

# **APPLICATION OF WTO IN ASEAN INCLUDING FOREIGN DIRECT INVESTMENT**

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## **1. Introduction – Establishment of the WTO**

The General Agreement on Tariffs and Trade (GATT), formed in 1948 was established to discuss trade related issues and negotiate further liberalization. Taking place in ‘rounds’, these negotiations initially focused on lowering tariffs before moving on to other issues such as subsidies. The 8<sup>th</sup> trade round (Uruguay Round – from 1986- 1994) was the most extensive of all as it covered trade in goods, services, intellectual property, and importantly it established the WTO.

The WTO recognizes that negotiations in trade should be conducted with the purpose of raising standards of living, ensuring full employment and expanding trade in goods and services. It also seeks to ensure the optimal use of the world’s resources in accordance with the objective of sustainable development, through protecting and preserving the environment and enhancing the means for doing so in a manner consistent with the different levels of economic development of its member states. Significantly for the developing nations, the WTO promised positive efforts to ensure that they, especially the least developed, secure a share in the growth in international trade commensurate with the needs of their economic development through reciprocal and mutually advantageous arrangements.

## **2. Nature of the WTO multilateral trading system**

Although imbued with equitable and philanthropic objectives, the WTO is seen by many as a forum dominated by the rich and powerful nations to further their own interests at the expense of the developing countries.

Commentators have criticized the decision-making processes of the WTO as opaque and non-participatory. Under the so-called consensus system, developing countries are pressured to accept what has been agreed among selected members at Green Room discussions. Decisions are imposed on members without consultations and discussions. The practice of chairs writing and submitting texts under the WTO Secretariat’s guidance has also been criticized.

In particular, the imbalances in the WTO system is evident in the area of investment. Under the Trade-Related Investment Measures (TRIMs), local content requirements and subsidies to local industries must be phased out by all developing countries. Export subsidies will also have to be eliminated. In prohibiting the imposition of domestic rules, procedures and measures which restrict trade and investment, developing countries are unable to encourage and develop their own domestic industries.

For almost a decade, the European Union (EU) has been pressing for the creation of an international investment agreement aimed at regulating the ability of governments to regulate foreign direct investment. In 1995, the Organization for Economic Cooperation and Development (OECD) began negotiations on a Multilateral Agreement on Investment (MAI). This proposed agreement was criticised for allowing multinational companies extensive rights to invest in countries and challenge government regulations. As a result of public pressure and disagreements between OECD countries, the MAI collapsed in late 1998. However, prior to the collapse of the MAI, the EU had sought to place investment on the agenda of the WTO. At the WTO's Singapore Ministerial meeting in 1996, the EU obtained the agreement from other WTO members to establish working groups to study the feasibility and desirability of WTO Rules on a range of issues, including investment. These issues became known as the 'Singapore Issues' or the 'new issues'

These 'new issues' are considered by many as venturing beyond the traditional market access expertise of the WTO into a wider scope of domestic rule - making which many see as encroaching on the sovereign rights of nations, exemplifying the imbalances of the WTO. It came to a head at the 5<sup>th</sup> WTO Ministerial Conference in Cancun. The meeting could not proceed beyond the discussion on the 'Singapore issues' due to the concerted opposition by more than 70 countries, including (ASEAN countries) Malaysia, Philippines and Indonesia. This was seen by many as a setback to the multilateral trading system, creating doubts as to the viability of the WTO.

### **3. ASEAN and the WTO**

ASEAN was established long before the WTO. However, it was not until the ASEAN Preferential Trading Agreement (PTA) was put into force that trade and economic linkages were strengthened. In January 1991, the ASEAN countries agreed to upgrade the PTA and the ASEAN Free Trade Area (AFTA) was established. Prior to this, ASEAN was more or less a political organization.

Cambodia was admitted as a WTO member state at the Ministerial Meeting at Cancun, Mexico. Amongst the ASEAN countries, only Laos and Vietnam remain as non-WTO member states. The WTO membership is currently 148.

ASEAN recognizes the different stages of economic development among its member states and the need for flexibility, including the need to facilitate the increasing participation of Cambodia, Lao PDR, Myanmar and Vietnam in the expansion of their exports, inter alia through the strengthening of their domestic capacity, efficiency and competitiveness. ASEAN has also created a habit of regional cooperation among countries in South East Asia. This regional consciousness has led to the established practice among ASEAN member states to consult closely with each other prior to any meeting with its Dialogue Partners. Regional cooperation is also evident in various areas, such as environment, health, education, trade and industry. As opposed to the multilateral trade forum of the WTO, there is a real sense of co-operation and understanding amongst ASEAN

member states, leading to comments that ASEAN is an example of the doctrine of independence through interdependence.

Bearing in mind the imbalances in the WTO system, this sense of unity protects and promotes ASEAN's cause at the multilateral trading forum. ASEAN, as a bloc, are more likely to be heard than single countries by themselves.

For the 55 million or more people of ASEAN, it is imperative that the region remains competitive and develops its economic performance. Ultimately it is economic strength which will create higher living standards and provide the region with political clout in the WTO.

