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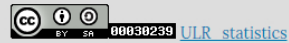
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# Regulation on Foreign Workers and Principle of Non – Discrimination in ASEAN Economic Community (AEC) based upon Nationality

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## ABSTRAK

*Every country has an obligation to ensure job vacancies for its people, so the priority of local workers is preferred to do. However, with the enactment of ASEAN Economic Community (AEC) in early 2016 in ASEAN, every country bound to open more opportunities for foreign workers to work in all ASEAN states. This agreement may bring into a contravention between national policies to accentuate local worker with obligation of free flow of workers in ASEAN, especially occupation regulated on Mutual Recognition Arrangements (MRAs). This article examines the regulation for foreign worker and the implementation of non-discrimination principle based on nationality in AEC. This is particularly pertinent considering a state's role to ensure stability of foreign worker and fruitfulness of AEC. Ultimately, this Article argues all ASEAN states should embrace harmonization as the new standard for foreign worker under MRAs.*

**Keywords:** ASEAN Economic Community; Foreign Worker; Nationality; Principle of Non-Discrimination

## Abstrak

Setiap Negara wajib menjamin ketersediaan pekerjaan bagi warga negaranya sehingga prioritas pekerja lokal utamanya dilakukan. Meskipun demikian, dengan disahkannya Masyarakat Ekonomi ASEAN (AEC) di awal tahun 2016 in ASEAN, setiap Negara anggota terikat untuk membuka kesempatan bagi tenaga kerja asing untuk bekerja di seluruh Negara anggota ASEAN. Kesepakatan ini dapat saja membawa pada suatu benturan antara kebijakan nasional yang harus mengutamakan tenaga kerja lokal dengan kewajiban arus bebas tenaga kerja di ASEAN, khususnya pekerjaan yang diatur dalam Mutual Recognition Arrangements (MRAs). Tulisan ini bertujuan untuk mengkaji peraturan mengenai tenaga kerja asing dan implementasi prinsip non-diskriminasi berdasarkan kebangsaan di AEC. Penelitian ini tentunya berkaitan dengan peran Negara dalam menjamin stabilitas tenaga kerja asing dan kesuksesan dari AEC. Pada akhirnya, tulisan ini mendorong setiap Negara anggota ASEAN untuk melakukan harmonisasi guna membuat suatu standar baru bagi tenaga kerja asing berdasarkan MRAs.

**Kata kunci:** Masyarakat Ekonomi ASEAN; Tenaga Kerja Asing; Kebangsaan; Prinsip Non-Diskriminasi

## 1. Introduction

MRAs have emerged for almost 20 years as a result of awareness of national needs for goods or services that unable to provide in a state, even though practically hard to implement. It is hard, because national security and policy simultaneously operated with MRAs. Most country in world are hardly to remove or reduce Technical Barriers to Trade (TBTs). A MRA, objectively intended to facilitate mutual market access by eliminating duplicative testing and certification or inspection.<sup>1</sup>

<sup>1</sup> Correia de Brito, A., C. Kauffmann and J. Pelkmans (2016), "The contribution of mutual recognition to international regulatory co-operation", OECD Regulatory Policy Working Papers, No. 2, OECD Publishing, Paris. <http://dx.doi.org/10.1787/5jm56fqsfxmx-en>, p.10

This situation applied for both goods and services fields. It becomes harder for services because human can't be polished as easy as goods. MRAs have become more popular since more than 139 have been notified to the WTO. OECD countries are the most who initiate MRAs.<sup>2</sup> In ASEAN, MRAs that have been initiated is Mutual Recognition Agreement on services (there are some occupation facilitated by it).

This article is structured as follows. It will first review ASEAN MRAs on services. Then, it will analyze whether harmonization of qualification is needed in ASEAN to ensure fruitfulness of those MRA. If harmonization will hardly apply, this article will examine the probability in using recognition of qualification. Lastly, this article will examine and explain the use of non-discrimination principle in ASEAN MRA. The final section concludes.

## 2. Research Method

This article based on normative research, using an analytic descriptive approach, focusing on the implementation of ASEAN Economic Community (AEC). This research uses statute and conceptual approach by reviewing all related regulation on employment; Mutual Recognition Agreement (MRA) in ASEAN. Writers collect the data normatively and by interviewing Ministry of Employment. The data then analyzed qualitatively before used as reference.

## 3. Result and Discussion

### National Policies versus Mutual Recognition Agreements (MRAs)

Mutual Recognition Arrangements (MRAs) in the services sector are key elements of ASEAN integration in trade in services. An MRA facilitates trade in services by the recognition among the ASEAN Member States for professionals who are authorized, licensed or certified by the respective authorities within the framework of the MRAs. An MRA enables the qualifications of services suppliers, recognized by the authorities in their home country,

<sup>2</sup> Ibid.

