issue # 5 . october 2014

ASEAN PATH

DFDL LEGAL & TAX

INDIA-ASEAN FTA
in services and investments: How long is the wait?

By Vinay Ahuja, senior adviser and regional head of DFDL India Desk and Kunal Bir Singh Sachdev, associate, DFDL India Desk

ASEAN PATH is a series of white papers prepared by DFDL's experts aiming to assess, in more depth, compelling issues arising from the regional economic integration under the auspices of the Association of Southeast Asian Nations ("ASEAN") Economic Community Blueprint. The articles are based on an in-depth legal analysis of the local and ASEAN legal framework from the perspective of a practitioner assisting foreign and ASEAN investors in their investments and operations throughout various ASEAN Member States. All articles will be accessible on our website: www.dfdl.com.

INDIA-ASEAN FTA
in services and investments: How long is the wait?

By Vinay Ahuja, senior adviser and regional head of DFDL India Desk and Kunal Bir Singh Sachdev, associate, DFDL India Desk

In 2009, India and the ASEAN nations signed and ratified a free trade agreement relating to goods. In 2014, it appears that negotiations on a separate India-ASEAN FTA covering services and investments will similarly be ratified, having the potential to change the shape of the India-ASEAN relationship. Though a formal conclusion to negotiations regarding this agreement came on 20 December 2012, the expected date of signing has been one marred with controversy[1]. Despite being negotiated over the past five years, the content of the ASEAN-India Trade in Services Agreement (the "**Services FTA**") and parallel ASEAN-India Investment Agreement[2] package is not yet in the public domain[3].

From the limited and general information available thus far, the Services FTA is expected to extend to telecommunications, information technology, transportation and logistics, financial services, education, real estate, business services, health and community/social services and the "Mode IV" free movement of natural persons and professionals. Such an agreement shows great promise, allowing for the generally accepted advantages that come with deeper integration and the harnessing of new markets, greater competition and specialization, efficiency and freedom of movement and growth as a whole. While the deal has been completed, significant challenges still exist in getting over the line in terms of ratification, with disagreement over the relative bargaining position of certain sectors and the merits of comparative advantage of each of the parties. Such issues are the essence of trade negotiation, with a multitude of stakeholders and domestic pressures adding uncertainty to the success or otherwise of final implementation. However, if successful, it appears that the breadth of a new Services FTA will have far-reaching effects, whatever its final form.

The past

The original structure of the ASEAN-India Free Trade Agreement was contemplated to be an agreement on both goods and services, and began as the Framework Agreement on Comprehensive Economic Partnership ("**FACEP**") in 2003. Negotiations of the goods element of the FTA (the ASEAN-India Trade in Goods Agreement ("**Goods FTA**")) commenced in 2004 and was subsequently signed in 2009, coming into effect in 2010. The categories of tariff reductions per sector totaling over 4,000 product lines are to be gradually reduced between 2016 and 2019.

The negotiations of the parallel Services FTA concluded in Delhi on 20 December 2012, and is structured following an '8+1+1' model, that is, one agreement between India and Myanmar, the Lao PDR, Cambodia, Vietnam, Brunei, Singapore, Malaysia and Thailand, and two separate agreements between India and Indonesia and India and the Philippines. This model provides a deviation from positions of Free Trade Agreements ("**FTA**") between ASEAN and China and ASEAN and Japan, where Goods, Services and Investments agreements with China and the comprehensive agreement with Japan were negotiated with ASEAN as a whole. Critics have often stated that by not negotiating the India-ASEAN FTA as a whole package encompassing trade in goods, services and investments has left India in a weaker position during the negotiations of the Services FTA.

Trade in Goods and Services between India and ASEAN stood at USD 76 billion in 2012-13, with the aim to increase to USD 100 billion by 2015[4] and then to USD 220 billion by 2022[5]. In addition to the overwhelming value of the Goods FTA, this ambitious target for both goods and services together is very much contingent upon the success of the Services FTA. The position of India's and ASEAN's service exports are already established in global terms, for 2011, totaling USD 137 billion[6] and USD 260 billion[7] respectively. If integration is to occur, it is clear that the service arm needs to be a comprehensive and effective instrument.

