LAND ACQUISITION FOR SPECIAL ECONOMIC ZONES IN INDIA

A Thesis
Submitted to
the Temple University Graduate Board

In Partial Fulfillment
Of the Requirements for the Degree
MASTER OF ARTS

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January, 2011

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This study is an exploration of land acquisition for Special Economic Zones (SEZs) in India. Land acquisition has become one of the most well known problems confronting the SEZ policy and other policies that encourage private investment in infrastructure. Land acquisition for SEZs has caused widespread popular mobilizations and resistance, which have in turn led to cost overruns, delays, and project failures. This study examines India’s land acquisition framework, particularly the evolution of the Land Acquisition Act 1894, in order to understand the factors contributing to acquisition problems when the state uses its power of eminent domain, as well as when private developers attempt to acquire land through consensual market transactions. It uses two SEZs spanning over 14,000 hectares of land near Mumbai—Navi Mumbai SEZ and Mumbai SEZ—as cases through which to examine the land acquisition process.
I wholeheartedly thank all of the members of the department of Geography and Urban Studies for their support during my studies at Temple University. However, I owe particular thanks to Professors Benjamin Kohl and Sanjoy Chakravorty. Ben, of course, is the reason I ended up at Temple University, and he continued to provide a constant source of support while I was here. Even before he was my thesis advisor, Sanjoy helped me to hone many of the ideas that eventually became part of this paper. I have benefitted tremendously from his encouragement to explore a variety of literature; his willingness to offer his frank opinion; and his patience. Finally, I would like to thank Patrick for enduring the writing process with me with good grace, unwavering enthusiasm, and relentless encouragement.
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Before the law stands a doorkeeper. To this doorkeeper there comes a man from the country and prays for admittance to the Law. But the doorkeeper says that he cannot grant admittance at the moment…

These are difficulties the man from the country has not expected; the Law, he thinks, should surely be accessible at all times and to everyone, but as he now takes a closer look at the doorkeeper in his fur coat, with his big sharp nose and long, thin, black Tartar beard, he decides that it is better to wait until he gets permission to enter. The doorkeeper gives him a stool … Franz Kafka, Before the Law.
CHAPTER 1

INTRODUCTION: THE LAND PROBLEM IN INDIA

India’s economic growth is high on the agenda of investors throughout the world. Slogans such as “Shining India,” “Global Power India,” and “China was yesterday, India is today,” as well as countless references to the BRICs (Brazil, Russia, India, and China) in financial news illustrate the manner in which India’s economic development captures the imagination of foreign and domestic investors alike. These slogans reflect a number of contemporary visions, such as creating glittering, “world class” infrastructure and “modern” urban living that rivals that of Dubai or Shanghai; exploiting the market potential of India’s swelling middle class and its material aspirations; and realizing expectations of India’s future dominance in the world economy.

These visions are buttressed at the level of policy by the broad but halting steps India has taken away from a paradigm of protectionism and economic self sufficiency supported by state-owned industry towards a more liberalized paradigm of export oriented growth, less restrictive government regulations on business and investment, and deeper levels of market integration. The first steps towards economic liberalization began explicitly in 1991, but liberal economic reforms have roots that extend back at least to the mid-1980s. India’s policy for the development of Special Economic Zones (SEZs), duty free enclaves considered foreign territory for trading purposes, form part of the second generation of economic reforms through which India is seeking to facilitate the development of privately funded infrastructure, to increase exports and foreign direct
investment (FDI), and to become more globally competitive by dismantling regulatory constraints.

### Table 1.1. The Indian Political Landscape: Land and the “Million Mutinies”

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The transition to a more liberal economic paradigm has been turbulent, and has inspired a number of competing discourses, slogans, metaphors and visions. These discourses sit uneasily with the discourse driving the creation of Shining India. Critical of the nature and trajectory of India’s economic development and its focus on export-led and market-oriented economic growth, they consider Shining India to be exploitative, exclusionary, and in the words of journalist Kalpana Sharma, “built upon the corpses of the poor” (cited in UN-Habitat, 2006, p. 24). The manner in which competing interest groups approach the ends and means of economic development has led to sustained and at times explosive conflict, the “million mutinies” of the Indian political landscape since Independence (Citizens’ Research Collective, 2009). Many of these “million mutinies” have land acquisition for development at the crux of the conflict (see Table 1.1, above).

Land acquisition has become the most problematic aspect of the SEZ policy, inciting popular mobilization, political and legislative backtracking, and widespread violence. These protests have in turn created delays, uncertainties, risks, and sometimes project failures for developers and investors. The policy has been characterized as a veil for real estate speculation, India’s great gold rush, developmental terrorism, Special Exploitation Zones, and a case of accumulation by dispossession (Banerjee-Guha, 2009; 2008; Ananthanarayanan, 2008; Bhaduri, 2005). The violence, mutual mistrust, suspicion, and speculation engendered by the SEZ policies are most commonly represented by the bloody confrontations at Singur and Nandigram, the specter of which colors many of the protests against land acquisition for SEZs (Fernandes, 2007). Activist NGOs, other civil society organizations, and politicians have often wielded the violence of Singur and Nandigram as an open threat or bargaining chip against SEZ developers
The drama has played out on a field of opportunism in which rhetoric and reality are mutually mediating and difficult to untangle. Rajan Tata, in a letter to the citizens of West Bengal after the Singur incident asked whether “they would like to support the present government of Mr. Buddhadeb Bhattacharje to build a prosperous state with the rule of law, modern infrastructure, and industrial growth,” or whether they would prefer to see West Bengal “consumed by a destructive political environment of confrontation, agitation, violence, and lawlessness” (cited in Alfaro & Iyer, 2009, p. 12)?

Figure 1.1 The Threat of Another Singur or Nandigram

The problem underlying the protests is an uncertainty about the appropriate role of the state in economic development, particularly regarding the state’s identification of a public purpose in the development of SEZs, a policy that conceptualizes India’s
economic development goals as being best facilitated by private enterprises. The second problem relates to the appropriate role of the government in solving land transaction problems between two private parties: should the government intervene and use its power of eminent domain to allow the private entity to bypass the market or should private entities cope with land assembly problems using other methods of facilitating consensual market transactions? When the state has stepped in and used its power of eminent domain to acquire land with the intent of transferring it to private developers, landowners, civil society organizations, and political parties have objected. They have claimed that these public-private transfers misuse the public purpose requirement necessary for the legitimate exercise of eminent domain. They have also claimed that the compensation paid has been inadequate for the rehabilitation of people affected by the project, particularly those who are dependent on the land for their livelihood.

The land problem itself encompasses these more specific issues. As conceptualized in this paper, the land problem broadly conceived is the result of many of India’s current political and socio-economic realities: population increases and other demographic changes that have led to increased pressure on rural land; a rapid flow of migrants from rural to urban settings who must find jobs and homes; an escalating private demand for land facilitated by economic reforms that emphasize private investment in infrastructure and industry; and competing ideas about the value of land and its highest and best use.

The chapters that follow endeavor to explain one aspect of land problem: the interaction of the political, socio-economic, and legal factors underlying the conflict surrounding land use change and land acquisition through eminent domain and
consensual market transactions in the case of Indian SEZs. As such, the economic policies of liberalizing India, the legal and regulatory framework in which they operate, the institutional foundations on which they were imposed, and the social and political milieu in which they currently operate form a suggestive explanatory nexus in this paper. These external explanatory factors—economic, demographic, political, and legal—are also matched by equally important internal or subjective factors such as the valuation of land and the uneven internalization of the values inherent in liberal economic policies.

Purpose and Methodology

This paper is an exploratory case study of land acquisition for SEZs in India. Its purpose is to examine India’s laws and policies relating both to property rights and to the compulsory acquisition of land through eminent domain in order to understand the causal mechanisms at work in the protests and problems SEZ development has encountered since 2005, the year the SEZ Act became law. It contextualizes the analysis of the laws and policies related to land acquisition and SEZs by embedding them in the larger context of a nation liberalizing its economic policies. It uses the current debate on SEZs to determine how “…the creation of SEZs to attract investment from abroad was to create islands of ‘free enterprise’ in a sea that is still largely embedded in past policies…” and politics (Raja, 2008, p. 756).

This case study employed a flexible methodology reliant on meta analysis. The purpose of employing meta analysis in exploratory research was to obtain a clearer picture of the socio-economic, political, and legal / regulatory mechanisms at play in land acquisition for SEZs, which might be obscured by more narrowly bounded studies. It also provided a beneficial level of detachment from which to discern the discourses of the
large number of stakeholders who are directly involved or who have inserted themselves into the SEZ debate. The mixed methods used include qualitative, semi-structures interviews with key stakeholders in the SEZ debate, including academics and activists actively involved in research and resisting SEZ development; analysis of written and unwritten data that included archived material, newspapers, academic studies, social impact assessments, pamphlets, and digital media; and unstructured participant observation at a meeting of representatives from a variety of civil society organizations involved in a participatory auditing process of SEZ development. The methods also include a detailed analysis of laws related to land acquisition and SEZ development, the Land Acquisition Act 1894 and the SEZ Act 2005 and Rules 2006, which is supplemented with case law in order to provide details on how interpretations of the law have changed over time.

The use of mixed methods helped to fill in many data gaps created by the lack of an easily accessible and accurate record of land transactions data in India and a comprehensive database of cases detailing the government’s use of its eminent domain power to acquire land. In addition, because SEZ development is carried out by private developers whose business plans are not public, it was more difficult to access informants from the developer’s side of the debate than it was to access academics and activists. The inclusion of law and policy analysis and archival research helped to correct this information imbalance. Finally, the legal analysis of the concept of property rights in the Indian Constitution and the use of case law to create a history of the public purpose debate helped to fill in many of the holes in the SEZ story. Because the issue is so explosive in the Indian discourse, many stakeholders and commentators have rigid
agendas. In the service of these agendas, distorted and often incorrect information disguises itself as fact. The legal analysis helped to mitigate some of these misunderstandings, and provided a platform to for exploring how the perception and interpretation of the law plays a role in the SEZ debate.

Significance

While this study focuses on land acquisition for SEZs in India, and is therefore dependent on social, political, and economic institutions that are specific to India and its history, the problem it addresses has relevance at a larger scale. The economic policy changes associated with economic globalization and its attendant social and political changes are not unique to India. Many countries throughout the world have devolved economic and fiscal responsibility to states and municipalities, which are reacting to the intense competition by offering fiscal and regulatory incentives. SEZs are only one such way that governments can incentivize investment by private companies at the national, state, and municipal levels, and can be interpreted in tandem with other programs such as urban reinvestment and renewal or slum clearance or rehabilitation through mechanisms such as public-private partnerships.

Land acquisition, land use change, and the appropriate role of the government in dealing with land transactions issues are also not unique to India. The recent resurgence of interest in the public purpose debate in the United States in the wake of the 2005 Supreme Court ruling that economic development constitutes a legitimate public purpose is a case in point. The debate in the U.S. is similar to the one taking place in India, from the media furor to the rush of state-sponsored legislation banning the use of economic domain for economic development that occurred after 2005 ruling. While it is important
not to overemphasize the similarities between the two cases—as it is possible to make comparisons between India and any number of countries—it is beneficial to draw on perspectives from other countries with different institutional settings. The majority of the law and economics literature that theorizes about the public purpose debate and public-private transfers is based on U.S. institutions. To the extent that I am able to do so, I draw together legal and economic theories from the U.S. institutional setting and apply them to the case of land acquisition for SEZs in the Indian institutional setting. While I make no claims to have exhaustively or explicitly tested many of these theories, it would be irresponsible not to clearly recognize that it is important to do so in order to more fully understand what is happening in the developing world.

Organization

This paper is organized as follows: The second chapter examines the law and economics literature to explore theoretical justifications for eminent domain and the debate surrounding public purpose and just compensation, particularly as it applies to public-private transfers. The third chapter begins by examining the concept of property in the Indian Constitution before narrowing its focus to the law used in the routine acquisition of land in India, the Land Acquisition Act 1894. The forth chapter begins the discussion of land acquisition for Special Economic Zones, focusing on the laws governing SEZs in India, the SEZ Act 2005 and Rules 2006. The fifth chapter removes these policies from the realm of theory and presents the details of the paper’s case studies: the Mumbai and Navi Mumbai SEZs located in Raigad district in the state of
Maharashtra. Finally, the sixth chapter summarizes insights and conclusions drawn from this study.
CHAPTER 2
THE POWER TO TAKE

Eminent domain is “the legal right to acquire property by forced rather than by voluntary exchange” (Munch, 1976, p. 473). Along with taxation and police power, it is one of three powers comprising the sovereignty of the state, all of which impinge on the right to private property and which assume that there are social interests greater than the “social interest in personal liberty” (Jain, 1968, p. 727). Throughout history, various explanations have been offered for the takings power. Civil law scholars such as Hugo Grotius took the position that the sovereign state possessed original ownership of property. In this view, individuals owned property by virtue of state grants that could be revoked at any time the state decided to resume its ownership. Natural law theorists have argued that eminent domain is an inherent and essential part of sovereignty, while others have argued that the existence of the takings power hints at persisting remnants of royal privilege that existed in feudal society (Dukeminier and Krier, 1993, p. 1143).

In many sovereign states, the government’s ability to use the power of eminent domain to acquire property is curbed by constitutional provisions that stipulate that private property may be compulsorily acquired only for “public use” or “public purpose.” The public purpose rationale underlying the takings power rests on the maxim

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1 In this chapter and in the remainder of the paper the terms eminent domain, compulsory acquisition, and takings are used interchangeably.
2 Hugo Grotius, credited with coining the phrase “eminent domain,” wrote in *De Jure Belli et Pacis* (cited in Jain, 1968, p. 99): “The property of subjects is under the eminent domain of the State, so that the State or who acts for it may use and even alienate and destroy such property, not only in the case of extreme necessity, in which even private persons have a right over the property of others, but for the ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But it is added to that that when this is done the State is bound to make good the loss to those who lose their property.”
3 The exact language comes from India and the United States, respectively.
salus populi est suprema lex, meaning that the welfare of the people is the paramount law, and also on the maxim necessitas public major est quam privata, which means, “public necessity is greater than private.” The “public purpose” requirement is read to mean that the government may not take land for “private” purposes even with the payment of compensation. It is clear from this reading that the adoption of a narrow as opposed to a broad view of public purpose may significantly circumscribe or expand the reach of eminent domain power. A third guiding maxim, audi alteram partem, which states that every subject has the right to be heard before he is deprived of his property, places restraints on the state’s use of eminent domain power in order to curb abuses (Aggarwala, 2008). In addition to the due process and public purpose requirements, the legitimate use of the takings power is also contingent on the payment of just compensation, what William Blackstone in his Commentaries called “full indemnification” (cited in Dukeminier and Krier, 1993, p. 1143). In many states, eminent domain law not only limits the government’s right to literally take property, but also curbs the government’s regulatory powers so that it does not restrict the use of property so severely that a zoning regulation, for example, becomes tantamount to a taking (Dukeminier and Krier, 1993).

When the government wants to acquire property, it has three choices: buy the property on the open market, acquire it through an exaction, or exercise its power of eminent domain. This chapter is concerned with the public purpose requirement in so-

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4 The just compensation requirement has uncertain origins. In the U.S., for example, one potential origin is the shift from a republican ideology to liberalism. Dukeminier and Krier (1993) have noted that the just compensation requirement was inserted into the Fifth Amendment to protect the landed classes from the ravages of egalitarian wealth redistribution. Raja (2008) has made a similar point about the zamindars in India, some of who protested against land reforms solely on the basis of the just compensation requirement. Because the redistribution of wealth, and implicitly the redistribution of social relationships, is the underlying purpose of land reform, the just compensation requirement provides a cushion for landowners and may even render some instances of redistribution cosmetic.
called public-private takings, in which the government acquires property on behalf of or for the benefit of a private entity (or bestows its takings power on a private entity such as a development corporation) by declaring the private entity’s purpose to be a public purpose. The controversy surrounding public-private takings has focused on whether the government can use its takings power for the benefit of a private party, and if so, under what circumstances.

These considerations may be condensed into two views. The narrow view holds that public purpose requires public ownership or public access, meaning that property may be acquired for uses such as a post office, highway, park, or airport. The broad view holds that the takings power may be exercised for any private use as long as it produces a general public benefit (Kelly, 2006). In this view, a wide spectrum of private projects may be interpreted as fulfilling the public purpose requirement, including development for real estate, stadiums, and casinos. The broad view considers public-private takings for economic development as falling within the limitations of the public purpose requirement, and as such has often been used as part of grand schemes like urban redevelopment or reinvestment.

With controversial uses such as public-private takings for economic development, the role of the courts in determining whether a taking meets the public purpose requirement becomes very important. Determining the limits of the public purpose requirement has significant implications for delineating the legitimate scope of public-

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5 Cohen (2006, p. 507) has noted disagreement among commentators on “how widespread this use-by-the-public view ever became” in the U.S.

6 It is possible to make a distinction between the “public use” requirement in U.S. law and the “public purpose” requirement in Indian law. In this chapter I do not make such a distinction because it is for the most part unnecessary. Both “public use” and “public purpose” may be broadly or narrowly interpreted and have been in both countries. In Indian law, for example, “public purpose” has been interpreted to mean either use or ownership by the public and a project that produces some general public benefit.
private takings and also for curbing potential abuse. In both India and the U.S., despite the fact that the courts have periodically expressed repugnance at the taking of property from citizen A to give it to citizen B,7 the judiciary has placed limitations on itself by granting the legislature virtually unencumbered discretion to decide what projects fulfill the public purpose requirement.8

This following section of this chapter uses “law and economics” literature from within the U.S. institutional setting to explore the economic justifications for the takings power. The second section of the chapter focuses on justifications for the compensation requirement. In doing so, it address foundational theoretical justifications for compensation and also briefly delves into literature from experimental economists on subjective valuation and perceptions of distributive justice. The third section of the chapter focuses on public-private takings in the context of economic development and inter-urban competition for investment and resources. The chapter concludes by examining public use tests proposed by various scholars.

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7 In Calder v. Bull, 3 US 386 the Supreme Court of the United States held a narrow view, arguing, “a law that takes property from A and gives it to B is against all reasons of justice.” In Wilkinson v. Leland, 27 US 367, Justice Joseph Story argued, “We know of no cases in which legislative act to transfer of the property from A to B without his consent has been held a constitutional exercise of legislative power in any State in the Union. On the contrary it has always been attempted to be resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced” (cited in Chaturvedi and Dalal, 2009, p. 317).

8 For example, Justice O’Conner noted for a unanimous court in the Midkiff case that “When the legislature’s purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less so than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts” (Hawaii Housing Authority v. Midkiff (427 U.S. 229, 223 1984) cited in Garnett 2003, p. 940).
Justifications for Eminent Domain

Functional justifications for the takings power stress its contribution to economic efficiency in projects requiring land assembly. The economic rationale holds that eminent domain allows buyers assembling land to circumvent problems caused by holdouts and free riders whose strategic behavior may block socially beneficial projects (Posner, 1992; Merrill, 1986). Without the use of eminent domain to bypass the market, holdouts may block a project that depends on the assembly of a parcel of land consisting of a large number of contiguous, individually owned properties (Munch, 1976; Merrill, 1986). In “thin” markets, property owners’ have the incentive to capture any rents generated from the assembly by demanding prices higher than their atomistic reservation price, the price a seller would accept from a buyer not assembling a large contiguous parcel of land (Munch, 1976). In holdout situations, property owners have a monopoly on pricing, allowing them to charge a price higher than the property’s opportunity cost (Posner, 1992). The result is that land that would have been converted to higher value uses remains at lower value uses because companies have the incentive to substitute other, cheaper inputs for land (Posner, 1992). Patricia Munch (1976) has suggested that eminent

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9 Errol Meidinger (1980, p. 49) described the holdout problem as follows: “Stated in lay terms it is the possibility than an owner of property necessary to the completion of a substantial project either will refuse to sell and thus entirely thwart the project’s possible benefits or will hold out for an exorbitant price and therefore ‘blackmail’ society for a higher than fair price.”
10 Merrill (1986, p. 75) defined a thin market as “any situation where a seller can extract economic rents from a buyer.”
11 It is often suggested that developers can “build around” parcels of owners who refuse to sell on the free market, making it unnecessary to acquire the property of holdouts. For example, in Burien v. Strobel Family Investments, a case submitted to the Washington State Supreme Court by the U.S. Institute for Justice (IJ) (which also litigated the Kelo case), IJ challenged the necessity of condemning the Strobel family’s diner style restaurant on the grounds that 1) it did not fit in to the “vision” of the newly renovated downtown and 2) that the parcel on which it stood was needed for implementing streets in a grid system (Institute for Justice, 2005).
domain can either increase efficiency by reducing total costs or can redistribute wealth by redistributing costs.

In other cases, particularly in “thick” markets where there are a number of perfect or at least acceptable substitutes for a particular property, the incentive to hold out is weaker because an assembler may go elsewhere (Merrill, 1986). It is difficult, if not impossible, however, to determine whether property owners are holding out because they want to extract an inflated price for their land or because they place a higher value on their land than the price offered by the assembler. Daniel Kelly (2006) has pointed out that all owners who stand in the way of the execution of an assembly project are typically classified as holdouts when in reality holding out is only possible if the developer does not have many available alternatives. Sunk costs in an assembly situation where a developer has already acquired a number of properties is one example of a situation where alternatives are not readily available. Other constraints on alternatives are natural, such as the only available parcel of land suitable for a telephone tower or lighthouse, while others are artificial. Artificial constraints such as location-based incentives or subsidies substantially decrease a developer’s incentive to relocate. Artificial constraints offered by a municipality or larger political entity may easily result in perverse or inefficient location decisions (Kelly, 2006; Garnett, 2003).\(^\text{13}\)

In cases where transactions costs are lower, the cost of acquiring a property through eminent domain may exceed that of negotiating through market mechanisms. A large part of the cost difference in cases of low transaction cost settings may be attributed to “due process” costs associated with eminent domain (Merrill, 1986, p. 129). Due

\(^{13}\) This is not to argue that location based incentives or subsidies are the primary driver of an entity’s location decisions.
process costs are the administrative costs of a transaction, including the cost of appraising, litigating, and settling disputes over a property, as well as any other costs necessary to comply with the procedures of eminent domain law. In cases of public private takings, due process costs include any costs private beneficiaries incur convincing or influencing the government to use eminent domain on their behalf (ibid).

In economic analyses of eminent domain transaction costs are crucial. Richard Posner (1992) has asserted that the fundamental factor in determining the appropriateness of the use of eminent domain in a particular setting is conditions of low transaction costs and high transaction costs:

In the former, the law should require the parties to transact in the market; it can do this by making the present owner’s property right absolute (or nearly so), so that anyone who thinks the property is worth more has to negotiate with the owner. But in settings of high transaction costs people must be allowed to use the courts to shift resources to a more valuable use, because the market is by definition unable to perform this function in those settings. This distinction is only imperfectly reflected in the law. While some government takings of land do occur in high-transaction-cost settings—taking land for a highway, or for an airport or military base that requires the assembly of a large number of contiguous parcels...many others do not (public schools, post offices, government office buildings) (p. 56-57, cited in Dukeminier and Krier 1993, p. 1144).

As mentioned earlier, the most commonly cited advantage of eminent domain is the ability of the state to avoid holdouts by circumventing the bargaining process involved in consensual transactions. However, land acquisition and assembly problems are faced by both the state and private entities. The fact that private developers face the same holdout problem as the government in high-transaction-cost settings leads to the question of whether or not private developers should also be granted the takings power to assemble a
large number of contiguous parcels (Posner, 1992). The question can also be reversed by asking whether it is preferable that the government copes with assembly problems in high transaction cost settings in the same manner as private developers who are denied the use of the takings power (Dukeminier and Krier, 1993). Munch’s (1976) study of eminent domain in 1968 Chicago suggested that eminent domain is not the most efficient way to effect a successful land assembly and that the government can acquire land without the use of the takings power. In contrast, Thomas Merrill (1986) has suggested that the government does not in fact have the same options as private entities seeking to assemble large parcels of land. According to Merrill’s rationale, private entities’ use of straw transactions and secret buying agents are unattractive for the government because it faces greater difficulties than private entities in maintaining the secrecy necessary to execute these assembly techniques. Adherence to standards of democratic accountability, public access to information, and the need to control corruption preclude the efficient use of such techniques by the government.

Daniel Kelly (2006) has argued that the significance of the fact that private entities are able to use buying agents is underappreciated in the law and economics literature. He maintains that the ability of private entities to use buying agents, while not always necessary and certainly not ubiquitous, helps to determine what transactions require the use of the takings power and also what constitutes a legitimate public purpose.

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14 Posner (2005) has argued: “The rationale for eminent domain is unrelated to whether the party exercising the eminent domain power is the government or a private firm” (cited in Kelly, 2006).
15 According to Kelly (2006, 5), “…while eminent domain is ordinarily unnecessary for private parties who can obtain and assemble property through buying agents, the takings power is necessary for the state. Perhaps surprisingly, this fundamental distinction has not been properly appreciated. Although some commentators have noted in passing that private parties sometimes employ buying agents, these commentators have not recognized the importance of this stratagem. Significantly, these commentators have not noticed that, because the government usually cannot employ this technique, secret purchases provide a mechanism for distinguishing between public and private uses.”
Ostensibly, if a project is genuinely profitable, private assemblers have the incentive to hide behind the fence to assemble the property without the use of eminent domain; this incentive, according to Kelly, means that the project is being used for a private purpose. Exchanges that use double blind buying agents\textsuperscript{16} utilize the primary advantage of eminent domain—overcoming the problem of strategic holdouts—through a mechanism of consensual exchange. Consensual exchange is advantageous because the transfer will not occur unless the buyer’s price exceeds that of the owner. These transfers would generate a net increase in value and hence be what Kelly called “socially desirable transfers.” In cases where secret buying agents are used, a property owner also has fewer incentives to artificially inflate his or her asking price (ibid).\textsuperscript{17}

By definition, socially desirable transfers in the sense used by Kelly will be efficient because they are consensual. In a seminal work written over thirty years ago, Frank Michelman (1967) argued that in determining compensation eminent domain laws should also meet the goals of efficiency and justice, which he called “utility” and “fairness.”\textsuperscript{18} Utility in a transfer occurs when the use or allocation in societal resources results in an increase of “goods (however defined or perceived) to society as a whole” (ibid). In a controversial move, Michelman was careful to leave room for societal goods

\textsuperscript{16} Transactions using double blind buying agents meet the following criteria: 1) the buying agents do not know they are assembling land for a single client and do not know the identity of the client for whom they are working; and 2) the landowners do not know they are selling their land as part of a larger assembly (Kelly, 2006).

\textsuperscript{17} There are obvious limitations to the use of secret buying agents. Some infrastructure projects cannot be kept secret. Time and the number of landowners also factor in to Kelly’s assessment of the viability of using secret buying agents. More time and fewer landowners increase the chance of success. Finally, the use of secret buying agents poses the risk that sellers will feel duped when they become aware that they sold their land as part of an assembly.