to be mutually recognized by other ASEAN states who are signatories to the MRAs. MRAs are not expected to override local laws. Instead, the agreements are applicable only in accordance with prevailing laws and regulations of the host country. The ASEAN Framework Agreement on Services (AFAS), signed on 15 December 1995 in Bangkok, Thailand, recognizes the importance of MRAs to facilitate deeper services trade integration in ASEAN. As a testament to the commitment to deepen services trade integration, ASEAN Leaders during the 7th Summit in November 2001 mandated the start of negotiations on MRA to facilitate the flow of professional services under AFAS. Since then, ASEAN has concluded and signed MRAs in several occupations: MRA on Engineering Services (9 December 2005); MRA on Nursing Services (8 December 2006); MRA on Architectural Services and Framework Arrangement for the Mutual Recognition of Surveying Qualifications (19 November 2007); MRA on Medical Practitioners and MRA on Dental Practitioners (26 February 2009); MRA Framework on Accountancy Services (26 February 2009) and subsequently as MRA on Accountancy Services (13 November 2014); and MRA on Tourism Professionals (9 November 2012). Various committees have been established to implement these MRAs and each of the MRA has its own mechanism for recognition and facilitation of qualified professionals in the region.

The first pillar of the AEC Blueprint, namely, a single market and production base, envisions a variety of free-flow policy issues: free flow of goods, free flow of services, free flow of investment, free flow of capital, and free flow of skilled worker. Especially to services field, a facilitated movement of people will contribute more to the achievement of the first pillar of the AEC Blueprint.

The actual movement of skilled workers will bridge the surplus of professionals between countries, vice versa shortage the professionals. The employment of foreign workers is necessary with expectation in bringing better technology, management skills, and ideas. It also help ASEAN states to upgrade their professional's competency.

Notwithstanding, implementation of MRA is not easy. There are some challenges in implementing MRA in ASEAN. First challenge is rivalry. The evidence on past experience shows that ASEAN country often involved in a dispute one to another. Second challenge is trust. MRAs require sustained trust in each other regulatory systems, structures and procedures for accreditation and conformity assessment. The MRA experience revealed clearly how difficult it is to accomplish the acceptance of all relevant aspects of conformity assessment of the trading partner for the mere purpose of testing and certifying foreign worker. The MRA has succeeded only in a few sectors and most of it was goods. It is critical that domestic regulators must be satisfied during the AEC that their pursuit of job opportunities and worker protection objectives will not be eliminated in any way.

To make ASEAN MRAs fully functional, role of domestic regulatory is important. It should be reviewed and revised accordingly so that they become consistent with ASEAN rules. Thus, regulatory revisions are a critical element of national implementation assessment. Some regulations, for example, the Nurse and Doctor Act, are crucial to the success of ASEAN MRAs. Others could be not crucial to MRA result, such as immigration regulations but still need compliance.

As an example, architect, according to country reports by members of ERIA's Research Institutes Network, some regulations are under review, undergoing revisions, or waiting for enactment in most ASEAN states. Brunei Darussalam is the only country that reported have been do some revise, followed by Malaysia and Viet Nam. Malaysia, Philippines, Singapore, and Thailand are still working on regulatory revisions to accommodate. Myanmar is facing the biggest challenge in the regulatory revisions as most of the relevant regulations are still under revision or waiting for enactment. Lao PDR also has a relatively larger number of regulations to be amended or enacted for full compliance with the regional framework. On the other hand, both Myanmar and Lao PDR as well as Brunei Darussalam, Cambodia, and Malaysia

reported significant improvement.<sup>3</sup> It shows that most of ASEAN states prepare their regulation and revise it according to the needs of MRA as for Indonesia, on the other hand, that the MRA does not trigger the move toward regulation harmonization.<sup>4</sup> Similar to the MRA on Architectural Services, the MRA on Engineering Services is a three-step registration system: home country registration, ASEAN registration, and host country registration.<sup>5</sup>

Disharmonies of law and procedure can be a problem and spend some money.<sup>6</sup> It also happens in case of MRA under AEC. So that's why, harmonization is necessary to win MRA goals in any way. One example of defining harmonization is adjustment of differences and inconsistencies among different measurements, methods, procedures, schedules, specifications, or systems to make them uniform or mutually compatible.<sup>7</sup> Harmonization aims to set bound same degree of a standard of something which regulate different entity. With regard to qualification, harmonization is essential to bridge the gap between one qualifications to another qualification for an occupation in different states.

<sup>3</sup> Five countries have not established a Registered Foreign Architect (RFA) registration system, thus, there can be no actual movement of professions. There are many more possible reasons for the slow movement of professionals. First, other alternative legal schemes allow foreign professionals to practice in host countries. For example, Malaysia has a legal scheme called 'temporary registration' for a professional architect of any citizenship (i.e., for both ASEAN and non-ASEAN) who is a consultant to a project, wholly financed by a foreign government, or implemented under a bilateral arrangement between governments. Similarly, the Philippines provides a special temporary permit for foreign professionals who meet the qualifications. Indeed, Brunei Darussalam is the only country that does not have any legal schemes other than the ASEAN MRA which allows foreigners to work as architects. See, Yoshifumi Fukunaga, "Assessing the Progress of ASEAN MRAs on Professional Services", *ERIA Discussion Paper Series*, ERIA-DP-2015-21, p. 7-11.

<sup>4</sup> Based on interview with Manager on Duty of Ministry of Empower and Transmigration of Indonesia on 22 February 2017.

