India-ASEAN Trade in Services: Possibility of MRAs[1]

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Introduction

India and ASEAN started their sectoral dialogue partnership in 1992, and later elevated the relations to a full dialogue partnership in 1995. Current relations cover broad ranges of issues of mutual interests. This is particularly the case for their economic relations, which have acquired a new dynamism.

The ASEAN-India Summit held on 5 November 2002 in Phnom Penh has led the way to talks on an India-ASEAN FTA. India and ASEAN are likely to conclude the Comprehensive Economic Partnership Agreement (CEPA) by end of this year. It is expected to bring key services and investment sectors under the ambit of free trade arrangement.

In the past, a number of ASEAN Members have put more thrust on Mode 3. This compares to India's demonstration of expertise and competitive advantages in Modes 1 and 4. Given the potential of exports of commercial services from India to ASEAN, India is encouraged for mutual recognition agreements (MRAs) with ASEAN under the framework agreement of the India-ASEAN comprehensive economic partnership agreement.

MRAs represent a recent development to facilitate the flow of professional services as part of ASEAN integration in services under ASEAN Framework Agreement on Services (AFAS), which was signed in December 1995 by ASEAN Economic Ministers (AEM) during the 5th ASEAN Summit in Bangkok. An MRA enables professional service providers who are registered or certified in signatory Member Countries to be equally recognized in other signatory Member Countries. At present, MRAs on certain professional services have been concluded. A number of other services are in stages of negotiations.

The possibility of India signing an MRA with ASEAN is expected to increase in the services sectors where ASEAN has concluded MRAs.

The main objectives of the study are two-fold:

1) To examine the existing domestic laws and institutional mechanisms governing selected services sectors in selected ASEAN member countries;

2) To examine intra-ASEAN approaches to mutual recognition arrangements in selected services sectors and implications for the possibility of Indo-ASEAN MRAs in such services sectors.

Sectorally, the study focuses on three sectors of trade in services shown in Table 1.

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Table 1.2: Sectors of Services Under Investigation

Sector	CPC
Accountancy Services	862
Architectural Services	8671
Engineering Services	8672

This is based on the notion that ASEAN has been expressing its interest during India-ASEAN talks in these sectors of services: 1) Business services; 2) Professional services; 3) Construction services; 4) Financial services in particular insurance and insurance related; 5) Education services; 6) Health and Health related services; 7) Distribution services; 8) Telecommunication services; and 9) Services incidental to manufacturing. In the meantime, India has expressed her interest in these sectors of services: 1) Professional service in particular architecture, engineering, integrated engineering; 2) Computer and computer related services; 3) Other business services in particular management consulting, technical testing and analysis, and others; 4) Construction services; 5) Financial services, in particular Banking; 6) Educational services; 7) Health and Health related services; 8) Tourism and travel services; and 9) Horizontal sectors in Movement of Natural Person.

Among sectors of interest expressed in India-ASEAN talks, architectural, engineering and accountant services are considered to contribute to India-ASEAN cooperation in both service supply and investment. They also seem to complement regional development initiatives through ASEAN, BIMSTEC and Mekong-Ganga regional cooperation while promoting connectivity among the member states. This is particularly the case when considering the growth of infrastructure, which serves as an important determinant of economic development. This compares to the growing construction stocks in India since early 2000s, as seen in the mega Golden Quadrilateral road project and other highways.

These three ASEAN member countries serve as the focus of this study: Malaysia, Singapore, and Thailand. This is to contribute to their on-going bilateral trade relations with India.

This paper is divided into four parts. After this introduction, the author touches upon the existing regimes governing each services sector under investigation in Malaysia, Singapore and Thailand. Then, it provides a discussion on ASEAN and its MRAs before looking into the possibility for India-ASEAN MRAs, which serves as the final part.

Regimes Governing Services in Malaysia, Singapore, and Thailand

Architectural Services

All countries under investigation in this study have their Architects Act in place to control the architectural profession in their territory. They provide protection to the profession through a Register of Architects and authorization to practice. Despite a varying scope of regulated profession

of architectural services among them, those under CPC 8671 of the Provisional CPC of the United Nations are regulated.

