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International Economic Law Practicum

INDIA: APPROACH DOCUMENT FOR NEGOTIATING ECONOMIC INTEGRATION AGREEMENTS WITH DEVELOPING AND LEAST -DEVELOPED COUNTRIES

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Executive Summary

Since the opening up of India's markets to foreign trade, the growth of India's trade in services has been exponential and it became a leading exporter in trade in services in the world. Due to increased competition, market saturation and other factors, India has a keen interest in expanding their activities to markets in emerging economies. This can be done through the conclusion of an EIA with emerging economies or having a mutual recognition agreement with them. General Agreement on Trade in Services (GATS) has provisions regarding the conclusion of EIA and MRA, which are respectively GATS Art. V and Art. VII. This memorandum proceeds to clarify those key requirements with a focus on India's specific situation and give recommendation to India.

An EIA needs to have "substantial sectoral coverage" and provides for "elimination of substantially all discrimination" in order to be compatible with GATS Art. V. In addition, there are several flexibilities for the meeting of those key requirements. "Substantial sectoral coverage" can be further understood in terms of number of sectors, volume of trade affected and mode of supply[1]. This memorandum also examined several EIAs concluded by India and China in order to have a general idea of how this requirement is implemented in practice. This is because none of the EIAs have been challenged before WTO, therefore, it can be safely assumed that the sectoral coverage under these EIAs are substantial. As for number of sectors, India has made commitments in around 60-90 subsectors under the EIA concluded previously, such a range can be used as a reference for the future negotiation of the EIA. As for trade volume, India can use contribution of service sectors to GDP as an indicator because there is currently not reliable data on trade volume. No mode of supply can be excluded from the entire EIA, but different levels of liberalization is allowed. The practice of selected EIAs revealed that mode 1 and mode 2 are highly liberalized compared to mode 3 and mode 4. But the assessment is a holistic one and

[1] The four mode of supply are: 1) cross-border supply (mode 1 of supply); 2) consumption abroad (mode 2 of supply); 3) commercial presence (mode 3 of supply); 4) presence of natural person (mode 4 of supply).

all of the three elements need to be considered together in order to make a final determination of whether the EIA has substantial sectoral coverage. An EIA also has to eliminate substantially all discrimination under the sectors covered under the EIA. There are two ways in meeting this requirement, which are “elimination of existing discriminatory measures and/or prohibition of new or more discriminatory measure.” Despite the confusion language “and/or”, these two means are not independent alternatives, rather, they complement with each other. The applicability of these two approaches is based on the current discrimination level of India, which can be referenced from the existing regulatory framework. GATS Art. V also provides some flexibilities for the requirement of “elimination of substantially all discrimination”. The first flexibility concerns with the implementation of the commitments under the EIA. The EIA does not need to eliminate substantially all discrimination immediately upon the time the EIA is enforced. Rather, it can be implemented based on a reasonable time-frame. There is not an agreed upon opinion on the exact meaning of this term. The China-ASEAN EIA provides an interesting approach, called progressive liberalization, where the parties divide its commitments into several phases and make a sequential phase in. The second flexibility is granted on the basis of the relationship of the EIA to “a wider process of economic integration or trade liberalization”. This terms means that if India is having an EIA on trade in services of a broader FTA, such as RCEP, which includes goods and investment, the condition of “elimination of substantially all discrimination” would be more flexible. The third flexibility is relevant with the competitiveness of India economy and specific service sectors. The competitive service sectors in India, such as ICT, may subject to a higher level of liberalization, but for services which are less competitive, such as health, may subject to less liberalization.

The EIA’s under Article V are generally followed by recognition of standards of the parties to agreement under the provisions of Article VII of GATS that exclusively covers the subject. The world we live in is a witness to the ever-growing service industry from social media corporate giants to online shopping empires that cuts across borders to the remotest place on earth. There are no physical customs to scrutiny, yet there is one factor that limits the transfer is the recognition part, i.e. if Country A does not recognize the service or service supplier of Country B, then there can be no supply

happening like how Facebook is blocked in China, because it is not recognized. Another scenario of service trade barrier is the non-recognition of education, qualifications and the like, where a doctor X from country A wants to work in Country B, but the medical studies of X from Country A is not recognized in Country B, hence X has no choice but to repeat the whole study in Country B. But if Country A and B decide to recognize each other professional education and training, the problem gets resolved.

This can be done in two ways, either horizontally i.e. the education and qualifications of Country A is recognized and approved by Country B and its regulator and vice versa, or through vertical approach by developing standards such as curriculum building, training of the citizens of Country B and thereby synchronizing A and B thus making it easier. The problem with the vertical approach, it is slow and takes longer time. The reason why most countries employ the horizontal approach.

Mutual Recognition of standards can be achieved through two methods either through Article VII under the GATS or bilateral agreement using MoU. There is substantial number recognition agreements India has achieved with various countries. They are listed and analysed in detail below.

The MRA's are volatile in nature because it spills over from being an exclusive trade feature to a political conversation and eventually non-compliant. Consequently, there are multiple reasons for delay in implementation EIA, despite having agreement in paper, because of the non-recognition of services or its suppliers. India has raised concerns multiple times in this issue as a trade barrier.

There is no requirement of MFN or substantial sector coverage as in the Article V, thus countries can choose to recognize particular professions only and leave the rest out. There is freedom of for third countries to enter the MRA that India might be negotiating, the transparency requirement might pose the problem of posing as a pre-emptive deterrence where third country decides not to join even before getting to the table.

The regulatory concerns, institutional and technical challenges, harmonizing initiatives, international standards as reference but develop India specific standards. The ASEAN is used as case study to understand and clarify the legal context.

The ASEAN-India case is taken broadly and with India's recent agreements on nursing, accountancy is case in point.

This memo rendered some interesting findings where India can work to have an heads and also arm the potential partner with guidelines that is useful for both parties.

1. Introduction

India has a proven strength as a leading services exporter in the global market, especially in the information technology and computer software and its related services. The global IT services industry is currently going through a transition phase from traditional to digital transformations like cloud computing, analytics, artificial intelligence and IoT. India is the leading sourcing destination across the world, with about 55 per cent market share of the $200 billion global services sourcing business in 2017-18 Indian IT & ITeS companies have set up over 1,000 global delivery centres in about 80 countries across the world. India has become the digital capabilities hub of the world with around 75 per cent of global digital talent present in the country. These business transformations are creating a huge opportunity for IT services companies. Nasscom projects the size of digital transformation businesses at around $470 billion by 2023. Indian IT sector's core competencies and strengths have attracted significant investments from major countries. The IT services sector in India attracted cumulative foreign direct investment (FDI) flows worth $32.23 billion between April 2000 to June 2018, according to data released by the Department of Industrial Policy and Promotion (DIPP).

As a growing economic power of the region, there is economic prospect, but also significant geo-strategic advantages in having trade relations with potential partners in the region and to the west.

This shows the importance of India’s quest to expand its service trade to new markets that has mutual benefit for both parties. There is high demand in the emerging countries and LDC’s which India can certainly capitalize on without exploiting the smaller economies. There could be significant economic imbalance with some of India’s potential partners and cannot be treated the same way as it treats United States or Germany or Japan. There needs to be some kind of flexibility, which is provided under the Article V of GATS for having an Economic Integration Agreement (EIA) that contains special and preferential treatment similar to the GATT Article XXIV and Enabling clause. This imbalance in economic strength also reflects in the difference on the standards of education, qualification, professional development, that brings forth the need for mutual recognition of such standards using the Article VII of GATS that exclusively lists the procedure and requirements. Only upon successful mutual recognition, can the parties of agreement supply the services through their suppliers to serve each other. It is, therefore, necessary

to provide for the mutual recognition between countries of each other's professional qualifications.

Otherwise, foreign professionals would have to repeat in the host country many of the qualification requirements that they have already completed in the home country.

The other important factor considered alongside the EIA and MRA is the data privacy and protection, that is progressively taking the central stage in controlling the services trade, especially the services that collect personal data. The lack of structured legal framework in India in comparison to GDPR of European Union has been pointed as a matter of concern that can affect the future EIA's and the MRA's. However, the data privacy act of 2018 seems highly promising. A brief analysis of the existing privacy laws, its extra-territorial application, its role in the e-commerce has been analysed in detail.

This memo would objectively address the above-mentioned provisions with a deep legal analysis with subjective deductions for the benefit of India.

Due to the reluctance of countries to make substantial commitments multilaterally, countries are more willing to conclude bilateral and/or regional economic integration agreements (EIAs) for trade in services. EIAs has been a positive regime for smaller economies, because of its inherent flexibility provisions such as deviation from the MFN. India, if it engages with a smaller economy to have an EIA, it can certainly treat the smaller economy with preference without violating the WTO.

The GATS Art. V sets out key requirements that parties to an EIA must meet in order to be legally compatible with the multilateral trading system that is discussed in the relevant section below. Despite hundreds of trade agreements notified under GATS Art. V, key requirements set out in GATS Article V are still ambiguous and begs for definition and clarity, including terms like "substantial sectoral coverage", "elimination of substantially all discrimination", "reasonable time-frame", "wider process of economic integration or trade liberalization", "overall level of barriers to trade in services" these phrases are interpreted objectively and comprehensively using wide range of sources.

The other finding is the contention against some of the commentator's notion that Article V contains the provisions for mutual recognition in it, obviating the need for Article VII. The research and interaction with experts revealed having an exclusive provision for recognition which is not contained in the GATT regime only indicates the drafters' allocation of importance for recognition. However, agreements notified under

Article V does not exclude other provisions such as VII or vice versa.
We conducted extensive research on the existing scholarship, case laws, case studies on existing EIA's collected data and facts to support, conducted multiple interviews with experts and concluded with recommendations that are practical and can be used by the negotiators while engaging developing and smaller economies for EIA.

1. India: Service Sectors

India's service sector contributes a large part to the GDP of the country and has attracted huge amounts of FDI. The sector has contributed 57.12 per cent of India's Gross Value Added at current price in H1 2018-19.[2] India's services sector covers a wide variety of activities such as trade, tourism and transport, communication, banking and financing, real estate, and some others. India also stood to be the eighth largest exporter of commercial services in 2017.[3]
India is also a large exporter of software services and has captured a 55 per cent share in the global sourcing market. India's IT & ITeS industry grew to US$ 181 billion in 2018-19. Exports from the industry increased to US$ 137 billion in FY19 while domestic revenues (including hardware) advanced to US$ 44 billion. Spending on Information Technology in India is expected to grow over 9 per cent to reach US$ 87.1 billion in 2018. Revenue from digital segment is expected to comprise 38 per cent of the forecasted US$ 350 billion industry revenue by 2025.[4] The large and increasing pool of skilled manpower, particularly in the IT sector is India's biggest competitive advantage.
India has drafted a Trade Facilitation Agreement for Services, which is expected to help in the smooth movement of professionals. India has a scheme called the Services Export from India Scheme ("SEIS") under which trade receives multiple benefits.

1.1. India: Schedule of Specific Commitments (GATS) and Deviations in Existing EIAs

India's Schedule of Specific Commitments under GATS is divided into two broad categories, i.e. i) horizontal commitments and ii) sector specific commitments. The

2 See https://www.ibef.org/industry/information-technology-india.aspx

3 See https://www.ibef.org/industry/services.aspx

4 See https://www.ibef.org/industry/information-technology-india.aspx

commitments under the first heading are applicable horizontally, to all sectors included in the schedule. There are four modes of supply, namely i) cross border supply; ii) consumption abroad; iii) commercial presence; and iv) presence of natural persons. The commitments are with regard to the limitations imposed by India on market access and national treatment.

In its Schedule of Commitments, India has broadly left market access and national treatment "unbound" (no commitments) for almost all sectors in mode 1 and mode 2 of supply. The Horizontal Commitments limit national treatment in cases of collaborations with public sector enterprises and preference is given on the basis of technology transfer. India seems to adopt a flexible approach in trade negotiations.

2. Art. V:1-- Substantial sectoral coverage and non-discrimination

GATS Art. V sets out key requirements for an Economic Integration Agreement (EIA) in trade in services:

> *Paragraph 1: This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement: (a) has substantial sectoral coverage, and (b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a), through: (i) elimination of existing discriminatory measures, and/or (ii) prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable time-frame, except for measures permitted under Articles XI, XII, XIV and XIV bis.*
>
> *Paragraph4: Any agreement referred to in paragraph 1 shall be designed to facilitate trade between the parties to the agreement and shall not in respect of any Member outside the agreement raise the overall level of barriers to trade in services within the respective sectors or subsectors compared to the level applicable prior to such an agreement.*

From the treaty language, it is understood that an EIA needs to have "substantial sectoral coverage" and provides for "absence or elimination of substantially all discrimination" . In addition, the EIA cannot "raise the overall level of barriers to trade in services". The purpose of these requirements is to ensure a wide scope of coverage for EIAs, and the logic of it seems to be that if an exception to the MEN principle is recognized, it should at least be ensured that the general goal of international services trade liberalization is enhanced by it.[5]

2.1. Substantial sectoral coverage

In GATS Art. V, "substantial sectoral coverage" is further defined in the footnote as:

> *Footnote: This condition is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the a priori exclusion of any mode of supply.*

The footnote provides for further explanation to "substantial sectoral coverage" requirement. In other words, whether the EIA has satisfied the first requirement, three elements have to be taken into consideration, which are the number of sectors, trade volume and four modes of supply. And it is a holistic assessment.

2.1.1. Number of sectors

Before analyzing the first element "substantial sectoral coverage", it is better to have some knowledge about the sectoral structure, which is usually based on MTN.GNS/W/120(W/120), a classification the WTO Secretariat has developed in the early 1990s. The classification distinguishes 11 broadly defined sectors (plus a twelfth category for miscellaneous services), which are subdivided into 160 subsectors.[6] Against this backdrop, the issue arises whether the EIA can exclude sectors in its coverage, and if so, how to determine the permissible scope of exclusion in order to make the EIA compatible with the requirement of "substantial sectoral coverage". The wording of the footnote that " *a priori* exclusion of any mode of supply" is not permissible without extending to "number of sectors" suggests that *a priori* exclusion of sectors is permitted.[7]

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[5] Nellie Munin(2010), Legal Guide to GATS, Kluwer Law International, pp. 226.

[6] Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS). S/L/92.

[7] EC, Committee on Regional Trade Agreements, Communication from the European Communities and their Member States on Article V of the GATS: Systemic Issues, ('W/35'), WT/REG/W/35, 21 Sep.

As for the permissible scope of exclusion, there has not been an agreed upon opinion and it can be understood from two perspectives, quantitative and qualitative. The former addresses the issue of how many sectors or sub-sectors shall be covered, while the latter address the issue of whether service sectors which are of relative importance to the country are allowed to be excluded in order to still meet this condition.

