



Mining, people and the environment

**The Implications of the EU-India Free Trade Agreement
Chandra Bhushan and Sugandh Juneja**

Chandra Bhushan is Deputy Director General of the Centre for Science and Environment, New Delhi. He can be contacted at chandra@cseindia.org. Sugandh Juneja is Programme Officer, Policy Advocacy and Community Support, Centre for Science and Environment, New Delhi. She can be contacted at sugandh@cseindia.org.

© Comhlámh 2012

Any part of this publication may be reproduced without permission for educational and non-profit purposes if the source is acknowledged. We would appreciate a copy of the text in which the document is used or cited.

Contents

Introduction	4
A. Mining industry in india	4
B. Mining, people and the environment	4
C. India's mineral policy	5
D. Raw materials initiative and EU-India free trade agreement	8
E. The way ahead	11
Recommendations	11
References	12

Introduction

India is a mineral rich country and a leading world producer of some key minerals such as coal, iron ore, chromite and bauxite. According to the Geological Survey of India, the national exploration agency, the country is yet to tap into its complete potential: it has huge reserves of important minerals awaiting exploration and exploitation. Unfortunately for India, almost all its minerals are in the same regions that hold its greenest forests and most abundant river systems. These lands are also largely inhabited by India's poorest and most marginalised people. Mining in India, therefore, is not a simple 'dig and sell' proposition. It is, in fact, a highly complex socio-economic and environmental challenge: at stake are natural resources, people, forests, wildlife, water, environmental quality and livelihoods. The issue requires balancing the imperatives of industrialisation, on one hand and the ecological and livelihood security of millions on the other. Considering this, the Union Cabinet of India has recently cleared a new mining law – The Mines and Minerals (Development and Regulation) (MMDR) Bill, 2011 – that includes many pro-people and pro-environment provisions which could go a long way in ameliorating the negative social and environmental externalities of mining projects. Some of the progressive provisions are sharing profits from mining with local communities, participation of communities in the decision-making process, tightening of environmental regulations, etc. However, all these provisions could come to naught if the proposed European Union-India broad-based trade and investment agreement (EU-India FTA) is concluded in the current form.

The EU's Raw Materials Initiative (RMI) acknowledges that access to 'affordable' raw materials is crucial for Europe's economy. Hence the EU is making a big push to help its companies and investors access cheap raw materials in developing countries, in line with the RMI, by signing free trade agreements. The proposed EU-India FTA includes provisions like national treatment, most favored market access conditions without any 'limitation', curbs on the use of performance requirements or economic needs test and investor-to-state dispute settlement mechanism through which foreign investors can invoke arbitration against the host governments. All these provisions have the potential to undermine the draft MMDR Bill, 2011. For the EU-India FTA to contribute to sustainable development and inclusive growth in India, it must make compliance with the draft MMDR Bill, 2011 mandatory.

A. MINING INDUSTRY IN INDIA

India is a mineral rich country with more than 20,000 mineral deposits. India produced 84¹ minerals in 2010-11, valued at Rs 2,006,090 million (€29,289 million²) (Ministry of Mines, 2011a: 9). The contribution of the sector to Gross Domestic Product (at constant prices) has stood at about 2.2 - 2.5 per cent in the last decade (Bhushan et al., 2008: 47). The average daily employment of labour engaged in the sector stood at half a million in 2008-2009 (Minsitry of Mines, 2011b).

The effective tax rate (includes all taxes, cess, levies and duties) on mining industry in India is 44 per cent (Bhushan et al., 2008: 54). This is lower than the effective tax rates in other major mineral-producing countries in the world – Canada 60 per cent, Papua New Guinea 55 per cent, South Africa 45 per cent and Indonesia 50 per cent (ibid.).

B. MINING, PEOPLE AND THE ENVIRONMENT

Wealth generated by the mining sector comes at a substantial development cost, along with environmental damages and economic exclusion of the marginalised. This has been exhaustively documented in India.

Almost all of the country's minerals are spread in regions that hold its greenest forests and most abundant river systems. These lands are also largely inhabited by India's poorest and most marginalised people – the scheduled tribes and scheduled castes – who depend on the very same forests, lands and watersheds for their survival.

