

ASEAN FREE TRADE AGREEMENTS: POLICY AND LEGAL CONSIDERATIONS FOR DEVELOPMENT

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INTRODUCTION

The Association of Southeast Asian Nations (ASEAN) was established in 1967 by Indonesia, Malaysia, Philippines, Thailand and Singapore, later joined by Brunei in the 1980s, and by Cambodia, Laos, Myanmar and Vietnam (known as CLMV) in the 1990s. Intra-ASEAN economic integration process started with liberalization of trade in goods through the reduction and elimination of tariffs under the ASEAN Free Trade Agreement 1992 (AFTA) through the Common Effective Preferential Tariff (CEPT) plan whose aim was to achieve zero tariff for all products by 2010 for the ASEAN-6 countries and 2015 for the CLMV.

Liberalization of trade in services is conducted through the ASEAN Framework Agreement on Services of 1995 (AFAS) whose aim was to ASEAN Member countries to provide wider and deeper market access for substantive coverage of service sectors than their commitments made under the WTO General Agreement on Trade in Services (GATS). Initially, the negotiations for liberalization of the services market were focused on financial services, transport, telecommunications, tourism and professional business services. Subsequently, members are considering placing seven sectors onto the fast track program and making commitments for an additional 27 sectors.

Under the Framework Agreement on ASEAN Investment Area (AIA) concluded in 1999, ASEAN members agreed to liberalize their investment regimes in non-service sectors (manufacturing, agriculture, forestry, fisheries and mining sectors) by the provision of national treatment to investors and investments of ASEAN countries. According to the Agreement, ASEAN-6 countries are obliged to accord unconditional national treatment to investors and investments of other members in all sectors by 2010 and 2020 for non-ASEAN investors, with a longer timeframe for CLMV.

Given the slow pace of intra-ASEAN economic integration process, the stalemate on Agriculture issues and the failed attempt by the OECD countries to include investment issues in the Doha multilateral trade negotiation round, many developed trading partners approached ASEAN countries for the conclusion of bilateral and regional FTAs. In respect of bilateral FTAs, Singapore took the lead and concluded an FTA with New Zealand in 2000. Subsequently, she has entered into FTAs with EFTA and her major trading partners: Australia, the US and Japan. Thailand followed suit and has negotiated and concluded FTAs with Australia and New Zealand and has finalized the text of the Japan-Thailand Economic Partnership Agreement. FTA negotiations with the US which started in 2004 were interrupted by unrelated political events in Thailand. Meanwhile, Malaysia concluded the Agreement between the Government of Japan and the Government of Malaysia for an Economic Partnership in 2005, and the Philippines concluded the Agreement between Japan and the Republic of the Philippines for an Economic Partnership in 2006. In respect of FTAs with its dialogue partners, ASEAN has embarked on FTA negotiations with China, India, Japan, Australia and New Zealand, South Korea. In August of this year, ASEAN signed the Trade and Investment Framework Agreement with the US, possibly paving the way for FTA negotiations. The EU has also expressed interest for FTA negotiations with ASEAN.

RATIONALE AND KEY FEATURES OF FTAS

From a global perspective, the surge in FTAs began in the early 1990s, of which there are altogether more than 300 FTAs in existence both at bilateral and regional level among the 149 WTO members. The rationale for conclusion of FTAs can be explained by several reasons, economic and political. From an economic perspective, a foremost reason is the creation of larger markets to take advantages of economies of scale in the production and export of goods and services, increase of employment, free flow of capital across borders which will contribute to economic and social development of the countries that are parties to the Agreement. Many countries negotiate and conclude FTA in order to counteract the perceived negative effect of “being left out” since the preferential treatment for trade under FTA are not extended to non-Parties. FTAs also allow the less developed trading partner to strengthen long-term strategic alliances with more powerful countries and key trading partners.

FTAs also provide parties with a comprehensive legal framework to provide greater market access for goods and services of the parties and to strengthen overall economic partnerships in areas not covered by the WTO. Indeed, FTAs are often described as being WTO-plus, in particular GATT-plus and GATS-plus, which means greater and faster market access for goods and services than those committed under the WTO. To avoid political sensitivity, the term “free trade agreement” is sometimes substituted by terms such as “Economic Partnership Agreements” or “Comprehensive Economic Cooperation Agreements” which is thought to help lessen resistance from anti-FTA groups while keeping with the objective of trade and investment liberalization. The most ambitious FTAs are those concluded with the US which extend coverage beyond the conventional area of trade in goods and services to areas such as government procurement, labour and environment standards, intellectual property rights and competition law. However, the negotiations within the ASEAN-dialogue partner framework does not go as far, and the focus of negotiations has remained confined to liberalization of trade in goods, trade facilitation, trade in services, investment liberalization and protection, rules of origin, economic cooperation and dispute settlement.

