly productive large entities. It might even be the case that milk availability in remote rural areas would decrease. While urban consumers might profit from decreasing milk prices, the existing rural-urban gap in milk consumption would even increase. This is highly significant because milk is not just a product that is sold. When consumed directly by the producer, it also helps ensure a balanced diet, especially in those areas in India where food insecurity still prevails.

For the processing sector too, higher dependence on milk powder imports would lead to a higher dependence on highly volatile world market prices. This is also outlined in the CFS survey on price volatility (HLPE 2011), which shows that greater integration into the world market leads to a higher transmission of volatile prices onto the national market. Since national production is relatively fragile due to its specific structure, it is more likely that frequent periods of low prices would damage national production structures. If international prices for milk powder were then to increase, national producers would not be able to jump in and serve the demand. Hence, higher world market prices would be passed on directly to national consumers and to the national milk processing industry.

The situation in the poultry sector is rather different. Large parts of the sector are already highly intensified. According to various surveys (Metha 2011), the large enterprises in the poultry sector are also highly competitive. The situation is very different for the small-scale producers who are involved in the sector. They have invested a lot of money – often on the basis of credits. Price depressions caused by cheap imports would first of all be a threat to these small contract farmers. Interviewees told us how difficult it is to pay back their debts, especially given the current trend in feed prices. These producers are at very high risk. Supporting them with better institutional, marketing and extension services would tremendously lower their risk of becoming unable to repay their debts. If managed well, Pica-Ciamarra and Otte (2009) see these small farmers as potential contributors to rural job creation and the availability of cheaper eggs and poultry meat – which would again favour poor consumers and landless workers in rural areas.

According to our interview partners, backyard farming is by contrast to a large extent disconnected from industrial broiler production. The female producers see their backyard bird as an important savings and income asset, which also supplements a healthy diet if consumed at home. However, several of our interview partners stated that over the last few years their agricultural income had decreased since a) the cost-benefit ratio of dairy production had decreased, b) they had lower yields on their land because of a lack of rain or other reasons, c) they had lost access to land which they previously had, or d) they had less wage labour on other producers' farms. When we asked particularly the women about their strategies for coping with decreasing income, some of them outlined the importance of selling a bird every once in a while in order to increase the household income. This income is spent on basic food needs. The women interviewed enjoyed a weekly diet of pulses, vegetables and once a week additional animal protein obtained by sharing a bird among several families. They saw this as both a healthy diet and a good way to raise their children. Even though selling the birds provides them with money for their basic food needs – which usually means rice – they told us that then they have to shift their diet to a lower quality which in the end might be enough to meet their calorie needs, but is much less healthy.

### Recommendations of civil society organisations

- All tariff lines for poultry and dairy products should be exempted from tariff cuts. Nor should a standstill clause freeze them at the currently applied tariff. Scope must be maintained for policy responses to developments in supply and demand, and national and international prices.
- The FTA must allow for asymmetric treatment of the partners. A comprehensive HRIA should identify all products that can affect the right to food and other human rights, and therefore require further protection. The coverage of the FTA must leave enough space for all these products, be they agricultural or non-agricultural products.
- An effective and easily applicable Special Safeguard Mechanism (SSM) must be established, to enable India to react to sudden import surges. This SSM must include a volume and a price trigger.
- A monitoring mechanism must be established that ensures continuous assessment of the impact of the FTA regarding trade in goods. Any threat to the right to food must lead to a revision of the problematic provisions of the agreement.

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# VI. SERVICES: LIKELY IMPACT OF EXPANSION BY EUROPEAN RETAILERS

## 1. The relevance of retailing to food security

Retail is the second largest employer in India after agriculture. It is a major source of income for hawkers, *kirana* employees, and indirectly for farmers and farm workers, since they provide the food which is sold in the 'organised' and 'unorganised' retail sectors.<sup>15</sup> Organised retail, which basically means formal domestic retailers such as Reliance, accounted for only 4.1% of the estimated total retail sales of USD 322 billion in 2006-07 (ICRIER 2008b: 8-9). In 2010, the *Indian Brand Equity Foundation* (IBEF) estimated the total retail market to be worth USD 353 billion.

### For small retailers and employees in the retailing sector

According to the most recent data of the Indian *National Sample Survey Organisation* (NSSO), in 2004-05 the retail sector employed 7.3% of the total workforce and provided jobs to 35.06 million persons (ICRIER 2008b: 8), 55% of them in urban and 45% in rural areas. In 2010, Carrefour estimated the number of jobs in Indian retail at 37 million (Carrefour 2010: 15). The vast majority of these people work in around 12 million small outlets such as local *kirana* shops, owner-manned general stores, chemists, footwear shops, apparel shops, *paan* and *beedi* shops, or as hand-cart hawkers and pavement vendors. All of these together make up the so-called unorganised sector. In 2000 no fewer than 4,365,000 people were engaged in street vending or 'hawking' (ILO 2007: 48). The largest numbers of hawkers were estimated to live in Mumbai (250,000), Kolkatta (150,000), Ahmedabad and Patna (both 80,000) (NCEUS 2006: 2). However, the different estimates vary widely, and it is very likely that the number of street vendors has increased dramatically since 2000. According to data of the *National Hawkers Federation*, as many as 10 million people were working as street vendors in 2008, 84.7% of them being the sole earners in their families (Sharma 2009: 26).

Poverty is widespread, particularly among these street vendors. They usually possess low skills and 'lack the level of education required for the better paid jobs in the organised sector'. According

to a study prepared for the *National Alliance of Street Vendors of India* (NASVI), 25% (Mumbai) to 37% (Bangalore) of hawkers surveyed were illiterate (Bhowmik 2000: 17 and 21). 'For the urban poor, hawking is one important means of earning a livelihood, as it requires minor financial input and the skills involved are relatively low.' (ILO 2007: 52). Furthermore, for many people in cities such as Mumbai and Kolkata, who previously worked 'permanently' in factories which then were closed down, the informal sector is one of the last options for finding any income at all and avoiding falling into extreme poverty.

According to Sengupta and Sharma, the unorganised retail sector is very important for women, as this sector accounted for 25.82% of female employment in rural services especially for women, and 16.63% in urban areas (CENTAD/ HBF 2009: 21).

### For small farmers and farm workers

Seventy per cent of Indians depend on agriculture as their primary source of livelihood (GoI 2005-06). Some 83.29% of the farmers are small and marginal farmers with an average land holding of less than 2 hectares. Sixty-five per cent of farmers own only 20% of total agricultural land, with an average holding size of 0.38 hectares, while 11% of rural households are even landless (NSSO 2006a).

For many of these farmers, the retail sector, particularly the unorganised part of it, obviously has a very important function as it provides a large and fast growing market for their products. Within the retail sector, food and beverages is by far the largest segment, accounting for 74% of revenues in the total retail market (IBEF 2009: 3). So far, only 1% of food is purchased in supermarkets, and the food and beverages segment makes up only 13% of organised retail. However, this segment is increasing very quickly in supermarkets, and is growing annually by 55% (Oxfam 2009: 10).

Although direct procurement of food by retailers and wholesalers has been allowed in some states, almost all farmers still sell their produce through the traditional channels, in most cases through the *Mandis*, which are controlled by the Agricultural Produce Marketing Committees (APMC).

<sup>15</sup> The distinction between 'organised' and 'unorganised' retail is misleading because the latter sector is not unorganised but rather organised in a different way than supermarkets. According to Dharmendra Kumar and Ranjan, 'the so called unorganised retail is in fact well organised, efficient, economically viable, and ecologically sustainable and support system for millions' livelihood' (Kumar and Ranjan 2011: 5).

### For poor consumers

ILO emphasises that hawking not only provides jobs for the poor, but also performs an important function on the demand side. 'Since goods sold by hawkers are typically cheaper than those found in organised retail outlets, the poor are more likely to choose to procure their basic necessities from hawkers' (ILO 2007: 53). A study by ICRIER shows that, among the interviewed shoppers, only 6% of those with a monthly income of up to Rs 10,000 buy in organised outlets (see table 4.19. in ICRIER 2008b: 45). Thus, unorganised retail is currently performing the very important role of providing affordable food for poor consumers.

## 2. Current involvement of European investors, and national regulations

At present, Foreign Direct Investment (FDI) is allowed without limit in wholesale, and up to an equity share of 51% in single-brand retail. For multi-brand retailing, FDI is totally forbidden so far. As a result, European companies are only active in single-brand retail, such as Adidas/Reebok, Nike, Levi's and Benetton, or in wholesale, where the Metro Group, Carrefour and Tesco operate cash & carry markets. The German Metro Group has been spearheading this development since 2003, when it opened two plants in Bangalore. This was followed by additional plants in Hyderabad (2006), Mumbai (2008) and Kolkata (2008) (Oxfam 2010: 10). Currently Metro is operating six cash & carry markets in India. In Bangalore and Kolkata, Metro had to face demonstrations by hundreds of local traders who fear they may be squeezed out of the market (Oxfam 2010: 13). Carrefour opened its first wholesale market in December 2010 (FAZ: 2011). According to its annual report for 2010, Tesco has an exclusive franchise agreement with Trent, the retail arm of the Tata Group. It has also announced that it will be opening a first cash and carry store by the end of the year (Tesco 2011: 7).

So far, though, multi-brand retail has been restricted to Indian companies. The key players in the organised sector are Tata, Future, Reliance, RPG, K Raheja, Landmark, Bharti, Mahindra, Aditya and Vishal Retail (IBEF 2010: 13-16).

## 3. Changes induced through FTA negotiations

In the negotiations on the EU-FTA, the EU is asking India to lift any restrictions on FDI by EU companies in the retail sector. By so doing the EU Commission is echoing the demands of European business associations such as EuroCommerce, the European Retail Roundtable (ERRT) (which includes members such as Tesco, Carrefour and Metro) and the European Services Forum (ESF). In a position paper, the 'ESF members call for the removal of all remaining equity caps that prevent EU businesses to fully control their investments and operations in India, or at least call for the possibility of majority ownership in all services sectors, if necessary through appropriate negotiated phasing out period' (ESF 2010: 5). With specific reference to the retail sector, ESF adds: 'Currently FDI in distribution service is restricted to 51% for single-brand and largely impossible for multi-brand retail. A removal of these equity caps is essential' (ESF: 13). Within the negotiations on services, EuroCommerce calls on the EU to ensure that 'priority [is] given to mode 3 for retail and wholesale' (EuroCommerce 2007: 5).

In the context of these negotiations and constant claims by global retailers, the Department of Industrial Policy and Promotion (DIPP) of the Government of India prepared a discussion paper in July 2010 in which it provided basic facts and figures, summarised important studies and points of view, and concluded by calling for an opening of the retail sector for FDI (DIPP 2010). The main two arguments put forward are: 1) that FDI in multi-brand retail will increase 'efficiency in the marketing system' and bring about investment in 'post-harvest and cold-chain infrastructure nearer to the farmers' fields' (DIPP 2010: 17); 2) that direct buying by retailers from the farmers would stabilise prices, reduce inflation and ensure more predictable farmgate prices. In response to the fears of small vendors, DIPP argues 'it is possible that the unorganised retail sector may be re-inventing itself, through new and improved practices, to meet the challenges posed by the organised retail sector' (DIPP 2010: 19).

However, DIPP argues that 'at the same time, in the Indian context, there is a view that this may be more appropriately done in a calibrated manner'. For this purpose the discussion paper concluded with 12 issues for resolution, on which it opened a public consultation. Among the regulatory options, it mentions caps on FDI, a mandatory percentage of 50% for investment in infrastructure, conditionalities regarding employment of rural youth, a minimum percentage of products to be sourced from Indian SMEs, the admission of FDI only in larger cities, a Shopping Mall Regulation Act to protect small retailers, and buffer stocks to protect the Public Distribution System (PDS).

In the consultation, the feedback was mixed. On the one hand, Carrefour and some other participants clearly opposed any cap or restrictions on FDI and any minimum investment. Even though Carrefour claims that it will source 90% of its products locally, it would be ready to accept only 'a reasonable threshold (say <10%) for sourcing from this sector' with regard to SME (Carrefour 2010: 8). On the other hand, the *Confederation of all India Traders*, several associations of foodgrain merchants and wholesalers and the NGO *FDI Watch* expressed strong opposition against any opening of the sector to FDI. The *Confederation of all India Traders* also criticised the fact that 'the majority of these traders are unaware of happening at government level', that the consultation was held only in English while most small traders only understand Hindi, and that the deadline for submissions was too short.

Nevertheless, at the end of June 2011, Prime Minister Manmohan Singh announced that multi-brand retailing would be opened for FDI. He based his decision on a position paper developed by an Inter-Ministerial Working Group (IMG) set up in February 2011 to suggest measures against inflation. The position paper proposes that the APMC Act be amended 'so as to enable farmers to bring their products to retail outlets and also to allow retailers to directly purchase from farmers' and 'to allow FDI in multi product retail and proposes that the Government considers this at the earliest' as 'an effective inflation busting measure' (IMG 2011: 3-4). In July 2011, the Committee of Secretaries (CoS) discussed the recommendations of the IMG. According to media reports they decided to open multi-brand retail to FDI up to an equity cap of 51% for cities with more than one million inhabitants, which applies to around 40 cities in India. Another condition for FDI will reportedly be a minimum investment of USD 100 million,



with half that amount going to back-end infrastructure (Kumar and Ranjan 2011: 6).

It is not yet clear whether FDI provisions will be part of the EU-India FTA. In fact, government sources provided contradicting information on this issue. On the one hand, the DIPP, while favouring domestically an opening up to a cap of 51%, clearly opposed FDI provisions on retail in an FTA with the EU. The reason is that this would lock in deregulation and make it very difficult or impossible for the Indian Government to implement a 'calibrated approach' by regulating foreign retailers appropriately, as considered in the DIPP discussion paper. An FTA would make it more difficult for India to impose discriminatory conditions on foreign retailers that it did not impose on domestic retailers.

On the other hand, the Ministry of Commerce indicated that the outcome of the domestic discussion would determine its position in the FTA negotiations. This would mean that, once the decision is taken domestically to open the sector, this would also be reflected in relevant commitments in the FTA. The consequence could be that a regulatory framework specifically for EU companies aimed at mitigating the effects on small vendors and farmers would be impossible, unless these were explicitly specified in the agreement. It would also mean that the decision to open the sector would be locked into an international agreement and be irreversible.

