

## LEGAL IMPLICATIONS OF THE ASEAN FREE TRADE AREA

At the landmark Fourth ASEAN Summit in Singapore, the ASEAN Heads of Government signed an agreement which is intended to bring about the ASEAN Free Trade Area. This article traces ASEAN economic cooperation in the past and analyses the contents and legal implications of the ASEAN Free Trade Area Agreement.

### I. THE CHANGED WORLD: ASEAN'S RESPONSE

IN his Opening Address at the Fourth ASEAN Summit in Singapore (27-28 January 1992) the Malaysian Prime Minister, Dato Seri Dr Mahathir Bin Mohamad stated, *inter alia*:

But in the meantime the world has changed radically. I shall not repeat here what these changes are. What is certain however is that we will be affected by the fallout. We can survive, I think. We can even prosper as a result of these changes. But it is up to us to design our response if we want to come out of these changes stronger and more prosperous. It will require all our ingenuity to do this. ASEAN must emerge from the restructuring of the world, freer and more resilient and better developed than ever.<sup>1</sup>

What were the changes that Dr Mahathir had in mind? There were many. The States of Eastern Europe had broken off from the Soviet orbit. The Warsaw Pact had ceased to exist. The USSR itself had splintered into independent states, the largest being the Russian Federation. Communism had collapsed in Europe. The Allies, predominantly the US, had demonstrated their overwhelming superiority in weapons and technology in the Iraq conflict. Within a short span of time, the US remained the only military super power in the world.

In the area of international trade, Canada and the United States signed, on 2 January 1988, a Free Trade Agreement producing a historic linkage between their economies. The US and Canada had commenced negotiations

<sup>1</sup> Address by Dr Mahathir Bin Mohamad at the 4th ASEAN Summit in Singapore, 27-28 January 1992.

with Mexico to form the North American Free Trade Area (NAFTA): the world's largest trading block linking 360 million North American consumers in a US\$6 trillion (S\$9.6 trillion) market. In Europe, economic integration towards a Single European Market (SEM) was to be completed by 1992. There was news that some of the East European countries may also be allowed to join the 12-member European Economic Community. Further, the discussions between the EC and the European Free Trade Area (EFTA) could result in the creation of the European Economic Area – a 19-nation common market of about 380 million consumers.

The changes were indeed far reaching. The response of the ASEAN Heads of Government, at the landmark fourth ASEAN Summit, was to recognise that the best way for ASEAN, in the changed circumstances, was economic liberalisation and freer competition. With this in view, the Heads of Government signed the Framework Agreement on Enhancing ASEAN Economic Co-operation and the Agreement for a Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA). How would the two Agreements help ASEAN? Mr Goh Chok Tong, the Prime Minister of Singapore and Chairman of the Summit saw the following benefits:

The Agreements commit ASEAN to open its markets sector by sector by reducing tariffs over the next 15 years. This will attract more investments to ASEAN, and help ASEAN to maintain its position relative to the SEM in Europe and NAFTA. By following through the Agreements swiftly, to implement the CEPT scheme on a significant range of products, we will convince both domestic and foreign investors that ASEAN is a serious player in the new world order.<sup>2</sup>

The benefits, according to Mr Anand Panyarachun, Prime Minister of Thailand were as follows:

Besides freer flow of trade, AFTA would lead to a larger ASEAN market of 360 million people which would surely be more attractive for investment, both from within and without, than six separate markets. With economy of scale, this would also lead to a rational allocation of resources and increased efficiency in production. ASEAN would be in a much better position to attract investment as goods would be produced more economically and sold at a more competitive price. Another important reason is that, at this juncture, our region is more ready than others to take on this initiative.<sup>3</sup>

<sup>2</sup> Closing Statement by Mr Goh Chok Tong at the 4th ASEAN Summit in Singapore, 27-28 January 1992.

<sup>3</sup> Opening Statement by Mr Anand Panyarachun at the 4th ASEAN Summit in Singapore, 27-28 January 1992.