POLICY CONSIDERATIONS FOR THE CONCLUSION OF FTAS

1. Trade in Goods - Most ASEAN countries are major exporters of such products as agriculture and fisheries products, electronic products, textile, leatherwear and computer parts. The major objective for concluding FTA is to expand more market access for their products with export potential.

2. Trade in Services - All ASEAN countries except Singapore are not able to compete with advance economies in supplying services in most sectors from financial, transportation, telecommunication, education, public health and other service sectors which require advanced technology and large amounts of capital. In concluding FTAs with developed economies, ASEAN need to make thorough assessment of their capacity to supply these services and make appropriate strategies for the opening of these markets to benefit from the management skills, technology and investment that can come with the liberalization of these services sectors.

3. Investment - Every ASEAN country has adopted her own national strategy and policy to attract foreign direct investment (FDI) which is expected to contribute to national economic and social development. While providing tax and other incentives to promote FDI, they also need infrastructure development projects and targeted promotion of special industries. All countries also have domestic laws to regulate the liberalization of investment in the industries and businesses that are considered important to national interest and security, for example, laws that limit foreign participation in the management and equity interest of companies in the transportation, financial, telecommunication and other domestic businesses or other industries which still need protection from foreign competition. In regulating foreign investment, the host country will normally require foreign investors to set up their establishment with the participation of local management and equity interest. To get value added benefits from FDI, local content and export requirements were normally imposed by the host countries in giving permission to foreign investor to do business and invest in their countries.

THE LEGAL STRUCTURE OF PRESENT DAY FTAS

The draft text of FTAs being used by the negotiating partner, mostly the developed countries, from the US, Japan, Australia and New Zealand are in line with North American Free Trade Agreement (NAFTA) which adopted as a basis the texts of the relevant WTO Agreements for liberalization of trade in goods, services as well as other trade-related matters, from the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Agreement on Trade-Related Investment Measures (TRIMS), sanitary and phytosanitary measures (SPS), technical barriers to trade (TBT), competition policy and government procurement with the addition of the investment chapter which provides a legal basis for the liberalization and protection of foreign investment.

LEGAL BASIS FOR PREFERENTIAL TREATMENT UNDER FTAS

To complement and supplement the trade and investment liberalization process under the multilateral trading system, the WTO Agreements - in particular the General Agreement on Tariffs and Trade (GATT) and General Agreement on Trade in Services (GATS) - allow Members to negotiate and conclude regional or bilateral trade liberalization agreements which provide the contracting parties or members with wider and faster market access for their goods and services than those committed under the WTO framework. To encourage and ensure that the parties to the FTAs enjoy more preferential treatment for their goods and services than those enjoyed under the multilateral trading system, the parties to an FTA which meets the criteria set by the WTO rules will be exempted from the major WTO obligation to extend most-favoured-nation treatment to all WTO Members.

FTA provisions for liberalization of trade in goods is sometimes called GATT-plus since they provide greater and more expeditious market access for the respective goods of the parties through the negotiation for reduction and elimination of tariff and quotas for all or substantive coverage of products with a specific limited time-frame. Under Article XXIV GATT, the basic obligations are that Members must eliminate (rather than just lower) trade

barriers on “substantially all trade” among the FTA parties upon entry into force of the FTA or on the basis of a reasonable time-frame, which may not exceed ten years.

For ASEAN, the ASEAN Free Trade Area provides for ASEAN countries to reduce and eliminate tariff and quota for their products listed in the tentative, exclusion and sensitive lists in accordance with the agreed time-frame with the target date for total elimination of tariff for all products in the year 2010, with a longer period for the CLMV which are considered new members of ASEAN. Since all ASEAN countries are developing countries, AFTA was negotiated and implemented on the basis of the Enabling Clause (a WTO Decision made in 1979) which allows the AFTA parties to be exempted from the obligation to accord MFN treatment to all other members of the WTO without the strict criteria of Article XXIV of GATT.

For trade in services, the ASEAN Framework Agreement for Trade in Services (AFAS), which was negotiated and implemented under Article V of the GATS, is used as a legal framework for negotiation and implementation of intra-ASEAN liberalization of trade in services. The objective of AFAS is to negotiate and liberalise the intra-ASEAN services market beyond the level committed under the GATS and the provisions of the Agreement is therefore sometimes called GATS-plus. Liberalization for the service providers of another party, whether natural or juridical persons, is done through the reduction and elimination of domestic measures considered as limitations to national treatment and market access for the various modes of supply. In order to enjoy MFN exemption under Article V of the GATS, AFAS must have “substantial sectoral coverage” and eliminate “substantially all discrimination” between the parties, with flexibility allowed for developing countries.