EU sources seem to confirm the latter option. Interestingly, in June 2011 the Commission expressed concern about the slow pace of the negotiations, especially on services. The Commission feared that the exchange of offers for goods and services originally scheduled for July would be delayed until September or even later, thus calling into question the target of concluding the FTA in 2011. On multi-brand retail the Commission expressed hope that the necessary political decision could be taken soon. As early as May 2011, the European Parliament had also declared in a resolution on the EU-India FTA negotiations that it was 'disappointed with the slow pace of the negotiations' and 'encourages India to further open its banking, insurance and retail sectors in line with the reforms announced by Indian authorities' (EP 2010: paragraphs 2 and 19). Against this background it is questionable whether the announcement made by the Prime Minister at the end of June concerning the decision to open the sector was a response to high food prices, or rather a response to time pressure in the FTA negotiations with the EU, or both. And while DIPP had been confident in April 2011 that FDI commitments would not be conceded within the FTA, the EU Commission seemed confident in June 2011 that the opposite would happen.

#### 4. Likely expansion of supermarkets

According to IBEF, India is acknowledged to be the most attractive market for global retailers. 'India topped AT Kearney's Global Retail Development Index 2007 for the third consecutive year, retaining its position in the global market as the most preferred retail destination amongst emerging markets' (IBEF 2009: 2). In its 2010 market reports, IBEF lists several reasons for this. The first is the rapid growth of the Indian economy and of purchasing power, mainly among the middle class. Between 2000-01 and 2009-10, per-capita income has doubled from USD 348 to

849. IBEF estimates that India's 'consumer class' will even grow twelve-fold from 50 million at present to 583 million by 2025 (IBEF 2010: 3).

At the same time, the retail penetration level is extremely low in India at 4-5%, compared to 85% in the US, 36% in Brazil and even 20% in China (IBEF 2010: 7). This obviously leaves a lot of space for growth by supermarkets. All in all IBEF estimates that the Indian retail market, currently valued at USD 353 billion, will grow at a rate of 12% per annum. For the organised sector, annual growth rates are even estimated to be as high as 45-50% (ICRIER 2008b: vii). It is difficult to say how realistic these projections are. The NGO *FDI Watch* suspects that they are at least partly 'intended to lure growth-obsessed governments into making tax and policy concessions'. *FDI Watch* questions particularly the assumption that the consumer class will grow as fast as projected, bearing in mind that currently 77% of the population have an income of less than USD 2 per day (FDI Watch 2008). Nevertheless, there is no doubt that the coincidence of population growth, per capita income growth and the low penetration of the organised sector makes the Indian market most attractive for global retailers, if FDI in retail is allowed.

This is well reflected in the fact that European business associations, as mentioned above, want the EU to give high preference to the opening of this sector within the negotiations on an FTA. And it is reflected in statements made by foreign retailers that confirm their willingness to expand rapidly in India, even before the decision has been taken to open up multi-brand retail for FDI. In 2011 alone, Wal-Mart, which was operating 6 wholesale plants in a joint venture with the Indian company Bharti, planned to triple its presence to 18 in the same year and reach 30 plants by 2012. For Metro, turnover was projected to grow in India by 20% in 2011. Frans Muller, the Metro board member responsible for Asia, openly told the German newspaper *Frankfurter Allgemeine Zeitung*: 'For 2012, we plan for the whole of Asia an even more aggressive performance with investments in China, India and Indonesia'. In 2011 alone, Metro wanted to increase the number of plants in these countries from 14 to 34 (FAZ 2011). It is difficult to say whether these enthusiastic announcements were already being made in anticipation of the opening of the multi-brand retail market. If not, it is very likely that this political decision will further stimulate investment plans of foreign retailers at least for the years to come.

In a comment on the above-mentioned DIPP discussion paper on FDI in retail, Carrefour provides two interesting figures that allow the likely expansion of supermarkets in India after a deregulation of FDI to be quantitatively estimated on the basis of industry assumptions (see calculation in annex 1). Carrefour first states that 350-400 square feet (sq. ft.) of retail space require one employee. Based on this figure, it calculates that the organised retail sector would directly create 1.5 million jobs within five years (Carrefour 2010: 15). This correlation reveals that the industry envisioned an expansion of sales area by (depending on whether an initial figure of 350 or 400 sq. ft. is assumed) 525,000,000 or 600,000,000 sq. ft. respectively in the period from 2010 until 2015 alone, if FDI were deregulated. As the current sales area of the organised sector is officially estimated at 31,000,000 sq. ft., the sales area of organised retail would increase by 1,793



or 2,035% respectively within five years (ICRIER 2008b: 11). Data provided in its annual report of 2010 allow for a rough estimate of what this might mean in terms of turnover. In Asia alone, Carrefour operated on a sales area of 27,072,160 sq. ft. (2,516,000 sq. m), on which it generated an annual turnover of USD 11,375,100,000, or USD 420 per sq. ft. (Carrefour 2011: 96 and 97). If a similar ratio between sales area and turnover for future foreign supermarkets is assumed for India, this would mean that the organised sector as a whole would generate a turnover of between USD 233.6 billion and USD 265.1 billion in 2014-15, which would represent between 66% and 75% of the total turnover of the Indian retail market of 2010.

The figures provided by Carrefour are obviously meant to influence the public and political debate on FDI deregulation by promising enormous job creation. It is difficult to say whether Carrefour really believes that the expansion required for such job creation is actually possible. The actual growth rate of foreign and particularly European retailers in India will depend on many factors. One of them is whether the cap on FDI will be lifted totally or whether it will be set at 51% or 49%, as the latter option would preclude the companies from gaining full control over the joint ventures. It will further depend on the regulatory framework which will accompany the opening; and finally, it will depend on how successfully foreign retailers adapt to or influence consumer habits in India.

## 5. Possible indicators of threats to the right to food

The main indicators of a threat to the right to food caused by an opening of FDI in multi-brand retailing would be:

- a) Decreased access to food and the means to its procurement for *vulnerable street vendors and kirana workers*, caused by a loss of jobs and livelihoods resulting from market entry by EU retailers;
- b) Decreased access to food and the means to its procurement for vulnerable small-scale *farmers and farm workers*, especially women, due to a loss of market and income caused by the expansion of EU supermarkets;
- c) Decreased economic access to food for *poor consumers* caused by increased prices or decreased physical access to food resulting from the disappearance of nearby retailers.

### First indicator: impact on the livelihoods of small vendors

- Have jobs or incomes been negatively affected in the past, in cases where domestic multi-brand supermarkets (like Reliance and More) or European wholesale markets (like Cash and Carry) were established? Are there geographical hot spots?
- How will employment in the Indian retail sector develop if FDI is allowed? How many jobs are likely to be created through FDI and how many existing jobs are likely to be destroyed?

- To what extent are street vendors and owners or employees of small outlets prepared to cope with competition from supermarkets? To what extent will they be able to find a new job and livelihood in the supermarkets that are newly established, or alternative sources of income?
- Will the food security of vendors and *kirana* owners and employees be affected? If so, will the effects on men and women differ?

### Second indicator: impact on small-scale farmers

- Do *kiranas* or street vendors directly or indirectly currently provide an important market for small-scale farmers' products?
- Will these traditional marketing channels be negatively affected by the expansion of supermarkets, for example through subsequent reforms of the APMC Act (Agricultural Produce Market Committee)?
- Will European supermarkets increasingly import larger shares of their agricultural products (fresh and/ or processed food), bearing in mind the parallel cut in tariffs?
- Will the purchasing practices of supermarkets provide new market opportunities for small-scale farmers? Does the government foresee specific measures in this respect?
- Will supermarket expansion create a positive incentive for investments in food processing and infrastructure?
- Will the food security of small farmers be negatively affected? If so, will the effects on men and women differ?

### Third indicator: impact on consumers

- Will the advance of supermarkets stabilise or reduce consumer food prices?
- Will poor consumers benefit from lower prices and enjoy better access to food?

## 6. Likely threats to the right to food caused by the expansion of foreign supermarkets in India

### 6.1. Likely impact on small vendors and kirana employees

Past empirical impact of organised retail on employment in the unorganised sector

So far, the *Indian Council for Research on International Economic Relations* (ICRIER) has undertaken the most comprehensive empirical study on the impact of organised retail on the unorganised sector. Its conclusion in the executive summary sounds optimistic: 'There was no evidence of a decline in overall employment in the unorganised sector as a result of the entry of organised retailers' (ICRIER 2008b: vii). However, the data that ICRIER collected based on a survey of 2020 unorganised small retailers across 10 major cities, raise serious doubts as to whether

this conclusion is actually sound. In the relevant chapter ICRIER acknowledges that 'there has been an adverse impact on turnover and profit of the unorganised retail sector after the opening of organised outlets'. More specifically: 'the overall impact has been a decline in turnover of about 14% and in profit of about 15% over the period, which is an average of 21 months'. In western India, the fall in turnover even reached 19% (ICRIER 2008b: 31). Regarding employment, a negative impact was also registered in the unorganised sector in the first year after the opening of organised outlets in the vicinity. While in all India, employment in the surveyed unorganised outlets fell by 0.5%, in the north it fell by 1.2% and in the west even by 7.4%.

The argument on which ICRIER based its positive overall conclusion is that the impact 'weakens over time'. According to the analysis, 'the adverse impact has been in the first 4-5 years of opening of organised outlets after which the negative effects peter out'. In a critical commentary on the study, *FDI Watch* questions this conclusion with two arguments. First of all, according to the same ICRIER findings, the surveyed unorganised retailers employ on average 1.5 family members and 1.1 hired personnel. 'That employment decline "weakens over time" is really only a reflection of the fact that having laid off one person, most unorganised retailers have nobody left to fire but themselves'. And secondly, *FDI Watch* argues that 'the report's failure to find evidence of a decline in overall employment might have something to do with the fact that ICRIER did not survey a single retailer who had been put out of business by new corporate and chain outlets' (*FDI Watch* 2008).

In fact, retailers who may have exited the business are not part of the empirical basis of the survey, which seems to be a major methodological weakness, and one which calls its figures on turnover and profit, but more importantly on employment, into question. On the other hand, ICRIER partly filled this gap by asking the surveyed retailers about closures of traditional outlets in their neighbourhood after the opening of organised outlets. And in fact, 'a total of 151 such outlets were reported to have been closed down over an averaged period of 21 months, which constitutes about 4.2% per cent annualised closure of retailers', while again this figure was higher in western India, reaching 6.8%. ICRIER claims that 'these rates of closure are very low by international standards', as in the US for example the closure rate reaches 50% within four years of operation. While ICRIER uses this comparison as an argument in favour of its optimistic projection for *kiranas*, in fact, it is rather a reason for greater concern. The fact that the closure rate for small businesses is much higher in a country with a high retail penetration level of 85% (compared to 4-5% in India) should rather caution India from following the same path as the US.

Street vendors were not part of the survey conducted by ICRIER. However, another survey conducted in Mumbai showed that 71% of street vendors and shop owners declared that they suffered losses in turnover after the opening of a supermarket (Wiggerthale 2009: 30).

### Likely future impact of FDI on employment in retail

Interestingly, in an earlier version of the same ICRIER study that was published in May 2008 (four months earlier), the long-

term effects of supermarket expansion on the unorganised sector appear in a completely different light than in the later version quoted above: 'However structural changes in retail will surely start affecting large numbers of small retailers at some stage, be it after one or two decades, especially when the overall share of organised retail in food reaches about 25-30%' (ICRIER 2008a: 47). *Kiranas* in the vicinity of organised outlets 'are the first ones to bear the brunt of its rapid expansion' and 'might lose their businesses to the organised sector relatively early while the small and marginal traders farther away from the supermarkets continue to survive and flourish'. According to this study, 'India is likely to reach this stage in the next 10 years or so'. It is remarkable that these paragraphs do not appear in the later version of the study published again in September 2008 (ICRIER 2008b). These statements actually contradict the main thesis of the second edition that the impact would 'weaken over time'.

As mentioned above, Carrefour states that 1,500,000 direct jobs would be created in organised retail within five years if FDI were allowed. Additionally it assumes that an increase in manpower of 10 to 20%, or 300,000 extra people, would be required for back-end activities. This estimate seems to be more than optimistic, bearing in mind that Carrefour currently employs 471,000 people worldwide, Tesco 472,094 and the Metro group 280,000 (Carrefour 2011: 61, Tesco 2010: 85 and <http://www.metrogroup.de/internet/site/metrogroup/node/9280/Lde/index.html>), which adds up to 1,223,094 jobs, with all of these companies ranging among the top ten global retailers. Against this backdrop, it seems that rather than providing a solid and realistic estimate, this announcement of creating 1,500,000 jobs is rather meant to influence the decision-making process by making optimistic promises.

Nevertheless, this estimate is interesting, first of all because it indicates the strong interest in rapid expansion among foreign retailers. And secondly it correlates the estimated figure of jobs with the anticipated expansion of sales area in the organised sector. It thereby allows us to draw up a more complete scenario of the possible implications, assuming that the projected Carrefour scenario were to become a reality. Carrefour assumes that the industry envisions an expansion in sales area of 525 to 600 million sq. ft. in the organised sector within 5 years. Assuming the average ratio between sales and turnover for Carrefour in Asia for the expanded organised sector, it would generate a turnover of USD 233.6 to 265.1 billion in 2014-15.

The question arises of what such a rapid expansion would mean for the unorganised sector. According to IBEF projections (which are also optimistic), total sales of Indian retail (organised and unorganised) will increase from USD 353 billion in 2010 to USD 543 billion in 2014 (IBEF 2010: 5). This would mean that the share of the unorganised sector in overall retail would shrink from around 95.5% in 2010 to 52-57% by 2014/2015 (see our own calculation in Annex 1). In absolute terms, the turnover of the unorganised sector would shrink by between USD 27.6 billion and USD 54.7 billion within five years. Currently, in Indian retail an annual return of 9,540 generates one job on average. Applying this ratio, the estimated loss in turnover would lead to a massive loss of between 2.9 and 5.7 million jobs in the unorganised retail sector.

Taking into account the promised creation of 1.8 million jobs in the organised sector, a total of between 1.1 and 4.9 million jobs would still be lost within five years despite a massive growth of the retail sector from USD 355 to 543 billion in four years, which corresponds to a compound annual growth of 12%. If we assume lower growth rates similar to the average between 2003 and 2010 for the whole sector (with a simultaneous growth of the organised sector as envisioned by Carrefour), the impact would be even more disastrous. In this case a total of between 6.9 and 10.1 million jobs would be lost. Bearing in mind that without super-market expansion, the turnover and number of jobs would keep on growing significantly in the unorganised sector without FDI, the negative impact of FDI on employment would be tremendous.