ASEAN has been in existence for nearly a quarter of a century. AFTA is not the first attempt at ASEAN economic cooperation. It is the most recent one. It is useful to take a look at the progress of ASEAN economic cooperation since its inception to see how it has fared and what lessons can be learnt from it for use in relation to AFTA.

## II. ASEAN ECONOMIC COOPERATION PRIOR TO AFTA

### A. *The Launching of ASEAN*

The Foreign Ministers of Indonesia, the Philippines, Singapore and Thailand, and the Deputy Prime Minister of Malaysia met in Thailand in early August 1967 to discuss the formation of a new Southeast Asian regional organisation. On 8 August 1967, after three days of talks, they signed a Declaration<sup>4</sup> establishing the “Association of Southeast Asian Nations” (ASEAN), Membership of ASEAN was declared open to all states in the Southeast Asian region which subscribed to ASEAN’s aims, principles and purposes.

Though ASEAN had been launched, its aims and objectives were not very clear – even in the minds of those who had launched it. In a frank and illuminating passage, Mr S Rajaratnam, the former Singapore Foreign Minister, stated:

You may recollect at the first meeting in 1967, when we had to draft our communique, it was a very difficult problem of trying to say nothing in about ten pages, which we did. Because at that time, we ourselves having launched ASEAN, were not quite sure where it was going or whether it was going anywhere at all.<sup>5</sup>

### B. *Economic Cooperation in the Early Years*

The uncertainty about ASEAN’s precise goals and future role persisted in its early years. Just what were the aims, principles and purposes of the newly formed body? This was not clear. Dr Frank Frost of the Parliamentary Library in Australia writes:

The founding states shared a number of common concerns including a commitment to anti-communism and anxiety about the long-term

<sup>4</sup> See the ASEAN Declaration (Bangkok Declaration), Bangkok, 8 August 1967 in ASEAN Documents Series (1967-1988), Third Edition, ASEAN Secretariat, Jakarta.

<sup>5</sup> Michael Leifer, “The ASEAN States and the Progress of Regional Cooperation in Southeast Asia” in *Politics, Society and Economy in the ASEAN States* (B Dahm & W Draguhn eds, 1975), at 4.

prospects for the US intervention in Indochina and the regional intentions of China, at that stage enmeshed in the Cultural Revolution. However, exactly what the new association could do to serve its members' interests was uncertain.<sup>6</sup>

In view of the uncertainty in its aims and objectives, there was only limited substantive cooperation in the early years. In the field of economic cooperation there were only two initiatives: a joint approach to Japan on the issue of synthetic rubber production in 1973 and the initiation of a dialogue with the European Economic Community in 1972. Frank Frost's view is that ASEAN had performed a useful function during the period despite its limited progress in the economic and other fields:

it can be seen in retrospect that ASEAN had by 1975 already served useful purposes for its members. While its formal co-operative projects were limited, and its members were divided on the major question of regional security, ASEAN had enabled a pattern of regular contacts to develop among regional leaders which was reducing the likelihood of inter-state conflict and which later provided a base for a more ambitious programme of consultation and cooperation.<sup>7</sup>

In April 1975, the non-communist regimes in Cambodia and South Vietnam collapsed. This resulted in increased cooperation amongst the ASEAN countries, especially in the economic field. It was felt that a strong economy would provide protection against attempts by Vietnam to support local insurgency movements.

The Bali Summit, held in February 1976, provided further impetus towards economic cooperation by adopting the Declaration of ASEAN Concord.<sup>8</sup> The Declaration provided for expanded cooperation in the economic, social, cultural and political fields. The greater part of the Declaration was, however, devoted to economic cooperation. It provided for cooperation in relation to basic commodities, industrial projects and trade. The Declaration also stated that:

Member states shall progress towards the establishment of preferential trading arrangements as a long term objective on a basis deemed to

<sup>6</sup> Frank Frost, "Introduction: ASEAN since 1967 - Origins, Evolution and Recent Developments" in *ASEAN into the 1990s* (Alison Broinowski ed, 1990), at 4-5.

