

# India's Engagement with Free Trade Agreements (FTAs): Challenges and Opportunities

**MEASURES FOR IMPROVING**  
**TRANSPARENCY AND ACCOUNTABILITY IN RELATION TO FTAs**

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## **MEASURES FOR IMPROVING TRANSPARENCY AND ACCOUNTABILITY IN RELATION TO FTAs**

**(Draft)**

### **Introduction**

The Department-related Parliamentary Standing Committee on Commerce has invited people's views on *India's Engagement with Free Trade Agreements (FTAs)*. India has already signed FTAs with many developed and developing countries and is in the process of negotiating similar agreements with several others. FTAs impact upon the individual and the collective aspirations and economic endeavours of the people as also the climate and environment within and beyond the trading partners' borders. As the Government of India enters into FTAs as the preferred means for increasing market access for foreign products and for improving the marketability of domestic products abroad, it is important to undertake a cost-benefit analysis. While undertaking such an assessment it is also important to pay attention to the processes that the Government of India has adopted to engage with all segments of society, the economy and polity upon whom the FTAs have already impacted or are likely to impact. CHRI welcomes the Honb'le Committee's efforts to examine issues around FTAs that India has signed or is currently negotiating.

CHRI's submission is focused upon three issues, namely:

- crafting a mechanism for Parliament to scrutinize and approve all FTAs that the Government of India enters into on behalf of the people of India;
- improving information accessibility in the public domain about the FTAs both during the negotiations and after the agreement is concluded; and
- opening up of the proceedings of the Standing Committee in order to inspire confidence amongst the people of India.

A detailed submission on all three issues is given below.

## Key Issues and Recommendations

### 1. Crafting a Mechanism for Scrutinising and Approving FTAs

***The Issue:***

Under Articles 73 of the Constitution of India, the power to enter into agreements in the nature of Free Trade Agreements (FTAs) as well as bilateral or multi-lateral is vested with the Union Executive. However there is no constitutional provision requiring the Union Executive to place an agreement or treaty before Parliament for approval. The Constitution-makers vested in Parliament the power to make laws for the purpose of giving effect to agreements and treaties. Under Article 246(1) read with Entries 13-16 of List I (Union List) of the Seventh Schedule, Parliament can enact laws to give effect to treaties domestically. Further, Article 253 specifically empowers Parliament to make laws to give effect to agreements and treaties irrespective of the scheme of distribution of legislative powers under Article 246. However there is no constitutional requirement placed on the Union Executive to seek Parliament's approval before signing, ratifying or enforcing any treaty or agreement. Nor has Parliament enacted any law as to the procedure that the Union Executive must observe while entering into or enforcing treaties. The absence of Parliamentary oversight mechanism in relation to agreements and treaties entered into by the Executive is a major gap in the constitutional scheme of checks and balances that must be corrected forthwith.

At the time of the drafting of the Constitution, the trend of countries entering into agreements and treaties that affected the rights of their citizens was almost non-existent. However FTAs affect people's fundamental right to engage in a occupation or profession of their choice or carry on a trade or business as guaranteed under Article 19(1)(g) of the Constitution. The FTAs have a direct bearing on people's right to life as producers, traders and consumers protected under Article 21 of the Constitution. They also have a bearing on the tax/customs revenue collectible by government agencies at the Central and State level particularly in the context of revenue forgone as a result of the immediate or phased removal of customs/tax barriers. Most importantly FTAs deal with subjects and commodities that may be directly related to entries under List III of the Seventh Schedule over which the Union Government does not have exclusive jurisdiction. FTAs also deal with matters that may be in List II over which the Union Executive has no jurisdiction at all. Consultation with State Governments and State Legislatures is a very important issue in relation to FTAs.

***Recommendations of the National Commission to Review the Working of the Constitution:***

In 2002, the National Commission to Review the Working of the Constitution chaired by Chief Justice (retired.) M N Venkatachaliah examined the issue of absence of Parliamentary oversight on the exercise of the treaty-making powers by the Executive and recommended as follows:

*"8.13.3 The Commission recommends that for reducing tension or friction*

*between States and the Union and for expeditious decision-making on important issues involving States, the desirability of prior consultation by the Union Government with the inter-State Council may be considered before signing any treaty vitally affecting the interests of the States regarding matters in the State List.*" (emphasis supplied)

**Recommendations of the Commission on Centre-State Relations**

In 2010 the Commission on Centre-State Relations chaired by Chief Justice (retd.) M M Punchhi also examined this issue and concluded as follows:

*"3.8.05 ... The exercise of the power obviously cannot be absolute or unchartered in view of the federal structure of legislative and executive powers. Several states have expressed concern and wanted the Commission to recommend appropriate measures to protect States' interests in this regard."*