As stated above, Carrefour's figures for projected job creation and growth of organised retail do not seem to be realistic. Growth in organised retail will probably be slower and will not create as many jobs as promised. At the same time, this means that job destruction in the unorganised sector might not occur as fast as calculated on the basis of the Carrefour figures. Nevertheless, it will probably be substantial. The main reason is obvious. The implication of the high efficiency of global retailers such as Carrefour, Tesco and Metro is its low labour intensity. While USD 1 billion of turnover currently generates 104,821 jobs in current Indian retail, it generates only 3,241 jobs on average in retail formats of Carrefour and similar global retailers.

### Coping capacities of small outlets and street vendors

According to a report by the *Confederation of Indian Industry* and *PriceWaterhouseCoopers*, the 12 million *kiranas* are 'an important and critical element of the retail system' in India and 'will continue to be the mainstay in Indian retail' (Confederation 2008: 31). The report emphasises their comparative advantage over supermarkets, such as their detailed understanding of consumers' shopping preferences and habits. They project that *kiranas* will continue to 'meet the needs of consumers who need to do daily top-ups of select food and grocery items'. The same view is defended by Carrefour, which claims that 'it is witnessed around the globe that organised and unorganised retail participants have co-existed' and '*Kiranas* will continue to enjoy the inherited knowledge of their eco-system' (Carrefour 2008: 14).

Empirical data on past experience in India as documented by the ICRIER study, and the projection based on the combination of Carrefour and IBEF figures, as shown above, give more reason for concern. If supermarkets grow as fast as estimated by the industry, not only the market share of small outlets, but also their aggregate turnover would shrink to an extent that massive closures and the loss of millions of jobs will already be inevitable within the near future. According to ILO as well, 'there is general agreement that opening up the retailing sector for FDI would have net negative employment effects' (Gosh et al. 2007: 65). ILO concludes that the unorganised retail sector 'except in the case of very segmented markets, [...] stands little chance of competing against large scale retailing corporations operating with economies of scale'. It is especially worrying that big supermarkets are expected to open first in those cities with the highest numbers of street vendors: Mumbai, Kolkata, Ahmedabad, Patna, Bangalore and Bhubaneswar (Wiggerthale 2009: 30).

Regarding small vendors or hawkers, even the industry itself is less optimistic than with regard to *kiranas*. While Carrefour does not mention them in its contribution to the DIPP consultation, the *Confederation of Indian Industry* recognises that 'headload vendors are a particularly vulnerable group since many are middle-aged widows or deserted women with little family support. They earn small profit margins and are 'impacted by sales from food and grocery stores, modern or unorganised' (Confederation 2008: 41). The above-mentioned NASVI study confirms this high vulnerability: Hawkers generally face legal uncertainty and harassment by the municipal authorities. They usually work between 10 and 12 hours a day and 6 to 7 days a week for a very low income. They are often illiterate, lack skills and access to credits and instead have to borrow money from moneylenders who charge high rates of interest of around 110% per annum (Bhowmik 2001: 13). In fact, it is very unlikely that these hawkers have the capacity to modernise their business in a way that will enable them to cope with competition from European retail giants.

### Likely impact on the right to food

The human right to food of many street vendors is very likely to be negatively affected, if multi-brand retail is opened to FDI. According to NASVI, the incomes of street vendors range from Rs 50 to 100 a day for males and Rs 35 to 40 for females. This income is far below the minimum wage of Rs 125 (EUR 1.9) per day, as calculated by the *National Centre for Labour* and the *National Council of Applied Economic Research* (NCAER) (Bhowmik 2001: 25-26). According to the *National Hawkers Federation*, as mentioned above, 84.7% of hawkers are the sole earners of the families (Sharma 2009: 26), even though they are often supported in their business by other family members. Particularly women with a daily income of less than 60 eurocents, belong to the extremely poor sectors of society. Their families are already very likely to face hunger and malnutrition today.

If the market share and absolute volume of turnover of the unorganised retail sector shrinks considerably as a result of super-market expansion, it is very likely that a significant proportion of street vendors will lose their livelihood totally and others will face even harsher working conditions and lower incomes. Moreover, the government is well aware that they are very unlikely to find alternative sources of income. In 2004, the Government of India set up a National Commission for Enterprises in the Unorganised Sector (NCEUS) to examine the problems and develop recommendations to improve the conditions of people working in this sector. In its report, NCEUS states that 'street vendors are mainly those who are unsuccessful or unable to get regular jobs' (NCEUS 2006: 3). This assessment is supported by a survey conducted among 2,259 hawkers in Kolkata, 92% of whom stated that there is no other source of income available (Sharma 2009: 26). NCEUS concluded by drawing up a *National Policy on Urban Street Vendors*. Comprehensive implementation of this policy would be a major step in strengthening the rights and promoting an enabling environment for livelihoods of street vendors (see box 1). The policy explicitly refers to the right to an adequate means of livelihood enshrined in article 39 of the Indian constitution.

Owners of the currently 12 million small outlets or *kiranas* might be in a better position than street vendors. But still, as stated

above, the major reduction in turnover expected as a result of supermarket competition will lead to the dismissal of employees and the closure of high proportion of these outlets. Many of these people will find themselves in a similar situation to other urban

poor, who face hunger especially in times of high international and national food prices. As supermarkets will destroy many more jobs than they will create, only some of these people will be able to get a job in organised retail.

#### Main specific objectives of the National Policy on Urban Street Vendors (NCEUS 2006: 11ff)

- Legalise street vending and provide legitimate hawking zones in urban zoning plans.
- Provide fee-based access to these zones where 'previous occupancy of the space by street vendors determines the allocation of the space'.
- Promote organisations of street vendors such as unions, co-operatives and associations 'to facilitate their empowerment'.
- Set up participatory mechanisms with representation of street vendors to conduct urban vending activities.
- Prevent vending by children, and seek their rehabilitation.
- Provide protective social security to take care of contingencies such as sickness, maternity and old age.
- Promote access to services such as credit, housing and upgrading of skills.

#### Likely impact on small-scale farmers

##### Traditional marketing channels for small-scale producers

Sixty per cent of the Indian population lives from agriculture, 40% of whom are women. The average size of the 119 million Indian farms was estimated at 1.33 ha in 2000/1 (Wiggerthale 2009: 18-20). More than 50% of farmers are working on less than 2 ha, 18.7% even on less than one ha. Most smallholders lack access to capital, locally appropriate farm inputs, market information and infrastructure. Fifty per cent of agriculture lacks irrigation. Despite the major contribution made by agriculture to GDP (18%), and more importantly employment, public investment in agriculture is very low. Between 1980 and 2006, the share of agriculture in total public investment shrank from 20% to 5%. This had a very negative impact on the public infrastructure available to small-scale farmers. Against this background many farmers find it difficult to produce enough surpluses beyond subsistence that they can sell in the market.

Agricultural markets are continuously subject to tight regulation in India (Wiggerthale 2009: 21-22). These regulations encompass minimum prices for all agricultural products except fruits, vegetables and herbs, a public distribution system, public food reserves and the promotion of marketing cooperatives. In 2006, 7,566 or 15% of the *Mandis*, wholesale or traditional markets, were regulated under the Agricultural Produce Marketing Act of 1937. However, the degree of regulation depends very much on the particular state and the different formats of the markets.

In 2003, the Indian federal government issued a Model Act in which it proposed that the states should promote private markets, improve conditions for private investment and contract farming, and support alternative marketing systems such as direct marketing and farmers' markets. The degree to which this has been applied varies a great deal between the states.

Current market formats are quite diverse in India. The 'backbone of the agricultural market' is the market yards governed by *Agricultural Produce Marketing Committees* (APMC), which are composed of producers, traders, municipalities and government nominees. In these markets, farmers bring their produce and receive a fixed minimum price, and the products are generally sold in auctions to traders who bid highest (Kumar and Ranjan 2011: 7-8). Another market format is the *farmers' cooperative markets*, which are membership-based farmers' cooperative societies, where farmers bring their produce and sell at that day's price. Other farmers sell their produce to *direct markets*, where the government provides the space but does not interfere in regulations. And finally *farmers' markets*, which are controlled by government agencies, are markets in an enclosure with properly built compounds and platforms, where farmers can sell their produce.

In many states, the 2003 Model Act has provided a space for Indian retailers and foreign wholesalers to circumvent traditional and government-controlled markets and establish their own procurement mechanisms, especially through contract farming. In Karnataka, for example, which was among the first to amend the

APMC Act according to the Model Act, two dozen corporations are already engaged in contract farming. Studies have raised criticism concerning adverse impacts on employment, gender inequity in terms of wages, a lack of space for the farmers to take their own decisions on production, and the refusal to accept produce 'on the pretext of bad quality and other deficiencies' (Kumar and Ranjan 2011: 11).

It is highly likely that market regulations will also be fundamentally reformed in tandem with the opening of multi-brand-retail for FDI. As mentioned above (section 3), the same position paper of the Inter-Ministerial Group that suggested allowing FDI in retail also recommended reviewing and revising the model APMC Act 'so as to enable farmers to bring their products to retail outlets and also to allow retailers to directly purchase from farmers, without facing blockades by incumbent traders' (IMG 2011: 2). The position paper also recommends making it easier for private companies to establish their own markets, and lifting restrictions on the number of traders or commission agents like those in place in Delhi. These recommendations, which are officially designed to combat inflation, were supported by Prime Minister Singh in June 2011, a month during which the European Commission and the European Parliament brought pressure to bear to increase the pace of the free trade negotiations, not least concerning retail services.

#### **New market opportunities for small producers through supermarkets?**

In its position paper, the IMG argues that the current APMC regulations promote 'cartel like behaviour' by traders in some markets that would prevent small farmers and new traders from bringing their produce to the markets. In the current system, intermediaries would at the same time depress farmgate prices for farmers and increase consumer prices because of their high margins of profit. Starting from this assumption, the IMG wants to encourage FDI 'to get new technology to come into the country and expand organised retail'. According to IMG, 'this could provide remunerative prices for farmers and fair prices for consumers'. In fact the retail industry had long been promising to establish 'farm-to-fork supply chains' by linking farmers and small manufacturers directly with retailers.

Opponents of FDI in multi-brand retail, such as FDI Watch, acknowledge that small-scale farmers are often marginalised in the current system and that the control of intermediaries has to be strengthened. 'But the suggestion by IMG to replace the APMC markets with international and giant cartels looks myopic', as FDI Watch puts it (Kumar and Ranjan 2011: 6). NGOs and farmers especially question whether an increased role of supermarkets would diminish the gap between consumer and producer prices, bearing in mind the huge power imbalances between supermarkets and small producers in price negotiations. The question is therefore to what extent would small farmers really benefit from direct procurement mechanisms, and how many small producers would gain access to these mechanisms.

In the above-mentioned government-sponsored survey on the impact of organised retail, ICRIER concludes that 'farmers will benefit significantly from the option of direct sales to organ-

ised retailers' (ICRIER 2008b: viii). However a closer look at the empirical data of the same study reveals a much more differentiated picture. Based on a survey of 197 cauliflower farmers around Bangalore, the study compares seven different supply chains used by farmers. First of all, one should be cautious about generalising the outcomes of a survey limited only to cauliflower. Secondly, the results do not allow the conclusion that the two examined supply chains of supermarkets are the most beneficial. Firstly, because of high product standards, the costs of cultivation are 50% and 100% higher respectively than in all other supply chains under consideration (ICRIER 2008b: 59). Due to higher producer prices, in one supermarket chain total profit is slightly higher than in most others. However, in the most direct chain, where farmers supply to the collection centre of the supermarket, total profit per acre is lower than in 5 other supply chains (ICRIER 2008b: 60).

What is even more worrying is the typology of the farmers who make up the different supply chains. The survey clearly shows that those farmers who supply to the supermarkets are by far the better-off farmers. On average they have the highest level of education, they often own larger land holdings and 'the farmers associated directly with organised retail also seem to be better endowed with assets', as for example they own four-wheelers that they can use to transport their produce (ICRIER 2008b: 64-65). To conclude, while it is not as obvious that those farmers who supply to the supermarkets did not always earn higher profits than farmers in other supply chains, it is obvious that marginal farmers are not even to be found in supermarket supply chains in the survey.

Among those companies that were allowed to directly procure fruits and vegetables from farmers is the Metro group, for example in Karnataka and Kolkata. A survey among these suppliers of Metro conducted by Oxfam shows mixed results. While most farmers were happy to obtain high prices for high quality products, they also stated that Metro accepted only those high quality products, while sending back the rest. This contradicts a public statement made by Metro, according to which they pay for all the produce delivered by the farmers (Oxfam 2010: 14-15). Despite these higher prices, farmers who supplied to Metro generally had to supplement their income with other jobs, which might have to do with higher production costs. Workers' rights abuses were also reported in Metro stores themselves and on plantations that supplied to Metro. According to Oxfam, rural workers who collect vegetables and fruits for Metro Cash & Carry, work up to 12 hours a day and 6 and a half days per week, and earn Rs 100 a day, which is below the minimum wage and only slightly above the poverty line. Women often receive only 50% of the wage received by men (Oxfam 2010: 20). There is also a lack of adequate protection against pesticides.

The main concern, however, is that a massive expansion of supermarkets in India will lead to the exclusion of smallholders from existing access to markets. While food and beverages currently account for 74.41% of revenues in Indian retail in general, they account for only 13.08% in the organised sector (IBEF 2009: 4). At the same time, food and beverages is the fastest growing segment, given the proliferation of supermarkets and hypermarkets. Considering the growth expectations of Carrefour for example,



the FDI-induced supermarket expansion is likely to lead to a fundamental restructuring of agricultural markets in India. International experience shows that supermarkets always try to optimise their supply chains by centralising their procurement and by listing only those suppliers that are able to meet their high quality standards. This usually means a small number of capital-intensive agro-industrial production sites, and no small-scale farmers (Wiggerthale 2009: 35).