2.1.1.1.A quantitative analysis

From the quantitative perspective, it may be more rational to use the coverage of subsectors, because the 11 major headings in W/120 do not reflect activities of comparable economic weight, even in the abstract.[8] Some service sectors, for example, the business services, cover a far broader array of subsectors than others, such as recreational services.[9] In addition, not all subsectors are committed under the covered sectors, rather, the exclusion of one or more subsectors or particular services are common.[10] For example, the air transport subsector is frequently excluded from the transport sector. Therefore, it is difficult to determine accurately whether the EIA has substantial sectoral coverage by looking at the number of sectors covered, though the other two elements "trade volume" and "four modes of supply" will also be taken into consideration in making the assessment, it is nevertheless, more accurate to refer to the number of sub-sectors covered.

No consensus has been made on a way to translate the concept into consensually agreed quantitative threshold.[11] Nevertheless, it is understandable that the higher the percentage (the number of covered subsectors/160) is, the broader the sectoral coverage is. In addition, the reference to such percentage is not definitive and universal, because

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1999, para. 4; New Zealand, Committee on Regional Trade Agreements Twenty-Second Session, Note on the Meetings of 29–30 Apr. and 3 May 1999 ('M/22'), WT/REG/M/22, 4 Jun. 1999, para. 17.

[8] Rudolf Adlung, Peter Morrison, Less than the Gats: 'Negative Preferences' in Regional Services Agreements, *Journal of International Economic Law*, Volume 13, Issue 4, Dec. 2010, pp.1110.

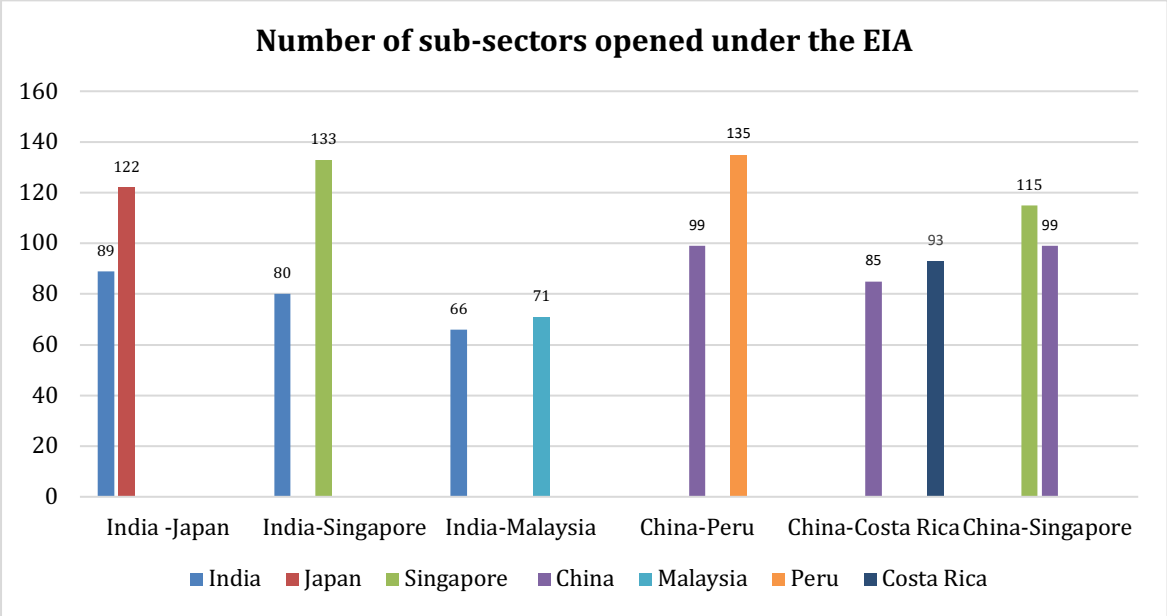
[9] According to Services Sectoral Classification List (W/120), there are total five categories under business services, and many subsectors under each category. However, there are only five subsectors under recreational, cultural and sporting services, which are entertainment services (9619), news agency services (962), libraries, archives, museums and other cultural services (963), sporting and other recreational services (964), and other.

[10] Wolfrum, R., Stoll, P-T. and Feinäugle, C. (eds.) (2008), WTO-Trade in Services, Max Planck Institute, Martinus Nijhoff Publishers, Leiden, pp. 131.

[11] Sauvé, Pierre & Ward, Natasha, The EC-CARIFORUM Economic Partnership Agreement: Assessing the Outcome on Services and Investment, European Centre for International Political Economy (ECIPE), Jan. 2009, pp. 22.

flexibilities need to be granted "in accordance with the level of development of the countries concerned.[12]

To have a general idea of how this requirement is implemented in practice, this memorandum chose several EIAs concluded by India and China, a country with similar level of development with India, and calculate the number of subsectors covered under each EIA, which is shown in the graph below. Since none of the EIAs have been challenged before the WTO, it is safely assumed that the sectoral coverage under those EIAs are substantial. The number of sectors covered under India's EIA is around 60-90, therefore, in the negotiation of future EIAs, if India makes any commitments in the subsectors around this range, it may be safely assumed to be consistent with this requirement.



2.1.1.2.A qualitative analysis

The qualitative perspective deals with the issue of what service sector can be excluded from the coverage of the EIA. By far, there is not agreed upon opinion about the exact interpretation on qualitative condition. Japan and Korea has suggested that essential service sectors which serve as the infrastructure for economic activity, such as communication, transportation and finance may not be excluded from the coverage of the

[12] GATS Art. V:3a: Where developing countries are parties to an agreement of the type referred to in paragraph 1, flexibility shall be provided for regarding the conditions set out in paragraph 1, particularly with reference to subparagraph (b) thereof, in accordance with the level of development of the countries concerned, both overall and in individual sectors and subsectors.

EIA.[13] There are also scholars suggesting that it is desirable to take into account the economic importance of the excluded sectors in terms of international exchange.[14] In other words, service sectors which are highly relevant to economic integration among parties to the EIA may not be excluded. So, sectors or particular services where limitations are maintained cannot be those where significant trade between the parties occurs or would occur in the absence of restrictions. As for sectors which are permissible for exclusion from the coverage of the EIA, it is suggested that limited number of sensitive sectors, such as primary education and public health care may be allowed to be exclude from the EIA.[15] The "substantial sectoral coverage" responds to the need to avoid the advent of numerous sector-specific agreements which pick and choose from mutually interested areas but leave the idea of comprehensive regional and preferential trade in services behind.[16] ICTs, health and transport services are considered to be most important in India, therefore, these sectors may not be excluded from the coverage of the EIA.

2.1.2. Trade Volume

Trade volume is another factor used in evaluating whether the EIA has substantial sectoral coverage. If an EIA has covered substantial trade volume, it is deemed to meet the threshold. However, due to the unavailability of reliable data on the volume of trade in services, it is difficult to apply this factor in the analysis of substantial sectoral coverage. This issue has been raised in the Committee on Regional Trade Agreements, and Member states has suggested several parameters as substituents. For example, Korea has suggested the use of statistics on the size of the domestic market of services sectors concerned or their contribution to GDP to determine the coverage of sectors, due to the assumption that a sector representing more than a certain proportion of GDP was bound to be significantly traded within an EIA.[17] Therefore, if the GDP of sectors and subsectors covered under the EIA has amounted to the level of substantial, then the EIA can be regarded as having substantial sectoral coverage.

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[13] WT/REG/M/22, supra. 7, para.18 and 20.

[14] Sieber-Gasser, C. (2016). Developing Countries and Preferential Services Trade (Cambridge International Trade and Economic Law). Cambridge: Cambridge University Press. Pp. 140.

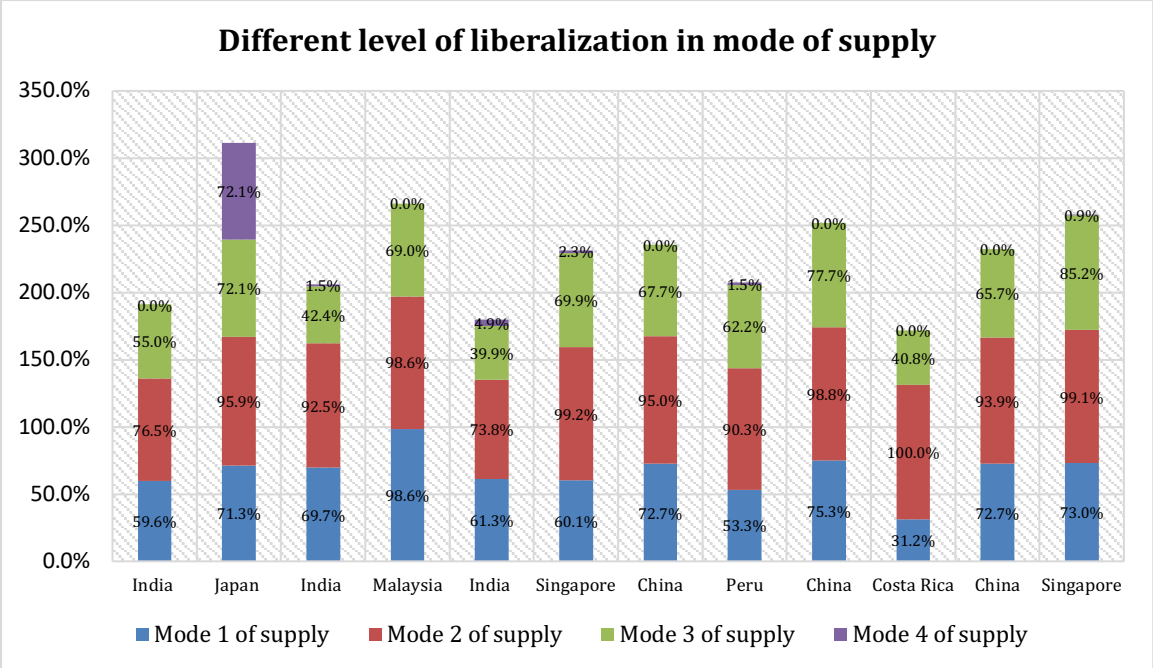
[15] Wolfrum, R., Stoll, P-T. and Feinäugle, C. supra. 10. pp. 132; Under the EC-CARIFORUM EPA, EC did not make commitments in publicly funded hospital services.

[16] Wolfrum, R., Stoll, P-T. and Feinäugle, C. supra. 10. pp. 132.

[17] Committee on Regional Trade Agreements, Synopsis of 'Systemic' Issues related to Regional Trade Agreements ('Synopsis of RTA "Systemic" Issues'), WT/REG/W/37, 2 Mar. 2000, para. 75.

2.1.3. Four modes of supply

On modes of supply, the footnote explicitly points out that the EIA "should not provide for *a priori* exclusion of any mode of supply". In other words, the EIA should provide for liberalization obligations on all four modes of supply, namely cross-border supply (mode 1 of supply), consumption abroad (mode 2 of supply), commercial presence (mode 3 of supply) and presence of natural persons (mode 4 of supply). To be noticed is that mode of supply can be excluded from a particular service sector or subsector, so long as the EIA, taking as a whole, has covered all four modes of supply. In addition, the wording "a priori" implies that an EIA can provide for different levels of liberalization for different mode of supply and this is completely subject to discretion of parties to the EIA.[18]
This memorandum analyzed serval EIAs concluded by India and China. The number of subsectors fully committed in each mode of supply was calculated, the results were then converted into percentages. The graph below vividly shows that mode 1 of supply and mode 2 of supply enjoy a comparatively higher level of liberalization compared to mode 3 of supply and mode 4 of supply. Almost every country analyzed below shows a highly conservative attitude towards the openness of mode 4 of supply.



Note: formula: % = number of subsectors fully committed in each mode of supply / number of subsectors covered under the EIA.

[18] Wolfrum, R., Stoll, P-T. and Feinäugle, C. supra. 10. pp. 133.

The assessment on whether the EIA has substantial sectoral coverage is a holistic one and needs to take into consideration of all three elements. Trade volume will inevitably be affected by 1) the exclusion of sectors or subsectors and 2) different level of commitments in different mode of supply. Therefore, in order to make the EIA consistent with the requirement of "substantial sectoral coverage", the exclusion of sectors or subsectors shall be limited and not significantly compromised by the volume of trade affected,[19] and the lack of commitments concerning one or more modes of supply may not impair the liberalization of substantial trade volume.[20]

2.2. Absence or elimination of substantially all discrimination

Except for having substantial sectoral coverage, parties to the EIA also have to eliminate substantially all discrimination in sectors covered under the EIA by granting national treatment to service suppliers of the other party.[21] By requiring elimination of substantially all discrimination, the EIA tries to bring about a level playing field and ensure a fair competition between domestic and foreign service suppliers in respect of sectors covered under the EIA.[22]

2.2.1. Interpretation of "substantially"

"Substantially all discrimination " does not equal to "all discrimination", in other words, discriminatory measures are still allowed so long as they do not amount to the degree of "substantial". Therefore, to fulfill this requirement, it is better to understand the scope of permissible discriminatory measures. In other words, to what extent are existing and potentially discriminatory measures considered as not substantial. So, the interpretation of the word "substantially" is necessary. The interpretation on "substantially all trade" in GATT Art. XXIV helps for further elaboration on this requirement. Such analogous is feasible given that GATT provides the original framework for the multilateral trading system which was built around the principle of non-discrimination,[23] the fact that GATS Art. V was drafted along the lines of GATT Art. XXIV to keep the services framework

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[19] WT/REG/M/22, supra. 7. para. 17

[20] Wolfrum, R., Stoll, P-T. and Feinäugle, C. supra. 10. pp. 134.

[21] Wolfrum, R., Stoll, P-T. and Feinäugle, C. supra. 10. pp. 135.

[22] Nellie Munin, supra. 5. pp.230.