THE LEGAL TEXT FOR FTA NEGOTIATIONS - TRADE IN GOODS AND SERVICES

In view of above-mentioned objectives and legal basis of the FTAs, the legal text for intra-ASEAN and ASEAN-Dialogue Partner FTAs should be based on the text of WTO Agreements. In principle, ASEAN should adopt the text of GATT 1994 and GATS as a basis for ASEAN-Dialogue Partner FTAs in total for negotiations on trade in goods and trade in services. The focus of the negotiations may then be shifted from the text to negotiations on liberalization, namely, on the issue of greater and faster reduction and elimination of tariffs for a substantive coverage of products and for the reduction and elimination of measures that are considered limitations to national treatment and market access. However, in practice, ASEAN and their negotiating partners have been using a simplified or modified version of the GATT and GATS as a basis for their agreement for liberalization of trade in goods and services. If a simplified version of the GATT and GATS is preferred, the ASEAN agreement should at least contain the following provisions : Objectives, definitions, general obligations, general and security exceptions, emergency and balance of payment safeguards, and dispute settlement mechanisms.

To ensure that the parties to the FTA are able to refer to the provisions of the GATT and GATS which have not been incorporated in a simplified or modified text of an Agreement, the following two provisions must be provided for in the intra-ASEAN and ASEAN-Dialogue Partner FTAs:

1. Nothing in this Agreement shall prejudice the rights and obligations of the Parties under the WTO Agreements or other international agreements to which they are parties; and
2. In case where there is no provision on a related matter stipulated in this Agreement, the relevant provisions of the related WTO Agreements shall be applied *mutatis mutandis*.

In view of the above-mentioned objective and legal basis for the conclusion of FTAs and the fact that ASEAN is currently negotiating for FTA with many trading partners such as China, Japan, South Korea Australia-New Zealand, India and is prepared to embark on negotiating the same with the US and EU, it is very crucial that ASEAN have a single unified FTA draft text for negotiation with the said trading partners. In this regard, it is most advisable that ASEAN use the text of GATT and GATS and other WTO covered Agreements i.e. TRIPS, TRIMs, Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), Agreement on Technical Barriers to Trade (TBT Agreement), Agreement on Rules of Origin and all other trade-related matters as a basis for negotiation and concluding FTA with their partners.

The following are some major reasons for using the WTO texts as a basis for negotiations:

1. The usage of the text of WTO Agreement helps avoid any complication and technical difficulties which tend to arise during the course of negotiation from the demand of the more developed trading partner which may cause difficulties in interpretation and application because of the usage of technical terms and definitions which is different from those used in the WTO Agreement.

2. The text of the WTO Agreements resulted from intensive negotiation by more than 130 trading partners from both developed and developing countries, who over the successive multilateral negotiation rounds made their best effort to create an international legal framework for a free and fair international trading system which will contribute to the economic and social development of all countries and peoples.

3. The provisions of the WTO Agreements from GATT, GATS, Agreement on Agriculture, TRIPS, TRIMS and all other trade rules and regulations contained therein are designed to serve the objectives of trade and investment liberalization which are to promote employment, raise standards of living and promote economic and social development of all

countries and peoples in particular of the less developed countries. The principle of progressive liberalization and special and differential treatment for less developed members take into account the fact that developing countries need more time to liberalize their markets in accordance with their stage of the development and to keep up their trade balance with their more powerful trading partners.

4. The WTO provisions on general and security exceptions as well as emergency and balance of payment safeguards also ensure that the liberalization of trade in goods, services and investment will not cause harmful effect to national security, environment, life and health of people, animals and plants, and that all members may temporarily suspend their obligation and adopt measures to protect their less competitive domestic market and industry which has been injured as a result of trade and investment liberalization as well as measures to address serious balance of payment difficulties.

5. The dispute settlement mechanism of the WTO has also been developed to provide fair and effective means of settlement of dispute arising from the differences of interpretation and application of the Agreement.

6. If ASEAN through the course of negotiations agrees to the proposal of our negotiating partners to amend or add any term, definitions or provisions other than those provided for in the WTO Agreements, ASEAN may not be able to fully enjoy their right as developing countries. The provisions in most FTA which are called TRIPS-plus or TRIMS-plus are some examples of provision which deviate from the text of the WTO covered Agreements that affect the rights of developing countries to special and differential treatment under the said Agreement.

TRADE IN SERVICES

As recognized at UNCTAD IX, the ability of developing countries to integrate successfully into the global trading system will depend on increasing their participation in cross-border trade in services. The principle of progressive liberalization using positive list approach should be insisted. It is important to remember that liberalization is not deregulation and all parties to an FTA retain the right to regulate and set the conditions for entry into the domestic market consistently with their international obligations.

