SPECIAL ECONOMIC ZONES (SEZS) AND LAND ACQUISITION: "AN ECONOMIC ANALYSIS"

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ABSTRACT

The coming of the Special Economic Zones (SEZ) in 2005 has led to widespread compulsory acquisition of land under the doctrine of "eminent domain" and has eventually led to the displacement of millions of people that has impoverished their traditional means of livelihood. The basic aim of the term paper is to define the functioning of SEZs; analyze the changes and subsequent amendments in the land acquisition act, and to do a economic analysis of the factors such as the doctrine of eminent domain, the notion of "public purpose", protection of entitlements, transaction costs and the problem of hold-out involved in the process of land acquisition.

INTRODUCTION:

The process of land acquisition in the name of intensifying development has generated widespread concerns across the country. It is important to note that the process of land acquisition was based on the traditions and legacy of the colonial past. The notion of "public purpose" around which the land is acquired remains unclear and problematic. In the process of acquiring land, the power of the government becomes overwhelming as there is no clear stated purpose for acquiring land. As the purpose of acquiring land is unclear, it has widened the scope for the state to acquire land for all purposes. Thus, land has been acquired for "housing colonies, 'ashrams', manufacturing enterprises, entertainment establishments, service industries, etc." (Morris and Pandey 2007:2087).

The compulsory acquisition of land is facilitated by the government under the doctrine of "eminent domain". "Eminent domain (ED) is the legal right to acquire property by forced rather than by voluntary exchange" (Munch 1976:473). This process curtails the rights of the

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landowner to condemn the compulsory acquisition of land and they often remain undercompensated. The coming of the Special Economic Zones (SEZ) in 2005 has led to widespread compulsory acquisition of land under the doctrine of "eminent domain" and has eventually led to the displacement of millions of people that has impoverished their traditional means of livelihood. The basic aim of the term paper is to define the functioning of SEZs; analyze the changes and subsequent amendments in the land acquisition act, and to do a economic analysis of the factors such as the doctrine of eminent domain, the notion of "public purpose", protection of entitlements, transaction costs and the problem of hold-out involved in the process of land acquisition.

In order to understand the process of land acquisition, it is important to understand who the stakeholders are and what are their respective interests? For this purpose, the stakeholders are classified into three categories: the first category of stakeholders are the land losers and in the first place their basic aim is to prevent the land from being acquired. However, if the land acquisition seems inevitable, then they claim for getting compensation which is equivalent to the value of the land and the assets lost. The second stakeholders are the developers who are interested in acquiring land in as little a time as possible and at the least possible cost. The third stakeholder is the government who justifies acquisition under the doctrine of eminent domain.

The coming of Special Economic Zones (SEZ) in 2005 was crucial for the development of economy as it laid stress on export maximization and creation of employment opportunities. Apart from its effects on economy, the policy of SEZ has led to the displacement of millions of people and has impoverished their traditional means of livelihood. It has worked on what David Harvey calls "accumulation by dispossession", where dispossession becomes an inherent necessity for accumulation of capital necessary for the process of development and growth. Accumulation by dispossession can be interpreted as the necessary cost of making a successful breakthrough into capitalist development with the strong backing of the state power. The cost of making this transition is associated with problems especially for those affected or dispossessed, as it involves compulsory parting of land if the government has the intent to acquire on the grounds of public purpose. Resistance to it can only be negotiable in terms of receiving fair compensation and rehabilitation. The dispossessed have to make the involuntary or voluntary transition into the new mode of capitalist production relation as semi-skilled or unskilled workforce. The parting away with land can have complex impact on

the traditional way of life of the dispossessed i.e. landowners and those depended on land for their survival

DEFINING THE CORE ELEMENTS OF SPECIAL ECONOMIC ZONES (SEZs) POLICY:

Special Economic Zones (SEZs) can be described as establishing a legal framework for the creation of geographic areas governed by a distinct regulatory regime – where taxes and bureaucratic burdens on business activity, especially the development of export infrastructure are substantially reduced (Jenkins 2014:2). One of the primary aims behind the development of SEZs was to create incentives for the private sector to invest in the "creation of world-class infrastructure – automated port facilities, fibre-optic networks, uninterrupted electricity supply"- that would eventually lead to export growth and job creation (Jenkins 2014:3). SEZ is divided into two areas where one segment of the area is devoted to the "processing area" for the development of export oriented business activity and the other segment is devoted for the construction of "ancillary commercial or residential purposes".