This Commission recommended as follows:

*" 3.8.05 .... a) In view of the fact that treaties, conventions or agreements may relate to all types of issues within or outside the States' concern, there cannot be a uniform procedure for exercise of the power. Furthermore, since treaty making involves complex, prolonged, multi-level negotiations wherein adjustments, compromises and give and take arrangements constitute the essence, it is not possible to bind down the negotiating team with all the details that should go into it. Nonetheless, the Constitutional mandates on federal governance cannot be ignored; nor the rights of persons living in different regions or involved in different occupations compromised. Therefore there is need for a legislation to regulate the treaty making powers of the Union Executive.*

*b) Agreements which largely relate to defense, foreign relations etc. which have no bearing on individual rights or rights of States of the Indian Union can be put in a separate category on which the Union may act on its own volition independent of prior discussion in Parliament. However, it is prudent to refer such agreements to a Parliamentary Committee concerned with the particular Ministry of the Union Government before it is ratified.*

*c) Other treaties which affect the rights and obligations of citizens as well as those which directly impinge on subjects in State List should be negotiated with greater involvement of States and representatives in Parliament. This can assume a two-fold procedure. Firstly, a note on the subject of the proposed treaty and the national interests involved may be prepared by the concerned Union Ministry and circulated to States for their views and suggestions to brief the negotiating team.*

*d) There may be treaties or agreements which, when implemented, put obligations*

on particular States affecting its financial and administrative capacities. In such situations, in principle, the Centre should underwrite the additional liability of concerned States according to an agreed formula between the Centre and States.

e) *The Commission is also of the view that financial obligations and its implications on State finances arising out of treaties and agreements should be a permanent term of reference to the Finance Commissions constituted from time to time. The Commission may be asked to recommend compensatory formulae to neutralize the additional financial burden that might arise on States while implementing the treaty/agreement.*” (emphasis supplied)

***CHRI’s Submission:***

It must be pointed out that there is not much evidence of any action taken by the Government of India to implement the recommendations of these successive Commissions funded by the tax-payers’ money. Nor has the Central Government placed in the public domain reasoned arguments about the infeasibility of implementing these recommendations. As a result India is sorely lacking in an institutionalized and effective mechanism for parliamentary oversight of the Union Executive’s actions of entering into agreements and treaties. One-off exercises of the kind launched by this Hon’ble Committee are better than having no oversight but they do not add to the creation of institutionalised mechanisms which are the need of the hour, given the number of FTAs that India is currently negotiating (more than 15 according to data available on the website of the Department of Commerce, Government of India).

***CHRI submits that the Hon’ble Committee examine this matter thoroughly and recommend that:***

- ***The Central Government chalk out a plan of action for consulting with the State Governments and Legislatures on all FTAs that are under negotiation;***
- ***A committee of both Houses of Parliament representing all political parties be constituted for the specific purpose of scrutinizing agreements and treaties entered into by the Central Government and making appropriate recommendations to both Houses of Parliament; and***
- ***The Central Government in consultation with all actors take steps to introduce a Bill in Parliament making it mandatory for the Government to seek Parliament’s approval before ratifying any treaty or agreement.***

## 2. Improving information accessibility about FTAs

### **The Issue:**

A key area of concern with regard to FTAs is the lack of transparency in the negotiations process. The Department of Commerce has rarely made public, details of any of the issues under negotiation. Although the Department claims to have held region-wise consultations with stakeholders and interest groups in 2007 in relation to the ongoing FTA negotiations with the European Union, their spread and numbers are not adequate. A close examination of the list of several thousand items covered under FTAs which India has signed with other countries, till date, reveals the diversity of segments of economic activity they affect.

#### **Farm and natural products:**

Vegetables such as cabbage, plantains, pumpkins, green pepper, mixed vegetables, and beverages and additives such as black tea, chicory etc.

Grains and pulses such as maize, kidney beans, *tur (arhar) dal* split pulses and sweet potatoes.

Fruits such as bananas, pineapples, guavas, mangoes, watermelons and tamarind.

Nuts and spices such as saffron, ajwain, fenugreek, mustard, cardamom (mixed spices) and a wide variety of flowers.

Dairy products such as milk products, yoghurt, buttermilk and whey.

Other natural products such as teak, mahogany, coniferous trees (sheets of plywood) betel leaves, groundnuts, gums, resins, tendu leaves, tobacco for manufacturing beedis, cigar and cheroot, zarda scented tobacco, snuff, bamboos, mineral water and ice and snow.