It is crucial that ASEAN make a study of their competitiveness in providing services in all sectors and allow foreign entry to their service sectors that are ready for competition, protect those sectors that still need time to develop and negotiate for the opening of the negotiating partner's market in sectors of export interest. Due to the substantial investment required in establishing a commercial presence abroad, the provision of services through the temporary movement of natural persons (mode 4) may be seen as a key export interest for ASEAN. Remittances from migrant service suppliers working abroad can amount to a significant source of revenue for ASEAN. It is estimated that Asian migrant workers sent home a combined remittance income of more than US\$40 billion in 2003. Under the GATS, commitments on mode 4 made by developed countries are generally quite restrictive, being mostly limited to managers, skilled professionals and intra-corporate transferees and subject to an economic needs test. Furthermore, service suppliers must still meet all conditions under domestic regulations regarding licensing and recognition of qualifications and Members retain discretion to grant, refuse and administer work permits and visa. It is therefore important for ASEAN to push for deeper mode 4 commitments from its FTA partners for service suppliers at all skill levels in sectors of interest such as health services, IT, engineering, construction and tourism. ASEAN should also propose GATS-plus elements such as mode 4 commitments in the manufacturing and agriculture sectors (currently excluded from GATS) and for commitments to facilitate the visa and work permit application process which is often cumbersome, time-consuming and costly. Barriers caused by lack of recognition of qualifications could be solved by provisions in the FTA providing

for the recognition of qualifications by reference to international standards and practices, or providing for specific tests of competence such as procedures for assessment of credentials, experience and knowledge.

Since the service industries of developing countries have relatively lower levels of development and competitiveness, it is possible that the rapid liberalization of service market will lead to a rapid surge of import of more competitive foreign services which might cause severe injury to the uncompetitive domestic service industry or market. In this regard, an Emergency Safeguard Mechanism (ESM) should be provided for in the Agreement on Trade in Services to enable the party whose domestic service industry or market has been seriously injured to temporarily suspend their liberalization commitments to provide temporary protection to their domestic service. As multilateral negotiations have not yielded results, this is an opportunity for ASEAN to contribute to international standard-setting that is beneficial for developing countries. Therefore, ASEAN should ensure that an ESM exists not only for trade in goods, but also for trade in services in all of its FTAs.

INVESTMENT

In addition to the agreement for liberalization of trade in goods and services, the FTA also includes an investment agreement which provides a legal framework for liberalization and protection of foreign investment. The first part of an agreement provides a legal basis for liberalization of investment through the provision of national treatment to investors and investments of the other parties with regard to the right of establishment, acquisition, management, enjoyment and disposal of investments. The second part obliges the parties to accord fair and equitable treatment and provides protection of investments of an investor of another party against expropriations and nationalization as well as guarantees the free flow of capital.

Most developing countries have adopted national strategies and policies to attract FDI mainly by providing tax and other investment incentives to direct FDI to their needed industries and major infrastructure development projects. At the same time the host developing countries also have the domestic laws and regulations to regulate the admission of foreign investment to do business in manufacturing and services. To promote inward FDI flow, most developing countries have concluded the Investment Promotion and Protection Agreements with major capital exporting countries. Such agreements provide guarantees to foreign investment, in particular, with respect to compensation in the case of expropriation and nationalization of foreign investments, and the free transfer of funds related to investments, including profits and returns of investments and access to mechanisms for dispute settlement. These guarantees provide confidence for foreign investors to invest in their countries. The first multilateral legal framework which has been used as a basis for the promotion and protection of foreign investments is the Multilateral Investment Agreement. The GATS, which covers the provision of services through commercial presence (mode 3), is the first multilateral agreement on investment liberalisation which require the parties to the agreement to accord national treatment to service providers of the other party (which can be seen as a right to establishment) and to lower and eliminate limitations to market access which include requirements in respect of the amount of capital and percentage of equity interest in the enterprises or company which has been granted permission to provide service in the territory of another party. The Parties may set conditions for national treatment and market access in their schedules.

ASEAN concluded agreement for the protection of their investment since 1987. The agreement to liberalize their investment regime in ASEAN investment area was concluded in 1995. The investment chapter was designed to facilitate and promote the cross border movement of capital which is expected to increase employment and production of goods and services thus contributing to economic and social development of the host countries. The investment provisions initially proposed by the OECD in the late 1990s to be included in the Doha multilateral trade negotiation round known as Multilateral Agreement on Investment (MAI) was strongly opposed by developing countries as an agreement that

severely threatened the economic sovereignties of those countries. The agreement somehow has been incorporated into the NAFTA agreement and has been used by developed trading partners in negotiating FTA with their counterparts, including ASEAN.