<sup>7</sup> *Ibid*, at 7.

<sup>8</sup> ASEAN Documents Series (1967-1988), at 36-38.

be at any particular time appropriate through rounds of negotiations subject to the unanimous agreement of member states.<sup>9</sup>

### *C. The ASEAN Preferential Trading Arrangements*

ASEAN member nations have long recognised the need for greater cooperation in intra-ASEAN trade. As a result, the Trade Preference Negotiating Group, a sub-committee of the Committee on Trade and Tourism, commenced work on the drafting of the Agreement on ASEAN Preferential Trading Arrangements (PTA)<sup>10</sup> in July 1976. The Agreement was signed by the ASEAN Foreign Ministers on 24 February 1977. The Arrangements enable the member nations to grant trade preferences to one another on a selective basis.<sup>11</sup>

The PTA was to be applied to basic commodities, particularly rice and crude oil; products of the ASEAN industrial projects; products for the expansion of the intra-ASEAN trade; and other products of interest to the ASEAN countries.<sup>12</sup> The following instruments were to be used for expansion of intra-ASEAN trade under the PTA: long-term quantity contracts; purchase finance support at preferential interest rates; preference in procurement by Government entities; extension of tariff preferences; liberalisation of non-tariff measures on a preferential basis; and other measures.<sup>13</sup> In practice, the main emphasis has been on the reduction of tariffs. Initially, this was done on a product-by-product basis. Later, the reduction was done across the board. A large number of items were ultimately covered by the PTA.

It appears to be generally accepted that the ASEAN Preferential Trading Arrangements have only been modestly effective in increasing intra-ASEAN trade. What are the reasons for this? Gerald Tan has summarised them succinctly:

The tariff cuts offered were relatively small; the number of products included under the PTA was relatively few in comparison with the total number of items traded by Asean countries; and estimated price elasticities of the product groups concerned were rather low. An additional reason was (as pointed out above) that the preference lists agreed upon by the Asean countries under the PTA were padded with many items which were either not traded at all, or if they were, comprised many items imported from outside the region because Asean countries did

<sup>9</sup> Declaration of ASEAN Concord, Article 3(ii).

<sup>10</sup> ASEAN Documents Series (1967-1988), at 293-299.

<sup>11</sup> Part IV of the General Agreement on Tariffs and Trade (GATT) permits this.

<sup>12</sup> PTA, Article 4.

<sup>13</sup> PTA, Article 3.

not have any comparative advantage in their manufacture. In addition, many items already had zero or close to zero tariffs so that their inclusion in the PTA was unlikely to increase intra-regional trade any further. There were also cases where tariff cuts were offered on meaningless items such as snow-ploughs and nuclear reactors which Asean countries were unlikely to use, or were unable to manufacture.<sup>14</sup>

#### *D. Further Steps to Improve ASEAN Economic Cooperation*

Progress in bringing together the economies of the various ASEAN countries was slow despite the various initiatives. The ASEAN Heads of Government meeting held in Manila in December 1987 recognised this and initiated a number of measures to remedy the situation. Four agreements<sup>15</sup> were signed at the meeting with the objectives of:

- (a) improving on the extension of tariff preferences under the PTA;
- (b) freezing non-tariff barriers and agreeing to phase them out;
- (c) encouraging industrial joint ventures; and
- (d) stimulating the flow of investments through the protection offered under an investment guarantee agreement.

### III. THE ASEAN FREE TRADE AREA

The 4th ASEAN Heads of Government Meeting (ASEAN Summit) adopted three documents:

- the Singapore Declaration of 1992;

<sup>14</sup> Gerald Tan, "Asean Preferential Trading Arrangements: An Overview" in *Asean at the Crossroads* (Noordin Sopiee ed, 1987), at 63-69.