The major mining districts of the country are not only ecologically devastated and polluted, they are also the poorest. Of the 50 major mining districts, 60 per cent figure among the 150 most impoverished districts of India. The wealth generated by the mining industry is therefore not being converted into sustainable development benefits for local communities (see Box 1).

¹ Excluding 3 atomic minerals

² At exchange rate of 1 INR = 0.0146 Euros (as on November 17, 2011)

BOX 1: PAREJ PERISHES

The World Bank, in 1997, supported Coal India Limited (CIL) in expanding coal mines and production in 25 mines in Hazaribagh's Parej area (Jharkhand state), under the Coal Sector Rehabilitation Project (CSRP) with an International Bank of Reconstruction and Development loan of US \$530 million (€385 million*). A study by two NGOs in India found that displacement due to mining has greatly impacted annual incomes in Parej. Every acre (0.4047 hectare) of land in Parej used to sustain the land-owning family for six months, and landless families for 3-4 months. A family owning three acres got a net income of Rs 2,600 (38 Euros) a year after taking care of its consumption needs. It also made Rs 5,000 (73 Euros) working as wage labour for a minimum of 100 days. From the nearby forests, a family earned Rs 2,000 (29 Euros) a year. Thus, each family used to make Rs 9,600 (140 Euros) a year – which placed it much above the poverty line for rural areas. Even the landless earned Rs 7,400 (108

Euros) a year from these sources. All this changed with the coming of CIL. For every three acres of land that it took away, the company compensated a family with a job. The study found that after a land-holding family shifted to resettlement colonies or other places, its net cash inflow went down. The net annual loss in cash inflow was Rs 9,260 (135 Euros) for landed families and Rs 7,060 (103 Euros) for landless families. Families now spend more money on buying foodgrains, which they were earlier growing on their own lands. The only employment is in the coal mines, while forest access has been barred. As a result, both landowning and landless households are spending the same – about Rs 8,200 (120 Euros) – per month.

* At exchange rate of 1 USD = 0.727 Euros (as on November 19, 2011)

Source: Bhushan et al. 2008: 19.

C. INDIA'S MINERAL POLICY

The Mines and Minerals (Development and Regulation) (MMDR) Act 1957 was the first legal framework for regulation and development of mines in independent India. Enacted in 1957, the MMDR Act has been amended four times since. But in all these amendments the issues of land accession, displacement, rehabilitation and resettlement and rights of communities were never addressed.

In 2005, following the mid-term appraisal of the Tenth Five Year Plan, the Planning Commission of Government of India constituted a High Level Committee to review the mining policy of the country and recommend changes. This came in the wake of rising protests across the country against the mining industry.

The committee report was published in July 2006 with wide ranging recommendations like institutionalising a Sustainable Development Framework (SDF) to address social, economic and environmental issues arising out of mining. Based on the report, the government came out with a new National Mineral Policy (NMP) in 2008. Following the NMP 2008, the Ministry of Mines (MoM) has framed a new MMDR Bill to replace the MMDR Act 1957. This bill was cleared by the Union Cabinet of India in September 2011.

DRAFT MMDR BILL, 2011

The MMDR Bill 2011 is a major attempt to bridge the gap between the need for mining on one hand and the need to address and internalise the social and environmental costs of mining on the other. It recognises that mining has had huge ecological impacts and that people in mineral rich areas have not benefited from mining. It also recognises the weaknesses of the regulatory institutions and the need to strengthen public participation in the decision making processes related to mining. Some of the key provisions of the draft MMDR Bill, 2011 are:

I. What benefits go to communities/mining affected people

- **Preferential treatment:** The draft bill allows states to make provisions for 'preferential' grant of mineral concession to cooperatives of Scheduled Tribes (STs) in the fifth and sixth schedule areas for small deposits (MMDR Bill 2011, s.6 (7)).
- **Compensation to persons holding usufruct, occupation or traditional surface rights of the land:**
 - > Compensation for undertaking high technology reconnaissance cum exploration (HTRE) (MMDR Bill 2011 s.43 (1)) as well as compensation for damage to land during HTRE (ibid.).
 - > Leaseholder to provide employment, compensation for acquiring land and other assistance as per the resettlement and rehabilitation package of the states (MMDR Bill 2011, s.43 (5)).