<sup>5</sup> Yoshifumi Fukunaga, "Assessing the Progress of ASEAN MRAs on Professional Services", *ERIA Discussion Paper Series*, ERIA-DP-2015-21, p. 11.

<sup>6</sup> Eleanor M. Fox, "Harmonization of Law and Procedure in a globalized world: why, what and how?", *Antitrust Law Journal* Vol. 60, No. 2, 1991 ANNUAL MEETING (August 11-14, 1991), p. 593.

<sup>7</sup> See at <http://www.businessdictionary.com/definition/harmonization.html>



The term “qualification” always associated to MRAs on services. The European Commission in the recommendation on a European qualification framework for lifelong learning (European Parliament and Council of the EU, 2008) define qualification as ‘a formal outcome of an assessment and validation process which is obtained when a competent body determines that an individual has achieved learning outcomes to a given standard’. A qualification as defined here is expressed in a formal document (certificate, degree, diploma or award) and is based on norms and specifications regulating its award. These norms and specifications constitute qualification standards. Moreover, glossary of RECOMMENDATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning define ‘national qualifications system’ as all aspects of a Member State’s activity related to the recognition of learning and other mechanisms that link education and training to the labor market and civil society. This includes the development and implementation of institutional arrangements and processes relating to quality assurance, assessment and the award of qualifications. A national qualifications system may be composed of several subsystems and may include a national qualifications framework. This article will examine the qualification required in national policies and in ASEAN MRA.

### **Principle of Non-Discrimination under ASEAN MRA on Services**

Principle on non-discrimination and equality are an integral part of constitution, international treaties<sup>8</sup>

<sup>8</sup> One of International Treaties which related to principle of non-discrimination is Convention No. 111 of 1958 (Discrimination on Employment and Occupation. It ratified by some ASEAN states, aim to protect everyone from any form of discrimination. This convention is not only protect who have got job or doing the job but also people who begin to work, seek to work and have risk in losing a work. This convention regulate all occupation or job either public or private occupation, including small and medium enterprises and informal job. In East Asia and South East Asia, Cambodia (1999), China (2006), Indonesia (1999), Republic of South Korea (1998), Mongolia (1969), Lao People’s Democratic Republic (2008), Philippines (1960) and Vietnam (1997) have ratified this

in all states. These principles are the foundation in creating a peaceful, harmony and inclusive society. These principles also recognized globally as crucial and compulsive standard behavior. In the work field, non-discrimination and fair opportunities and treatment valued as a part of human right and fundamental right of worker in order to ensure social and economic justice.

Implementation of these principle enable everyone, without considering ethic, religion, race, group even gender and their condition, to optimize their potential for a better life. This implementation is important because most of company or employer appreciate innovation and adaptability that provided by workplace. Open recruitment in one case, enable employer to improve worker talent. Nowadays, a success state is a state which able to utilize its human resources without considering all differences except competency. In case a state do it in opposite then those states can be categorized as discriminative.

Discrimination may present in a statute or regulation, knowed as “de jure discrimination” – and/or in reality and practice, knowed as “de facto discrimination”.<sup>9</sup> It is said “de jure” because the regulation show those act. For example, in some countries, regulation still limit woman for some occupation or profession, judges and polices. Moreover, “de facto” happened when in practice one or more person treated different even if the regulation forbid it. For example, in some countries, there is a requirement for a job seeker, specific ethnic, in order to apply for those job, eventhough the work did not required it.

As in ASEAN MRA, discrimination can be occurred anytime, including discrimination based on nationality.

convention and therefore state their commitment to uphold human right of worker and progressively adopt all equal principles, especially principle of non-discrimination to each national policy and regulation. See, Kementerian Ketenagakerjaan dan Transmigrasi Republik Indonesia, *Panduan Kesenjangan dan Non-Diskriminasi di Tempat Kerja di Indonesia*, Jakarta, (2012), p.1

<sup>9</sup> Kementerian Ketenagakerjaan dan Transmigrasi Republik Indonesia, *Panduan Kesenjangan dan Non-Diskriminasi di Tempat Kerja di Indonesia*, Jakarta, (2012), p. 26

Basically, discrimination on nationality seldom to occur because of the competition mostly happened between same nationality job seeker. Especially, in fact most countries limit the use of foreign worker. The exertion of foreign worker always consider specific needs and only if local worker unable to do the work.

With the implementation of AEC, discrimination to professional services in ASEAN MRA may improve significantly. It is different case for judges and polices, because commonly all states always avoid the use of foreign judges and polices either in “de jure” or in “de facto”. But for doctor, nurses, architect and other profession according to ASEAN MRA, discrimination treatment may be occur more. Hence, this article will discuss it more.