The framework

The FACEP[8] in its present form sets out a loose structure for the terms of negotiation of the Services element of the FTA. This general scope extends to the following:

- To "progressively liberalize trade in services on a preferential basis with substantial sectorial coverage"
- Elimination of "substantially all discrimination" between the parties, and/or the "prohibition of new or more discriminatory measures with respect to trade in services"
- Expansion in the "depth and scope of liberalization" beyond those undertaken by India and ASEAN under the GATS (General Agreement on Trade in Services, a WTO instrument)
- "Enhanced cooperation in services... in order to improve efficiency and competitiveness, as well as to diversify the supply and distribution of services of the respective service suppliers of the parties"

The beneficiaries

As noted earlier, the content of the Services FTA is not yet in the public domain and as such the merits are difficult to determine, however, particular issues of note extend to the following:

(a) Multi-Brand Retail – India's guarded retail sector has long been coveted by foreign investors. Indonesia and Thailand in particular have, in recent times, developed a significant presence in their own respective markets, and are both looking to expand.

(b) Business Process Outsourcing (BPO), Software and IT Enabled Services (ITeS) – India's dominance in Software and ITeS has continued to expand in recent times, while Business Process Outsourcing **(BPO)** in general and Call-Centre Services in particular have seen overwhelming success in the Philippines whereby following its ambition to become the 'Call-Centre hub of Asia' and a major provider of IT services. India's Information and Communication Technology **(ICT)** services account for 65.9% of its total services exports, with the Philippines at 67.3%[9]. ICT and BPO promises to be a central and contentious point in the impending Services FTA.

(c) Restriction on Work Permits and Uniform Qualification Recognition – Enabling the ease of movement for professionals, referred to as 'Mode IV' access, would provide greater flexibility in obtaining certain visas for a longer duration and for obtaining work permits. An additional feature complimenting Mode IV access may be the implementation of 'Mutual Recognition Agreements' **(MRAs)**, whereby certain professional qualifications obtained in India or in an ASEAN nation may be recognized uniformly across the region. Giving the different economic scenario in each of the ASEAN countries and the opposition to the idea of free movement of professionals in certain ASEAN member nations, India may be required to negotiate MRAs with each ASEAN member country. At present, Indian and ASEAN states require certain professional qualifications to be obtained locally for foreigners, or for certain domestically obtained licenses to be held, for example an Indian doctor wanting to practice in Thailand is required to obtain a license from the Medical Council of Thailand. A harmonization of qualifications and mutual recognition is desirable for free integration of professionals. Should such a harmonization take place, India may be able to make significant inroads in health care and financial services.

Deloitte and the Federation of Indian Chambers of Commerce and Industry ("**FICCI**") report[10] that sectors of comparative advantage for India lie in ICT services, e-commerce, telecommunications and engineering, where the largest beneficiaries in ASEAN appear to be in construction services, shipping and transportation and logistics services. Integration of the Financial Services and Insurance Services sectors appear to provide a 'middle ground' on near equal stance. In the interim, it is projected that the growth of the ASEAN states (like the Lao PDR, Cambodia and Myanmar) is to require a greater degree of skilled labour and professionals in general terms, and that India may fill that gap, providing the means to grow the region by generating greater demand for Indian imported goods. These aside, the broader general benefits of a comparative advantage shift, unrestrained flows of capital and labour, the reduction of transaction costs, increase in competition and market efficiency all provide for the conventional notion of mutual benefit across the Southeast Asian corridor.

The roadblocks

While the agreement has been accepted by most of the parties, Thailand[11], Indonesia and the Philippines are yet to agree to provide their assent. The application of the agreement in opening up services inherently provides for increased competition which may be to the detriment of certain domestic players, thus domestic pressure on policymakers is proving to be a challenge.