The Architects Act of the respective countries sets out the general qualifications and requirements for registration. BOA Singapore, BOA Malaysia and ACT (Thailand) are the institution with legitimacy to evaluate of applications for admission to the register of architects in their respective country. The requirement for the academic qualification varies from one country to another.

Engineering Services

Singapore, Malaysia, and Thailand shares the notion that engineering is a profession, which means one must be a member of that profession in order to practice. According to legislative provisions in Singapore, Malaysia, and Thailand, these major parameters form a basis for the concept and definition of practice of engineering profession: legal authorization, and functional activities. Civil, mechanical and electrical engineering services are commonly found to be regulated according to the legislative regimes governing professional engineering practices in Singapore, Malaysia, and Thailand. Meanwhile, Malaysia and Thailand has prescribed some other branches of engineering in their respective regime.

The term “professional engineer” and the actual practice of professional engineering is legally defined and protected, particularly in the prescribed branches of engineering in each particular country under investigation. It is unlawful to use the term and to offer engineering services to the public unless permission is specially granted by the respective statutory body established by the laws in Singapore, Malaysia and Thailand - - Professional Engineers Board Singapore (PEB), Board of Engineers Malaysia (BEM), and Council of Engineers (COE), Thailand.

A formal status of professional engineer accrues as a result of registration or licensing as a part of the system of regulation currently being designed by the above-mentioned statutory body of Singapore, Malaysia, and Thailand.

Each country under investigation has specific requirements and procedures for the registration and license. Despite some differences in detail among them, Singapore, Malaysia, and Thailand maintains an educational qualification at the level of an engineering degree approved or accredited by the respective professional statutory body as a basic requirement for registration.

Accountancy Services

Accountancy practices are regulated by Accountants Act and Companies Act in Singapore and Malaysia. An individual practice of accounting services in Thailand is currently under the Accounting Act and the Accounting Professions Act. Such practice of business entities is under a number of laws.

There is a varying scope of regulated profession of accountancy among the countries under investigation in this study. The title 'accountant' is also protected in Malaysia, while it is not in Singapore.

Given the above notion, it is clear that public accountancy is the profession, which needs protection in all countries under investigation in this study. Yet, the approach to regulate the profession also

varies among them. While registration as a public accountant is required in Singapore, authorization to practice in terms of license and practicing certificate is mandatory in Thailand and Malaysia, respectively.

ASEAN and MRAs

AFAS aims at substantially eliminating restrictions to trade in trade in services among ASEAN countries in order to improve the efficiency and competitiveness of ASEAN services suppliers. It provides broad guidelines for ASEAN member countries to progressively improve market access and ensure equal national treatment for services suppliers among ASEAN member countries. All AFAS rules are consistent with international rules for trade in services as provided by the General Agreement on Trade in Services (GATS) of the World Trade Organisation (WTO). Liberalisation of services trade under AFAS is directed towards achieving commitments beyond Member Countries' commitments under GATS, or known as the GATS-Plus principle.

MRAs in professional services are a relatively recent development in ASEAN cooperation in trade in services. The scope of coverage in ASEAN MRAs is still limited while some professional services limit themselves to just a framework on MRA. The notion is particularly revealing in services sectors under investigation in this study: ASEAN architectural and engineering services belong to the former category, while accountancy services remains in the category of an MRA framework.

While the MRAs aim at facilitating mobility of the professionals concerned, the MRA Framework limits itself to just facilitate the negotiations of MRAs on such particular professional services between or among ASEAN member states.

The ASEAN MRAs on Architectural and Engineering Services provide a regional identity "an ASEAN Architect" and "an ASEAN Chartered Professional Engineer" to a qualified professional from a member country who meets the stipulated regional standards or a set of recognition criteria, which cover education, examination, registration/licensing, experience, continuing professional development, and code of ethics (professional conduct) requirements.

Yet, the recognition is not automatic. An application process is needed while the recognition arrangement does not automatically entitle "an ASEAN Architect" and "an ASEAN Chartered Professional Engineer" to employment or professional services in a host country within the region. The MRAs only provide that the ASEAN Architect and ASEAN Chartered Professional Engineer (ACPE) are eligible to apply to the professional regulatory authority of a host country to be registered as a Registered Foreign Architect (RFA) and a Registered Foreign Professional Engineer (RFPE), respectively. Without an MRA, professions and technical personnels are subject to skill assessment by relevant authorities.