[23] WT/REG/M/22, supra. 7. para. 15.

agreement as parallel to the GATT as possible during the negotiation,[24] as well as the fact that the Appellate Body has drawn on several occasions on provisions in the GATT in order to interpret GATS requirements which have similar wording and function.[25] In the "*Turkey-Textiles*", AB has discussed the meaning of "substantially all the trade":

> *"It is clear, though, that 'substantially all the trade' is not the same as all the trade, and also that "substantially all the trade" is something considerably more than merely some of the trade."*[26]

Adlung has pointed out that the wording "substantially all", in the light of the Appellate Body's ruling, shifts the range of trade coverage needed in a goods PTA significantly towards the "all trade" end of the spectrum. Consider the similar language, the same would be true for "substantially all discrimination" in the context of services trade.[27] Nonetheless, substantially all discrimination does not equal to all discrimination, the EIA is not required to eliminate all preferential treatment for the Parties' domestic service suppliers, elimination of only a substantial part of discrimination should suffice. So, the parties to the EIA may be able to maintain certain discriminatory measures in specific services sectors or services as long as substantially all discrimination is removed from the sectors covered by the EIA.[28]

2.2.2. Analysis on "and/or"

Elimination of substantially all discrimination can be achieved through "(i) elimination of existing discriminatory measures (liberalization obligation),[29] and/or (ii) prohibition of new or more discriminatory measures (standstill

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[24] Committee on Regional Trade Agreement, Systemic Issues related to 'Substantially all the Trade': Background Note by the Secretariat, Revision, WT/REG/W/21/Rev.1, 5 Feb. 1998. para. 14.

[25] In US—Gambling, the Appellate Body applied interpretations developed under GATT Article XX to GATS Article XIV on the basis that both provisions have the same objective and that each use similar language'. Appellate Body Report, United States—Measures Affecting the Supply of Cross-Border Gambling Services, WT/DS285/AB/R, adopted 20 April 2005, para 291; See also Rudolf Adlung, Peter Morrison, supra. 8. pp.1111.

[26] Appellate Body Report, Turkey–Restrictions on Imports of Textile and Clothing Products (Turkey–Textiles), WT/DS34/AB/R, adopted 19 Nov. 1999, paras. 48.

[27] Rudolf Adlung, Peter Morrison, supra. 8. pp.1111.

[28] Wolfrum, R., Stoll, P-T. and Feinäugle, C. supra. 10. pp. 135-137.

[29] The language entails an obligation to liberalize. By requiring that the elimination of existing discriminatory measures, this obligation tries to improve the competition environment between foreign and domestic service suppliers, featuring a deeper level of liberalization.

obligation)".[30] The wording "and/or" raises the question of whether these two means can be considered as self-standing and independent alternatives of fulfilling the requirement of GATS Art. V:1(b). In other words, whether countries are allowed to choose freely between either of the obligation, so that a mere fulfilment of the standstill obligation can also ensure the compliance with the requirement of elimination of substantially all discrimination. There are different views regarding this issue among WTO Members during the CRTA. One interpretation, supported by US, relies on the word "or", insisting that (i) and (ii) are independent alternatives and parties are allowed to choose only to eliminate the possibility of adding new measures or of making existing measures more restrictive, rather than also have to eliminate existing measures.[31] EC and Japan, however, hold the view that the purpose of the wording is to offer flexibility in applying this provision according to the status of discriminatory measures in the sector under consideration, and (i) and (ii) are not independent alternatives, rather, they complement each other in order to ensure the requirement that "elimination of substantially all discrimination" has been satisfied.[32]

It seems more appropriate to construe Art. V:1b as a whole in assessing this issue. The main goal of GATS Art. V:1b is to ensure the elimination of substantially all discrimination and the two obligations set out in GATS Art. V:1b(i) and (ii) are ways to achieve the main goal of GATS Art. V:1b.[33] Therefore, the choice of ways to implement the main requirement depends on the existing status of discriminatory measures of the sectors concerned.[34] Parties to the EIA shall adopt one "and/or" the other instrument in the process of bringing about non-discrimination and level playing fields, depending on the domestic

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[30] The wording implies an obligation to remain *status quo*. By preventing parties from introducing new or more discriminatory measures, this obligation tries to ensure that the conditions of competition between foreign and domestic suppliers not to be worsened. The purpose of this obligation is to freeze the regulatory *status quo*.

[31] US, WT/REG/W/37, supra. 17. para.82(a).

[32] EC, Japan, WT/REG/W/37, supra. 17. para. 82(b), para. 82(c).

[33] Wolfrum, R., Stoll, P-T. and Feinäugle, C. supra. 10. pp. 136.

[34] EC, WT/REG/W/37, supra.17. para. 82

regulatory situation.[35] The purpose of the wording is to offer flexibility in applying this provision according to the status of discriminatory measures in the sectors under consideration.[36] If, under the covered sectors, the level of existing discriminatory measures is very high, and amounts to substantial, then the mere prohibition of new or more discriminatory measures (i.e. standstill obligation) cannot achieve the objective of "absence or limitation of substantially all discrimination",[37] because a standstill obligation only requires that conditions of competition between foreign and domestic suppliers not be worsened, it does not improve the *status quo*.[38] It is difficult to see how such a course of (non-)action could ensure the compliance with the basic requirement, which is to provide for the "absence or elimination of substantially all discrimination"-- in an environment characterized by high initial levels of discrimination.[39] If, at the entry into force of the agreement, no discrimination or the existing level of discrimination does not amount to the level of "substantial", the mere application of a standstill obligation may suffice to meet the requirement.[40] To sum up, the applicability of (i) and (ii) depends on the current level of discrimination of sectors concerned. As for the determination of current level of discrimination, the parties' existing regulatory framework can be sued as a reference.

GATS Art. V contains several flexibilities for the fulfilment of the requirement, including 1) the time period allowed for the meeting this requirement; 2) to what extent can the elimination of discrimination be regarded as "substantially all"; 3) the possibility of having some sectors or subsectors maintain more discrimination than others and so on.

2.2.3. Flexibility1: Phase-In is Possible

GATS Art. V1:b require the EIA to meet the requirement of "elimination of substantially all discrimination" "either at the entry into force of that agreement or on the basis of a

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[35] EC, WT/REG/W/37, supra. 17. para. 82

[36] EC, WT/REG4/M/4, para. 19.

[37] WT/REG/W/35, supra.7. para. 8.

[38] Wolfrum, R., Stoll, P-T. and Feinäugle, C. supra. 10. pp. 136.

[39] Rudolf Adlung, Peter Morrison, supra. 8. pp.1113.

[40] EC, WT/REG4/M/4, para. 19.

reasonable time-frame".[41] The treaty language "a reasonable time-frame" implies that a reasonable implementation period is allowed for the fulfillment of the requirement of " elimination of substantially all discrimination". In other words, a phase-in is possible. The issue here is that the language "reasonable time-frame" is very vague and no further clarification has been provided, which causes uncertainty. Still, there are various interpretations, including 1) ten-year time frame;[42] 2) five year time-frame;[43] 3) the term should not be uniformly defined, rather, it should be applied to agreements on a case-by-case study.[44] In practice, there are also EIAs which do not provide for a comprehensive timetable, with only provisions referring to progressive liberalization. For example, the "China-ASEAN Framework Agreement on Comprehensive Economic Cooperation" only has provisions suggesting that there will be a "second package" of specific commitments, featuring further liberalization without an exact timeline.[45] To get a more comprehensive view of this issue, the graph below choose several EIAs concluded by India and China, which shows that the implementation period[46] of each EIA varies. And it seems that there is no predictable pattern to follow. The only assumption is that the implementation period may be relevant on the level of liberalization commitments in the EIA. The deeper the level of commitments made, the longer the implementation period may be needed. India can use the deeper level of commitments as a bargain in exchange for a longer implementation period. In addition, India can also use the practice in "China-ASEAN

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[41] GATS Art. V:1b.

[42] The ten-year limit was suggested by Australia during the meeting held in the Committee on Regional Trade Agreement, based on similar provision on GATT Art. XXIV5c and paragraph 3 of the Understanding on the Interpretation of Article XXIV of GATT 1994 Paragraph 3 of the Understanding on the Interpretation of Article XXIV of the GATT provides an explanation on what time frame can be considered as reasonable, within which an interim agreement is to be transformed into a full-fledge PTA, should exceed ten years "only in exceptional cases". See WT/REG/M/22, supra.7. para. 15.

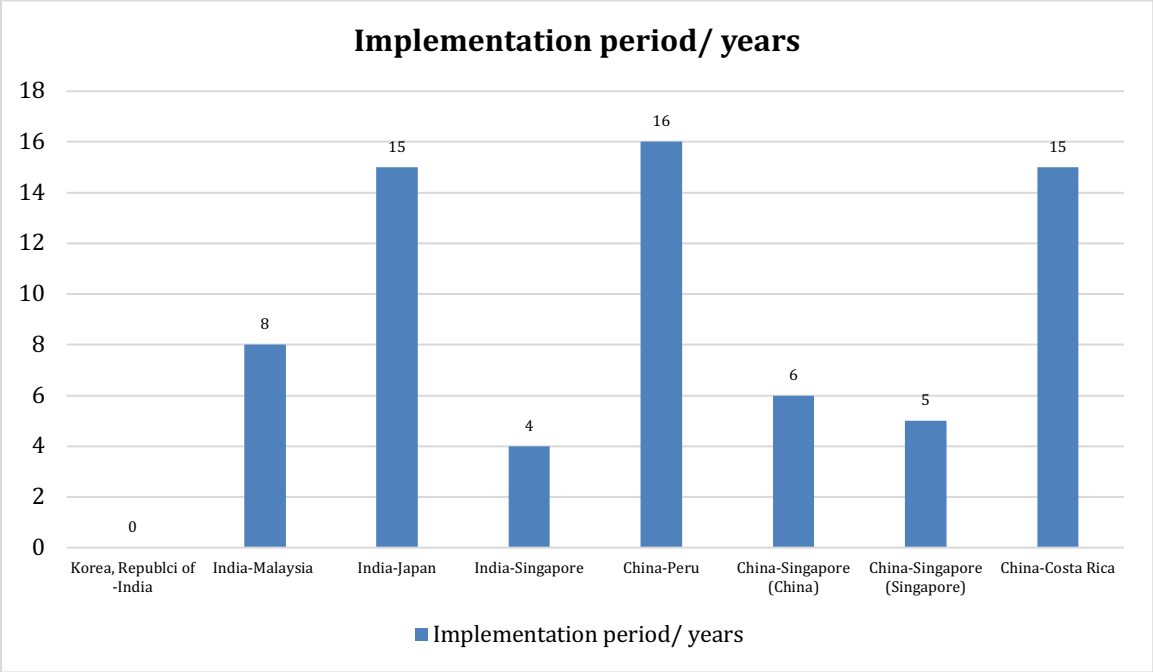
[43] Japan and US supported the use of 5-year time-frame given that the next round of negotiations of trade in services was schedule to commence five years after the entry into force of the GATS. See WT/REG/M/22, supra.7. para. 18.

[44] EC considered that a "reasonable time-frame" should be applied to agreements on a case-by-case basis rather than being formally defined. See WT/REG/W/37, supra.17. para. 84.

[45] See Framework Agreement on Comprehensive Economic Co-operation between the Association of Southeast Asian Nations (ASEAN) and China (Services) Article 23.2: "The Parties shall, with the aim of substantially improving on the first package of specific commitments, conclude the second package of specific commitments within a year from the date of entry into force of this Agreement."

[46] The implementation period means that party to the EIA does not have to meet the requirement of "elimination of substantially all discrimination" right at the entry into force of the EIA, rather, it can have a long time-period to meet this requirement, i.e. to fulfil the commitments it undertook under the EIA.

Framework Agreement on Comprehensive Economic Cooperation" for reference, where India can divide the commitments into several packages, and have a provision in the agreement referring to progressive liberalization.



2.2.4. Flexibility 2: Allowance for discriminatory measures

GATS Art. V: 2 allows parties to an EIA to take into account the relationship of the EIA in services with a "wider process of economic integration or trade liberalization"[47] in evaluating the EIA's consistency with GATS Art. V: 1(b). There are different interpretations regarding this term. One of the interpretation reads the term as having an EIA involving the elimination of trade barriers not only in services but also in goods.[48] In other words, this term allows a party to the EIA to make an overall assessment, taking into account of both trade in goods and trade in services in assessing whether the EIA is consistent with GATS Art. V:1b.[49] This interpretation provides for possibility of allowing

[47] GATS Art. V:2: In evaluating whether the conditions under paragraph 1(b) are met, consideration may be given to the relationship of the agreement to a wider process of economic integration or trade liberalization among the countries concerned.

[48] WT/REG/W/37, supra. 17. para. 85; WT/REG/W/21/Rev.1: para. 16(b): the drafting history: Members, in evaluating the sectoral coverage of economic integration agreements, could give consideration to whether such integration process included also goods sectors.

[49] Wolfrum, R., Stoll, P-T. and Feinäugle, C. supra. 10. pp. 139.

for certain level of discriminatory measures to continue among EIA parties so long as the overall evaluation under the consideration of the impact on the "wider process of economic integration" is more positive.[50] There are also proposals that areas other than trade, such as investment should also be taken into account, given the parallel reference to "economic integration" and "trade liberalization" in the provision.[51] A third interpretation suggests that "wider process of economic integration" could be construed to mean a process that go beyond the elimination of discrimination to the harmonization of government regulatory measures among Members of an EIA.[52] These interpretations are not mutually exclusive, and can be considered together in granting the flexibility to the fulfilment of "elimination of substantially all discrimination".

Trading environment normally varies from country to country, there are some countries which are good at trading in goods, while other countries are known as competitive on services markets or have an advantage in investment, namely foreign direct investment and foreign portfolio investment. So, it is feasible for countries to commit more in the field which has comparative advantages in exchange for less commitments in the area which is not competitive. In addition, if the potentially discriminatory measures can serve the cause of economic development and meanwhile bringing the world closer to a global free trade, those measures may be lowed to continue among the parties to the EIA.[53] Overall, the flexibility is elastic based on the coverage of the agreement, if India only has an EIA on trade in services with other countries, then the threshold on whether the EIA is consistent with GATS Art. V:1b may be higher and fewer discriminatory measures may be allowed to stay in place. However, if India is going to have an EIA on trade in services of a broader FTA, such as RECEP (Regional Comprehensive Economic Partnership), which includes goods and investment, the conditions of GATS Art. V:1b may be more flexible.

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[50] WT/REG/W/34, para. 11

[51] Wang, Heng, The Interpretation of GATS Disciplines on Economic Integration: GATS Commitments as a Threshold? (April 2, 2012). Journal of World Trade 46, no. 2 (2012), pp. 420.