<sup>15</sup> (1) Protocol on Improvements on Extension of Tariff Preferences under the ASEAN Preferential Trading Arrangement, Manila, 15 December 1987; ASEAN Documents Series (1967-1988), at 302-304.  
(2) Memorandum of Understanding on Standstill and Rollback on Non-Tariff Barriers among ASEAN countries, Manila, 15 December 1987; ASEAN Documents Series (1967-1988), at 310-313.  
(3) Revised Basic Agreement on ASEAN Industrial Joint Ventures, Manila, 15 December 1987; ASEAN Documents Series (1967-1988), at 281-287.  
(4) Agreement for the Promotion and Protection of Investments, Manila, 15 December 1987; ASEAN Documents Series (1967-1988), at 288-292.

- Framework Agreement on Enhancing ASEAN Economic Cooperation (“Framework Agreement”); and
- Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA) (Agreement on CEPT for AFTA).

The Singapore Declaration deals, *inter alia*, with directions in ASEAN economic cooperation by declaring that to further accelerate joint efforts in enhancing intra-ASEAN economic cooperation, ASEAN shall adopt appropriate new economic measures as contained in the Framework Agreement on Enhancing ASEAN Economic Cooperation.<sup>16</sup> It further provided that:

ASEAN shall establish the ASEAN Free Trade Area using the Common Effective Preferential Tariff (CEPT) Scheme as the main mechanism within a time frame of 15 years beginning 1 January 1993 with the ultimate effective tariffs ranging from 0% to 5%.<sup>17</sup>

The Framework Agreement signals the need for urgent action on the part of ASEAN if it is not to be marginalised. It refers to the need for “more cohesive and effective performance of intra-ASEAN economic cooperation” in view of the “rapid and pervasive changes in the international political and economic landscape.”<sup>18</sup>

Though the AFTA scheme has received (and continues to receive) the most publicity, it is only a part of the larger arrangements for cooperation envisaged under the Framework Agreement. The Agreement also provides for cooperation in industry, minerals and energy; finance and banking; food, agriculture and forestry; transportation and communications; research and development; technology transfer; tourism promotion; human resource development and other economic-related areas.

The ASEAN States agreed to the following<sup>19</sup> measures to achieve the AFTA objective:

- (a) AFTA was to be established within 15 years. All member states were to participate in it.
- (b) A ministerial-level Council was to be set up to supervise, co-ordinate and review the implementation of AFTA.

<sup>16</sup> Singapore Declaration of 1992, para 5.

<sup>17</sup> *Ibid.*

<sup>18</sup> Framework Agreement, 7th preamble.

<sup>19</sup> Framework Agreement, Article 2.

- (c) The CEPT Scheme was to be the main mechanism for AFTA. For products not covered by the CEPT Scheme, the PTA or some other mechanism to be agreed upon, could be used.
- (d) Non-tariff barriers between and among the member states were to be reduced or eliminated.
- (e) Further measures on border and non-border areas of cooperation to supplement and complement the liberalisation of trade were to be explored.

Certain guiding principles<sup>20</sup> were to be adhered to in strengthening or enhancing economic cooperation. These were: an outward-looking attitude and mutual benefit. A practical approach was also adopted on the issue of participation in the intra-ASEAN economic arrangements. All ASEAN member states were to participate. However, in the implementation of the economic arrangements, two or more member states would proceed if the other member states were not ready to implement the arrangements.<sup>21</sup>

The AFTA is to be created using the Common Effective Preferential Tariff (CEPT) Scheme as the main mechanism. All ASEAN members are required to participate in the CEPT Scheme. Identification of products to be included in the CEPT Scheme is to be on a sectoral basis. The CEPT Scheme covers all manufactured products, including capital goods, processed agricultural products and those products falling outside the definition of agricultural products as defined in the Framework Agreement. It does not include agricultural products.

The scope of coverage of the CEPT Scheme would be incomplete without a consideration of exclusions. The effectiveness of the PTA had been reduced as a result of the exclusion of sensitive products. Notwithstanding this experience, member states are permitted to exclude specific products which are sensitive to them from the CEPT Scheme, subject to a waiver of any concession provided for such products.<sup>22</sup> Ideally, exclusions should not have been permitted under the CEPT Scheme as it is intended to lead to a free trade area, or they should have been restricted as much as possible. The scope of coverage is further complicated by the general exceptions provision which states:

Nothing in this Agreement shall prevent any Member State from taking action and adopting measures, which it considers necessary for the

<sup>20</sup> Framework Agreement, Article 1.

