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Cross Border Legal Practice in ASEAN under WTO

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MALAYSIA

INTRODUCTION

Within the global economy, the significance of trade in services is irrefutable. World export of commercial services in 2000 was USD1.4 trillion representing one fifth of global export of goods and services. The services industries also account for a significant portion of the growth of the domestic economy and of job creation. Total world trade in commercial services is currently dominated by Western Europe controlling more than half of the share at 54.5 percent. The United States has a 17.0 percent share of the world total. In Asia, Japan has 5.2 percent followed by Hong Kong and Singapore with 1.9 percent each. Other major services traders are Korea (1.3%) and Australia and Chinese Taipei with 1.1 percent each.

The share of ASEAN exports and imports of commercial services in the world trade grew from 3.9% in 1991 to 6.8% in 1997. Exports of commercial services by ASEAN countries increased almost three times from USD 31.8 billion in 1991 to reach a peak of USD 86.8 billion in 1997. In 2000 it was at USD 66.8 billion. The import of commercial services is about the same trend and magnitude. It was at USD 31.9 billion in 1997, and was at USD 78.2 billion in 2000.¹

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¹ ASEAN Cooperation in Trade in Services: Towards Free Flow of Trade in Services in ASEAN region, The ASEAN Secretariat.

In the light of the increasing tradeability of services and the growing importance of service sectors to the economy, it is significant that well-defined and acceptable multilateral rules be in place to ensure that countries secure better deal in commercial services. To date the international trade in services among over 130 members of the World Trade Organization (WTO) is regulated by the General Agreement on Trade in Services (GATS)². The GATS establishes a basic set of rules for world trade in services applicable to all services sectors and all forms of trade in service. In addition it has a legal structure for ensuring that those obligations are observed.³

DEFINITION AND SCOPE OF SERVICES

Stern provides a typology of services for purposes of international trade and Hoekman based on whether buyers or sellers move across borders in the course of providing the service.⁴ The first type is separated services, which does not involve the movement of either demander or provider. The second is demander-located services, which require “physical proximity to the consuming households and firms” as “a necessary condition for the service”. The third type is provider-located services in which the buyer must move

² Agreement Establishing the World Trade Organization ; Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (Marrakesh, 1994) ANNEX 1- ANNEX IA: Multilateral Agreement on Trade in Goods, General Agreement on Tariffs and Trade, 1947, as amended, General Agreement on Tariffs and Trade 1994, Understanding on Article II:I(b); Understanding on Article XVII; Understanding on Balance-of-payments Provisions (including 1979 Declaration); Understanding on Article XXIV; Understanding in respect of waivers; Understanding on Article XXVIII Marrakesh Protocol Agreement on Agriculture; Agreement on the Application of Sanitary and Phytosanitary Measures; Agreement on Textile and Clothing; Agreement on Technical Barrier to Trade; Agreement on Trade-Related Investment Measures (TRIM); Agreement on Implementation of Article VI; Agreement on Implementation of Article VII; Agreement on Preshipment Inspection; Agreement on Rules of Origin; Agreement on Import Licensing Procedures; Agreement on Subsidies and Countervailing Measures; Agreement on Safeguards; ANNEX IB: General Agreement on Trade in Services (GATS); ANNEX IC: Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs); ANNEX 2: Understanding on Rules and Procedures Governing the Settlement of Disputes; ANNEX 3: Trade Policy Review Mechanism; ANNEX 4: Plurilateral Trade Agreement; Agreement on Government Procurement; International Dairy Agreement; International Bovine Meat Agreement

³The most important obligations of the GATS include the following; Most Favoured-Nation (MFN) Treatment; National Treatment, Market Access, Domestic Regulation, and Transparency .

to the provider's location. The fourth type is non-separated services when both providers and demanders move. GATS⁵ identifies four modes of supply. These are cross-border supply; consumption abroad; commercial presence and temporary entry of natural persons. Cross border supply is defined as the supply of a service from the territory of one economy to another. Consumption abroad refers to the supply of a service inside the territory of a member to a consumer from another member. Commercial presence requires the service supplier from one member to establish a company in the territory of another member before service is supplied to that member. Lastly, service may be supplied by a natural person, not an employee, from a member in the territory of another member.