#### **Minerals, industrial and consumer products:**

Common salt, kaolin and other types of clay, marble, granite, sandstone, gypsum, limestone, mica, manganese ore, copper ore, nickel ore, coal, petro-products, chemicals, dyes, synthetic detergents, fungicides, herbicides.

Items for household consumption such as candles, basketwork, wickerwork, handmade paper and other types of paper, jewellery, baby diapers, sanitary napkins and towels.

Items such as feature films, children's films, educational material and stationery.

Agro-machinery parts, printed circuit boards (PCBs), fast moving consumer goods (FMCG), aircraft engines, marine propulsion engines, nuclear reactors and their parts and a wide variety of polymers.

The aforementioned list is only illustrative not exhaustive. The ability of big and small farmers, fisher-folk, horticulturists, floriculturists, cottage industries, mining, industrial and commercial enterprises of all sizes, all over India carry on production and/or sale of these items will be affected over a period of more than ten years and probably longer.

Further, some FTAs such as the India-Japan Comprehensive Economic Partnership Agreement (CEPA) signed in 2011 permit the import of municipal waste, sewage sludge,

clinical waste, wastes of hydraulic fluids and antifreeze fluids apart from ash residues from the incineration of municipal waste. It is not clear which sectoral interests groups the Central Government held consultations with on reducing tariff barriers for the import of these items when Japan has not offered reciprocal arrangements for similar kinds of waste generated in India. It is not clear which other FTAs, currently under negotiation, will compel India to import garbage in this manner. Clearly the import of waste from trading partners will increase garbage management woes in India manifold. There is very little information about these crucial matters which have a direct bearing on the environmental health of the country which is inextricably connected with the health of the people.

This situation has been allowed to develop despite the existence of statutory obligations on the Government to proactively disclose information about the impact of the CEPAs and FTAs to all citizens under the *Right to Information Act, 2005* (RTI Act). Under Section 4(1)(c) of the RTI Act all departments and public authorities under the Central Government who are responsible for implementing FTAs and CEPAs have an obligation to:

***“publish all relevant facts while formulating important policies or announcing decisions that affect the public.”***

Further, under Section 4(1)(d) of the RTI Act all departments and public authorities under the Central Government who are responsible for implementing FTAs and CEPAs have an obligation to:

***“provide reasons for” their “administrative or quasi-judicial decisions to affected persons.”***

The Central Government has a duty to proactively disclose information about FTA negotiations from time to time. In 2009 the **United Nations Special Rapporteur Mr. Anand Grover**, in his very first report on *“the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”*, lamented the lack of transparency in FTAs negotiated between countries in the following words:

*“68. Many countries have signed or are currently engaged in negotiations on extensive trade agreements, including bilateral investment treaties (BITs), FTAs, economic partnership agreements (EPAs) etc. Such agreements have extensive implications for pharmaceutical patent protection, which can directly impact access to medicines. Some developed countries, for example have negotiated FTAs which reflect their standard of IP protection.*

*69. These agreements are usually negotiated with little transparency or participation from the public, and often establish TRIPS-plus provisions. These provisions undermine the safeguards and flexibilities that developing countries sought to preserve under TRIPS. Studies indicate that TRIPS-plus standards increase medicine prices as they delay or restrict the introduction of generic competition. It should also be noted that TRIPS-plus measures could also arise in other contexts such as terms for WTO accession.” (footnotes omitted).*

The UN Special Rapporteur made a specific recommendation to open up the processes of FTA negotiations in order to keep the people informed about developments at all stages. The relevant recommendation is cited below:

*“70. The need for public health to be taken into consideration in negotiating these agreements has been highlighted not only in developing countries and LDCs but also in developed countries. The European Parliament for example, in 2007, specifically asked the European Commission to take into consideration the need to protect public health in support of the Doha Declaration and refrain from negotiating TRIPS-plus provisions. Nevertheless, countries continue to negotiate and introduce agreements with TRIPS-plus standards. TRIPS and the Doha Declaration specifically allow for countries to protect the right to health. As FTAs can directly affect access to medicines, there is a need for countries to assess multilateral and bilateral trade agreements for potential health violations and that all stages of negotiation remain open and transparent.” (footnotes omitted and emphasis supplied)*

***CHRI’s Submission:***

The Hon’ble Committee may take note of the fact that the Department of Commerce has ignored these recommendations for transparency in FTA negotiations and stonewalled requests for access to information about the India-EU FTA. Private citizens have been denied access to this information despite formal requests made under the RTI Act (for example, see *D G Shah vs Ministry of Commerce and Industry, Department of Industrial Policy and Promotion, IP and IC-II*, Appeal No. CIC/SS/A/2011/000676, Central Information Commission’s decision dated 11/08/2011).