<sup>21</sup> *Ibid*, para 3.

<sup>22</sup> Agreement on CEPT for AFTA, Article 2, para 3.



protection of its national security, the protection of public morals, the protection of human, animal or plant life and health, and the protection of articles of artistic, historic and archaeological value.<sup>23</sup>

The CEPT Scheme envisages a two-track approach for tariff reduction. Under the non-fast-track route, the tariffs of all products within the CEPT Scheme are to be reduced to 0%-5% within 15 years. The reduction from existing tariff rates to 20% is to be done within a time-frame of 5 years to 8 years, from 1 January 1993. The subsequent reduction of tariff rates from 20% or below shall be done within a time frame of 7 years.<sup>24</sup>

The above schedule of tariff reduction does not restrict any member states from immediately reducing their tariffs to 0%-5% or following an accelerated schedule of tariff reduction.<sup>25</sup> In conformity with this objective, the Singapore Declaration identifies 15 product groups for fast-track or accelerated tariff reduction: vegetable oils, cement, chemicals, pharmaceuticals, fertilisers, plastics, rubber products, leather products, pulp, textiles, ceramic and glass products, gems and jewellery, copper cathodes, electronics and wooden and rattan furniture.<sup>26</sup>

If ASEAN is to effectively meet the competitive challenge of emerging blocs like the North American Free Trade Area (NAFTA), comprising the United States, Canada and Mexico, and the Single European Market, it must keep up the momentum on the AFTA and, if possible, speed up its establishment ahead of the agreed 15-year time-frame. The 15 product sectors targeted for fast-track tariff reduction should also be expanded.<sup>27</sup>

Which products in the 15 product sectors would kick off the fast-track portion of the CEPT Scheme on 1 January 1993? Initially, there was a great deal of uncertainty about this. The AFTA Ministerial Council, which was expected to finalise the list during the 24th ASEAN Economic Ministers meeting (Manila, 22-23 October 1992), was unable to do so. Another meeting of the Council was then arranged to be held in Jakarta on 11-12 December 1992 to resolve the issue.<sup>28</sup> This delay caused some analysts to wonder whether domestic political pressures and lobbying by business interests may hamper ASEAN's drive to lower trade barriers among member states. It also upset most of the ASEAN Economic Ministers who attended the 24th ASEAN Economic Ministers meeting. The comment made by Datuk Seri

<sup>23</sup> *Ibid*, Article 9.

<sup>24</sup> *Ibid*, Article 4, para 1.

<sup>25</sup> *Ibid*, Article 4, para 3.

<sup>26</sup> Singapore Declaration of 1992, para 5.

<sup>27</sup> See speech by Mr Wong Kan Seng, Singapore's Foreign Minister, to businessmen at a Singapore International Chamber of Commerce luncheon, *The Straits Times*, 14 April 1992.

<sup>28</sup> *Singapore Business Times*, Weekend Edition, 24-25 October 1992.

Rafidah Aziz, Malaysia's Minister of International Trade and Industry, was typical:

I am personally disappointed that the AFTA Council is not able to meet now, as there are basic issues that need to be resolved. No country within ASEAN should allow internal problems to supersede the overall ASEAN interests and I'm sure Thailand is fully aware of that.<sup>29</sup>

The Third AFTA Council meeting (which ended in Jakarta on 12 December 1992) finally reached agreement on the tariff reduction programmes for the ASEAN countries and indicated that all ASEAN governments would simultaneously announce their tariff reduction programmes on 22 December 1992. A total of 38,308 products are to be covered. Of these, 13,240 would be on the accelerated or "fast track" and 25,068 on the "normal track" list. In percentage terms about 87% of ASEAN's total tariffs have been included for reductions. On average, 10% of tariffs, or a total of 3,839 items, have been temporarily excluded.<sup>30</sup>