\textsuperscript{18} William Fischel (1995) has stated that “[Michelman’s article] has dominated academic discussions of the takings issue for more than a quarter of a century” (cited in Garnett 2003, p. 944). Similarly, Hellerman and Krier (1999) have observed that Michelman’s article “remains, more than thirty years after its publication, the most significant piece of academic commentary on the subject” (cited in Garnett, 2003, p. 944).
to include both the material and immaterial. It is thus unsurprising that Michelman’s concept of an efficient process as maximizing welfare and personal satisfaction in society hinges on his stipulation that “not all satisfaction is material” (Michelman, 1967, p. 1214-24). Michelman’s broad conceptualization of welfare or satisfaction has brought an onslaught of criticisms from commentators, who have accused Michelman of over-relying on the psychology of takings.  

Although through his work Michelman made a substantial contribution to efficiency theories of eminent domain, he was mostly concerned with compensation. According to Michelman, in addition to promoting efficiency, compensation should also be fair or just. The concept of justice found most consistently in the eminent domain literature, according to Cohen, results in equal distribution of the burden among the public for public projects. In *Armstrong v. United States*, for example, the court upheld that justice entails an equitable distribution of burden. It claimed that it is unjust to make “some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole.” The following section explores compensation for takings in terms of the theoretical justifications of efficiency and justice, especially as related to public-private takings.

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19 Daniel Farber (1992) has criticized Michelman by noting that “Michelman’s theory is rooted in a psychology of takings; he seems to see the function of compensation awards to be as much therapeutic as economic” (p. 228, cited in Garnett, 2003, p. 945).

20 Michelman’s efficiency theory was based on cost-benefit analysis and enabled one to determine whether the taking met the constitutional provisions for public use.

21 364 U.S. 40, 49 (1960)
The legitimate exercise of eminent domain power by the state is generally accompanied by (just) compensation. The just compensation requirement represents what Cohen (2006) has called an “equitable compromise between the needs of the public and the rights of the individual” (p. 536). The so-called “equitable compromise” entails insuring that a private citizen does not have to bear more than his fair share of the public burden. The concept of just compensation is so embedded in the popular concepts of eminent domain that Cohen (2006) has speculated that people unfamiliar eminent domain proceedings might puzzle over the complaints of owners of condemned property. Contrary to the opinion of the observing layman, however, there is ample empirical evidence to suggest that compensation in cases of eminent domain is often undercompensatory, thereby generating a net loss of societal goods or welfare.

The reasoning behind the compensation requirement is by no means obvious. Richard Posner (1992) gave a common economic rationale for the compensation requirement: “The simplest economic explanation for the takings power is that it prevents the government from overusing the takings power” (p. 58). According to Posner’s rationale, compensation is necessary for efficiency because it forces the government to consider the cost of a taking. Were the government to proceed without internalizing the cost of a taking, it would operate under “fiscal illusion,” underestimating the cost of acquiring a property in relationship to the expected gains from an acquisition. In this view, the government should pay for the property it takes, not only because using the eminent domain power may lead to acquisitions that cost more than they produce, but also because acquisition without compensation may threaten private property rights and
cause private owners to under-invest in their property (Raja, 2008; Dukeminier and Krier, 1993). Especially because takings insurance is not widely available, compensation decreases the risk of investing capital in productive enterprises. In stark contrast to Posner’s view, other commentators suggest that no compensation is justifiable because the compensation requirement may lead property owners to strategically overinvest in property likely to be taken by the government (Raja, 2008).

Guido Calabresi and A. Douglas Malamed’s (1972) model of rights and the rules governing them are useful for understanding when and why compensation may be required in a compulsory taking. Different rights receive differential degrees of protection (Krauss, 2000). In Merrill’s (1986) elaboration of Calabresi and Malamed’s model, a citizen has four possible rights in a takings situation (p. 66).22 On one end of the spectrum of rights, a person has no entitlement. Just as the government has the power to legitimately use police power and to tax, in situations where a person has no entitlement the government may legitimately acquire property without consent or compensation. On the opposite side of the spectrum, a person’s rights are inalienable and the government cannot acquire the property by any means. When rights are protected by inalienability rules, such as constitutional rights or corporeal entitlements, they cannot be exchanged or alienated, even voluntarily (Krauss, 2000).23

The two situations in the middle of the spectrum are guided by property rules and liability rules. Property rules fully protect property owners against compulsory acquisition, meaning that the government may acquire a citizen’s property only through a

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22 Merrill’s (1986) model is useful because it applies property and liability rules directly to the takings power and the means-ends question.
23 A number of corporeal entitlements are only partially protected. For example, one may donate blood, but may not sell it (Krauss, 2000).
When a person has property rights (an entitlement protected by a property rule), it implies that person A cannot take the property of person B because he values it more. Because exchange must be consensual, person A must demonstrate his higher valuation of the property by acquiring it through a contract. Consensual exchange through contracts implies that the exchange takes into account the value over the market price that person B attaches to his property, his property’s subjective value (Krauss, 2000).

By contrast, in situations in which property is protected by a liability rule, the government may acquire it, but only on payment of compensation. Unlike property rules, rights protected by liability rules may be forcibly exchanged if the exchange increases overall societal wealth or welfare (Kelly, 2006; Krauss, 2000). Because eminent domain is guided by liability rules, compensation does not reflect the subjective valuation of the owner because the exchange is forced rather than consensual. It reflects the market price, but this price may underestimate the value of the property to its owner, who is not a willing seller (Polinsky, 1980, cited in Kraus, 2000). After all, if the owner did not value the property more than the market value, it is reasonable to assume, as Lee Ann Fennell (2005) has done, that “he probably would have sold it already.”

Because eminent domain is a forced transaction guided by liability rules, fair market value will not compensate property owners for their loss if they value the property more than government or the private assembler on whose behalf the government is

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24 According to Krauss (2000), “The name [property rule] is intuitively attractive, because property rule protection is what the man on the street thinks he deserves if he has a property right” (p. 783).
25 Ronald Dworkin (1975) captured the distinction between property rules and liability rules well when he noted that in the case of property rules, “rights trump utility” (cited in Krauss, 2000, p. 783). By this he meant that property rights protect owners from having their property appropriated to serve the common good.
exercising its power of eminent domain. In contrast to a consensual transaction, which is by definition mutually beneficial, cases in which values are misjudged by the condemner may lack mutual benefit. In a fact recognized by the U.S. courts, it is extremely difficult to determine the value of a property at any given time either because of subjective values, such as idiosyncratic or sentimental value, as well as other values that a seller would be able to bargain for in a consensual transaction (Cohen, 2006). To these values Fennell (2004) has added the loss of “holding an option—the capacity to wait on unfolding conditions to decide when one wishes to sell” (pp. 966-67). Cohen (2006) has equated this with the loss of the autonomy to refuse to sell at an offer higher than the property owner’s own valuation of the property.

The subjective premium or surplus value includes the value an owner “might attach to his property above its opportunity cost” (Merrill, 1986, p. 83). Subjective value may include idiosyncratic and sentimental values an owner attaches to his property. Owners of condemned property lose their home, neighbors, businesses, and community. Businesses, in particular, may be uniquely suited to the area and in relocating will lose the trust, goodwill, or reputation at a certain address. Even if a property has close or perfect substitutes, idiosyncratic values such as familiarity, social connections, community, and habit will be lost in the transfer, creating a situation of uncertainty, disorientation, and in many cases, grief (Bell and Parchomovsky, 2005). It is possible that subjective value placed on land may be greater in instances where one’s identity, skills, and livelihood are largely dependent on land.26 While the specifics applicable to developing countries are absent from law and economics literature in the U.S.

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26 In a rural economy, skills and identity are likely to be based on land. In an interview with Alfaro and Iyer (2009), a farmer from a Joymalla village in West Bengal said, “We know only farm work, we don’t know any pencil-paper work” (p. 10).
institutional setting, it has been pointed out by a number of Indian commentators who highlight the lack of options available to unskilled farmers and other laborers displaced by a condemnation. (Mohanty, 2009; Morris and Pandey, 2009; Ray and Patra, 2009).

The possibility of a condemnation generating grief or despair is not country dependant.\textsuperscript{27} Observing condemnations for economic development during federal urban renewal program in the 1940s U.S., Jane Jacobs (1961) noted,

> People who get marked by the planner’s hex sign are pushed about, expropriated, and uprooted much as if they were the subjects of a conquering power. Thousands upon thousands of small businesses are destroyed, and their proprietors ruined, with hardly a gesture at compensation. Whole communities are torn apart and sown to the winds, with a reaping of cynicism, resentment, and despair that must be heard and seen to be believed (p. 5, cited in Garnett 2003, p. 946).

Michelman (1967) coined the term “demoralization costs” to encompass the uncompensated loss to condemnee and the costs necessary to compensate property owners and those who sympathize with them or experience feelings of anxiety or uncertainty about the security of their property.\textsuperscript{28} He used the term “settlement costs” to describe the “dollar value of the time, effort, and resources which would be required in order to reach compensation settlements adequate to avoid demoralization costs” (p. 1214). Settlement costs may exceed the market value of the property, and in such cases compensation may be inadequate.\textsuperscript{29}

\textsuperscript{27} The psychological toll of displacement is well documented in both the Indian context of development in the post-Independence era, as well as in projects of urban renewal worldwide. Nicole Stelle Garnett (2003) has argued that urban renewal theory rests a great deal on what she calls “vast, involuntary subsidies wrung out of helpless site victims.” In the Indian case, Partha Mukhopadhyay (2009, 48) argued something similar, that “Dispossessing poor farmers to subsidize SEZs is prima facie unconscionable” (p. 946).

\textsuperscript{28} See Cohen (2006) for an overview of “demoralization costs.” Fischel (1995) defines demoralization costs as follows: “Demoralization costs, in short, are the bad (for a utilitarian) things that happen if you don’t pay” (cited in Cohen 2006, p. 551).

\textsuperscript{29} Michelman (1967) argued that if settlement costs or demoralization costs exceeded the any gains made in efficiency through using eminent domain, than its use was both inappropriate and impermissible.
Yet it is difficult to find a mechanism for determining a property owner’s true subjective valuation. In addition to the practical difficulties of assessing subjective value, which have led to the practice of taking fair market value for land for the purposes of compensation, property owners may have incentives to overestimate the subjective worth of their property. Fennell (2005) has argued that self-valuation is problematic because inflating the asking price is “both costless and unambiguously profitable” and therefore systematically leads to overstatements of value (cited in Kelly, 2006, p. 26). When overstatements of value are coupled with other practical difficulties such as the underdeveloped system of valuation or patchy and inaccurate records of transactions found in the many parts of the developing world, it is extremely difficult to determine a property’s true market value. Furthermore, it is difficult to predict what property might be subject to the subjective valuation problem. Garnett (2003) has documented evidence from psychologists and experimental economists that suggests that all property is subject to the subjective valuation problem. These experiments indicate the possession is enough to increase a person’s valuation of an item of property. The “endowment effect” has been demonstrated in experiments that document differences in what a person would be willing to pay to acquire an item and what they would accept to part with the item (Hovencamp, 1991).\footnote{Jack Knetsch and J.A. Sinden (1984) have observed that the amount a person would be willing to pay to maintain an entitlement is much lower than what a person would require for compensation to part with an entitlement.} It is easy to see how evaluation disparities may lead to bargaining impasses (Hoffman and Spitzer, 1986; 1985; Coursey, Hovis, & Schulze, 1987; Knetch and Sinden, 1987; 1984).

In a taking, condemnees not only are denied compensation for subjective or idiosyncratic value, they are also unable to take advantage of surplus value created either
by assembling a parcel or reassignment of land to a higher value use. When compensation reflects market value at the time of condemnation, the condemner or the entity to which the property is ultimately transferred reaps the entire surplus generated by the transfer. This may raise strong objections in cases of assembly in public-private transfers, particularly those that are perceived as failing to meet the public purpose requirement. Commentators such as Cohen (2006) have claimed that assigning all of the surplus value to the condemner is unfair, while Merrill (1986) has argued that it is not objectionable to award the condemner the surplus value because the condemner supplies the idea for the project or assembly that results in value creation. Experimental economists have suggested that the fairness of an income distribution may depend on a person’s concept of distributive justice (Hoffman and Spitzer, 1985; 1986).

Drawing on Michelman (1967), Garnett (2003) has observed that assigning the surplus value to the condemner may be especially demoralizing if the taking appears to be part of a systematic plan of redistribution rather than random. Michelman’s argument was based on the difficulty of adjusting to “systematically imposed loss” as opposed to randomly generated loss (p. 1217). When the person who gains is a private beneficiary, and perhaps one with considerably more political and economic power than the condemnee, demoralization costs might be even higher. As Abraham Bell and Gideon Parchomovsky (2005) have noted, “While people can view windfalls that befall another with relative sanguinity, when the windfall arrives as part of a strategic and deliberate

31 In cases of land acquisition on the periphery of large Indian cities, the potential value of the land—both the potential increase in value by virtue of waiting and by virtue of their location—has the potential to generate what Professor R.N. Sharma (personal communication, January 15, 2010) called “superprofits.” Awareness of money to be made, and lost, in transfers fuels discontent, especially in public purpose cases where the beneficiary already possesses a tremendous amount of political and economic power or where there is a large discrepancy in power, influence, and economic standing between the transferee and the condemnee.
decision of the government, the reaction may turn into resentment and frustration.”

According to Fischel (1995), adjustment to “strategic loss” generates greater disutility than adjustment to random loss (cited in Cohen, 2006, p. 552). This may be true in every exercise of the takings power, regardless of the beneficiary or the soundness of the public purpose simply because takings involves the act of “singling out,” which Garnett (2003), drawing on Saul Levmore (1991), has argued is demoralizing in and of itself.32

The public benefit generated by condemnations may be able to mitigate justice issues raised by the value not included in the compensation award if the property owner gleans some reciprocal benefits from the taking. This concept is called the “average reciprocity of advantage,” and has been addressed in detail by Hanoch Dagan (1999). Like the public purpose requirement, the reciprocity of advantage may be applied both narrowly and broadly. If a project for which a property was condemned confers a benefit on the condemnee and not on other members of the public, the condemnee enjoys reciprocity of advantage in the narrow sense. Broadly applied, a condemnee enjoys reciprocity of advantage if the project for which his property was condemned is socially desirable in that it leads to net societal welfare and wealth enhancement over time (Cohen, 2006).

Reciprocity of advantage is arguably greater in cases of takings for projects that adhere to a narrow public use, such as for public hospitals or parks. In cases of classic

32 Those who are “singled out” for takings are often vulnerable or marginalized groups, despite the fact that the compensation requirement is supposed to deter the government from over-consuming private property. In this case, those who are singled out by the condemner have often already been singled out for special protections because of their status as a marginalized group. This is evident in India, where politically or economically vulnerable groups such as Other Backwards Castes (OBCs) or adivasis experience being singled out for takings. It is interesting to speculate whether those whose identities have been shaped in a large part by the first instance of singling out (that they are vulnerable and as such need special protections) experience more or different demoralization than other groups who have not been singled out in the first sense.
public use, as opposed to more implicit or indirect public use as in public-private takings, the reciprocity of advantage is much clearer and thus compensation at market value may be less problematic (Fennell, 2005). Cohen (2006) has argued that the reciprocity of advantage argument is far too ambiguous to be persuasive in cases of condemnation for economic development, in which the absence of any clear rules necessitating that the private entity’s estimated benefits actually materialize may lead to exaggerated (or mistaken) projections about job creation or other net social benefits. In the absence of any rules necessitating that projected public benefits do occur, such as the U.S. Supreme Court’s recent rejection of petitioners’ plea that the public use test take into advantage the “reasonable certainty” of a project’s public benefit’s materializing, private entities have the incentive to exaggerate expected benefits in order to capture value generated from the use of eminent domain (Kelly, 2006; Cohen, 2006). Dagan has taken the argument a step further by suggesting that even if the requirements of the narrow or broad views of the average reciprocity of advantage are not met, a disproportionate distribution of the public burden is still acceptable subject to certain conditions.

Public-Private Takings: Politics and Economic Development

As noted above, the compensation requirement is supposed to check the government from the overconsumption of private property. It is also supposed to protect groups with less political and economic power, as well as minorities, from exploitation

33 An excellent example of a public-private taking for economic development is the Poletown case in Detroit, U.S. In Poletown, the courts upheld condemning the petitioners’ land to build a factory for General Motors. Actual job creation fell significantly short of projections.

34 Namely that political and economic power of the person affected is not too low, and the degree of the burden is not too extreme (Dagan, 1999, p. 771). Dagan’s argument is called into question because the power of eminent domain has been historically exercised against members of marginalized and politically and economically weaker groups.
through the mechanism of “specific deterrence.” Because groups with less political power will have fewer resources or organizational abilities to enable them to protest a taking, it may be easier for government to direct its takings power against these groups. As a form of specific deterrence, compensation is intended to prevent such abuses. Garnett (2003) has observed that public choice theory suggests that compensation may not deter the government from abusing its takings power because governments respond to political and not market incentives. The opinions of dissenting justices in the notorious *Kelo case* in the U.S. expressed the fear that acquisitions for a private entity in cases of economic development might actually encourage the government to use its takings power to appropriate the property of minorities and the politically weak. Supreme Court Justice Sandra Day O’Conner (2005) noted the potential for abuse of the takings power inherent in public-private takings for economic development:

> Any property may now be taken for the benefit of another private party, but the fallout from the decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms (p. 12-13).

In an independent dissenting opinion, Justice Clarence Thomas (2005) wrote,

> Allowing the government to take private property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses...
will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful (p. 17-18).

Compensation may fail at specific deterrence for two additional reasons. Because the cost of compensation is distributed among taxpayers and because of the lag time between condemnation and the time when the consequences of the condemnation will be fully apparent, the government can use its takings power without expending too much political capital (Garnett, 2003; Kelly, 2006).

Garnett’s argument is particularly relevant in cases of public-private takings when the public purpose is economic development. Numerous commentators have pointed out that the potential for abuse by both the government and powerful interest groups is greater in cases of public-private takings than in takings for a narrow public use such as a post office or park. Kelly (2006) has identified three problems arising in public-private takings: the concentrated benefit problem, the costless acquisition problem, and the resource disparity problem. To start, private entities have an incentive to influence eminent domain proceedings when they stand to obtain concentrated benefits. Because the cost of compensation is spread among taxpayers, the individual taxpayer has little incentive to oppose an exercise of eminent domain on behalf of a private entity. Even if larger groups of taxpayers did have the incentive to oppose a taking, they would still have a disadvantage over a powerful private entity because of the difficulties in coordination and in obtaining relevant information (Kelly, 2006). Kelly has claimed that the ability to reap concentrated benefits from capturing the eminent domain proceedings creates “socially perverse” incentives to pursue profit maximizing opportunities even though these opportunities may not be in the public interest” (p. 36).
The costless acquisition and resource disparity problems may be best understood in the current context of intense competition for resources and investment that is evident at the municipal as well as the regional scale in countries throughout the world. Decentralization and the devolution of fiscal responsibility from the national / state level to the municipal level have left governments with their “economic back to the wall” (Garnett, 2003, p. 956). Governments of distressed municipalities, as well as those in municipalities faring relatively well, have demonstrated their willingness to compete with other municipalities to attract investment through subsidies, tax abatements, and infrastructure improvements. Peter Enrich (1998) has attributed municipalities’ willingness to play the incentive game to a desire to avoid the political costs of failing to do so. He observed,

The political costs of adopting tax breaks for businesses are lower than the costs of failing to participate aggressively in the incentive bidding competition. Consequently, the states find themselves caught in a classic prisoner’s dilemma…If the other states are going to offer a widening array of tax breaks, then none can afford the costs—more political than economic—of abstaining (p. 396, cited in Garnett 2003).

Reduced cost or costless acquisitions create an incentive for private entities to engage in rent seeking behavior. In addition to the array of goodies offered to private entities, governments offer their power of eminent domain as another incentive to attract private investment with the intent to create jobs or increase their tax base by upgrading land to a higher value use (Miceli, Segerson, & Sirmans, 2007). Finally, costless acquisitions transfer a portion of the project’s risk from the developer to the state because the private entity can back out of the project with fewer costs if the estimated benefits of the project

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37 U.S. Supreme Court Justice Louis Brandeis coined the term “race to the bottom” to describe this kind of competition in the 1933 case Ligget Co. v. Lee, 288 U.S. 517, 558-559.
are not going to materialize (Kelly, 2006). Backing out is particularly relevant if the entity acquiring the land is a development agency, which may not be subject to democratic accountability, and if the government has made no provision for the private entity to take responsibility for compensation costs or the costs of land acquisition if the project is not implemented.

The resource disparity problem is closely related to the costless acquisition problem in that it is generated by the influence exerted on local governments by private entities with ample legal and financial resources. In times of fierce competition for resources as described above, powerful private parties who promise job creation or investment may wield a great deal of influence over local governments and may be able to capture the eminent domain power of the government for their own ends. Eminent domain thus becomes a tool that may be manipulated by developers or corrupt governments. Particularly in cases of economic competition between municipalities, powerful private interests have an advantage over potential condemnees because they possess the power of “exit”—to use the terminology of economist Alfred Hirschman (1970). Adhering to Hirschman’s terminology, condemnees in turn have the power of “voice”—protest through the democratic process—but they have substantial investments in the community and lack the power of exit. Garnett (2003, p. 960), drawing on Vicki Been (1991), concluded that while using the power of voice may succeed in stopping some takings, it does not provide a “systematic deterrent” in the same way as a developer’s power of exit, particularly in cases where the government expedites the takings proceedings such as through “quick takes” in the U.S. or through invoking the
urgency clause of the Land Acquisition Act 1894 in India.\textsuperscript{38} Expedited takings proceedings may significantly circumscribe the ability of affected citizens to organize to object to a taking and may increase demoralization costs.

Public Purpose: A Problem of Means and Ends?

As discussed above, the potential for abuse of the takings power in public-private takings or the capture of the process by powerful private interests raises concerns about both efficiency and justice. The public purpose requirement in the Indian Constitution has been severely weakened through a series of constitutional amendments, as Chapter 3 will address in detail, culminating in the deletion of the explicit commitment to public purpose in Article 31(2) by means of the Forty-Fourth Amendment. Nonetheless, the addition of Article 300A has been subsequently read by commentators to implicitly reaffirm the deleted explicit public purpose requirement (Chaturvedi and Dalal, 2009).\textsuperscript{39}

The public use requirement in the U.S. as provided for by the Fifth Amendment’s Takings Clause states that private property shall not “be taken for public use, without just compensation.” In other words, through their public purpose requirements the language in both countries’ takings clauses sets some limitations on the legitimate exercise of eminent domain.

What remains ambiguous is to what extent the public purpose limitations are judicially enforceable, as in both countries the judiciary has shown extreme deference to

\textsuperscript{38} The urgency clause of the LAA 1894 is clause 17(4).

\textsuperscript{39} For example, in Hindustan Petroleum Corporation Ltd v. Darius Shapur Chenai AIR 2005 SC 3520, the court stated: “Having regard to the provisions contained in Article 300A of the Constitution of India, the State in exercise of its power of ‘eminent domain’ may interfere with the right of property of a person by acquiring the same but the same must be for a public purpose and reasonable compensation therefore must be paid” (cited in Chaturvedi and Dalal, 2009, p. 339).
the legislature in deciding what constitutes a public purpose. As the debate in the U.S. after the *Kelo* case underscores, what will extreme judicial deference to the legislature mean for regulating the use of the takings power in cases of takings for economic development? As Justice O’Conner pondered in *Kelo*’s majority dissent, how is one to distinguish between public and private use if the courts allow that public-private takings for economic development constitute a legitimate public use? Questions like these, along with the history of judicial deference to the legislature, make public use tests both philosophically and practically important.

In an influential article, Thomas Merrill (1986) argued that the deference of the court to the legislature on public use questions stems from its historical focus on ends rather than means. In ends-oriented public use tests, the use to which a property will be put once acquired decides the legitimacy of a compulsory acquisition. As governments progressively focused on socioeconomic regulations as opposed to natural rights based law, the courts became increasingly deferential to the legislature in deciding the appropriate ends of government (Cohen, 2006). According to Merrill (1986), the court’s hands off position in deciding whether a taking serves the public interest can be explained by the fact that “the answer to such questions demand an exercise in high political theory that most courts today are unwilling (or unable) to undertake” (p. 67).

Because of these problems, Merrill proposed that the courts focus more narrowly on the means rather than the ends of a taking. The means question “asks where and how the government should get property, not what it may do with it…. [it] is also ‘political’ in that it concerns state actions that may advance or retard conflicting interests.

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40 In the U.S., for example, see the *Midkiff* case. In India, see *Hamabai Framjee Petit v. Secretary of State for India* AIR 1914 PC 20.
Nevertheless…[it] demands a more narrowly focused and judicially manageable inquiry than the ends approach” (Merrill 1986, 67). Merrill recognized exceptions in his basic model. He called for heightened judicial scrutiny through a traditional ends-based public use test in cases with a high likelihood for abuse, such as in cases where the government transfers property to a small number of entities or where private entities may have influenced the legislative process and used condemnation for private gain (Dukeminier and Krier, 1993; Cohen, 2006; Merrill, 1986).

In a review of recent scholarship on public use tests, Cohen (2006) has emphasized that most scholars have followed Merrill and focused on means: whether the use of eminent domain is appropriate to facilitate the government’s stated ends. Michelman (1967), as discussed above, used a cost benefit analysis to determine whether efficiency concerns render a project unconstitutional under the public use clause. In Michelman’s model, if the costs exceed the benefits, the courts must determine that the taking does not serve a public use and is unconstitutional (Merrill, 1986). Other scholars such as Errol Meidinger (1980) proposed means-based public use tests based on the necessity of the taking for carrying out the government’s public purpose. Richard Epstein (1985, cited in Merrill, 1986; Dukeminier and Krier, 1993; Cohen, 2006) argued for a narrow public use test based on whether a taking provided “public goods” or at the least goods that were generally open to the public.41 Epstein also suggested that increased compensation might help to mitigate justice and efficiency issues.42 Finally, Garnett

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41 Public goods have two characteristics. The first is that once the good is provided it is impossible to prevent anyone from consuming it or enjoying its benefits. The second is that consumption by one person does not affect the ability of others to consume the good (Dukeminier and Krier, 1993).

42 Partha Mukhopadhyay (2009) at the Centre for Policy Research in New Delhi makes a case for “overcompensation” on the basis of avoiding costs incurred through delays, protests, and implicitly, a public perception that the SEZ policy lacks legitimacy.
(2003) has suggested that courts follow procedures similar to those used in cases of exactions in the U.S., particularly by determining whether eminent domain is necessary by examining if it is “‘related in nature and extent’ to the public purpose used to justify it” (p. 939, cited in Cohen 2006).

Cohen (2006), advocating for a bright-line rule prohibiting takings for economic development, has suggested that all of the above public use tests suffer from deficiencies, particularly in their application to public-private takings for economic development. Summarizing his arguments, takings for economic development are particularly difficult for the courts to resolve using efficiency theories because of how difficult it is to predict the benefits of the project. Economic development projects are speculative and subject to risks of cost overruns, delays, and the ultimate risk of failure, which makes it very difficult for the courts to make a reasonable cost-benefit analysis, particularly if they have to consider subjective valuation in that analysis. Subjective value may also make it difficult to determine whether increased compensation is sufficient to make up for a property owner’s loss. Increased compensation may, furthermore, inflate the incentives of property owners to strategically over invest in a property up for condemnation because of inflated returns.