- > After the termination of a mineral concession, the state is to assess damages to the land, and determine the compensation payable by the licensee or leaseholder. This compensation is to be paid to persons holding occupation or usufruct or traditional rights of the surface of the land and they are to be consulted in the process of deciding the compensation (MMDR Bill 2011, s.43 (7)).
- > A Corporate Social Responsibility (CSR) document has to be attached with a mining plan. This shall comprise of a scheme for annual expenditure by the lessee on socio-economic activities in and around the mine area for the benefit of the host populations and for enabling and facilitating self-employment opportunities, for such populations (MMDR Bill 2011, s.26 (3)).
- **Profit sharing:** The mine leaseholder has to share a proportion of the profits/royalty with the local community. A District Mineral Foundation (DMF) will be constituted in each district to distribute the share of the profits within the affected communities. A mine leaseholder is to pay annually to the DMF (MMDR Bill 2011, Ss. 24, 56, 43).
 - > An amount equal to the royalty paid during the financial year in case of major minerals.
 - > An amount equal to 26 per cent of profit after tax in case of coal and lignite. The Central government has been given the authority to review this profit-sharing percentage and,
 - > In case of minor minerals, profit-sharing percentage is to be decided by states.
- The final mine closure plan has to be based on the planned land use for the lease area after its closure. For deciding the planned land use, the concerned panchayats are to be consulted (MMDR Bill 2011, s.32 (8)).

III. Regulatory reforms

The MMDR Bill has introduced a number of steps to strengthen the existing regulatory regime in the country.

- A National Mineral Fund has been created to strengthen the capacity of the Indian Bureau of Mines (IBM) – the premier regulatory agency. This fund will also be used for Research & Development in sustainable mining, developing, detecting and preventing illegal mining, etc.
- A National Mining Regulatory Authority is proposed which will review royalty and cess rates, suggest penalties regarding non-compliance in royalty payments, settle disputes in matters of inspection (states vs IBM) etc.
- A National Mining Tribunal is to be set up to hear matters from affected people on various issues and dispose of applications where the governments have failed to do so.

Overall, the draft MMDR Bill 2011 is a vast improvement over the existing mining laws of the country and makes a serious attempt to safeguard the economic and social well-being of the local community as well as environmental protection of mining areas. For the first time, communities are being involved in governance of the mining industry⁵. The most important concept introduced by the draft MMDR Bill is profit sharing. If it is implemented as per the spirit of the law, it will go a long way in ameliorating the negative social and economic externalities of the mining industry (see Box 2).

II. Rights of communities

- The Gram sabha (village council) or district council in fifth and sixth schedule areas³ and the district panchayats⁴ in non-scheduled areas is to be consulted before issuing notification of public lands for inviting applications to bid for prospecting license, large area prospecting license or mining lease (MMDR Bill 2011, s.13 (11)).
- The Gram sabha or the district council is to be consulted before granting mineral concession for minor minerals in a fifth or sixth schedule area (ibid.).
- The concerned panchayats are to be consulted before approving or disapproving the progressive mine closure plan (MMDR Bill 2011, s.32 (5)). This is to be done within a period of 90 days from receipt of the plan.

³ Scheduled areas as declared under the Indian Constitution are those with tribal population, under-developed nature of the area and an evident disparity in the economic condition of people (<http://tribal.gov.in/index3.asp?subsublinkid=305&langid=1> as viewed on December 19, 2011)

⁴ The gram sabha, district council and the district panchayat are all forms of local self government. These are usually at the village or the district level.

⁵ Provision for consultation with gram sabha/district council/panchayats before granting the concessions and on mineclosure have been provided in the draft Bill. However, what this consultation means and how it will be conducted have not been defined. What will be the relationship between consultation and consent has not been explored.

BOX 2: WHAT DOES THE PROFIT SHARING PROVISION MEAN FOR THE LOCAL COMMUNITIES?

The government's proposal to include a specific provision for sharing profits with local communities in the MMDR Bill 2011 is an important step ahead in building an inclusive growth model.