All six ASEAN countries announced their lists of items offered for lower import duties on 22 December 1992. Singapore offered the highest percentage for reduction, covering 98% of its 5,832 tariff lines. The number of product items offered by the other countries were: Indonesia – 9,222; Brunei – 6,544; Philippines – 5,561; Thailand – 5,318; and Malaysia – 11,746.<sup>31</sup>

The possibility of recourse to emergency measures to restrict the flow of trade should also be noted. The provision on this in the CEPT Scheme is along the lines of that found in the General Agreement on Tariffs and Trade (GATT):

1. If, as a result of the implementation of this Agreement, import of a particular product eligible under the CEPT Scheme is increasing in such a manner as to cause or threaten to cause serious injury to sectors producing like or directly competitive products in the importing Member States, the importing Member States may, to the extent and for such time as may be necessary to prevent or to remedy such injury, suspend preferences provisionally and without discrimination, subject to Article 6(3) of this Agreement. Such suspension of preferences shall be consistent with the GATT.
2. Without prejudice to existing international obligations, a Member State, which finds it necessary to create or intensify quantitative

<sup>29</sup> The Straits Times, 23 October 1992.

<sup>30</sup> The Straits Times, 12 December 1992.

<sup>31</sup> The Straits Times, 23 December 1992.

restrictions or other measures limiting imports with a view to forestalling the threat of or stopping a serious decline of its monetary reserves, shall endeavour to do so in a manner, which safeguards the value of the concessions agreed upon.

- 3 Where emergency measures are taken pursuant to this Article, immediate notice of such action shall be given to the Council referred to in Article 7 of this Agreement, and such action may be the subject of consultations as provided for in Article 8 of this Agreement.<sup>32</sup>

The supervision and review of the implementation of the CEPT Scheme is to be done by a ministerial-level Council comprising one nominee from each member state and the Secretary General of the ASEAN Secretariat.

#### IV. THE LEGAL IMPLICATIONS

A consideration of the Framework Agreement and the Agreement on CEPT for the AFTA raises various interpretational issues giving rise to legal implications. These are dealt with below under separate headings.

##### *A. Participation in Economic Arrangements*

It is crucial to the success of AFTA that every ASEAN country should participate in all the intra-ASEAN economic arrangements worked out to achieve the AFTA objective. This is an important principle incorporated in the Framework Agreement. It is, of course, recognised that the ASEAN Six are at different levels of economic development. Hence, it is unrealistic to expect that all of them would be in a position to proceed at the same pace in relation to economic reform and that the same economic regime can apply to all of them. The Framework Agreement deals with the issue as follows:

All Member States shall participate in intra-ASEAN economic arrangements. However, in the implementation of these economic arrangements two or more Member States may proceed first if other Member States are not ready to implement these arrangements.<sup>33</sup>

The principle is stated in broad terms. How will it work out in practice? Will domestic pressures cause one or more of the ASEAN countries to stay

<sup>32</sup> Agreement on CEPT for AFTA, Article 6.

<sup>33</sup> Framework Agreement, Article 1, para 3.

out of some of the arrangements in view of the “sacrifices” required? Only time will tell.

The principle was put to the test even before the CEPT Scheme was launched. When the 24th ASEAN Economic Ministers meeting commenced, there was uncertainty about Thailand’s participation in the CEPT Scheme. Fortunately, the Thai position changed by the end of the meeting, mainly because of the pressure of regional opinion, thus enabling ASEAN to close ranks again behind AFTA.<sup>34</sup> It is important for the success of AFTA that all the ASEAN countries participate in the various economic arrangements.

### B. *The Scope of Coverage*

Article 1(1) of the Agreement on CEPT for AFTA states:

‘CEPT’ means the Common Effective Preferential Tariff, and it is an agreed effective tariff, preferential to ASEAN, to be applied to goods originating from ASEAN Member States, and which have been identified for inclusion in the CEPT Scheme in accordance with Articles 2(5) and 3.