The development of SEZ policy is India is not a recent trend, it can be traced back to the development of export processing zones during the 1960s. India first Export Processing Zone (EPZ) was developed in Kandla in 1965. It was completely dependent on the USSR for its export market under bilateral trade agreements. Furthermore, the coming of SEZ in Santa Cruz, Maharashtra became an important hub for electronics, software engineering and gems and jewellery industries. In order to enhance and promote the policy for imports, the central government revised guidelines in 1994 that led to a huge influx of EPZs in the late 1980s. This led to opportunities for greater private-sector involvement in the establishment and operation of EPZs. SEZ policy in India was formulated by the visit of the then Commerce Minister, Murasoli Maran to China in 2000. The commerce minister got impressed by China's SEZ policy and thus, initiated a change in India's policy regime. This led to the creation of Export-Import (Exim) Policy, which allowed conversion of existing EPZs into SEZs. The main difference between Export Processing Zones (EPZs) and Special Economic Zones (SEZs) was that EPZs were mainly industrial estates where as SEZs comprised of a small township that included all the facilities like housing, hospitals, schools, commercial and recreational developments. Another difference between EPZs and SEZs is related to governance. SEZs were designed to operate on the principle of "self-certification" which was

based on tax-exempt business, whereas EPZs required “official attestation to formally verify attestation”.

SEZ act was passed in 2005 by the United Progressive alliance coalition government. The prime consideration for the formulation of SEZ Act, was to attract investment in the development of export-oriented infrastructure. The prime strategy behind it was to enhance growth and increase employment opportunities .There were wide array of incentives for the developers, for instance, “firms were offered corporate income-tax deductions on 100 per cent of profits from exports for the first five years of operation within an SEZ; 50 per cent of profits from exports for the following five years; and up to 50 per cent of profits for a further five years” (Prabhu 2009:43).

Special Economic Zones (SEZs) can be classified into three types: Multi-product SEZs occupying a minimum 1000 of hectares of land for the production of products that ranges from garments to automobiles; Sector-specific SEZs occupying minimum of 100 hectares of land in which mainly leather and electronics production takes place; IT-BPO and Biotech SEZs occupying a minimum of 10 acres of land in backward States such as Assam, Meghalaya, Mizoram, Manipur, Tripura, Himachal Pradesh, Uttaranchal, Sikkim, J&K, Goa and the UTs. Furthermore, the firms functioning within SEZs were exempted from the need to acquire licences to import capital goods or raw materials. The task for developing Special Economic Zones (SEZ) was left open to state governments, private developers or could be managed by developing a strategic partnership between the two (Singh 2009:34).

The process of evaluating proposals to establish SEZs takes place via a ‘single window’, an inter-ministerial Board of Approval (BoA), chaired by the ministry of commerce and industry (MoC&I) in New Delhi. The guidelines that function as the fundamental basis of BoA have been revised since its inception since 2006.The process for approving the inclusion of business units within an SEZ is undertaken by an Approval Committee that is headed by a development commissioner (DC), a senior civil servant by the Government of India (GoI). The Approval Committee also includes representatives of the customs authorities. After the establishment of business units, further decision-making is centralized in the hands of the Development Commissioner (DC). The Approval Committee has entrusted with the task of monitoring the performance of business units within the SEZ and can register violations pursuant to the Foreign Trade (Development and Regulation) Act. In some states such as Gujarat, SEZs are managed by a ‘Development Committee’ which includes the corporate