Discrimination on nationality includes discrimination on the origin country, birthplace, and descent. It also consist of discrimination on national ethnic group, minority linguistic and immigrant ethnic group. Different treatment between birthplaces is the most obvious example.<sup>10</sup>

Nationality, in essential refer to citizenship of the worker. Term “immigrant worker”<sup>11</sup> point to a worker who will, is and have doing the activity of a hired worker in other states. Regulation in some countries in ASEAN treat foreign worker as a worker who come from other countries (Malaysia, Filipina, Thailand). Implementation of non discrimination means that a

<sup>10</sup> For example, see ILO: “Individual observation concerning Discrimination (Employment and Occupation) Convention, 1958 (No. 111) on France and Netherland” dalam Reports of the Committee of Experts on the Application of Conventions and Recommendations (Jenewa, 2008); ILO: “Individual observation concerning Discrimination (Employment and Occupation) Convention, 1958 (No. 111) in Report of the Committee of Experts on the Application of Conventions and Recommendations (Jenewa, 2006).

<sup>11</sup> Eventough ASEAN MRA and AEC focus on 8 profession but still those professions included as all occupation according to Article 3 of International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. ASEAN MRA should obey and conform to this Convention as long as ASEAN states bound to this Convention. All ASEAN States have ratified this convention. Indonesia has ratified this convention through Law No. 6 of 2012, as Philippines also ratified it. Cambodia has sign it. Brunei Darusalam, Lao People’s Democratic Republic, Malaysia, Myanmar, Singapore, Thailand and Vietnal still not ratified it. See, <http://indicators.ohchr.org/>.

foreign worker must be treated and having an equal opportunites as much as local worker with regards to occupation and chance for better position.<sup>12</sup>

ILO Convention No. 111<sup>13</sup> did not firmly forbid any different treatment based on nationality unless the countries state it by itself in their national regulation (as Repucliv of South Korea).<sup>14</sup> Nevertheless, local and foreigner must be protected from any possibility of discrimination as regulated in this convention.<sup>15</sup> But, still a state has souverignty to regulate national policy different to other state as long as the minimum requirement in ILO fulfilled. This includes regulation on access of foregin worker to work in domestic. Committee of Experts on the Application of Conventions and Recommendations (CEACR) danand bodies of United Nations have instigate all states to protect migrant or foreign worker.<sup>16</sup>

In practice, discrimination is not only based on one basis only but also two or more basis. Discrimination based on one reason can bring into another basis,

<sup>12</sup> Kementerian Ketenagakerjaan dan Transmigrasi Republik Indonesia, *Panduan Kesetaraan dan Non-Diskriminasi di Tempat Kerja di Indonesia*, Jakarta, (2012), p. 56

<sup>13</sup> Because of All Asean States are state party to International Labor Organization (ILO), as consequence, those states obligate to adjust their national regulation to ILO Convention. Until 2009, ILO has adopt 188 Conventions and 199 Recommendations on freedom of association and negotiation, equal treatment and opportunities, elimination of forced and child labor, promotion and training, social insurance, work condition, administration and monitoring, accident prevention in working, protection of pregnant worker, migrant worker and other categories like sailor, nurse and plantation worker.

<sup>14</sup> Ibid.

<sup>15</sup> As an example, Convention No. 111 forbid any payment to woman less than man for same occupation or work. This convention also forbid any pregnancy test to newcomer and similar worker. This convention also forbid different treatment to any foreign worker even if they don’t have legal document. National regulation must ensure that all worker gain equal treatment in any condition (Article 9 of ILO Convention No. 143).

<sup>16</sup> ILO release some regulation and recommendation related to this obligation. See, CESCR: Concluding comments of the Committee on Economic, Sosial and Cultural Rights: Philippines (Jenewa, 2008); CEDAW: Concluding comments of the Committee on the Elimination of Discrimination against Women: Malaysia (2006) & Philippines (2006) (Jenewa). See also, Kementerian Ketenagakerjaan dan Transmigrasi Republik Indonesia, *Panduan Kesetaraan dan Non-Diskriminasi di Tempat Kerja di Indonesia*, Jakarta, (2012), p. 57

which is called multiple discrimination<sup>17</sup> For example, discrimination based on nationality addressed to Myanmar worker in Malaysia, then this discrimination develop into new basis, religion because of most of Myanmar people are buddhist. Victims of multiple discrimination always found in more terrible situation than other worker hence identification of multiple discrimination is important in implementing principle of discrimination since all form of discrimination must be handled simultanioulsly.

Discrimination can happen in all process, recruitment, placement, working, payment, facility and etc. Discrimination in recruitment process usually showed by asking specific requirement such as nationality. Requirement of religion and ethnic in requirement process also indicate discriminative treatment.

Discrimination in workplace means different treatment with regards to job opportunities that can harm people without objective assessment. For example, 2 person that contribute in same amount paid different because their nationality. It won't be problem if the employer paid based on productivity or qualification of the worker but it will be discriminative if not. Usually, most of foreign paid more than local because their competency, but if it is irrational and groundless, or even the employer treat them more special then it can be classified as mainstreaming foreign worker. Discrimination is not only about treating other worser but also treating other better without based on competency.<sup>18</sup>

<sup>17</sup> In Eropean Union, discrimination based on more than one reason called multiply discrimination. Directive of European Union defines it as a form of discrimination based on more than one reason for discrimination at the same time. See, Erica Howard, *Study on the implementation of Directive 2000/78/EC with regard to the principle of nondiscrimination on the basis of religion or belief*, Brussels: European Parliamentary Research Service, 2016, p. 60. Accessed at <http://www.europarl.europa.eu/thinktank>.