The Multi-Brand Retail sector in India is a long standing and vexing issue. FDI relaxation came through in 2012, allowing for foreign holdings of up to 51% stake in an entity, which may be allowed or disallowed by the relevant Indian State government, rather than the Government of India (the Central Government)[12]. Based on the news reports, this policy has been marred by controversy, giving rise to mass strikes which have resulted in only around half of Indian states accepting the position[13]. This lack of unity within India places limitations on prospective leverage Thai and Indonesian retailers may enjoy benefits from a Services FTA in their comparative strengths in the retail industry. To compound the problem, the Indian position has the potential to regress further, as negotiations on the agreement concluded before the recent election of BJP Party led by new Prime Minister Narendra Modi, which may lead to a change of stance, however it is pertinent to note that it may be another few months before the newly elected government will contemplate FTA negotiations. The party has stated in its election manifesto prior to election that FDI in Multi-Brand Retail would be repealed altogether, however as of July 2014 speculation is mounting that the FDI policy will remain the same as under the previous United Progressive Alliance government. If this were to be the case the previous'state enabling policy' of leaving the issue to individual Indian states would be retained. At the same time, Thailand and Indonesia have stated categorically that they require unlimited ability to set up shop in India before ratification can occur. A solution may thus be a long way off[14].

The Mode IV free movement of professionals is also being met with resistance from ASEAN states. The concern is that in opening the door to foreign professionals by allowing such movement in terms of visas could affect the employment of domestically trained professionals. Further concern exists over the potential for an influx of unskilled labour more generally which could lead to a rise in the unemployment rate in their respective countries. Restrictions on work permits and visa access remain high in many ASEAN nations, providing higher barriers in hiring foreign workers, particularly in certain sectors in Singapore. National treatment goals in relation to hiring practices remain central to the success of the agreement. In addition to these issues, and although unconfirmed, it appears that the possibility exists of uniform qualification recognition being left out of the agreement, leaving individual Mutual Recognition Arrangements to be conducted on a bilateral basis between India and each ASEAN nation. It is unclear at this point what effect, if any, the Mode IV and professional recognition may have had on negotiations.

Regional implications

The Goods FTA and the Services FTA seek to give rise to the long awaited Framework Agreement on Comprehensive Economic Partnership, with a view to create a greater regional market giving effect to India's 'Look East' policy, and ASEAN's ambition for expansion. India's current trade with ASEAN member countries seems to import heavily under the Goods FTA. With the introduction of the Services FTA it is expected that more balanced trade relations between the two regions will spawn.

Integration of Financial Services, IT Services, Transport and Logistics, Education, BPO Services, Health Services, the recognition of professional qualifications and free movement of persons may provide for sweeping change – when and if the agreement can get through, and depending on what form it takes. If successful, the region appears in a sense to be doing away with the dividing titles of 'South Asia' and 'Southeast Asia', but rather towards a unified region. Comparative advantages will make themselves felt as deeper integration continues, and for the present, the best case scenario for potential mutual benefit looks promising.

As part of broader initiatives for further integration such as the ongoing India-Mekong Corridor infrastructure developments, and the integration of the Regional Comprehensive Economic Partnership (RCEP) within ASEAN's existing FTA partners of China, Japan, South Korea, Australia and New Zealand, the India-ASEAN region is poised to become a significant engine of growth in the coming decades. Additionally, it would give rise to greater business opportunities for Indian investors in places where Indian FDI has been historically low. India is often criticized for its dismal investment levels in Myanmar. Large Indian investors have generally stayed away from Myanmar despite other powerhouses such as America and China aggressively establishing their presence in the country.
The question now appears to be one of getting it right, and getting it across the line.

REFERENCES:

1 - Following negotiations, it was expected that the Services FTA would be signed in August 2013 this deadline was further delayed to December 2013. The revised tentative signing date was then set to be between the 24-26 August 2014 during the ASEAN Economic Ministers meeting in Naypyidaw, Myanmar. Unfortunately India's representative, Ms. Nirmala Sitharaman, was unable to attend the meeting which has caused further delays. From recent news articles on the subject, it would seem that India is now prepared to sign the agreement and has proposed signing the agreement using a circulation process. Under the circulation process, each member will separately sign the agreement, and it will only become effect after the last member signs the pact.

2 - This article has been more focused on the Services part of the proposed FTA.

3 - https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/352233/India_trade_report_-_Aug_2014.pdf (India's Trade Report for August 2014 created by the UK Government).

