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India's trade agreements and human rights

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- **Background of FTAs:** India's engagement in trade and investment agreements has gone up rapidly since the 1990s. In addition to its engagement in the World Trade Organisation (WTO), which is a multilateral institution, India has been signing a number of bilateral and regional trade and investment agreements, generally referred to as free trade agreements (FTAs).[1] All these impose legally binding commitments and rules with significant impact on people's lives and their human rights (HRs). These agreements cover liberalisation of trade in goods and services and of investment and, in addition, several non-trade issues such as intellectual property rights (IPRs), government procurement, competition policy, and so on. These agreements operate at multiple levels and their scope is becoming more intensive (deeper liberalisation of agreed sectors) and expansive (covering more and more areas) at the same time, impacting several HRs, especially those of economically or socially weaker groups who bear a disproportionate cost from such agreements. All such agreements appear to necessitate a shift of incomes and resources across countries, sub-regions, sectors, gender and social groups, without compensation or adjustment support for those who lose out. The most important impact of such agreements is the loss of governments' policy space to regulate and implement the necessary measures for development and rights of citizens.

- **India's Trade Agreements:** India signed the WTO Agreement, which entered into force in 1995, and in addition has signed about 15 bilateral trade agreements and is negotiating about 15 more, bringing the total to 30. These include agreements with Sri Lanka, Singapore, the Association of Southeast Asian Nations (ASEAN), South Korea, Malaysia and Japan and the South Asian Free Trade Agreement (SAFTA).[2] While the early FTAs were goods-only, India's recent FTAs are all more comprehensive, often referred to as Comprehensive Economic Partnership Agreements (CEPA), Comprehensive Economic Cooperation Agreements (CECA) or Bilateral Trade and Investment Agreements (BTIA) etc. These include goods plus services, investment and IPRs, with standards of liberalisation set beyond the level of commitments at the WTO (WTO-plus).

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- **North-South FTAs:** India had signed mainly with developing-country partners until recently when, in a shift in its trade policy, it started to negotiate and sign agreements with developed countries, which are known as North-South FTAs. The FTA with Japan has been signed, while India is negotiating with the European Union (EU), EFTA, Canada, New Zealand and Australia. Not only are the economic and social development levels of the country parties very different, but these agreements are (will be) much more ambitious, and include most or all of the chapters mentioned above. India is also facing demands to include government procurement and competition policy in the agreement with the EU, and to include e-commerce in the Regional Comprehensive Economic Partnership (RCEP) (see below).

- **Mega FTAs:** In keeping with the recent global trends, India has also joined negotiations on a mega FTA called the Regional Comprehensive Economic Partnership, which, apart from India, includes the ASEAN bloc of 10 countries, plus China, Japan, South Korea, New Zealand and Australia. This agreement attempts to emulate its better-known but now demised predecessor, the Trans-Pacific Partnership (TPP) signed (but not universally ratified) between the US and several Asia-Pacific countries including six RCEP members. The current RCEP negotiations reveal a high level of ambition for most of the chapters mentioned above.

- **Investment Agreements:**[3] India has also signed 83 bilateral investment treaties (BITs) that offer foreign investors strong protection and rights beyond those enjoyed by domestic investors. Most of these agreements include an expansive definition of "investment" and the controversial investor-state dispute settlement (ISDS) clause that allows foreign investors to sue the government in secretive international arbitration tribunals for any "expropriation" of their (even expected) profits. The scope of ISDS includes decisions made by state governments, the legislature and the judiciary and even changes in policy regulation such as on the environment, public health, taxes, natural resource use, rights of specific constituencies and human rights in general. India is currently trying to renegotiate its BITs based on a new model text that puts in some safeguards, and has not automatically renewed 56 of its 83 BITs. It has faced 20 ISDS cases so far and lost all (where decisions have been made) and with multiple cases and awards on the same issues. The ISDS provision is also included in the FTAs along with "market access" (opening specific sectors for foreign investment). ISDS has led to a challenge to policy space worldwide and has chilled policy regulation in critical areas.

- **Provisions in Trade and Investment Agreements and Human Rights:** The following section draws attention to specific provisions in trade and investment agreements and the current and likely future impacts on key human rights.