The profit sharing provision is in line with the famous 1997 judgement of the Supreme Court of India on the matter of mining in Schedule areas (also referred to as Samata Judgement). In the judgement, the Supreme Court directed that in Schedule five areas of the country, only the government can undertake mining and at least 20 per cent of net profits would be set aside as a permanent fund for development needs.

Calcite mining in Nimmalapadu village of Andhra Pradesh would have led to the displacement of a large tribal population had it not been for the Samata judgement. The residents of Nimmalapadu are agriculturists who harvest three crops a year, having managed to divert a small stream into the village. In 1987, a few men descended on the village and started to dig. Soon, revenue officials appeared on the scene and asked the villagers to vacate. They offered Rs 5,000 (73 Euros) per family. People realised that "development work" was in progress to mine the abundant mineral deposits in the area. Birla Periclase, owned by the Aditya Birla group, wanted to mine calcite from this tribal village to manufacture magnesia at its factory located 110 km away in Visakhapatnam. Determined not to allow mining in their village, the people of Nimmalapadu began a struggle against the government and one of India's leading business houses. Samata, an NGO based in Hyderabad, helped the villagers in organising the agitation. On the advice of Samata, the villagers filed a case in the High Court, which they lost in 1995. But Samata took up the cause and filed a case in the Supreme Court on behalf of the villagers and this judgement is a result of that.

According to the Delhi-based non-profit organisation, Centre for Science and Environment (CSE), if this profit sharing provision comes into effect at the present level of mining in the country, it will generate close to Rs 105,000 million (1.53 billion Euros) as share of profits for the local communities. A major portion of this will be available to the top 50 mining districts of the country, which together will get as much as Rs 90,000 million (1.3 billion Euros).

As per CSE's estimation, if the share of profits from mining is equally distributed to all the directly affected people in the top 50 districts, everyone could get as much as Rs 38,000 (550 Euros) per year. This is more than five times the official poverty line in India. The provision of profit sharing will go a long way in reducing large-scale poverty and deprivation, as is illustrated by the following examples:

- Dantewada (Chhattisgarh), the most severely left-wing extremism affected district of the country, produced minerals worth Rs 39,610 million (578 million Euros) in 2010-11. More than 80 per cent of the population lives below the poverty line. If draft MMDR provisions were implemented, the mining affected population of the district could have got more than Rs 4,000 million (58 million Euros) in 2010-11 as profit share. Every household in Dantewada could have been given Rs 40,000 (584 Euros) annually.
- Keonjhar, Odisha produces more than Rs 70,000 million (1.022 billion Euros) worth of minerals, mainly iron ore. More than half the population lives below the poverty line. If draft MMDR provisions were implemented, the directly affected people could have got more than Rs 7,500 million (110 million Euros) in 2010-11 as profit share. In other words, every directly affected person would have got more than Rs 60,000 (876 Euros) annually.

Source: Bhushan and Juneja (2011)

D. RAW MATERIALS INITIATIVE AND EU-INDIA FREE TRADE AGREEMENT

Raw Materials Initiative

The EU is making a big push to help its companies and investors access cheap raw materials in developing countries (Curtis, 2010). The Raw Materials Initiative (RMI), launched in 2008 by the European Commission (EC), is an integrated strategy of the EU to secure affordable, reliable and undistorted access to raw materials (ibid.: 4) on which the EU economy is argued to depend on for its future competitiveness (EC, 2008).

The EU sees little scope in ensuring a sustainable supply of raw materials from European deposits. The RMI is, therefore, largely targeted to ensure access to raw materials from international markets, especially from developing countries. According to the EC, the key problem with securing access to these materials is the 'proliferation of government measures that distort international trade in raw materials' (ibid.: 4) like export taxes, quotas, subsidies and restrictive investment rules (ibid.). Important steps that the EU plans to take to access 'affordable' raw materials include:

- Promoting new rules/agreements on 'sustainable' access to raw materials and ensuring compliance with international commitments
- To try and eliminate measures that restrict access to raw materials and to act against export restrictions
- To ensure that dual pricing of raw materials is addressed
- To ensure that an open and well functioning market for raw materials exists using different trade policy instruments, and
- To assess ways of lowering import restrictions for raw materials.