Necessity tests are problematic because they essentially test for holdout behavior. As Cohen pointed out, if taking is being litigated there most likely has been holdout behavior and the taking would be necessary to carry out the project. Because by default litigated cases focus on holdouts, testing necessity in the courts would be a waste of resources. Finally, Epstein’s public goods test is radically narrow, and Garnett’s proposal
suffers from loose standards that have to be considered on a case-by-case basis and may require drawn out litigation (Cohen, 2006).
Since Independence, the concept of property in the Indian Constitution has been subject to a protracted struggle between the judiciary and legislative branches of the government. The basic issue at stake in the conflict between the two branches of government was the ability of the legislative branch to implement land reform legislation and industrial policies that violated fundamental rights, including the right to property as laid out in Article 31(2) of the Constitution, in order to address socioeconomic inequality. The narrative of this struggle as illustrated by case law shows how the Supreme Court’s power of judicial review became increasingly curtailed by a legislature implementing the political paradigm of the day and attempting to maintain legitimacy as a government distinct from its colonial predecessor (Chatterjee, 1993). The struggle may be conceptualized as a process of bargaining between the branches of the government, which resulted in the erosion of property rights through a series of Constitutional Amendments. Describing the bargaining process, Singh (2004), commented that while the legislature gave itself the ability to expedite land reform and industrial policy, in the process the Constitution itself became “the site of the bargain” (p. 24). The judiciary also periodically placed limitations on its power to examine the legitimacy of the public purpose in cases of compulsory takings for companies, although it consistently maintained its power to review compensation.

Because the protests against SEZs have focused on the government’s misuse of its eminent domain power, particularly in relation to the public purpose behind the
acquisitions,\textsuperscript{43} and the policy’s violation of fundamental rights, this chapter begins by exploring property rights from a historical and Constitutional perspective though the struggle between the legislature and the judiciary.\textsuperscript{44} It continues by examining the specific legislation used by the state to exercise its power of eminent domain, the Land Acquisition Act 1894, before reviewing some of the peculiarities of the land acquisition process and institutional framework in India that have a bearing on the public purpose and just compensation debate. It concludes by discussing the failed Land Acquisition Amendment Bill 2007.

Property in the Indian Constitution

Many of the property rights related issues that would become the substance of the struggle between the judiciary and legislative branches can be traced back to the struggles of the members of the Constituent Assembly over structuring the Constitution in a way that would best serve the social good (Singh, 2004). In particular, the framers were concerned about fundamental rights limiting the ability of the legislature to implement land reform, as well as clogging the courts with due process issues. According to Singh (2004), the framers resolved these concerns by deciding to remove any explicit connection between due process and property in the Constitution. Furthermore, they eliminated “just” from the language addressing compensation in cases of government takings. Property became a Fundamental Right in the Constitution through Article

\textsuperscript{43} The members of the National Panel at the National Audit of SEZs said the following in their preliminary observations: “SEZs are also a classic example of the anti-people misuse of the State’s powers under ‘eminent domain’, and ‘public purpose’” (National Panel, 2010, p. 2).

\textsuperscript{44} This section draws heavily from Raja (2008), Singh (2004), and Austin (2003).
19(1)(f), which guaranteed citizens the right to acquire, own, hold, and dispose of property subject to restrictions laid out in Article 31.\textsuperscript{45}

\textit{The First, Fourth, and Seventeenth Amendments}

Following Independence, the political agenda of the Congress Party focused on land reform. In doing so, the Congress Party sought to fulfill the redistributive mandate in Article 39 (b) and (c) of the Constitution, which sought to prevent unequal distribution of wealth (Nayak, 2005).\textsuperscript{46} The immediate target was the abolishment of the \textit{zamindari} system, an institution through which the British colonial government used tax agents or “\textit{zamindars}” to collect revenue from farmers and which facilitated the zamindar’s ownership of large tracts of land.\textsuperscript{47} A number of these zamindari abolition and other land reform laws, as well as laws related to the nationalization of industry, were challenged by the judiciary on the grounds that they violated fundamental rights under Article 19 in conjunction with Article 31 (Singh, 2004).\textsuperscript{48} For example, the Patna High Court struck down the Patna Bihar Management of Estates and Tenures Act 1949 and the Bihar Land Reforms Act 1950 on the grounds that they violated Articles 19(1)(f) and Article 31 because principles of payment of compensation varied between categories of zamindars.

\textsuperscript{45} Article 31 states, “No person shall be deprived of their property save by authority of law.” It further provides for police power in relation to property; stipulates that the law must set the principles for payment of compensation; and sets a time frame for enacting property legislation that is not subject to judicial review over compensation.

\textsuperscript{46} Article 39(b) states, “The State shall, in particular, direct its policy toward securing that the ownership and control of the material resources of the community are so distributed as best to serve the common good.”

\textsuperscript{47} The zamindars were tax agents who collected taxes for the empire from farmers, retaining a percentage of taxes as a commission. They gained titles to the land under colonial rule through the Permanent Settlements Act, 1793, after which they became landlords and paid a fixed amount to the British colonial government. The government argued that because they were only “intermediaries” between the state and the farmers, the state could take their land without compensation (Raja, 2008).

\textsuperscript{48} See Raja (2008) for a brief discussion on why many of these land reforms failed.
(Raja, 2008). In another important case involving the nationalization of private industries, the government took over management of a closed spinning and weaving mill in Bombay, arguing that “taking over management is not the same as taking over property” (Austin, 2003). The Bombay High Courts ruled that the takeover was unconstitutional because it consisted of a deprivation of property without compensation.

Cases like these, which Prime Minister Nehru called as “wasteful and dilatory litigation,” motivated the passing of the First Amendment in 1951, which added Articles 31A, 31B, and the Ninth Schedule to the Constitution (Nehru, 1951). These articles gave the state the right to make laws to acquire private property and to immunize them from challenges by the judiciary by placing them in the Ninth Schedule. Until its immunity was removed though a judicial challenge in 2007, the Ninth Schedule was called the “dirty laundry bag” of the Indian Constitution (Jaising, 2007).

In reaction to Supreme Court’s judgments on property issues, the Fourth Amendment was passed in 1955. The purpose of the Fourth Amendment was to further the state’s social welfare legislation by facilitating the passage of land ceiling acts that allowed the government to take over land from those who owned more than the maximum allowance (Nehru, 1954). Through the addition of Clause 2A to Article 31(2), the Fourth Amendment protected the state from judicial challenges when it took over property or took over the management of privately owned industrial ventures (Raja, 2008). The clause stated that an acquisition was not compulsory if the property was not

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49 Sir Kameshwar Singh (Darbhanga) v. The Province of Bihar, AIR 1950 Patna 392ff.
50 Moti Lal and others v. the State of UP and others, AIR Allahabad
51 Nehru made an argument that if the courts insisted on cash compensation at the time of the taking than it would amount to no compensation because “no government in the wide world can make payment in cash in such circumstances” and that “large loans to finance compensation were unlikely as the government had limited capacity to help” (Austin, 2003, p. 75).
transferred to the state under a law, even if deprivation of the right or use of property could be proven (Singh, 2004). The addition of Clause 2A was a reaction to the Supreme Court’s judgment that stockholders in a Bombay spinning and weaving mill that had been taken over by the state for mismanagement were entitled compensation.\textsuperscript{52}

The Fourth Amendment also placed compensation outside the purview of judicial review, which was a reaction to the judgment in the \textit{Bela Banerjee} case.\textsuperscript{53} The \textit{Bela Banerjee} case challenged the legality of the West Bengal Land Development and Planning Act 1948, which set rates of compensation for land acquisition to the market rate in December 1946 instead of the current market rate. While the state argued that the Constitution gave the legislature full discretion in making laws on property, the Supreme Court asserted its right to judicial review by striking down any acquisition—even one made for a valid public purpose—if the compensation paid did not amount to just compensation at market rates (Raja, 2008; Singh, 2004).

In 1969, the Seventeenth Amendment was passed in order to allow state-level land reform laws to be placed in the Ninth Schedule. As was the case with the First and Fourth Amendments, the Seventeenth Amendment was directed toward Supreme Court intervention in the issue of compensation. In this case, the catalyst was the Court’s 1961 judgment that the Kerala Agricultural Relations Act was unconstitutional because it did not have uniform principle for determining compensation for different sized parcels of land (Singh, 2004).\textsuperscript{54}

\textsuperscript{52} \textit{Dwarkadas Srinivas v. The Sholapur Spinning and Weaving Company Ltd.}, AIR 1951 Bombay 86.

\textsuperscript{53} \textit{State of West Bengal v Mrs. Bela Banerjee}, AIR 1954 SC 170. Raja (2008) noted that the public purpose in the \textit{Bela Banerjee} case was housing for refugees from East Pakistan.

\textsuperscript{54} \textit{Karimbil Kunhikoman v. The State of Kerala}, 1962 (1) SCR 829ff.
The Twenty-Fourth and Twenty-Fifth Amendments

The political impetus at the time the Twenty-Fourth and Twenty-Fifth Amendments were passed in 1971 was to strip the power of the courts to intervene in the affairs of the legislature. This meant to secure protections for the continuation of “socialist” endeavors and to definitively immunize the legislature’s power to amend parts of the Constitution dealing with fundamental rights (Singh, 2004; Austin, 2003). These amendments came in the wake of two landmark cases on property rights and compensation in which the judiciary unequivocally challenged the power of the legislature to amend fundamental rights and set compensation, the so-called Bank Nationalization case\(^{55}\) and the *Golaknath* case.\(^{56}\)

The Bank Nationalization case was a challenge to the validity of the Banking Companies (Acquisition and Transfer of Undertakings) Act 1969 on the grounds of compensation. The case came in the wake of the nationalization of banks on the recommendation of Prime Minister Indira Gandhi. A ten-to-one majority ruled that the principles laid out by the Act to determine compensation were invalid:

> The Constitution guarantees a right to compensation—an equivalent in money of the property compulsorily acquired. That is the basic guarantee. The law must therefore provide compensation, and for determining compensation relative principles must be specified; if the principles are not relevant than the ultimate value determined is not compensation (cited in Singh, 2004, pp. 15).

By equating the use of invalid principles for determining compensation to the decision not to pay compensation at all, the court ruled that the Act did not adhere to Article

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\(^{55}\) *R.C Cooper v. Union of India*, 1970 (2) SCC 298

The Supreme Court also made positive recommendations by laying out principles for valuation that included awarding the owner compensation equivalent with both “existing advantages” and “existing potentialities” (Singh, 2004, p. 15).

The *Golaknath* case challenged the Punjab Security of Land Tenures Act 1953 on the grounds that it violated property rights and equality before the law, moving to eliminate the First, Fourth, and Seventeenth Amendments to the Constitution. Although the Supreme Court upheld the constitutionality of the previous Amendments, the case gained its landmark status by introducing the principle of the “basic structure” of the Constitution, meaning that fundamental rights were permanent and unchangeable even if both houses of Parliament unanimously approved the change (Nayak, 2004).

The Twenty-Fourth Amendment eliminated the ability of the President to refuse assent to a constitutional amendment, mandating that the President “shall assent” to all amendments placed before him. The Twenty-Fifth Amendment essentially cleared confusion around previous judgments on compensation by replacing the word “compensation” with “amount” in Article 31(2) and by making it impossible for the judiciary to challenge this “amount” (Singh, 2004). The Amendment further consolidated the power of the legislature by inserting Article 31(c) into the Constitution, which

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57 The Bank Nationalization case relied on previous cases that state that if parliament awarded compensation based on invalid principles then the compensation was “illusory” and “not compensation.” *State of Gujarat v. Shantilal Mangaldas*, AIR 1969 SC 624, 1969 (1) SCC 509

58 The Bank Nationalization case provided principles of valuation that have bearing on the compensation debate for SEZs, and is thus worth quoting at length: “The broad object underlying the principle of valuation is to award the owner the equivalent of his property with its existing advantages and its existing potentialities…Where there is no established market for property, the object of the principle of valuation must be to pay the owner for what he has lost, including the benefit of advantages present as well as future, without taking into account the urgency of acquisition, the disinclination of the owner to part with the property, and the benefit which the acquirer is likely to obtain by the acquisition” (cited in Singh, 2004, p. 15).
declared that all that was necessary to determine that a law was fulfilling the Directive Principles was its assertion that doing so was its purpose (ibid).

These Amendments were challenged and subsequently upheld in the seminal *Kesavanada* case, which again was based on the appropriation of privately owned land by state-level land reform legislation. Although it overturned a number of aspects of the *Golaknath* case, the majority decision curbed Parliament’s constituent power by upholding that a constitutional amendment could not alter the basic structure of the constitution (Nayak, 2004; Singh, 2004). Singh (2004) claimed that the importance of the *Kesavanada* case for property related issues lies in the fact that the verdict was used in subsequent cases as precedent for upholding that the right to property was excluded from the basic structure of the Constitution. The Supreme Court in subsequent cases has rigorously upheld the position that the right to property is not a part of the basic structure of the Constitution.  

*The Forty-Fourth Amendment and Beyond*

The consolidation of the legislature’s coercive power culminated in the Forty-Fourth Amendment Act 1978, which deleted Article 19(1)(f) and Article (31) from the Constitution and replaced them with Article 300A. This had the effect of changing property from a fundamental right to a legal right. A basic position advanced by supporters of the move to change property to the status of a legal right was that as a fundamental right the right to property restricted the exercise of other, more important, fundamental rights (Bhushan, 1978). The effect of changing property from a fundamental right to a legal right was that as a fundamental right the right to property restricted the exercise of other, more important, fundamental rights (Bhushan, 1978). The effect of changing property from a fundamental right to a legal right was that as a fundamental right the right to property restricted the exercise of other, more important, fundamental rights (Bhushan, 1978).  

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59 *His Holiness Kesavananda Bharati Sripadagalavaru v. State of Kerala and Another*, 1973 (4) SCC 225ff
60 *Indira Nehru Gandhi v. Raj Narian*, 1975 Supp SCC 1
61 Article 300A reads, “No person shall be deprived of his property save by authority of law.”
to a legal right limited the recourse of a condemnee to a civil suit (Chaturvedi and Dalal, 2009). However, there is scholarly disagreement over the effects of Article 300A. Tripathi, for example, has argued that property rights will be better protected than they were as a fundamental right because they will have to satisfy the common law requirements of public purpose and compensation as laid out in legislation such as the Land Acquisition Act 1894 (cited in Chaturvedi and Dalal, 2009).

In 2007, the Supreme Court ruled in the I.R. Coelho case that laws placed in the Ninth Schedule after 1973 were no longer immunized from judicial review.62 The date is taken from the Kesavananda case, which placed limits on Parliament’s power to amend the Constitution. While the Ninth Schedule was created to place land reform laws outside judicial review and therefore contribute to wealth redistribution, the I.C. Coelho verdict has had little impact of property legislation because of the current status of property as a legal and not a fundamental right (Gagrani, 2007). The removal of the Ninth Schedule’s immunity from judicial review is unsurprising considering the current liberal paradigm under which India is operating, in which large scale social programs are not conducted through land reform or the nationalization of industry, but through market transactions and public-private partnerships.

The Land Acquisition Act

The Land Acquisition Act 1894 (LAA 1894) is the law that governs routine government acquisition of land thorough the power of eminent domain. As indicated by the date of its legislation, it has roots in the British colonial administration’s need to facilitate land acquisition and assembly for the completion of public works projects such

62 I.R. Coelho (Dead) by LRs. v. State of Tamil Nadu, 14, 9,1999.
as canals, roads, or railways (Ray and Patra, 2009; Kasturi, 2008). Through the LAA 1894, the British colonial government consolidated a number of previous Acts relating to the compulsory acquisition of land and the payment of compensation, beginning from the Regulation I of 1824 of the Bengal Code and culminating with Act X of 1870 (Aggarwala, 2008). The *Statement of Objects and Reasons* of the LAA 1894 makes it clear that the new Act was necessary because of problems caused by the mandate in prior Acts that required the district collector to refer any and all disagreements over title and compensation to the courts. According to the *Statement*, this component wasted public funds and also encouraged strategic behavior on behalf of condemnees, particularly the owners of small subdivisions, who had the incentive to refuse reasonable offers of condemnation because of the likelihood of receiving a larger amount through litigation proceedings (ibid).

Through Article 372 of the Constitution, which incorporated colonial laws into the Independent state unless they were explicitly repealed, independent India inherited the LAA 1894 unchanged (Ray and Patra, 2009; Chatterjee, 1993).

The LAA 1894 is primarily intended to lay the framework to determine when land may be acquired and how much compensation must be paid. It is the LAA that governs the rules and procedures for the compulsory acquisition of land for SEZs. The LAA is a central Act, although individual states have made changes applicable to their jurisdictions to accommodate unique or locality specific circumstances. The meaning and limitations of the public purpose requirement under the LAA are neither explicitly nor exhaustively

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63 For an exhaustive overview of colonial land acquisition laws leading up to the Land Acquisition Act 1894, including why the colonial government thought a change was necessary, see Aggarwala (2008). Aggarwala’s overview uses case law to explain the need to amend and change the various Acts. In doing so, it provides an interesting glimpse into the functioning of the eminent domain regime prior to Independence.

64 In the event that the small plot owners did not win in court, the *Statement* makes note that they often had to pay an amount many times higher than the worth of their land in court costs (Aggarwala, 2008).

65 See Aggarwala (2008) for a review of state-level land acquisition acts.
defined. As it stood before amendments were introduced in 1962 and 1984, the Act restricted itself to listing provisions for acquiring land for purposes that would be permissibly public, such as land needed for town planning and the establishment of government-sponsored enterprises such as schools, public offices, hospitals, or village sites (Alfaro and Iyer, 2009; Singh 2004). In determining public purpose, however, the judiciary periodically granted broad deference to the legislature to determine what projects best served the common good or the “general public interest.” It reasoned that because the legislature’s role in government was to act as the “sole guardian of the public interest,” it possessed unfettered discretion to determine whether an acquisition met the public purpose requirement. The majority opinion in *State of Bihar v. Kameswar Singh* stated,

> The Legislature is the best judge of what is good for the community, by whose suffrage it came into existence and it is not possible for this Court to say that there was no public purpose behind the acquisition contemplated by the impugned state (cited in Chaturvedi and Dalal 2009, p. 342).

One part of the legislature’s political agenda immediately following Independence, as mentioned earlier, was state-controlled and owned heavy industrialization, for which the Act was invoked extensively (Ray and Patra, 2009). These acquisitions were carried out by the government under both Part 2 and Part 7 of the Act, which stipulated that it was

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66 *Hamabai Framjee Petit v Secretary of State for India*, AIR 1914 PC 20. In this case, the courts stated “General definitions are, I think, rather to be avoided where the avoidance is possible, and I make no attempt to define precisely the extent of the phrase ‘public purpose’…” (cited in Chaturvedi and Dalal, 2009, p. 342).

67 Despite the general trend towards deference to the legislature, a recent decision by the judiciary seems to indicate a willingness to consider the legitimacy of the public purpose of an acquisition. The language of *Jilubhai Nanbhai Kachar v. State of Gujarat*, AIR (1995 SC 142) makes this change of direction plain: Prima facie, [sic] State would be the judge to decide whether a purpose is a public purpose. But it is not the sole judge. This will be subject to judicial review and it is the duty of the Court to determine whether a particular purpose is for a public purpose or not (cited in Chaturvedi and Dalal, 2009, p. 342).

68 In *Shyan Behari v State of Madhya Pradesh* (AIR 1965 SC 427) it was decided that the notification under Part 2 of the Act could not say that the land was needed for a public purpose if a company paid the
permissible to acquire land for a public purpose or for companies, respectively (Choudhary, 2009). Part 7 required special provisions and agreements between the government and the company about the nature of the project and how it met the public purpose requirement; terms on which the company held the land; terms regarding the transfer of the land to the company; and terms regarding the payment of the cost of the government expenditures on acquiring the land (ibid). The government acquired land for companies under both parts of the Act, which led to an extensive debate on whether land acquired for a company could fulfill a legitimate public purpose and, if so, what kinds of companies and what purposes were acceptable.

The 1962 Supreme Court judgment in *R. L. Arora v State of U.P* was a landmark in the interpretation of public purpose in Part 7 of the Act. In addition to reasserting the right of the judiciary to review the public purpose of acquisitions under Part 7, the court unequivocally rejected broad interpretations of the public purpose requirement for companies in favor of the narrow direct use-or-access-by-the-public interpretation of public purpose. In their considerations, the court examined the legitimate application of two limitations in land acquisition for companies: 1) the kind of work that is “likely to prove useful to the public” and 2) the terms on which the “public shall be entitled to use entirety of the compensation. Instead, the notification must be made under Part 7 that the land was being acquired for a company.

The primary difference in differentiating whether Part 2 or Part 7 must be used depends on whether compensation will be paid in full by a private entity or at least in part by the government. If a private company is to pay compensation in full, then Part 7 must be used. However, even if the government or a government owned company makes a nominal contribution to the compensation, Part 2 may be used. *Somavanti v State of Punjab* (AIR 1963 SC 151), for example, allowed Part 2 to be used to acquire land for a company manufacturing refrigeration compressors with a token contribution of Rs. 100 by the state government.

*AIR 1962 SC 764.*

*LAA 1894 Clause (b) of section 40(1) (cited in Chaturvedi and Dalal, 2009, p. 348).*
this work” (cited in Chaturvedi and Dalal, 2009). The narrow view endorsed by the court concluded that the work itself, and not the product of the company, had to be directly used by the public, and that access to the land for regular business transactions did not fulfill the requirements of direct use. The courts further stated that, “the Land Acquisition Act did not contemplate that the government should be made a general agent for companies to acquire lands for them for their private profit” (cited in Ray and Patra, 2009, p. 42).

The status of the *R.L Arora* case as a landmark in the public purpose debate is based on the fact that it prompted the 1962 Amendment of the LAA. The 1962 Amendment made two changes. First, it prevented state governments from acquiring land for companies under Part 2. Second, it relaxed the public purpose requirements for acquisition for companies under Part 7 (Chaturvedi and Dalal, 2009). This amendment gave the government greater leeway in characterizing projects for industry and infrastructure as useful to the public, specifically overturning the decision in the *R.L. Arora* case that land could not be acquired for the building or work of a company. The constitutionality of the 1962 Amendment was subsequently challenged in *R.L. Arora (II)*, but the amendment was upheld. The courts asserted that the LAA did not permit the

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72 LAA 1894 sub-section (5) of section 41. Specifically, sub-section five states that “the public will have such right of access to and use of the land /works herein and before specified as may be necessary for the transaction of their business with the firm.” (cited in Chaturvedi and Dalal, 2009, p. 351).

73 The court observed, “In the present case the Government seems to have taken a wrong view that so long as the product of the Works is useful to the public and so long as the product of the public is entitled to go upon the Works in the way of business, that is all that is required by the relevant words in ss. 40 and 41. We have held that this is not the meaning of the relevant words in ss. 40 and 41 and therefore the Government’s satisfaction on this meaning cannot be binding and would be worthless” (AIR 1962 SC 764 at para. 15, cited in Chaturvedi and Dalal, 2009, p. 352).

74 Specifically, the 1962 Amendment did three things: 1) insert Clause (aa) into section 40; 2) insert sub-clause (4A) into clause (1) of section (40); and 3) insert sections 44A and 44B. See Aggarwalla (2008) for an overview.

75 See *Agarwalla v State of West Bengal*, AIR 1965 SC 995.

government to control the products of the company for which it acquired land and was limited to requiring that the land must be used for the purpose for which it was acquired (ibid).

The 1984 Amendment to the Act provided a more comprehensive differentiation between acquisition for public purpose and acquisition for companies. Although it continued to provide an inclusive definition of public purpose, it significantly expanded its scope to give include “the provision of land for any scheme of development sponsored by the Government,” for planned land development paid for by public funds, for town or rural planning, or for land required by a corporation controlled or owned by the state. Appended at the end of the list of situations in which the Act found a permissible public purpose, the Amendment placed an exclusionary rider stating that land acquisition for companies did not meet the public purpose requirements.

The full meaning of the exclusionary rider cannot be fully appreciated without understanding that the Amendment also made provisions to distinguish between a “company” and a “corporation owned or controlled by the state.” This distinction between a privately owned “company” and a state-owned “corporation” was contingent on 51% government ownership of paid-up share capital. If the state owned less than this, the entity was considered a “company” for purposes of the Act and land could not be acquired for the entity under Part 2 of the Act. As Pranay Chaturvedi and Ankur Dalal

77 LAA (Amendment) 1984 Section 3(e) vii.
78 LAA (Amendment) 1984 Section 3(e) iii.
79 LAA (Amendment) 1984 Section 3(e) ii.
80 LAA (Amendment) 1984 Section 3(e) iv.
81 The conclusion of the LAA (Amendment 1984 Section 3(e) states “…but does not include acquisition of land for companies.”
82 A company as defined by section 3(e), means a company as defined by the Companies Act 1956; a society as registered under the Societies Registration Act 1860; or a co-operative society as defined by “any law relating to cooperative societies.” See Chaturvedi and Dalal (2009, 359-360) for an exact reproduction of section 3(e).
(2009) have pointed out, the 1984 Amendment must be understood within the scope of the language of the document and within the scope of the Amendment’s intended purpose, which was to prevent state governments from acquiring land for private companies under Part 2 of the Act, which lacked the special provisions for land use provided by Part 7.

As the broadened scope of legitimate public purposes indicates, the purpose was not to prevent the takings power from being used to acquire land for privately owned entities at all, which could still be pursued under Part 7. With the Amendment, the legislature made absolutely sure that it could continue to use the LAA to facilitate acquisition for state-owned companies and for privately owned companies. Indeed, the amended Act facilitated the acquisition of huge tracts of land for infrastructure projects, industries, and townships such as Bhubaneshwar, Durgapur, Gandhinagar, and Chandigarh by development corporations and companies owned fully or in part by the government (Ray and Patra, 2009; Alfaro and Iyer, 2009). Although many people quietly surrendered their land for projects initiated under the banner of “national reconstruction,” others generated considerable dispute and agitation (Sharma, 2009). One of the most well known protest movements is the Narmada Bachao Aandolan (Save the Narmada Movement), which fought against the construction of a number of hydroelectric dams on the Narmada River in Gujarat on the basis that the compensation was inadequate, the project lacked a legitimate public purpose, and the dams would cause environmental damage (Alfaro and Iyer, 2009).

83 In fact, the failure to define the term “company” by a number of authors weighing in on the public purpose debate in India is grossly misleading.
Compensation Under the Land Acquisition Act

The LAA requires that landowners receive compensation for the loss of their land at the standard of fair market value: what a willing seller would reasonably accept from a willing buyer in a consensual transaction. Section 23 of the Act specifies that market value should be determined from the value of the land on the date of the declaration of intent, and that the following principles should be considered in determining market value: 1) damage to trees and standing crops at the time the Collector takes possession of the land; 2) damages from taking the land from the landowner or separating it from other parcels of land; 3) damage from injuring other property or earnings; 4) damage from change of residence or business due to the acquisition; and 5) damage from loss of profits due to the impending acquisition from the time of the notification of the intent to acquire the land and the actual acquisition (Singh, 2004, p. 21). In addition to the principles listed above, Section 23 also stipulates that the 15% of the market value of the land should be added to the compensation as a solatium.84

The Indian courts have repeatedly observed the difficulty of determining the value of land with complete accuracy. They have noted the problems that arise for courts attempting to provide precise reasons for their final valuation of land in a taking because of subjective value and surplus value problems. The need to venture into the realm of projection and conjecture therefore leaves room for abuse and raises problems of accountability.85 In Secretary of State v Charlesworth Pilling and Co.86 the court noted that a determination of value is “an enquiry relating to a subject abounding in uncertainties, where there is more than ordinary guess work and where it would be very

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84 A solatium is an award for damages or suffering.
85 Secretary of State v. Govind Ram, 11 IC 233: 252 PLR 1911.
86 ILR 26 Bom 1 (PC). See also Secretary of State v. Ataf Hussain, AIR 1927 Cal 827: 103 IC 714.
unfair to require an exact exposition of reasons for the conclusions arrived at” (cited in Aggarwala, 2008, p. 780).