Following a study on supermarket development for horticultural farmers in Asia, FAO economist Andrew Shephard already warned in that 2005: 'There is growing concern that modern supermarket procurement arrangements might result in unfavourable terms of trade for small-scale farmers'. The report concludes that 'the squeeze on farmers' margins is likely to tighten as the supermarkets become as concerned with safety and quality as they are now with cost – small farmers lack the capital needed to invest in hygienic infrastructure and the bookkeeping skills that 'traceability' requires' (FAO 2005). In a briefing note on concentration in food supply chains, Olivier De Schutter, UN Special Rapporteur on the Right to Food confirms this concern: 'In general, dominant buyer power reduces producers' incomes. The downward pressure forces less efficient producers to merge, to cut costs or to exit the market, leaving the field open for more efficient ones' (De Schutter 2010: 2). In a note to the General Assembly of the UN, De Schutter also raised concern that 'contract farming often excludes the poorest farmers, who have limited and marginal land and fewer resources to invest and live in remote areas' and that 'contract farming can create potentially devastating dependence by small farmers on the technology, credit, inputs and services provided by their contracting companies' (De Schutter 2011: 7 and 11).

### Food exports, imports and processing through FDI in retail

One of the hopes the government attaches to FDI in retail is that global retailers would start to procure their products in India, not only for domestic but also for international sales. Carrefour for example promises that it 'will strengthen the portfolio of potential suppliers able to export and as such will reinforce India role in supplying the world' (Carrefour 2010: 23). The positive example frequently quoted is China, where Wal-Mart procures goods worth USD 20 billion annually, mainly for its international business (Guruswamy and Kamal 2006: 4). So far, however, there is little evidence that Indian agriculture will be able to significantly benefit from such opportunities. The main obstacle for this is that up to now, only 2% of food is processed in India (IBEF 2009: 3). The only exception might be the dairy sector, where the share of processing reaches 37%. In meat and poultry, it is still very low at just 1%. And where food is processed, this is mostly on the primary level. As internationally most food sold in supermarkets is processed, India has a considerable comparative disadvantage. One of the reasons for this is the very low level of public spending by India on agriculture, as mentioned above.

For the same reason of low processing levels, Oxfam fears that that not only for exports but also for sales in India, European supermarkets might fall back on their well established international sources to a large extent, especially if the expansion of supermarkets occurs very rapidly (Wiggerthale 2009: 31). A study commissioned by the German Government seems to confirm this fear. 'The

regulations [on FDI in retail] do not only protect local retailers but also domestic food producers. Food processing is to be extended intensively. Internationally, the country is lagging far behind. [...] China reaches a share of processed food of 40 percent.' (BMELV 2009: 57). This danger would be even higher if tariffs for imports from the EU were dismantled under the FTA. In fact it is well known that supermarkets are often the best customers of the agricultural producers of their home country. It is a common pattern of internationalisation that exports target those countries where these supermarkets are established. 'Exports are often only a prolongation of internal business relations', as pointed out in a study by Ernst & Young on the internationalisation of German agribusiness (Theuvsen et. al. 2010: 27).

Such fears are also confirmed by the reluctance of foreign retailers to accept binding regulations on local sourcing from small and medium-sized enterprises (SMEs). On the one hand, Carrefour states in its contribution to the government consultation that it will source approximately 90% of its ranges locally. On the other hand, it is ready only to accept a 'reasonable threshold (say <10%) for sourcing from this sector' (Carrefour 2010: 7-8). It seems that Carrefour is not so sure whether it really will source 90% locally, and even less sure whether a large part of that should come from small or medium-sized producers.

The question arises as to whether Indian capacities for processing and for supplying supermarkets will increase in Indian agriculture. To some extent, it probably will, as the planned FDI in mega food parks shows. On the other hand, experts doubt whether such investment will be significant, and especially whether it will benefit small producers, who will otherwise lose significant market shares due to the decreased share of their traditional marketing channels. For example Biswajit Dar, Director General of the Research and Information System for Developing Countries (RIS), told our research team in an interview that he is not expecting huge investment in back-end infrastructure, for example in cooling chains. 'Retailers will purchase a large share of the products from outside. They will say they do not want to make compromises on their quality. Global food chains will lock you in'. Moreover, investment that will come in, he fears, will increase market segmentation, from which only a small proportion of efficient farmers will benefit.

### Likely impact on the right to food

Access to markets and remunerative prices is an essential factor enabling small food producers to realise their right to food. Despite their shortcomings and lack of control over intermediaries, current market regulations still play an important role in securing market access and minimum prices for products of small and medium-scale farmers in India. Along with the opening of multi-brand retail to FDI, the Government of India plans to reform APMC regulations and to allow supermarkets to bypass regulated markets and establish their own private procurement mechanisms. If supermarkets' share in agricultural markets expands significantly, turnover of traditional markets will shrink considerably.

This can have a significant negative impact on market access for small-scale producers. At the same time, experience in India and

internationally shows that supermarkets tend only to list the most efficient farmers who are able to meet their high product standards. For small-scale farmers who are affected or vulnerable to poverty and malnutrition, supermarkets are not likely to offer a realistic alternative. This is especially true if no meaningful thresholds for local sourcing from small and medium-sized enterprises (SMEs) are legally established. Market access, incomes and the right to food of smallholder families would be under threat as a result.

## 6.2. Likely impact on poor consumers

As mentioned above, the most recent push for opening multi-brand retail to FDI came from the Inter-Ministerial Group on Inflation. Deregulation was deemed necessary in order to improve farmgate prices for farmers and to reduce and stabilise retail prices for consumers. The argument that more FDI in retail would make supply chains shorter, more efficient and thereby help in taming the price rise had already been defended in the DIPP discussion paper in mid-2010, and the government sponsored ICRIER study published in 2008.

Indeed, as in many other developing countries, food prices have increased considerably in India since 2007. A recent report on international price volatility by the High Level Panel of Experts (HLPE) to the Committee on World Food Security (CFS) of the FAO states: 'Periods of high or low prices are not new. In fact, price variability is at the core of the very existence of markets. Since 2007, however, the degree of price volatility and the number of countries affected have been very high' (HLPE 2011: 9). Price trends thus have to be considered in the context of international price volatility, which has increased mainly due to increased use of agricultural commodities for agrofuels, increased speculation in future markets, increased weather extremes caused by climate change, misguided trade policies and the neglect of agriculture in public policies. It is questionable whether India is more affected by food price volatility than other countries. In 2008, an FAO study found that in India the transmission of international price inflation for rice and wheat was much lower than in most other large Asian countries. India's relative success in stabilising rice prices was partly attributed to government intervention such as public procurement, storage and distribution and restrictions on trade. 'It is obvious from visual inspection that domestic prices [in India] are more stable than international prices' (Dawe 2008: 6).

Nevertheless, in India prices have continued to climb even after international prices for wheat and rice had started to decline in March 2008 and June 2008 respectively. Some Indian commentators argue that the specific shortcomings of supply chains in India are the reason for this. However, it has to be underlined that India is no exception in this regard. 'The subsequent drop in international prices was only partially transmitted – average consumer prices in developing countries remained up to 50% higher than they were before 2007-08', as the HLPE explains (HLPE 2011: 11). In India, the situation was especially aggravated around the beginning of 2011, when a food price inflation rate of almost 17% was registered and hundreds of thousands of people demonstrated against high food prices in Delhi. Since then, however, the situation has improved somewhat. Current FAO data show that from August 2010 to August 2011, nominal retail prices for rice in Delhi increased by 6.1%, for wheat by 7.1%, and for sugar by

2.5%. The retail price for onions, which had more than tripled from August 2010 to January 2011, came down again in July 2011 to the level of the previous year.

Nevertheless there is no doubt that food price inflation is a problem that urgently needs to be addressed. Reducing the gap between producer prices and retail prices is certainly one of the challenges in this context. On the other hand, international experience shows that a stronger role of global retailers does not necessarily help solve this problem, as Sukhpal Singh from the Delhi-based *Institute of Economic Growth* argues on the basis of data from Argentina, Mexico, Nicaragua, Thailand, Vietnam and Madagascar. In all these countries, average food prices turned out to be significantly higher in modern supermarkets than in traditional outlets (Singh 2011: 20). For India, however, the situation is not that clear. While ILO had stated that 'goods sold by hawkers are typically cheaper than those found in organised retail outlets' (Gosh et al 2007: 53), another comparison of food prices in different types of outlets in Delhi comes to a different conclusion: in eight out of 14 product combinations, modern retail was less expensive, in three prices were on a par and in another three it was more expensive (Minten et al. 2009). In general, supermarkets seem to be cheaper in dry food products as these are easier to handle, procure and store. For fresh products, prices are sometimes lower as well, though the produce is of lower quality than in traditional outlets and wet markets. For many consumers in Delhi, modern retail therefore seems to be an attractive and cheaper alternative to *kiranas* and street vendors.

With regard to poor consumers, according to Minten et al. the situation looks different for several reasons. First of all, in traditional outlets poor consumers are often able to negotiate lower prices than rich customers. Secondly, while supermarkets are able to deliver processed food more cheaply, they tend to 'focus on offering labelled or branded products, which are significantly more expensive and less sought-after by the poorer part of the population'. Thirdly, supermarkets tend to focus on packaged food, while poor people tend to buy loose food, as the latter is available in smaller quantities. In addition, Singh argues that supermarkets are not likely to establish significant presence in slums or other poor neighbourhoods, which will limit the physical access of many poor urban dwellers to these markets (Singh 2011: 21). These observations may explain why ILO and the NASVI survey come to the conclusion 'that lower income groups spend a higher proportion of their income in making purchases from hawkers mainly because their goods are cheap and thus affordable' (Bhowmik 2001: 31). Even though many food items are offered at lower prices in supermarkets, these items tend to involve processed, labelled and packaged food, which are generally more expensive and less suitable for poor customers.

For poor consumers, the ability to purchase food in the market is an essential element of the right to food. Therefore, food price inflation is in fact a huge obstacle for them to enjoy the right to food. The analysis shows, however, that India is not more but rather less affected by food price inflation than most other Asian countries. The expansion of supermarkets is likely to have mixed impacts. While modern retailers in Delhi offer many food items more cheaply than traditional retailers including street vendors, they do not offer those food categories in the low price segments that poor consumers find affordable and suitable. To conclude, the



expansion of European supermarkets is not likely to help vulnerable groups realise their right to food.

## 7. Transparency and democratic participation

As retail is the second largest employer in India after agriculture, the question of opening the sector to FDI is very sensitive. The Government of India (GoI) is well aware of this. In interviews with our research team, officials emphasised that the Indian position on this matter within the free trade negotiations would be based on the outcome of a domestic discussion process. In this sense it is to be welcomed in principle that the DIPP launched a public electronic consultation on the question in 2010. Yet, the format of an e-consultation seriously limits the scope for transparency and participation for the affected people. In a contribution to this consultation the *Confederation of all India Traders* criticised the fact that the consultation was only held in English for example, while most of the affected people only understand Hindi and/ or their respective local languages (Confederation 2010: 1).

Nevertheless, the contributions show an ample variety of opinions, with about two thirds of the responses arguing against the opening of the sector to FDI (Kumar and Ranjan 2011: 6). Some argued for maintaining a total ban on FDI in the sector. Others recommended tying FDI to strict conditions. The latter position was also taken by the Parliamentary Standing Committee on Commerce in a report in May 2009.

<sup>1</sup> The Committee, therefore, recommends that in view of the adverse effects of corporate retail (foreign as well as domestic) on the small retailer, there is a compelling need to prepare a legal and regulatory framework and enforcement mechanism for the same that would ensure that the large retailers are not able to displace the small retailers, by unfair means' (Parliament of India 2009: 40).

Notwithstanding all this, it seems that the government will open up multi-brand retail for FDI up to an equity cap of 51%, the only conditions being that this be limited to cities above one million inhabitants and investment of USD 100 million. The wide range of other conditions suggested in the DIPP discussion paper, such as a minimum employment of rural youth, a minimum percentage of products to be sourced from Indian SMEs, a Shopping Mall Regulation Act to protect small retailers, and buffer stocks to protect the Public Distribution System (PDS), were, it seems, dismissed. Moreover, contrary to the statements of DIPP representatives, EU sources suggest that the commitment to open multi-brand to European retailers will be locked into the FTA, which would make it impossible to impose new conditions, especially on foreign retailers. This will be the case even if initial regulations turn out to be insufficient to protect jobs, incomes and the right to food of small shop keepers, street vendors, small-scale farmers or poor urban consumers.

It is obvious that recommendations of interested companies such as Carrefour, and business associations such as *Business Europe*, the *European Services Forum* and the *Confederation of Indian Industry*, have tailored the positions both of the GoI and the EU Commission (and the European Parliament), and that critical voices from potentially affected persons and groups and CSOs have largely been ignored regarding this topic (Eberhardt and Kumar 2010: 22-24).

## 8. Recommendations

In order to respect, protect and fulfil the right to food of small shopkeepers, street vendors, small-scale farmers or poor urban consumers,

- The GoI and the EU should not include provisions in a bilateral trade agreement that would prevent India from maintaining the existing ban on European FDI in multi-brand retail. In the light of the findings of this Chapter, the policy space of India to restrict such FDI must be maintained whenever the right to food is found to be violated or threatened.
- The EU Commission and the European Parliament should not exert any pressure to open retail for European FDI. They should instead undertake their own Human Rights Impact Assessment (HRIA) and take into account its findings when defining their position in this sensitive area.
- The GoI should make sure that it does not accept any international commitments under bilateral or multilateral trade and/ or investment agreements that would limit its policy space to protect the right to food of producers and consumers currently benefitting from so-called 'unorganised retail'.
- The GoI should initiate a more comprehensive and participatory consultation and *ex ante* HRIA on FDI in retail. This should then form the basis for any decisions on possible gradual opening.
- The GoI should take measures to improve market access by and support of small-scale farmers, and should increase public support of domestic food processing.
- The GoI should support the development of small outlets, and improve the legal, social and economic situation of street vendors, inter alia by systematically implementing the *National Policy on Urban Street Vendors*.

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# VII. INVESTMENT PROTECTION: LIKELY IMPACT ON ACCESS TO LAND BY RURAL COMMUNITIES<sup>16</sup>

## 1. The relevance of access to land for food security in India

Land distribution in India is highly unequal. Small and marginal farmers with less than two hectares are the mainstay of Indian agriculture, as they make up 83% of Indian farmers. Altogether, however, they own only 41.14% of the total agricultural land. The 65% with an average holding size of 0.38 hectares, i.e. the smallest farmers, own only 20% of the total agricultural land. According to the 59th round of the National Sample Survey (NSSO 2006a), 11% of rural households in India are landless. Some 75.38% of the entire workforce is located in this sector. The average monthly household expenditure among farming communities has been estimated at 503 Indian rupees<sup>17</sup> (National Sample Survey Organisation 59th Round) – a clear indicator of the adverse economic conditions. And yet, the near landless communities, forest dwellers, marginal farmers, share croppers or agricultural labourers continue to remain dependent on the land owned by the landed elite for their livelihoods and food security.