The EU is promoting the RMI despite recognising that 'many emerging economies are pursuing industrial strategies aimed at protecting their resource base to generate advantages for their downstream industries' (ibid.: 4) and therefore are an integral part of their development strategies. To illustrate, the average daily earning in the iron ore mining sector in India stands at Rs 100 (1.5 Euros) while that in an iron and steel factory is Rs 163 (2.4 Euros)⁶. Also, downstream integration creates more jobs (an iron ore mine along with an iron and steel plant creates 5-10 times more jobs than a stand-alone iron-ore mine) and leads to the development of 'under-developed' areas. The Initiative is, therefore, likely to hinder developing countries' economic prospects by reinforcing their dependence on unprocessed raw material exports (Curtis, 2010).

⁶ <http://labourbureau.gov.in/OWS%20New%20Table.htm> as viewed on November 19, 2011

EU-INDIA FREE TRADE AGREEMENT

The EU's quest for raw materials, as laid down in the RMI, is evident in the range of free trade agreements (FTAs) it is negotiating with various developing countries, including India.

India and the EU have been negotiating a FTA since 2007 covering trade in goods and services, investments, intellectual property rights and government procurement (Singh, 2011: 1). The FTA, termed EU-India Broad based Trade and Investment Agreement, which is likely to be concluded in 2012, contains many features that could undermine the pro-people and pro-environment provisions of the draft MMDR Bill 2011. These features include national treatment and most favoured market access conditions without quantitative limitations or the use of performance requirements or economic needs test. In addition, the EU proposal includes investor-to-state dispute settlement mechanism through which foreign investors can invoke arbitrations against the host governments.

I. National treatment

As per the draft FTA between EU and India, EU companies should get the best treatment given to an Indian company down to the regional and local level and it should cover both pre- and post-investment/establishment aspects (Article 3) and vice-versa. The 'similar treatment' is not to be applied to government owned companies of either country.

The principle of national treatment is highly contentious in the case of the mining sector since it essentially means exercising control over vital national resources. In addition, giving national treatment to a foreign private sector company without performance requirements⁷ will be detrimental to the developmental goals of the country.

II. Market access

As per the EC proposal in the draft FTA, India is to accord EU investment and investors favourable market access without limitations on:

- the number of establishments or total value of transactions or assets, whether in the form of numerical quotas, monopolies, exclusive rights or other establishment requirements such as economic needs tests (ENT);
- the total number of operations or on the total quantity of output expressed in terms of designated numerical

⁷ Performance requirements are certain conditions that may be laid down which a business needs to fulfil in order for it to be able to operate. These essentially are pre-requisites.

units in the form of quotas or the requirement of an ENT;

- the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment; and
- measures which restrict or require specific types of establishment (subsidiary, branch, representative office) or joint ventures through which an investor of the other Party may perform an economic activity.

Many of the above-mentioned are problematic provisions as far as mining sector is concerned. For instance, the demand for no restriction on size and type of investment/ establishment is in line with the EU's RMI 2008. However, this provision will promote monopolies, as EU companies with deep pockets supported by lending from European Investment Banks will start buying Indian mining companies that are essentially smaller in both size and turnover.

The other problem with the market access provision is the environmental impact of large mining projects or number of mining projects in a region (cumulative impact). For the sake of managing social and environmental fallouts, India will have to have a provision in the FTA that allows it to restrict the size of mining projects or restrict mining itself in certain areas and in certain situations, irrespective of the risks it entails to the investors.