Among a number of other acceptable methods for determining compensation, the LAA accommodates government set or approved rates, which do not necessarily have to adhere to the market value of the land; the capitalized value of average income of the land; and prevalent market rates based on land transactions data (Raghuram, Bastian, & Sundaram, 2009, p. 6). In using these methods, however, the Act stipulates that the courts should not take into consideration any of the following factors: 1) degree of urgency; 2) disinclination of the condemnee to part with the land; 3) damages sustained that would not have necessitated compensation if caused by a private person; 4) damages that are likely to be caused by the use the land is put after acquisition; 5) increase in the land’s value do to the new use; 6) any increase in the value of the condemnee’s other land due to the new use of the acquired land; 7) Any improvements made to the land after notification; and 8) any increase in value caused by an illegal use of the land (cited in Singh, 2004, pp. 21-22).

The Land Market in India

Excluding the inherent problems with compensation such as subjective valuation, the Indian land market has problems that are specific to the development of its institutions and regulations. In practice, even if one ignored subjective valuation problems and assumed that compensation at market value fully compensates landowners after a condemnation, determining the appropriate market rate is fraught with difficulties.

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87 Some methods that the courts have judged are not acceptable include averages and sale by auction, in Amrit Lal Bysak v. Secretary of State (22 IC 78) and Kishore Chand Kapoor (Dr.) v. Dharam Pal Kapoor (AIR 1987 SC 66), respectively.
Not only does India lack well-trained third party evaluators, but also the regulatory overload to which the government subjected the land market has led to a lack of accurate land transactions data to use for determining the market value of a particular parcel of land. Yogendra Garg, the former director of the Ministry of Commerce’s SEZ division, explained how government regulations led to the recording of fraudulent prices for land transactions as follows:

In India, historically, when land was bought, the actual transaction price was not revealed to the government, primarily to save on stamp duty and capital gains tax. Sizeable amounts were paid in cash and thus not declared to the government. The documents registered with state or local governments reflected only the amounts transacted through banking channels. When the government determined the value at the time of acquisition, it was largely guided by the prices declared in the official documentation. Though we were aware of this reality, and corrective actions such as a locality-wise minimum have been taken in a number of states, compensation was largely determined by the prices declared at the time of registration (cited in Alfaro and Iyer, 2009, p. 10).

The lack of transparency extends throughout the entirety of the land administration system. Land records are poor due to coordination problems between the multiple agencies handling land records and the lack of communication between these agencies. The institutional framework of the registration system also makes it difficult to achieve clarity of titling, both because of informal intergenerational inheritance and because of the lack of a legal provision for a landowner to register his title with a notified authority and achieve a clear and unencumbered title to his land (Morris and Pandey, 2009).

The difficulty lies in the system for recording land rights, which is both cumbersome and inadequate. Rather than providing a single registration system, land rights can be recorded and registered through either the title system or the deed system. Registration of land transactions in India provides for public record of the transaction, but
does not require the registering agency to establish the validity of the transaction. The title system verifies the validity of the transaction, while the deeds system does not, placing the onus of potential buyers to verify the validity of the transaction themselves. Buyers can thus find themselves personally responsible for determining whether the title to the land they wish to buy is clear and unencumbered, a task that is made more burdensome by inconclusive and often obsolete information disseminated by the various departments dealing with land transaction records (Morris and Pandey, 2009). The transaction costs due to lack of clarity in land records may create incentives for companies to influence the state to acquire the land for them using eminent domain. On the side of the landowner, unresolved disputes over titles can easily lead to social unrest in cases of compulsory acquisition, particularly because the LAA only gives the landowner forty-eight hours to respond to the notice of the government’s proposed price posted in a local gazette by the District Collector (Alfaro and Iyer, 2009). In both cases, ample room for dispute, litigation, fraud, and corruption stems from a lack of secure property rights that place significant burdens on both buyers and sellers.

The regulatory constraints placed on land also play a role in the valuation and the use-path of land, particularly as it changes from agricultural to non-agricultural uses. In India, a Non-Agricultural Use Clearance (NAC) is necessary to put agricultural land to non-agricultural uses, and is typically given to a buyer rather than to a farmer looking for a seller (Morris and Pandey, 2009). While NAC may place a burden on farmers and depress the value of agricultural land in general, in cases of consensual market transactions the owner of agricultural land may be able to bargain to capture some of the

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88 In 2008, the Indian government launched a national program for reforming the system for land registration called the National Land Resource Modernization Programme (Morris and Pandey, 2009).
value created by the use change. In cases of compulsory acquisition, the surplus value
generated by the transfer and the change in use is assigned entirely to the condemner.
Because the potential to capture the surplus value entirely is assured more fully through
government takings than through market transactions, the incentive to use eminent
domain may be greater than the incentive to use market transactions. The wealth transfer
from the condmnee to the condemner may also lead to distorted investment decisions and
transactions motivated more by the capture of the surplus value than the proposed project.

Reforming Land Acquisition and Compensation

Unrest and dissatisfaction with the land acquisition framework set out by the LAA
has led to calls for reform on the issues of compensation and the public purpose for which
land may be compulsorily acquired. The criticism of the LAA has rested on the broad
definition of public purpose and the refusal of the courts to issue an exhaustive, rather
than an inclusive definition. The 2007 Supreme Court judgment in *Daulat Singh Surana
v. First Land Acquisition Officer* explained the court’s position on public purpose as
follows:

> Ambiguity, indefiniteness, and vagueness of public purpose are usually the
grounds on which notifications under Section 4(1) of the Land Acquisition Act
are assailed. Public purpose cannot and should not be precisely defined and its
scope and ambit be limited as far as acquisition of land for the public purpose is
concerned. *Public purpose is not static.* It also changes with the passage of time,
need, and requirements of the community (para 31-32 AIR 2007 SC 471, cited in
Mohanty, 2009, p. 46, emphasis added).

The elastic definition of public purpose has allowed the courts to sanction land
acquisition for a number of projects that they deem to be socially viable given the
government’s new paradigm of dismantling regulations, encouraging more intense
integration into the world economy, and promoting exports. However, concerns that the
LAA neither provided adequate protections for all those dependent on the land for their livelihood nor defined public purpose narrowly enough to avoid abuse led to the introduction of the Land Acquisition Amendment Bill 2007. The Amendment Bill 2007 redefined “public purpose” to include land required for defense purposes or public infrastructure projects, as well as acquisition of land for a “Person” (including any company, association, or body of individuals) if the person required land for a purpose useful to the general public and had acquired a minimum of 70% of the total land required for the project in direct negotiations with landowners (cited in Mohanty, 2009, p. 49).

The Amendment proposed other significant changes, among which many of the most important involved the compensation requirement. First, it recognized a broad spectrum of land based rights, from informal use or tenancy rights to formal property rights, by offering compensation to all those dependent on the land for their livelihood, including tribal people, artisans, and forest dwellers. Second, it required social impact assessments (SIAs) in cases involving large-scale displacement. Third, it specified that the intended use of the land and the current market value of land with a similar use should be included in determining compensation, and that this compensation must include shares or debentures. Fourth, in order to address grievances about delayed payment, it set a cutoff date for payment at one year after the declaration of the intent to acquire the land was made. Fifth, it established a judicial body that comprised members with and without judicial qualifications to address grievances, replacing the civil courts. Sixth, it stipulated that if the acquired land is resold, the original acquirer must

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89 Strategic, military, air force, or naval defense.
redistribute eighty percent of the capital gains to the original owners or their descendents (Parker and Vanka, 2007).  

While the Bill’s promoters have claimed that it will provide a more holistic view of compensation that takes into account livelihood issues and will eliminate the need for negotiations between landowners and a distrusted government, it has generated strong reservations. It is inconclusive whether negotiations between private companies and farmers and other landowners are likely to be free or fair due to the huge power asymmetries between the two groups (Menon and Mitra, 2009). Private businesses are likely to benefit from planning, research, and strategizing that began before the negotiations. Private business also enjoy the advantages of increased information and time supplemented by money and other resources, while the landowners, politely put, have significantly fewer resources to marshal at the negotiation table, even with the aid of activist NGOs or civil society organizations, and significantly less time and information with which to plan their response. 

As a community they may resort to collective negotiations to level the playing field, but collective bargaining brings with it its own problems. It is short sighted to assume, along the lines of some more optimistic commentators, that the community necessarily can and will bring a uniform set of demands or desires to the table. In short, the community may not be able to come to the negotiating table as a singular entity because power asymmetries, conflicting demands, and strategic behavior are operating within it as well between it and the private

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90 As Parker and Vanka (2007) point out, this requirement places a huge burden on the acquiring party, which must ostensibly keep track of all the land’s original owners and their heirs.  
91 Given that failed protests and violence has led to the general perception, as Mohanty (2009) pointed out, that all development projects are anti-poor, it is possible to argue that the landowners enjoy the benefit of anti-development public sentiment.
The potential for fragmentation is greater within a community of landowners than within a company, leaving the community open to manipulation from the company itself or from middlemen working for the company or for their own benefit.

Table 3.1. Acquisition and Compensation Policies: 1894-2010

<table>
<thead>
<tr>
<th>Milestones</th>
<th>Mode of Acquisition</th>
<th>Compensation and Livelihood Agenda</th>
</tr>
</thead>
<tbody>
<tr>
<td>LAA, 1894</td>
<td>Drawing strength from an English law; It yields extraordinary power to the state to acquire land with mere notification, since declaration that the purpose is “public” is recognized as sufficient for it to be legally recognized as such.</td>
<td>The LAA, 1894 is designed to facilitate acquisition of land for public purpose. This law empowers the state to compel the owner of any a property to submit it to the state, any agency or entity authorized by the state on the grounds that the property is required for the purpose of the state (for a broadly defined “public purpose”). The pretext of ‘public purpose’ is often accused of harboring private interests. LAA, 1894 does propose compensation for loss of asset ownership, but there is not a clear emphasis on livelihood.</td>
</tr>
<tr>
<td>LAA, 1894 (as amended in 1984)</td>
<td>Acquisition process as above</td>
<td>The Amendment in 1984 enabled greater private sector participation but the state’s role was still pre-eminent. There was still no emphasis on livelihood security.</td>
</tr>
<tr>
<td>National Policy on Rehabilitation and Resettlement (NPRR), 1998</td>
<td>Acquisition under LAA, 1894</td>
<td>The NPRR-1998 recognizes the rights of tenants and agricultural labor and is broad based in order to address livelihood issues to include both the displaced and those both directly and indirectly affected.</td>
</tr>
<tr>
<td>SEZ Act, 2005</td>
<td>Acquisitions for SEZs</td>
<td>The focus of this Act was primarily the creation of new industrial / manufacturing jobs at the cost of traditional livelihoods. Compensation is often at the discretion of the acquiring party (private company), some of whom advocate what they call “generous” compensation packages exceeding that set by the government or relying on the prevailing market rate” of land.</td>
</tr>
</tbody>
</table>

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92 R.N. Sharma (personal communication, January 2010) noted this when he observed the intergenerational tension surrounding land.
In addition, while the Bill attempted to reduce corruption in the acquisition process for private entities by requiring market negotiations for 70% of the land, it is unclear how this might affect the behavior of strategic holdouts, whose behavior may
depend on the attractiveness of the government’s compensation package compared to that of the private entity. If the government’s compensation package is more attractive, the company may find it more difficult to acquire the needed 70% of the land, potentially thwarting socially beneficial projects. The Standing Committee on Rural Development (SCRD), which reviewed the proposed Amendment Bill in 2007, echoed some of these concerns. It expressed reservations about the tremendous costs the government was likely to incur in compensating the remaining 30% of landowners because of the price increase in the time between the purchase by the developer and acquisition by the government (cited in Alfaro and Iyer, 2009). The SCRD also observed that the government would be responsible for rehabilitating 30% of the landowners, but not the initial 70%, which raised the question of equality.

Given the extent of the politicization of land acquisition and displacement, it is not a stretch to imagine a scenario in which some of the original 70% of landowners express their dissatisfaction with their compensation package after accepting it with protests and perhaps litigation with the aid of activists and civil society groups. Dissatisfaction may be especially likely to occur in hindsight if the private entity used straw transactions or secret buyers to obtain the 70%. Following this, it is equally possible to imagine a scenario in which political actors scramble to maintain legitimacy among their constituencies by demanding equal compensation between the 70% and the 30%. Regardless of whether the government makes up the difference or the company is entreated to do so, the result is likely to be higher transaction costs and an environment less conducive to investment.
While it has become conventional to discuss the Amendment Bill 2007 in the larger context of land acquisition and compensation, the Bill failed to pass in both houses of Parliament in 2009. It is included here because it indicates possible directions policy on acquisition and compensation may take in the future under more successful legislation. Alternative frameworks and paradigms for compensation, such as those laid out by individual companies or by multi-lateral institutions such as the Asian Development Bank may also become more prevalent in the future (see Table 3.1, above).
CHAPTER 4

SPECIAL ECONOMIC ZONES

This chapter provides an overview of the salient features of Special Economic Zones (SEZs) in general, and India specifically. It begins with a brief history of India’s transition from a highly regulated economy through its liberalization process in 1991, leading up to the creation of spatially targeted zoning policies that culminated in the SEZ Act 2005 and Rules 2006. It then turns to the Act and Rules themselves, focusing on explicating the processes and procedures for setting up a zone and the requirements for acquiring land. Finally, it examines the status of SEZs in India today, including popular locations and some general trends emerging since the economic downturn.

Periods in Indian Economic History

Three broad periods can be identified in India’s more recent economic history: 1) an autarkic period prior to liberalization (1956-1957 through 1974-1975); 2) a period of intermittent incremental liberalization (1975-1976 through 1990-1991); and a period signaling a “paradigm shift” to an outward looking economic policy in 1991 (Nayar, 2006, p. vii).

The period of partial, intermittent reforms leading up to the paradigm shift in 1991 was concerned with dismantling “license raj,” a vast and complex arsenal of licenses, regulations, subsidies, controls, and tariffs supported by a macroeconomic policy (monetary, fiscal, and exchange rate policies) controlled by the central government. Many of these controls, as Denoon (1998) has pointed out, date back to World War II under British rule. They were both continued and deepened after
independence by the Congress-led government, which justified the establishment of a planned economy emulating the “socialist pattern of society” in which the “commanding heights” were controlled by the government (Nehru, 1971, cited in Nayar, 2006, pp. vii-8). With the assistance of Cambridge-trained physicist and statistician Prasanta Chandra Mahalanobis, Jawaharlal Nehru directed the economy on an autarkic course of development through beginning in the mid-1950s with the implementation of the Second Five-Year Plan (1956-1961) (Dohrmann, 2008; Nayar, 2006; Chatterjee, 1993).

A planning commission was set up to fulfill the Directive Principles of State Policies in the Indian Constitution, in which Article 30(b) gave the state the mandate to enable that the “ownership and control of the material resources of the community are so distributed as best to serve the common good.” In response to these goals, the planning arm of the state began a program based on import substitution industrialization directed towards capital goods, metal making, and heavy engineering in order to fulfill the goals of political independence, national security, and legitimacy, as well as economic self-sufficiency (Nayar, 2006, p. 9). Self-sufficiency, the hallmark of import substitution industrialization, evoked the nationalist model of choice promulgated to garner support for the nationalist movement, swadeshi. Guha (2007) observed:

> Once, Gandhian protesters had burnt foreign cloth to encourage the growth of indigenous textiles; now, Nehruvian technocrats would make their own steel and machine tools rather than buy them from outside...Self-reliance...became the index of development and progress. From soap to steel, cashews to cars, Indians would meet their material requirements by using Indian land, Indian labor, Indian materials and, above all, Indian technology (p. 209, cited in Dohrmann, 2008, p. 61).

Economic self-sufficiency enabled India to set up a diverse industrial system that was aligned with the prevailing opinion of development policymakers and even organizations
such as the World Bank, resulting in GDP growth of about 3.6% per annum between 1956 and 1975. While was higher than that of other newly independent countries, the inability of India to improve its rate of growth led to 3.6% being derisively labeled the “Hindu rate of growth” and the years after Independence under Nehru the “lost years” (Dohrmann, 2008; Nayar, 2006). During this time, laws such as the Foreign Exchange Regulation Act (FERA), which limit foreign investor’s equity in companies to 40%, forced foreign companies such as Coca-Cola, Mobil Oil, and IBM out of the country (Alfaro and Iyer, 2009; “Business: India May Swallow,” 1977).

Baldev Nayar (2006) has demarcated the halting period of partial reforms following the failure of the import substitution industrialization program by the collapse of the Bretton Woods Regime in 1971 and the OPEC oil price shock of 1973. During this period, the government took tentative steps towards liberalization of the economy in response to a series of severe economic and political crises. These included external elements such as droughts, the Indo-Pakistani war, and quadrupling oil prices, as well as internal elements that included chaos that ensued from Prime Minister Indira Gandhi’s nationalization of banking and industry.

In response to these crises, the government imposed deflationary policies, adopted measures promoting deregulation and export that included cash incentives for engineering, chemicals, synthetic fibers, and garments, and simplified procedures for export licensing (Nayar, 2006). Both Indira Gandhi and her son Rajiv experimented with expanding these policies, which Nayar has noted were prompted by dissatisfaction with

93 FERA has since been amended to allow 100% foreign equity ownership in companies.
94 Chatterjee (1993) has proposed that the planning mechanism set up immediately after independence is related to a two-fold, and contradictory, mechanism for security legitimacy as an independent government: 1) legitimacy through representative government and 2) legitimacy as a developmental state acting on behalf of the “unified will of the people” through welfare distributing activities.
India’s economic performance. He stressed that these first attempts at liberalization were less influenced by attempts to emulate other successful liberalizers than the 1991 policies, and were free of coercion by foreign agencies implementing the “Washington Consensus,” which had not yet been formulated.

The New Economic Policy (NEP) of 1991 was prompted by a severe balance of payments crisis stemming from high inflation rates and government budget deficits. Spiraling oil prices and a gross domestic product (GDP) that plummeted to 1.3% per annum prompted the government to enter into an arrangement for a supplementary loan from the International Monetary Fund (IMF). Conditions attached to that loan demanded liberalization of the Indian market, which stimulated an economic liberalization program spearheaded by Finance Minister Manmohan Singh, who was elected Prime Minister in 2004 (Nayar, 2006; 2001; Shome and Mukhopadhyay, 1998). Customs duties, excise tax, central government expenditure, and restrictions on the banking sector were lifted; import licensing was abolished; the industrial licensing system was systematically dismantled; exchange rates were oriented towards the market; income tax rates were reduced; and many restrictions on FDI were eased.

The reforms produced numerous successes. The software industry experienced growth rates of over 50% per annum between 1991 and 2000, and large Indian firms such as Tata Steel and Tata Motors acquired foreign firms.\(^\text{95}\) India attracted $65 billion in FDI from April 2000 to May 2008. It is arguable that there was little done to change the

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\(^\text{95}\) In 2007, Tata Steel acquired the Anglo-Dutch steel firm Corus to make it one of the top five steel companies in the world. In 2008, Tata motors unveiled the Nano, slated to be the world’s cheapest car, indicating it had not only India, but other emerging markets in its sights, and also purchased the Jaguar and Land Rover brands from Ford (Alfaro and Iyer, 2009).
earlier policies of the “license raj,” and that in areas and sectors in which reforms did take place, the reform process was limited, halting, and often rolled back (Denoon, 1998).

Alfar and Iyer have pointed out that it was commonly perceived that unlike China, India’s growth was occurring in spite of cumbersome economic policies and regulations. The editor of Newsweek International, Fareed Zakhira, observed,

India’s growth is messy, chaotic, and largely unplanned…[It] is not top down but bottom up… India does not have a government that rolls out the red carpet for foreign investment. But it has a vast and growing number of entrepreneurs who want to make money. And somehow they find a way to do it, overcoming the obstacles, bypassing the bureaucracy” (cited in Alfaro and Iyer, 2009, p. 4).

For many years after the 1991 reforms, for example, the Indian Government continued to limit most sectors of the economy to foreign investment through elaborate regulatory structures. Unlike other areas this limitation changed in 2001, when the central government passed legislation allowing 100% FDI in key sectors of the economy, including public infrastructure and real estate.

Special Economic Zones Worldwide

A Special Economic Zone is a spatially delineated, duty free enclave that is considered foreign territory for the purpose of trade, duties, and tariffs (Government of India, Ministry of Trade and Commerce, 2008). The term “Special Economic Zone” may be considered an umbrella term that covers a variety of more specific enclave development or zone types, including Export Processing Zones (EPZ), Free Trade Zones (FTZ), Free Trade Warehousing Zones (FTWZ), Free Zones (FZ), Industrial Estates (IE), Free Ports, and Urban Enterprise Zones (Alfaro and Iyer, 2009). These zones exist in

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96 Urban Enterprise Zones, as Alfaro and Iyer (2009) have pointed out, are not treated as foreign territory although like other zone types provide a package of tax benefits and other fiscal incentives.
industrialized countries, developing countries, and transition economies, although their characteristics vary widely between categories and countries. Worldwide, special economic zones began to promulgate rapidly in the late 1960s and early 1970s, generally to create a competitive environment free of encumbrances by regulations, although objectives varied from country to country.

Broadly, the creation of spatially delineated export zones is based on the premises that 1) it is necessary to use special policies and incentives to attract FDI and increase the export capacity of a country’s manufacturing sector and 2) that it is undesirable or impossible to impose such policies outside a geographically demarcated area within the country (Gopalakrishnan, 2007). The variable success record of export zones illustrates the gaps in research about investment location decisions and the role of incentives, place marketing, and other locational advantages that allow businesses to exploit economies of scale and economies of agglomeration. It also suggests that there is need to do research on both the short and long term positive and negative effects of SEZs across countries. Amartya Sen (2007), for example, has said, “Though I have not studied it [SEZs], I am appalled to see how little it has been studied” (cited in “Noble Laureate,” 2007, para. 3).

Taiwan and South Korea are frequently cited examples of SEZ successes. Taiwan, for example, set up SEZs in 1965 as part of a larger development strategy to facilitate the transfer of agricultural land to industrial uses. While by 1980 the three SEZs in Taiwan (Kaohsiung City, Nanze, and Taizhong) contributed 7% to the nation’s overall export volume, the zones’ importance decreased as the economy as a whole became increasingly liberalized and the incentives associated with the zones became less attractive (Alfaro and Iyer, 2009). South Korea’s export zones are also considered a success story, contributing
to the country’s ability to diversify its export platform by producing non-traditional exports, although they were subject to a similar “life cycle” as that of Taiwan (Gopalakrishnan, 2007).97

In his study of the history of EPZs and SEZs, Shankar Gopalakrishnan (2007) warns that the success of the Taiwanese and South Korean EPZs cannot be blindly replicated in other countries due to specific historic conditions that contributed to their success, namely, their placement in U.S. foreign policy as bastions against the spread of communism. According to Gopalakrishnan, this had two affects. First, it enabled large-scale land reform prior to the opening of EPZs, under the American occupation in Korea and under Kuomintang in Taiwan, which had the dual effect of dampening or diverting peasant unrest and generating surplus land to transfer to industrial uses. Second, the U.S. gave South Korea and Taiwan preferential access to its export markets.

Zones in other countries such as Egypt, Ghana, Senegal, Guatemala, and Tunisia have been considerably less successful, tending either to remain isolated from the rest of the country’s economy (the domestic tariff area or DTA) or concentrate in either extractive industries or those with low value added. UNCTAD (2002) has pointed out that zones may serve to trap countries into increasing dependence on serving as low cost processing centers for goods low on the supply chain, causing them to capture little of the value added generated by activities such as R&D (cited in Gopalakrishnan, 2007).

97 The life cycle of export zones is described similarly by Ge (1999), Jayanthakumaran (2003), and Amirahmadi and Wu (1995). Gopalakrishnan (2007, p. 16) synthesized them into four stages: 1) construction of basic infrastructure and beginning of investment flow into the zone; 2) significant rise of production and exports, with one industry beginning to dominate others; 3) leveling off of foreign investments and exports, rise of general costs, and possibly replacement of low value processing activities with high value added industries; and 4) decrease of the zone’s importance for export promotion, reappraisal of role of zones, and tendency for reintegration into the domestic economy.
The benefits of using location based incentive packages may be temporary and also fragile, which may be illustrated of the effect of multi-national policies and regulations on countries that depend heavily on zones. One illustration is the effect of the expiry of the Agreement on Textiles and Clothing (ATC) on textile producing countries heavily dependent on textile dominated export zones. The ATC was a transitional policy set up by the World Trade Organization (WTO) that sought to end the quotas that the Multi Fiber Arrangement imposed on countries’ clothing exports. The 2002 removal of MFA restrictions on 29 types of garments correlates with an approximate 18% increase in China’s share of the US market for those types of garments. In the same year, glove exports from Guatemala, Bangladesh, and Sri Lanka, countries with textile dominated zones, fell by 65%, 48%, and 47%, respectively, while China’s glove exports increase by 291% (ICFTU, 2003, cited in Gopalakrishnan, 2007). The “footloose” nature of industries such as textiles and garment manufacturing gives reason for concern about the long-term effects of the creation of zones on countries.

**The Chinese Experience**

It was not until China’s experiment with SEZs and the broad perception of their success did SEZs gain global legitimacy as a promising—in some opinions foolproof—strategy for economic development. The exact role of SEZs in China’s economic success is debated by scholars, and is beyond the scope of this paper. It remains that the perception of SEZs role in China’s economic development is of particular importance to Indian policymakers and politicians, who use China as a benchmark for India’s economic progress as the two compete for dominance in the regional economy.

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98 The Agreement on Textiles and Clothing expired on January 1, 2005.
In a colloquial rendition on the Indian side, the competition between the two countries can be put in tortoise-and-hare terms: despite China’s impressive record of growth and infrastructure creation, India’s “soft infrastructure”—its democracy and civil liberties—will ensure that it will catch up, if not overtake, its neighbor (Pilling, 2010; Dohrmann, 2008). In describing India’s “democratic challenge,” Ashutosh Varshney (1998) has offered evidence to support the slower pace of India’s liberalization (p. 93). He points out the tensions inherent India’s liberalization of her economy within a pre-established democratic order, which contradicts democratic theory about the relationship between market reforms and democratic principles. In short, the historical experience of other countries points out that by giving voting rights to all sectors and classes of society prior to liberalization, rapid GDP growth, and large scale per-capita income gains, India should be experiencing turbulence and resistance to liberalization policies if not outright reversal in some cases.