The issues that require special attention in the investment agreement are as follows:

1. Definition of the term "Investor" - An investment agreement typically defines "Investor" of the parties to include natural persons who under its law are considered to be its nationals, and juridical persons established under the applicable law of a party, and juridical persons which are owned or controlled by nationals or juridical persons of a party. Since the definition is not entirely based on the national laws of the parties, it is important that the domestic law which defines the term foreign juridical person must be consistent with the definition provided for in an investment agreement in order that the parties can exercise their rights under the agreement effectively.

2. Definition of the term "Investment" - An important issue in negotiations on investment is whether to limit the scope of investment disciplines to FDI or to extend coverage to portfolio investment. Capital-exporting countries will surely insist on extending coverage to portfolio investment and this should be resisted by ASEAN. For developing countries, FDI is expected to contribute to creating employment, providing technology transfer and developing a lasting relationship with the host economy. On the other hand, short-term speculative capitals are potentially destabilizing and may lead to severe balance of payment problems. Given that provisions on investment protection would normally guarantee the free transfer of funds related to an investment (which is, in effect, capital liberalization), there is thus a need to include an exception clause to apply when a country is facing serious balance of payment difficulties. Furthermore, as sudden withdrawal of capital can negatively impact the exchange and interest rates and volatile capital inflows can substantially complicate economic management and threaten macroeconomic stability, ASEAN should also consider including a broader exception clause to allow for measures to ensure macroeconomic stability. It should also be borne in mind that even the stability of FDI has been questioned in light of evidence suggesting that as a financial crisis becomes

imminent, transnational companies indulge in hedging activities to cover their exchange rate risk leading to additional pressures on the local currency.

To achieve the objectives of the the FTA of increasing FDI which is expected to contribute to the economic and social development of the country, it is critical that the application of the chapter is limited to FDI. FDI should be clearly differentiated from portfolio investments in the security markets. The definition of FDI has various other important implications, including the protection against expropriation or nationalization and measures having equivalent effect. The host country will certainly be liable, for example, if an order by the security exchange commission to suspend the transaction in the domestic security market has caused severe effect to the value of the share that can be considered as tantamount to expropriation. According to the prevalent theory adopted by the IMF and OECD, the FDI threshold can be reached by the holding of 10 per cent equity participation of a company doing business in any country. This IMF/OECD definition of FDI does not give a good basis for defining the term FDI that the host developing countries need as it does not adequately ensure that the investment is of a substantial amount and long term. Therefore, ASEAN needs to find the common definition of FDI to make it confine only to long-term investments, vis-a-vis portfolio investments which are of short-term nature and is volatile. If the portfolio investments are to be included in the definition of FDI, there should be a requirement that it has to be held for a period of at least one year.

3. Liberalization Provisions - The agreement requires the party to accord national treatment to investors and investments of the other contracting parties with regards to the full range of investment activities, from the establishment, acquisition and expansion of investments to the management, enjoyment, and disposal of the investments. The obligation to provide pre-establishment national treatment (i.e. for the establishment, acquisition and expansion of investments) to investors is considered the liberalization provision. Since an FTA normally already includes an agreement for trade in services which provides for national treatment to service providers of another member including for the establishment of a commercial presence, the agreement for liberalization of investments in services sector

should be governed by agreement for trade in services while investments in non-service sectors which includes manufacturing, agriculture, forestry, fishery and mining and includes investments in major infrastructure development projects should be covered by the agreement on investments.

4. Protection Provisions - An investment agreement typically obliges parties to accord fair and equitable treatment to investments and investors of the other parties, guarantees foreign investment against expropriation and nationalization of their investments except where the measures have been taken under due process of law with prompt, effective and adequate compensation, and ensures the free transfer of capital related to investments including the initial capital needed to make the investment, profits and returns. The provisions on the protection of investments may be applied to both investments in services and non-services sector. However, the protection should be accorded to investments which has been made in accordance with the host country's domestic laws and those which has been specifically approved in writing by the competent authorities. This approach allows the host country to screen investments to ensure that international protection is accorded only to investments that are truly beneficial to the social and economic development of the country. This approach is in accordance with the approach adopted in the 1987 ASEAN investment protection agreement.