[52] WT/REG/W/34, para. 11; WT/REG/W/37, supra. 17. para. 85

[53] Sieber-Gasser, C. supra. 14. pp. 154

2.2.5. Flexibility 3: Variation on level of liberalization in different sectors

GATS Art. V: 3a provides for further flexibility to EIAs involving developing countries:

> *Where developing countries are parties to an agreement of the type referred to in paragraph 1, flexibility shall be provided for regarding the conditions set out in paragraph 1, particularly with reference to subparagraph (b) thereof, in accordance with the level of development of the countries concerned, both overall and in individual sectors and subsectors.*

The mandatory language "shall be provided" implies that special and differential treatment shall be granted to developing countries which are parties to an EIA, in other words, developing countries can enjoy a greater degree of flexibility in meeting the two requirements set out in GATS Art. V:1.[54] And parties have discretion in terms of the implementation of this provision through specific commitments under each sectors and subsectors.[55] It was said that this provision responds to the philosophy of progressive regulation which links levels of commitments in WTO law to levels of competitiveness of Members and specific sectors.[56] Consideration should be paid to the state and prospects of competitiveness of the economy and of particular service sectors and subsectors in assessing the scope of flexibility. Overall flexibility may be based upon low levels of competitiveness of the service economy as a whole. As to specific sectors, competitive sectors may be fully subject to reciprocal commitments, while uncompetitive sectors may benefit from flexibility and therefore subject to exemption or a lesser degree of liberalization.

Flexibility could also be afforded by accepting the exclusion of more services activities from the sectoral coverage of the agreement, or allowing for more restrictive measures to be maintained despite the obligation to eliminate

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[54] Wolfrum, R., Stoll, P-T. and Feinäugle, C. supra. 10. pp. 141.

[55] Nellie Munin(2010), supra. 5. pp. 236; Literal meaning of GATS Art. V: 3a suggests that flexibility shall be granted "in accordance with the level of development of the countries concerned, both overall and in individual sectors and subsectors".

[56] Wolfrum, R., Stoll, P-T. and Feinäugle, C. supra. 10. pp141.

substantially all discrimination.[57] The language 'in accordance with the level of development of countries concerned, both overall and in individual sectors and subsectors' suggest a distinction between the different levels of development in the different services sectors and subsectors.[58]

GATS Art. V:3b grants additional flexibility to EIAs involving only developing countries:

> *Notwithstanding paragraph 6, in the case of an agreement of the type referred to in paragraph 1 involving only developing countries, more favourable treatment may be granted to juridical persons owned or controlled by natural persons of the parties to such an agreement.*

This provision allows for more preferential treatment to companies owned or controlled by countries' natural persons as opposed to those controlled by juridical persons from other Members operating in the territory of one of the parties to the agreement if the EIA involves only developing countries. This provision should be read in conjunction with GATS Art. V:6. GATS Art. V:6 requires parties to the EIA to grant same treatment to juridical persons established and involved in commercial activity in the territory of the parties but are owned or controlled by persons of third parties.[59] In other words, GATS Art. V:3b allows for more preferential treatment to service suppliers of citizens of the parties to the EIA. Therefore, if India is planning to have an EIA with another developing country, it can exempt the obligations of GATS Art. V:6 and impose a stricter rule of origin. Specifically, India can discriminate against juridical person owned or controlled by natural persons of non-parties, even if the latter are established in the territory of India or the contracting party to the EIA. But the grant of more favourable treatment to service suppliers of citizens of the parties cannot raise the overall level of barriers for service suppliers of non-parties, which is subject to the prohibition of GATS Art. V:4. And it has been suggested that the favourable

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[57] Wolfrum, R., Stoll, P-T. and Feinäugle, C. supra. 10. pp141.

[58] Wolfrum, R., Stoll, P-T. and Feinäugle, C. supra. 10. pp141.

[59] GATS Art. V:6: A service supplier of any other Member that is a juridical person constituted under the laws of a party to an agreement referred to in paragraph 1 shall be entitled to treatment granted under such agreement, provided that it engages in substantive business operations in the territory of the parties to such agreement.

treatment here should be interpreted in conjunction with the purpose of Art. V:3a which is to consider the situation of developing countries that have a lower competitiveness in trade in services.

2.3. Overall Level of Barriers to Trade in Services

Except for the internal obligations, countries also have to meet the external requirements, which requires that EIAs in services shall not "raise the overall level of barriers" to trade in service in respect of third parties.[60] This provision intends to prevent parties from embarking on so-called "fortress" economic integration in which the country liberalize internal trade but do so to the detriment to the third parties by raising compensatory protection in relation to service and service suppliers form third parties outside the EIA. It is suggested that the assessment is to be made in comparison with the level of barriers applicable before the conclusion of the EIA and should take account of each sector and sub-sector covered by the agreement.[61] However, it is difficult to assess since barriers to trade in services are less quantifiable and transparent, in addition, there are statistical difficulties to obtain the full data which is relevant for the assessment.[62]

3. Analysis of Existing EIAs: How Art. V Requirements are Satisfied in Practice

This section focuses on analysis of existing EIAs to illustrate how GATS Art. V requirements are implemented in practice. The spotlight is mainly on EIAs concluded by India (i.e. India-Japan, India-Malaysia and India-Singapore). The analysis is based upon the assumption that all the EIAs chosen are consistent with GATS Art. V because none of them have been challenged so far.

3.1. India-Japan

India and Japan signed the EIA on 16th Feb. 2011 and the agreement entered into force on 1st Aug. 2011. Under the EIA, India has made commitments on 89 (55.6%) sub-sectors of the 160 sub-sectors contained in the Sectoral Classification List W/120. And commitments have been made in every mode of supply under the agreement, though

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[60] WT/REG/W/37, supra. 17. para. 91.

[61] Wolfrum, R., Stoll, P-T. and Feinäugle, C. supra. 10. pp. 143-145.

[62] Nellie Munin, supra. 5. pp.241-242.

subject to different levels of liberalization. The commitments made under the sectors covered reflect the level of discrimination maintained in the sense of national treatment under the EIA. A closer look at the 89 subsectors scheduled by India under the EIA, reveals that 34 (38.2%) sub-sectors in mode 1 are left unbound (no commitments), 19 (21.3%) sub-sectors in mode 2 are left unbound, 11 (12.4%) sub-sectors in mode 3 are left unbound and nearly all (98.9%) committed sectors in mode 4 are left unbound. A total of 29 (32.6%) sub-sectors are subject to limitations in mode 3 in the sense of national treatment.[63] The discrimination level in the sense of national treatment is assumed as not amounting to substantial because the EIA has not been challenged and is presumed to have met the requirement of providing for "elimination of substantially all discrimination." In addition, India has a long time period to implement the commitments made under the EIA and achieve the goal of "elimination of substantially all discrimination" because the timetable for implementation is 10 years.[64]

Commitments made by Japan under the EIA have an even more substantial sectoral coverage, amounting to a total 122 (76.3%) sub-sectors of the 160 sub-sectors contained in the Sectoral Classification List W/120. And no mode of supply has been *a priori* excluded from the EIA. As for "elimination of substantially all discrimination" in terms of national treatment, no commitments have been made in 32 (26.2%) out of 122 subsectors in mode 1 of supply, 5 (4.1%) sub-sectors in mode 2 of supply, 3 (2.5%) subsectors in mode 3 of supply, 31 (25.4%) sub-sectors in mode 4 of supply. 31 (25.4%) sub-sectors in mode 4 of supply and 3 subsectors in mode 3 (2.5%) of supply are subject to limitations, featuring a deeper level of liberalization.[65] As for the implementation of the EIA, Japan does not need to implement these commitments upon the entry into force of the EIA until 2026.[66]

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[63] Those limitations take the form of: i) nationality requirement of board of directors, managers, chairman and executive officers; ii) subject to horizontal limitations; iii) conditions in market access column should apply; iv) government public sector undertaking; v) adhere to prescribed minimum capitalization norms.

[64] For India, the EIA does not have to be fully implemented until 2021. See Committee on Regional Trade Agreements, Factual Presentation Free Trade Agreements Between Japan and India (Goods and Services), Sep. 30, 2013, WT/REG300/1/Rev.1, pp4.

[65] Those limitations take the form of: i) prior notification is required for coastwise ship leasing services in accordance with the Foreign Exchange and Foreign Trade Law; ii) nationality requirements of certain services; iii) deposit insurance system does not cover deposits taken by branches of foreign banks; iv) operation or governmental registration be granted on reciprocal basis.

[66] The total implementation period for Japan is 15 years. See WT/REG300/1/Rev.1, supra. 51. pp4.

3.2. India-Malaysia

In terms of number of sectors, India's commitments under the Agreement has covered total 10 sectors out of 12 sectors, covering 66 (41.25%) out of the 160 subsectors contained in the Sectoral Classification List W/120. And commitments have been made in every mode of supply under the EIA, though mode 1 to mode 3 are offered more favourable national treatment conditions. The commitments made under the EIA reflect the level of discrimination in terms of national treatment which will still remain in place upon the full implementation of the EIA. A closer look at the 66 subsectors scheduled by India, reveals that 19 (28.8%) out of the total opened 66 subsectors have been left unbound in mode 1 of supply, 4 (6%) subsectors are unbound in mode 2 of supply, 21 (31.8%) sub-sectors are left unbound in mode 3 of supply, almost all sub-sectors (95.5%) are not committed in mode 4 of supply. A total of 17 (25.8%) subsectors are subject to one or two limitations in mode 3 of supply in the sense of national treatment.[67] As for the implementation period, India should have fulfilled the obligations under the EIA by June 30, 2016.[68]

Malaysia has made commitments in 71 (44.38%) subsectors of the 160 subsectors contained in the Sectoral Classification List W/120. And no mode of supply has been *a priori* excluded from the EIA, though mode 1 to mode 3 are subject to more favourable national treatment. The commitments made under the EIA reflect the level of discrimination in terms of national treatment which will still remain in place upon the full implementation of the EIA. As for elimination of substantially all discrimination, almost all committed sub-sectors are fully liberalized in terms of national treatment in mode 1 and mode 2, with 11 (15.5%) sub-sectors subject to some limitation in mode 3. Malaysia was very conservative in opening mode 4 of supply, almost all committed subsectors (98.6%) are left unbound in mode 4. Malaysia does not need to fully implement those obligations until the end of 2019.[69]

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[67] Those limitations take the form of: i) nationality requirements of chief officers, directors on board, chairman, managing directors; ii) have to adhere to prescribed minimum capitalization norms; iii) limitations prescribed in the horizontal section, which are applicability of domestic tax law and subsidies will only be granted to domestic industries.

[68] The EIA was enforced in 2001 and the implementation timetable is 5 years. See Committee on Regional Trade Agreement, Factual Presentation Free Trade Agreement Between India and Malaysia (Goods and Services), July 9, 2013, WT/REG329/1, pp4.

[69] The full implementation time for Malaysia is Dec. 31, 2019. See WT/REG329/1, ibid. pp4

3.3. India-Singapore

India and Singapore signed the EIA on 29th June 2005, and the agreement entered into force on 1st Aug. 2005. In terms of sub-sectors, India has ultimately undertaken commitments under the Agreement in 80 (50%) subsectors of the 160 subsectors contained in the Sectoral Classification List W/120 and the commitments have covered all four modes of supply. The commitments made under the EIA reflect the level of discrimination in terms of national treatment which will still remain in place upon the full implementation of the EIA. At a closer look at the 80 subsectors covered under the EIA, 30 (37.5%) subsectors have been left unbound in mode 1, 20 (25%) subsectors have been left unbound in mode 2, 11 (13.8%) subsectors have been left unbound in mode 3 and a total of 55 (68.8%) subsectors have been left unbound in mode 4. And 37 (46.3%) subsectors in mode 3 and 21 (26.3%) sub-sectors in mode 4 are subject to some discrimination in terms of national treatment.[70] The implementation period is pretty short, only four years.[71]

The sectoral coverage under Singapore's EIA schedule is much broader, covering 133 (83.1%) subsectors of the 160 subsectors contained in the Sectoral Classification List W/120. As for the level of discrimination in terms of national treatment under the EIA, no commitments have been in 48 (36.1) subsectors in mode 1 of supply, 31 (23.3%) subsectors are left unbound in mode 3 of supply, and almost all (97.7%) committed subsectors are left unbound in mode 4 of supply. Mode 2 of supply is the most liberalized, with only 1 (0.8%) subsector subject to one or two limitations in national treatment. And Singapore has made partial commitments in 5 (3.8%) subsectors in mode 1 of supply and 9 (6.8%) subsectors in mode 3 of supply.

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[70] These limitations takes the form of: i) Security& Exchange Board of India Regulations are applicable for transfer of equity in an existing company to the investor of the other party; ii) special treatment may be provided to Schedule Castes, Scheduled Tribes and weaker sections of society; iii) personal appearance before Indian Tax authorities is confined to Indian nationals only, iv)for engineering services, in case of juridical persons, subject to ceiling of 5% of the total work force on a project; v) juridical persons in the highly skilled and managerial categories are subject to fulfilment of qualification and licensing requirements, vi) have to adhere to prescribed minimum capitalization norms; vii) subject to collaboration with Indian partner; viii) the majority content would be created locally by Indian nationals; ix) limitations can be imposed on the grounds of public and national interest; x) publicly funded hospital services may be available only to Indian citizens or may be supplied at differential prices to persons other than Indian citizens.

[71] The EIA came into force in Aug. 1, 2005 and the end of implementation period is 2009. See Committee on Regional Trade Agreements, Factual Presentation Comprehensive Economic Cooperation Agreement between India and Singapore (Goods and Services), Oct. 1. 2008, WT/REG228/1/Rev.1. pp.7.

3.4. China -Peru

China and Peru signed the EIA on 28th Apr. 2009 and the agreement entered into force on 1st Mar. 2010. Under the EIA, China has made commitments on 99 (61.9%) sub-sectors of the 160 sub-sectors contained in the Sectoral Classification List W/120. And commitments have been made in every mode of supply under the agreement, though subject to different levels of liberalization. The commitments made under the sectors covered reflect the level of discrimination maintained in the sense of national treatment under the EIA. A closer look at the 99 sub-sectors scheduled by China under the EIA, reveals 25 (25.3%) sub-sectors in mode 1 are left unbound (no commitments), 5 (5.0%) sub-sectors in mode 2 are left unbound, 11 (11.1%) sub-sectors in mode 3 are left unbound and nearly all (90.9%) sub-sectors in mode 4 are left unbound. 21 (21.2%) sub-sectors in mode 3 of supply and 9 (9.0%) sub-sectors in mode 4 of supply are subject to limitations in the sense of national treatment. As for the implementation of the EIA, China does not need to implement these commitments upon the entry into force, instead, it enjoys a long time-period for implementation of its obligations under the EIA, which is 2026.