THE LEGAL SERVICES INDUSTRY⁶

One of the most challenging legal practices in the law profession is the introduction of cross border legal services offered under the General Agreement on Trade in Services (GATS) in 1995.⁷ Although at its inception most countries recognized that professional

⁴ Stern, Robert M. and Bernard M. Hoekman (1988) "Conceptual Issues Relating to Services in the International Economy," in Lee and Naya, eds, *Trade and Investment in Services in the Asia-Pacific Region*, Korea: Center for International Studies, Inha University.

⁵International trade in services between over 130 Members of the World Trade Organization (WTO) is regulated by the General Agreement on Trade in Services (GATS).

⁶ Legal Services Definition (CPC 861) – This sector corresponds to the United Nations Central Product Classification (UN CPC) at the three- digit level. The definition includes:

-Legal advisory and representation services concerning criminal law: includes legal advisory and representation services during litigation process and drafting services of legal documentation in relation to criminal law. Generally, this implies the defence of a client in front of a judicial body in criminal offence case when private legal practitioners are hired on a fee basis by the government, includes both pleading the case in court and out-of-court legal work.

-Legal advisory and representation services in judicial procedures concerning other fields of law: includes legal advisory and representation services during the litigation process and drafting services of legal documentation in relation to law other than criminal law. Representation services generally consist of either acting as a prosecutor on behalf of the client, or defending the client from prosecution: included both the pleading of the case in court and out-of-court legal work.

- Legal advisory and representation services in statutory procedures of a quasi judicial tribunals, boards etc: includes legal advisory and representation services during the litigation process and drafting services of legal documentation in relation to statutory procedures. Generally, this implies representation of the client in front of a statutory body (e.g. an administrative tribunal). Includes both the pleading of the case in front of authorized bodies other than judicial courts and the related legal work.

⁷ An initial paper was presented by the writer in the ASEAN Law Association 7th General Assembly and Conference in Kuala Lumpur in 1995 entitled "GATS- Its Impact on Legal Profession and Legal Education and Training in Malaysia."

services are of particular importance for economic development and the role they play in the creation of an investment- and business friendly institutional framework, response to liberalize legal services were however slow from member countries.⁸ In particular the developing countries, granting liberal market access for professional services is indispensable for attracting FDI, and for promoting the transfer of knowledge. Furthermore, the opportunities provided through e-commerce make cross-border provisions of certain professional services practical and technically easier than before.⁹

Legal services refer to legal advisory and representation services in any legal or juridical procedures, and the drawing up of legal instruments or documentation.¹⁰ Lawyers provide legal advice, represent clients, prepare contracts and other legal documents, and act as executor or trustee in estate matter. They are also involves in specializing certain areas of law such as criminal, corporate, property and labour law. The growth and increase borderless markets and multi-jurisdictional transactions in international trade have directed legal services towards international dimension where it is no longer adequate for legal firms to offer expertise in the law of a single jurisdiction only. Rather, firms are now actively engage in international advising and offer expertise and specialized services for example international financing, re-engineering, environmental law and other fields of law. The reality of globalization has forced many international law firms to localize their operations where permitted by local regulations and bar rules, either through employment of local lawyers or through integrated firm associations. Lawyers supplying legal services abroad usually act as foreign legal consultants (FLC). They normally advise in international law, the law of their home country or in the law of any third country if they

⁸See GATS 2000 Professional Services; Summary of proposals from WTO members (as of May 2001)

⁹Ibid.