developer, the DC and a representative of the State government. The role of the DC in Section 11 of the SEZ Act is fundamental in the functioning of the administrative machinery that governs SEZs establishment and operation. Section 21 and 22 of the Act provide additional powers to the DC that limit the ability of state governments to carry out normal law and order functions within SEZs. Section 22 entrusts DC with enormous powers, for instance, without the consent of the DC, no investigation, search or seizure shall be carried out in a SEZ by any agency or officer, with the exception of certain violations of national law. Section 23 empowers state government to establish special courts to adjudicate civil cases. SEZs are exempted from the provisions of the 74th Amendment, which provides for popular participation in municipal governance through the election of local representatives.

LAND ACQUISITION LAWS: A CRITICAL PERSPECTIVE

Land Acquisition Act 1894: Since Independence, India has followed the policy of land acquisition that claims its reminiscence from colonial rule which had no provisions for the rehabilitating the displaced people. The Land Acquisition Act 1894 (LAA) was based on the doctrine of "eminent domain" which empowered the state to acquire land for the purposes of general good. It clearly mentioned that "acquisition for companies is restricted to only those activities from which the public can benefit directly"(Singh 2012:2). However, there is a misuse of the provisions of the "eminent domain" by the state government as they have taken advantage of the emergency clause which allows for easier acquisition of land. There have been abuses of the land acquisition laws, for instance, acquisition of land citing some public purpose but covertly diverting it to private ends; adoption of the pick and choose method for selecting a project site; and, the use of the denotification clause to exempt land belonging to the powerful but simultaneously acquiring all neighbouring properties (Singh 2012:2). It is important to note that the process of providing compensation under the Land Acquisition Act, 1894 suffers from a major lacuna as the basis of deciding the value of land is based on circle rate[i] or the sale deed of a similar kind of land. The compensation that they receive is based on the circle rate and is devoid of the existing current market price which is well above the circle rate set by the government. Moreover, in order to save money on stamp duty charges, the price mentioned in the sale deed is extremely below the actual transaction cost. Therefore, both the circle rate and the value of the land as mentioned in the sale deed are to a large extent below the current market valuation of the land. The disjuncture between the circle rate and the sale deed has led the judiciary to intervene and has stated the valuation of land should

be based on either circle rate or sale deed, whichever is higher. The land acquisition collectors (LAC) have ultimately violated the recommendations of judiciary and have awarded compensation to the affected on the basis of circle rates. Therefore, the different basis for determining compensation has led to extensive litigation among the affected. It was based on involuntary acquisition of land and thus rendered the displaced population landless and jobless.

In 1984, the Land Acquisition Act witnessed significant amendments that rendered the role of the state as a facilitator in transferring the land to private players. In 2005, Special Economic Zones Act (SEZA) was introduced in which state gave multiple incentives in the form of tax and non-tax concessions to private players for the purposes of enhancing development. Thus in the context of enhancing growth, it has dispossessed millions and millions of population This has led to an escalating demand to replace the LAA, 1894 with a law that recognises the perils of mass displacement, accounts for those who have been dislodged and dispossessed through the decades, restrains companies from benefiting from involuntary acquisition and forced eviction, and reconsiders a model of development that could demote agriculture and, consequently, threaten food security (Ramanathan 2011:11).

Land Acquisition Rehabilitation and Resettlement Act 2011: In 2007, the UPA government introduced the Land Acquisition (Amendment) Bill, 2007 and a separate bill for Rehabilitation and Resettlement (R&R Bill). The Land Acquisition (Amendment) Bill, sought the creation of Social Impact Assessment (SIA) for any land acquisition that would result in large scale displacement.. The Bill also sought the formulation of a Land Acquisition Compensation Disputes Settlement Authority in Delhi and in other states. Both the bills got passed in the lower house of the Parliament but remained pending in the upper house and eventually elapsed in the wake of the general elections in 2009. Later on, the Land Acquisition Amendment Bill and the Rehabilitation and Resettlement Bill were merged into one piece of legislation: the LARRB, 2011.