In India, land has always been and continues to be a key source of food, especially for subsistence farmers. This type of dependence on land can still be seen across the country in various regions, especially the belts dominated by Adivasi or indigenous populations, for instance the central eastern belt. Common property resources provide food security for large parts of the Indian population. Landless and forest-dwelling communities in India are more dependent on common lands, which include grasslands, scrubs and forest lands. For most marginalised communities in India's villages these lands support livestock rearing, and the collection of roots, tubers, fruits and fuelwood. These common lands contribute almost 12% of the income of poor households (Beck and Nesmith 2001). In states like Maharashtra, Madhya Pradesh, Rajasthan, Gujarat and many others a huge pastoral community depends entirely on these lands for livestock rearing. However, in both cases, be it that of private lands or the commons, the absence of tenure security has been a direct threat to food security – manifesting itself in extreme poverty, hunger and malnutrition.

<sup>16</sup> This Chapter mainly draws on two unpublished studies commissioned by the publishers, the first conducted by Manshi Asher and Shalini Bhutani, the second by Rhea Hoffmann.

<sup>17</sup> Approximately seven euros.

## 2. Current land policy in India

Despite a huge land mass, a diversity of land types and complex land uses, India is a country that does not, to date, have a comprehensive land-use policy. Under the Constitution of India, 'land' is on the State List, making it a matter for the State Legislatures to make laws on. Most of the land-related legislations and policies are evolved and governed at the devolved federal state level rather than at the centre.

### The land reforms process

The only time a national agenda was set toward a larger land policy was after independence, when the newly formed nation state envisioned land reforms for rural reconstruction and equality. The land reforms agenda had four basic components: 1) the abolition of landlords, 2) allocation of land to the tiller, 3) consolidation of small land holdings, and 4) re-distribution of land above certain ceilings to the landless. From the 1950s onwards and all through the 70s, various of India's federal states brought out laws and policies in line with the four objectives. Unfortunately, in most states the political class, comprised of the landed elite, ensured that the reforms did not achieve success. Lack of political will and the inability of the bureaucracy, especially the revenue departments, to deal with the complex realities on the ground, facilitated the non-implementation of land reform-related legislation in many of the states. Land reforms in India thus remain an unfinished business, with 11% of rural households currently still lacking access to land.

Over the last two decades economic policy formation and the evolution of trade agreements have seen a centralising trend in the wake of the economic reforms. Today, though, virtually all state governments are taking measures to liberalise land legislations and policies to facilitate the conversion of agricultural land for non-agricultural uses, and free the buying and selling of land from restrictions (Sud 2007: 603–637). Ceiling limits have been extended and ceiling lands have been re-acquired by the state. One of the results is that, between 1990 and 2004, land under non-agricultural use has gone up by 3,400,000 hectares (Goswami 2008). The state of Maharashtra has lost more than 1,000,000 of its 4,400,000 acres of fertile land under agricultural use to non-agricultural use

in the last decade (Shukla 2011). Many more thousands of acres of common and forest lands have been lost, data for which is not even compiled by the government.

### Land acquisition

Sixty years after independence the colonial Land Acquisition Act (LAA) of 1894 is still in place in India. This law was introduced by the British imperialist government to enable unhindered and forced acquisition of private land, based on a set of principles and guidelines. Even as the number of people displaced by development projects (e.g. dams, mines, roads, railways and industries) is reportedly surpassing 60 million (75% of whom are awaiting rehabilitation), the government still continues to delay the process of amending the legislation in favour of the rights of rural communities (Asher and Mumtaz 2006).

For the last three decades civil society groups and anti-displacement movements have been criticising the LAA; their key points of contention were:

- Use of the power of 'eminent domain' by the state to acquire land
- Use of 'public purpose' to justify all kind of acquisition by the state
- No prior and informed consent (FPIC) required from individual landowners or the local village councils (*gram sabhas*)
- No land in exchange for land but cash for land. Cash compensation is not determined by market rates.
- No legislation to ensure 'rehabilitation' and no acceptable policy on rehabilitation
- No timeframes for implementation of rehabilitation and no punitive action against non-implementation

The LAA was amended in 1983 to allow acquisition by the state for private companies. Since 1991, when the government began to open up the economy to the global market there has been an increasing shift in the nature of displacement. The acquisition of large contiguous lands, which used to be the common practice, has been replaced by piecemeal purchases, and government land transfers followed by private acquisitions in case of holdouts. Homestead lands (on which people have their homes) are avoided in the initial land transfers, perhaps on the assumption that the inhabitants will slowly move away as construction work on the project starts or expansion takes place.

Currently, the government is in the process of introducing an amended Land Acquisition, Rehabilitation and Resettlement (R&R) bill.<sup>18</sup> This bill would include an expansion of the ambit of 'public purpose' to include a wide variety of infrastructure and private mining projects. Recently the Prime Minister's office has

indicated that this bill, along with the Land Titling Bill, is on its prime agenda. The latter aims to change the system of property records. The current practice of 'presumptive titles' is based on a rather complex documentation of past transfers of land. The draft Land Titling Bill would replace this system with a single register of land titles for the entire country. The names of current owners could then be determined conclusively. On the one hand, the new system of land titling will make private purchase of land easier. On the other hand, the proposed law will not help marginal farmers and people from rural backgrounds to declare land rights, as their land rights have often never been settled since independence.

### The Indian Forest Act 1927

Under the Indian Forest Act, millions of hectares of land in India were declared as 'government forests' by the British, without the rights of those who lived in these areas being recorded. Owned and governed by the Forest Bureaucracy, these areas, covering 750,000 square kilometres, are inhabited by more than 500 million forest dwellers, a large percentage of whom belong to scheduled tribes. The oppression faced by forest dwellers in the pre-independence period continued even after 1947 under the Indian forest department. The diversion of forests for development projects displaced these communities without any compensation or rehabilitation.

This practice continued even after the Panchayat Extension to Scheduled Areas Act (1996) was passed, which restricts acquisition of indigenous lands without local community consent. In fact, some states, like Jharkhand, have laws that do not permit buying and selling of tribal lands. But the use of the LAA has de facto over-ridden every other law to maintain the State's eminent domain over land. After a century of struggles and a long-drawn-out campaign in 2006, the Indian Government finally adopted the Forest Rights Act 2006 – which has provisions for recognition of (scheduled tribes' and other traditional forest dwellers') community and individual rights on forest land. It remains to be seen whether implementation of the Act will be full and satisfactory. Forest lands continue to be diverted for industrial projects across the country in complete violation of this legislation.

## 3. European investment as a possible threat to communities' access to land

FDI and investment in general can be an important means for development and can have a positive impact on the realisation of human rights, for example by creating income opportunities. In other cases, however, investment can have a negative impact on human rights. One of the examples in the latter scenario which is currently under debate is investments in land that lead to displacement of rural or urban communities who depend on this land as their source of alimentation, housing or cultural activities. In India many such cases of often forced evictions in the realm of larger investment projects have been reported. In some cases, European investors are involved.

The EU is India's largest source of FDI. It accounted for 65% of all FDI flows into India in 2007, when flows peaked just before the decline triggered by the financial crisis. In 2008, Germany was the biggest EU investor in India, followed by the UK, France and Sweden (Gonçalves 2007). Even though foreign companies

<sup>18</sup> The Land Acquisition, Rehabilitation and Resettlement Bill (LARR Bill 2011) was introduced into the lower house of the Indian Parliament (Lok Sabha) on September 7, 2011 and might be debated in December 2011. The proposed LARR Bill 2011 contains provisions on the acquisition of land by the State. Besides establishing the law on land acquisition, the rehabilitation and resettlement of those directly affected by the land acquisition will be regulated. The current draft of the LARR Bill 2011 is available at <http://rural.nic.in/sites/downloads/general/LS%20Version%20of%20LARR%20%20Bill.pdf>.

are not allowed to directly purchase land in India, foreign direct investment (FDI) is allowed and promoted in sectors where activities often require a lot of land. Among the capital- and in some cases land-intensive sectors whose attractiveness for European investors has been increasing are the automobile industry, agro-fuel, solar and wind energy, mining and minerals.

The general rule is that non-Indians cannot acquire agricultural land, plantation property or farm houses in India.<sup>19</sup> For FDI projects, the state can acquire land and offer it for the use of foreign companies under leasing arrangements, which can be embedded in investor-State agreements. In many cases, this land has been converted from agricultural to industrial land before being

handed over to the companies. One of the sectors where most land displacements and human rights violations have been reported is mining. According to Amnesty International (AI), the eastern state of Orissa alone has some 600 mine lease areas, covering 97,000 hectares, of which 370 leases covering an area of 74,400 hectares are currently in operation. During 2002-2008, the Government of Orissa signed 54 agreements with various national and international companies in the extractive sector, which is estimated to represent 2.1 trillion Indian rupees (USD 46.3 billion) in investment (Amnesty International 2010: 5). At the same time Orissa remains one of India's poorest states. The majority of rural communities are Adivasis and Dalits, of whom 73% and 53% respectively live below the poverty line.

<sup>19</sup> However, a foreign company which has a branch office or other place of business in India can, in accordance with the Foreign Exchange Management (Establishment in India of Branch or Office or other Place of Business) Regulations, 2000, acquire immovable property (land) in India that is necessary for or incidental to carrying on such activity. But if the foreign company has established

only a Liaison Office in India, it cannot acquire immovable property. In such cases, Liaison Offices can acquire property through leases not exceeding five years. Companies incorporated in the EU do not need prior approval from the Reserve Bank of India (RBI), as do some from listed countries such as Pakistan, Iran, etc. This is as explained by the RBI as of April 2011.

Important European Investors in India			
	COMPANY	COUNTRY	ACTIVITY
1	Lafarge	France	Cement/Building
2	Vedanta Resource PLC	United Kingdom	Mining
3	Hochtief	Germany	Infrastructure
4	Rio Tinto	British-Australian	Mining
5	Kuoni	United Kingdom	Luxury travel/Tour Operator
6	TUI AG	Germany	Travel group
7	Siemens AG	Germany	Energy, Dam Building
8	Eleng UK Ltd.	United Kingdom	Energy Industry
9	ABB Group	Swiss-Swedish	Power/Electricity Grids
10	Volkswagen	Germany	Automobile Manufacturing
11	Nokia	Finnish	Telecommunications

European investors play an important role in mining, especially Lafarge, a French transnational corporation (TNC) and giant in the cement industry, and the UK-based Vedanta in Aluminium. Both these corporations' projects in India have come under scrutiny and also met opposition, mainly on the grounds of their impacts and human rights violations. The following examples illustrate the threats to local communities caused by mining projects:

According to Amnesty International, Vedanta Aluminium Limited started operating an aluminium refinery in a rural area alongside

the river Vamsadhara, which is surrounded by 12 villages with 4,000 to 5,000 inhabitants, including Adivasi and Dalit communities (Amnesty International 2010: 3-6). The land where the refinery was established had formerly been used by the communities as farmland. In 2002-2004 it was acquired by compulsory purchase, leading to the full displacement of 118 families and a further 1,220 who sold the land to the refinery. AI reports on numerous violations of the rights to water and health caused by pollution and poor management of waste produced by the refinery. In 2007, Vedanta applied for environmental clearance for a

six-fold expansion of the refinery, which would require the acquisition of an additional 1,340 hectares from 800 more families in the area. Furthermore the **South-west Orissa Bauxite Mining Corporation**, involving another subsidiary of London-based Vedanta Resources Plc and the state-owned Orissa Mining Corporation (OMC), would like to establish a bauxite mine on the Niyamgiri Hills, on the traditional land of the indigenous community of the Dongria Kondh. For centuries the communities have considered the hills sacred, and depend on them as sources of water, food and cultural values. Following protests against the clearance granted by the Ministry of Environment and Forests (MoEF) in 2009, the same ministry rejected the forest clearance and suspended the environmental clearance for the bauxite mine in August 2010. In April 2011, OMC filed a petition against the MoEF decision before the Indian Supreme Court (Amnesty International 2011).

In July 2011, the Supreme Court allowed Bangladesh-based **Lafarge Surma Cement Ltd.**, a joint venture between Lafarge Group and the Spanish cement company Cementos Morlins, to carry out mining in Meghalaya, despite protests by local villagers. In 2006, the Chief Conservator of Forests had warned the MoEF that the mining lease area around the developed mine benches was surrounded by thick natural vegetation covered with a sizeable number of tall trees. Civil society organisations claim that 90% of the land required is forest land which contributes to the livelihoods of the poorest, especially the Dalit communities dependent on livestock rearing. In October 2010, the National Environment Appellate Authority had quashed the environment clearance for the project on the grounds that the impacts on local livelihoods would be irreversible, and that the Majathal Wildlife Sanctuary was adjacent to the mining site. This decision was then overruled by the Supreme Court in July 2011. The company's project in Chhattisgarh had already been criticised for having displaced the local indigenous population and making empty promises of employment.

Some policy decisions of recent years have further promoted projects that involve shifting the control of land to foreign investors:

- The SEZ Act of 2005. In the last decade the Government of India formulated a policy which it then backed up with legislation for setting up Special Economic Zones (SEZ) in India. Contiguous land – anywhere from 3–14,000 hectares – is a non-negotiable requirement for setting up an SEZ. Within these zones, which are open to 100% FDI, units set-up for the manufacture of goods and other activities including processing, assembling, trading, repairing, reconditioning etc. receive several tax exemptions. Since the act was passed, 500 SEZs have been officially approved, which required 30,122 ha of land by 2008. CSOs estimate that by now, 122,000 ha might be covered by approved SEZs, and that 114,000 farming households (each of them comprising on average five members) and 82,000 farm worker families working on these farms will be displaced once these SEZs are established (Sharma and Goswami 2006).
- New mineral policy and amendments to the mines and minerals law. After the FDI cap in the mining sector had already been raised to 100% for most minerals in 2000<sup>20</sup>, India's ruling coalition, the United Progressive Alliance (UPA) government, subsequently introduced the new National Mineral Policy (NMP) in April 2008. It did so in order to boost investment in the mineral and mining sector to the tune of two billion dollars. This was achieved inter alia through measures to simplify procedures for environmental clearance of mining projects, making FDI in mining projects in India a more attractive option.
- FDI policies for further liberalisation. The Indian Government came out with a new consolidated FDI policy that came into effect as of 1st April 2011. Under the new policy foreign investors are no longer required to obtain Government approval if they have had previous ventures in India, so long as the new investment otherwise meets the automatic criteria. The Government has also set up the Foreign Investment Implementation Authority (FIIA), which is mandated to facilitate quick translation of Foreign Direct Investment (FDI) approvals into implementation, working hand in hand with the foreign investor.