¹⁰A Consultative paper in preparation for the World Trade Organization (WTO) General Agreement on Trade in Services (GATS) Negotiations: Prepared by the International Investment and Services Directorate Industry, Canada 2000

are legally qualified. Foreign lawyers are less likely to be involved in domestic law due to the barrier created which are shaped along national lines.¹¹

In the vast majority of countries the legal profession is practiced by individual professionals or small firms, while large firms are still limited to a small number of Anglo –Saxon/common law countries.¹²

Most trade in legal services takes place across borders or via temporary stay of natural persons traveling as individual professionals or as employees/partners of a foreign established law firm. Affiliate trade of legal services is still limited as suppliers often find the costs and the difficulties associated with a commercial presence too high.

Cross border trade in legal services consists of the transmission of legal documents or advice by mail via telecommunication devices. Technological advancements in the telecommunication sector are creating more efficient and accessible ways by which cross-border trade in legal services can take place. Trade in legal services is expected to benefit from the advent of the internet and e-commerce application since majority of legal services can be delivered electronically.

REGULATING LEGAL SERVICES

Legal services by tradition belong to the group of accredited professional services. Lawyers in any jurisdictions normally are required to obtain a license to practice. Licensing requirements may include qualification, establishment or residency requirements, absence of a criminal record, the taking of oath, subscription of a professional indemnity insurance etc. Professional organization of lawyers exists in most countries and membership in these organizations is often mandatory.¹³

¹¹ See Rahmat Mohamad, paper presented at the Malaysian Law Conference, 2001 entitled “Should Foreign Lawyers be given rights of practice in Malaysia: Are we ready for full entry or joint law ventures?”.

¹²In 1988 for example the first 91 law firms by number of partners were from the United States, Canada, the United Kingdom and Australia. The top twenty firms included 17 from the U.S, two from Canada and one from the U.K. In the past few years, however, more large firms have emerged in civil law jurisdictions such as France, Germany and the Netherlands.

Although member countries of WTO is encourage to be generous on market access, in legal services, limitation will normally include restrictions on the movement of professional, managerial and technical personnel, and restrictions on the form of incorporation. In case of lawyers engaging in advisory services in international and home/country law (foreign legal consultant) are not subjected to nationality requirements, general nationality requirements for all legal services may still restrict foreign legal consultants. Limitation on the form of incorporation is still common in the legal services sector.¹⁴

Important national treatment limitation include: nationality requirements; restrictions on partnership with local professionals; restrictions on the hiring of local professionals; restrictions on the use of international and foreign firm names; residency requirements; and general discrimination in the licensing process.¹⁵

Qualification requirements often represent a barrier to trade in legal services, especially for the practice of host country law. Legal education differs from country to country and in some cases within the same country (Canada as an example). In some instances, these differences are so significant that regulators require foreign qualified lawyers to re-qualify in order to be able to practice.¹⁶

In the field of international law and home/country law, qualification requirements constitute lower barriers to trade than in the field of host country law.¹⁷

¹³Ibid

¹⁴Ibid

¹⁵ Ibid

¹⁶Ibid. Three EU Directives deal with qualification requirements for lawyers in the European Union. NAFTA does not contain binding provisions for the mutual recognition of qualifications among its Members.

¹⁷Ibid

Following the Uruguay Round and subsequent accessions, 56 WIO member countries have made commitments in legal services. Of the 58 countries, 23 made commitments in advisory host country law, 53 in advisory international law, 52 in advisory home country law, 5 in third country law and 6 in other legal services (including legal documentation and certification services and other advisory and information services).¹⁸ In addition, several countries made commitment in legal representation services; 21 countries made this type of commitment in host country law, 18 in international law, and 18 in home country law.¹⁹ Countries with commitments in all types of law include Japan and the United States. Most EU countries made commitments only in international and home country law. Canada scheduled commitments in advisory international, home country and third country law.²⁰ Commitments vary significantly between countries and regions. Several countries made commitments about foreign legal consultants, while a few made commitments about host country law. In case of developing countries, several have made relatively liberal commitments in legal services, but mostly did not provide a schedule for legal services, and remain completely unbound.