It is clear that the CEPT Scheme only applies to goods – not services – unlike the arrangements for the North American Free Trade Area or the Single European Market. The issue of services would have to be addressed at some point.

The goods in question must originate from ASEAN Member States. What does this mean? Some guidance is afforded by Article 2(4) of the CEPT Agreement:

A product shall be deemed to be originating from ASEAN Member States, if at least 40% of its content originates from any Member State.

Does this mean that 40% of the content must be derived from a single ASEAN country (local content) or can it be derived from a number of them (ASEAN cumulative content)? The issue gave rise to much discussion. The AFTA Council meeting (11 – 12 December 1992, Jakarta) finally agreed that to qualify, a product must have 40% local content either within a single member country or on an ASEAN cumulative basis. It is the submission of this writer that the solution adopted is in conformity with past ASEAN practice and the objective of increased ASEAN trade.

<sup>34</sup> Singapore Business Times, Weekend Edition, 24-25 October 1992.

### C. Agricultural Products

The CEPT Scheme applies to all manufactured products, including capital goods, processed agricultural products, and products falling outside the definition of agricultural products as the expression is defined in the CEPT Agreement. Agricultural products are, however, excluded from the Scheme. The agricultural sector is a sensitive one within ASEAN. Hence, its exclusion from the CEPT Scheme.

What is included within the ambit of the expression “agricultural products”? Article 1(7) of the CEPT Scheme defines the expression as follows:

‘Agricultural products’ mean:

- (a) agricultural raw materials/unprocessed products covered under Chapters 1-24 of the Harmonised System (HS), and similar agricultural raw materials/unprocessed products in other related HS Headings; and
- (b) products which have undergone simple processing with minimal change in form from the original products.

The definition is not without difficulty. A separate group had to be set up during the 4th ASEAN Summit for the drafting of the definition. It was only agreed to after substantial discussion.

What would be the position of agricultural products outside Chapters 1-24 of the Harmonised System? The objective of AFTA is to liberalise trade. From this perspective, such products should benefit from the CEPT Scheme.

### D. Non-Tariff Barriers

It is the contention of a number of researchers<sup>35</sup> that intra-ASEAN trade may not increase significantly even after the lowering of tariffs under the CEPT Scheme. Hence, it is necessary that non-tariff barriers must be reduced or eliminated if the objective of AFTA is to be achieved. The importance of doing so is realised. Article 2 of the Framework Agreement provides:

Member States shall reduce or eliminate non-tariff barriers between and among each other on the import and export of products as spe-

<sup>35</sup> See remarks made at the ASEAN Roundtable organised by the Institute of South East Asian Studies, Singapore Business Times, 7 September 1992.

cifically agreed upon under existing arrangements or any other arrangements arising out of this Agreement.

The Agreement on CEPT for AFTA goes on to provide (in Article 5) the following schedule for the elimination of quantitative restrictions and non-tariff barriers:

1. Member States shall eliminate all quantitative restrictions in respect of products under the CEPT Scheme upon enjoyment of the concessions applicable to these products.
2. Member States shall eliminate other non-tariff barriers on a gradual basis within a period of five years after the enjoyment of concessions applicable to those products.

An interesting question arises. Who decides which are the quantitative restrictions and the non-tariff barriers which are to be eliminated? Should each ASEAN country be left to decide the issue itself? Should there be a collective decision on the matter? It would be best if the matter is dealt with collectively. This would be in the interest of all and would avoid friction. The Senior Economic Officials' Meeting could work out a list to be approved by the AFTA Ministerial Council.

#### *E. Emergency Measures*

Following the model in the GATT, the Agreement on CEPT for AFTA makes provision (in Article 6) for the suspension of preferences by participants to the CEPT Scheme in situations where injury is caused or is likely to be caused to domestic industry by the increase in imports of a particular product. A provision such as this can be used in a constructive fashion or it can become a protectionist tool.