5. Prohibition of Performance Requirements - This provision which is based on the WTO TRIMs Agreement prohibits the host country to set the following conditions for giving permission to foreign investor to do business and invest in their countries: local content and export requirement, trade balancing and foreign exchange balancing requirements. Although ASEAN countries that are Members to the WTO have to comply with the said provisions of TRIMs Agreement, but in text of the Agreement proposed by the developed trading partner the prohibition is extended to other conditions which are considered TRIMs-plus such as technology transfer and employment of local technician and expert and management. While the TRIMS Agreement has already minimized the right of the host developing countries from acquiring value added from foreign investment the

TRIMS-plus provisions will totally eliminate the right of the host country to the shared benefits from the return of foreign investments and host countries may be left only receiving the low returns for cheap labour cost. Such provisions also clearly reduce the right of developing countries under the WTO Agreement and should not be agreed upon by ASEAN countries in their negotiations with their more developed trading partners

6. Dispute Settlement Mechanism - ASEAN should insist on the dispute settlement provision provided for in the AIA which is limited to state-to-state dispute settlement. However, if the negotiating partner insists on having the provisions on investor-state dispute settlement, the rules and procedures for settling disputes through international arbitration should be negotiated in advance. A major issue in such case is the issue of consent and ASEAN countries should insist that consent for arbitration must be given on a case-by-case basis if a foreign investor wishes to submit a claim to international arbitration.

HARMONIZATION OF ASEAN TRADE AND INVESTMENT LAW THROUGH THE CONCLUSION OF FTAS

The ASEAN-dialogue partner FTAs contain several trade and investment issues such as investor-state dispute settlement, transparency of domestic laws, regulations and judicial decisions (requiring publication and possibly in the English language) alongside “border administration” disciplines such as customs valuation and administration of rules of origin (the control and verification of the country of origin of imports to determine whether a good is eligible for preferential treatment). These requirements are expensive to implement and administer and may require the enactment of new laws and regulations, or revision of existing ones which will impose a heavy burden on ASEAN countries, especially for those whose previous practice and regulations may differ substantially from international standards.

One of the most important legal principle under the international law of treaties provides that every treaty in force is binding upon the parties to it and must be performed by

them in good faith (*Pacta sunt servanda*). Article 27 of the Vienna Convention on the Law of Treaties also stipulates that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. Therefore, prior to the entry into force of a treaty, the parties must ensure that their existing domestic laws and regulations comply fully with their obligations under that treaty. If there are existing laws which are not fully in compliance with the terms and conditions of the treaty, that party to the treaty must make the necessary adjustments so that they can fully exercise their rights and comply with their obligations. Since FTAs can provide common rights and obligations which ASEAN countries must comply with, FTAs can be seen as one important means that ASEAN domestic trade and investment laws can be harmonized.

For the agreement on trade in goods, the enabling legislation of a party is the law which enables the relevant authority, which in the case of Thailand is the Minister of Finance, to impose, maintain, reduce, abolish and raise tariffs for imported goods. This domestic law will enable the government of the party to an FTA to negotiate and agree to reduce and abolish the tariff on the product at the rate agreed by the negotiation, and to raise the tariff for protection when the circumstances allow such as in case of dumping or to protect domestic market which has been injured by the rapid surge of imports and in times of balance of payment crisis.

For the agreement on trade in services and on investment the enabling domestic laws are the foreign investment laws which provide for defining who is a foreign natural and juridical persons, which are foreign service providers and foreign investors for the purposes of regulating their right to do business and investing in their countries, in particular, in manufacturing, services and all other business sectors. Most of the countries will have specific laws for regulating the right to do business in some special business sectors which are considered crucial to their national interest and security such as financial, telecommunications and agriculture sectors.

It is quite crucial that the domestic laws and regulations of a party to the FTA comply fully with the terms and conditions of the treaty to enable them to exercise their rights and comply with their obligations and fulfill the objectives of the agreement. An example of a domestic legislation which is not fully consistent with the definition of the term “service provider of another Member” under Article XXVIII(m) of GATS is Article 4 of the Thai Foreign Business Act 1999. Under Article XXVIII(m) of GATS, service provider of another Member, in the case of supply of services through commercial presence, is defined as domestic juridical persons owned or controlled by natural or juridical persons of another Member, while the definition of the term foreign juridical persons under Article 4 of the Thai Foreign Business Act looks only at the ownership criteria without taking into account the control criteria. The said Article therefore allows foreign juridical persons who are supposed to be a foreign service provider under the GATS or a foreign investor under an investment agreement to register as a Thai company by holding 49 per cent equity participation. Thereby, such companies enjoy the right to do all business as a Thai company in spite of the fact that the majority of the directors of company who have the power to control the company may in fact be foreigners. Therefore, any conditions and limitations set in the GATS or relevant FTA for the entry of foreign service providers or investors are meaningless and cannot be enforced on such companies in practice.

While the implementing legislation for liberalizing trade in goods are the law which empower the Minister of Finance to impose, maintain, reduce abolish and raise customs duty, the enabling law for liberalization of trade in services are those laws and regulations which the government uses for giving the permission to service supplier of another member to supply their service to service consumer in their territory. In supplying their services in many sectors from financial, telecommunication, construction, the service suppliers also need to bring in their management, personal, technology and the capital, the relevant law also include those which regulate foreign investment.