The provisions of market access can be used for uncontrolled exports of minerals from India to the EU, which is again one of the key objectives of the RMI. Exporting minerals does not lead to the development of the mineral bearing areas in terms of employment, secondary and tertiary sector development and tax revenues. It also promotes predatory mining. Take for example, the surge in iron ore exports to China from India for their Olympics preparation. Owing to the Chinese price rise of iron ore, Indian companies started exporting huge quantities of iron ore out of the country. The prices shot up from Rs 1,200 (17.5 Euros) per tonne in 2000 to Rs 5,000 (73 Euros) per tonne in 2003 (Down to Earth, 2011). This led to an immense amount of illegal mining operations in Bellary district of Karnataka. The amount lost by the state exchequer due to illegal mining is to the tune of Rs 160,850 million (2.35 billion Euros) in a period of four years (ibid.). Farmers lost agriculture as the mining mafia started digging up land everywhere and pollution levels increased tremendously (ibid.). Because of the large-scale environmental and forest destruction, the Supreme Court of India has ordered a halt to all mining operations in Bellary. Several mining related problems exist in other states (see Box 3).

The desire of the EU to have an unfettered access to minerals from India can be gauged by the fact that it is proposing to keep out all economic needs tests (ENTs) for establishments. An ENT helps to understand the project in economic terms. In a way it is the economical justification of the project elaborating on its economic viability and need (UNCTAD, 1999). For example, if an EU company wants to start iron ore mining in a particular location, the economic needs test may include aspects like: existing mining operations in the region, impact of existing operations, demographical attributes of the region's population, employment creation, existing infrastructure, market need and location, etc. Thus it incorporates aspects of site assessment and justification, impact of similar existing operations and the need for new operations. To keep all EU investments/companies under the FTA free of an ENT would hamper assessing the project activity better and will serve to India's disadvantage. Hence an ENT should be mandatory for all or at least big investments/projects under the FTA.

Under Article 12 (e) of the draft FTA, India can overlook these provisions on virtually no size restriction in relation to 'conservation of exhaustible natural resources'. However, this is possible only if India decides to restrict domestic production and consumption as well. In essence, the domestic mineral policy of India will become hostage to the FTA.

III. Performance Requirements

The EC would like to 'impose disciplines on performance requirements' under the proposed FTA with India (Singh 2011: 2). Performance requirements with respect to mining projects could include preference to local people in employment, development of the mining areas, sharing profits with the local communities, restrictions on exports, technology transfer, value addition on the minerals in terms of setting-up of upstream/ downstream operations, etc. All these could contribute significantly towards India's economic development, especially the development of 'under-developed' areas. In the absence of performance requirements, a foreign corporation is likely to exploit the minerals of a country without contributing to the development of the mineral bearing areas. In fact, without appropriate performance requirements, EU-India FTA will completely reverse the progressive provisions of the draft MMDR Bill 2011.

IV. Investment protection and dispute settlement

The draft FTA incorporates provisions on investment protection including clauses on expropriation and dispute settlement that are contentious. The fact that

BOX 3: IRON ORE'S RED HAZE

Everything in Lamgaon village in Goa is coated with a fine layer of red earth – part of the environmental price paid by the community for the nearby iron ore mine. “Look at this muddy water flowing into my farm now,” says 48-year-old Shantabal Hoble, a member of the Lamgaon Citizen’s Committee. “It disgorges so much silt that the level of my field has risen by about a third of a metre. The fertile land that once yielded more than two tonnes of paddy is buried under the clay from the mine on the hill and now I get less than a tonne of paddy from the field.” The channel that brings water to her two hectare field is choked by silt. Other mine debris has affected the fertility of the farms in the village,

30 km east of Panaji. But Lamgaon is not alone. Many villages have been hit by the activities of the iron ore mines in the state. All over Goa, pollution caused by the transportation of mined material is causing havoc. The dust generated by the heavy trucks has reduced agricultural productivity, apart from causing significant congestion problems. At least 7,000 trucks travel every day in Goa – through villages, forests, wildlife sanctuaries and farmlands. And the impact on this small state, with a delicate ecosystem, is enormous.

Source: Bhushan et al. 2008: 145

the draft FTA does not exclude ‘speculative investment’ from protection is another area of concern.

Article 20 of the draft FTA relates to ‘investment disputes’ between party and an investor of the other party (investor-to-state dispute) causing loss/damage to the investors/ investments. As per its provisions, if a dispute does not get resolved through ‘consultation and negotiations’ within a period of six months, it may be submitted to a court or the International Conciliation for resolution.

The investor-to-state dispute settlement mechanism, therefore, gives rights to investors to completely bypass the domestic legal system and seek redressal before a panel of international arbitrators without any public participation or accountability and public scrutiny.