Most countries provide limitations to the commitments. The most common limitations to market access are restrictions on the type of legal entity. In most cases, Members have limited the choice of legal form to natural persons (sole proprietorships) or partnerships excluding limited companies. Some countries have also scheduled nationality and citizenship limitations. In relation to national treatment, the obvious restrictions are residency requirements. This includes all legal service suppliers (domestic or foreign) to be graduates of national universities, recognition of foreign degrees only for nationals who have studies abroad, and requirement for foreign lawyers to take an active part in the business in order to be able to maintain an interest in a local law firm.

¹⁸ See Canadian Legal Services: A Consultative Paper in preparation for the WTO GATS Negotiations (Canadian Legal Services).

¹⁹Ibid

²⁰Ibid

REGIONAL INITIATIVES IN LIBERALIZING LEGAL SERVICES WITHIN APEC

As part of the Osaka Action Agenda, the APEC Ministers and Leaders in 1995 have agreed to prepare Individual Action Plans (IAP) outlining the steps that they will take to achieve free and open trade and investment by 2010 for developed economies and 2020 for the developing economies.

There are four kinds of restrictions being applied by the nine economies namely; scope of work limitations (4 instances), citizenship or residency requirements (4 instances), establishment restrictions (6 instances), and qualifications specifications (3 instances). The scope of work limitations usually allow foreign lawyers to work in one or any combination of home country law, third country law or international law. In some cases, lawyers can only serve in an advisory or consulting capacity or work as an assistant to a local lawyer.²¹

MALAYSIA'S COMMITMENT IN LEGAL SERVICES UNDER GATS

In as far as Malaysia is concerned commercial services are placed under multilateral rules only in 1995 with the establishment of the WTO and GATS. Negotiations to liberalize the sector at that juncture did not lead to much market opening measures generally.

²¹ In Hong Kong for example, to practice as a solicitor, foreign lawyers must pass the Overseas Lawyers (qualification for Admission) Rules under the Legal Practitioners Ordinance. In the case of practicing as barrister, one need to satisfy one of the following; Obtain their qualifications in Hong Kong; Obtain their qualifications in England, Northern Ireland or Scotland and; i. Have practiced as a barrister or advocate in the UK for at least 3 years; or ii. Be a permanent resident of HK; or iii. Has been ordinarily resident in Hong Kong for least 7 years; Are Commonwealth citizens or citizens of the Republic of Ireland and; i. Have been ordinarily resident of HK for at least 7 years; and ii. Have obtained a Postgraduate Certificate in Laws from a HK university; Have been admitted as a solicitor in HK for at least three years; and i. During that time was in practice as a solicitor in HK; or ii. Were employed by the HK government as a legal officer; Have been admitted as a barrister or legal practitioner in Australia, Canada (except Quebec), i. New Zealand, the Republic of Ireland, Zimbabwe and Singapore; and ii. Have experience in advocacy; iii. Have been employed in the HK government Legal Dept. as legal officer for at least 7 years, of which time 3 years was spent on work similar to that undertaken by a barrister of 10 years seniority and intend, if admitted, to practice as a barrister in HK within 12 months after admission; To operate a Foreign Law Firm: A foreign law firm cannot practice HK law and cannot employ and/or enter into partnership with HK solicitors. A registered foreign firm may associate with a local law firm provided that the ratio of foreign lawyers to local lawyers is not more than one. A waiver is provided by the Law Society under exceptional circumstances. A branch of a foreign law firm registered as a local law firm (i. E. practicing HK law) may bear the same name as the mother firm provided that the mother firm is registered and has practiced HK law for the past three years.