FTAS WITH DIALOGUE PARTNERS AS A DEVELOPMENT TOOL FOR ASEAN

In theory, FTAs should lead to the expansion of market access for goods and services and foreign direct investment (FDI) which would lead to the faster development of industrial structures, improvement of competitiveness through lowering of costs and increased efficiency, and to achieve the objectives of trade and investment liberalization which are increased employment, and economic and social development of all countries and people as stated in the preamble of the Agreement establishing the WTO. Nevertheless, the benefits for ASEAN countries' participation in FTAs with their dialogue partners will not come automatically, but will depend on several factors including: 1) the clear understanding of the costs and benefits of the FTA at all levels, from government to private sectors to civil society; 2) the sound study of the country's supplying capacities and the capacity to compete, 3) ability to take advantage of the market access obtained; 4) ability to fulfill obligations undertaken; and 5) ability to protect rights under the dispute settlement mechanism.

Due to the complexity of WTO covered agreements which are used as a basis for FTA, from the Agreement of trade in services, TRIPS, competition policy and investment law, ASEAN needs adequate number of lawyers who have clear understanding of the negotiation with their more developed partners and to defend their right under the agreement through the dispute settlement mechanism

While, ASEAN may benefit from larger markets for their products, FTA will provide wider market for much more competitive services from the more advanced economies in particular in sectors such as finance, telecommunications and education. The thorough studies of our competitiveness in all service sectors in particular service sectors and the balance of trade in services with the negotiating partner are needed for negotiation.

With its comprehensive nature of liberalization from trade in goods, agriculture and industrial, service and investment, the effect of the FTA is far reaching and may severely

affect small and medium sized companies which are not able to compete with the multinational corporations.

It will be imperative that the all interested parties - politicians, government, private sector, and civil society - understand clearly the costs and benefits and the objectives and mechanisms for trade and investment liberalization under an FTA. Indeed the participation of all those stakeholders should take place early in the negotiating process so that policy makers can receive input in order to formulate the appropriate negotiating positions. Public participation also helps to ensure that the resulting FTA will not be met by public resistance due to misunderstandings. Apart from information dissemination and the building up of public awareness, it will also be necessary to raise the potential of exporters and investors to be able to seize the new trading and investment opportunities resulting from the FTAs, i.e. increase supply-side capacity. Utilizing opportunities to produce competitively and to export the resulting goods and services requires knowledge, skills, technology and access to finance. Therefore, government assistance may be required, especially for agricultural development and for small and medium enterprises. Access to markets may be complicated by quality requirements and for trade in goods, this may require government support targeted at improving the quality of products to meet various health, safety and environmental standards; and for trade in services, to improve skills to meet professional and licensing requirements. The government is obliged to help build up the supply side capacity, management skill and capital as well as protect the small and medium sized companies to survive and get stronger, with the capacity to export their goods and services to international markets.

Therefore, adequate information on the supply side capacity and the opportunity to export goods and services to other countries is required for the formulation of an FTA negotiation strategy. Since ASEAN is also required to open our market for our FTA partner, ASEAN needs to make a thorough assessment of the capacity of their own domestic industries in particular the small and medium sized companies and other small businesses which might need government support and protection in order to be able to survive and

compete with the much more powerful multinational corporations. The fact that several FTAs are being negotiated simultaneously with the text of the agreements being quite complex will require an adequate number of policy and legal officers to handle gather and analyse data, if ASEAN countries are to have a meaningful and intelligent trade liberalization strategy.

TECHNICAL COOPERATION PROVISIONS/CAPACITY BUILDING FOR GOVERNMENT OFFICIALS RESPONSIBLE FOR FTA NEGOTIATIONS

Trade and legal officers with good knowledge of the WTO Agreements is essential since much of the texts of FTAs are based upon those agreements. Even for the ASEAN-6 countries who have had time to build experience with the WTO texts, deep knowledge on WTO-plus issues such as investment protection may still be lacking. The growing complexity of the legal text of the agreement and the negotiations process also poses a serious challenge for ASEAN because sophisticated capacities for handling the negotiations is needed. In the ASEAN-dialogue partner FTA negotiations the process may involve ASEAN “Caucus” meetings involving negotiations amongst the ASEAN countries themselves to find a common position on a various issues, supplanted by Trade Negotiating Committee (TNC) meetings where the Chairperson of ASEAN and of the dialogue partner negotiate matters of principle and key provisions of the agreement, intersected by Working Group negotiations where officials discuss the technical and finer details of the agreement, and with possibly separate bilateral negotiations on market access commitments. Furthermore, the fact that ASEAN is simultaneously negotiating at least five comprehensive FTAs and individual countries may also be negotiating several other bilateral agreements outside the ASEAN framework calls for domestic mechanisms to coordinate amongst the different negotiating teams in order to ensure policy coherence.