For example, Taiwan and South Korea did not implement democracy with universal suffrage until two decades after the beginning of their economic reforms; Western democracies did not give the poor voting rights until after they were relatively rich; and China and Singapore are not yet liberal democracies (Varshney, 1998). Unlike in an authoritarian regime, in India, where people of low caste, income, and education form an important part of the voting bloc, economic policies are shaped by political

99 Rajesh Chadha’s article “Exim Policy Changes: Let’s Do It Right This Time,” appearing in Economic and Political Weekly in April, 2000 (after the Indian government announced the new Exim policy that was the precursor to the SEZ Act) is an excellent example of the prevalent view that Indian is playing a game of “catch up” with China. After quoting a series of economic indicators for China and India, Chandra commented, “Clearly, China seemed to be jogging enthusiastically while India was still awakening from its deep slumber. In the process, we got behind schedule by about two decades if not more. The solace lies in the often-displayed slogan while driving up hilly tracks: ‘better late than never’. However, the path ahead is tough and bumpy.” Although made up of bizarre mix of imagery, Chandra’s point is nonetheless clear: India can catch up with China if the government prudently and efficiently implements its export policies.
bargaining between parties, interest groups, and electorates. Implementation of liberalization measures is necessarily slower when policies must be renewed by vote and policymakers must garner necessary support from crucial constituents through bargaining and other concessionary measures (Nayar, 2006).

Nonetheless, in the colloquial version of the Indian tortoise and the Chinese hare, this turbulence will lead to long-term sustainability of India’s liberalization policies and economic growth, along with so-called “deepening” or “widening” of democracy.¹⁰⁰ Xiaobo Zhang’s (2008) study of the contribution of the paradox of China’s rapid economic growth and its poorly-defined property rights regime and weak legal system offered some qualified support for this conclusion. The social and political costs of authoritarian enforcement of economic policies perceived as unfairly benefitting private capital at the expense of large numbers of peasants, farmers, and laborers may serve to create powerful political interest groups that will jeopardize the social stability that has been an asset to China’s investment climate.¹⁰¹

Despite such optimism, at the outset of the SEZ policy many commentators believed that India’s 1991 reforms lacked the depth and breadth necessary for India to remain competitive with other reforming economies, particularly China. Despite a quick return to growth after the global economic recession in 2009, and despite recent predictions by Prime Minister Manmohan Singh and K.M. Chandrasekhar, the government’s cabinet secretary, that 4% growth in the farming sector would be sufficient

¹⁰⁰ See Arjun Appadurai (e.g. 2001) for an example of the use of the terms “deepening” or “widening” democracy.
¹⁰¹ Alternately, rising social unrest may catalyze political reform. Rising income levels may perform a similar function, as was the case in Taiwan and South Korea in the demand for more secure property rights (Zhang, 2008).
for India to see double-digit growth in 2010, India still lags behind China (Dohrmann, 2008).  

While India speculates about its potential for double-digit growth in 2010, China has grown at a rate of approximately 10% per annum since the 1990s, an indication of its attractive investment climate (Pilling, 2010; Zhang, 2008). Furthermore, while India and China had roughly the same per capita income at the beginning of the 1990s, China’s has risen over three times higher than India’s since then. Comparisons in infrastructure are also unfavorable. Jha (2006) observed that China built 41,000 km of international standard roads from 1998 to 2003, approximately 22 km per day, while India, in the same amount of time built only 3.2 km of lower quality roads (cited in Dohrmann, 2008).

The influence of India’s perception of China’s SEZs on its own SEZ policy cannot be overstated. The views of both detractors and supporters of SEZs in India both stem from perceptions of the Chinese SEZ experience. Mr. Murasoli Maran, former Minister of Commerce and Industry, conceived of India’s SEZ policy as a way to attract foreign direct investment and simultaneously facilitate the construction of infrastructure of modern standards by private companies working alone or in tandem with state or municipal corporations. Minister Maran’s Exim policy speech in April 2000, which formalized initiatives for the future SEZ policy, claimed that his recent visit to Chinese SEZs was an “eye opener” (cited in Chadha, 2000, p. 1343). According to Minister Maran, modeling India’s new Exim policy on Chinese policy was also supposed to serve the role of generating rapid increases in India’s share in world exports and build on opportunities created by the world’s recognition of “India’s crucial role as the largest democracy and as a dynamic economy” (cited in Chadha, 2000, p. 1343).

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102 This is five years after the implementation of the SEZ Act, 2005 and Rules, 2006.
Parliamentary debates on the passage of the SEZ Act, 2005 also serve to underscore Indian enthusiasm about the success of Chinese SEZs in acting as “engines for growth.” In the Lok Sabha in May 2005, Professor M. Ramadass\(^{103}\) expressed a prevalent opinion about the manner in which Chinese SEZs have served as “engines for growth” within the Chinese economy:

> China is a shining example of a country which has developed through its Special Economic Zones. Various facilities given have attracted foreign direct investment and they have gone a greater extent in developing their economy” (cited in Gopalakrishnan 2007, 27).

In practice, China’s SEZ policy is significantly different from India’s, both in the number of the zones and in land ownership within the zones. In China, the government maintains ownership of the land, offering it to investors on a leasehold basis, while in India the land is owned by private developers and in some cases their government partners. Stories of widespread land speculation, inflation, and protests by workers also provide warrant for caution when interpreting the success of the Chinese experience. These negative experiences are cited by scholars and civil society organizations working to reverse or reform India’s SEZ policy.

**Special Economic Zones in India**

India set up Asia’s first Export Processing Zone (EPZs) in 1965 in Kandla, Gujarat, followed by the Santa Cruz Export Processing Zone (SEEPZ) in Mumbai in 1972. Nineteen eighty-four saw the establishment of four new zones in Noida (Uttar Pradesh), Cochin (Kerala), Falta (West Bengal), and Chennai (Tamil Nadu) before the establishment of a final zone in Visakhapatnam (Andhra Pradesh) in 1989, which did not

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\(^{103}\) Professor M. Ramdass, Member of Parliament, Pondicherry in the Lok Sabha on May 10, 2005.
become operational until 1994 (Government of India, Ministry of Commerce 2009). Conforming to general goals of EPZs, India’s EPZs attempted to redirect investment away from large urban centers into lagging regions in order to balance regional development, as well as to attract FDI without removing protections for domestic sectors (Gopalakrishnan, 2007).  

Particularly in the initial years of the EPZ policy, these zones were constrained by their position as yet another part of India’s import-substitution industrialization policy with few concessionary measures besides tax concessions and the provision of infrastructure facilities of low quality (Mitra, 2007). EPZs were subject to the same intensive load of regulatory restrictions and controls as businesses outside the zones. These included clearance regulations that required entrepreneurs to acquire individual clearances from multiple departments, a restrictive FDI policy, the lack of an authority empowered with central control to expedite clearances, and cumbersome controls for day-to-day operations such as bank guarantees and the movement of goods from the zones to the domestic economy. Despite EPZs’ contributions to the share of India’s total exports rising to 3% from 1975 to 1985, due largely to production at SEEPZ, and the expansion of EPZs in the late 1980s due to the “pro-business” environment promoted by  

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104 Redirecting investment away from urban centers had the additional goal of decongesting urban centers that were seen as larger than the optimal city size. One such example is Mumbai, and the development of the twin city Navi Mumbai (see Shaw, 2004).

105 A major rationale for EPZs is the promotion of exports, which is a way to acquire foreign exchange in order to import capital goods, fuel, etc. In the period of import substitution followed by many developing countries following the Second World War, high tariffs and protection for domestic industry reduced quality and increased prices, making it difficult for domestic industries to export their products. Gopalakrishnan (2007) noted that in the context of high levels of protection for domestic industry, FDI was concentrated in capital-intensive industries in order to evade tariff costs and avail itself of the high domestic prices that resulted from protectionist policies. He argued that because FDI was concentrated in capital-intensive industries, developing countries were not able to take full advantage of one of their major attractions to foreign investors—cheap labor, resulting in incentive-based schemes such as EPZs to attract foreign investment.
Indira and then Rajiv Gandhi, the policy was largely viewed as unsuccessful (Aggarwal, 2004).

Table 4.1. Differences Between EPZ Policies and the SEZ Act in India

<table>
<thead>
<tr>
<th></th>
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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>FDI Approval</strong></td>
<td>Government board required to approve FDI</td>
<td>100% FDI investment</td>
<td>Simplified and speedier FDI inflows into SEZ</td>
</tr>
<tr>
<td><strong>Tax Exemption</strong></td>
<td>Income tax exempt for first 5 years</td>
<td>100% income tax exempt for 5 years, 50% for 2 more years thereafter, 50% ploughed back export profit for next 3 years</td>
<td>Companies with SEZ have greater income tax incentives</td>
</tr>
<tr>
<td><strong>Retention of Foreign Exchange Earnings</strong></td>
<td>Retain 70% foreign exchange earnings in EEFC (Exchange Earner Foreign Currency Account)</td>
<td>Retention of 100% export earnings by SEZ units in EEFC account</td>
<td>Companies within SEZs have better control over foreign exchange earnings</td>
</tr>
<tr>
<td><strong>Sectors</strong></td>
<td>Focused mainly on manufacturing</td>
<td>Manufacturing, trading activities, services</td>
<td>SEZ sector focus is more expansive</td>
</tr>
<tr>
<td><strong>Export Performance (EP) &amp; Net foreign Exchange Earnings as % of exports (NFEP)</strong></td>
<td>Minimum EP &amp; NFEP required (varies by state and industry)</td>
<td>No minimum EP required. Positive NFEP required (varies by state and industry)</td>
<td>Companies within SEZ have more freedom in meeting export performance requirements</td>
</tr>
<tr>
<td><strong>Domestic Tariff Area (DTA) Sales</strong></td>
<td>50% of exports qualify for DTA Sales</td>
<td>Units within SEZs can sell unlimited products to DTAs. However, sales subject to applicable import duties</td>
<td>SEZs have greater access to national market, but required to pay import duties</td>
</tr>
<tr>
<td><strong>Duty on Imported Raw Materials</strong></td>
<td>Duty free raw materials must be used within 1 year</td>
<td>Duty free raw materials must be used within 5 years</td>
<td>SEZs have longer period within which to use imported raw materials</td>
</tr>
</tbody>
</table>
Table 4.1. (continued)

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Certification of Imports</td>
<td>Imports need certification of government authority</td>
<td>Imports on self-certification basis</td>
<td>SEZs have simpler customs procedures making import of goods easier</td>
</tr>
<tr>
<td>Zone Authority</td>
<td>No independent, autonomous zone authority</td>
<td>Independent, autonomous zone authority and development commissioner</td>
<td>SEZs have independent zonal authority, making action within the zone potentially quicker and less subject to political fighting</td>
</tr>
<tr>
<td>Size Allowances*</td>
<td>Only Kandla (700 acres) significantly larger than minimum area for single sector SEZ. Smallest is SEEPZ at 93 acres.</td>
<td>Varies according to zone type. Minimum 100 ha for single sector zone. Maximum 5000 ha for multi-product zone.</td>
<td>SEZs larger. Potential importance for exploiting economies of scale/agglomeration, general dynamism. Real estate implications.</td>
</tr>
</tbody>
</table>

* This indicates the zone size allowances under the respective policies. Number of zones within allowed size varies, especially for SEZs.
Source: Adapted from Alfaro and Iyer, 2009, p. 19.

The explicit liberalization policies the government began implementing in 1991 were also applied in the context of EPZs, resulting in the expansion of fiscal incentives, simplifications of policies, empowering zone authorities, loosening of controls, and expansion of the scope of sectors included in the scheme (Mitra, 2007). Liberalization provided the context in which the EPZ scheme evolved into the SEZ policy, despite significant differences between the two (see Table 4.1, above, for some differences between the two policies). On implementation of the new SEZ policy, all active EPZs
were converted into SEZs and were eligible for all privileges and incentives accorded to new SEZs, for which individual approvals began in 2006.

Salient Features of the Special Economic Zones Act 2005 and Rules 2006

The concept of SEZs was introduced through India’s Export-Import Policy for 1997-2002. Prior to the formalization of the concept through the implementation of the SEZ Act 2005 and Rules 2006, the legal framework for foreign economic policy was formulated by paragraph 7.1 of the Foreign Trade Policy. When the SEZ 2005 and Rules 2006 became operative in February of 2006, the state governments enacted their own SEZ laws to cover state-related issues, although policies by both the state and central governments aimed to set up a legal framework that provided protections to significant stakeholders, including the developer and operator, occupying units, external suppliers, and residents (Bhatnagar, 2009; Dohrmann, 2008).

In an economy that has seen significant expansion of the Information Technology (IT) sector, the SEZ policy was an attempt to serve multifold objectives simultaneously, including the promotion of exports of both goods and service, the development of India’s infrastructure facilities, and the generation of employment and economic growth more generally (SEZ Act 2005, Section 5). To serve this purpose, the SEZ Act allows

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106 According to the Foreign Trade Policy (para 7.1), 1) SEZs are duty-free enclaves within the territory of India, where 2) goods and services going into an SZ from a domestic tariff area (DTA) shall be treated as exports, while goods coming from the SEZ area into the DTA shall be treated as imports, and 3) the SEZs may be set up for the manufacture of goods or rendering of services.

107 Early on, the central government wanted to remove the rights of the states to have a say in the approval process for SEZ, but had to dispense with this policy under pressure from the states. The minority coalition government led by the Indian National Congress depends on the support of left-wing parties in Parliament, and had to preserve their support (Dohrmann, 2008). This is an excellent example of the kinds of tension inherent in India’s democratic system that would not be an issue in China.
developers to set up single sector, multi-product, or Free Trade and Warehousing Zones (FTWZ).  

SEZs are considered foreign territory for trade and function as islands within the domestic economy (or domestic tariff area, DTA). Both the developer of the SEZ and the firms or units operating within the SEZ are granted “enabling conditions,” such as privileges and exemptions including tax and duty holidays, freedom from routine customs checks through the process of “self-declaration” of goods, relaxed labor laws, and free or subsidized land ownership.

The attractiveness of these incentive packages far outstrips those for EPZs (see Table 4.2 for a list of incentives), particularly when the states provided additional incentives in order to attract investment. For example, many SEZ developers were exempt from stamp duty, a percentage of any land transaction owed to the government, as well exemptions of duty on goods used to build the SEZ (Alfaro and Iyer, 2009). In the context of the intense competition generated by decentralization and liberalization policies such as the 74th constitutional amendment, which devolved responsibility for economic development to the state and municipal levels, the relative attractiveness of state policies may take on a renewed importance.

108 Free Trade and Warehousing Zones (FTWZ) are a special category of SEZ that focus on warehousing activities in order to facilitate the export of goods and services. According to the Act, FTWZs are to be established in the proximity of ports and airports to provide modern warehousing, transportation and handling facilities, commercial office space, and other infrastructure (Bhatnagar, 2009). Multi-product zones include those in which units for the manufacture of goods from one or more sectors may be set up in the processing area, such as, for example, from information technology enabled services (ITES) and pharmaceuticals.

109 Power under the Industrial Disputes Act, 1947 and other related acts relating to the units in the SEZ and those employed by the Developer are delegated to the Development Commissioner. SEZs are also declared Public Utility Service under the Industrial Disputes Act, 1947, meaning that notice is necessary for strikes.
Table 4.2. SEZ Incentives and Exemptions

<table>
<thead>
<tr>
<th>Exemptions and Incentives for Units in SEZs</th>
<th>Exemptions and Incentives for SEZ Developers</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Duty free import and domestic procurement of goods for development, operation and maintenance of SEZ Units</td>
<td></td>
</tr>
<tr>
<td>- 100% Income Tax exemption on export income for 5 years. 50% for next five years</td>
<td></td>
</tr>
<tr>
<td>- No minimum value addition norms or export obligations</td>
<td></td>
</tr>
<tr>
<td>- Facilities can retain 100% foreign-exchange receipts in Exchange Earner’s Foreign Currency Accounts</td>
<td></td>
</tr>
<tr>
<td>- Exemption from minimum alternate tax</td>
<td></td>
</tr>
<tr>
<td>- Exemption from Central Sales Tax</td>
<td></td>
</tr>
<tr>
<td>- Exemption for State Sales Tax</td>
<td></td>
</tr>
<tr>
<td>- Single Window Clearance for Central and State approvals</td>
<td></td>
</tr>
<tr>
<td>- Exemption from industrial licensing requirements for items reserved for small-scale industries sector</td>
<td></td>
</tr>
<tr>
<td>- No cap on foreign investment for small-scale-sector reserved items which are otherwise restricted</td>
<td></td>
</tr>
<tr>
<td>- No import license requirements</td>
<td></td>
</tr>
<tr>
<td>- No routine examinations by Customs for export and import cargo</td>
<td></td>
</tr>
<tr>
<td>- Exemption from Central Excise duties on procurement of capital goods, raw materials, consumables, spares, etc.</td>
<td></td>
</tr>
<tr>
<td>- Facility to realize and repatriate export proceeds within 12 months</td>
<td></td>
</tr>
<tr>
<td>- Profits allowed to be repatriated without any dividend-balancing requirements</td>
<td></td>
</tr>
</tbody>
</table>

| - Exemption from customs/excise duties |
| - Income Tax exemptions on export income |
| - Exemption from minimum alternate tax |
| - Exemption from dividend distribution tax |
| - Exemption from Central Sales Tax (CST) |
| - Exemption from Service Tax |
| - Exemption on sales tax, octroi, mandi tax, turnover tax for authorized activities |
| - FDI to develop townships within SEZs with residential, educational, health-care, and recreational facilities |

Infrastructure and Land

The SEZ policy differs from previous policies in that constrained state budgets led the Indian government to promote development infrastructure financed by private companies in part through FDI. It allows the land to be owned or leased by a private, public, or joint-sector company, and gives the developer the option of building all the infrastructure themselves, outsourcing projects to co-developers, and sharing infrastructure with other SEZs (Dohrmann, 2008).

Infrastructure facilities are defined under section 2(p) of the Act to include industrial, commercial, or social infrastructure considered necessary for the development of the SEZ, with all infrastructure providers recognized as co-developers of the SEZ. Land outside the processing area (area for manufacturing of goods or rendering of services), which may comprise 50% of the zone, may be used by the developer for a variety of authorized purposes, including the construction of infrastructure for residential, recreational, or commercial activities. The processing area may be devoted to traditional manufacturing as well as “economic processing,” which includes commodity hedging and offshore banking through the construction of Offshore Banking units or International Financial Service Centers (Sheth, 2008).

The provision for the development of social infrastructure has contributed to claims that SEZ development is motivated by land speculation. For example, Gopalakrishnan (2007) and Aggarwal (2004) have noted that the developer may profit significantly without having to develop the processing area at all in light of the package of concessionary measures. The inclusion of land acquisition at a reduced or negligible

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110 Infrastructure for SEZs is primarily intended to serve the SEZs themselves, not the DTA. For example, the BoA rejected a proposal for a railway station intended to service the DTA (Bhatnagar, 2009).
cost as an implicit or explicit incentive for developers along with the social infrastructure caveat, may contribute to larger potential profit margins.

In recognition of objections of this kind, the Board of Approvals (BoA) amended the list of activities the Development Commissioner was allowed to approve for locations outside the processing area in August 2009. They recommended that facilities for shopping/retail, housing, medical services, power, business/convention centers, and office/commercial space in the non-processing area be subject to approval only after a detailed justification and plan for each, commenting that infrastructure with the purpose of attracting tourism should be avoided. Case-by-case approvals are based on factors such as the area of the SEZ, the ratio of processing/non-processing area in the SEZ, available Floor Area Ratio (FAR), number of employees, SEZ location, and the list of approved authorized operations in the SEZ (Bhatnagar, 2009).

Setting up an SEZ

According to Section 3 of the SEZ Act, an SEZ may be developed and managed jointly or individually by the state or central government or any “person,” including an individual, a Hindu Undivided Family (HUD), cooperative society company, privately owned foreign or domestic firm, proprietary concern, association of persons, or local authority. The SEZ Rules stipulate a minimum contiguous land area required for setting up an SEZ, which varies according to the type of SEZ being set up (see Table 4.3), which has been reduced for certain small states such as Assam, Meghalaya, Nagaland,
Arunachal Pradesh, Mizoram, Manipur, Himachal Pradesh, Sikkim, Jammu and Kashmir, Goa, or in a Union Territory.\textsuperscript{111}

While previously there was no maximum allowance, the Empowered Group of Ministers (EGoM) imposed a cap of 5,000 ha for multi-product zones in April of 2007 after land acquisition became a focal point in protests against SEZs. However, since land is a state matter in the Indian Constitution, individual states are able to lower this ceiling (Bhatnagar, 2009). The Act (section 3, sub-section 8) also give the Central government the power to approve the clubbing of contiguous approved SEZs even if the total area exceed this 5,000 ha cap on a case-by-case basis.\textsuperscript{112}

Table 4.3. Minimum Contiguous Area Requirements by SEZ Type

<table>
<thead>
<tr>
<th>Type of SEZ</th>
<th>Hectares</th>
</tr>
</thead>
<tbody>
<tr>
<td>Multi-product (sec. 5 para. 2 lit. a) SEZ Rules)*</td>
<td>1,000 or more</td>
</tr>
<tr>
<td>Sector-specific in one or more services/port or airport (sec. 5 para. 2. Lit. b) SEZ Rules)</td>
<td>100 or more</td>
</tr>
<tr>
<td>Sector-specific: electronics hardware or software, IT, gems &amp; jewelry, biotechnology, non-conventional energy, including solar energy equipment and solar cells (sec. 5. Para. 2 lit. b) proviso 1 and 2 SEZ Rules)</td>
<td>10 or more</td>
</tr>
<tr>
<td>Free Trade &amp; Warehousing Zone (FTWZ) (sec. 5 para. 2 lit. c) SEZ Rules)</td>
<td>40 or more</td>
</tr>
</tbody>
</table>

\*Capped at 5,000 ha

Source: Dohrmann, 2008, p. 66

\textsuperscript{111} There are very specific minimum area requirements for single sector SEZs. These are outlined in the SEZ Rules sec. 5 para 2 lit. b) and c).

\textsuperscript{112} None of the conditions for Notification of an SEZ can be relaxed except for the contiguity requirement. On August 18, 2009, the Department of Commerce declared that the following conditions applied to developers who wanted to relax the contiguity requirement: 1) the developer must maintain contiguity through security gates/bridges/underpasses/culverts/fences on the side of the road facing the processing area; 2) no tax benefits for measures taken to establish contiguity; 3) the entire processing area must be on one side of the National Highway; 4) no LoA can be issued until the all measures for establishing contiguity and securing the processing area are completed; 5) movement between two adjoining SEZs will be restricted until proposed contiguity is established (Bhatnagar, 2009, p. 76).
Billed by the Indian government as a “single window clearance,” the process for setting up an SEZ proceeds in multiple phases under the authority and direction of the Board of Approvals (BoA), a central government authority responsible for overseeing SEZ development and insuring the adherence of proposed SEZs to legal requirements (Section 8, SEZ Act, 2005). The approval procedure varies according to whether SEZ is being developed by a private developer or by the state or central government.

The approval process for a private developer can be accomplished one of two ways. The developer may submit a proposal detailing the economic viability of the proposed project to the concerned State Government, which is required to forward the proposal along with their recommendation to the BoA in no more than 45 days (sec. 3 para. 2 SEZ Act; sec. 4 para. 1 SEZ Rules, 2006). Alternately, the developer may go directly to the BoA for approval, but must obtain a “No Objection Certificate” from the concerned state government within six months of approval (sec. 3 para. 3 SEZ Act, 2005). If the developer is the state government, the proposal is sent directly to the BoA for approval (sec. 3 para. 4 SEZ Act). When the central government acts as developer, it may approve and notify the SEZ without seeking approval from the BoA (sec. 3 para. 4 SEZ Act, 2005).

Following review of the proposal, the BoA has the power of approving, rejecting, or requiring modification, and will convey its recommendation to central government (sec. 3 para. 9 SEZ Act, 2005). The central government will then grant approval to the Developer through a Letter of Approval (LoA) within thirty days of the receipt of the proposal.

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113 Rules 3 to 16 of SEZ Rules, 2006 outline the procedural requirements for establishing an SEZ and the responsibilities of its Developer.
BoA’s decision (sec. 3 para. 10 SEZ Act, 2005; Rule 6 SEZ Rules, 2006). The LoA will be in the form of a “formal approval” if the developer self-declares that it has obtained the minimum contiguous area of vacant land required for a proposed SEZ type.\footnote{Rule 2(zf) of the SEZ Rules defines vacant land as land where there are no functional ports, manufacturing units, industrial activities, or structures in which any commercial or economic activity is in progress (Bhatnagar, 2009).} The LoA denoting formal approval is valid for three years, but may be extended an additional two years if requested by the developer. During the initial three-year period of validity, at least one LoA must be issued for a unit within the SEZ, at which point the SEZ is considered operational (Rule 6(a) SEZ Rules, 2006).

Alternately, if the developer has not acquired the minimum contiguous area of land required by the Act, the LoA will be issued in the form of an “in-principle” approval. In-principle approvals are valid for up to one year, which the BoA may extend for up to two years if the developer applies two months before the LoA’s expiry. During this time period, the developer is responsible for obtaining the minimum contiguous area of land and submitting proof of possession of land ownership or leasehold rights, along with an updated project report so formal approval can be granted (Rule 6(b) SEZ Rules, 2006). In the final stage in setting up an SEZ, the developer must obtain “Notification” from the Ministry of Commerce, which requires the Development Commissioner to conduct a physical inspection of the land in order to verify that developer has taken possession of the land. During the notification process, the developer submits exact details of the area identified for the SEZ and supplies proof of its legal right of ownership and possession, after which the state government will issue a certificate verifying that the land is free of encumbrances (Rule 6, SEZ Rules, 2006). The Development Commissioner (DC) will then make a recommendation to the Ministry of Commerce,
which will in turn notify the SEZ with the condition that the minimum built up area required for the SEZ type is constructed within ten years, with at least 50% to be constructed within five years. Following notification, the DC will demarcate the areas within the proposed SEZ into a processing, trading and warehousing, and non-processing area, ensuring that each area is secured appropriately and marked with entry and exit signs (Rule 11, SEZ Rules). Table 4.4 illustrates the procedures of SEZ notification and demarcation.