<sup>18</sup> Prioritization usually happened to fellow worker. For example, in practice, employer prioritize man worker than woman worker with good looking for positions such seller. Sometimes, recruitment based on particular religion. See, Kementerian Ketenagakerjaan dan Transmigrasi Republik Indonesia, *Panduan Kesetaraan dan Non-Diskriminasi di Tempat Kerja di Indonesia*, Jakarta, (2012), p. 24

As stated before, principle of non-discrimination intend to eliminate discriminative treatment in working. Principle of non-discrimination based on nationality itself aims to abolish any different treatment because of the origin of worker. In ASEAN, since MRA under AEC implemented, all discrimination based on nationality must be eliminated. Free flow of 8 profession under MRA encourage all ASEAN states to freely send and accept all profession. A s consequence, all state must implement principle of non-discrimination to all foreign professional either "de jure" or "de facto".

Inthe ASEAN Framework Agreement on Services (AFAS), ASEAN states commit to implement MRA, standard of education, experiences, requirements, licenses and certification acknowledged in ASEAN. The qualification standard becomes authority of host states as agreed mutually, as 5 years experiences for doctor and dentist, and 3 years for nurses.<sup>19</sup>

Before, it has been stated that regulation and implementation of free flow of services under MRA is varied and consisten to each national policy. One of those services is engineer. Liberalization of engineer have agreed on MRA on Engineering Services. This agreement established on Desember 9, 2005 in Kuala Lumpur, Malaysia. There are some point agreed here, MRA scheme and procedure for foreign engineer practicing in other ASEAN states.

Foreign engineer who want to practice in other ASEAN states must conform to ASEAN Chartered Professional Engineer (ACPE). He must firstly fulfil the requirement and recognized as the eligible person can then work as a Registered Foreign Professional Engineer (RFPE) in other ASEAN states while he/she still obey national regulation. This recognition become the ticket to accelerate application process in acquiring license to work abroad.<sup>20</sup> For example, In Phillipnes, an engineer can register as member of ACPE through the ASEAN Monitoring Committee on

<sup>19</sup> KPMG, "Moving across Borders: The Philippines and the ASEAN Economic Community", 2016 *Investment Guide*, R.G. Manabat& Co, p. 26

<sup>20</sup> Ibid.



Engineering Services of the Philippines (AMCESP), which directly work under the Professional Regulation Commission (PRC) and also a part of representative of the Commission on Higher Education (CHED) dan Philippine Technological Council. It can be different for each countries since all ASEAN states has their own regulation and authority body.

Eventhough all ASEAN states has their own regulation, mutual standar has been agreed between states under Code for Technical Standards of engineering, especially standardization on salaries and wages. Now, there is ACPE in 5 ASEAN States. Some states still limit residence permit for engineer. In Thailand, member of ACPE recognized as temporary member by engineer association or engineer council. While in Malaysia, member of ACPE must stay at least for 180 days in Malaysia, furthermore, their license must be sponsored by Malaysia employeer. As addition, the use of foreign engineer become possible if the shortage of local engineer occurred in Malaysia.<sup>21</sup> This policy in Malaysia solely taken in order to protect local engineer, not a form of discrimination policy.

Different situation take place in Indonesia. According to ASEAN Federation of Engineering Organisations (AFEO), there are only about 9000 engineer in Indonesia. This amount is less than other ASEAN states, Malaysia (11.170 orang), Thailand (23.000 orang), danPhilippines (14.250 orang).<sup>22</sup>Moreover, qualitatively, there are only some Indonesian engineer that have complied with standard inASEAN Mutual Recognition Arrangements (MRA). It is said that there are only 0, 03 percent of Indonesian engineer that fulfill it.<sup>23</sup>As consequence, for Indonesia, there will be more foreign engineer come than local engineer go. Indonesia will only become target of foreign engineer in ASEAN. The “plus side”, It is hard for Indonesia to discriminate based on nationality,

<sup>21</sup> Deunden Nikomborirak and Supunnavadee Jitdumrong, “ASEAN Trade in Services”, the ASEAN Economic Community A Work in Progress, Asian Development Bank and Institute for Southeast Asian Studies, 2014.

<sup>22</sup> Kementerian Luar Negeri RI, “MembidikPeluangMea”, *Media Publikasi Direktorat Jenderal KerjaSama ASEAN* (Edisi 7 / MARET 2015), p. 5

<sup>23</sup> Ibid.

because Indonesia still need to accept foreign engineer in order to fulfill the needs of qualified engineer.<sup>24</sup>

Other example is architect. As for architect, in Philippines, the ASEAN Monitoring Committee on Architectural Services for the Philippines (AMCASP) still prepare and consult with the association of architect, the United Architects of the Philippines (UAP). As a result, there are about 14,000 architects in Philippines that registered and acknowledged in ASEAN.<sup>25</sup> Those amount surpass the amout of architect from Indonesia, Singapore dan Malaysia.<sup>26</sup> Similar to engineer, in Indonesia, because of lack of architect, there are few chances for discrimination based on nationality happened.