Upon approval of the professional regulatory authority of the host country, an ASEAN Architect may either work in collaboration with one or more licensed Architect or provide the services independently. Meanwhile, the ASEAN MRA on Engineering Services maintains that the services of an RFPE is be in collaboration with designated Professional Engineers in the host country, within such area of his own competency as may be recognised and approved by the professional regulatory authority of the host country.

The ASEAN MRAs and the MRA Framework under investigation in this study share the principle of respect and conformity with the domestic regulations of the participating ASEAN member states without lowering the standards and requirements of the respective profession in each ASEAN member state. They also provides for the exchange of information in order to promote and take into consideration the development of the best practices on standards and qualifications in the professions.

In terms of dispute settlement, the following provision is commonly found in both ASEAN MRAS as well as in the ASEAN MRA Framework on Accountancy Services: "ASEAN Member States shall at all times endeavor to agree on the interpretation and application of this MRA and shall make every attempt through communication, dialogue, consultation and cooperation to arrive at a mutually satisfactory resolution of any matter that might affect the implementation of this MRA. The provision is based on the ASEAN Protocol on Enhanced Dispute Settlement Mechanism, done at Vientiane, Lao PDR on 29 November 2004, which applies to disputes concerning the interpretation, implementation, and/or application of any of the provisions under this MRA upon exhaustion of the above-mentioned mechanism."

Yet, one may note that there is no mandatory requirement for all ASEAN member countries to be a party of an ASEAN MRA.

Possibility for India-ASEAN MRAs

To see if there is a possibility of Indo-ASEAN MRAs in Accountancy, Architectural, and Engineering Services, one needs firstly to clarify if an ASEAN MRA is subject to include all ASEAN member countries as a party to the arrangement, and secondly to identify if an ASEAN MRA to be automatically extended to India, as a WTO Members, on a MFN basis.

For the first notion, AFAS Article V, para. 1 reads:

"Each Member State may recognise the education or experience obtained, requirements met, or licenses or certifications granted in another Member State, for the purpose of licensing or certification of service suppliers. Such recognition may be based upon an agreement or arrangement with the Member State concerned or may be accorded autonomously."

The above AFAS provision does not signify any mandatory requirements for all ASEAN member countries to be a party of an ASEAN MRA. This is given the existence of AFAS Article V, para. 2, which reads:

"Nothing in paragraph 1 shall be so construed as to require any Member State to accept or to enter into such mutual recognition agreements or arrangements."

As to the second notion, AFAS provides for an ASEAN MRA to limit itself to ASEAN member countries only. AFAS Article V reads:

"These agreements or arrangements are concluded for Member State only. In the event a Member State wishes to join such agreements or arrangements, it should be given equal opportunity to do at any time."

Accordingly, one may note that an ASEAN MRA is not automatically extended to India, as a WTO Members, on a MFN basis.

Nevertheless, ASEAN member countries under AFAS are also bound under GATS Article VII. Article VII (2) of the GATS states that: *"A Member that is a party to an agreement or arrangement…, whether existing or future, shall afford adequate opportunity for other interested Members to negotiate their accession to such an agreement or arrangement or to negotiate comparable ones with it. Where a Member accords recognition autonomously, it shall afford adequate opportunity for any other Member to demonstrate that education, experience, licenses, or certifications obtained or requirements met in that other Member's territory should be recognized."*

Hence, ASEAN member countries being parties to an MRA are required to afford adequate opportunity for India, as a WTO member, if India expressed her interest to negotiate. Yet subject to AFAS Article V, a negotiation in a comparable one in terms of qualification recognition and the role of professional regulatory authority is more appropriate than to negotiate an accession to an ASEAN MRA. This leads to the notion that the provision on dispute settlement may need a special consideration from all parties concerned. This is based on the following notions.

Firstly, ASEAN is now in a transitional period. It is now on its way to draft a legal instrument to establish an appropriate dispute settlement mechanism while it is moving forward as an ASEAN Community by 2015. This is based on the notion at the recent ASEAN Foreign Ministers Meeting with High Level Legal experts' Group on follow up to the ASEAN Charter (HLEG) in 2009 that ASEAN should use existing mechanisms, such as a reconciliation or mediation, before opting to use arbitration.