Right to Livelihood

Chapters: Goods trade, investment
Provisions: Reduction of import duty, restriction on export measures, ISDS clause and expropriation clause

Under the WTO, India is allowed to retain import duties (to protect domestic jobs and encourage production and value addition) of 113.5% on agricultural products and 34.5% on non-agricultural products, but India has itself reduced average duties to 32.7% and 10.1% on agriculture and non-agriculture respectively. India has agreed to cut duties to zero under signed FTAs on 60% to nearly 80% (ASEAN) of its products and is known to be negotiating coverage of 85-95% products with the EU.[4] In the RCEP it is expected to open 80% or more of its products to duty-free imports from partners (while it may try to offer a bit less to China). An increasing trade deficit in goods shows a threat to its industrialisation and job creation. A challenge to agricultural livelihoods is also evident from India's import duty reductions on agricultural products under the WTO, ASEAN FTA and Malaysia FTA.

India's engagement in global value chains, supposedly promoted through its trade agreements, has, while creating some employment, encouraged lax labour laws in its Special Economic Zones (SEZs) and export-oriented industries such as garments, with increased informalisation, casualisation, gender-based wage disparity, volatility of employment and worsening conditions of work (e.g., absence of toilet breaks, lack of maternity leave, risky work environment). Weaker and unorganised workers, for example, women, have borne the brunt of such production systems. Transnational corporations have benefitted by exploiting labour and natural resources in supplier countries including India.

Recent FTA partners such as the EU are insisting on removal of export restrictions (including quotas and export taxes) on raw materials such as minerals and raw products. This will prevent domestic value addition and job creation by threatening access to the raw materials for domestic industrialisation. For example, raw leather in India is subject to a 25% export tax, the removal of which will threaten the domestic leather industry. India also imposes restrictions on export of minerals from a local value addition as well as environmental protection perspective.

Under the investment agreements, foreign investors can sue the government for any change in labour laws that can reduce profits, even expected profits. This can severely undermine progressive labour laws and labour rights in India. The investment provisions coupled with removal of export restrictions on raw materials can thus seriously hamper the prospect of progressive industrialisation and job creation.

Right to Food[5]

Chapters: Goods, investment, services, IPRs
Provisions: Import duty cuts (goods), export measures (goods), subsidies (WTO Agreement on Agriculture), standards (WTO Agreement on the Application of Sanitary and Phytosanitary Measures), protection of FDI in non-agricultural land (investment), liberalising government procurement of food (if India opens up government procurement)

India has committed its agriculture sector under the WTO. Under the commitments, it is expected to limit import duties to some maximum level which will be reduced based on a particular formula. This will reduce protection and policy flexibility to develop key agricultural products and protect farmers' livelihoods. Recently, India has been under pressure to further open up its agriculture sector (reducing or eliminating duties) under the FTAs, for example, under the FTAs with the EU, New Zealand, Australia etc. This will not only threaten domestic production of food but also prevent long-term value addition in the agriculture sector. Projections for the EU-India FTA[6] show huge gains in absolute value and market share for the EU, while India would gain marginal value and no increase in market share in the EU. Being a large country with acute food insecurity, and with the passing of the National Food Security Act, India can ensure food security and the right to food only if it ensures domestic production. India has 8.2 million farmers, many of whom are small and marginal farmers including women farmers; most also meet their own food security by continuing to produce food.

At the same time, Indian food and agricultural exports are blocked off by high non-tariff (standards) and technical barriers, for example through the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.

Further, developed countries such as the US, the EU, New Zealand, Australia and Japan heavily subsidise their agricultural producers, many of which are big agribusiness companies. While they have not reduced these subsidies, India's own subsidies given through the administered price support of the Public Distribution System are being challenged by the developed countries. Though India has fought to retain such essential subsidies to producers for public food programmes, very onerous conditionalities make such subsidies subject to challenge at the WTO. Any effort to limit subsidies to agricultural subsidies to agricultural producers, especially in the continued subsidies of the developed countries, will undermine production, long-term food security and the right to food in India.