Engineers and architects are professions so far considered as the most prepared within the MEA framework according on common standards that have been agreed. Based on both the professions (without putting aside of other profession view), the author provides a study related to the application of the non-discrimination principle against foreign professionals based on their nationality.

Some Indonesian legislation actually has incorporated the principle of non-discrimination in their rules. For example, Article 85 of Law. No. 36 Year 2014 concerning Health Workers determining the sanctions, both Indonesian health workers and foreign health workers who deliberately run practice without Registration Certificate (STR) is liable to a

<sup>24</sup> Eventhough having limitation, Indonesian Engineer has their own advantages. Indonesia has the biggest number of engineer registered from all ASEAN states in ACPE. From 987 of registered engineers from ASEAN in ACPE, 290 from Indonesia, 218 Singapore, 203 Malaysian, 134 Vietnamese, 85 Myanmar, 55 Philippines, and 2 from Brunei Darussalam. Ibid.

<sup>25</sup> Professional Regulation Commission, “Prospects for Deeper Services Integration in the AEC”, Presentation, November 2013

<sup>26</sup> According to Bobby Gafur Umar, Chief of Engineer Association (Persatuan Insinyur Indonesia), untul December 2014, There are about 700.000 engineers in Indonesia and 9500 of it have certified in (ASEAN Chartered Professional Engineer). This amount surpass the amount of engineer from other ASEAN states. But, this amount still not enough for the need of Indonesian development. In next 5-10 years, Indonesia still need 1,5 million engineers to support economic development. Lihat, Kementerian Luar Negeri RI, “Membidik Peluang Mea”, *Media Publikasi Direktorat Jenderal Kerja Sama ASEAN* (Edisi 7 / MARET 2015), p. 5

maximum fine of Rp 100,000,000.00 (one hundred million rupiah). The Medical Practice Law also provides equality of imposing sanctions, in Article 75 states that either the doctor or the dentist either an Indonesian citizen or foreign citizen, who intentionally conducts medical practice without a certificate of registration shall be punished with three (3) years imprisonment or a fine of Rp 100,000,000.00 (one hundred million rupiah).

Not all actions that give effect to certain groups constitute discrimination. Such an action could be allowed if it is necessary and proportionate to achieve a legitimate purpose. For example, hospitals should always be able to recruit people who can fit the job requirements inherent (attached) to certain type of job, especially for specialists whose the expertise is not widely held by Indonesian doctors.

There are several reasons that allowed a State or government to make an excuse to carry out protection for foreign workers, namely, first, national security. Article 4 of Convention No. 111 states that, the action is given to a person who is legally suspect and involved in activities that compromise the security of the state is not an act of discrimination, as long as the individual is given the right to appeal to a competent body in accordance with national practice. Actions that affect employment opportunity or treatment of a person is not considered discriminatory if the person was involved in violent and dangerous activities that have been done, and not just because he was a member of a group. Similar things can be done in terms of the person suspected of incompetence in performing the profession before working in Indonesia.<sup>27</sup> Second, the protective measures and affirmative actions.

<sup>27</sup> In the case of Cyrotheraphy happened in Indonesia that killed a patient performed by foreign doctor, turns Foreign Doctors who practice physicians is problematic in his countries of origin. The rejection of foreign doctors with troubled backgrounds certainly cannot be categorized as a form of discrimination on the basis of nationality but rather the responsibility of the State to ensure the competency of foreign doctors who will practice in Indonesia. See, Wlsnu Prasetyo, "Allegations of malpractice: Alleged Case Chiropractic Malpractice, Family Could Have Asking Responsibilities from Dr. Randall", <http://news.detik.com/berita/3113323/kasus-dugaan-malpraktik-keluarga-sempat-minta-tanggung-Answer-dr-randall>, accessed on February 18, 2017, at. 11:25 pm.

Convention No. 111 obliges Member States to adopt the principle of equality and non-discrimination against foreign workers in the level of practice. However, the country still has the authority to make protection for the sake of national interests. Article 5 of the Convention states that "the protection or special assistance" which is set in the convention or other international labor recommendation is not discrimination. Furthermore, measures that is intended as an attempt to meet the needs of a person or group of people who, for reasons such as gender, age, disability, family responsibilities or social or cultural status, need protection or assistance is not included as discrimination. Thus, special measures are considered as acceptable exceptions on the principle of equality of opportunity and treatment for this type of "positive discrimination" is vital for the achievement of equality in practice.<sup>28</sup>

Protective actions can be done by requiring the transfer of technology from foreign worker to local worker. In some of the legislation governing the professions within the clause contained in MRA are as a form of protection so that the acceptance foreign workers in Indonesia are not solely for business purposes but also for the development of the local workforce.

Protective actions can be done by requiring the transfer of technology from foreign worker to local worker. In some of the legislation governing the professions within the clause contained in MRA are as a form of protection so that the acceptance foreign workers in Indonesia are not solely for business purposes but also for the development of the local workforce.