## Civil society criticisms of Special Exploitation Zones (SEZ)

1. Un-constitutional nature of the SEZ Act has an overriding effect over other legislations
2. Breakdown of democratic governance systems, especially those involving local self-government (both urban and rural), combined with the creation of independent private capital enclaves outside the purview of the Indian state
3. Large-scale forced acquisition of land and promotion of speculative real estate businesses, resulting in loss of agricultural, fisheries-based and other traditional livelihoods. Direct conflict of interests with farmers, as most approvals are in peri-urban areas around big cities where land is fertile and water and other infrastructure is easily accessible.
4. Creation of exploitative work environments, as units can be declared as Public Service Utilities, where trade union activities are prohibited
5. Increasing burden on natural resources such as land, water and forests, and uncontrolled environmental destruction caused by a concentration of projects in coastal regions
6. Revenue losses and creation of serious economic imbalances – both sectoral and geographical. Maximum number of approvals in the southern part of the country and in the IT sector
7. No effort by the government to initiate or open public consultation on the matter

<sup>20</sup> See: <http://mines.nic.in/comp2.html> and <http://www.oecd.org/dataoecd/30/8/1830307.pdf>.



#### 4. Existing bilateral investment treaties and changes likely to be caused by the FTA

The combination of poor protection of land rights and the high priority attached by the Government to attracting domestic and foreign investors has often resulted in the displacement of rural communities and severe human rights violations. These domestic policies are pursued by the Government of India largely independently of its international obligations. However, international obligations under Bilateral Investment Treaties can shape and re-define the domestic policy space for land and investment policies, and thereby have a positive or negative impact on human rights.

With regard to Europe, at present India has signed 21 bilateral investment treaties (BITs)<sup>21</sup> with EU Member States.<sup>22</sup> As there is a single agreement for both Luxembourg and Belgium, 22 of the 27 EU Member States have already signed BITs with India. India started negotiating BITs after the liberalisation of the Indian economy in 1991. The first Indian BIT was signed in 1995 (UK-India BIT). These investment agreements typically contain clauses on investment promotion and protection, national treatment and most-favoured nation treatment, protection against expropriation, compensation for losses, repatriation of investment (subrogation), investor-State dispute settlement and dispute settlement between States.

As the Treaty of Lisbon partly shifted the competences for negotiating investment treaties from the EU Member States to the EU level, the free trade agreement (FTA) with the Republic of India will include an investment protection chapter which will be negotiated by the EC under the mandate of the Council. On Monday, 12th September 2011 the European Union's General Affairs Council approved a modification of the investment negotiation mandate of the EC to negotiate investment protection chapters with India, Singapore and Canada. In contrast to investment protection, EU already had the competence to negotiate market access before the entry into force of the Lisbon Treaty. As the competence to negotiate the protection of portfolio investments still belongs to the Member States, the Member States have to approve treaties which also include portfolio investments as a special kind of FDI.

The following comparison between the existing commitments of India under the BITs and its likely commitments under the FTA<sup>23</sup> shows that the standards of investment protection will *first of all* harmonise the 21 existing BITs, secondly include the five Member States that did not sign BITs with India and thirdly probably involve a race to the top for investor protection in order to satisfy the will of those Member States with an interest in safeguarding the current high standards already enshrined in their existing BITs

with India.<sup>24</sup> As the EC negotiation mandate states, the future EU-India FTA

'[...] shall provide for the highest possible level of legal protection and certainty for European investors in India, provide for the promotion of the European standards of protection and seek to increase Europe's attractiveness as a destination for foreign investment [...]'.<sup>25</sup>

This means that for those EU Member States with the highest standards included in the BIT, changes will be very moderate, while for others they will be major. Therefore, it is reasonable to assume that the highest protection offered by one of the existing EU Member State BITs with India will form the template for the investment chapter of the EU-India FTA.

#### The definitions of 'investor' and 'investment' and scope of the agreements

With regard to the definitions of investor and investment, the negotiation mandate states that

'the investment protection title of the agreement shall cover a broad range of investors and their investments, intellectual property rights included, whether the investment is made before or after the entry into force of the agreement.'

The EC negotiation mandate puts forward a broad asset-based definition of investment, which covers almost every kind of investment and asset owned or controlled, directly or indirectly, by European foreign investors.

Broadly speaking, the definitions of investor and investment in the Member State BITs are quite similar. They all provide a **broad asset-based definition** of investment, adding a specific non-exhaustive list of examples. At present, there are no areas of investment that are excluded from the scope of the EU Member State BITs with India. All BITs apply to agricultural investment and land deals. However, all of the 21 BITs with India provide for a significant exception because the protection of the investment is restricted to any kind of asset, provided that the investment is made ' [...] in accordance with national laws of the Contracting Party in whose territory the investment is made [...]'.<sup>26</sup> It is not yet certain whether the investment chapter of the EU-India FTA will provide for such an exception, too.

Another issue of concern is the **temporal scope**, which in the upcoming FTA might cover investments made before the date of enforcement of the FTA. This definition would further extend the scope of the agreement beyond some BITs if it provides for a broad, open-ended definition without any exception. The Finland-India BIT, for example, extends the scope of the agreement to investments made before the entry into force, but not with regard to claims settled before entry into force.<sup>26</sup> The Hungary-India BIT and some other Member State BITs even extend this exception to ' [...] any disputes concerning an

21 In India these agreements are called Bilateral Investment Promotion & Protection Agreements (BIPAs). As the term BITs is more common it is used here.

22 The EU Member States that have signed BITs with India are (the following list is based on the date on which the various agreements between the states was signed, the dates of enforcement may differ): United Kingdom, Germany, Denmark, Netherlands, Italy, Poland, Czech Republic, France, Spain, Belgium and Luxembourg, Romania, Bulgaria, Austria, Portugal, Sweden, Finland, Hungary, Slovak Republic, Greece, Latvia, (negotiations are under way with Lithuania and Slovenia; see [http://finmin.nic.in/the\\_ministry/dept\\_eco\\_affairs/icsection/list\\_countires3.asp](http://finmin.nic.in/the_ministry/dept_eco_affairs/icsection/list_countires3.asp)).

23 The analysis of the potential investment chapter in the EU-India FTA is based on the leaked investment negotiation mandate for the European Commission (EC), which was approved by the General Affairs Council of the European Union on Sept 12th. The text is available at <http://www.s2bnetwork.org/themes/eu-investment-policy/eu-documents/text-of-the-mandates.html>.

24 One example of a Member State that is pushing for such an 'upgrade' of the level of protection might be Germany.

25 The wording of this exception varies in the 20 BITs. This exact wording can be found in the Czech Republic-India BIT in Art. 1 (b).

26 Art. 2 of the Finland-India BIT.



investment which arose (...) before its [author: the BIT] entry into force'.<sup>27</sup>

Under the current EU Member State BITs with India and the potential EU-India FTA there is a possibility for individuals to hold assets in companies, enabling domestic investors to then qualify as foreign investors (by becoming 'legal persons'), and thus gain the protection of the investment treaty. In other words, nationals of a country may qualify as foreign investors. This **definition of investor** extends the threat posed to rural communities' access to land from real foreign investors to Indian investors who have an interest in land. Such corporate structuring creates further hurdles for governments seeking to find out which kind of investor might be affected by measures necessary to realise reforms.

### National treatment, market access and most-favoured nation treatment

**National treatment (NT)** and most-favoured nation (MFN) treatment are included in all EU Member State BITs with India, and will be included in the EU-India FTA. **NT** is the obligation of the host country to treat foreign investors no less favourably than domestic investors. However, the negotiation mandate states that the EC should negotiate for an 'unqualified national treatment' of foreign investors, whereas the proposed text of the EC in the first version as of January included the qualification that national treatment should apply for foreign investors 'in like circumstances' to domestic investors.<sup>28</sup> Not all the current BITs go as far as the current negotiation mandate. The Slovak Republic-India BIT explicitly includes a qualified NT provision. Qualified NT provisions narrow the scope of application because foreign investors do not have to be treated the same way as national investors in all cases; they need only be treated thus if they are in some way comparable; e.g. comparable to investors operating in the same market segment and of the same size. Therefore, unqualified NT – having no such further conditions – widens the scope of national treatment, making it much easier for foreign investors to claim that they were not treated the same way as national investors.

Provisions of **market access** will become a critical point in the EU-India FTA. The EU already negotiated for market access in the past, as market access was covered by the EU competences even before the entry into force of the Lisbon Treaty. Therefore, the EU is definitely seeking market access for European investors in India. Although the EC investment protection negotiation mandate states that the investment protection chapter will not be linked to market access, it is not yet absolutely certain whether or not the FTA will cover pre-establishment national treatment, as negotiations between the EU and India are ongoing and not yet predictable. The EC negotiation mandate tries to clarify the relationship between the investment chapter and other chapters of the FTA by saying that

'The chapter on investment protection shall be a separate one, not linked to the market access commitments. These

markets access commitments may include, when necessary, rules concerning performance requirements'.<sup>29</sup>

The crucial question is, whether contrary to the clarification in the investment protection mandate, market access will be included in the investment protection chapter in addition to other market access commitments in the FTA. This would make a huge difference in terms of investor rights as they could claim market access in investor-State arbitration.

Market access is often referred to as a 'pre-establishment' commitment in BITs. If pre-establishment is included in the investment protection chapter, the provisions on NT will allow foreign investors access to land, minerals, water and forest products in the same way as national investors have such rights. This means that domestic regulations which prohibit foreign investors from buying land for investments may be circumvented by the NT-standard in the future investment chapter of the FTA. NT therefore is a strong right that threatens access to natural resources such as land, water and energy sources for the Indian rural population. As foreign investors can make use of international investment arbitration in order to claim compensation if they are discriminated against, they have much stronger rights than the domestic population, who are treated on the basis of domestic legislation. EU Member State BITs with India do not contain clauses that extend to pre-establishment protection, and therefore offer less protection to foreign investors than the EU-India FTA would if pre-establishment national treatment were included.

The **MFN clause** extends this investment standard to the level of protection given to any other investor of a third State ruled by an investment agreement between the host country and the third State. MFN clauses make it hard to determine the actual level of protection, because BITs of the host country and other States might have to be taken into account if an MFN clause is included in the contract.

### Fair and equitable treatment

Fair and equitable treatment (FET) is one of the vaguest investment standards, and one which is included in almost every investment agreement.<sup>30</sup> All of the 21 EU Member State BITs with India contain a clause according to which foreign investors must be treated in a 'fair and equitable' manner.

One problematic aspect is that FET includes the 'legitimate expectations' of the foreign investor. Legitimate expectations may secure rights to maintain the investment project, for example to draw water for the project. Foreign investment therefore also has impacts on rural communities' right to water if water is used for foreign investment projects instead of being used for the needs of rural communities. Due to cost considerations, the government might rather restrict the right to water of its population instead of restricting foreign investors' rights to water, which might cost large amounts of compensation. A reduction in water allocations may also amount to an indirect expropriation of a foreign investor if the investment project is affected by the measure.

27 Art. 2 Hungary-India BIT; see also Latvia-India BIT in Art. 2; Art. 2 Portugal-India BIT; Art. 2 Romania-India BIT; Art. 12 Slovak Republic-India BIT; Art. 2 Sweden-India BIT.

28 See the leaked proposal of the EC, available at [http://www.bilaterals.org/spip.php?page=print&id\\_article=18960](http://www.bilaterals.org/spip.php?page=print&id_article=18960).

29 See the EC investment mandate, available at <http://www.s2bnetwork.org/themes/eu-investment-policy/eu-documents/text-of-the-mandates.html>.

30 At least as far as investment agreements that have been concluded recently are concerned.

The draft investment chapter of the EU-India FTA will contain an FET standard, too, and thereby extend it to all EU Member States. As the EC has indicated, there will not be any public interest exemption from the FET standard. FET is a dangerous investment standard because it is almost impossible to calculate a breach of it due to its vagueness and unpredictability.

### Protection against expropriation and nationalisation without compensation

Investment treaties typically contain clauses concerning expropriation and nationalisation. Depending on the measure taken, expropriation can be classified as either **direct or indirect expropriation**. Direct expropriation is the physical taking of property, whereas an indirect expropriation can also be claimed if a regulatory action interferes with the enjoyment of an investment (including profits thereof). Protection from both **direct and indirect expropriation** can pose threats to ongoing land reform processes and the land rights of rural communities. The host State might not carry out such reforms if it fears large compensation claims might be made by foreign investors.

For example, the protection from direct expropriation in the Germany-Paraguay BIT has been the main argument for Paraguayan authorities not to transfer the legal title of land to an indigenous community (Hausmann et al. 2006: 15). A ruling of the Inter-American Court of Human Rights against Paraguay, which placed the human rights of the indigenous communities above investors' rights, has not been implemented so far.<sup>31</sup> With respect to indirect expropriation, many regulatory measures can give rise to claims for which compensation has to be paid, even if the measure was in the public interest. In particular, this provision can limit policy spaces for state governments to act against land grabbing. As foreign investors often get land tenure for several decades, in some cases up to 99 years, any change of such contracts, which often conflict with human rights, may be regarded as an indirect expropriation of the investment at hand. Furthermore, interferences may be a breach of the FET standard.