In terms of number of sub-sectors, Peru's commitments under the Agreement has covered 135 (84.4%) out of the 160 subsectors contained in the Sectoral Classification List W/120. And commitments have been made in every mode of supply under the EIA. The commitments made under the EIA reflect the level of discrimination in terms of national treatment which will still remain in place upon the full implementation of the EIA. A closer look at the 135 subsectors scheduled by Peru, reveals that 34 (25.2%) out of the total opened 135 subsectors have been left unbound in mode 1 of supply, 9 (6.7%) subsectors are unbound in mode 2 of supply and almost all (89.6%) sub-sectors are not committed in mode 4 of supply. A total of 51 (37.8%) subsectors in mode 3 of supply and 29 (21.5%) subsectors in mode 1 of supply are subject to one or two limitations in the sense of national treatment. As for the implementation period, Peru should have fulfilled the obligations under the EIA by 2026.[72]

[72] The EIA was enforced in 2010 and the implementation timetable is 17 years. See http://rtais.wto.org/UI/PublicShowRTAIDCard.aspx?rtaid=666

3.5. China-Costa Rica

China and Costa Rica signed the EIA on 8th Apr. 2010 and the agreement entered into force on 1st Aug. 2011.

China's commitments under the Agreement are surrounded by significant obligations that are both broader and deeper. In terms of number of subsectors, China has ultimately undertaken commitments under the Agreement in 85 (53.1%) of the 160 subsectors contained in the Sectoral Classification List W/120. And no mode of supply has been *a priori* excluded from the EIA. As for elimination of substantially all discrimination in the sense of national treatment, national treatment in mode 1 has been left unbound in 17 (20.0%) out of 85 committed sub-sectors, only 1 (1.2%) sub-sectors is left unbound in mode 2, 8 (9.4%) sub-sectors are left unbound in mode 3 and 74 (87.1%) sub-sectors left unbound in mode 4. There are 11 (12.9%) sub-sectors in mode 3 and 11 (12.9%) subsectors in mode 4 are subject to one or two limitations in the sense of national treatment. In addition, China has a long timetable (15 years) for fulfilling the obligations undertaken under the EIA and achieve the goal of "elimination of substantially all discrimination".[73]

Commitments taken by Costa Rica under the EIA is slightly broader compared to China, with a total of 93 (61.3%) subsectors of the 160 subsectors contained in the Sectoral Classification List W/120 committed. But the level of commitments is far lower compared to China. Most of the subsectors committed are subject to limitations in terms of national treatment, mostly seen in mode 3 and mode 4 of supply. Specifically, national treatment in mode 1 has been left unbound in 57 (61.3%) out of 93 subsectors, 38 (40.9%) subsectors are left unbound in mode 3 and no commitments have been made in mode 4 of supply. Costa Rica made partial commitments in 7 (7.5%) subsectors in mode 1 of supply in the sense of national treatment and 17 (18.3%) subsectors in mode 4 of supply and all subsectors are subject to limitations in the sense of national treatment. The EIA does not distinguish the implementation timetable between the parties, so Costa Rica has the same implementation period as China, which is 15 years.

[73] The EIA came into force in 2011 and the end of the full implementation period is 2026. See http://rtais.wto.org/UI/PublicShowRTAIDCard.aspx?rtaid=677

3.6. China -Singapore

China and Singapore signed the EIA on 23rd Oct. 2008, and the agreement came into force on 1st Jan. 2009. In terms of sub-sectors, China has ultimately undertaken commitments under the Agreement in 99 (61.9%) subsectors of the 160 subsectors contained in the Sectoral Classification List W/120 and the commitments have covered all four modes of supply. The commitments made under the EIA reflect the level of discrimination in terms of national treatment which will still remain in place upon the full implementation of the EIA. At a closer look at the 99 subsectors covered under the EIA, 25 (25.3%) subsectors have been left unbound in mode 1, 6 (6.1%) subsectors have been left unbound in mode 2, 12 (12.1%) subsectors have been left unbound in mode 3 and almost all (90.9%) subsectors have been left unbound in mode 4. Only a few subsectors are subject to some discrimination in terms of national treatment, specifically, 4 (3.5%) subsectors in mode 1 and 22 (22.2%) subsectors in mode 3 and 9 (9.1%) subsectors in mode 4 are partially committed under the EIA.[74] The implementation period is pretty short, only six years.[75]

The sectoral coverage under Singapore's EIA schedule is much broader, covering 115 (71.9%) subsectors of the 160 subsectors contained in the Sectoral Classification List W/120. As for the level of discrimination in terms of national treatment under the EIA, no commitments have been made in 17 (20%) subsectors in mode 1 of supply, only 1 (1.2%) subsector is left unbound in mode 2 of supply, 8 (9.4%) subsectors are left unbound in mode 3 and most subsectors (87.1%) are left unbound in mode 4 of supply. Partial commitments have been made in 4 (4.7%) subsectors in mode 1 of supply, and 11(12.9%) subsectors in mode 3 and 11 (12.9%) subsectors in mode 4 are subject to one or two limitations in the sense of national treatment. The implementation period is one year less compared to China, which does not have to implement fully until 2014.

		Unbound				Partial Commitments			
EIA	Country	Mode 1	Mode 2	Mode 3	Mode 4	Mode 1	Mode 2	Mode 3	Mode 4
	India	38.2%	21.3%	12.4%	98.9%	2.2%	2.2%	32.6%	1.1%

[74] These limitations take the form of:

[75] The EIA came into force in 1st Jan. 2009 1 and China does not have to fulfil its commitments until 2015. See Committee on Regional Trade Agreements, Factual Presentation Free Trade Agreements between China and Singapore (Goods and Services), 7th July 2014, WT/REG262/1. pp.4.

India-Japan	Japan	26.2%	4.1%	2.5%	25.4%	2.5%	0%	25.4%	2.5%
India-Malaysia	India	28.8%	6.0%	31.8%	95.5%	1.5%	1.5%	25.8%	3.0%
	Malaysia	0%	0%	15.5%	98.6%	1.4%	1.4%	15.5%	1.4%
India-Singapore	India	37.5%	25%	13.8%	68.8%	1.25%	1.25%	46.3%	26.3%
	Singapore	36.1%	0%	23.3%	97.7%	0.8%	0.8%	6.8%	0%
China-Peru	China	25.3%	5.0%	11.1%	90.9%	2.0%	0%	21.2%	9.1%
	Peru	25.2%	6.7%	0%	89.6%	21.5%	3.0%	37.8%	8.9%
China-Costa Rica	China	20%	1.2%	9.4%	87.1%	4.7%	0%	12.9%	12.9%
	Costa Rica	61.3%	0%	40.9%	100%	7.5%	0%	18.3%	0%
China-Singapore	China	25.3%	6.1%	12.1%	90.9%	2.0%	0%	22.2%	9.1%
	Singapore	23.5%	0%	5.2%	99.1%	3.5%	0.9%	9.6%	0%

4. Mutual Recognition Agreements – MRA

4.1. Introduction:

The GATS allow Members to deviate from the MFN requirement and set up bilateral or plurilateral Mutual Recognition Agreements (MRAs). This reflects the assumption that MRAs hold great potential for facilitating the movement of professional services suppliers, are instrumental to policy reform, and represent powerful tools for economic integration, while maintaining the diversity of services that come onto the markets.

The skill levels in professions such as Information communication technology and engineering, management consultancy, health services and its related tourism are some of the strong sectors in India. There is a high demand for these sectors in the developing economies and in the general international market. However, the bilateral trade will not increase unless market access and regulatory barriers to trade are addressed. These services are supplied through People-to-people connectivity. That is easier movement of professionals and workers across the border that facilitates bilateral trade and market integration.

The usual barrier is the qualification requirements and standards in the partner countries that are different from Indian standards, in addition to the limited knowledge about each other's market.

Hence, the first step would be the need for greater interaction and sharing of knowledge among professional bodies through bilateral agreements-MoU i.e. through Institutional connectivity on different levels; government-to-government, between professional bodies,

between industry associations, between government and businesses, and between businesses and businesses. That includes exchanging information and expertise on standards and qualification and promoting the adoption of best practices that have been tried and tested along with capacity building and training of professionals.

This is usually followed by assessment exercises on studying the market demand of certain professional skills and the supply strength of India and vice-versa. Once such assessments are done, India can utilize such assessment reports in Mutual Recognition as mandated under Article VII, while negotiating Economic Integration Agreement under Article V of GATS in the WTO regime as a trade facilitation measure.

Importantly, MRA's are not restricted to EIA's, there could be bilateral agreements that can be signed between two countries using a MoU between two respective nodal agencies like in the India-UK recognition agreement in 2015[76]. In both these modes of recognition, there is also "no substantial coverage" requirement, which can be good or bad based on the specific agreement, the time factor, and the countries India engages. As a good practice for India, it can have MFN idea while negotiating, although not required to adhere. Because, having such notion can help to stay in line and not laterally shift for each country for similar measures. It can help India in creating a path that is certain, develop its standards on the same line and offer other countries a clear picture as what to expect and offer, this in turn can enable other countries make domestic efforts to meet those standards that can facilitate such agreements in the future. It develops a predictable environment, which is the core premise of recognition.

There is also high probability of encountering difficulties in bring the agreement to effectively into practice for various reasons, which is discussed below.

This becomes an important component in trade negotiations because developing economies are expressed their general interest on mode 4, which is a sensitive area to India.

Overall, the Mutual recognition agreements are living documents that require continual revision, improvement, and renegotiation. To put this in context the opinion of the ASEAN

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[76] India- United Kingdom signed on March 2015 by the Ministry of Skill Development and Entrepreneurship(MSDE) and UK India Education & Research Initiative.
(AREAS COVERED - Institutional capacity-building, Sharing of technical expertise, best practices, Joint initiatives such as validation of National Occupational Standards, teacher training and use of ICT, Collaborative research, Joint training on entrepreneurship development).

countries is listed below which might be of interest to India, being a dominant economy in the Asian region.

GATS Art. VII:

> *1. For the purposes of the fulfilment, in whole or in part, of its standards or criteria for the authorization, licensing or certification of services suppliers, and subject to the requirements of paragraph 3, a Member may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.*
>
> *2. A Member that is a party to an agreement or arrangement of the type referred to in paragraph 1, 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.*
>
> *3. A Member shall not accord recognition in a manner which would constitute a means of discrimination between countries in the application of its standards or criteria for the authorization, licensing or certification of services suppliers, or a disguised restriction on trade in services.*
>
> *4. Each Member shall*
>
> *(a) within 12 months from the date on which the WTO Agreement takes effect for it, inform the Council for Trade in Services of its existing recognition measures and state whether such measures are based on agreements or arrangements of the type referred to in paragraph 1;*
>
> *(b) promptly inform the Council for Trade in Services as far in advance as possible of the opening of negotiations on an agreement*

or arrangement of the type referred to in paragraph 1 in order to provide adequate opportunity to any other Member to indicate their interest in participating in the negotiations before they enter a substantive phase;

(c) promptly inform the Council for Trade in Services when it adopts new recognition measures or significantly modifies existing ones and state whether the measures are based on an agreement or arrangement of the type referred to in paragraph 1.

5. Wherever appropriate, recognition should be based on multilaterally agreed criteria. In

appropriate cases, Members shall work in cooperation with relevant intergovernmental and non-governmental organizations towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions.

1.2 General

1.2.1 Electronic commerce

1. With respect to application of Article VII to electronic commerce, see the Progress Report adopted by the Council for Trade in Services in the context of the Work Programme on Electronic Commerce on 19 July 1999.1

1.2.2 Financial Services

2. Paragraph 3 of the Annex on Financial Services relates to recognition in the area of financial services.

1.3 Article VII:4 Format for notifications

3. With respect to the format for notifications under paragraph 4, see the Guidelines for Notifications under the General Agreement on Trade in Services.

1.4 Article VII:5 Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector

4. On 29 May 1997, the Council for Trade in Services approved the voluntary Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector.

5. Analysis of GATS Article VII: Recognition

Mutual recognition has been incorporated in the international trade regime in reference to Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), the Agreement on Technical Barriers to Trade (TBT Agreement) and the GATS.

Article VII and Article 3 annex of Financial services of the GATS allows WTO members to reach MR with regard to "education or experience obtained, requirements met, or licenses or certificates granted". We shall restrict in analyzing Article VII for aiding article V for this work. Article V on Economic integration agreements does not explicitly preclude MRAs, and most countries have chosen to notify their MRAs under this provision. India has followed suit.

Non-Compliance of notification obligations under Article VII - complaint raised by India

India has raised doubts about Members' principle compliance with the notification requirement under Article VII and perceived information gaps in the notifications actually made in several meetings of the Council for Trade in Services in 2003[77].

On August 26, 2016, India again raised its concerns with Singapore, South Korea and Japan that despite signing services deals as part of the free-trade agreements (FTAs), India is not benefiting as they refuse to sign mutual recognition agreements (MRAs) recognizing professional degrees issued by Indian educational institutions. Though the FTAs that India has signed with Singapore, South Korea and Japan aim to create MRAs for professionals such as accountants, auditors, architects, doctors, dentists and nurses within one year of entry of force of the bilateral trade deal.

This brings the relevance of signing an MRA is not an end in itself, implementation in timely manner is crucial to service suppliers to enjoy the benefits of trade arrangement. This shall yield some lessons, if a large economy like India feels the delay in implementation of MRA's a trade barrier, it must count this into the future negotiation with its prospective partners, especially if they are smaller economies.

Article V:6 requires participants in an integration agreement to extend "the treatment granted under such agreement[78]" (possibly includes for recognition measures) to juridical

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[77] (WTO documents S/C/M/67, 68 and 69 of 17 September, 28 November and 15 December 2003).

[78] Article V.6. A service supplier of any other Member that is a juridical person constituted under the laws of a party to an agreement referred to in paragraph 1 shall be entitled to treatment granted under such agreement, provided that it engages in substantive business operations in the territory of the parties to such agreement.

persons of other Members that are constituted under their laws and engage in substantive business operations in their territory, there are no equivalent provisions applying to natural persons of other Members supplying services within the relevant area.

5.1. Essentiality of Article VII

However, Article VII of the GATS dealing specifically with recognition, strikes a delicate balance by allowing such agreements, provided they are not used as a means of discrimination and third countries have the opportunity to accede or demonstrate equivalence. It shall be inferred that this provision, with its desirable non-discriminatory and open-ended nature, doesn't override Article V of the GATS as far as MRAs are concerned but signals the essentiality of recognition measures for a EIA to work. In practice invoking Article V for Economic Integration does not rule out other obligations of GATS, thus article VII is a reinforcement of the need for recognition which is the core of cross-border service supply and suppliers.