Protective action refers to measures that are intended for foreign professionals and clients. For example, foreign nurses who practice in Indonesia based on the Regulation of the Minister of manpower No. 35 of 2015 are not required to be able to speak Indonesian, whereas nursing activity requires 2-way

<sup>28</sup> The Ministry of Manpower and Transmigration Republic of Indonesia, Guide to Equality and Non-Discrimination at work in Indonesia, Jakarta, (2012), p. 24

communication between nurses and patients. Lack of good communication can impede the healing process. Although the regulation of no obligation to speak Indonesian language is solely to avoid allegations of discriminatory acts, but as a form of protection and security in practicing a profession, the obligation to speak Indonesian language should stay to be a requisition. Important facts, even when a nursing student wishing to study in countries that use a language other than Indonesian, its requiring students to know the language of the State where they studied. When compared with nursing practice, of course, knowledge of the language where the foreign nurses work become a necessity and inevitability.

In the ILO, usually it's called affirmative action or positive action. Affirmative actions provides for special measures, usually temporary, measures to reduce the effects of discrimination in the past and are still ongoing in order to create equality of opportunity and treatment in actual practice in the labor market. The measures are usually targeted to a particular group, such as groups of one gender, or ethnic and race which have been the subject of discrimination because of the history or the oppression of one group against another group. They aim to cover the losses incurred due to the ongoing attitude, behavior and structure based on stereotypes and stigma, and reshapes a balance between the different groups in the labor market.

Convention No. 111 urges states to “declare and develop” a national policy to promote equality of opportunity and treatment in employment and occupation. The policy usually includes either the legal provisions to prohibit discrimination and proactive measures to achieve equality in the labor market practice.

Convention No. 111 states that the national policy should be developed “through appropriate methods in accordance with national conditions and practice”. This means there is enough room for flexibility in designing a national policy, but that policy must also be progressive and provide practical and effective

contribution to the elimination of discrimination whenever and wherever it occurs. Therefore, the important encouragement from the ASEAN Community for states to establish anti-discrimination laws based on the same minimum standards in order for economic cooperation which was built at the ASEAN level such as MEA and MRA can run well.<sup>29</sup> In addition, the promotion of the application of the principle of non-discrimination should also embody in the national policies of each country. Most preferred approach in many countries when preparing their national policy is to adopt the legislation, added with some regulation that are implementers and technical. Anti-discrimination law that was formed at the ASEAN level should serve as a basic guideline establishment of national anti-discrimination laws.

The principle of equality and non-discrimination must be incorporated into the programs and policies of the active labor market – start from promotion, foreign labor contract and steps of social insurance up until training, corporate development and social financial programs directed at reducing poverty which the application being monitored through the mechanisms and appropriate procedure.

National policy objectives of equality are to promote substantive equality for all groups of workers in the labor market. These means not only repeal discriminatory laws and practices, but also carry out some supportive measures to help disadvantaged groups in realizing their full potential. The goal of the national policy of equality is to ensure that the existing differences in the labor market reflect a free choice of work for all individuals without discrimination interferences, bias or prejudice.<sup>30</sup>

<sup>29</sup> In the EU, member states have agreed to establish anti-discrimination law. 28 member states have adopted a second decision (directive) that the Employment Equality Directive and the Race Directive. Both the decision obliges member states to adopt it into their respective national laws. See, Erica Howard, Study on the implementation of Directive 2000/78 / EC with regard to the principle of Nondiscrimination on the basis of religion or belief, Brussels: European Parliamentary Research Service, 2016, p. 9. Can be accessed in <http://www.europarl.europa.eu/thinktank>. ILO: Time for equality at work (Geneva, 2003), p. 26

<sup>30</sup> ILO: Time for equality at work (Geneva, 2003), p. 26

Committee of Experts on the Application of Conventions and Recommendations of the ILO (CEACR) emphasized the importance of effectiveness when assessing whether a particular country has set national policies conform ILO Convention No. 111. CEACR taking notes that creates policy and take action alone is not enough; national policies should be effective in securing tangible results in improving the labor market for disadvantaged groups of workers.<sup>31</sup>

Application of the principle of non-discrimination can also be seen as a measure of protection. Guarantee the equality between foreign workers and local worker is a form of protection for foreign workers and local worker at the same time. When foreign worker given better treatment than local workers, which has been mentioned before that treatment is also categorized as an act of discrimination, therefore from the standpoint of the local worker, they have been given less treatment. In addition, when a State has effectively apply the principle of non-discrimination against foreign workers in the AEC, such State may have a better bargaining position both to encourage even giving pressure to the other ASEAN countries to carry out similar actions on the base of that each state has committed to doing thereby.