Malaysia commitment in services under the Uruguay Round were essentially binding the then existing levels of success for foreign suppliers and with limitation on equity participation.²²

Malaysia's commitments have limitations on market access and national treatment in the interest of achieving national objectives. Among the limits are:

- i. foreign equity participation at 30%
- ii. incentives/preference given to Malaysian owned corporations
- iii. intra-corporate transfers for key personnel for maximum of five years.

Services sector is important to Malaysia and has been identified as one of the three pillars of the economy as Malaysia progresses towards realizing industrialized nation status by 2020. Malaysia is currently the 25th largest exporter and 26th largest importer of commercial services.

Malaysian services providers, particularly in the professional services sector, where many firms operate as small firms will now have to consider; vertical integration, through mergers and acquisitions or formation of consortia to take advantage of economies of scale and strengthen the competitive position, forming partnerships or alliances with service providers abroad and specializing in niche areas.

Firms in Malaysia are also encouraged to acquire internationally recognized accreditation such as ISO certifications, which can be an additional marketing asset in promoting services abroad.

²² Services offered are as follows; Telecommunication, Basic telecommunications, Audio- visual services; Health-care services; Accounting services; Advertising services; Legal services; Architectural and Engineering Services; Construction services; Travel/Tourism services; Sea Transport; Business Services; Financial services

They must consider accreditation schemes for qualifications that are in conformity with international standards, to facilitate foreign recognition of local professional qualifications. Local professional firms must also consider concluding mutual recognition agreements to increase the international mobility of Malaysian professional service providers.

Under legal services in GATS, Malaysia is committed to liberalize “advisory and consultancy services relating to home country laws, international law and off-shore corporation laws of Malaysia and in term of limitation on market access, legal services offered, however shall only be supplied to off-shore corporations established in the Federal Territory of Labuan”. Thus foreign lawyers can only serve in an advisory or consulting capacity operating in the Federal Territory of Labuan.

Like any other legal profession in the Common Law jurisdiction, the legal profession in Malaysia is still exclusive in nature and it is a resident-based profession. At present, qualified local legal practitioners dominate most legal services offered in Malaysia. The majority of legal practitioners can be found in Kelang valley and major cities in Malaysia. Unlike their counterpart in Singapore, lawyers in Malaysia are largely engaged in domestic laws and the bulk of the legal services provided by Malaysian law firms relate mainly to the law of Malaysia. A few large law firms have started specialization in legal services either within or outside Malaysia. In the light of e-commerce application in Malaysia, cross-border legal services will have great potential. Currently there is a minimal application of e-commerce legislation in the country despite heavy usage of internet buying and selling transactions.

FREE FLOW OF LEGAL SERVICES AND PROFESSIONALS IN ASEAN

At the regional level, initiatives with a view to accelerate trade liberalization are encouraged. Recognizing the growing importance of trade in services, ASEAN countries officially launched their joint effort to work towards freer flow of trade in services within

the region. In as far as ASEAN is concerned an initial step was taken in 1995 when the ASEAN Framework on Services was introduced.²³

ASEAN has concluded 3 packages of services commitment following the signing of the ASEAN Framework Agreement on Services (AFAS) in 1995.²⁴ The AFAS was aimed at substantially eliminating restrictions to trade in services among ASEAN countries in order to improve the efficiency and competitiveness of ASEAN services suppliers. Seven sectors of importance to ASEAN were selected for services liberalization.²⁵

AFAS provides the broad guidelines for ASEAN countries to progressively improve Market access and ensure equal National Treatment for services suppliers among ASEAN countries in all four modes of services delivery.²⁶

ASEAN has agreed to work towards achieving a free flow of services earlier than 2020. Clear targets and schedules of services to liberalize each sector have been agreed upon. ASEAN also has agreed to adopt the ASEAN Minus X formula for services liberalization so that countries, which are ready, could liberalize first and the others will join in later. In addition, ASEAN intends to conclude Mutual Recognition Arrangements (MRAs) for qualifications in major professional services by 2008 to facilitate free movement of

²³ 15 December 1995 by ASEAN Economic Ministers during the 5th ASEAN Summit in Bangkok, Thailand.