#### **4. Economic growth of ASEAN**

##### ***4.1 Foreign Direct Investment (FDI)***

According to the United Nations Conference on Trade and Development (UNCTAD), more than 65,000 transnational corporations are currently driving the global expansion of FDI. The development of a country depends to a great extent, on FDI. It is through FDI that technology transfer (through backward and forward linkages between multinational enterprises and local firms), research and development (R&D) and marketing expertise are acquired. This in turn generates increased productivity and enhanced export capacity. Ultimately, this leads to creation of employment while precipitating finance and foreign exchange. The role FDI plays in countries with insufficient domestic savings is crucial as it provides greater access to international financial markets.

However, for the potential benefits of FDI to be realized, there must be a minimum level of absorptive capacity, to acquire and utilize the foreign technology. To what extent, FDI will benefit ASEAN member states may therefore vary depending on the country's absorptive capacity.

##### ***4.2 Steps to promote FDI in ASEAN***

FDI flows into ASEAN in 2001 increased by 13% from US\$11.5 billion in 2000 to US\$13 billion in 2001. This favourable development was partly because of the improved regional investment environment, such as the benefits AFTA promised to investors. The ASEAN Industrial Cooperation Scheme has also enhanced the advantages of putting up manufacturing facilities in the ASEAN region.

ASEAN members are toughening the laws against the infringement of intellectual property rights. Work is also being done on establishing a regional filing system on trademarks and patents. These steps are in line with developing an environment to protect the legitimate interests of foreign investors.

Further, the e-ASEAN Agreement was signed by ASEAN leaders with 5 objectives –

- i) infrastructure building;
- ii) liberalization of trade;
- iii) services and investment in ICT products;
- iv) e-commerce, e-society; and
- v) e-government.

In this age of information technology, the adoption and integration of such laws and policies will promote and further develop the use of IT for trade and social purposes. Foreign investors of such goods and services will be presented with wide possibilities and opportunities. This rich potential for foreign investors to promote their products and technology should facilitate their investment into ASEAN member countries.

ASEAN countries signed a binding agreement (on 7<sup>th</sup> October 1998) to establish the ASEAN Investment Area (AIA) by 2010. The AIA is to attract greater levels of FDI and promote ASEAN as an investment region by providing investors a highly competitive, liberal and transparent investment regime. Investors will be granted, among others, national treatment, greater investment market access and will enjoy a low transaction cost environment. The restrictions on investments will be removed and the investment process streamlined.

ASEAN members are also making efforts to liberalize trade in services within ASEAN. Articles II(1) and V of the GATS provide for the formation of agreements between and among member countries to remove discriminatory measures and provide an environment conducive to a free flow of trade in services between and among them. In moving towards this increased liberalization of trade in services, ASEAN Member Countries signed the ASEAN Framework Agreement on Services (AFAS) on 15 December 1995. Its objective is to eliminate substantially, restrictions to trade in services amongst Member Countries and to liberalise trade in services by expanding the depth and scope of liberalization beyond that taken by Member Countries under GATS.

The liberalization of services, in particular banking and finance, accounting and legal sectors would create an environment conducive for international trade and foreign direct investment, which in turn will promote economic growth.

## **5. WTO's role in facilitating FDI in ASEAN**

A key question is whether investment should be negotiated as part of the Doha Development Round. This consists of two issues- firstly – whether the WTO is the right forum for an investment agreement? and secondly, whether developing countries should make obligations regarding investment at this time?

Discussions of an investment agreement in the WTO have been restricted to the rights of investors, with no mention of investor obligations. It is questionable whether discussions and negotiations on investment in the WTO would be in the best interest of ASEAN.

In a statement given at UNCTAD conference on trade, investment and development held in New Delhi, May 18-20 2003, the Indian Minister of Commerce and Industry Arun Jaitley spoke out against a WTO investment agreement. He first denounced what he described as undue pressure on developing countries to negotiate on an issue that they felt under-prepared to discuss. He insisted that developing countries are just beginning to understand the issues involved in an investment agreement and the impact on their countries, much less begin to create the kind of institutional capacity they would need to be able to handle free flowing international investment. Mr Jaitley questioned whether the WTO was in fact the right forum for an investment agreement, or if the vast differences in political stability, market size, and economic policies amongst WTO member countries make a multilateral agreement inappropriate.

Even assuming that WTO member states agreed on an investment agreement, available studies have shown that liberalization through binding treaties at a bilateral or multilateral level has not led to any significant increase in investment flows. One of the reasons for the tenuous link between liberalized investment rules and increased flows of FDI is that the primary motive of companies investing abroad has little to do with investment regulations. In its *Global Economics Prospects 2003*, the World Bank indicated that other factors such as political stability or market access into developed countries were much more important determinants. The choice of a particular country is driven primarily by access to customers, and a stable social as well as political environment.

## **6. Is the WTO necessary for ASEAN?**

Its detractors have branded the WTO as corporate – rather than development – driven. In light of the misgivings of the multilateral trading system, ASEAN member states may question the intrinsic value of the WTO to the region's economic development.