In the words of the then Minister for Rural Development, Jairam Ramesh, “Infrastructure across the country must expand rapidly. Industrialisation, especially based on manufacture, has also to accelerate. Urbanisation is inevitable. Land is an essential requirement for all these processes.” Having set these out as priorities which the law is to adopt, it is then said: In every case, land acquisition must take place in a manner that fully protects the interests of

landowners and also those whose livelihoods depend on the land being acquired (Ibid:11). This clearly states that the foreword of the LARR bill right from the beginning suffered from a major lacuna as it accorded priority to the processes of urbanisation and industrialisation.

Ram Singh argues that the LARR bill completely "ignored the causes behind excessive litigation over compensation"(Singh 2012:1). The compulsory acquisition of land gives way to litigation as the only resort to defy the provisions of land acquisition. However, litigation as a means to counter the compulsory acquisition of land is inherently a tool in the hands of the rich as they have the resources and as a result it leads to unfavourable implications for the poor. The process of litigation is socially regressive as it is much more profitable for the owners of the relatively high value properties than for those owning low value properties (Singh 2012:3).

Land Acquisition Ordinance, 31st December 2014: As compared to the LARR Act that was enacted after a long period of discussion and consultation, the ordinance was bought in a haste that removed some of the important provisions brought in by the LARR Act. It omitted the requirements of Social Impact Assessment, the informed consent of affected families, lifted ban on the use of multi-irrigated land and the retrospective clause for a wide range of projects such as those vital to national security and defence, rural infrastructure, affordable housing and housing for the poor, industrial corridors and PPPs.

PROTECTION OF ENTITLEMENTS:

The policy of SEZs suffers from the lacuna of dispossessing the livelihood of people dependent on land and has led to widespread unrest and protest movements. Therefore, the primary aim is to protect the entitlements of the dispossessed persons. There are three kinds of entitlements; "entitlements protected by property rule, liability rule and inalienability rule" (Calabresi and Douglas 1972:1092). Property rule works where transactions are voluntary in which the value of entitlement is agreed upon by the seller. Liability rule is applied in cases where transactions are compulsory as it violates the initial entitlement of the dispossessed and in order to protect the entitlement the role of the state is crucial. Under inalienability rule, the state intervenes in order to forbid the transaction between the buyer and the seller. The working of the SEZs is based on the entitlements protected by liability rule. The enormous power of the state to acquire land under the garb of "eminent domain" in turn leads to the protection of the entitlements based on liability rule. In other words, state has the power to

acquire land, this in turn justifies that the state has the liability to protect the entitlements of the dispossessed. The process of land acquisition leads to the infringement of the initial entitlement of the landowners, therefore in order to protect the entitlement under the liability rule the dispossessed are compensated for the loss of entitlement. In this process, the role of the state is important in protecting the entitlements of the dispossessed.

ARE TRANSACTION COSTS PARETO-OPTIMAL?

The process of land acquisition is economically distorted as the transaction costs involved in it violates the core principle of being Pareto Optimal. The core principle of Pareto Optimal works on the basis of a set of entitlements which would lead to that allocation of resources which could not be improved in the sense that a further change would not so improve the condition of those who gained by it that they could compensate those who lost from it and still be better off than before (Calabresi and Douglas 1972:1094).

PROBLEM OF HOLD-OUT AND HIGH TRANSACTION COSTS:

One of the main problems that give rise to the interference by state is the hold-out problem. The problem of hold-out arises when one or significant number of land owners are not willing to sell their land to the developers. In order to extract more compensation from the developers, the landowners hold-out their respective lands. This situation indeed gives rise to the interference by state under the ambit of "eminent domain". "Under eminent domain, the state takes over the land and hands it over to the new owner for the socially beneficial activity"(Morris and Pandey 2007:2083). At the end, it is the landowner who suffers from the compulsory acquisition of land and it is the developer who benefits from the entire process of compulsory acquisition of land. Thus, the compulsory acquisition of land is based on liability rule in which state acts as a mediator.