Modeled on the controversial Chapter 11 of North American Free Trade Agreement (NAFTA), investor-state dispute settlement mechanism has been exploited by private companies to challenge a wider range of regulatory measures on health, environment and public safety that infringe on their expansive investment rights (Singh 2011: 5). This could be problematic in the case of mining projects in India as government intervention (and regulation) in mining projects is very high because of its potential of large-scale social and environmental disruption. In fact the draft MMDR Bill aims to tighten the regulatory framework including the role of the local communities in governance of the mining sector. The investor-state dispute settlement mechanism could nullify all these by challenging the domestic mining law in case it affects profitability of the company.

V. Disclosure of information

As per Article 14 of the EU-India FTA, information disclosure has been restricted in the name of confidentiality and to protect public interest and the legitimate commercial interests of enterprises. What is ‘public interest’ or what constitutes ‘legitimate commercial interests’ has not been defined.

For mining projects this information disclosure provision will not only lead to huge corruption but will also have immense social and environmental ramifications. For instance, a wholly owned EU company might refuse to share information on profits therefore jeopardising the entire profit sharing provision of the draft MMDR Bill, 2011. Similarly, they might refuse to share crucial social and environmental information in the name of protecting ‘legitimate commercial interest’. Article 14 of the investment chapter of the EU-India FTA must be modified to facilitate information disclosure and transparency.

E. THE WAY AHEAD

There are many provisions in the EU-India FTA that could nullify various progressive environmental and social provisions of the draft MMDR Bill as well as jeopardise the sustainable development and inclusive growth agenda. In fact, the Members of the European Parliament (EP) too have raised concerns over the EU-India FTA, which are especially relevant to mining projects.

MEPs tabled amendments to the draft report of the EU-India FTA (EC Committee on International Trade, 2008) and voted on these way back in February 2009. Some important concerns raised in this draft resolution (December 2008) by Parliamentarians then were:

- “FTA should include ‘commitments’ on social and environmental standards and sustainable development” (ibid.: 6).
- FDI “is not encouraged at the ‘cost of lowering environmental, labour or occupational health and safety legislations and standards” (ibid.: 13).
- The “benefits of the FTA reach dalits/adivasis and other marginalised tribes and caste” (ibid.: 9).

The latest position of the EP on the EU-India FTA was released in May 2011, under which the Parliament has asked the EC to include an ‘ambitious’ chapter on sustainable development as part of the FTA to promote sustainable development and inclusive growth (EP, 2011).

An ambitious chapter on sustainable development would help, but for EU-India FTA to contribute to sustainable development and inclusive growth in India, it must be draft MMDR Bill, 2011 ‘compliant’.

RECOMMENDATIONS

The EU-India FTA should be suitably modified to include the following provisions in the investment chapter with respect to mineral exploration and mining projects:

- Consultation with and obtaining consent of local communities before starting the mineral exploration and mining project;
- Profit sharing with local communities;
- Displacement should be minimised and people should be resettled and rehabilitated in such a way that their social and economic conditions are better than before. In other words, displacement should be used as an opportunity to improve the socio-economic status of the population;
- Preference to local communities in employment and contracts;
- Value addition to minerals and therefore, performance requirements of upstream/ downstream linkages;
- Performance requirement on technology transfer in mineral exploration and mining;
- Removal of the clause on international arbitration in investor-to-state dispute settlement. All disputes should be settled under the domestic law taking into consideration the social, economic and environmental conditions;
- Protection of investment/investors in mining projects should be at par and not above the protection to local communities and environment from the activities of these mining projects. In other words, if the negative environmental and social externalities of a mining project are very high then the investment protection clause of the EU-India FTA should not come in the way of mitigating those impacts or even closing down the project.
- No provision under the EU-India FTA should prevent the disclosure of social, economic and environmental information related to mining projects. EU-India FTA should facilitate disclosure of information and transparency.
- Appropriate Economic Need Tests must be included for big investments/projects under the FTA.