In view of the above, ASEAN needs to strengthen their cooperation in capacity building for their officials assigned to represent ASEAN in negotiating with the more developed trading partners. The project and programme for capacity building should be

designed to build up understanding on the objectives, mechanisms and implications of all agreements negotiated under FTA framework. Particular attention should be made on the agreement on trade in services, investment liberalization and protection, TRIPS, and TRIMS. In such endeavours ASEAN should involve international organizations responsible for providing technical assistance for developing countries in the area of trade and investment, for instance WTO, UNCTAD, and ITC, in the training programmes and workshop.

CONCLUSION

With the stalemate of Doha round of trade negotiations, ASEAN countries are likely to continue FTA negotiations with their major trading partners. To maximize the benefit and minimize the adverse effect from ASEAN should strengthen their cooperation in the formulation of a common trade and investment policy and strategies for the negotiation of the agreement. To maximize the benefit and minimize the adverse effects from liberalization of trade and investment under an FTA, ASEAN must closely cooperate in making thorough assessment of the opportunity to export their goods and services and their supply side capacity. While ASEAN may gain more market access for their goods and services, the FTA will also require ASEAN to open their market to the FTA partner. In the negotiations for market access, all parties therefore need to know their own strength and competitiveness. This is the reason why some ASEAN members still maintain some of their goods in the sensitive list and ask for a longer time frame for liberalization of the market for those products, and maintain several conditions and limitations to national treatment and market access for sensitive service sectors. Due to the complexity of the WTO Agreements which are used as a basis for concluding the FTA, ASEAN needs to build up the capacity of their officials who are responsible for the negotiation of the Agreement and, therefore, devote sufficient time and resources in formulating a common unified FTA text for use in negotiations. Such text should contain rules and provisions conducive to development, for example, investment rules that give countries the policy space to adopt performance requirements such as technology transfer requirements, and sufficient safeguard provisions that will allow them to take appropriate measures in order to address severe balance of

payment difficulties or import surges or goods and services. Such text should also adopt the language of the WTO Agreements as much as possible and the ASEAN countries should agree that new WTO-plus texts will not be open for negotiation. This is especially important in light of the scarce negotiating and analytical capacities of less developed countries who might not have sufficient resources to fully evaluate the full implications - economic, social and developmental - of new text. Negotiations on new text would also open the opportunity for the more powerful negotiating partner to push in agendas and provisions that may be less beneficial to developing countries than the rules that had been agreed multilaterally at the WTO. Adopting the WTO text also avoids any complication and technical difficulties which tend to arise during the course of negotiation from the demand of the more developed trading partner which may cause difficulties in interpretation because of the usage of technical terms and definitions which is different from those used in the WTO. In conclusion, if ASEAN countries proceed carefully with their FTA negotiations and avoid the political pressure to conclude agreements hastily, the FTAs can be an effective tool for the realization of the WTO objective of increasing employment, raising standards of living and expanding production of goods and service

The implications for ASEAN countries of trade and investment liberalization through their FTAs with dialogue partners will first and foremost depend on the outcome of the negotiations both in terms of market access commitments and substantive obligations. ASEAN countries will benefit from rules that are conducive to development, for example, investment rules that do not restrict the policy space of countries to adopt performance requirements such as local employment and technology transfer requirements, and sufficient safeguard provisions that will allow them to take appropriate measures when necessary in order to tackle severe balance of payment difficulties or import surges. In terms of market access, a good outcome means gaining meaningful market access for sectors of export interest such as mode 4 commitments for lesser skilled service suppliers and opening markets in sectors where foreign entry will stimulate increased competitiveness rather than wipe out entire domestic industries.

In order to maximize the benefit and minimize the adverse effect from the conclusion of FTA, ASEAN needs to have in place a development oriented trade and investment policy and well-planned FTA strategy that is consistent with their development goals. In addition to strengthening intra-ASEAN economic integration and cooperation, ASEAN must closely cooperate in building up the capacity of our for all ASEAN countries to have the sufficient amount of technical and legal experts to handle the negotiations of numerous FTAs, and the amount of resources for information gathering, consultations and research needed to formulate and evaluate the social, economic, and developmental implications of various negotiating positions on topics ranging from investment protection, market access for goods and services to rules of origin. Upon careful reflection on the enormity of the task of capacity-building, this puts into question the wisdom of embarking on comprehensive FTA negotiations with so many dialogue partners at the same time. Perhaps it is time for a serious reassessment of ASEAN's FTA strategy with its dialogue partners.

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