While the EU has provided its big business houses and their lobbyists access to documents relating to the ongoing negotiations, there is no clarity on who all the Central Government has shared information with, within India, despite strong civil society demand for more transparency [See “Commission Defends Privileged Access to Big Business in Court”, article published on the website of Corporate Europe Observatory accessible at: <http://corporateeurope.org/blog/commission-defends-privileged-access-big-business-court> (accessed on 04 February, 2013)]. India can do better than the EU by taking not only big businesses into confidence but all civil society organisations demanding transparency in the FTA negotiations. Almost every FTA that India has concluded contains transparency provisions which require India to proactively disclose information about rules, regulations, inquiry points and other related matters. So there is no justification for undertaking FTA negotiations in secrecy when so many sectoral interests are affected as demonstrated above.

***CHRI submits that the Hon’ble Committee take serious note of the lack of transparency of even basic information relating to the ongoing FTA negotiations and recommend that:***

- ***The Central Government take immediate steps to share information about the EU-India FTA negotiations with all citizens, civil society organisations and State Governments and Legislatures in accordance with the RTI Act. This information must include but not necessarily be limited to comprehensive impact assessment studies with particular focus on the specific segments of the economy and society that will be impacted upon;***

- ***The Central Government proactively disclose, in a timely manner, key information about other ongoing FTA negotiations such as negotiating texts and changes made in the negotiating positions over time, in order to enable people to provide their views and comments. The methodology of dissemination of information provided for in Section 4 of the RTI Act may serve as a guide in this regard. The relevant provisions of Section 4 are provided below:***

*“(2) It shall be a constant endeavour of every public authority to take steps in accordance with the requirements of clause (b) of sub-section (1) to provide as much information suo motu to the public at regular intervals through various means of communications, including internet, so that the public have minimum resort to the use of this Act to obtain information.*

*(3) For the purposes of sub-section (1), every information shall be disseminated widely and in such form and manner which is easily accessible to the public.*

*(4) All materials shall be disseminated taking into consideration the cost effectiveness, local language and the most effective method of communication in that local area and the information should be easily accessible, to the extent possible in electronic format with the Central Public Information Officer or State Public Information Officer, as the case may be, available free or at such cost of the medium or the print cost price as may be prescribed.*

*Explanation.—For the purposes of sub-sections (3) and (4), "disseminated" means making known or communicated the information to the public through notice boards, newspapers, public announcements, media broadcasts, the internet or any other means, including inspection of offices of any public authority.”*

### **3. Opening up the Hon'ble Committee's Proceedings to the Public**

***The Issue:***

Given the high levels of secrecy in ongoing FTA negotiations and a clear absence of simple language literature available for people's reference in the regional languages, about the likely impact of the FTAs already concluded, the confidentiality that the Hon'ble Committee has surrounded its deliberations is cause for concern. Despite civil society's demand that the proceedings of Parliamentary Committees be opened up to the public in the manner of the plenary sessions of both Houses of Parliament, meetings continue to be held in secret. As the submissions from non-government entities and civil society actors almost always precede submissions made by government departments, there is little opportunity for civil society to examine their claims and submit rejoinders or rebuttals for the committee's consideration. This can be rectified if the sessions relating to submissions from all persons appearing before the Hon'ble Committee through telecasting or broadcasting. The Committee's deliberations while finalizing the report need not be opened up to the public in order to allow members the freedom to express their opinions freely and frankly.

***CHRI's Submissions:***

***CHRI submits that at the very least the Hon'ble Committee take the step of opening up its proceedings to the general public by televising or broadcasting the verbal submissions made by all invited parties. However the deliberations of the Committee while finalizing its report and recommendations may be held in camera in order to afford the Hon'ble Members an opportunity to discuss and debate the issues in a candid manner.***

**About CHRI**

CHRI is an independent, international, non-partisan, non-government organisation headquartered in New Delhi with offices in London, UK and Accra, Ghana. CHRI works for the practical realisation of the human rights of people in the countries of the Commonwealth. CHRI was a member of the drafting committee that put together the civil version of the Draft Right to Information Bill in 2004. CHRI was invited twice by the Department-related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice to advise it on best practice principles relating to the right to information. In 2010 CHRI made several submissions to the same committee to strengthen the Public Interest Disclosures and Protection to Persons Making the Disclosures Bill, 2010, later rechristened as the Whistleblower Bill, 2011 and also the Lokpal and Lokayuktas Bill, 2011. CHRI works for the promotion of people's access to information and justice across Commonwealth countries. More information about CHRI's activities is available on its website: [www.humanrightsinitiative.org](http://www.humanrightsinitiative.org)