One major threat is that indirect expropriation might not be defined in the investment chapter, making it very easy for European investors to challenge public interest regulation concerning food and land. In contrast to the earlier proposal of the EC from January 2011, which stated that non-discriminatory regulatory actions to achieve legitimate public policy objectives 'do not constitute indirect expropriation', the new negotiation mandate of the Council omits this clarification. This would mean a step backward compared to two of the 21 BITs between EU Member States and India that take a quite modern approach in this particular regard.<sup>32</sup> These BITs follow the example of the US Model BIT<sup>33</sup> and the Canadian Model Foreign Investment Promotion and

Protection Agreements (FIPA)<sup>34</sup>. There, indirect expropriation is defined more precisely. The Protocol of the Latvia-India BIT, for example, says with regard to Art. 5 that non-discriminatory regulatory actions to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriation. The comments of the European Parliament also refer to this point of concern, i.e. the lack of precise definitions.<sup>35</sup> If the investment chapter does not contain a clear definition of indirect expropriation that defines regulatory measures in the public interest as not constituting an indirect expropriation, there will be a high risk that courts will interpret public interest regulations as indirect expropriation as well.

The EU Member State BITs vary with regard to the **amount of compensation** to be paid in case of an expropriation or nationalisation. For example, the Hungary-India BIT calls for 'fair and equitable compensation', which it further defines as representing the 'market value' of the investment. Other wordings concerning the amount of compensation may even leave more latitude. It is possible that the amount of compensation will be raised by the wording of the FTA in order to meet the highest protection currently available in the EU Member State BITs. The draft investment chapter of the EU-India FTA provides broad protection against expropriation without compensation, by stating that 'any measures of expropriation' are prohibited.

Comparing Indian investment treaties (both EU Member State BITs with India and the draft investment chapter of the EU-India FTA) with the Constitution of India, a major discrepancy becomes obvious: the Constitution does not offer compensation if property is taken due to land reform. If compensation for expropriation is paid, this might be due to non-constitutional legislation. The different treatment with regard to compensation paid can be to the detriment of rural communities.

### Umbrella clause

Most of the EU Member State BITs with India do not contain an umbrella clause. Umbrella clauses require a State party to observe all obligations entered into with foreign investors, e.g. through investor-State contracts. For example, BITs with umbrella clauses may enable investors to seek dispute settlement before an investor-State tribunal, even though the contract between the foreign investor and the host State is silent on this possibility of dispute settlement. Umbrella clauses strengthen the legal value of investor-State contracts. Therefore, an umbrella clause in the investment chapter of the EU-India FTA will give all European investors greater rights and options for effectively gaining protection of their investments.

Those EU Member State BITs that do contain an umbrella clause exclude the dispute resolution mechanism, except for the Germany-India BIT, which contains a classical umbrella clause. Unlike in the Germany-India BIT, umbrella clauses of most other Indian

<sup>31</sup> See Inter-American Court of Human Rights, *Sawhoyamaya Indigenous Community v. Paraguay*, Judgment of March 29, 2006, available at <http://www2.law.school.cornell.edu/womenandjustice/legalresources/upload/IACtHR-20Sawhoyamaya-20Indigenous-20Community-20v-20Paraguay.pdf>.

<sup>32</sup> See the Annex of the Slovak Republic-India BIT and the Protocol with regard to Art. 5 of the Latvia-India BIT. Given that these two agreements were concluded in recent years (2007 and 2010), and therefore reflect more modern BIT practice, the progressive approach toward clarification on indirect expropriations is no surprise.

<sup>33</sup> See Art. 6 and Annex B US Model BIT, available at: <http://www.state.gov/documents/organization/117601.pdf>.

<sup>34</sup> See Art. 13 (1) and Annex B.13(1) of the Canadian Model FIPA available at <http://ita.law.uvic.ca/documents/Canadian2004-FIPA-model-en.pdf>.

<sup>35</sup> See European Parliament resolution of 6 April 2011 on the European international investment policy, available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0141&format=XML&language=EN> and European Parliament resolution of 11 May 2011 on the EU-India FTA, available at <http://www.europarl.europa.eu/sides/getDoc.do?type=PV&reference=20110511&secondRef=ITEM-005-17&language=EN&ring=P7-RC-2011-0292>.

BITs only address the issue of whether or not there is reference to dispute settlement. Therefore, these umbrella clauses address the potential problem of concurrent jurisdictions between investment treaty arbitration and contractual or local remedies (Newcombe 2009: 446 ff.). The Spain-India BIT, for example, provides that disputes under the clause must be submitted to the contractual dispute resolution mechanism.<sup>36</sup> Likewise, the Austria-India BIT states that treaty remedies shall only be available in the absence of normal local judicial remedies.<sup>37</sup> These wordings of umbrella clauses, which are typical of Indian BITs, do not strengthen the legal value of investor-State contracts, but rather try to find solutions for concurrent jurisdiction and to limit the typical umbrella effect. Therefore, such typical 'Indian umbrella clauses' do not pose an additional threat, because foreign investors still have to make use of the domestic jurisdiction and are normally not allowed to file claims to investor-State tribunals provided for in a BIT. If the EU-India FTA included an umbrella clause similar to the one in the Germany-India BIT, foreign investors would gain additional rights as they could sue the host government under the investment arbitration mechanism provided for by the FTA. This would be the case even though their claim would originally arise from an investor-State contract and not from the FTA directly.

### Investor-State dispute settlement

Provisions on investor-State dispute settlement give foreign investors the procedural right to sue the host State for breaches of the treaty, even though they are not directly party to the agreement. Investor-State arbitration clauses mean that foreign investors can circumvent national legal processes, as they do not have to exhaust local remedies. Investment tribunals have often tended not to take into account the public interest of a governmental measure, when the investor claimed the measure was in breach of investment treaty obligations. With regard to indirect expropriation, for example, arbitrators sometimes simply looked at the sole effect of the governmental measure on the investment instead of looking at the aim of the measure.<sup>38</sup>

Clear rules on transparency and third party participation may, to some extent, strengthen the position of the State and people negatively affected by an investment. While the Commission had proposed that '[a]ny arbitrations shall be subject to transparency requirements'<sup>39</sup> the negotiation mandate of the Council did not include the transparency requirements proposed by the EC in January.

Most of the EU Member state BITs with India contain clauses that allow the investor to choose whether they want to make use of local remedies or directly file a claim to the investor-State tribunal mentioned in the treaty. However, Art. 8(4) of the Slovak Republic-India BIT excludes disputes that arise from measures taken with regard to essential security and emergency protection and all pre-establishment disputes from the investor-State dispute settlement mechanisms. Moreover, a few BITs define the scope of investment arbitration by stating that the dispute must

have been in relation to an investment<sup>40</sup> or investments under the agreement.<sup>41</sup>

Moreover, all of the BITs at least mention that the investor and the host State have to try to reach an amicable settlement of the dispute before taking the host State to court or international investment arbitration. The time the investor has to wait varies from 3 to 6 months. This period is at least an attempt to avoid causing disputes with high cost. The EC negotiation mandate is silent on this point and simply tries to push forward the effectiveness of investment arbitration. The mandate states that

'the agreement shall aim to provide for effective investor-to-state dispute settlement mechanism. State-to-state dispute settlement will be included, but will not interfere with the right of investors to have recourse to the investor-to-state dispute settlement mechanism. It should provide for investors a wide range of arbitration fora as currently available under the Member States' bilateral investment agreements (BIT's).'

As transparency and third party participation are handled quite differently in various arbitration fora, the wide range of arbitration tribunals then available must cause concern.

There are various institutional and legal frameworks for investor-State dispute settlement, including the International Centre for the Settlement of Investment Disputes (ICSID), the Stockholm Chamber of Commerce (SCC), the London Court of International Arbitration (LCIA), the International Chamber of Commerce (ICC) or *ad hoc* arbitration under the UNCITRAL Rules. ICSID provides for two sets of procedural rules that may govern disputes initiated under its auspices, the 'ICSID Convention, Regulations and Rules' and the 'ICSID Additional Facility Rules' which might be applicable even if one of the State parties is not a Contracting State of the ICSID Convention. As the EU cannot be party to ICSID since ICSID is only open to States, and as India is not yet a party to ICSID, it remains to be seen what the actual investor-State dispute settlement mechanism in the EU-India FTA will be. One possibility would be to refer to the ICSID Additional Facility Rules, as well as to the other forms of investor-State dispute settlement.

### 5. Possible indicators of a threat to the right to food

Access to and control over land is important because it enables millions of rural families to feed themselves. According to General Comment 12 of the CESCR, it is an important component of the right to adequate food. The *Voluntary Guidelines to support the progressive realisation of the right to adequate food in the context of national food security*, which were unanimously approved by FAO Member States in 2004, confirm this interpretation. For example, guideline 8 calls on the states to 'respect and protect the rights of individuals with respect to resources such as land, water, forests, fisheries and livestock without any discrimination'. It adds that 'where necessary and appropriate, States should carry out land reforms and other policy reforms consistent with their

36 Art. 4(3) Spain-India BIT.

37 Art. 8(2) Austria-India BIT.

38 See e.g. *Metalclad Corporation v. United Mexican States*, (ICSID Case No. ARB(AF)/97/1) (assessing only the effect of the interference).

39 See the leaked proposal of the EC, available at [http://www.bilaterals.org/spip.php?page=print&id\\_article=18960](http://www.bilaterals.org/spip.php?page=print&id_article=18960).

40 See Art. 8(1) Czech Republic-India BIT.

41 See Art. 9(1) Italy-India BIT.

human rights obligations' with special attention to pastoralists and indigenous people.

Therefore, with regard to the investment chapter of the FTA, the following two indicators are key to identifying possible threats to the right to food:

#### **First indicator: impact on rural communities without access to land**

a) Will the FTA investment chapter limit the policy space of state governments to undertake land reforms in favour of landless and food insecure communities?

#### **Second indicator: impact on rural communities with existing access to land**

a) Will the FTA investment chapter make it easier for European investors to acquire land that affects the food security of rural communities?

b) Will the FTA limit the policy space of governments to act against land grabbing?

c) It may be necessary to take into account the potential overall effects on development of FDI (what happens if compensation was paid? >> positive FDI?)

## **6. Impacts of the EU-India FTA on access to land and food**

As the above analysis shows, many of the provisions that are likely to be included in the investment chapter of the FTA are already part of existing BITs between India and individual Member States of the EU. The additional impact of the FTA will be that investor protection standards will be harmonised at the level of those BITs with the highest level of investor protection, such as the BIT between India and Germany. This will mean a race to the top in investor protection for all EU Member States, including those that have not signed any BIT with India to date.

Land issues will be affected by many provisions in the FTA investment chapter, as according to the EU mandate it will be based on a broad asset-based definition of investment. This is similar to the existing BITs. The latter, however, clarify the definition, indicating that it only applies to investments made in accordance with national laws of the contracting party. It remains to be seen whether this will be included in the FTA as well.

#### **Impact on people without existing access to land**

The land reform processes initiated after independence in India remain an unfinished business, with a high variation in success between the different states. Land reforms have faced a great deal of resistance from landed elites and suffered a lack of political will in many states. Moreover, the promotion of cash-crop production, and simple growth in production and exports in agriculture, but also the endeavour to attract FDI in other sectors such as mining, are often higher on the political agenda than redistributing land to poor and often marginalised rural communities.

Some of the likely provisions of the FTA investment chapter may turn out to be major obstacles to current or future land reform initiatives, beyond the already existing internal obstacles and beyond the ones arising from existing BITs. On the one hand, the EU-India FTA will obviously not prohibit land reforms. On the other hand, the investment chapter of the FTA will impose a series of obligations on the Government of India that reduce the national policy spaces for land reforms. The most problematic are the following:

- The prohibition of **direct and indirect expropriation** without compensation makes it very expensive for Indian states to acquire land that is currently used by EU companies. While the Indian constitution does not prescribe such compensation in the framework of land reforms, the FTA will. Thus, EU investors will benefit from a higher degree of protection than domestic ones. The EU draft investment mandate for the FTA of September 2011 is very ambitious, stating that 'any measures of expropriation' are prohibited. In contrast to an earlier proposal of the EC of January 2011, it does not clarify this by stating that regulatory measures to achieve legitimate public policy objectives 'do not constitute indirect expropriation'. If these measures are not exempted, investors may challenge new land reform laws that threaten their investment projects. Some of the existing BITs explicitly clarify this special status of public purpose regulations. Even if a clause protecting public interest regulation is integrated in the EU-India FTA, generally speaking it might still provide a higher standard of protection to foreign investors than some existing BITs. Unless such a clause excludes the obligation to pay compensation on the grounds of public welfare (such as social, environmental and health concerns), it will not protect rural communities' access to land and therefore will not safeguard food stability.
- India's obligation to provide '**fair and equitable treatment**' includes its obligation to meet the 'legitimate expectations' of an EU investor and protect their investment. This means that India would have to compensate the investor not only for direct losses due to an expropriation, but also for gains that the investor had hoped to make out of the investment. This may happen for example in cases where the investor had expected to gain access to a lease over land that would be relevant to his business, even though this land serves as a source of livelihood for indigenous people. India may also secure the rights of an investor to resources required for the investment project such as water, even if the same water is necessary for the fulfilment of the rights to water and food of neighbouring communities. According to what the EC has indicated, there will be no public interest exemption from the FET.
- The FTA investment chapter will probably, similarly to the existing BITs, provide for the option of **investor-State dispute settlement**. This means that companies themselves can sue the Indian Government for violations of the FTA provisions on investment, and thereby circumvent local and national courts. They can appeal directly to a variety of international institutional frameworks, some of which are in private hands. Moreover, in contrast to some of the existing

BITs and to the earlier EC proposal, the EU negotiation mandate falls short of imposing clear transparency requirements for such dispute settlements. Nor does the mandate request amicable settlement of a dispute within a specific period before taking the State to court. Such omission in the actual agreement would further strengthen the position of investors, not least in conflicts over land use.

### Impact on rural communities with existing access to land

Based on the Land Acquisition Act (LAA), the State of India often acquires land for the purpose of investment projects, even if that land has previously been declared and protected as forest or agricultural land. This means that legislation aimed at protecting the land rights of indigenous people, such as the Panchayat Extension to Scheduled Areas Act or the Forest Rights Act, is often circumvented or violated. The planned amendment of the LAA and the Land Titling Bill are posing additional threats to such communities. Once an international investment agreement is in force (in this case the investment chapter of the EU-India FTA), the investor-friendly policies it embodies are locked in place for a long period. Ignoring the consequences following reforms that might be in breach of investment standards could become expensive in the face of potential investment claims.

The likely provisions of the FTA discussed above bear the risk of further weakening the position of the affected communities in their efforts to defend their land rights against large-scale investment projects by European companies. Even though it is very unlikely that the FTA investment chapter will allow European investors to buy and own land in India, it will further increase the level of protection for investment, including in sectors which involve the use of land on a large scale, such as mining or tourism. This is highly problematic, as human rights principles and instruments such as Free Prior and Informed Consent (FPIC) are not mentioned in BITs, nor will they be mentioned in the FTA investment chapter.