4 - http://www.thehindu.com/business/Economy/india-asean-target-100-bn-bilateral-trade-by-2015/article5045229.ece (Last Accessed: 8/8/2014)

5 - http://www.mea.gov.in/in-focus-article.htm?23855/Indias+Enhanced+Look+East+policy+takes+wing (Last Accessed: 8/8/2014)

6 - WTO International Trade Statistics 2012 (summary of India's performance available at: http://www.iitrade.ac.in/kmarticle.php?topic=WTO_-_International_Trade_Statistics_for_Commercial_Services_2012_-_India_ranks_Seventh (Last Accessed: 8/8/2014)

7 - http://www.asean.org/communities/asean-economic-community/category/services (Last Accessed: 8/8/2014)

8 - http://www.asean.org/communities/asean-economic-community/item/framework-agreement-on-comprehensive-economic-cooperation-between-the-republic-of-india-and-the-association-of-southeast-asian-nations

9 - 2012 statistics, World Bank

10 - http://www.deloitte.com/assets/Dcom-India/Local%20Assets/Documents/India_ASEAN_FTA.pdf

11 - http://www.business-standard.com/article/economy-policy/india-asean-fta-final-draft-likely-to-be-signed-in-myanmar-114082600036_1.html (Last Accessed on 16/9/2014).

12 - http://articles.economictimes.indiatimes.com/2013-05-30/news/39629171_1_multi-brand-retail-51-cap-foreign-retailers

13 - http://www.bbc.com/news/world-asia-india-15979163

14 - http://www.business-standard.com/article/economy-policy/india-asean-services-fta-in-limbo-over-retail-fdi-114041400972_1.html (Last Accessed: 8/8/2014)

VINAY AHUJA
Senior legal adviser
Vinay specializes in investment laws, general corporate & commercial law and legal and practical aspects of cross-border transactions in the ASEAN Region. Vinay is the head of Regional India Desk and significantly focuses on outbound investment needs of the India Inc. into ASEAN markets mainly Laos, Cambodia, Thailand, Vietnam, Myanmar and Indonesia. His regional transactional and advisory experience includes advising and representing various multinational clients in complex transactions related to Energy, Mining & Infrastructure, Banking & Finance, Information Technology, Agriculture & Plantations, Automotive, and Telecommunications. Vinay also has basic experience in litigation and dispute resolution. He is a gold medalist graduate from Symbiosis Law School, University of Pune, India. Vinay is a member of Bar Council of India, Bar council of New Delhi, International Bar Association and Inter-Pacific Bar Association. He is also an active member of India-Lao Chamber of Commerce, India-Cambodia Chamber of Commerce and India-Thai Chamber of Commerce. He speaks English, Hindi, Punjabi, Sindhi and Urdu.
email: vinay.ahuja@dfdl.com

KUNAL SACHDEV
Legal adviser
Kunal joined the Bangkok office as a trainee in the Corporate and Commercial Practice Group and subsequently became a Legal Adviser supporting the Thai team on domestic and international projects and legal matters.
Before joining DFDL in 2014 he worked as a legal trainee in the Banking, Finance and Property Department in a law firm in Singapore. Kunal holds a Bachelor of Laws from the University of Adelaide, Australia and a Graduate Diploma in Legal Practice from the College of Law in Sydney. He speaks English, Hindi and conversational Thai.
email: kunal@dfdl.com

INDIA DESK

DFDL's India Desk is comprised of lawyers with dedicated South Asia experience to focus on the business needs of our esteemed Indian clients. The India Desk focuses on all aspects of business and investment opportunities in connection with outbound investments into Southeast Asia, South Asia and beyond. Drawing on DFDL's international and local expertise in legal and tax services combined with our understanding of Indian business culture and the interests of our Indian clients, DFDL is the go-to firm for Indian corporations looking to expand their businesses further into Asia.

Excellence . Creativity . Trust
since 1994

www.dfdl.com

BANGLADESH
DHAKA
bangladesh@dfdl.com

CAMBODIA
PHNOM PENH
cambodia@dfdl.com

INDONESIA *
JAKARTA
indonesia@dfdl.com

LAO PDR
VIENTIANE
laos@dfdl.com

MYANMAR
YANGON
myanmar@dfdl.com

SINGAPORE
SINGAPORE
singapore@dfdl.com

THAILAND
BANGKOK
thailand@dfdl.com
PHU KET
phuket@dfdl.com
SAMUI
samui@dfdl.com

VIETNAM
HANOI
hanoi@dfdl.com
HO CHI MINH CITY
hcmc@dfdl.com

** In exclusive association with Mataram Partners*