Instead of compulsory acquisition of land, there is a need to facilitate transfer of land through voluntary transactions. There are certain instances, where transaction of land has been based on voluntary acquisitions in certain parts of the country such as Special Economic Zones in Gurgaon have bought several acres of land directly from the landowners; Kakinada SEZ in Andhra Pradesh have bought 4,800 acres of land; GMR group in Chhattisgarh have also adopted the mechanism for voluntary transaction. These examples show that the seller hold-

out is not inevitable even for large projects, provided a facilitating environment is created; arguably, voluntary transactions are much more likely to succeed for small projects and those that have flexibility over location (Singh 2012:5).

However, land acquisition based on voluntary transactions that is protecting the entitlement under property rule suffers from two serious limitations. First, the voluntary transaction between the buyer and the seller can lead to serious implications for those depended on land for their survival, for instance, sharecroppers, daily wage agricultural labourers and artisans. Thus, in order to protect the interests of those depended on land, the state can make provisions where the buyer can be made to compensate for their loss. The provisions for protecting the entitlement of those depended on land have been adopted in the recent Land Acquisition Rehabilitation and Resettlement Act (LARRB) Act, 2013. The act has inserted two words Rehabilitation and Resettlement that extends to provide compensation to those whose livelihood is dependent on land. Second, there are certain structural constraints which prohibit the developers from acquiring large tracts of agricultural land for non-agricultural use. The developers in order to proceed the case for voluntary transaction of land have to get what is called change-in-use clearance (CLU) from the state government or the local authorities concerned. Similarly, land ceiling regulation limits the size of the land to be owned by the developers. Therefore, such structural constraints increases the transaction costs for the developers and in such circumstances, it becomes compelling for the state to intervene under the veil of "eminent domain" and ensure the acquisition of the land for the developers. The developers highly benefit from the abuse of the provisions of "eminent domain" as the interference by the state lowers the transaction costs of the land by compulsory acquisition of the land.

According to Ram Singh, the "transaction costs of direct purchases can be reduced greatly if the ownership and land type records are clear and verifiable" (Singh 2012:5). Thus, in order to make transaction fair and efficient, there is a need to digitalise land records related to ownership and type of land. In addition to lower the transaction costs, there is a need to encourage collective bargaining among the landowners. For example, "more than 1,000 farmers from Avasari-Khurd villages along the Pune-Nashik highway pooled about over 2,665 acres to form a special purpose vehicle to set up a multi-product SEZ"(Singh 2012:6). Instead of alienating the landowners from the process of development, there is a need to incorporate farmers as stakeholders in the process of development.

RESTRICTIONS ON THE USE OF LAND:

There are certain factors such as zoning and land use restrictions that depress the price of agricultural land. The process of zoning is facilitated by the government in order to restrict the use of land for the purposes of development. In addition to this, there are several restrictions imposed by the government on the private development for using agricultural land for non-agricultural purposes. In order to use agricultural land for non-agricultural purposes, it is mandatory to get non-agricultural use clearance (NAC) from the respective local or state government. The onus of getting clearance from the local or state government rests with the buyer who wants to own the land for the purpose of non-agricultural use. "Therefore, the farmer cannot benefit the value accretion that arises out of the probability of its use in non-agriculture even when no taking is involved"(Morris and Pandey 2007:2085). It thus bestows enormous incentives to the buyer at the cost of the farmer who traditionally owned the land and is significantly against the interests of the farmer. The Special Economic Zones Act 2005 has amended this provision of clearance by incorporating the provision of prior regulation of land and its use. However, the developers takes the advantage of SEZ act by acquiring huge tracts of lands that remains unutilised for years to come.