However, such misgivings must be tempered with the reality that the lack of progress in trade negotiations in the WTO retards trade liberalization and adversely affects all countries. It is generally recognized that developing nations should still commit themselves fully to the WTO process. Otherwise the developing countries, including ASEAN, will continue to face import barriers such as high import tariffs, tariff rate quotas, tariff peaks, anti-dumping duties, technical and sanitary restrictions and producer and export subsidies which restrict the access of their agricultural and industrial exports to developed countries.

However, it is arguable that the WTO may not be the best forum for negotiations and decisions on investment issues. ASEAN on its own has made progress in this area, with the AIA and the recent Bali Concord II, which envisages a common economic region with free flow of not only goods, services and capital, but also investment by 2020.

## **7. Alternatives to the WTO**

The lack of progress in global trade negotiation has resulted in some countries turning towards regional and bilateral trading arrangements. For example, ASEAN intends to strengthen trade and economic links not only among the member countries through an ASEAN Economic Community but also with those outside - China, India, Japan and South Korea. Steps have already been taken to launch a free trade agreement between ASEAN and China. Discussions are now taking place regarding a free trade agreement between ASEAN and India. Singapore has on its own signed a number of free trade agreements with its trading partners.

It is said that these regional and bilateral arrangements could lead to a 'spaghetti bowl' of overlapping deals that clog rather than open trade channels, undermining the WTO's authority to both oversee trade negotiations and to settle disputes.

A disadvantage in a bilateral trade agreements is that the developed countries can assert their own interests much more easily because of the existing imbalance of power. They can by sheer weight of power, bully the developing countries into yielding to their demands even if it is not in their interests to do so. Even with imperfections, the multilateral trading system through the WTO offers developing countries some protection against bilateral pressures.

## **8. The way forward for ASEAN**

It may be in the best interests of ASEAN member states to remain committed to the WTO, while pursuing regional and bilateral agreements. In all this, it will be imperative for ASEAN's projected integration as a single market to materialize.

The Bali Concord II issued recently is a step in the right direction. As mentioned earlier, another positive indication is that work is progressing on possible free trade agreements with China in 2010, India in 2011 and Japan in 2012.

However, any optimism must be tinged with an awareness of the difficulties and impediments that must be overcome in forming an economic, social and political bloc. ASEAN's inability to agree on a date earlier than 2020, reinforces the view held by some skeptics that it is too divided and ineffectual for economic integration. The biggest obstacle is the uneven economic and political development. While the group includes relatively developed economies such as Singapore and Malaysia, the combined GDP of ASEAN's 10 members is only marginally larger than that of South Korea and smaller than that of China. This division has resulted in countries like Singapore, as well as Thailand pursuing their own bilateral trade deals outside of ASEAN.

ASEAN's long standing tradition of 'non-intervention' in the internal affairs of member states, broken momentarily by the uproar over the imprisonment of the Burmese opposition leader Aung San Suu Kyi, has to a

certain extent, mitigated against ASEAN states pressuring one another on economic matters.

Singapore's Prime Minister Goh Chok Tong, before the recent talks at Bali formally began, said that a single ASEAN market, with the free movement of goods, services and capital was "the only way" the region could "remain competitive in the face of the growing regional and bilateral free trade agreements". He also warned that the potential for an integrated market of some 55 million people would be lost without urgent action.

While recognizing the faults of the WTO system, ASEAN member states must also acknowledge its own shortcomings and work towards overcoming all impediments blocking the path towards market integration.

## **9. Conclusion**

It cannot be denied that the multilateral trading system of the WTO has its limitations. However, it would still be important for ASEAN to remain committed to the WTO process. Developed countries should also be committed towards rectifying the problems and imbalances in the existing system. The development principle should be accorded the highest priority in the WTO.

The primary focus of ASEAN should be on solidarity and co-operation, leading to the formation of a common economic region. It will be a difficult and arduous path. Even the European Union, triggered by the search for lasting peace and reconciliation after the Second World War, culminated into an economic union only after a long period of time. ASEAN member states must be ready and willing to make concessions in its national political sovereignty to achieve an integrated market. Greater economic influence in the international arena is imperative. Only then will the inequalities and asymmetries in the process of globalization be evened out. To achieve this, the pursuit of national interests must evolve into the pursuit of regional interests.

## REFERENCES

1. Roberts, John – ASEAN's problems on display at Bali summit (30 October 2003)
2. Oxfam International Briefing paper 46: The Emperor's New Clothes
3. Kaner - Global Trade Talks -After Cancun What?
4. H.E. Mr. K. Kesavapany, The High Commissioner for Singapore – Talk on "Is ASEAN a sustainable proposition" presented at the Bar Council (17 November 2000)
5. Nayar, Deepak – Globalization: What does it mean for development
6. Commission of the European Communities for Development - Response To The Challenges of Globalisation – A Study on the International and Financial System and on Financing for Development
7. Jomo, K.S. and Nagaraj, Shyamala (editors) - Globalization versus Development
8. Parlin, C. Christopher – Current Developments regarding the WTO Financial Services Agreement
9. Dhanaraj, Sumithra – Understanding the GATT and the Uruguay Round
10. Ministry of International Trade & Industry – Cancun WTO Ministerial Conference- The Malaysian Perspective