The other provision in Article VII is to balance the freedom of third countries to enter into MRA's and facilitating the free movement of professionals. The Article VII (2) specifically states interested Members "shall afford adequate opportunities for other interested Members to negotiate their accession to such an agreement or arrangement or to negotiate comparable ones with it" or in the event of autonomous recognition, to demonstrate that their education, licenses, etc. should be recognized as well. The rationale behind the provision can be understood with respect to India. India does have individual webpages by individual agencies like for Nursing is here. But it would be much more beneficial if India makes effort to setup a one easy to read digital curated web page listing all standard of all the professions India has been currently trading in services and shared with existing and potential partners, it can be an excellent source of preparation guide before negotiation and saves time. It is a measure of Transparency provision listed under Article VII (3)(b). The transparency obligations can help in two ways, one in spotting if any disguised restrictions, and aid third countries to decide if wants to accede into the agreement.

The flip side of this setup could be, it can posture as a pre-emptively deterrence even prior to negotiation for countries that has high marginal difference in standards. Hence, it would be better to add footnotes that can indicate the flexibility and spirit of Article V and preferential treatment be applicable to recognition measures too.

The delay in operationalizing the MRA has mostly been an administrative issue by the concerned regulatory agencies, there is uncertainty in timeline. This is a negative aspect for

India and stymie the economic prospect of emerging countries and LDC's. India has raised such concerns as serious.[79] There could be multiple reasons for the delay, the political or sudden economical changes. The absence of any specific timeline specified in Article VII, that is an exempt from the MFN requirement under Article II (1) for an indefinite period of time could also be general reason why timeline for implementation has always been a contentious issue. By reading with Article IV (3) on priority to be given to LDC's and read with Article IV (Increasing Participation of Developing countries) and VI (Domestic Regulation) for understanding holistically.

Time shall be considered a very critical factor for smaller economies and must be given high priority. Having an EIA, and recognition agreement signed under Article V, but no mutual authorization of each other's standards would certainly restrain the supply and generate losses to service and its suppliers. This would appear as disguised restriction that is clearly prohibited under VII (3) states recognition must not constitute "a means of discrimination between countries" in the application of standards etc. or "a disguised restriction on trade in services".

This can disincentive other countries from showing willingness to engage with such countries.

5.2. Regulatory concerns

Article IV.1(a) - relates to strengthening developing country domestic services capacity, efficiency and competitiveness. India's interest to expand its trading partners in services, especially with low developed or developing countries that has huge demand for India-strong services. It has to take considerations of the objective impediments that could have discouraged the use of recognition measures such as; absence of effective coordination links between the administrations directly involved – e.g. lack of coordination between sector ministries, government-mandated private bodies, trade ministries coordinating with WTO; lack of incentive due to the persistence of formal access barriers (discretionary licensing etc.) and the absence of effective regulatory disciplines under Article VI.

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[79] Commerce minister Nirmala Sitharaman met her counterparts from Singapore and South Korea and raised concerns about the delay in concluding MRAs. "I told my counterparts from Singapore and South Korea that the services agreements are not helping us due to lack of MRAs. The issue has also been raised separately with Japan,"- RCEP (Regional Comprehensive Economic Partnership) ministerial at Laos on 5 August.
(https://www.livemint.com/Politics/4aDjezDhFLkYOhRfIhFN2O/India-urges-Singapore-S-Korea-and-Japan-to-sign-MRAs-on-de.html)

Fears about perceived losses of regulatory sovereignty which can be a key aspect of restrain in India's potential partners who are economically and structurally not efficient, also is India yet to have provisions in place on par with the advanced economies ; concerns about the credibility and integrity of foreign licensing and certification bodies; incompatibilities of the relevant education, training and licensing systems; incumbent suppliers' interest in retaining discretion in the licensing processes; high cost of negotiating recognition schemes and monitoring their operation over time; and absence of suitable blueprints and actionable plan with timeline.

Article IV.1(b) – "relates to the improvement of developing country access to distribution channels and information networks".

This provision invokes the need for transparency in the MRA negotiations, that helps third parties' accession to the agreement, since LDC/developing countries shall be more assured of terms prior to access. This can also help in India developing some sort of multilateral guidelines of MRA that is suitable for developing and LDC's. Also, notification and reporting requirement to be submitted to the WTO secretariat "as far in advance as possible" of recognition negotiations under Article VII. 4(b). This suggests the emphasis on the timeline, which both countries shall prioritize in signing and implementation of MRA based on their demand and prospect.

5.2.1. Proactive harmonizing initiatives

Article IV.1(c) – relates to the liberalization of market access in sectors and modes of supply of export interest to developing countries. India shall use this as an opportunity and initiate special efforts such as capacity-building, technical assistance for facilitating the recognition of the academic and professional qualifications of LDC/developing country professionals in the party countries in THE MRA.

This shall also help the stimulate the professions of the other party to make the necessary adaptations to become and remain competitive on the market that provides policy-makers with an opportunity for domestic regulatory reform.

Article IV.2(a),(b) and (c) call upon "developed country members to supply, through the establishment of contact points, information to developing country members concerning commercial and technical aspects of the supply of services, registration, recognition and obtaining of professional qualifications and the availability of services technology" The contact may play the role of facilitators of Recognition mentioned under Article VII on

professional qualifications of developing country professionals and developing country participation in international standard-setting activities.

Article VII (5) specially provides for "wherever appropriate" development of international standards that can help parties to adopt rather than enable LDC's/developing countries to enact their own standards to match India's standard requirements and must be read with VI (4) that states Council of Trade in Services through appropriate bodies establish or develop necessary disciplines to facilitate and not constrain or burdens beyond the expected assurance of quality of service.

International Standards[80] as benchmark to develop India specific guidelines.

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[80] 1- Washington Accord- 1998 for engineering education and programs.

2- EMF 1997- it was agreed to establish an independent forum called the Engineers Mobility Forum Its objectives are to: facilitate the international movement of professional engineers.

(Professionals registered in the register are exempted from or get a streamlined access to licensing or registration in the other participating countries. However, as far as the right to practice is at stake, domestic regulations may restrict it. India is yet to become a full member of it.

3-1999- Adopted- *The International Union of Architects (UIA*) a federation of national professional organizations. It now represents some 1,300,000 architects in more than 100 countries. The UIA established the Professional Practice Commission that has developed the "UIA Accord on Recommended International Standards of Professionalism in Architectural Practice" (the Accord) and nine related Accord policy guidelines

(The Accord was adopted in 1999 as a global standard for the profession. The UIA encourages governments and regulatory agencies to adopt the policies of the Accord as the basis for reviewing and making appropriate revisions to their own national standards and as the basis for negotiating MRAs)

4- *Sidney Accord* – an agreement was developed for engineering technologists or incorporated engineers.

5-2002- *the Dublin Accord* for engineering technicians.

The *WTO Guidelines on Mutual Recognition in the Accountancy Sector* (S/L/38, 28 May 1997), produced by the Working Party on Professional Services, represent an example of efforts carried out by WTO Members under Article VII.5*.(The establishment of guidelines for the recognition of qualifications was one of the three pillars of the Working Party's mandate. The Working Party on Professional Services was replaced by the Working Party on Domestic Regulation in April 1999.)*

The Guidelines are voluntary and non- binding and are aimed at facilitating the negotiations of MRAs in the accountancy sector and the accession of third parties to existing ones. The intent is to assure that foreign qualifications are evaluated in a non-arbitrary, non-discriminatory way, and to make sure that the process is fair and open. The guidelines cover both the process for negotiating and the substance of the agreements.

To emphasis on the adoption of existing International standards developed by NGO's, we can compare GATS to TBT agreement's "Code of Good Practice" for the Preparation, Adoption and Application of Standards (Annex 3 to the TBT Agreement) refers to the activities carried out by any standardization body, including non-governmental bodies, which develop standards, i.e. rules, guidelines or characteristics for products and related processes and production methods with which compliance is not mandatory but is open for acceptance to any standardizing bodies including the government.

Some of the International Standards developed by professional bodies that can serve as non-binding but adaptable measures. As mentioned above they do not seem to strictly comply with Article 1.3(a) of GATS and may appear as not binding but has been adopted by most developed countries for best practices and guidance in framing their own. The only concern would be, even for India, those might be of yet to achieve standards. As countries that have adopted the above are developed countries, so that might become a higher burden for lower economic countries.

Nevertheless, these guidelines can serve India developing its own standards, without much deviation from the International standards or best practices. Being an aspiring global power in from the south, it must incorporate the regional values while formulating standards sensitive to other parties' economic status and preferential treatment mandated under Article V. It shall develop attainable standards for developing/LDC's that it mutually beneficial but not lay down unachievable standards that becomes a barrier, which is unfair trade practice.

At the same time, it must be prudent in putting forward more capacity building and training measures in the agreement that can incrementally match the education, qualifications standards of India. This, even if it sounds effortful or slow, is much more beneficial for India in the future automaticity of recognition process.

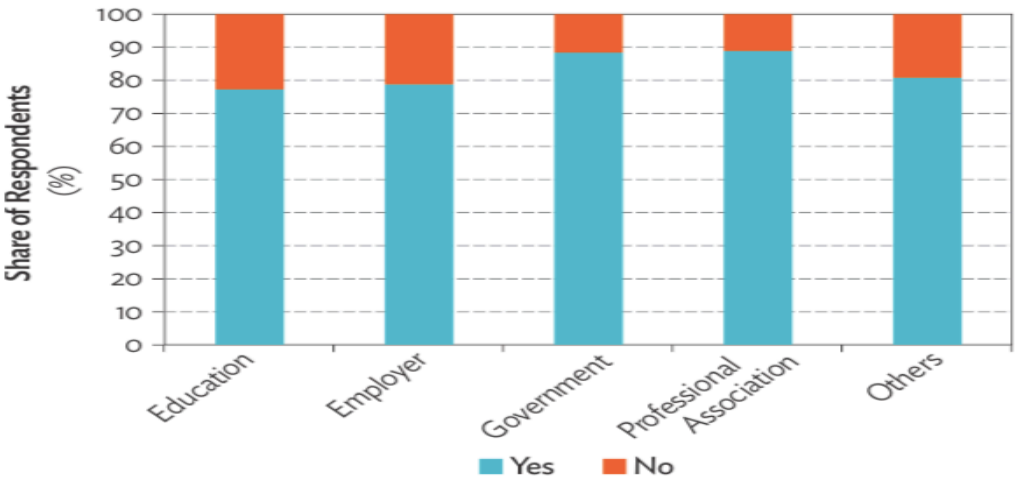
5.3. Example: The ASEAN Case – MRA's

Some of the members of ASEAN have expressed their expectations, optimism and benefits of successful MRAs. Why is that important for India? Because these countries might be willing to and are within the scope of potential partners for India in services trade.

Figure1: Responses to the Survey Question "Do You Think that the Mutual Recognition Arrangement Will Facilitate the Hiring of Professionals from Other ASEAN Countries into Your Country, and Vice Versa?"

Source: Asian Development Bank-Migration Policy Institute (ADB-MPI) Questionnaire – MRA Implementation, August 2015–February 2016

The WTO Working Party on Domestic Regulation (WPDR) was established on April 26. 1999. The emphasis of WPDR is on the development of generally applicable disciplines for all service sectors. It was further adopted by the Council for Trade in Services on March 28. 2001.



Notes:

"Others" includes respondents who are practitioners, or work in hospital or other settings. Data based on the 171 respondents[81] who answered the survey question.

Respondents: Brunei Darussalam[82], Cambodia, Indonesia[83], Lao People's Democratic Republic Lao PDR[84], Malaysia, Myanmar, (Philippines, Thailand, and Viet Nam)[85].

5.4. Different approaches and types of MRAs

Approaches could vary, the two basic approaches are;

Vertical approach, recognition is provided on a specific profession-by-profession basis by either harmonization or coordination among the parties to an MRA of the education and training required by each profession known as harmonization-based approach.

Horizontal approach is provided without prior harmonization of the above requirements, it is based broadly on equivalence of qualifications also known as equivalence-based approach. For example, if country A has been training nurses in certain specific standards such as nursing education, medicine knowledge, domestic and cultural sensitivity, and if country A wants to export or import the nursing skill to/from country B, which is different

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[81] Nearly 90% of respondents from governments and all respondents of professional associations said they believe in the potential mobility benefits of the MRAs, and the same is true of nearly 80 percent of respondents from the academic and business sectors

[82] the MRAs will make the recognition process "easier, faster" and more "cost-effective,"

[83] "much easier and unrestricted" intraregional flow of professionals' due to the creation of a "shared regional framework

[84] "full support" to professionals, including widening access to work and immigration permits, and thus increasing mobility

[85] A range of government officials across professional sectors in the Philippines, Thailand, and Viet Nam share similar positive expectations

from A's standards. Country A, let their nursing regulatory agency jointly explore ways to fill that difference by either through an exams to taken in country A's standards or require a 3 or x months training in country A before beginning practice, or a combination of both. This way, its faster, because it does not involve because its fixing the deficit rather than building standards together from basic (Vertical method) i.e. sharing the education curriculum and training methods and then recognize it. The vertical approach might look convincing, but countries with distinct culture and political expectations doesn't allow that to happen seamlessly. This is why, horizontal method is preferred, it doesn't mean the vertical method should be seen as less attractive, it is a long process yet highly beneficial, that is why India shall aim to have more MoU's with countries to slowly synchronize those standards for the future.

Table 1: Procedure

Vertical	Horizontal	Hybrid
1-Harmonized 2-Long process- agreeing upon the details of each profession and implementing specific rules for each profession is a long and laborious process and usually requires significant time and efforts. 3- Clearly, there could be great value in pursuing harmonization in sectors and occupations that are extremely relevant to regionally set goals—as long as the parties involved	1-Equivalence of standards 2-Fast- often accompanied by a system of compensatory measures[86] to offset possible gaps among existing education and training systems (which have not been harmonized) of the countries parties to the MRA so preferred pattern 3- It can be less resource intensive: regulators do not need to create new structures but instead utilize what already exists at the	Could both components, namely the recognition of the equivalence of the substantive requirements, as well as the recognition of the home country's authority to certify such training through the granting of diploma

[86] Compensatory measures bridge the difference in the scope of practice rights or of formal qualifications between MRA parties, and may take various forms, including bridging courses, mentoring programs, on-the-job training, supervised or conditional work, and aptitude tests.

are aware of and commit to finding and investing the required resources.	local level. Ensuring compliance, however, is difficult. Decentralized registration bodies may unilaterally decide to apply licensing requirements contrary to the spirit of the MRA	
Example: MRA of Academic qualification in MERCOSUR, Washington accord on engineering	Example: MRA of professional qualifications - TTMRA- Australia and New Zealand. European Union professional Qualifications directive	

Table 2: Substantive elements in MRA

Vertical	Horizontal
Contains one of elements: Professional qualifications, the content of studies and licensing examinations	Procedures by which individuals are made to conform and comply with requirements, including through examination, and the process by which the institutions that certify them are themselves accredited

Note: Horizontal approach - partial lack of predictability and automaticity of market access conditions and the risk of arbitrary behaviours by host authorities represent limiting factors of the horizontal approach.