REFERENCES

- Bhushan, C., and Juneja, S. (2011) *Sharing the Wealth of Minerals: A report on Profit Sharing with local communities*, NewDelhi: Centre for Science and Environment.
- Bhushan, C., Zeya Hazra, M., Banerjee, S. (2008) *Rich Land Poor People – Is Sustainable Mining Possible?* New Delhi: Centre for Science and Environment.
- Committee on International Trade (2008) *Draft Report on an EU-India Free Trade Agreement (2008/2135(INI))*. Available:<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-409.788+02+DOC+PDF+V0//EN&language=EN> [24 April 2012]
- Curtis, M. (2010) *The New Resource Grab: How EU Trade Policy on Raw Materials is Undermining Development*, [Online], Traidcraft Exchange, Oxfam Germany, WEED, AITEC, and Comhlamh. Available: http://www.s2bnetwork.org/fileadmin/dateien/downloads/The_new_resource_grab.pdf [24 April 2012].
- Down To Earth (2011) 'Picture imperfect', *Down to Earth* [Online] 31st Aug. Available: <http://www.downtoearth.org.in/node/33863> [29 October 2011].
- European Commission (2008) *The raw materials initiative – meeting our critical needs for growth and jobs in Europe*, Communication From The Commission To The European Parliament And The Council, Brussels, 4.11.2008 COM(2008) 699 final.
- European Parliament (2011) *European Parliament resolution of 11 May 2011 on the state of play in the EU-India Free Trade Agreement negotiations*. P7_TA-PROV(2011)0224. Available: <http://www.europarl.europa.eu/document/activities/cont/201202/20120207ATT37518/20120207ATT37518EN.pdf> [24 April 2012].
- Mines and Minerals (Development and Regulation) Bill 2011*, Draft. Available: <http://pib.nic.in/archieve/others/2011/sep/d2011093002.pdf> [23 April 2012].
- Ministry of Mines, Government of India (2011a) 'Mineral And Metal Scenario' in *Annual Report 2010-2011*, [Online] 29 March]. Available: <http://mines.nic.in/index.aspx?lid=549&level=1&chk=24dfe45y5edf5e3> [23 April 2012].
- Ministry of Mines, Government of India (2011b) *Indian Minerals Yearbook 2009*, Nagpur: IBM Press.
- Singh, K. (2011) *India-EU FTA: Policy Implications of Unfettered Investment Flows*, Briefing Paper # 2, New Delhi: Madhyam.
- UNCTAD (1999) *Lists of Economic Needs Tests in the GATS Schedules of Specific Commitments*, New York: UN.

This Policy Report is published by Comhlámh, AITEC and WEED as part of an EU funded project.

© Comhlámh 2012

Edited by: Ruth Doggett, Lisa Wilson, Alfred M'Sichili and Fleachta Phelan, with contributions from AITEC and WEED

Thanks to Fanny Simon, Viola Dannenmaier, Christine Pohl, David Hachfeld, Amy Stones, Rebecca Varghese Buchholz and Jayde Bradley. Thanks also to the project advisory group; David Cronin, Pia Eberhardt, Aileen Kwa, Charly Poppe, Sanya Reid-Smith and Elisabeth Tuerk.

Designed by Alice Fitzgerald www.alicefitzgerald.com

The full contents of this report are also available online

http://www.comhlamh.org/NewReport_Southern_Perspectives_TradeDev.html

Comhlámh
2nd Floor
Ballast House
Dublin 2
www.comhlamh.org
Tel.: 00353 (0)1 4783490



AITEC
21 ter rue Voltaire 75011 PARIS
<http://aitec.reseau-ipam.org/spip.php?rubrique230>
Tél.: 0033 (0)1 43712222



WEED
Eldenaer Str. 60
10247 Berlin
<http://www.weed-online.org/>
Tel.: 0049 (0)30 27582163



This publication is part of a joint project by Traidcraft Exchange (UK), Comhlámh (Ireland) AITEC (France), Oxfam Germany and WEED (Germany).



Responsibility for the opinion and views expressed in the papers are solely the views of the authors and are not attributable to any of the partner organisations.



This document has been produced with the financial assistance of the European Union. The contents of this document are the sole responsibility of its contributors and can under no circumstances be regarded as reflecting the position of the European Union.