To eliminate discrimination, it is necessary to have legal framework and holistic protection. Very often, the principle of equality and non-discrimination enshrined in the regulations in one country, but in practice facing difficulties in applying the principles or laws that do not define what is meant of discrimination. Specific legal provisions should be formulated to define discrimination and to identify the foundation of discrimination and the situation in the legislation can be apply. In practice, government, the judiciary (particularly the industrial court), employers, professional associations and other interested parties should be given an understanding of the limitations associated with the use of foreign worker in one

<sup>31</sup> ILO: "Fiftieth anniversary of the Discrimination (Employment and Occupation) Convention, 1958 (No.111)" in the Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), International Labor Conference, Session -98 (Geneva, 2009)

country. This understanding relates to the knowledge about the limitation, when an action to curb the surge of foreign workers considered discriminatory or simply as protection policies that are the responsibility of the state. However, the government must be able to provide the definition and limitations of discrimination in their respective national laws.<sup>32</sup>

Access to legal protection refers to the ability to exercise the law, both formally and informally. Protective measures can be initiated from the liabilities of the company providing media complaints on a company policy. Actually, in practice this can be done through the Labor Union. Furthermore, the procedure through the courts and alternative dispute resolution should still be strengthened. In many countries and jurisdictions, arbitration and mediation procedures and mechanisms available to protect against discrimination in employment practices. Settlement of a claim of discrimination by a court general, decision and determination is usually the most widely used method of enforcement. Advantages and disadvantages of enforcement through the courts is as follows.

The legal system will usually provide the burden of proof on the complainant. People who file lawsuits later must strengthen its allegations with greater certainty, give the facts, documents, testimony, and so were able to support his case. It then becomes a major obstacle to the enforcement of cases of discrimination, because of the special treatment can often be explained by the discriminatory behavior of invalid

<sup>32</sup> The Committee of Experts Application of Conventions and Recommendations of the ILO (CEACR) and the United Nations treaty bodies have repeatedly noted that the national legislation in many countries of East and Southeast Asia does not contain clear definition of discrimination. Definition of discrimination does not exist in national legislation, for example, Cambodia, China, Indonesia, Laos, Malaysia, Singapore and Thailand. CEACR and UN agencies have urged countries to accommodate clear definition of discrimination that reaches either direct or indirect discrimination in their national legislation. This definition should cover all of the foundation and discrimination aspects in employment and occupation as referred to in Article 1 Discrimination Convention (Employment and Occupation) 1958 (No. 111). See, the Ministry of Manpower and Transmigration Republic of Indonesia, Guidance of Equality and Non-Discrimination at Work in Indonesia, Jakarta, (2012), p. 86



and also by valid reasons derived from the “inherent requirements of a job”. Attempts to overcome this obstacle have caused the trend to reverse the charge in the case of discrimination.<sup>33</sup> Therefore in terms of foreign workers harmed as a result of discriminatory acts committed by a particular party, then the party which accused it must prove that the allegations are untrue. Especially in the situation of foreign workers, would be difficult if the burden of proof is given to them while not easy to collect data. Not to mention, for this long the position of labor is always inferior to the employer or the company.

Therefore, if all regulation of general regulation and technical implementers has been able to accommodate the principle of non-discrimination, then it can guarantee the labor equality. It will also succeed the purpose of establishing the MEA and the agreement contained in the MRA. Indonesia as the country with the largest population in ASEAN and owner of a large labor force will be able to provide a better bargaining position on the protection of Indonesian workers abroad when Indonesia itself had applied at the national level.

#### 4. Conclusion

Services are important part of trade in ASEAN to increase national income, provide job opportunities and enable skill exchanges between local and foreign workers. ASEAN Economic Community (AEC) that applied in 2015 become crucial to boost it. ASEAN MRA, an agreement that enable the flow of 8 profession will become the new icon for free flow of worker in ASEAN. Therefore, ASEAN states

<sup>33</sup> In the EU, stipulates that “Member States shall take the necessary measures, in accordance with their national legal systems, to ensure that, when people feel they are treated incorrectly associated with the principle of equal treatment which does not run against them demonstrate, before the court or the competent authorities of other facts from which one might think that there has been discrimination directly or indirectly, then it becomes the task of the parties are required to prove that there was no violation of the principle of equal treatment that has happened. “Council of the European Union: Directive 97/80 / EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, Art. 4 (1) (OJ L 14, 20.1.1998), p. 6-8.

must formulate comprehensive national regulation related to those professions (doctor, dentist, surveiyor, engineer, accountant, nurse, architect and tourism personel). Those regulation must able to sincronize the process of recruitment, selection, licensing, placement, termination, health insurance, accommodation, pension and other important things under one recognized standard.

Aside from recognized standardization, the success of AEC and MRA also decided by ASEAN states commitment to implement principle of non-discrimination consistently. Different treatment and overprotective regulation from one state can generate a cycle of revenge from other states with the result that AEC and MRA commitment for free flow of workers will be failed. Discrimination to either foreign or local worker is possible to occur in many ways. Therefore, a state obligated to specify what action can be called as discrimination, including discrimination based upon nationality. Manual guide for anti discrimination policy play crucial in order to avoid different understanding between ASEAN states. This is necessary because discrimination is not always about treat other less but also treat other more. Principle of non-discrimination must be formulated in any level of legislation, technical regulation and Standard of Procedure (SOP) in recruitment, selection, payment, pension and other thing related to the interest of worker. However, protection of foreign should not be deemed as prioritization of foreign worker but as mutual protection of local worker in other ASEAN states. Implementation of non-discrimination principle in a state will push other state to do same thing to their foreign worker.

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