# The emerging FTA contour

**By Manu Sanan**

## Introduction

Free Trade Agreements (FTAs) are instruments of bilateral trade liberalization and going by recent statistics, they have become the most popular method of pursuing liberalisation of commerce. Ever since the weakening of trade liberalization agenda at the multilateral level due to massively fragmented interests – free trade has shifted to a largely regional/bilateral plane thanks to commercial and political expediency. Almost 300 preferential trade agreements (*notified and not notified*) were in force in 2010 and according to the WTO, 13 is the average number of Preferential Trade Agreements (PTAs) that a WTO member is party to.

India too, is looking to strengthen its FTA portfolio with the recent notification of the Comprehensive Economic Co-operation Agreement (CECA) with Malaysia and Comprehensive Economic Partnership Agreement with Japan (CEPA). In addition, India is expected to ink a deal with the European Union in the near future.

As trade agreements are usually undertaken by complimentary economic structures, the prospects of commercial growth are naturally high. The general setting of RTAs is an exception to the uniform MFN practice mandated by the WTO. However, though both goods and services may be liberalized bilaterally banking on the MFN exceptions in the GATT and GATS, this is not possible with intellectual property (IP).

This is because, the TRIPS agreement does not have an MFN exception and therefore though IP may be negotiated bilaterally – its liberalization is always at the multilateral level – leading to uniform layers dubbed as the IP ratchet. This is possibly one of the reasons why India remains reluctant to negotiate IP at the bilateral level, evident by the EU-India FTA standoff, and has only re-affirmed TRIPS obligations in all international commitments including the CEPA and the CECA.

Put together, the CEPA and CECA aim to reduce tariffs on more than 90 per cent of the goods that India trades with Japan and Malaysia over the next ten years. The CECA has been notified and has been effective since the 1$^{st}$ of July, 2011 along with its corresponding Rules of Origin.[1] The CEPA has also been notified and has come into force since the 1$^{st}$ of August, 2011.[2] The India EU FTA however, remains locked under negotiation and the earliest it might approach finality would be next year.

[1] Customs Notification No. 53/2011-Customs dated 1-7-2011; Customs Notification No. 43/2011-Customs (N.T.), dated 1-7-2011

[2] Customs Notification No.69/2011-Cus., dated 29-7-2011; Customs Notification No. 55/2011-Cus.. (N.T.), dated 1-8-2011

This short note attempts a brisk analysis of the opportunities highlighted by these agreements.

**India-Japan CEPA**

The India-Japan CEPA, which primarily focuses on tariff liberalization rather than non-tariff issues, covers 90% of the tariff lines with Japan having committed 5% more than India. The Agreement ensures that sensitive sectors for the Indian market remain protected. This list includes agriculture, fruits, spices, wheat, basmati rice, edible oils, wines and spirits and also certain categories of industrial products such as auto and auto parts.

In addition, India's agriculture, textile, seafood, and pharmaceutical products will benefit from the CEPA because they will get a reduction in tariffs. Tariffs have also been lowered by Japan on petrochemicals, chemical products, jewellery and cement.

Japan has also made significant promises in the services sector with commitments to greater access for contractual suppliers, professionals such as accountants, researchers, tourist guides and management consultants, and engineers including computer, mechanical, electrical, construction, industrial and design engineers. Japan has even committed to an additional category of instructors for yoga practitioners, classical musical and dance practitioners, chefs and English language teachers.

India's primary exports to Japan have been petroleum products, iron ore, gems and jewellery, marine products, oil meals, ferro alloys, inorganic/organic chemicals, etc. India's primary imports from Japan are machinery, transport equipment, iron and steel, electronic goods, organic chemicals, machine tools, etc.

On the Japanese side, Japanese exports to India mainly comprise vehicles and electronic goods while Indian exports to Japan include oil, steel and jewellery which should benefit from the CEPA. Japan too has sought to protect its politically sensitive farm products, such as rice, for which pre-existing tariff levels will remain intact.

The Agreement also seeks to ensure competition in the case of government procurement where it mandates transparency, non-discrimination, reciprocity and exchange of information.[3] However, this commitment is only at the Central level and not at the state of provincial level of the government.

The Agreement also has a detailed chapter on investment which includes commitments on fair and equitable treatment and direct and indirect expropriations till the extent provided for under the customary international minimum standard.[4]

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[3] Chapter 10
[4] Art. 96, 87

## India-Malaysia CECA

The India-Malaysia CECA too promises greater liberalization throughout the spectrum of goods, services, investment and economic co-operation and takes tariff liberalization beyond the Indo-ASEAN agreement. Under the Agreement, India is set to get greater market access for goods including fruits, basmati rice, two wheelers and cotton garments. Also, at the same time, protection continues to be provided for the sensitive sectors.

Under the services chapter, India is set to get greater market access in sectors, *inter alia*, including accounting and auditing, architecture, urban planning, engineering services, medical and dental, IT & ITES and Management Consulting Services. Additionally, India will now enjoy higher FDI caps in Malaysia in key sectors such as construction services (51%), computer and related services (100%) and management and consultancy services (100%).

As of 2009, India was Malaysia's 12th largest import source and its 11th largest export destination. India's major export items to Malaysia include frozen bovine meat and fish, machinery/appliances & parts, chemicals and chemical products, vegetables and oilseeds, spices, groundnuts and cashew nuts. India's imports from Malaysia include palm oil, copra palm kernel, animal & vegetable fats, petroleum products, machinery & transport equipment, cocoa powder/butter fat, electrical and electronic goods.

Under the investment chapter, notably, a most detailed provision on expropriation is to be found in comparison to any existing Indian RTAs and assumes greater significance in light of acquiescence to progressive ICSID jurisdiction in case of disputes under the additional facility.[5]

## India-EU Proposed FTA

The European Union has provided a substantial market for Indian exports and has also been one of the largest sources of Foreign Direct Investment in India. The important EU states for FDI are UK, Germany, the Netherlands, France, Italy and Belgium. Much of the investments from EU have come in energy, telecommunication and the transport sector.

Both India and EU have agreed to eliminate tariffs on 90 percent of all tradable goods. However, India wants EU to up their offer to 95 percent and EU wants India to include 98 percent of the tradable goods for tariff reduction.

Following the preliminary exchange of lists on their agriculture and industrial tariff offers, both sides are believed to be reflecting on how the proposed concessions could be revised. The EU is particularly insistent on removal of wines and spirits, cars and dairy products from India's negative list. India has maintained that opening up of its markets

[5] Annex. 10-1

for the heavily subsidised and protected EU dairy sector could hurt marginal farmers' livelihoods. On the other hand, India wants chemical, pharmaceuticals and textiles out of EU's negative list. However, it is difficult to pinpoint the current position with certainty given the opaque nature of the negotiations and the number of non-trade issues entangling the negotiations.

**Conclusion**

Thus, both the CEPA and the CECA have massive potential to transform bilateral ties of India with Malaysia and Japan. However, close monitoring of trade will be required to ensure that the agreements do not result in trade deflection. The myriad provisions on settlement of disputes arising from the agreements may also lead to systemic conflicts within the system of international dispute settlement. As for the proposed FTA with EU, though it holds massive potential, it remains to be seen whether it can be carried to its conclusion.

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