In April 2009, the Department of Commerce issued instructions for modifying and expediting the approval and notification process after observing a lag time between the DC’s recommendation for notification to the Ministry of Commerce and the actual notification. This modification requires the developer to submit documentary proof of land possession/ownership such as survey numbers, non-encumbrance certificates, and vacancy and contiguity reports to the DC and Ministry of Commerce before an application is placed before the BoA.\footnote{That is, step 2 in Table 4.5 would be a part of the approval process prior to the proposal being considered by the BoA.}

Following notification and demarcation of the SEZ, it is necessary for the developer to obtain approvals for authorized operations within the SEZ. Only when the SEZ is notified can the developer begin applying for approval for separate units within the SEZ, as illustrated below in Tables 4.5 and 4.6.
Table 4.4. Procedure for SEZ Notification and Demarcation

<table>
<thead>
<tr>
<th>Step No.</th>
<th>Details</th>
<th>Remarks</th>
</tr>
</thead>
</table>
| 1       | Land acquisition process has to be completed by the developer          | - Land should be vacant and contiguous with no encumbrances or public thoroughfare  
|         |                                                                        | - Land may be free or leasehold                                         |
|         |                                                                        | - If leasehold, the period of lease must be a minimum of 20 years       |
| 2       | Submission of landholding details to the Central Government (sec. 7 SEZ Rules) | - The exact particulars of the land in question need to be submitted along with proof of legal ownership. A certificate from the state government is required to show that the land is unencumbered.  
|         |                                                                        | - In case of any additional terms in the LoA, the acceptance of the same must be shown |
| 3       | Notification of the identified area as an SEZ (sec. 8 SEZ Rules)        | - Central Government will issue notification identifying a specific area as an SEZ. This will be published in the Official Gazette and will contain all the details of the land which has been identified as an SEZ |
| 4       | Central Government appoints the Development Commissioner and notifies the Approval Committee | - Must be done within a period of six months from the date of establishment of the SEZ |
| 5       | Work of the Development Commissioner                                   | - The Development Commissioner demarcates the areas within the SEZ as processing and non-processing zones |

Source: Adapted from Dohrmann, 2008
### Table 4.5. Procedure for Obtaining Grant of Approval for Authorized Operations in SEZ

<table>
<thead>
<tr>
<th>Step No.</th>
<th>Details</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Submission to the BoA of the details of the operations proposed in the SEZ by the developer (sec. 9 SEZ Rules)</td>
<td>- Fiscal concessions only available on the basis of authorized operations after the grant of approval</td>
</tr>
<tr>
<td>2</td>
<td>Authorization by the BoA (sec. 9 SEZ Rules)</td>
<td>- The BoA may authorize the developer to undertake any operations that the Central Government may authorize</td>
</tr>
</tbody>
</table>
| 3        | Application to the Approval Committee (sec. 10 and 12 SEZ Rules)         | - Developer must make a list of items/goods and services which will be required to carry on the authorized operations in the SEZ and to seek permission from the Approval Committee for the procurement of the same  
- The Approval Committee will approve the import or procurement of the goods/services from the DTA for the authorized operations |
| 4        | Steps to be taken thereafter by the developer (sec. 22 SEZ Rules)        | - Developer undertakes the various steps required to commence authorized operations such as execution of a Bond and Legal Undertaking regarding adherence to SEZ laws |

Source: Adapted from Dohrmann, 2008
Table 4.6. Procedure for Setting up Individual Units in an SEZ

<table>
<thead>
<tr>
<th>Step No.</th>
<th>Details</th>
<th>Remarks</th>
</tr>
</thead>
</table>
| 1        | Proposal for setting up a unit in an SEZ made to the Development Commissioner (sec. 17 para. 1 SEZ Rules) | - The proposal must be submitted to the Development Commissioner  
- Existing units from former EPZs, etc. shall have been deemed to have been set up in accordance with the Act and will not need new approval |
| 2        | Development Commissioner forwards the proposal to the Approval Committee (sec. 17 para. 2 SEZ Rules) | - On receipt of the proposal, the Development Commissioner shall submit the same to the Approval Committee for its approval |
| 3        | Development Commissioner forwards the proposal to the Board of Approval (sec. 17 para. 3 SEZ Rules) | - In the following cases the Development Commissioner will have to forward the proposal to the BoA for approval:  
  - Proposal for units for foreign collaboration and foreign direct investments in the SEZ for its development, operation, and maintenance  
  - Proposal for a unit engaged in providing infrastructure activities within the SEZ  
  - Proposal for granting a license to certain industrial undertakings to be established as a whole or in part in an SEZ |
| 4        | Approval by the Approval Committee (sec. 18 SEZ Rules) | - The Approval Committee may either approve the proposal with or without an modification, or reject the proposal  
- In case of modification/rejection, the applicant must be given reasonable opportunity to be heard, after which the proposal will be modified or rejected |
| 5        | Grant of Letter of Approval (sec. 19 SEZ para. 1-3 SEZ Rules) | - The Development Commissioner may, after approval of a proposal grant, send a Letter of Approval to the applicant to set up a unit and undertake operations. |
| 6        | Start of operations (sec. 19 para. 4 SEZ Rules) | - The Letter of Approval will be valid for one year, within which time the unit must start the operations for which it has been granted approval |

Source: Adapted from Dohrmann, 2008
Current Status of Indian SEZs

As of May 2010, there were 576 Formally Approved SEZs, 155 valid In-Principle Approved SEZs, 356 Notified SEZs, and 114 operational SEZs in India. Southern, Western, and Northern India have experienced the most aggressive SEZ development since the inception of the Act. The Eastern states, which have political parties that have made redistributive policies the basis of their platform and which are traditionally wary of private capital, have lagged behind (see Figure 4.1 and Table 4.7).

Figure 4.1 SEZ Locations in India

116 There have been a number of SEZ developers who have applied for denotification, in various stages of approval. The statistics here are taken from the Ministry of Commerce’s official SEZ website and may have changed since the time this was written.
Table 4.7. Distribution of SEZs by State

<table>
<thead>
<tr>
<th>State</th>
<th>Formal Approvals</th>
<th>In-principle Approvals</th>
<th>Notified SEZs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Andhra Pradesh</td>
<td>103</td>
<td>4</td>
<td>68</td>
</tr>
<tr>
<td>Chandigarh</td>
<td>2</td>
<td>-</td>
<td>2</td>
</tr>
<tr>
<td>Chattisgarh</td>
<td>1</td>
<td>2</td>
<td>-</td>
</tr>
<tr>
<td>Delhi</td>
<td>1</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Dadra and Nagar Haveli</td>
<td>4</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Goa</td>
<td>7</td>
<td>-</td>
<td>3</td>
</tr>
<tr>
<td>Gujarat</td>
<td>50</td>
<td>11</td>
<td>27</td>
</tr>
<tr>
<td>Haryana</td>
<td>46</td>
<td>17</td>
<td>30</td>
</tr>
<tr>
<td>Himachal Pradesh</td>
<td>-</td>
<td>3</td>
<td>-</td>
</tr>
<tr>
<td>Jharkhand</td>
<td>1</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Karnataka</td>
<td>52</td>
<td>9</td>
<td>27</td>
</tr>
<tr>
<td>Kerala</td>
<td>24</td>
<td>0</td>
<td>11</td>
</tr>
<tr>
<td>Madhya Pradesh</td>
<td>14</td>
<td>6</td>
<td>5</td>
</tr>
<tr>
<td>Maharashtra</td>
<td>111</td>
<td>36</td>
<td>55</td>
</tr>
<tr>
<td>Nagaland</td>
<td>2</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Orissa</td>
<td>10</td>
<td>3</td>
<td>6</td>
</tr>
<tr>
<td>Pondicherry</td>
<td>1</td>
<td>1</td>
<td>-</td>
</tr>
<tr>
<td>Punjab</td>
<td>10</td>
<td>7</td>
<td>2</td>
</tr>
<tr>
<td>Rajasthan</td>
<td>8</td>
<td>11</td>
<td>7</td>
</tr>
<tr>
<td>Tamil Nadu</td>
<td>69</td>
<td>18</td>
<td>49</td>
</tr>
<tr>
<td>Uttar Pradesh</td>
<td>34</td>
<td>5</td>
<td>16</td>
</tr>
<tr>
<td>Uttarakhand</td>
<td>3</td>
<td>-</td>
<td>2</td>
</tr>
<tr>
<td>West Bengal</td>
<td>25</td>
<td>13</td>
<td>11</td>
</tr>
<tr>
<td>TOTAL</td>
<td>578</td>
<td>146</td>
<td>322</td>
</tr>
</tbody>
</table>

Mukhopadhyay (2009) has examined data on SEZ size, location, and performance in order to assess how the zones have met their stated goals of infrastructure development and inclusive development that mitigates regional inequality. He observed that SEZ developers tend to prefer to locate their projects in districts containing or proximate to India’s megacities (Chennai, Mumbai, Delhi, Kolkata, Hyderabad, and Bangalore), and that these projects tend to be less than a square kilometer in size. These dual observations led him to speculate that (1) the SEZs will act as appendages to mega-cities in highly industrialized areas and may therefore exert further strain on already strained municipal infrastructure; (2) their small size will probably reduce the infrastructure they are able to provide; and (3) their location close to mega-cities might indicate that real estate speculation is driving SEZ development, what Swapna Banerjee-Guha (2009) has called the logic of “accumulation by dispossession.”

The preferential location near mega-cities also indicates that SEZ policy has failed to play a role in mitigating regional inequalities. For reasons specific to economic geography, transport economics, and the exploitation of economies of scale, it is unlikely that developers would choose to locate far from large cities and transport facilities. Most are, in fact, too small to generate economies of scale (Sivaramakrishnan, 2009; Ahya and Sheth, 2006). Proximity to cities and ports is more important than proximity to industrial clusters or developed regions more generally (Aggarwal, 2004). As Mukhopadhyay’s analysis makes clear, SEZs might be understood as part of the spatial transformations of Indian cities, where increasing land prices make peri-urban land extremely attractive for developers. By acting as appendages to the million-plus cities, SEZs may also participate in economies of agglomeration and some of the attendant beneficiaries of densely located
firms and industries. As such, they are part of the space economy of India’s megacities, and are thus intrinsically related to issues of land acquisition and redevelopment experienced in the cities themselves, for example slum rehabilitation or upgrading and other urban renewal programs.

Denotification

SEZ development, unsurprisingly, has also slowed with the 2008 global economic crisis. By January of 2010, over 29 SEZs had sought denotification, not just for a portion of the SEZ, but of the entire project, while 16 SEZ developers had sought extensions (Mukherjee, 2010). The global economic downturn has affected large developers by dampening prospects for meeting projected export figures, as cited by Royal Palms India Pvt Ltd and Essar SEZ Hazira Ltd, as well as constraining developers’ ability to raise funds for projects, particularly in the Information Technology (IT) and Information Technology Enabled Sectors (ITES). For example, DLF, India’s largest real estate firm, has sought denotification for five of its nine IT/ITES SEZs. Rajeev Talwar, DLF’s director, claimed that a massive “resource crunch” due to the effects of the downturn on IT exports is the primary reason for denotification (Mukherjee, 2010).

Other developers such as Pradeep Jain, the chairman of Parsvnath Developers have claimed that the protests and social unrest surrounding land acquisition for SEZs since 2007 have limited the options developers have to keep their SEZs viable during the crisis. In short, developers claim that the decrease in demand combined with increased

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117 These include SEZs at the following locations: Gandhinagar (10.2 ha), Sonepat, Haryana (10.12 ha), Kolkata (10.48 ha), Bhubaneswar (10.23 ha), and Shivaji Marg, Delhi (10.02 ha) (Mukherjee, 2010, p. 41).
regulatory restrictions due to the politicization of land acquisition is driving
denotification. Jain explained,

At a time of funds crunch, we are constrained by the absence of any
provisions for selling part of the land notified for the SEZ or selling of
built-up spaces or giving it on long-term lease to any strategic investor.
The non-processing areas should be looked at as an instrument to raise
funds for the processing area (cited in Mukherjee, 2010, p. 41).

The limited ability of developers to leverage funds by the sale of land also comes at a
time of relative uncertainty regarding the stability of the SEZ Act’s provisions. The
uncertainty stems from procedural issues about land use and acquisition, as well as the
draft direct tax code. The draft direct tax code may lead to regulatory overhaul in the
Income Tax Act that could affect the exemptions and tax incentives extended by the Act
if incentives specific to SEZs are not exempted.

The number of denotifications is small compared to the number of notified and
approved SEZs. However, the media has seized on the denotification issue with ferocity,
calling it a “rush” and “denotification fever.” Added to the other reasons SEZ developers
cite as motivating denotification, media portrayal could potentially contribute to a lack of
confidence in the SEZ policy and catalyze project abandonment.
CHAPTER 5
THE CASES OF MUMBAI SEZ AND NAVI MUMBAI SEZ

No legal hurdles are foreseen in the implementation and commissioning of the integrated SEZ as there are no environmental restrictions in the area other than the provisions of the CRZ Act and the Pollution Control Act.

— Nikhil Gandhi, CEO SKIL Infrastructure

The decision has strengthened our belief that even mighty corporations can be forced to eat humble pie using peaceful and democratic means of agitation.

— Ulka Mahajan, National Alliance of People’s Movement (in response to the Supreme Court’s decision to refuse to stay the land acquisition process for MSEZ)

This chapter is an in-depth case study of two SEZs near Mumbai: Mumbai SEZ (MSEZ) and Navi Mumbai SEZ (NMSEZ). Several reasons make studying these two SEZs together more useful than focusing on either one or the other, especially in terms of land acquisition. MSEZ and NMSEZ were conceived as twin or sister SEZs, which means that they share some project promoters and a similar location. A similar location means that the relative demand for land in the area is comparable and that the developers of the SEZs as well as the landowners affected by the acquisition were operating under the same state level acquisition and rehabilitation policies and dealing with the same state and municipal governments. These shared attributes are most useful because of the distinctly different land acquisition trajectories in the two cases. MSEZ experienced tremendous amounts of protest and publicity, was under litigation several times for land acquisition issues, and had a difficult time acquiring land through consensual market transactions and persuading the government to effectively use its power of eminent
domain on their behalf. In 2010, MSEZ shut down its website and it was rumored that the project promoters were considering alternative uses for the land. In contrast, NMSEZ, while not yet operational, has not been the object of protests and has had a smooth land acquisition experience. NGOs and civil society organizations that have targeted MSEZ mention NMSEZ little if at all in their literature. NMSEZ’s website, which once had a link to that of MSEZ, now does not mention its erstwhile sister at all lest it become associated with what has popularly become a symbol of the misuse of public purpose, protest, and corruption almost to the level of Singur or Nandigram.¹¹⁸

These starkly different land acquisition trajectories enable the exploration of the factors contributing to the relative success and failure of the two SEZs. As the object of protests, MSEZ is uniquely able to provide some practical information about problems with valuation and compensation, flaws in the land acquisition framework, bargaining impasses, and strategic behavior on the part of stakeholders. Both are uniquely situated to illustrate how the nature of the “data” on SEZs is contested and difficult to come by because of the secrecy involved in the development plan. By narrowing the scope of the problem and replacing generalizations with specifics, the case study is able to suggest the way in which external explanatory factors—socio-economic, political, and legal / regulatory—interact with more internal and subjective issues like valuation and the behavior of stakeholders in bargaining situations where information is difficult to come by and rumor and conspiracy disguise themselves as fact.

¹¹⁸ Because of the success civil society organizations have had with MSEZ, it has become common to use it as a symbol of the anti-SEZ struggle. For example, Ulka Mahajan, a leader in the anti-MSEZ struggle, gave the introductory remarks at the National People’s Audit of SEZs in New Delhi in April 2010, during which she mentioned MSEZ several times. MSEZ was also mentioned by other speakers in the program who were not directly involved with the struggle.
The chapter begins by describing the rationale for making the two SEZs before moving on to discuss the economic and social geography of northern Raigad district, Navi Mumbai, and the Mumbai Metropolitan Region. It proceeds by describing the layout and land use in the two zones, with a specific focus on NMSEZ. Following this section, it discusses the protests against SEZs generally and MSEZ specifically. Finally, it analyzes the land acquisition process, problems, and outcomes with respect to the two zones using theoretical concepts and aspects of the LAA introduced in chapters 2 and 3.

MiSEZ: The Integrated Zones

The narratives of (M)MSEZ\(^{119}\) and NMSEZ are closely intertwined, despite the distinctly different outcomes of the two projects. Both were conceived as contributing to the development of infrastructure, industrial capacity, and general dynamism and productivity of the area surrounding Mumbai. In 2004, SICOM signed a Memorandum of Understanding with CEO Nikhil Gandhi’s Gujarat Positra Port Infrastructure Ltd (GPPIL) to set up a 2,100 ha SEZ in Gujarat, which was moved to Mumbai through Gandhi’s SKIL Infrastructure Ltd following administrative delays (Parthasarathy, 2004). At the same time, CIDCO, the industrial development arm of the government of Maharashtra, floated a global bid for the development of Navi Mumbai SEZ, a 500 ha SEZ located in the area adjacent to MMSEZ 300 meters away across a creek (SKIL, 2006-2007).

SKIL was encouraged by Infrastructure Leasing and Financial Services Ltd. (IL&FS), a leading Indian infrastructure and development finance company, to bid for NMSEZ as

\(^{119}\) At its inception, MSEZ was known as the Maha Mumbai Special Economic Zone (MMSEZ). The MiSEZ was an integrated zone comprising MMSEZ and NMSEZ.
well and develop the two SEZs as an integrated township with the name Maha Mumbai Integrated SEZ (MiSEZ) in order to avoid the unnecessary duplication of infrastructure and “undue competition” (IL&FS, 2006) (see Figure 5.1). Through the competitive bidding process, CIDCO formed a preferred bidder/strategic investor consortium, which formed a company called Dronagiri Infrastructure Pvt Ltd (DIPL). DIPL later formed a Special Purpose Company (SPC) called NMSEZ Pvt. Ltd with a consortium of equity partners, with DIPL and CIDCO holding 74% and 26% stakes in NMSEZ, respectively. Under the SPC, SKIL broke ground at NMSEZ in 2005, but soon after sold a majority stake to Mukesh Ambani’s Reliance Industries Ltd (RIL). RIL acquired a 75% stake in MMSEZ, while SKIL retained a 25% stake. RIL obtained 48% stake in NMSEZ in conjunction with Anand Jain’s Jai Corp (Mathew, 2006).

SKIL’s move of co-opting RIL as an equity partner in the twin SEZs generated controversy that prevented the project from achieving financial closure until 2006. A consortium including Anik Development Corporation and Gammon India filed a writ petition in the Bombay High Court in 2005 claiming that SKIL was engaging in trade and not development by taking on Reliance as an equity partner. This demand for re-tendering of the NMSEZ project was withdrawn in early 2006, although critics of the process point to the lucrative proposition of promoting the project as a real estate venture.

IL&FS was initially promoted by the Central Bank of India (CBI), Unit Trust of India (UTI), and the Housing Development Finance Corporation Ltd. (HDFC), but has broadened its base of shareholders to include other institutional shareholders such as the State Bank of India (SBI), the Life Insurance Corporation of India, and corporations representing the Investment Authorities of Japan and Abu Dhabi. IL&FS has the “distinct mandate” to catalyze India’s infrastructure development through the commercialization of infrastructure projects and the promotion of value added financial services centers (IL&FS, 2006). IL&FS acted as a co-developer and financial advisor for a consortia of private sector firms that won the bidding process from the Government of Maharashtra. IL&FS initially invested INR 20 crore towards project development of MiSEZ, promoted a real estate mutual fund to participate in the equity capital of MiSEZ, and courted the investment of large institutions such as the Exim Bank and HUDCO (Srivats, 2004).
and then selling it out to actual SEZ promoters at huge profits (Sharma, 2009; Mathew, 2006).

At their inception, the twin SEZs were slated to be the second largest single-location SEZ complex in the world after Shenzhen SEZ in Guangdong province, which has around 65,000 acres (Mathew, 2006). Their development was to be simultaneous, with the Singapore Government owned Jurong Town Corporation as the primary planning organization. The larger MMSEZ arm of the project proposed to acquire over 10,000 ha of land in three phases over a period of ten years, acquiring land in 15 villages in the Uran and Pen tehsils of Raigad district of Maharashtra within the Mumbai Metropolitan Region, directly impacting around 5,521 households (Shaban and Sharma, 2005). The first phase of the project would affect around 2,126 ha of land spread over four villages in the area. Together, the MMSEZ and NMSEZ arms of the project were estimated to affect around 40 villages with a population of over 70,000, with land in excess of 14,163 ha (Sharma, 2009).

As noted in the introduction of this chapter, MSEZ has been beset by intense protests surrounding land acquisition and has experienced considerable delays. In order to shed some of the symbolic liability with the project, the promoters changed its name from Maha Mumbai SEZ to Mumbai SEZ fairly early on in the process, and also shed the name MiSEZ as NMSEZ sought to distance itself from MSEZ.124

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121 JTC took over from a previous master plan acquired by CIDCO from Chicago-based consulting firm McCliter.
122 A tehsil is an administrative area at the sub-district level.
123 Panvel, Pen, and Uran tehsils have a population (and number of villages) of 224,560 (160), 176,681 (153), and 140,351 (53), respectively (Shaban and Sharma, 2005).
124 The MSEZ website, which has been unavailable and “under construction” since the beginning of 2010, originally had a link to the NMSEZ website, and vice versa. The NMSEZ website currently does not mention MSEZ or anything about the benefits of the integrated SEZs, even in the section of the website devoted to explaining the “genesis” of NMESZ.
Economic and Social Geography of Northern Raigad District

Raigad is a coastal district on the west coast of Maharashtra comprising 7,152 sq. km. It is bounded to the north by Thane District, to the south by Ratnagiri District, to the east by Pune District, to the southeast by Satara District, and to the west by the Arabian Sea. The majority of the people who occupy the 15 villages to be affected by MSEZ work in agriculture. However, due to general poverty, increasing population, and a lack of other employment opportunities, there has been large-scale out-migration, both seasonal
and permanent to nearby villages and towns, as well as to Mumbai and Navi Mumbai. The pattern of out-migration has left most villages with a greater percentage of females than males (Shaban and Sharma, 2005).

The villages are predominately comprised of the Agri community, who are classified as Other Backwards Castes (OBC) because of persistent economic and social marginalization. Other community groups include the Koli and Katkari. These communities do not own land and are dependent on livelihood activities such as fishing and collecting food, fruits, honey, and medicinal plants to barter for grains. Poverty in the district stems in part from the small amount of land available per capita/per household. While large landowning families in the district own between 9.4 and 29.74 ha per household, the average per household availability of land is around 0.903 ha (Shaban and Sharma, 2005). The decreasing supply of land per capita and per household is due to an increasing population and a shrinking supply of arable land in the face of environmental degradation. Soil salinity and a lack investment in irrigation by government and private sources have rendered agriculture less profitable (ibid).

A social impact assessment performed in 2003 on behalf of SKIL Infrastructure by researchers at the Tata Institute of Social Sciences (TISS) in Mumbai found that of the 2,20,300 ha of land cultivated for food grain, 82.74% was devoted to rice in 2001-2. The study found that villagers in the district practiced monocropping due to adverse climatic, soil, and topographical conditions. In 2002-3 only 188,500 (27.44%) ha of the 689,900 ha

125 For an interesting discussion on the conflict between liberal values such as individual freedom and equality and the need to protect historically marginalized tribes, see Partha Chatterjee’s (1993) *The Nation and its Fragments*. According to Chatterjee, more privileged classes use the protection of liberal values in order to fight against place reservations for adivasis or other tribal groups. An excellent example of this is a recent newspaper report of protests by medical students at a Kolkata university about the university’s policy of reserving a specific number of places for students from tribal groups (Raman, 2006).
reported area was net sown area. Due to increasing soil salinity and rising sea levels, which led to aggressive land reclamation in the 1970s, many villages in the district are unable to cultivate grains. Villagers in Dadar village (in Pen tehsil) informed TISS researchers that their entire village gets flooded at high tide and they have not been able to grow a single crop of rice since 1989) (R.N. Sharma, personal communication, January 15, 2010).

The extent of the region’s agricultural viability or fertility is a point of contention between SEZ developers and activists, NGOs, and many villagers. In an interview with Ulka Mahajan, a prominent social activist in the Greater Mumbai Area who spearheads a number of organizations, including Sarvodaya Jan Andolan and the National Alliance of People’s Movements, she repeatedly emphasized the fertility of the region, calling it Maharashtra’s “rice bowl” (personal communication, January 9, 2010). An open letter from the 24 Gaon SEZ Virodhi Shetkari Sangharsha Sanghatnana, a collective opposing SEZ development in the region, also contradicts TISS’ social impact assessment by claiming that most of the land in the district is under double crop (24 Gaon, n.d.). The difference in these claims may be due to divergent agendas, differing standards for assessing fertility, and, most importantly, the relativity of perception, the questions asked, and the tools used to answer those questions. As a case in point, the Maharashtra government has called many of these land marginal or “wastelands,” while

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126 Hereafter, “24 Gaon SEZ Virodhi Shetkari Sangharsha Sanghatnana” will be referred to as “24 Gaon.”
127 These claims are directly at odds with each other. It may be important to note the relativity of what is “fertile” and “infertile.” In addition, R.N. Sharma, a co-author of the Social Impact Assessment observed in an interview that TISS was asked to do the survey by SeaKing Infrastructure Ltd. He noted that some of the most positive perceptions of the project by villagers should be taken with a grain of salt, as his research assistants indicated that the company attempted to influence the direction of the assessment. Furthermore, Professor Sharma claimed that the 2004 assessment was the last he would perform for a private company because he thought that Seaking was using the reputation of TISS as a means of legitimizing the project, not because they were actually going to take any of the recommendations into account (personal communication, January 15, 2010).
others have pointed out that these lands nonetheless play an important role in the livelihood of landless villagers, especially tribal people (24 Gaon, n.d.).

A large number of families in the district are involved in fishing and dredging sand from the Arabian Sea. Overfishing and increased pollution have decreased catches so that rather than supplying fish to the Greater Mumbai market, the district is now a net fish importer. Sand dredging, which enables households to earn cash income, only brings in between Rs. 50 and 80 per day. Many villagers are not involved in agriculture, but work as salt producers, salt workers, bullock cart owners, rice mill owners and workers, brick kiln workers and transport workers (24 Gaon, n.d.). There is a variety of livelihood and income earning activities, which are supported by a complex network of social relationships on which households depend (Shaban and Sharma, 2005).

Farmers are burdened by having to produce on small, fragmented plots with low productivity in the face of increasing pressure on land. Many farms act as a sink for surplus labor in the villages, and contribute to the phenomenon of “disguised unemployment,” as the surplus labor does not improve the productivity of farms (Mohanty, 2009). These farms are unable to exploit economies of scale, and are hindered by technological obsolescence and price structuring for agricultural commodities that is unfavorable for them (Sharma, 2009). Farmers also face climactic events like droughts and floods, and slow progressing events such as increasing soil salinity, which decrease profits (ibid). Under these circumstances, youth in agricultural regions in general may lack emotional attachment to the land possessed by their

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128 Mohanty (2009) pointed out that “disguised unemployment” might make it more difficult to estimate the effects of displacement and the compensation it would take to accommodate the surplus labor.
parents. Some male youth in Raigad district migrate to Mumbai, while others work as casual laborers in the container depots surrounding the nearby Jawaharlal Nehru Port Trust (JNPT) or drive tempos and auto-rickshaws (Shaban and Sharma, 2005). Exposure to life outside the villages, greater relative education, and the influence of modern media may cultivate youths’ desire for opportunities outside the village and material goods like mobile phones that cannot be obtained by working in agriculture. In an interview, R.N. Sharma pointed out that many young people in Raigad’s villages were more likely to be positive about land acquisition and enthusiastic about accepting compensation payments from developers, leading to infighting within families and villages and sometimes to the covert sale of land (personal communication, January 15, 2010).

Many male youths aspire to enter into small-scale businesses such as quarrying, transport of materials, or dock work. Sharma’s visits to villages in 2003 led to the observation that several youths in villages in Northern Raigad district had sold their lands to stevedore companies in exchange for setting up small warehouses near JNPT. It is very possible that the youths who sold their lands would have received a higher profit under the current scheme by the Maharashtra government that provides for 12.5% of the developed lands in a project to be returned to project affected families (PAFs). However, even with such schemes in place villagers remain vulnerable to manipulation by intermediaries and brokers who buy land from cash-strapped villagers at throwaway prices.