5.5. India's Case

India has recently notified under Article VII (4) of GATS on 5 March 2019 a list of MRA's complying Article 1.3(a) of GATS.

It is worth noting here that according to Article I.3(a), GATS applies to "measures by Members"; those are "measures taken by: (i) central, regional or local governments and authorities; and (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments and authorities"[87] and MRAs negotiated by other than government- approved authorities, will not be binding on States nor will they be held accountable for the implementation and the agreements will not fall under the transparency and accession obligations spelled out in GATS Article VII. However, in practice, as long as the government approves and signs the standards drawn by any Indian entity, it is "measures"[88] by members.

5.5.1. Nursing services

It can be broadly classified under the horizontal approach, for example in the recent MRA with Singapore on nursing services signed in 2018. Article 2.4 states both countries shall recognize qualification granted by a recognized training institution approved and recognized by the Nursing Regulatory Authority of the Country of Origin. Art 2.1 defines Country of Origin as either India or Singapore, where the Registered Nurse has a valid and Current License to Practice nursing.

5.5.2. Accountancy services

Similarly, India's nodal authority in accountancy services, The Institute of Chartered Accountants of India (ICAI) signed MOU with UK, Ireland, Canada, South Africa, Australia and New Zealand on Mutual Recognition of accountancy service professional provided they satisfy the requirements of country specific examinations additional to education requirements to be exempt from practical training requirements.(listed below in Table 3) merely to exhibit the approach type India is handling and not a detailed analysis of each country and conditions.

This can help in identifying the advantages and disadvantages of adopting such approach with partner countries and the constrains it might have to face during negotiating services agreements since EIAs are aimed at progressive liberalization and economic progress of

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[87] This definition refers to the attribution of conduct to a State for purposes of State responsibility under international law. Cf. Article 4, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, adopted by the International Law Commission at its fifty-third session (2001) ("Report of the International Law Commission on the work of its Fifty-third session", *Official Records of the General Assembly*, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.1).

[88] Article 27(a) "measure" means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form;

developing/LDC's that are chiefly dependent on professional services (Mode 1 and 4) which directly depends on Mutual Recognition Agreements on a time bound manner. It only means MRA becomes a very important element in implementation of mode 1 and 4 but not any less important in other modes of supply.

6. Benefits of formulating India-specific guidelines

These guidelines could also additional serve another purpose, it can set some India-specific preconditions that countries should satisfy in order to be considered as eligible partners for new negotiations, e.g. the existence of a domestic system for regulating the profession at stake; the existence of an accreditation system; a national register of professional and such. This kind of "screening" would ensure that negotiations are extended to additional parties only when there are realistic chances of successfully including them in the agreement. This can be a valuable effort for India to develop an internal guideline that shall come up with setting a particular stage of the negotiations at which transparency obligations under Article VII.3(b) would be invoked. This can avoid countries unnecessary burden of inconclusive negotiations.

The Article VI.5(b) of GATS[89] requires account being taken of relevant international standards applied by that member, hence for practical purpose it can be interpreted as not strictly binding. Therefore, India while adapting the existing standards or creating a whole new set of draft for LDC's or developing countries solely relies on negotiating partners.

Also, harmonization of standards entails major benefits for lower economies: it promotes market efficiency and expansion; fosters international trade, including at the regional level; encourages competition and lowers barriers to market entry; provides the basis for establishing domestic regulatory requirements; diffuses new technologies; protects consumers against unsafe or substandard products/services; and reduces disputes. Hence, the reason why countries choose the easier option of horizontal approach in MRA's.

Caveat: Countries can have two sets of standards, one for International trade and development in harmonizing certain specific qualifications and training. The other is state-cultural specific education and development for harnessing its native and domestic strength,

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[89] Article VI (Domestic Regulation)

5(b) In determining whether a Member is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organizations applied by that Member.

for the state's distinctive economic and social status in the world. This rift in approach can sometime stymie the implementation of MRA's, since this falls under the political sphere. Hence clear policy in delineating the both could help the process.

Overall, adopting international standards provisions under VI and VII is not as strong as in SPS or TBT agreements of WTO, which gives India more flexibility in designing the guidelines that is workable and adjust to countries keeping the existing International best standards as the benchmark.

7. Beyond GATS and WTO

As an alternative to the MRA's under Article VII of GATS, India can also independently negotiate bilateral agreements independent of WTO. It has signed recognition and adequacy MoU's with some countries, which can be greatly beneficial in supporting the EIA's formation.

The Ministry of Skill Development and Entrepreneurship (MSDE) has engaged actively in this with the purpose of technology transfer in skill training, training of trainers, setting up of model and centres of excellence.

In addition, active collaboration is being sought in the area of creation of international mobility through mapping of job roles and development of transnational standards. Overall, the strategy for International framework focuses around implementing and adapting the best practices in skill development of respective countries systems in India. Why is this progressive and important to India? Because this is a long process, where India is making efforts to harmonize its qualifications accepted by others and involving in capacity-building in other potential partners aligned with India's export strength and import demand in services.[90]

Table 3: Bilateral agreements - MoU's India has signed in capacity building and recognition by Ministry of Skill Development and Entrepreneurship, India.[91]

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[90] https://www.msde.gov.in/aboutus.html

[91] The Ministry is responsible for co-ordination of all skill development efforts across the country, removal of disconnect between demand and supply of skilled manpower, building the vocational and technical training framework, skill up-gradation, building of new skills, and innovative thinking not only for existing jobs but also jobs that are to be created.

The Ministry aims to Skill on a large Scale with Speed and high Standards in order to achieve its vision of a 'Skilled India

MoU- between parties Signed by (MSDE, DGT, NSD, NSDA)[92]	Year	Agency/Dept	Signed by	Expected Outcome[93]
India- UK	Mar – 2015	UK India Education & Research Initiative	MSDE	Institutional capacity-building, Sharing of technical expertise, best practices, Joint initiatives such as validation of National Occupational Standards, teacher training and use of ICT, Collaborative research, Joint training on entrepreneurship development.
	Jan - 2014	Association of Colleges UK	NSDC	support in building training capacity, functional skill assessments, international benchmarking in certifications

[92] MSDE- Ministry of Skill Development and Entrepreneurship

DGT- Directorate General of Training

NSDC- National Skill Development Corporation

NSDA- National Skill Development Agency

[93] Note: This is just for indicative purpose, for original arrangement please see here

	Nov - 2013	Department for Business, Innovation and Skills- UK	DGT	Institutional capacity-building, sharing of technical expertise, Supporting development of employment services in India on the lines of National Careers Service,
	Mar – 2011	UK Commission on Employment and Skills	NSDC	performance management, impact assessment, Standards and Qualifications, Qualification frameworks
India-Germany	May - 2011	IMOVE (International marketing of Vocational Education under BiBB)	NSDC	Knowledge transfer and fostering of private sector initiatives and collaboration
	May - 2011	Federal Ministry for Education and Research of Federal Republic of Germany	DGT	Mutual recognition of qualifications, Sharing and development of competency standards
India-Australia	Jan – 2015	TAFE SA and Heraud		Global Standard Multi Skill Development Center to be setup
	Nov – 2014	TAFE directors Australia		Reciprocal staff exchange and study tours to develop professional capability,

			NSDC	Advanced teacher training programs
	Nov – 2014	Australian Council for Private Education & Training (ACPET)		Promote strategic partnerships between training members.
	Sept - 2014	Department of Industry, Australia and now shifted to Department of Education		Developing transnational standards to strengthen skills mobility by making NOS transnational in 4 sectors (Auto, Healthcare, Telecom & IT) across 8 job roles
India- USA	Apr – 2015	US community Colleges	NSDC	Set up Academies of Excellence in India mainly in Capacity Building of the type and quality matching International Standards. Developing expertise in areas of curriculum development, teaching and learning resources development, occupational standards, testing and certification etc.
	Nov - 2014	US-India Business Council (USIBC)		To work with US companies to ensure that in a span of 3 years, they support 10 training centres that are expected to scale to reach a

				capacity of around 10,000 persons per year. Over a 10 year period these centres should be able to train 1,000,000 people. The specified sectors are Life Sciences, Healthcare, Tourism, Hospitality, Automotive, Electronics, Heavy Equipment Manufacturing, FMCG, Aviation, BFSI, IT/ITES, Agriculture, Defense and Infrastructure.
India-Canada	Feb - 2014	Associate of Canadian Community Colleges	NSDC	Objectives: Community colleges - 10 loan proposals to set up Academies of Excellence in India of the type and quality matching International Standards. Each entity is committing to create min 50,000 qualified skill Trainers & Assessors in a period of 10 yrs.
India-Singapore	July - 2012	Ministry of Education, Singapore	DGT	Capability Development in Vocational Education & Skill Development
India- EU	June-2014	European Commission	NSDA	Enhanced capacity of the beneficiary institutions to

				apply and adopt a European best practice perspective Development and maintenance of the national qualification framework for India, including the National Occupational coding Labour market information systems and analysis practices
India-France	Jan - 2015	CNCP (Commission Nationale de la Certification Professionnelle-CNCP)	NSDA	Work out methods of cooperation in the area of qualifications register
India- Iran	July - 2014	TVTO (Technical and Vocational Training Organisation)	NSDC	Sharing Indian national occupational standards (NOS) and Qualifications Pack QP to support IT based training systems.
India- China	May - 2015	MHRSS (Ministry of Human Resources and Social Security)	MSDE	Advisory and knowledge sharing, development and designing of courses and curriculum, skill standards, qualification framework and competency standards,

India- Qatar	June 2016	National Qualifications Authority/Supreme Education Council, Government of the State of Qatar	MSDE	Skill development and mutual recognition of qualifications to facilitate mobility of skilled workers from India to Qatar.

8. Notable Observations for India from ASEAN- Mutual recognition

Figure 2: Additional Requirements for Permanent Licensing of Foreign Nurses, by Country[94]

Country	Competency Assessment	Local Language Requirement	English Language Requirement	Educational Qualifications	Minimum Years of Study	Pass National Licensure Exam
Brunei Darussalam	No	Malay	Yes	Diploma/Bachelor	No	n/a *
Cambodia	Yes	Khmer	No	Diploma/Bachelor	No	Yes
Indonesia	Yes	Bahasa Indonesia	No	Bachelor	No	Yes
Lao PDR	No	Laotian	No	Diploma	3	Yes
Malaysia	No	No	Yes	Diploma/Bachelor	3	
Myanmar	No	No	Yes	Diploma/Bachelor	3	Yes
Philippines	No	No	Yes	Bachelor	No	Yes
Singapore	Yes	No	Yes	Diploma/Bachelor	No	Yes
Thailand	No	Thai	No	Diploma	3	Yes
Viet Nam	n/a **	Conditional***	No	n/a **	n/a **	n/a **

The above figure can explain the complexity in negotiating mutual recognition and implementation with smaller economies and even developed countries like Singapore.

[94] The national licensure exam in Brunei Darussalam has been listed as "currently N/A."

Viet Nam has not yet confirmed requirements of competency assessment, educational qualifications, minimum years of study, nor the necessity of passing a national licensure exam.

In Viet Nam, foreign nurses may either pass the language requirement in Vietnamese or use an interpreter.

Sources: ASEAN Joint Coordinating Committee on Nursing (AJCCN), Registration Requirements Process for Overseas-qualified Nurses, as of 18th AJCCN, accessed 10 September 2016, www.asean.org/wp-content/uploads/2012/05/Registration-Licensing-Requirements-21st- AJCCN.pdf; AJCCN, Language Requirements for Licensing and Registration, as of 18th AJCCN, accessed 10 September 2016, www.asean.org/wp-content/uploads/images/2015/september/ajccn/AJCCN%20web-5%20Language%20Requirements%20for%20Licensing%20%20 Registration%2018th%20AJCCN.pdf

Figure 3: Engineering Licensing Requirements[95] in the ASEAN Region, by Level of Restrictiveness.[96]

Potential concerns common to any approach in recognition

8.1. Institutional Challenges

(1) inadequate funding (Smaller economies do not have the financial and technical resources to fulfill their growing and increasingly complex mandates, it can be a burden on their spending and allocation of funds beyond their coffers)

(2) lack of coordination among government agencies (Implementation bodies at regional and national levels, where has even led to situations in which multiple government agencies provide the same applicant with multiple certifications, Governments must also navigate a highly complex system with a wide range of stakeholders responsible for various aspects of the recognition process)

(3) Infrastructural incapacity such as implementation offices and bodies

(4) frequent turnover of personnel (resulted in delayed implementation, incomplete legislative and regulatory frameworks)

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[95] In the middle of the spectrum are Brunei Darussalam, Cambodia, Lao PDR, Myanmar, Singapore, and Thailand, where foreign engineers can practice only if they meet additional requirements, some of which are more onerous than others. For instance, foreign engineers wishing applying to practice in Brunei Darussalam for the first time must provide proof of 1 continuous year of residence, while applicants for renewal must prove residence for at least 90 days for every calendar year. Similarly, Cambodia requires at least 3 months of residency and Lao PDR requires permanent residency. Likewise, to apply for registration as a Graduate Engineer in Malaysia, an applicant must be a permanent resident and hold an engineering degree that is accredited or recognized by a national professional body that is a signatory to the Washington Accord (Singapore demands the same)—an international agreement among professional bodies in 15 countries that recognize each other's engineering program.

[96] Handbook on Liberalization of Professional Services Through Mutual Recognition in ASEAN: Engineering Services.

(5) poor data collection and sharing (existing occupation-specific data on professionals are often patchy, making MRA implementation even more difficult without undertaking new data-collection efforts)

8.2. Technical Challenges

The restrictive domestic regulatory regimes that might be yet to align with MRAs signed for certain sectors or some domestic regimes are already more liberal than the MRAs.

The incorporation or transposition of MRA principles into national laws (Ex: Philippines has a constitutional provision that limits the practice of medicine to citizens. The only way for foreign doctors to practice in the Philippines is to get a special temporary permit, which significantly restricts both the length and type of practice)

8.3. Data protection and Privacy

India is the topmost offshoring destination for IT companies have set up over 1,000 global delivery centres in about 80 countries across the world. Having proven its capabilities in delivering both on-shore and off-shore services to global clients, emerging technologies now offer an entire new gamut of opportunities to top IT firms in India, with around 75 per cent of global digital talent present in the country. Strong demand from different geographies are expected to revive the robust growth in the IT exports in the next five years. This bring forth the issue of data protection.