Secondly, it is quite common among ASEAN member countries that there is no statutory domestic procedure for conducting consultations or negotiations with trading partners in case of trade disputes. Preference is found to rather rely on a multilateral approach based on a strengthened WTO dispute settlement mechanism.

This study is of a notion that at the initial phase of cooperation, a bilateral MRA between India and an ASEAN member country is a more viable option than a regional Indo-ASEAN one. Among other reasons, AFAS does not "affect the rights of the Member States to enter into other agreements not contrary to the principles, objectives and terms of this Framework Agreement." Moreover, a bilateral negotiation and request/offer approach has so far prevailed in most ASEAN regional talks with a non-ASEAN member country.

Thailand is relatively closed to foreign services providers, particularly in the three studied sectors of professional services. The professional regulatory authorities, particularly in architectural services, prefer a foreign architectural firm to contractually affiliate with a local registered firm to provide a range of defined professional services. According to a study presented at an experts meeting on trade in professional services in 2007, such a process is a common form of international practice, which provides a foreign service provider with a local partner who is experienced and well versed in the broad scope of professional service while avoiding the necessity for the foreign service provider to become licensed in the host country where the project is located.

At this current period, register as a member of the COE is a pre-requisite for licensure. While Thailand has imposed certain nationality requirements for registration, there is not yet a provision for a "Foreign Architect" licensure in Thailand. Accordingly, local collaboration is a viable option for India to seek for such professional services in Thailand now. To do so, a service provider from India needs to identify a competent local registered architect and negotiate contractual relationship.

An MRA Framework negotiation under the existing India-Singapore CECA is recommended as a point to start, in recognition of their long-standing friendship, strong economic ties and close cultural links, and Singapore's relatively openness to foreign services providers. This is considered a viable approach to contribute to the promotion of closer links with other ASEAN member countries.

Article 9.1 of the India-Singapore CECA reflects the preferential trading relationship between both parties, their mutual desire to facilitate temporary entry of natural persons on a comparable basis and of establishing transparent criteria and streamlined procedures for temporary entry, while recognizing the need to ensure border security.

Accountancy, architectural and engineering services are already covered in the professional list, Annex 9A of the India-Singapore CECA, which requires the followings:

a) Theoretical and practical application of specialised knowledge;

b) Educational attainment of a Bachelors' degree, Masters' degree and/or Doctoral degree conferred by institutions in India and Singapore; and

c) Registration, license or credentials, as specified by the relevant authorities of the party concerned, if applicable, to engage in a business activity as a professional listed in Annex 9A.

Under India-Singapore CECA, short-term service suppliers are subject to the right to temporary entry for an initial period of up to 90 days, with possibility for a further period of up to 90 days provided that the total sum of the initial period and the extended period shall not exceed 180 days or the length of the service contract. For a long-term service supply, professionals and those seeking to engage in a business activity of both parties can enjoy a temporary entry for up to one year or the duration of contract, whichever is less.

Dispute settlement is also provided Chapter 15 of the India-Singapore CECA. According to Article 15.3 each party is subject to accord adequate opportunity for consultations regarding any representations made by the other party with respect to any matter affecting the implementation, interpretation or application of the India-Singapore CECA. Any differences must, as far as possible, be settled by consultation between the parties. Any party which considers that any benefit accruing to it directly or indirectly under the India-Singapore CECA is being nullified or impaired, or that the attainment of any objective of the Agreement is being impeded, as a result of the failure of the other party to carry out its obligations under the Agreement, may, with a view to achieving satisfactory settlement of the matter, make representations to the other party, which is subject to give consideration to the representations made to it.

Article 15.3 provides further that any request for consultations must be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis of the complaint. The Party to which the request is made must reply to

the request within 10 days after the date of its receipt and shall enter into consultations within a period of no more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution.

Chapter 15 of the India-Singapore CECA maintains that India and Singapore are subject to make every effort to reach a mutually satisfactory resolution of any matter through consultations. To this end, both parties are required to provide sufficient information as may be reasonably available at the stage of consultations to enable a full examination of how the measure might affect the operation of the Agreement. They must treat as confidential any information exchanged in the consultations, which the other party has designated as confidential.