²⁴ The ASEAN Framework Agreement on Services (AFAS) is an agreement governing the progressive liberalisation of trade in services in ASEAN and it was signed on December 15, 1995 in Bangkok at the 5th ASEAN Summit. Brunei, Indonesia, Malaysia, the Philippines, Singapore, Thailand and Vietnam (member states) are signatories to the AFAS. The preamble to the AFAS inter alia states that it recognises that the GATS permits economic integration agreements and the agreement is necessary to supplement and complement the liberalisation of trade in ASEAN.

²⁵ The seven priority sectors that were subject to the negotiations were tourism, air transport, maritime transport, construction, business services and financial services.

²⁶ Mode 1 (Cross-Border Supply): the services cross border independent of the suppliers or consumers; Mode 2 (Consumption Abroad): the consumers cross border to consume services; Mode 3 (Commercial Presence): the suppliers establish local offices or subsidiaries to supply; Mode 4 (Movement of Natural Persons): the suppliers physically present in the country on a temporary basis.

professional/skilled labour/talents. ASEAN also agreed to liberalize the healthcare, air travel and electronic commerce sectors by 2010.

CHALLENGES IN LIBERALIZING LEGAL SERVICES IN ASEAN

Despite the consensus of introducing numerous efforts to ensure progressive liberalization of trade in services, liberalization of legal services within the ASEAN framework is still slow. The reality is insignificant and very little therefore can be said about offering of legal services among ASEAN member countries. Commitments in legal services among ASEAN member countries are not fully transparent, general or unbound. In most cases, the blame is absorbed by the bar associations for being so exclusive and inward looking.

Historically, at the outset it must be understood that unlike the European Union, ASEAN since its inception in 1967 is only an inter-governmental organization. Thus, as an inter-governmental entity it has no legislative authority to promulgate any laws or directives to its member country and therefore it has no mandate to direct member countries unless through treaties or conventions. Since the inception of the new ASEAN member countries, the economies of ASEAN member countries are currently divided into two levels which can be said to be a factor that can cause the slow down in liberalizing legal services within the ASEAN region. It is also noted that legal services is not the main services offered committed by ASEAN member countries under AFAS as it is mainly categorize under business services. Currently there are two major legal systems that are operating under ASEAN system; (Malaysia, Singapore and Brunei under the Common Law jurisdiction while Indonesia, Thailand, and Philippines under Civil Law jurisdiction). There is no attempt to establish uniform rules and regulations under ASEAN system. Qualification requirement is still not transparent among member countries. It is imperative for member countries to establish common qualification entrance for ASEAN lawyers to practice in any member countries if liberalization of legal services is to progress. Attempt to understand various legal systems are still very slow. In Malaysia for example, none of the Law Schools have made a serious attempt to introduce ASEAN legal system as a compulsory law course in its law curriculum. There

is also a need to look at the standards of practicing law in the ASEAN region given the lack in understanding of both Common Law and Civil systems in member countries of ASEAN. Finally, there is a need to identify and establish standard agreed criteria of legal practitioners by member countries' Bar Associations.

CONCLUSION

Given the hesitation by economies to open their markets to foreign services suppliers, ask for increased transparency of rules governing cross border services. Transparency helps to minimize risks associated with movement of suppliers. Transparency is least costly to economies because there is no requirement to bind the rules.

It is interesting to note that in the Post WTO era and the implementation of AFTA we are still at stage of looking for positive steps that can be taken by member countries to ensure cross-border legal services attractive and how to overcome the barriers. We are also looking at standardization of legal services in ASEAN member countries and the various cross border legal services that can be offered by member countries

There must be serious effort made by member countries to ensure that liberalization in legal services meets the objective and this can only be done through political will of ASEAN leadership.