Ironically, India is yet to have a comprehensive data protection and privacy legislation. The GDPR[97] of EU can be a good standard for framing the guidelines of its own, it would be the most significant step towards realizing its ultimate potential of services that has highest potential.

The recent Japan- EU signed mutually recognition[98] of each other's data protection laws as providing an adequate level of protection of personal data in accordance with GDPR creating the world's largest area of safe data flows.

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[97] The GDPR was adopted in April 2016 and added to the EU's general policy of protecting citizen's data. In addition to the notifications of collection and legal ramifications for misuse, there is also a requirement to obtain explicit consent, notify in cases of a hack or breach, appoint dedicated data protection officers, and much more. For financial institutions, the GDPR requires significant investments in compliance to ensure continuing access to the EU market

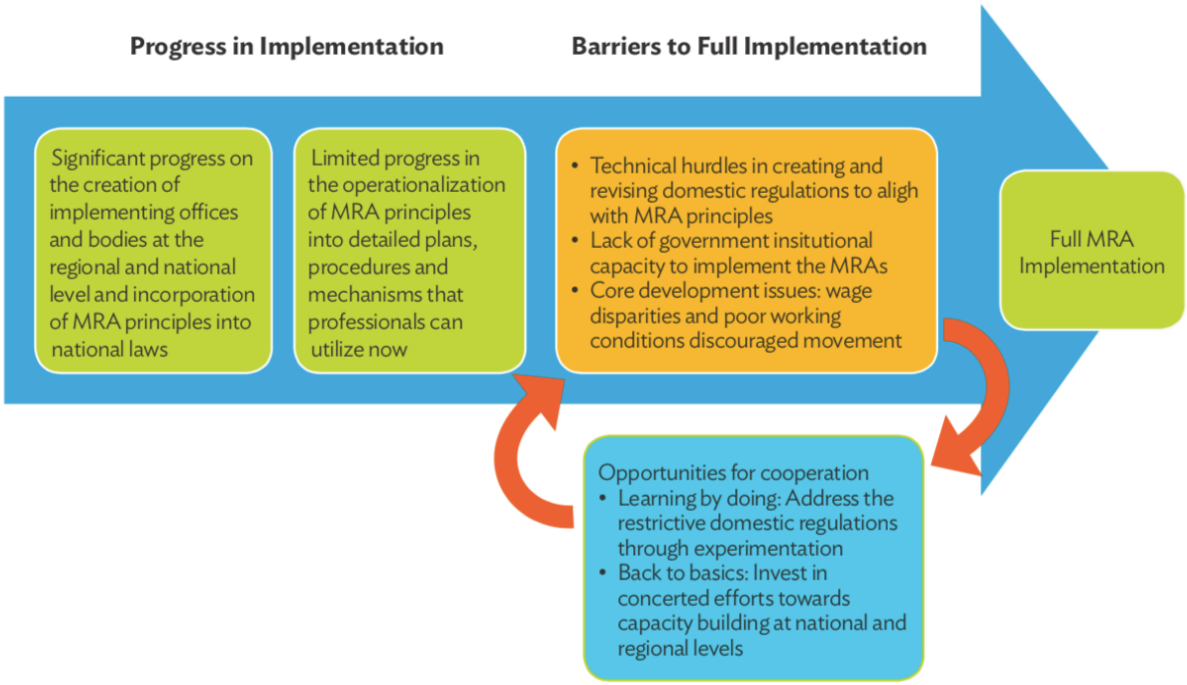
[98] 23 January 2019, EU-JAPAN adopts adequacy decision on data flows- all personal data can now flow freely between the EU and Japan. The European Commission's decision does not apply to transfers of data to media operators, academic institutions, religious organizations and political bodies to the extent the data is processed for press, academic, religious or political purposes, respectively

8.4. Other

(1) the operationalization of MRA principles into detailed regulations, plans, procedures, and mechanisms that professionals can utilize now

(2) Language proficiency requirements (Ex: foreign dentists, language is slightly less common. Only Cambodia requires both local and English language proficiency, Thailand require local language proficiency, while the Philippines, and Singapore require fluency in English)

Figure 4: Looking ahead: MRA Implementation: Progress, Challenges, and Opportunities



9. India's data privacy laws read with EU's GDPR

India has been rapidly progressing towards internet penetration and digitization like the "Digital India"[99] initiative. Its growing strength in IT service industry demands global data privacy and security standards through a comprehensive legal framework. India currently does not have a structured and dedicated data protection law and the regulatory agency to enforce these laws, it is largely non-existent.

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http://europa.eu/rapid/press-release_IP-19-421_en.htm

[99] The Digital India programme is a flagship programme of the Government of India with a vision to transform India into a digitally empowered society and knowledge economy. (https://digitalindia.gov.in/content/about-programme)

India has privacy and personal data protection laws but not as single legal framework as in EU' GDPR.

Some of the important Laws and rules notified on data privacy in India

Information Technology Act, 2000 – came to force on October 17, 2000

The Information Technology (Amendment) Act, 2008[100]

Information Technology Amendment Act 2008 (IT Act 2008)

Information Technology (Amendment) Act 2008 and its effect on the Indian enterprise.

Information Technology Amendment Act 2008 compliance guidelines for India.org.

The IT rules 2011 notification

1. IT (Intermediaries guidelines) Rules, 2011, (under sections 87 and 79(2))
2. IT (Reasonable Security Practices and Sensitive Personal Data) Rules, 2011, (under sections 87 and 43A)
3. IT (Electronic Service Delivery) Rules, 2011, (under sections 87 and 6A (2))
4. IT (Guidelines for Cybercafé) Rules, 2011, (under sections 87 and 79(2))

9.1. Adequacy and Privacy

GDPR's stipulation of the "adequacy requirements" which restrict the transfer of personal data to any third country or international organization that does not "ensure an adequate level of protection". Adequacy requirements will consider whether the legal framework currently prevalent in India affords adequate protection to personal data that would be transferred across the EU and India in the course of services transaction with respect to privacy and protection of their data.

India has proposed a similar legislative framework named "*Personal Data Protection Bill, 2018"* (Herein referred as the bill) The bill is yet to be passed in the parliament, and

[100] This amendment Inserted Section 43A in the IT Act which notified the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011

expected to be tabled post parliamentary elections in 2019. This has created a real concern not just for doing business with EU which a crucial service trade market[101]. It will significantly affect the EIA's that operates through mutual recognition when every country is heading towards passing their own data protection laws that could
contradict each other in some fundamental ways.

Privacy in India is not patently granted in the Constitution of India as a fundamental right like in the EU[102]. However, the recent Supreme Court of India judgement declared privacy as a fundamental right.[103] It has built the momentum for the separate codified law relating to personal data protection within the country in the lines of EU' GDPR.

Privacy and data protection has to assessed together to understand the adequacy requirements of each country and its compatibility with India. India has privacy laws that deals with commerce[104] that might satisfy the GDPR standards for adequacy requirement, but the "IT rules 2011"[105] powered by the "Information Technology Act, 2000" has developed strict rules that made the law complex sometimes conflicting. Some scholars have argued it as positive sign, because it can remove the fears of foreign companies to outsource their services.[106]

Nonetheless, this is crucial to understand the necessity passing the bill and making it law along with the regulatory agency at the earliest so it becomes single legal framework before

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[101] There is a high degree of uncertainty regarding applicability and enforceability of GDPR on Indian companies.

[102] As enshrined in the Charter of Fundamental Rights of the European Union and the Treaty for the Functioning of the European Union.

[103] See, for example, the Supreme Court of India's landmark [2017] judgment in the case of Justice K.S. Puttaswamy v Union of India which held that the right to privacy is a fundamental right under the Constitution of India.
Indian constitutional provisions - Right to privacy given fundamental-right status under Article 14{Equality before law}, 19{Protection of certain rights regarding freedom of speech, etc.} and 21{Protection of life and personal liberty} of the Constitution of India

[104] B.M.Gandhi. Indian Penal Code. India: Eastern Book Company. p. 41.
(The Information Technology Act, 2000 (also known as ITA-2000, or the IT Act) is an Act of the Indian Parliament (No 21 of 2000) notified on 17 October 2000. It is the primary law in India dealing with cybercrime and electronic commerce. It is based on the UNCITRAL Model Law on International Commercial Arbitration recommended by the General Assembly of United Nations by a resolution dated 30 January 1997)

[105] Ministry of communications and information technology (department of information technology) notified, New Delhi, the 11th April 2011
(https://www.wipo.int/edocs/lexdocs/laws/en/in/in098en.pdf)

[106] India data privacy rules may be too strict for some U.S. companies". The Washington Post. 21 May 2011. Retrieved 23 April 2015.

heading towards engaging smaller economies. This high degree of uncertainty regarding applicability and enforceability through multiple privacy and data related laws can undermine India's competitive advantage in IT exports.

As a caveat, India must be careful to balance in developing rules for e-commerce especially while engaging with smaller economies. Having a strict data protection laws such as data localization must not develop a competitive disadvantageous environment for its business and the parties engaged without compromising consumer privacy data.

9.2. Cross- reference: "Personal Data Protection Bill, 2018"(the bill) and GDPR on regulatory standard.

Many countries are developing data privacy laws, but so far GDPR remains the gold-standard. The Bill introduces a restrictive regime for transfers of personal data out of India to third countries, which is the nucleus of the EU model under the GDPR. Other foundational concepts inspired upon GDPR like "data principals" (i.e. natural persons) and "data fiduciaries" (i.e. entities including the State, or individuals who determine the purposes and processing of personal data) are broadly similar to the concepts of "data subjects" and "data controllers", the processing of data personal data like the privacy by design and transparency are analogous to the equivalent principles under the GDPR.

It is envisaged the Data Protection Authority of India (the "Authority") will be established to implement the new legal regime, also adjudicate the breaches and determine the appropriate penalties under "the bill". Certain other factors built along the GDPR is the Extra-territorial application in "the bill"[107] and "data principal rights".[108] Major Indian companies are already aligned or in the process of GDPR compliance, hence, it would not be a major structural chaos to the Indian corporations nor the potential partners. The only area of concern would be the scale and effectiveness of regulator in India and with much more concern in the LDC countries. Which turns the light on cross-border data transfer[109]

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[107] The processing of personal data (i) within the territory of India by Indian data fiduciaries and data processors; and (ii) crucially, to foreign data fiduciaries and data processors where personal data is processed by them in connection with: — any business carried on in India; or — the systematic activity of offering goods or services to data principals within the territory of India; or — any activity which involves profiling of data principals within India. - "Personal Data Protection Bill, 2018"

[108] such as the right to be forgotten, the right to confirmation and access, the right to data portability, and the right to correction

[109] Cross-border data transfers are only possible where: (a) made subject to standard contractual clauses or intragroup schemes in each case as approved by the Authority, (b) the Central Government after consultation with the Authority determines that certain countries/ sectors are permissible locations /

and data localization[110], this usually stretches the economic argument and falls into the political realm, requiring much more attention.

This proposed Personal Data Protection Bill, 2018 along with GDPR adequacy requirements, service industry growth, has triggered increased scrutiny on companies with respect to the vendors they select, because high local standards for data protection has become an important selling point of their service offering.

Thus, it can be deduced that India is on the verge of having a GDPR modelled privacy and data protection law in less than a year with few gaps to be defined and resolved.[111] However, negotiation for Mutual recognition through Article V / VII or bilateral agreement using MoU with emerging economies and LDC's, the negotiators shall have the proposed "the bill" 2018 along with GDPR for reference for adequacy standard and privacy protections.

10. Recommendations

1. Develop a framework that can help in assessing the trade volume.
2. India shall consider amending its original unbound commitments to partial / none in its competitive sectors, to use that as a leverage for reciprocal demand from the other party.
3. Prioritize on initiating arrangements through MoU's for assessment studies on potential partners local standards prior to negotiation, it can be good start. It would greatly help in reducing post-agreement delays. The study of potential value of MRA in CETA[112]

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recipients of data transfers, (c) consent of the data principal (explicit consent in the case of sensitive personal data) has been obtained, or (d) the Authority approves a transfer due to a situation of necessity.

[110] Data localization as per "the bill" at least one serving copy of personal data is required to be stored on a server or data centre located in India. Furthermore, the Central Government has the power to issue a notice setting out certain critical personal data which is mandatorily required to be processed in a server or data centre located in India

[111] Needs definition - 'business carried out in India'- the Bill does not define it, this will inevitably cause difficulties for foreign data fiduciaries and data processors who are seeking to determine whether the new law applies to them.
"purpose limitation" - that personal data may only be processed for the purpose for which it was collected.

[112] The Comprehensive Economic and Trade Agreement is a free-trade agreement between Canada, the European Union and its member states. It has been provisionally applied, so the treaty has eliminated 98% of the tariffs between Canada and the EU. The negotiations were concluded in August 2014

and its recommendation[113] from such a study gives a blueprint to work on[114], India shall undertake similar initiatives.

4. India shall develop a one-stop shop a easy accessible webpage listing all the exiting standards set by respective regulatory agency such as nursing, engineering, accountancy etc, and with update provision every three months. It can be an excellent source of and preparation guide before negotiation and saves time for developing and LDC's.
5. Increased transparency in the negotiations of MRAs and clear rules regarding third party rights represent crucial steps towards making the overall process of MR of academic and professional qualifications more responsive to developing country expectations and needs.
6. India and its partners while opening their professional services markets, could include in the schedules of specific commitments reference to the suitability of concluding MRAs on professional qualifications and timeline.
7. GATS Article IV may be highly relevant for India. It may be argued that the article suggests that developed countries but India shall assume to oblige and make efforts aimed at facilitating the recognition of the academic and professional qualifications of developing/LDC's professionals and their country effective participation in MRAs.
8. The focus here must be also be in the consideration of the actual and/or potential relevance that MR has for strengthening developing country domestic services capacities and enhancing export opportunities for them.
9. Technical cooperation and capacity building - through government-to-government, government to private sector and private sector-to-private sector assistance – would increase the efficiency and competitiveness of the professional services sector in developing countries.

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[113] an assessment of the potential value of an MRA, on the basis of criteria such as the existing level of market openness, industry needs, and business opportunities, for example, the number of professionals likely to benefit from the MRA, the existence of other MRAs in the sector, and expected gains in terms of economic and business development. In addition, it shall provide an assessment as to the compatibility of the licensing or qualification regimes of the Parties and the intended approach for the negotiation of an MRA.

[114] CETA's chapter 11 actually does are two important things:

1. Encourage its relevant authorities or professional bodies, as appropriate, to develop and provide Joint Committees on Mutual Recognition (art 11.3.1)

2. Provide guidance/framework on such committees and how they should operate. (art 11.3.2-6)