Concretely, the prohibition of direct and indirect expropriation and the FET also apply to land that the state has leased or promised to lease to the investor, even when the same land is still being used by the communities to enjoy their right to food. As foreign investors often get land tenure for up to 99 years, any interference in the investment might be regarded as an indirect expropriation of the investment in question. Furthermore, interference may be in breach of the FET standard. The option of investor-to-State dispute settlements strengthens the position of investors in such cases as well.

One other possible provision of the FTA investment chapter may further increase the danger of land grabbing:

- The **umbrella clause** will strengthen investor rights under investor-State contracts, which is the most current form under which land is leased out to investors. The umbrella clause might blur the distinction between investor-State contracts, which might include those land leases, and the EU-India FTA. Therefore, any breach of the investor-State contract could be considered a violation of the FTA under the umbrella clause. Furthermore, foreign investors can claim compensation for a breach of the investor-State con-

tract through international arbitration provided for in the EU-India FTA.

- Current BITs between India and individual EU Member States provide only for protection, not for further **market access** for European investors, often referred to as **pre-establishment** provisions. If pre-establishment is included in the draft investment agreement, the provisions on **National Treatment (NT)** will allow foreign investors access to land, minerals, water and forest products in the same way as national investors have such rights. This means that domestic regulations that prohibit foreign investors from buying land for investments may be circumvented by the NT standard in the future investment chapter of the FTA. NT therefore is a strong right that threatens access to natural resources like land, water and energy sources for the Indian rural population.

## 7. Recommendations

Most civil society organisations believe that EU Member States' current BITs are inappropriate and unbalanced, and should not serve as blueprints for the EU-India FTA. With regard to rural communities' access to food, land is one of the most important factors in realising the right to food, as it provides the essential resources and means of existence for the local population. Land sovereignty has always been a sensitive issue in any country of the world. Giving foreign investors strong land rights may result in a weakening of the capacity of rural communities to feed themselves. Therefore, in order to respect, protect and fulfil the right to food, India and the EU should not conclude an FTA that undermines India's regulatory space to protect and improve access to land for social groups affected by or vulnerable to hunger.

Any provision that limits Indian policy spaces for public-interest land regulations designed to secure land tenure and redistribute land to landless people under the rule of law must be avoided in the FTA. In particular, the EU and India should:

- Narrow the definition of 'investment' in the investment chapter of the proposed EU-India FTA;
- Remove investor-State arbitration from the investment chapter;
- Remove the umbrella clause;
- Define 'indirect expropriation' and 'fair and equitable treatment' precisely and narrowly in order to protect legitimate government regulations in support of public interests, such as access to land and the right to food;
- Sensitive sectors, such as agriculture and land must be excluded from market access provisions and market access shall not appear in the chapter on investment protection.
- The EU and India should provide for clear exception clauses guaranteeing that public interest regulation is not in breach of any investment obligations under the agreement.

- They should include not only principles and mechanisms for the protection of investors' rights, but also human rights such as Free Prior and Informed Consent (FPIC).
- They should not include restrictions on 'performance requirements' for foreign investors in the investment chapter. A ban on performance requirements would forbid India, for example, from requiring investors to hire local personnel (e.g. for management and directorship). Moreover, performance requirements imposed on foreign investors often include mandatory technology and know-how transfer, which ensures that FDI contributes to the local economy.

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## Annex 1

# EXPERT CONSULTATION ON THE LIKELY IMPACTS OF AN EU-INDIA FREE TRADE AGREEMENT ON THE RIGHT TO FOOD

### Day 1

Timing Programme Schedule for First Day : Monday April 11, 2011

9.00 am	Welcome, Aims and organization issues of the Consultation (Dr. Axel Harneit-Sievers, Heinrich Böll Foundation, India)
9.10 am	Objective and program of the consultation, Sagari Ramdas, Anthra.
09.20 am	Brief round of introductions.
09.40 am	<b>Human Rights Impact Assessments</b> on Trade Agreements: Approach and Methodology: Armin Paasch, Misereor)
10.30 am	Overview on FTA provisions with a possible impact on agriculture and food security (Input: Ranja Sengupta, TWN)
11.10 am	Coffee Break
11.30 am	<b>Trade in goods:</b> likely impact on poultry and dairy producers: presentation and discussion of pre studies (Inputs: Prof. Vijay Paul Sharma, India Institute of Management, and Prof. Rajesh Mehta, RIS, New Delhi)
12.30 pm	Lunch Break
1.30 pm	Possible indicators for violations of the right to food (Christine Chemnitz, Heinrich Böll Foundation)
1.45 pm	Likely impact on the food security of dairy farmers: Yudhvir Singh (President, BKU) and discussion along indicators.
2.30 pm	Likely impact on the food security of poultry farmers: Ricky Thapar, Poultry Federation of India, and discussion along indicators.
3.15 pm	Likely impact on food security of smallholder backyard poultry farmers-particularly adivasis: Mr Pandu Dora, Adivasi Aikya Vedika.
4.00 pm	Tea Break
5.00 pm	Investment and Services: Likely impact on small retailers and food suppliers: presentation of pre-studies (Inputs: Vinay Ranjan, Researcher, and Marita Wiggerthale, Oxfam Germany).
5.45 pm	Possible indicators for threats of the right to food: Armin Paasch (Misereor)
6.00 pm	End of the first day.



**DATE: APRIL 11-12, 2011**

## **Day 2**

Timing	Programme Schedule for Second Day : Tuesday April 12, 2011
9.00 am	Likely impact on food security of small retailers: Shaktiman Ghosh (National Hawkers Federation) and discussion along indicators.
9.45 am	Likely impact on food security of smallholders in the supply chain (Inputs Mr. Chandra Shekhar (President Karnataka Rajya Raiyyata) and Suresh Kadasen (FDI Watch, Bangalore)
10.30 am	Coffee Break
10.45 am	Conclusions on threats of the rights to food through the retail deregulation through the FTA and recommendations.
11.30 am	Investment: Likely impact of Foreign Direct Investment in land on rural communities (Inputs: Shefali Sharma (IATP) and P.V Ragagopal (Vice Chairman of Gandhi Peace Foundation and President Ekta Parishad)
12.30 pm	Lunch Break
1.30 pm	Conclusions on likely impacts on the right to food of rural communities.
2.30 pm	Public Procurement: Likely impact on suppliers of the food distribution system (Inputs: Himanshu, Assistant Professor, Centre for Studies in Regional Development (CSRD), JNU, New Delhi; Madhukar Sinha, Centre for WTO Studies, New Delhi)
3.30 pm	Conclusions on likely impact on the right to food of suppliers and recipients of the public distribution system.
4.00 pm	Coffee Break
4.15 pm	Follow-up activities: Next steps towards the HRIA and possible activities make the HRIA relevant for the affected groups
6.00 pm	Vote of Thanks (Ashutosh Sexena –South Asian Research & Development Initiative).

**VENUE: MAGNOLIA HALL, INDIA HABITAT CENTRE, LODHI ROAD, NEW DELHI - 110003**

## Annex 2

### EXPERT CONSULTATION LIST OF PARTICIPANTS

	Name	Organization
1.	Christine Kögel	Misereor
2.	Armin Paasch	Misereor
3.	Christine Chemnitz	Heinrich-Boell-Stiftung
4.	Marita Wiggerthale	Oxfam Germany
5.	Shalini Bhutani	Independent
6.	Rajeswari S. Raina	National Institute of Science, Technology and Development Studies
7.	Shefali Sharma	Institute for Agriculture and Trade Policy
8.	Milind Murugkar	Policy Analyst and freelance Journalist
9.	Ricky Thapar	Poultry Federation of India
10.	Saktiman Ghosh	National Hawkers Federation
11.	Prof. Vinay paul Sharma	Indian Institute of Management
12.	Prof. Rajesh Mehta	Research and Information System for Development Countries
14.	Madhukar Sinha	Center for WTO
15.	Nitya Ghotge	Anthra
16.	Sagari Ramdas	Anthra
17.	Sanjay Rai	FIAN India
18.	Yudhvir Singh	Bharatya Kisan Union

	Name	Organization
19.	Shalini Mishra	Programme on Women's Economic, Social and Cultural Rights
20.	Kalpana desai	IFT
21.	Ranja Sengupta	Third World Network
22.	Shalini Yog	Heinrich Böll Foundation
23.	Pandu Dora	Adivasi Aikya Vedika
24.	Pramod Dev	Independent
25.	Susanna Baria	NTUI
26.	Axel Harneit-Sievers	Heinrich Böll Foundation
27.	Vinay Ranjan	Independent Researcher
28.	Suresh Kadasen	FDI Watch Bangalore
29.	P.V.Rajagopal	Gandhi Peace Foundation and President Ekta Parishad
30.	Dr. Himanshu	Centre for Studies in Regional Development (CSRD) JNU
31.	Ankita Aggarwal	Right to Food Campaign Secretariat
32.	Himanshu Upadhyaya	Kriti, Development Research, praxis & communications team
33.	Kumar Gautam	Third World Network

## Annex 3

### FIELD TRIP PROGRAMME

#### Day 1 (14th April)

- Meet farmers in Village Yallakallu and Village Y.C. Bandapalli (Dalit hamlet)
- meet private dairy agents
- meet agents from Balaji dairy (NDDDB supported dairy)

#### Day 2 (15th April )

- Meet farmers in Village Raypedu in KVB Puram mandal
- Meet the Kalahasti Dairy cooperative officials

#### Day 3 (16th April, Saturday)

- Meeting with Cooperative Dairy Union leaders at the Centre for Economic and Social Science (CESS), Hyderabad, India

- Participants included

Dr. Srinivasa, Society for Elimination of Rural Poverty (SERP),

Ms Sujata, President, Dairy Development Cooperative, Nizamabad

Mr Srinivas Reddy, Dairy Coordinator, Nizamabad district;

Mother Dairy, Dairy Cooperative Union, Ranga Reddy District.

Krishna District Milk Union;

Vijaya Dairy Trade Union

AP Dairy Development Corporation

APPDDCF Union;

Mr. Subramanyam, Livestock Economist, Prof. Emeritus Centre for Economic and Social Science (CESS), Hyderabad, India

Meeting with Adivasi women and men from East Godavari district, Adilabad, district, Khammam districts of Andhra Pradesh– Anthra Office (total number of participants 15)

#### Day 4 (17th April, Sunday)

- Meet farmers in Village Devamguda Thanda and Chennapur village, Shivampet Mandal, Medak district
- Meet Suguna contract farmers
- Meet farmers who cultivate maize only for poultry markets
- Meet Backyard poultry chicken farmers
- Meet farmers who rear local buffaloes and sell milk in the local market

# LIST OF ABBREVIATIONS

AI	-	Amnesty International
APEDA	-	Agriculture and Processed Food Exports Development Authority
APEDA	-	Agriculture and Processed Food Exports Development Authority
APMC	-	Agricultural Produce Marketing Committees
BITs	-	Bilateral Investment Treaties
CAP	-	Common Agricultural Policy
CCCI	-	Canadian Council for International Co-operation
CEO	-	Corporate Europe Observatory
CESCR	-	Committee on Economic Social and Cultural Rights
CFS	-	Committee on World Food Security
CoS	-	Committee of Secretaries
CSOs	-	Civil Society Organisations
DGFT	-	Directorate General of Foreign Trade
DIPP	-	Department of Industrial Policy and Promotion
EC	-	European Commission
EP	-	European Parliament
ERRT	-	European Retail Roundtable
ESF	-	European Services Forum
EU	-	European Union
FAO	-	Food and Agriculture Organisation
FDI	-	Foreign Direct Investment
FET	-	Fair and equitable treatment
FIIA	-	Foreign Investment Implementation Authority
FPIC	-	Free Prior and Informed Consent
FTA	-	Free Trade Agreement
GIs	-	Geographical Indications
GoI	-	Government of India
HBF	-	Heinrich Böll Foundation
HLPE	-	High Level Panel of Experts
HRC	-	Human Rights Council
HRIA	-	Human Rights Impact Assessments
IBEF	-	India Brand Equity Foundation
ICC	-	International Chamber of Commerce
ICESCR	-	International Covenant on Economic, Social and Cultural Rights
ICRIER	-	Indian Council for Research on International Economic Relations
ICSID	-	International Centre for the Settlement of Investment Disputes
ILO	-	International Labour Organization
IPRs	-	Intellectual Property Rights
LAA	-	Land Acquisition Act
LCIA	-	London Court of International Arbitration
MEP	-	Members of the European Parliament
MFN	-	Most-Favored Nation
MoEF	-	Ministry of Environment and Forests

MPCE	-	Monthly Per-Capita Expenditure
MPI	-	Multi-dimensional Poverty Index
MRAs	-	Mutual Recognition Agreements
NCEUS	-	National Commission for Enterprises in the Unorganised Sector
NDDB	-	National Dairy Development Board
NFHS	-	National Family Health Survey
NMP	-	National Mineral Policy
NSSO	-	National Sample Survey
NT	-	National Treatment
NTBs	-	Non-Tariff Barriers
OBC	-	Other Backward Castes
OMC	-	Orissa Mining Corporation
PAPs	-	Processed Agricultural Products
PDS	-	Public Distribution System
R&R	-	Rehabilitation and Resettlement
RFIA	-	Right to Food Impact Assessment
RIS	-	Research and Information System for Developing Countries
SAC	-	Supreme Court Case
SC	-	Scheduled Castes
SCC	-	Stockholm Chamber of Commerce
SEZ	-	Special Economic Zones
SMEs	-	Small and Medium-Sized Enterprises
SMP	-	Skimmed Milk Powder
SP	-	Special Products
SR	-	Special Rapporteur
SSM	-	Special Safeguard Mechanism
ST	-	Scheduled Tribes
TBTs	-	Technical Barriers to Trade
TNC	-	Transnational Corporation
TRIPS	-	Trade-Related Aspects of Intellectual Property Rights
TRQ	-	Tariff Rate Quota
TWN	-	Third World Network
UN	-	United Nations
UNDP	-	United Nations Development Programme
UPA	-	United Progressive Alliance
UPOV	-	Union for the Protection of Organic Varieties
WMP	-	World Market Prices
WTO	-	World Trade Organisation