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129 A similar point can be made about absentee landlords, who may not have emotional attachment to the land and may therefore be more willing to sell to project developers. Such sales would leave landless laborers or others who use but do not own the land (and thus have undefined tenure status) in a precarious position if a rehabilitation plan was not implemented.

130 Shaban and Sharma’s (2005) social impact assessment provided some salient information about the aspirations of PAPs, although it did not provide explicit information about the demographic / economic information about the person or group of people to whom the information applies, which would have been useful.
Northern Raigad district has a larger amount of industrial development than the rest of the district due to its proximity to Mumbai and its twin city on the mainland, Navi Mumbai. The district headquarters at Alibaug, for example, is approximately 140 km from Mumbai by road. Because Raigad district participates in the space economy of the Mumbai Metropolitan Region (MMR), changes in the MMR’s economic, political, regulatory, and legal infrastructure have implications for Raigad district. The impetus to create an international or “global” city in Mumbai, for example, is often used to justify land redevelopment and transformation in both the city and the surrounding areas (Weinstein, 2005). According to the Mumbai Metropolitan Region Development Authority (MMRDA) 1996-2011 Draft Plan, for example, “Mumbai can emerge as an international city if it promotes changes in the regional economy and permits the adoption of land-use policies that respond to market potential” (cited in Weinstein, 2005, p. 4).

Raigad and other districts surrounding near Mumbai and Navi Mumbai are experiencing the transformation of agricultural lands into “urbanisable” lands, particularly with the high prices for land in Mumbai proper and the 1970s ordinance banishing polluting industries from the city (Shaw, 2004). The genesis of Navi Mumbai, then known as Navi Bombay, was part of a larger series of urban dispersal strategies by a generation of urban planners who responded to crowding and housing

131 Resolving the debate about whether the transformation is part of a natural process of out-migration to the city or is related to other factors cited by critics such as predatory builders or corrupt real estate agents is a slightly outside the scope of this paper. Undoubtedly, builders and developers are hungry for land. A cursory read of a daily newspaper in Mumbai will immediately alert one to the fact that everyone in Mumbai, from slum dwellers to billionaire real estate developers like the Ambanis are acutely aware of the value of their land.
shortages (some artificial or price-based) in Mumbai by aiming to decongest the city (Shaw, 1999). While the genesis of the idea for a new urban development on the mainland across from Bombay Island can be traced to the 1940s, it was not until 1970 that CIDCO (City and Industrial Development Corporation of Maharashtra) adopted a plan to create and develop Navi Mumbai.

Prior to the adoption of the plan, the Modern Architects Research Group (MARG), headed by architect Charles Correa, drafted a document that envisioned a city for the common man, with populist architecture and a focus on the need for better living conditions than those on Bombay island (Shaw, 2004; 1999). The Draft Development Plan of 1973 envisioned Navi Mumbai as a center for white-collar employment in the tertiary sector, with the aim of decongesting Mumbai by drawing office workers away from South Mumbai to the mainland. The plan further envisioned the creation of the Nheva Sheva port on the mainland as a decongesting apparatus. Plans for housing and residential development were set along twenty residential nodes/new towns spread over 400-600 ha of land (ibid).

In the 1970s CIDCO acquired 16,677 ha of land in 54 villages from private owners in phases. Land acquisition accelerated in the 1990s, near the time of the real estate bubble in Mumbai (see Nijman, 2000). CIDO acquired private land in the Navi Mumbai area at a rate of compensation ranging from 50 paise to Rs. 2 per sq ft, which, now developed with infrastructure, is being sold at rates ranging from Rs. 700 to 7000 per sq ft. Sharma (2009) has observed that CIDCO has shed its previous mandate to act

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132 As Shaw (1999) noted, it is unclear how the creation of tertiary sector white-collar jobs in Navi Mumbai was supposed to decongest the mainland, given that a large portion of workers came to Mumbai for industrial jobs. Her concern is borne out in the sector composition of jobs in Navi Mumbai, which in 1991 was characterized by dependence of manufacturing employment on MIDC (Maharashtra Industrial Development Corporation) estates (Shaw, 1999, p. 972).
as a developer of affordable housing outside of Mumbai and instead acts as the largest real-estate agency in the MMR. Most investment by the Maharashtra Industrial Development Corporation (MIDC) and CIDCO is at present directed towards industrial ventures rather than agriculture.

**Locational Advantages**

Both MSEZ and NMSEZ are part of an emerging network of trade and industrial development in the Mumbai Metropolitan Region (MMR). MSEZ and NMSEZ were initially billed by the project promoters as participating in the “Greater Mumbai Economic Hub” and in the Mumbai-Pune-Ahmedabad industrial and knowledge corridor. Because the two SEZs were conceived as integrated and because they share developers, promoters, and financing institutions, the locational advantages promoted by the developers apply equally to both zones. Media reporting on infrastructure development in the Navi Mumbai area now more frequently refers to NMSEZ and its developers because of the land acquisition protests and resulting delays with MSEZ.

The “inherent locational advantages” eagerly promoted by the developers translate simply into the zones’ proximity to Mumbai and Navi Mumbai. Proximity to Mumbai, according to NMSEZ’s promoters, offers advantages such as access to 1) financial institutions within Mumbai; 2) developed trading centers for products such as gens/jewelry and apparel; 3) an educated and skilled pool of labor due to the variety of educational institutions in Mumbai; and 4) the urban markets of over 20 million people of Mumbai, Pune, and Navi Mumbai (“Best Positioned SEZ,” n.d.). The advantages of
locating around Mumbai have already drawn a large number of SEZs to Raigad and other surrounding districts (see Table 5.1).

Both NMSEZ and MSEZ are billed as contributing to infrastructure development by providing amenities for health, recreation, housing, transportation, and commerce as part of the developers’ projection that the Navi Mumbai area will become increasingly important in the regional, national, and indeed, global economies in the future. The promoters emphasize access to airport, road and rail, and sea transport links as a means of achieving this goal and making their SEZs attractive to potential export units or other investors. The execution of upcoming infrastructure projects outside the SEZs are therefore crucial for their success, and are reason to view the SEZs as pieces of a larger regional development plan in which the success of the respective infrastructure or development projects is interdependent.

The layout of NMSEZ shows the planned interdependence of the zones and the surrounding areas. The plan envisions development in four nodes: Dronagiri, Ulwe West (waterfront), Ulwe East (airport), and Kalamboli, each of which is adjacent to existing infrastructure facilities and proposed infrastructure projects (see Figure 5.2). Dronagiri, located at the southern tip of Navi Mumbai with substantial waterfront access, comprises 2,150 ha of land proposed to cater to port-based industries such as light engineering, logistics and warehousing, as well as a Multi-Services Sector, which includes IT/ITES (see Figure 5.3). The node’s proximity to Jawaharlal Nehru Port Trust, the nation’s largest seaport contributing 40% of its shipping, as well as to Mumbai Port, is cited by developers as an important logistical and locational advantage. Proposed Rewas Port, set to have a draft deeper than JNPT or Mumbai Port, in which Mukesh Ambani’s Reliance
Infrastructure Ltd (RIL) and Anand Jain’s Jai Corp obtained a majority stake in 2006, is highlighted by the developers for its potential to increase the region's role in South Asian as well as global trade.

Table 5.1. SEZ Statistics for Districts Near Mumbai

<table>
<thead>
<tr>
<th></th>
<th>Raigad</th>
<th>Thane</th>
<th>Ratnagiri</th>
<th>Pune</th>
<th>Mumbai Suburban</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number SEZs Formally Approved</td>
<td>19</td>
<td>20</td>
<td>2</td>
<td>31</td>
<td>5</td>
</tr>
<tr>
<td>Number SEZs in-Principle Approved</td>
<td>13</td>
<td>5</td>
<td>1</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td>Amount of Land in Hectares (ha)</td>
<td>17,600.47</td>
<td>6,269.53</td>
<td>526.03</td>
<td>4,392.05</td>
<td>431.89</td>
</tr>
<tr>
<td>Median SEZ Size (ha)</td>
<td>71.50</td>
<td>50.00</td>
<td>200.00</td>
<td>20.12</td>
<td>27.73</td>
</tr>
<tr>
<td>Average SEZ Size (ha)</td>
<td>550.02</td>
<td>250.78</td>
<td>175.34</td>
<td>122.00</td>
<td>61.70</td>
</tr>
<tr>
<td>Range SEZ Size (ha)</td>
<td>10.00 – 5000.00</td>
<td>13.00 – 2429.00</td>
<td>100.00 – 226.03</td>
<td>10.00 – 1085.92</td>
<td>10.00 – 218.00</td>
</tr>
</tbody>
</table>

Source: Compiled by the author using data from the Government of India, Ministry of Commerce & Industry.
The 80 ha Ulwe waterfront node, located on the waterfront of the Harbor Bay equidistant between the Dronagiri and Kalamboli nodes, is slated as an IT/ITES hub and financial services center comparable with the Bandra-Kurla Complex in Mumbai (see Figure 5.4). The Ulwe waterfront node is expected to benefit from its proximity to the proposed Mumbai Trans Harbour Link (MTHL), a six-lane bridge linking South Mumbai (Sewri) to Navi Mumbai (Nhava), which has the potential to reduce the commute time from Mumbai to Navi Mumbai from two hours to thirty minutes (NMSEZ Pvt. Ltd., n.d.).
Ulwe waterfront node is closely situated within 500 ha of the Ulwe airport node, which is located directly south of the proposed Navi Mumbai International Airport (see Figure 5.4). The proposed airport is expected to facilitate the increased traffic and trade expected when the SEZ becomes fully operational. Although the airport has been delayed for over three years and has met with protests from activists who object to the destruction of environmentally sensitive mangroves, the Union Civil Aviation Minister Praful Patel anticipates that the first phase will be completed by 2013 (“First Phase,” 2010). Ulwe airport is slated to cater to the gems and jewelry sector as a diamond hub comparable to those in Antwerp and Dubai, as well as to house IT/ITES, conference, and trade facilities.

At the eastern tip of Navi Mumbai, the Kalamboli node comprises an area of 310 ha adjacent to the Mumbai-Pune Expressway and the Maharashtra Industrial Development Corporation’s (MIDC) Taloja Industrial Estate (see Figure 5.5). The promoters anticipate that proximity to the MP Expressway and the proposed expansion of the Sion-Panvel highway will enable the node to function as a services and IT/ITES hub for western India. Kalamboli is close to developed residential and commercial areas in Navi Mumbai, including CBD Belapur, Panvel, and Kharghar that will provide social infrastructure for the zone and provide an attractive residential area for workers in the IT sector. In early 2010, CIDCO floated a bid to develop 100 ha of land at Kharghar, bringing in Rs. 1,530 crore from Future City Properties Pvt. Ltd., of which 60% will be

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133 The airport has become another site of controversy in regards to land acquisition, although CIDCO claimed in early 2010 that it had 70% of the land. In response to environmental activists, who have estimated that half of the funds required to build the airport will be used to divert two rivers and destroy 450 ha of mangroves, CIDCO has determined to replant the mangroves at an alternative site (Tembhekar, 2010).
developed as a Bollywood theme park and the remaining 40% dedicated to commercial, residential, and recreational facilities (Tembhekar, 2010).

Figure 5.3 Detail: Dronagiri Node

Deals like the one at Kharghar are in line with the state government’s mission to facilitate development through joint ventures between the private and public sector. CIDCO retained a 26% state (worth Rs. 530 crore) in the Kharghar project, as well as entitlements to 26% of the park’s future profits. In 2008, CIDCO sold the Larson and Toubro Seawoods station for Rs. 1,809 crore. Like the land at Kharghar, this land was also on the Kharghar hill plateau in the Sayhadri Mountain Range (Tembhekar, 2010). The two deals exemplify CIDCO’s active role in facilitating entrance of private corporations into the area.

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Figure 5.4 Detail: Ulwe West (waterfront) and Ulwe East (airport) Nodes

Figure 5.5 Detail: Kalamboli Node
NMSEZ is clearly participating in a development paradigm being enacted on a larger than local scale. NMSEZ and MSEZ are intended to contribute to the dismantling of infrastructural problems such as traffic, congestion, and a lack of connectivity, and will reap the benefits of other similar projects in the region.

Navi Mumbai SEZ

Despite their proximity of the two zones and the overlap between their promoters, developers, and financers, NMSEZ has faced significantly less opposition than MSEZ. NMSEZ experienced problems with the BoA questioning the contiguity of the zone in 2006 because of railways and roads running through it, which delayed formal notification and the attendant subsidies and benefits. NMSEZ resolved the issue by the use of flyovers and sky bridges (“Board of Approval,” 2010).\textsuperscript{135} NMSEZ’s promoters also received permission from the Ministry of Commerce in early 2010 to delay the start of operations in light of the global recession (“RIL’s Haryana,” 2010; Prasad, 2010). Unlike MSEZ, however, it did not face significant hurdles in land acquisition. In 2008, CIDCO had already transferred over 1,680 ha of land to NMSEZ SPC (“Navi Mumbai SEZ,” 2008). A CIDCO official explained that RIL focused on NMSEZ over MSEZ because it did not want to court greater controversy after large-scale protests that could lead to political setbacks for the SEZ. The presence of CIDCO as a 26% stakeholder that had already acquired the necessary land also undoubtedly played a role in the smoother acquisition process. CIDCO officials explained,

\textsuperscript{135} The BoA decided in February 2010 to allow NMSEZ to benefit from customs duty exemptions prior to notification, although the Finance Ministry subsequently objected (Prasad, 2010).
Since the state is involved through CIDCO, there are no serious land issues. The rehabilitation part is being taken care of by CIDCO and there has not been a serious hurdle so far…CIDCO’s main task is to make land available and facilitate other clearances (“Navi Mumbai SEZ,” 2010).

Sharma (2009) has claimed that CIDCO plays a role in an “unholy nexus between money, muscle, and political power” with little transparency (p. 215). Similar comments have been made about MSEZ, although in contrast to the case of NMSEZ, these have fructified into protests and political machinations on a regional and national scale.

Mumbai SEZ

Unlike NMSEZ, MSEZ has at present been unable to acquire all of the land needed in order to start construction and operations. The broad scope of the project—over 10,000 ha and around 45 villages—left it vulnerable to problems assembling land through direct negotiations with landowners after the state, reacting to political backlash from protests, backed out of its initial commitment to acquire the land using eminent domain.

The Maharashtra government’s attempts to acquire the land using provisions in the LAA 1894 met with extended protests from 2006 through 2009. A large number of local and regional civil society and activist networks participated in these protests, making Raigad district “the battleground for social justice and human rights,” according to Sampat Kale of the National Center for Advocacy Studies in Pune (2008, p. 1). The protests were led by organizations with varying degrees of influence, reach, resources, and institutionalization, including: farmers’ groups from Raigad, the 24 Gaon SEZ Virodhi Shetkari Sangharsha Sanghatana, Jagtikikaran Virodhi Kruti Samit, the Peasants and Workers Party, the National Alliance for People’s Movement, Janata Dal, Samajwadi Jan Parishad, Rashtra Seva Dal, the Left Progressive and Workers Unions, and other civil
society organizations (Kale, 2008). Many of these protests drew their strength from grassroots organizations working on the ground with people from project-affected villages, encompassing protest strategies such as marches, theater, community meetings and organizational forums, information dissemination sessions, protests to block roads (*rasta roko*), group protests (*andolan*), hunger strikes (*dharna*), and disrupting government meetings.

Numerous protests occurred before the land was notified for acquisition under Section 7 of the LAA on June 9, 2007. A “people’s delegation” led by Jagzikarn Virodhi Kruti Samiti met the Rehabilitation Minister Patangrao Kadam in Nagpur during the winter session of the Maharashtra Assembly, during which the delegation was assured that irrigated and agricultural lands would not be acquired. Following the failure of the government to withdraw the project, the 24 Gaon SEZ Virodhi Shetkari Sangharsha Sanghatana organized a hunger strike from February 14th through March 5th 2007 at the headquarters of Pen taluka. During a rasta roko later in March, leaders of the Peasants Workers Party and the Jagzikaran Virodhi Kruti Samiti (JVKS) asserted that they were promised a hearing on the project in a cabinet meeting, although in the time before the hearing government issued the intent to notify the land (S. Kale, personal communication, January 12, 2010). In the wake of the violence at Nandigram in West Bengal, in April 2007 the Central Government requested that Maharashtra government reduce the size of MMSEZ from 10,000 ha to 5,000 ha in order to avoid a similar incident. The Maharashtra Government claimed it was unable to reverse the decision of the state Cabinet, which had previously set the size of SEZs (“Can’t Reduce,” 2007).

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136 Numerous political parties advocated for a limit to SEZ size in the wake of the Nandigram incident, including West Bengal’s Communist Party of India (Maoist) (CPI(M)).
The notification spurred intense resistance by local farmers’ groups, who often used the threat of violence similar to Nandigram in their confrontation with government officials. Under the leadership of local activists such as Professor N.D. Patil, Mohan Patil, Ulka Mahajan, Surekha Dalvi, and Vaishali Patel, the farmers’ Anti-Land Acquisition Committee and Anti-SEZ Committee burnt copies of the notification outside the Special Land Acquisition Office at Pen on June 21, 2007. Following the notification, a group of 17 farmers and activists undertook an hunger strike from July 18th to July 24th. They demanded the revocation of the land acquisition notification and the immediate implementation of the Hetawane irrigation project in Pen tehsil, which activists claimed would make it illegal to acquire land in 22 villages in Pen tehsil because they would be under irrigation (U. Mahajan, personal communication, January 9, 2010). The protesters ended their hunger strike after Deputy CM R.R. Patil promised the protesters that the villages would be excluded (S. Kale, personal communication, January 10, 2010).

Other large protests took place throughout 2008, including a rasta roko at Vashi Naka on the Mumbai Goa highway on June 17, 2008 led by JVKS, during which over a hundred protesters were arrested along with activist Professor N.D. Patil. Professor Patil began an indefinite fast at Aazad Maidan in Mumbai on July 24, 2008, which he continued after hospitalization. During Professor Patil’s hospitalization, activists at the

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137 The central government’s rehabilitation and resettlement policy for SEZs prohibits the acquisition of irrigated land. This policy made the question of whether or not the Hetavane dam was beneficial to the 22 villages in Pen tehsil extremely explosive. Anti-SEZ activist Vaishali Patil explained, “The irrigation department figures clearly show that water is available for irrigation purposes, contrary to what reliance claims” (Gadgil, 2008). In an interview, Ulka Mahajan noted that the 4,002.27 ha of land in Pen tehsil had been acquired 28 years ago for the Hetawane Dam project, which would irrigate 22 out of the 24 villages within the MSEZ. Mahajan claimed that the land in these villages should be irrigated according to the Hetawane Dam proposal, and therefore should be considered to fall under the government mandate that irrigated lands cannot be acquired for SEZs (personal communication, January 9, 2010).
National Center for Advocacy Studies in Pune reported that over 2000 anti-SEZ activists joined the fast and participated in the protest (Kale, 2008).

Due in part to the protests of Professor Patil and other activists, the Chief Minister Vilasro Deshmukh met with a delegation of farmers to discuss excluding 22 villages in Pen from the MSEZ project. Discussions in the Legislative Assembly on July 25, 2008 resulted in a walkout by opposition parties supporting the farmers (S. Kale, personal communication, January 10, 2010).

The continued protests created a growing fear that MSEZ was a political liability. The Bombay High Court denied a petition filed jointly by MSEZ and RIL to disallow an unprecedented proposed farmers’ referendum on MSEZ (Malekar, 2008). On September 22, 2008, farmers in the 22 villages in the Hetavane dam area of Penn were given the de-facto referendum, which asked approximately 4,000 landowners to record statements about land acquisition. Landowners and their heirs were able to vote on proposed improvements to RIL’s compensation package, which was approved by the Maharashtra government in May 2008, or declare their opposition to the SEZ regardless of the implementation of the proposed improvements (Gadgil, 2009; Malekar, 2008). The results of the referendum have not yet been made public, although in an interview an activist claimed that over 90% of the voters voted against MSEZ regardless to improvements in the compensation package (U. Mahajan, personal communication, January 9, 2010).139

138 Despite the petition filed by RIL to stop the referendum, according to a report by the Press Trust of India (Malekar, 2008) Mukesh Ambani issued a public statement saying, “We must have the trust of the people. Referendum will increase transparency…We would also only want to deal with willing sellers.”
139 See also “Anti-SEZ Body,” 2008, in which other activist groups claim that 95% of the farmers voted against the SEZ in the referendum.
MSEZ had withdrawn a petition to the Bombay High Court asking for assistance for land acquisition earlier in 2008, as under the Land Acquisition Act (1894), acquisition for a private company by the government cannot exceed a year (Bavadam, 2009). However, MSEZ continued to aggressively pursue land deals with individual landowners at rates exceeding the recorded market rates and offering additional compensation and rehabilitation.

During the struggles to acquire land, MSEZ successfully applied for the two extensions it was legally allowed under the SEZ Act. According to both the LLA (1894) and the SEZ Act, however, the land acquisition process lapses if all the land has not been acquired within the two extension periods. In June 2009, the Supreme Court dismissed MSEZ’s request for a stay on the land acquisition process. Grass roots resistance groups received this news triumphantly. Under the SEZ Act MSEZ still had the option of reapplying to BoA for a fresh in-principle approval, although the political climate made it less likely that the BoA would approve the application given that resistance groups had publically resolved to continue their protests if an approval was granted.

In January 2010, MSEZ’s developers suspended land acquisition through voluntary transactions for an indefinite period because they had not been able to acquire the minimum of 1,000 ha of contiguous land as mandated by the SEZ Act. Although the developers had acquired over 1,500 ha of land, it was non-continuous, and newspapers reported that RIL and Jai Corp were considering other options for the land—such as a gas-based power project—as the government was unlikely to interfere for land acquisition for such a politically sensitive project (Jog, 2010). MSEZ’s options may change if the LAA Amendment Bill 2007 is eventually passed, which would allow the
government to interfere and acquire the 30% of the land once the SEZ acquired 70% of the land on its own through voluntary transactions.

Objections to MSEZ

The objections to the establishment of MSEZ are generally of two kinds: functional objections centering on issues like compensation and ideological objections that attack SEZs because as a policy they form part of the new economic paradigm. Land acquisition issues, in the case of MSEZ, straddle both categories. However, because land acquisition is highly politicized, many objections extend beyond compensation into the latter category. In an interview, an activist working with the national and state-level People’s Audits of SEZ commented on vast differences between farmers’, landowners’, and other potential project affected people’s (PAPs) identification of the problem. She observed that levels of politicization vary from state to state, with some states, such as Tamil Nadu, concerned mainly with issues such as the type and amount of compensation. In other states such as Maharashtra, where the MSEZ protests have become symbolic of the struggle between “the people and big business,” the objects are highly political and fought for under the banner of social justice (S. Vedanta, personal communication, January 9, 2010). In the words of 24 Gaon’s open letter, “Castles of wealth cannot be built on the foundation of disparity and inequality, at least in [sic] the democratic country. This cannot be considered development” (24 Gaon, n.d., p. 3). Unlike other resistance movements, those directed against MSEZ are based not on renegotiation of the proposed compensation package, but often on outright refusal of farmers to sell land and sacrifice
the security land ownership entails. Of course, many farmers and villagers may be holding out for strategic reasons as well.

A letter written by the 24 Gaon in the early 2007 identified five core objections to SEZ development, all of which focus on land and livelihood issues. Many of these issues have been echoed in the Preliminary Observations of the National Panel for the National People’s Audit of SEZ’s in April of 2010, which has situated its objections to the Act against the backdrop of India’s economic development.

At its root, the SEZ phenomenon is an outcome of the model of ‘development’, with its current epitome in financial globalisation that India has adopted. This model treats nature and local communities as raw material or labour, to be exploited and abused in the raw pursuit of profits, and justifies itself using outmoded and false indicators like percentage of economic growth. It depends on increasing exports regardless of consequences. It increasingly privatizes public assets, and the SEZ phenomenon is a classic example of how the ‘commons’ are being enclosed for private profit (National Panel, 2010, p. 3).

The National Panel condemned the role of the state and national governments in repressing, intimidating, and criminalizing activism in favor of colluding with and aiding SEZ developers. Their objections spared no branch of the state, as they claimed that the executive, legislature, and the judiciary have failed to uphold the fundamental rights of the people and have unquestioning accepted facts and figures presented by developers when making decisions. Using the testimonies of farmers and activists to provide evidence for their claims, they observed that the state has consistently aided SEZ

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140 The opening of the letter expresses the groups’ “deep concerns towards the indifference and apathy shown by the state as well as union governments faced by farmers, agricultural laborers, and fishing communities in the proposed SEZ area” (24 Gaon, n.d.).

141 The National People’s Audit of SEZs in late March 2010 was the culmination of a series of People’s Audits at the state-level. The first of the state-level audits was held in Raigad district near the MSEZ site in September 2009. The Maharashtra Audit was sponsored by respected academic institutions such as the Tata School for the Social Sciences (TISS) and the National Campaign for the People’s Right to Information. It was attended by academics, activists, farmers, potential PAPs, and civil society leaders. The coordination of the state-level people’s movements suggests a more coordinated national-level resistance movement to SEZs, as previously many other resistance movements were highly localized.
developers at the direct expense of local people by distorting land records, acquiring land after local people have expressed objections by manipulating the LAA or state level land acquisition laws, intimidating or imprisoning protesters, and allowing public officials to take leave from work to assist developers. They also suggested that the behavior of political parties has been opportunistic, with promises made to farming communities in the run-up to elections that have subsequently been abandoned.

In interviews, activists stated that the SEZ Act 2005 and Rules 2006 might be unconstitutional because they impinge on fundamental rights and violate constitutional guarantees for adivasis and other marginalized groups (U. Mahajan, personal communication, January 9, 2010; S. Kale, personal communication, January 10, 2010). They also claimed that, regardless of the law’s constitutionality, the complex ways in which land is used by the landless and marginalized groups was not taken into account in compensation packages. The concession by MSEZ’s developers not to acquire gaonthan land (land in village settlements) has done little to allay the fears of villagers, who have pointed to the fact that the outer bunds used to protect against flooding would be destroyed (24 Gaon, n.d.). Activists have suggested that taking the agricultural land on which the villagers sustain themselves is tantamount to displacement, particularly if villagers are unable to get work in the SEZ or in the surrounding area. Mahajan observed that if their agricultural land is taken, villagers would be “stuck in their villages like islands within the SEZ…with little to sustain themselves” (U. Mahajan, personal communication, January 9, 2010).

Many groups that have protested against MSEZ have cited the government’s failure to make good on its past promises to provide employment to displaced persons.
CIDCO, in particular, has been accused of failing to adhere to its policy of returning 12.5% of developed land to the original landowners and to provide employment when it acquired the land of ninety-five villages displaced for the development of Navi Mumbai. A salt worker from Agroli village displaced by the Navi Mumbai project claimed,

The state didn’t deliver on any of its assurances. We only got Rs. 15,000. Very few got jobs. They didn’t give back 12.5% of the land. They had also promised salt-pan workers 40 square meters. We are still fighting for that land. They have left us beggars (cited in Bunsha, 2006, para 15).

The job placements that are awarded are likely to be viewed with skepticism by activist groups, who have pointed both to the menial and unskilled nature of the jobs given to PAPs and inflated projections of employment generation.