The EU is also asking India to eliminate restrictions on export measures under the WTO and the FTA. This could mean India has to eliminate export restrictions on food items in years of shortage, which could threaten food security and the right to food at home.

Under the IPR chapters in FTAs,[7] India is being asked to join international seed breeders' conventions such as UPOV 1991, which will threaten Indian farmers' access to seeds by preventing them from engaging in the traditional practice of freely exchanging, saving (allowed only for subsistence) and reselling IPR-protected seeds.[8]

Under the investment agreements and investment chapters in FTAs, India is allowing foreign investors huge protection, and there has been increased land grab of agricultural land even though foreign direct investment (FDI) in agricultural production is still not allowed in India. Land grabs in the name of mining, industry, ethanol production, agriculture-allied activities (where FDI has been allowed recently) and other activities are leading to severe land shortage for agriculture and food production in India.

Right to Health

Chapters: IPRs, services, others
Provisions: Data exclusivity (IPRs), patent term extension (IPRs), patent linkage (IPRs), enforcement measures (IPRs), services Mode 3 or commercial presence (investment)

The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) has already made patenting of medicines mandatory in India. This is beginning to raise prices and threatening the existence of the generic medicine industry which has contributed to bringing down medicine prices and increasing access to medicines not only in India but globally. The generic medicine industry had developed from a flexible and friendly patent regime in India. The new Patents Act 2005 has changed this.

Nevertheless, the WTO's 2001 Doha Declaration on the TRIPS Agreement and Public Health still affirmed the right to use flexibilities in the TRIPS Agreement to protect public health in developing countries. Now, however, the FTAs are being used by negotiating partners such as the EU, EFTA, Japan and Australia (in the RCEP) to push for higher IPR standards through provisions such as data exclusivity, patent term extension and strict enforcement measures that will force smaller medicine producers to unnecessarily repeat and bear the cost for clinical trials, and pay for patent monopolies for longer terms. Stronger enforcement could criminalise off-IPR production and also punish third-party users such as medical and humanitarian organisations for using generic medicines. Though India has so far refused to agree to TRIPS-plus measures in its FTAs, it is under severe pressure to agree to the same in some of the FTAs mentioned here.[9] IPR standards are also being pushed through the investment chapters of FTAs.[10]

In addition, increased FDI through services trade liberalisation (e.g., in diagnostics and hospitals) is leading to a severe threat to access to healthcare and treatment by raising user fee levels, shrinking access from rural areas (by crowding out public investment), and promoting unnecessary and expensive treatment options (e.g., stents). At the same time, the investment protection provisions can challenge regulation of foreign health service providers. While FDI in the health sector arguably creates overall access, the impact is unequal and often adverse on poorer and weaker segments of the population, for example, women[11] (with significant implication for women's care work), the elderly, those in remote locations etc.

Right to Information and Participation

Undemocratic and Non-transparent Process: Unlike with many of its FTA partners, there is no parliamentary ratification in India of these agreements, and major decision-making is done in the bureaucracy under a nine-member Trade and Economic Relations Committee (TERC) of which most members are not representative of the people. Further, India does not need to consult with state governments even on matters under state or current lists. The process of the FTA negotiations is secret, with limited public consultation with stakeholders and no public access to negotiating texts.

Recommendations:

- Provide for ex-ante and ex-post Human Rights Impact Assessments of trade and investment agreements by an independent commission with the participation of civil society experts.
- Ensure provisions agreed to in trade and investment agreements are in compliance with recommendations of the HR Impact Assessment and do not violate key HRs.
- Introduce parliamentary oversight.
- Conduct consultations with state governments and affected constituencies.
- Make public negotiating texts and HR Impact Assessments.
- Retain policy (economic, social and environmental) flexibility in trade and investment agreements, especially public policy objectives.
- Build process for evaluation of impacts (by independent multi-stakeholder bodies) and to assess and disburse compensation to affected constituencies.
- The government should enforce HRs on behalf of affected constituencies, including assisting in judicial processes (e.g., filing cases on behalf of affected constituencies) and using FTA dispute settlement mechanisms, against violators including foreign investors and foreign corporations that use trade agreements to do so.

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