Upon a written request, an arbitral tribunal will be appointed if the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations.

One may also consider the Framework for Mutual Recognition Arrangement between Malaysia and Pakistan under Malaysia-Pakistan Closer Economic Partnership Agreement (CEPA), as a basis for India to express her interest in negotiating an MRA Framework with Malaysia. This is to provide a framework for the development of an MRA with the latter on the followings on accreditation of educational institutions and academic programmes, and/ or qualifications, registration, licensing and certification requirements and experience for the fulfillment in whole or in part, of standards and criteria for the authorisation, licensing or certification of services suppliers.

In both cases of India-Singapore and India-Malaysia frameworks on MRA, there should be a provision to encourage relevant competent bodies in the respective territory to endeavour to take all relevant steps to develop mutual acceptable accreditation and recognition arrangements under the respective sectors or subsectors. This should include the matters of educational qualifications, registration/licensing/certification, and practical experiences for a particular profession concerned.

To enter into a negotiation with Singapore and/or Malaysia, one may need to note that the requirements in terms of the academic qualification, practical experience for authorization to practice are different from one to another. In Singapore, besides graduate architects, those with recognised training in architecture and having passed prescribed Professional Practice Examination and the Professional Practice Interview Examination may apply for registration as well. In Malaysia, being a graduate architect, practical experience, prescribed examination, and citizenship or residency are basic requirements for registered Professional Architects in Malaysia.

In engineering services, Malaysia is relatively flexible in terms of the educational qualification requirement. Malaysia has provided an alternative to the basic educational qualification requirement, where the Engineering Council Examination of the United Kingdom is acceptable.

Foreign engineers are allowed to gain registration in Singapore if they have studied one of the degree programs recognised by the Professional Engineers Act. In Malaysia, they are allowed to register as a Temporary Professional Engineer (TPE), if they are holding the necessary qualifications, which are recognized for practice of engineering as a Professional Engineer in the country where he normally practices professional engineering services. As in the case of architectural services, there is a residency requirement to practice professional engineering services in Malaysia.

One may also start looking for an opportunity to negotiate a bilateral MRA between India and a particular ASEAN member country in the sector an equivalent level of qualification.

Comparing with architectural and engineering services, accountancy seems to be relative open for a qualified accountant from India if he/she meets the residency and other requirements. This is based on the notion that a member of the Indian Institute of Chartered Accountants qualifies to apply for admission as a chartered accountant in Malaysia.

Architectural and accountancy services are also recommended to be considered as a priority for India to seek for an MRA or a framework on MRA with such ASEAN member countries as Singapore and Malaysia.

A major explanation is that India has already the legislative and institutional mechanisms in place to regulate the said professions. The Architects Act, 1972, for example, vests the power on the Council of Architecture to regulate the architectural profession and register eligible persons as architects. Foreign architects who are registered with the Council of Architecture are allowed under the Architect Act to practice in India.

Meanwhile, India is in an urgent need of similar legislation to regulate the profession of engineers, while installing a system to ensure quality of engineers with continuous professional development or to bring the educational standards up to the internationally accepted levels. An opportunity should be open to India if the shortcoming noted by the Engineering Council of India is mitigated, despite the Indian Institutes of Technology, Indian Institute of Science and a few other reputed institutions being near world-class.

It is also recommended for India to be part of the Washington Accord or the Network of Accreditation Bodies of Engineering Education in Asia (NABEEA), or to ensure the accreditation process is recognised internationally through such fora as the Washington Accord, or regionally through NABEEA. This is based on the notion that IES and IEM are also part of them.

In all cases, the qualification recognition on architectural and/or engineering services at the bilateral level between India and Singapore as well as India and Malaysia should be comparable to the ASEAN MRAs on Architectural and Engineering Services. This is to contribute to collaboration with other ASEAN member countries.

While, the dispute settlement provision in an India-Singapore MRA should be based on the dispute settlement provision contained in the India-Singapore CECA, an India-Malaysia MRA may consider such provision contained in the India-Pakistan CEPA during the negotiation process.