Activists speaking on behalf of farmers in Raigad unequivocally identified SEZs as a real estate scam, with infrastructure that will do little to serve the needs of the displaced (U. Mahajan, personal communication, January 9, 2010; S. Kale, personal communication, January 10, 2010). Mahajan expressed disgust that SEZs were not open to the public, but were being subsidized by the government for providing public infrastructure (U. Mahajan, personal communication, January 9, 2010). Other activists pointed to the “five star” housing colonies, recreation and entertainment facilities, and high tech industry compounds displayed in promotional materials both for MSEZ and other SEZs as evidence of the transformation of these lands into areas for consumption and high tech production in which they will have no place. D.K. Patil, a project affected person, explained,

We were ousted from Mumbai and Navi Mumbai. Where are we to go? Can you see us anywhere in this picture? We won’t get jobs here. There’s an Agri saying: Mumbai tumchi, Bhaandi ghasa aamchi [Mumbai is yours, but you will wash our dishes]. That’s all they will make us do (cited in Buncha, 2006, para.12).
The distrust and suspicion of the villagers suggests a feeling of increasing marginalization and helplessness in the face of what they have interpreted as a systematic assault on their land and livelihoods. Civil society organizations speaking on behalf of villagers living on the MSEZ site were quick to point out that the developer’s choice of land was driven by the huge profits to be made by changing the land from an agricultural to an industrial use (S. Kale, personal communication, January 10, 2010).

In interviews, activists consistently supported the TISS SIA that reported RIL’s use of strongmen and touts used to intimidate villagers, disseminate incorrect information, and create fraudulent land transaction records (R.N. Sharma, personal communication, January 15, 2010; U. Mahajan, personal communication, January 9, 2010; S. Vedanta, personal communication January 9, 2010). Activists have responded strongly to this intimidation. Malekar (2008), reporting on the 2008 referendum, observed the expulsion of Reliance representatives from villages in Pentaluka and the silencing of pro-SEZ voices. Both groups have attempted to garner political and popular support through influencing the media representations of their side of the debate.

Compensation

The compensation package RIL submitted to the Maharashtra government and which was subsequently accepted stated that RIL was offering “unparalleled monetary benefits and career opportunities (MSEZ, n.d.).” Before the MSEZ website was made unavailable in 2010, the developers devoted a substantial section of their information on rehabilitation to promoting their adherence to the values of Corporate Social

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142 Retrieved from [http://www.msez.in/rehabilitation.html](http://www.msez.in/rehabilitation.html). June 2009. All data in this section regarding compensation, if not otherwise noted, is taken from the MSEZ website, which has not been available since the beginning of 2010.
Responsibility (CSR) through the support of health and eye clinics in the villages and funding of popular celebrations, such as the Ganpati festival.

The compensation package included purchasing land at well above the market rate—Rs. 5 lakh per acre for unproductive land and Rs. 10 lakh per acre for productive agricultural land. These rates may be reasonable both because of the profits to be made from SEZ ventures and because increasing compensation may help to avoid costly delays stemming from protests and social unrest.

The compensation package offered Project Affected Families (PAF) three options. They included: (1) 12.5% of the developed land in proportion to land sold, at a price to be determined by the State Government; (2) a one time payment of Rs. 5 lakh per acre of land originally sold; or (3) monthly payments of Rs. 5,000 per month per acre of land sold in perpetuity. In addition, training and employment options were offered to one nominated family member per PAF, with employment and a monthly income guaranteed upon the completion of a training program. Women were offered special vocational training programs geared towards setting up small businesses and “empowerment.” Finally, landless families were offered monetary compensation (a two years sustenance allowance of an unspecified amount), in addition to training for one member of each landless PAF.

The compensation package could be considered competitive, especially because the compensation exceeds the market rate and it attempts to address needs of those who lack land tenure or who only have use rights. However, the inherent market distortions and reports that land in the villages appreciated tenfold after the announcement of MSEZ

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143 These numbers represent those given by the MSEZ website in 2009. Sharma (2009), who conducted the SIA of MMSEZ in 2003 claimed that MSEZ officials are offering much higher rates, from Rs. 25 lakh for productive agricultural land and Rs. 12.5 lakh for uncultivated lands.
probably led to rejection of the compensation package and strategic behavior on the part of villagers. Ulka Mahajan noted,

> We have burnt copies of the Reliance package. We condemn it. The land that Reliance is going to acquire is so close to Mumbai, and still they have undervalued it…Everyone in India knows that ‘on the record’ charges of land is always shown much below the actual market rates (cited in “Does India,” 2007, sec. 3, para. 1).

Mahajan’s expression of disgust at the market rate offered by Reliance confirms that the regulatory irregularities and inaccurate records of land transactions that have distorted market prices are a key factor in objections to compensation packages offered by SEZ developers and the government.

The compensation plan also makes concessions to critics who claim that farmers and villagers do not have the necessary skills to gain employment in the proposed SEZs. While this concession certainly does not alleviate the concern that older agriculturalists will not be able to be absorbed into the industrial sector, it does provide, on at least a basic level, some provisions for the younger generations to become relatively higher earners in the future. However, there is no way to know how this continued guarantee of employment will fare in a competitive labor market and in industries where efficiency and high value added, or if and how retrenchment can occur. Similar questions have led Mahajan to question the both the sincerity of the offer of employment as well as the ability of the promise to be enforced:

> Do you believe them, really? Who is going to give employment? Nowhere in India have local people been absorbed into industrial development…Now, you want us to trust Ambani? Ambanis have private enterprises…there is no legislation that says they must provide employment (cited in “Does India,” 2007, sec. 4, para. 1).
The involvement of RIL, whose business practices are notorious for being corrupt, may be contributing to the resistance to direct negotiations with the developer (U. Mahajan, personal communication, January 12, 2010). Advocates of direct negotiations have often cited farmers’ distrust of the state as one reason for the state to retreat from land acquisition, although Mahajan’s statement neatly implicates distrust in the developer as well. It may be that the power imbalances between the developer and landowners fuel this distrust and the feelings of mutual frustration and resentment.\footnote{For example, in his survey of MSEZ, Sheth (2008, p. 57) quoted a developer for MSEZ referring to the affected villagers by saying, “They don’t have entrepreneurial spirit in their blood. They just cannot take risks.”}

However, resistance to MSEZ seems to rest on more fundamental issues than that of compensation, at least in the perception of leaders of resistance movements such as Mahajan. Civil society organizations have expressed fear that the rights of agricultural workers are being overlooked and rural economies are being destroyed in the industrial transition. As Mahajan noted,

…the real issue is not one of compensation. When agricultural land, anywhere in India, is transferred for non-agricultural purposes, not only farmers who own that land get affected, but the entire rural economy vanishes (cited in “Does India,” 2007, sec. 2, para. 3).

Concerns about the destruction of the rural economy indicate a fundamental problem yet to be addressed effectively by policymakers—namely how to incorporate SEZs as a part of the broader paradigm shift in economic policy while simultaneously ensuring the rural population receives an appropriate share of the benefits. In the meantime, activists have focused their efforts on ways to upgrade the technology on farms in Raigad in order to make agriculture more productive and competitive. In this manner, they hope to demonstrate the viability of India’s agricultural sector as an alternative to
industrialization policies such as SEZs (U. Mahajan, personal communication, January 9, 2010; S. Kale, personal communication, January 10, 2010).

**Alternative Forms of Resistance**

The lure of potential profits to be made by converting land from agricultural to industrial uses has led some villages to creatively engage in venture capitalism, forming their own jointly-owned companies in order to qualify for a NAC. These projects are notorious because of their scarcity and differ significantly from resistance movements rooted in objections to India’s current development paradigm.

Resistance by turning to market-led industrialization and development is exemplified by the village of Dadar on the Raigad coast. The land at Dadar, occupied by around 1,200 families working as fishermen, sand dredgers, and idol makers, had not been cultivated since a large flood in 1989 made the soil unviable (Shaban and Sharma, 2005). After notification of RIL’s intention to acquire the land for MSEZ, the villagers formed Kalbhairav Company Limited in order to convert their landholdings into industrial sites and office and residential space over a period of seven years (Sheth, 2008). The model for the Dadar villagers was another incident of resistance that took place in 1999 in Pune, in the village of Magarpatta. The villagers formed a private development company after clubbing their land together, allowing them to build an IT residential township on 400 acres of agricultural land. Although the villagers sell stake in their company to developers, they remain owners of the land (Patra, 2009).

Despite the attractive possibilities suggested by Dadar and Magarpatta, it is unlikely that other villages will be able to emulate their success. Lack of business and
regulatory know-how, coupled with villages occupied by farmers with small or no-holdings, limits the options of the majority of villagers. Conflict between generations or villagers of varying socio-economic or social status also contributes to the limited instances of companies such as those at Dadar and Magarpatta. Those villagers who do not find compensation packages attractive or who prefer to retain the security of their only fixed asset may join grassroots protest and mobilization for legislative action because of a lack of other options.

Power, Corruption, and Information in Land Acquisition

The majority of this chapter has discussed the process of land acquisition for NMSEZ and MSEZ and some of the regulatory and political hurdles faced by the developers in attempting to make them operational. The conflict and lack of consensus between and among the various branches of government (from the central down to local governments) highlights the bargaining, negotiation, and revision involved in the process of implementing SEZ legislation and dealing with stakeholders with divergent agendas. Examples include the false assurances given to JVKS’ people’s delegation by the Rehabilitation Minster and the Chief Minister in Nagpur in December 2006, the central government and Empowered Group of Ministers’ waffling on the cap on SEZ size, the refusal of the Maharashtra government to consider the central government’s suggestion to limit the size of MSEZ, and the statement made by Congress Party leader Sonia Gandhi that agricultural lands should not be acquired for SEZs without any move to enact legislation that would support it. The result of all the bargaining and waffling in the Indian case has been to create an atmosphere of extreme volatility and uncertainty both in
regards to the security of property rights—which a number of economists including Douglass North (1990) have argued is fundamental for economic development—and in regards to the attractiveness of India’s business climate. As Rodrik (2004) has observed, legal institutions may matter less for growth than investors’ perceptions about the safety of their property rights (cited in Zhang, 2006). Perception matters, and the highly publicized bargaining and wrangling between branches of the government and political parties about the SEZ policy itself and about land acquisition may make India’s SEZs significantly less attractive to potential investors.

Time emerged as a critical factor influencing the different land acquisition trajectories of the two SEZs (see Kakani, Raghu Ram, & Tigga, 2009). Nothing indicates that NMSEZ would not have been subject to similar protests to MSEZ if CIDCO had not already acquired the land before the project was implemented. In this case, time served to occlude the memory of past acquisitions, displacements, and injustices, as well as to give some relief to the developers from the two year limit to the land acquisition process (Kakani et al., 2009). There is insufficient evidence to determine whether more time might have resulted in a different outcome for MSEZ, whose developers had to apply for several extensions for land acquisition. By the time the Supreme Court denied their petition for a stay on the land acquisition process, the protests and objections had a solid base of both popular and political support, which may have made it difficult for the developers to acquire the remaining land without the use of eminent domain power. Certainly, at that point, openly supporting the SEZ was a political liability and it was too late to use secret buying agents or other options generally available to developers assembling a parcel of land. It is also clear that the corruption endemic in the land
acquisition process, particularly that of the government, was a factor influencing land acquisition and project outcomes. Corruption may lead to protests that subsequently lead to project failures. Corruption can work as an incentive—it is an easy way for developers to capture the eminent domain process or to exert their influence—but it can also be costly to exploit that avenue, as the case of MSEZ indicates.

SEZ developers are undoubtedly strategically locating at places with the highest potential value generated from the change in land use. It is thus unsurprising to see developers setting up SEZs around large cities like Mumbai. As was the case in urban renewal programs in the U.S. where developers and planners looked for “the blight that’s right”—blight just bad enough to make condemnation justifiable, but still good enough to make redevelopment cost efficient—Indian developers are undoubtedly making strategic choices to obtain land at the best possible location at the lowest possible cost (Garnett, 2003). The objections of civil society organizations and landowners suggest that they recognize the strategy and in turn conceptualize the loss generated by land acquisition as strategic or planned, not random. As Michelman (1967) pointed out, adjustment to strategic loss generates greater disutility than adjustment to random loss. In areas where the price of land has the greatest potential to rise after an acquisition or a change in use, being denied a portion of the surplus value generated by the transfer may be extremely disheartening. When a condemner with power and influence working for a project that may generate only tangential public benefits is granted the surplus value, it may cause anger and protest on the levels seen at MSEZ. The fight over the surplus value is, therefore, probably the most problematic issue in setting a price or an amount of compensation.
All stakeholders, regardless of their affiliation or view on the viability or justice of SEZs, have actively courted the media as a vehicle for disseminating information that is often radical, distorted, or contradictory. This highlights the necessity to avoid oversimplifications that merge the multitude of stakeholders who have voiced their opinion over NMSEZ and MSEZ into opposing camps with neatly delineated and temporally rigid positions. Activist organizations, for instance, have tapped into public opinion that all SEZ developments and many other privately funded infrastructure developments are anti-poor (Mohanty, 2009). They have also attempted to mitigate the gross power and resource imbalances between themselves and the developers by riding the coattails of the media frenzy around the violence at Nandigram and Singur. RIL’s decision to direct its attention to NMSEZ in 2010, withdrawing from the land acquisition process for MSEZ, could very much be a strategic move to wait until media coverage has moved on to a different issue before re-activating the project. Interest, energy, and resources of most activist groups are limited. Anosh Malekar (2008) vividly pointed this out in his observation that activists fighting MSEZ advised him to take an expressway to the referendum that was a site of intense farmer protests in 1997.

The complexity of the media’s role in the SEZ debate is meant to draw attention to the role of information in its many guises—misinformation, lack of information, distorted information, and information that is difficult to come by—in shaping the outcomes of land acquisition for SEZs. The scarcity of information has much to do with

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145 The open letter of the 24 Gaon (n.d., p. 6) commented on the government’s lying and backtracking saying, “This is sheer fooling people and playing with their lives. If this continues there would be [sic] second Nandigram.” The preliminary observations of the National Panel for the National People’s Audit of SEZs concludes in its recommendations that “It is also clear that people, so far protesting peacefully, are losing patience; a recipe for possible violence and public disruption in the future. If this happens, it will only be the State which is to blame” (2010, p. 3).
the nature of the competitive process of setting up an SEZ. The potential socio-economic or public benefits of SEZs do nothing to change the fact that the developers operate in a competitive environment in which disseminating information may compromise their investments. This may be particularly pertinent in the case of India’s SEZ policy, which is based on a location-based incentive package that allows the company to choose the location. As such, attractive locations such as the areas around cities will most likely be subject to intense competition.

Even in the case of the social impact assessments required as part of the central government’s rehabilitation and resettlement plan, competition may provide incentives to withhold or distort information, particularly in a politically charged climate. A MSEZ representative stated, “People ask for social impact studies and environmental assessments, but why? If we do something it will be for ourselves. What we are doing is business intelligence… and business intelligence is like military intelligence, it should be confidential” (cited in Sheth, 2008, p. 55). Even in light of inadequate information about the motives of many stakeholders in the cases of MSEZ and NMSEZ, it is not difficult to imagine how rumors of conspiracy, malfeasance, foul play, better deals and impending actions may influence people to make decisions they would not were they in possession of perfect and complete information, particularly regarding the intentions and future actions of other stakeholders.\textsuperscript{146}

\textsuperscript{146} Nandigram is a perfect illustration of some of the effects of rumor. The proposed project at Nandigram was a major chemical hub that would require the acquisition of over 14,000 acres of land spread over around 29 villages. Although the government approved the project in 2005, it was opposed vehemently by political opposition parties and local villagers, who objected to losing their land and livelihoods. The situation exploded on 14 March 2007, when fourteen villagers were killed in a confrontation with local police and cadres of the Communist Party of India (Marxist) (CPI(M)). The police were mobilized in response to control of the proposed area by the Bhumi Uchhed Pratirodh Committee (BUPC), who gathered over 2,000 villagers to block the entry points into Nandigram. All these events occurred based on rumor,
The National People’s Audit’s National Panel observed that affected populations suffer from inadequate information about proposed projects, a situation that is most likely enhanced by the complexity of financial, development, and promotional arrangements by project stakeholders, which regularly change. With such amorphous arrangements, it may be difficult for landowners and civil society organizations to determine what entity they are fighting. On a more basic level, very little information is provided to affected people on the nature, cause, and extent of the proposed SEZ. Not knowing such basic information may leave people subject to manipulation by touts, middlemen, or other groups with their own agendas. Furthermore, a lack of information also limits the ability of landowners to access the law and have a fair hearing. In this way, the lack of information is more likely to systematically affect people who already have less political and economic power.

as the government had made no official notification of the land for an SEZ (Alfarro and Iyer, 2009; Dohrmann, 2008).
CHAPTER 6
CONCLUSIONS: LAW, LAND, AND POWER

This study began with the observation that despite its initial promise as a development strategy, the Indian government’s Special Economic Zone policy has given rise to popular mobilizations and protests that center on land acquisition and the related issue of compensation. Although there is a myriad of ways in which land acquisition problems may be approached in order to take into account socio-economic and historical factors, in this study I began with an analysis of the construction of property rights in the Indian Constitution and the law governing routine acquisition of land, the Land Acquisition Act 1894, followed by an examination of land acquisition “on the ground” through the case study of Mumbai SEZ and Navi Mumbai SEZ. In other words, the first half of this study addressed formal legal structures, while the second half illustrated how these laws operate in specific cases in order to understand what factors could be contributing to land acquisition problems. The second half of the study could, in a sense, also be considered an exploration of the social life of the law—how India’s current eminent domain regime is experienced by people whose reality it affects. Both parts can be interpreted together, however, for more useful results.

The state’s practice of performing public-private transfers is not, and has never been, outside the scope of the Land Acquisition Act 1894, which has consistently made provisions for the government to acquire land on behalf of private entities. Case law indicates, however, that the legal provision for public-private transfers is an issue with which the courts at least have often not been completely comfortable, especially because
they have attempted to reign in the legislature’s enthusiastic attempts to fulfill its redistributive mandate by protecting private property rights. The current paradigm of decentralization and the liberalization of economic policies is one, albeit amorphous and difficult to pin down, qualitative difference between the current institutional and socio-economic setting and the setting in which the Land Acquisition Act was repeatedly amended. This setting makes a difference because municipal and state governments are increasingly competing for resources and for private investment as the state has reconfigured its role from owning and managing industry and infrastructure to facilitating private entities to perform these roles. This reconfigured role of the state leads to increased opportunities for the power of eminent domain in the form of public-private transfers to be used as a sweetener in the incentive game. In such an environment, the opportunities and incentives for corruption may increase.

Incentive driven investment is problematic for land acquisition because municipalities cannot afford to lose political (and also economic) capital by opting out, and may not make fiscally sound or economically efficient decisions. This is true even in states like West Bengal, the site of the notorious Nandigram incident, where political parties who have made redistribution a central part of their political platform still relentlessly compete to offer alluring incentives to private developers. In the case of public-private transfers, private developers have a greater incentive to influence the eminent domain process to their own advantage, particularly as they stand to capture concentrated benefits and are able to transfer the risks to the state because it is relatively costless to pull out of a project. The failed Land Acquisition Amendment Bill 2007 does attempt to impose sanctions on developers whose projects do not materialize and for
whom the state acquired land, but how this mechanism of redistributing the land back to its original owners might work remains ambiguous. It is possible that the much-maligned land banks being acquired by private developers would end up in the hands of the state, whose track record in terms of corruption does not assure the land would be put to its most socially beneficial use. Indeed, the fact that the state is holding or using the land does not obviate concerns that the purpose of the project is permissibly public under the law.

Incentive driven investment also imposes artificial constraints on developers and in doing so increases the potential for strategic holdouts because it is more costly for a developer to pull out of a project. Even though the SEZ policy gives developers practically unfettered discretion in choosing a location for their project, it is impractical to consider that developers will choose sub-optimal locations where they do not have the ability to exploit economies of scale and transport. Nirmal Mohanty (2009) put it well when he observed that it is not desirable to build in the desert just because land is available there. It is not surprising that Partha Mukhopadhyay’s (2009) analysis of SEZ locations revealed that most of them were located on the peripheries of India’s million-plus cities, where they can, as he predicted, piggyback off of already existing infrastructure. Therefore, while the freedom given developers to choose the location of their SEZs makes it predictable that they will choose land outside large cities in areas with what NMSEZ’s promoters called “inherent locational advantages,” it leaves them open to questions of why parcels of specific land are necessary for their projects, why the project could not be moved to a nearby location. It is a concern that developers may be choosing to acquire land if, as civil society organizations protesting MSEZ claim, large
parcels of land acquired by the state in prior years are lying unused. Why these lands are undesirable to developers remains to be investigated, particularly because the NMSEZ project, for which CIDCO acquired the land many years prior, proceed relatively smoothly.

The latent value of land on the periphery of large cities makes land acquisition in these cases extremely sensitive. As the cases of NMSEZ and MSEZ suggest, all stakeholders are acutely aware of the value of the land. The suggestion of protestors that land is consistently undervalued goes beyond impugning India’s underdeveloped valuation system for relying on incorrect land transaction data to determine market value for compensation purposes. Instead, the objections of protestors indicate that the subjective value of the land and the surplus value generated by the transfer—two factors that the LAA 1894 does not consider in determining compensation—are generating much of the conflict over price and acquisition. The subjective valuation problem in the case of acquiring agricultural land in India is especially acute because people depend on the land for identity, community, livelihood, and security. These idiosyncratic values of land are difficult to quantify both because they are worth more than the sum of their parts and because people assign them different values.\footnote{One has to wonder as well if nostalgia is also a factor, as a number of people interviewed lamented the loss of India’s village culture in recent times.} The surplus value problem is relevant in both market transactions and in compulsory acquisition due to the difficulty farmers would have obtaining a non-agricultural use clearance (NAC) and because of the practice in condemnation to assign the surplus value exclusively to the condemnner. It is the perception of protestors and landowners that they are being denied their fair share of the
surplus value that gives rise to objections that compensation awards—even those over recorded market values—are unjust.

The sense of injustice expressed by the protesters seems to center not only on the surplus value and other price issues, but the fact that the SEZ policy appears to systematically benefit large developers and industrialists through the consolidation of land, wealth, and market share. It is less easy to see the public benefits, the reciprocity of advantage, of these ostensibly public projects, particularly in the short term. The sense of injustice expressed by protestors may also stem from the fact that SEZs and other infrastructure projects do not generally benefit small or medium sized enterprises in the development stage. The involvement of massive corporations such as RIL and Jai Corp in the NMSEZ and MSEZ projects is a case in point.

There are stark disparities between the access to resources and the political and economic power of the stakeholders involved in land acquisition for SEZs. To fully appreciate how this affects land acquisition outcomes, I would like to revisit the quote by Kafka at the beginning of this paper, which gives a vivid representation of the experience of unequal access to the law. The information, resources, and influence possessed by private developers makes it much easier for them to engage in litigation for land acquisition, to understand and exploit the loopholes in the law, and to persuade government officials to overlook infractions. They are much more comfortable maneuvering in and around the law. While the increased involvement of civil society organizations in the land acquisition debate as well as the debate on more equal access to information may indicate a move in the opposite direction, the chance that the average farmer or villager is able to exploit the law to the same degree as a powerful development
corporation is extremely unlikely.

Procedural aspects of the LAA and SEZ policy also make it difficult for landowners to protect their property and as such effectively block access to the law. For example, there is little chance that a landowner with only forty-eight hours to register his objections to the government’s intent to acquire the land—in which time he might not even see the notification in the official gazette—will be able to do so. India’s land acquisition laws in examples like this seems to preclude equal access, and suggests that the brunt of the deprivation facilitated by this law will borne by those outside of the nexus of class, caste, and capital. This is true regardless whether the setting is rural or urban, as a tribal person dispossessed of his land in a rural area may have a similar experience of the resident of an urban slum facing the state’s wrecking ball in order to bring about a “world class city” or to continue India’s relentless chase of the Chinese dragon.

This research suggests that there may be ample opportunity to reform the many flaws in India’s land acquisition framework in order to facilitate more transparent and equitable solutions to the construction of infrastructure, either through the SEZ policy or through its successor. However, refining the Land Acquisition Act (1894) will probably require intensive research moving beyond the current focus on how to incorporate livelihood issues into compensation and rehabilitation packages. The legal insights generated by this paper would greatly benefit from systematic and coordinated research on land acquisition outcomes in India when the state uses eminent domain to acquire land for private entities and when private entities acquire land through consensual market transactions. Studies such as these would be an invaluable resource both for adding to
current theory on economic domain and public-private transfers from the U.S. institutional setting and for making better-informed policy decisions.
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### APPENDIX A

**SPECIAL ECONOMIC ZONES IN DISTRICTS NEAR MUMBAI**

A.1. Maharashtra SEZs: Raigad District

<table>
<thead>
<tr>
<th>State</th>
<th>District</th>
<th>Status</th>
<th>Taluk</th>
<th>Village</th>
<th>Developer</th>
<th>Sector</th>
<th>Area (ha)</th>
</tr>
</thead>
<tbody>
<tr>
<td>MH</td>
<td>Raigad</td>
<td>in principle</td>
<td>-</td>
<td>-</td>
<td>Marathon Realty Ltd</td>
<td>Multi Product</td>
<td>1100.0</td>
</tr>
<tr>
<td>MH</td>
<td>Raigad</td>
<td>in principle</td>
<td>Roha</td>
<td>-</td>
<td>Supreme Petrochem Ltd</td>
<td>Plastic</td>
<td>100.0</td>
</tr>
<tr>
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<td>Raigad</td>
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<td>-</td>
<td>-</td>
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<td>Multi Product</td>
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</tr>
<tr>
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<td>Raigad</td>
<td>in principle</td>
<td>-</td>
<td>-</td>
<td>Quipo Infrastructure</td>
<td>Engineering</td>
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<td>Multi Product</td>
<td>2850.0</td>
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<td>Khopoli</td>
<td>Uttam Galva Group (Uttam Galva Steel Ltd (UGSL) &amp; Uttam Power &amp; Steel Pvt Ltd)</td>
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<td>-</td>
<td>-</td>
<td>ISPAT Industries Ltd</td>
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<td>Raigad</td>
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<td>Shabhaez</td>
<td>Veritas Infrastructure Development Ltd</td>
<td>Biotech</td>
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<td>Raigad</td>
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<td>-</td>
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<td>-</td>
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<td>-</td>
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<td>FTWZ</td>
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<td>-</td>
<td>Rameshwar Vaibhav Development Pvt Ltd</td>
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<td>Chawk</td>
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<td>Gitanjali Gems Ltd</td>
<td>Gems &amp; Jewelry</td>
<td>10.2</td>
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<tr>
<td>State</td>
<td>District</td>
<td>Status</td>
<td>Taluk</td>
<td>Village</td>
<td>Developer</td>
<td>Sector</td>
<td>Area (ha)</td>
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Source: Author’s own using data from Government of India, Ministry of Commerce.
### A.2. Maharashtra SEZs: Ratnagiri District

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Source: Author’s own using data from Government of India, Ministry of Commerce & Industry.

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Source: Author’s own using data from Government of India, Ministry of Commerce.
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Source: Author’s own using data from Government of India, Ministry of Commerce & Industry.

Table A.5. Maharashtra SEZs: Thane District

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Source: Author’s own using data from Government of India, Ministry of Commerce & Industry.