One of the underlying objectives of the CEPT Scheme is to increase the competitiveness of the ASEAN economies. This objective would not be achieved if recourse is made to the emergency measures provision at every perceived threat to an industry. The provision should not be narrowly interpreted. It should only be used where there is a clear demonstration of injury or threat of injury to a particular product. The period of suspension should also not extend beyond that which is absolutely necessary.

#### *F. General Exceptions*

Article 9 of the Agreement on CEPT for AFTA enables each ASEAN country to take action and adopt measures "which it considers necessary for the

protection of its national security, the protection of public morals, the protection of human, animal or plant life and health, and the protection of articles of artistic, historic and archaeological value.” This is obviously an overriding provision. The situations under which action may be taken under it are also indicated in broad terms, thus allowing room for differing interpretations.

It is hoped that action under the general exceptions provision would be kept to a minimum, or avoided altogether, if possible. The AFTA Ministerial Council should also act as a check on unilateral action.

### G. *Supervision and Review Mechanism*

In the Singapore Declaration of 1992, the Heads of Government agreed that a ministerial-level Council be established to supervise, coordinate and review the implementation of the Agreement on CEPT for AFTA.<sup>36</sup> The Agreement on CEPT for AFTA provides in Article 7 that the ASEAN Economic Ministers shall establish a ministerial-level Council comprising one nominee from each Member State and the Secretary General of the ASEAN Secretariat.

An interesting issue arose at the 24th ASEAN Economic Ministers meeting. To whom should the AFTA Ministerial Council report? Should it report to the Heads of Government or to the ASEAN Economic Ministers? Thailand insisted that the Council should report to the Heads of Government. The issue became a major sticking point. It was finally resolved and agreement was reached that the AFTA Council would report to the Asean Economic Ministers.<sup>37</sup>

### H. *Settlement of Disputes*

ASEAN has always attempted to reach a consensus when differences have arisen. Its preferred method for the settlement of disputes has been consultation and negotiation rather than recourse to a judicial or quasi-judicial mechanism. Following the traditional pattern, the Agreement on CEPT for AFTA provides in Article 8(3):

Any differences between the Member States concerning the interpretation or application of this Agreement shall, as far as possible, be settled amicably between the parties. If such differences cannot be settled amicably, it shall be submitted to the Council referred in Article 7 of this Agreement, and, if necessary, to the AEM.

<sup>36</sup> Singapore Declaration of 1992, para 8.

<sup>37</sup> Singapore Business Times, Weekend Edition, 24-25 October 1992.

The provision does not spell the procedures which the AFTA Council or the AEM would follow in dealing with the dispute. Presumably the usual attempt would be made to reach a consensus.

Some businessmen have argued for the setting up of an arbitration body to deal with differences in relation to the CEPT Scheme. One would have to see if the AFTA Council or the AEM picks up the suggestion.

#### V. AFTA – THE FUTURE

In a radically changed world, ASEAN must move rapidly and purposefully in relation to AFTA. The arrangements agreed upon should be implemented and, if possible, well ahead of schedule. It is in the interest of ASEAN to do this.

There have been calls by a number of ASEAN leaders to speed up the implementation of AFTA. Rounding off a 4-day trade and investment mission to the Philippines, Datuk Seri Rafidah Aziz, Malaysian Minister for Trade & Industry, stated that the time-table for creating AFTA should be speeded up and its scope expanded.<sup>38</sup> Deputy Prime Minister Brigadier-General Lee Hsien Loong has stated that the ASEAN countries are likely to review AFTA and decide whether its implementation should be accelerated.<sup>39</sup>

AFTA should also not be seen as an end itself. The ultimate objective is to prepare ASEAN to compete in world markets. Other measures which would assist in this objective should also be explored.

S TIWARI\*

<sup>38</sup> Singapore Business Times, 19 January 1994.

<sup>39</sup> The Straits Times, 23 February 1994.

\* Senior State Counsel; Head, Civil Division, Attorney-General's Chambers, Singapore.

\*\* The views in this paper are personal to the writer and do not necessarily represent the views of the Chambers or of Singapore.