Apart from this, another factor which leads to the undermining of the price of agricultural land is the ban on the purchase of agricultural land by people other than farmers. This system distorts the price of the land as there is no incentive of selling land at a higher price to people other than farmers. The urban-rural divide is accentuated by such restrictions, and clearly the farmers are most hurt by these restrictions, and builders and other land developers with connections with the decision-making authorities, to make regulatory arbitrage work in their favour are the gainers (Morris and Pandey 2007:2086). According to Ram Singh, "these regulations preclude a large number of potential transactions, and put heavy downward pressure on the transaction prices"(Singh 2012:2).

INFRINGEMENT ON NEGATIVE LIBERTY:

According to Isaiah Berlin (1969), there are two types of liberty: positive liberty and negative liberty. Positive liberty can be described as the freedom to achieve something for instance, freedom to vote where as negative liberty is the freedom from interference for instance, A has the right over his land and is subject to non-interference from others. The state under the ambit of "eminent domain" interferes with the negative liberty of the landowners and thus in

order to compensate for the loss of liberty it provides compensation with the claim of enhancing the positive liberty. In order to enhance the positive liberty of the affected, it is important that the compensation should be fair that is, to say, it should be based on the current market price of the land. As noted earlier, the basis of providing valuation of the land is determined on the circle rate which is extremely below the market valuation of the land.

FORMULATION OF A MARKET-BASED MECHANISM FOR COMPENSATION:

In order to remove the implications of compulsory acquisition of land under the doctrine of "eminent domain", there is a need to devise a market-based mechanism for compensation in the form of a Special-Purpose Development Corporation (SPDC). An SPDC would acquire unified ownership of the land and the development project, and would offer the "affected people" a choice between receiving pre-project "fair market value" compensation or pro rata shares in the SPDC. This would make it more likely that compensation is closely linked to the true economic value of the land and, consequently, that land assembly projects are both more just and genuinely social welfare maximizing (Lehavi and Lichet 2007:1704). Thus, it offers the affected landowners a choice between receiving either pre-project compensation or shares in the SDPC. It tries to uphold a market based mechanism for ensuring free and fair compensation to the landowners.

CONCLUSION:

In order to make the process of land acquisition efficient for the displaced, it is necessary on the part of the state either to clearly define the "public purpose" for which the land is being acquired or to make provisions for the dispossessed so that they can challenge the notion of "public purpose" in the court. For instance, America has not defined the "public purpose" for which the land is being acquired but has provisions for challenging the notion of "public purpose" in the court of law. Thus, the role of judiciary in the form of judicial review of the compulsory acquisition of land is important to ensure a just and efficient transaction for the affected. Moreover, the state has to take initiative in order to lower the transaction costs for the developer that in turn will facilitate voluntary acquisition of land. In recent past, we have witnessed that the competition between the states has intensified in order to attract huge investment in the form of developing SEZs. The central government need to take hold of the rising competition among the state in order to ensure a free and fair land acquisition. In the

purpose of the introduction of smart cities and making India a manufacturing hub, the central government has sought to introduce easier norms for the land acquisition process in order to attract huge investment from the private players. It remains to be seen to what extent it can address the economic and social concerns of the people affected. Thus, in order to overcome the problem of high transaction costs and "hold-out" there is a need to develop an efficient land market system that is devoid of the existing unnecessary restrains that restricts the fair valuation of the land.

ABBREVIATIONS:

CLU: Change-in-use clearance

EPZ: Export Processing Zones

LAA: Land Acquisition Act

LAC: Land Acquisition Collector

LARRB: Land Acquisition Rehabilitation and Resettlement Bill

R&R Bill: Rehabilitation and Resettlement Bill

SIA: Social Impact Assessment

SEZ: Special Economic Zones

SPDC: Special-Purpose Development Corporation

UPA: United Progressive Alliance

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[i] Circle rate is the minimum rate of the land set by the government. Circle rate is not based on the current market valuation.