ASEAN Services Liberalization Beyond 2015

Assessment and Recommendations

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Executive Summary

This report was commissioned by the USAID for use by the ASEAN Coordinating Committee on Services (CCS). The stated objective of this report is to make recommendations to enable ASEAN to incorporate new approaches/provisions to the liberalization of trade in services as it transitions from the ASEAN Framework Agreement on Services to the proposed ASEAN Trade in Services Agreement (ATISA).

Trade in services plays an important role in the global economy, yet growth remains stifled due to trade and other regulatory barriers. The same is true in ASEAN. Progress toward the liberalization of services has been steady over the past several years, but criticized in some quarters for being too gradual and for not going far enough with liberalization targets and outcomes. There is evidence to suggest that preferences are slight in a large percentage of sectors, that other regulations not directly related to trade preferences remain as barriers and that a lack of transparency among existing commitments and regulations is stifling progress. To this end, there is also a feeling that intra-ASEAN services liberalization has not received the same level of attention or ambition seen in some external agreements negotiated by ASEAN Members with other nonparty countries.

ASEAN and its Members clearly understand the importance of services to future economic growth in the region and that the time is ripe for ASEAN to become more ambitious in its internal services commitments. The importance of prompt services liberalization is present in in a host of official ASEAN documents and a multitude of statements by high-placed ASEAN officials in recent years. Of note, the ASEAN Vision 2020 (1997), Bali Concord II (2003), Bali Concord III (2011) and countless other documents which envisage accelerated liberalization and integration of ASEAN and lay the initial groundwork for the attainment of these objectives. The AEC Blueprint (2007) builds on and encompasses the aims of these documents and stresses the importance of liberalization of services and ultimate objective of the ASEAN Economic Community (AEC):

> Free flow of trade in services is one of the important elements in realizing ASEAN Economic Community, where there will be substantially no restriction to ASEAN services suppliers in providing services and in establishing companies across national borders within the region, subject to domestic regulations.

In line with the objective of the AEC Blueprint of increased liberalization and integration, ASEAN must recognize that the ATISA represents a once in a generation opportunity to revise the architecture and ambition of the regional services agreement.

While it does seem imperative to move beyond the positive list approach to scheduling services commitments in order to deepen commitments and increase transparency in ASEAN, this in itself in not sufficient. In order for the ATISA to have a positive economic impact—and regardless of scheduling architecture—the agreement must use modern drafting techniques to address general principles and other core elements in a coherent fashion with the clear aims and objectives of the AEC Blueprint in mind. Discussed in Chapter 4 of this report, such principles and elements include specific liberalization targets, existing and future use of flexibilities (such as the 15% flexibility and the possible incorporation of emergency safeguards), most-favored nation, convergence and harmonization of regulations (in particular but not exclusively through mutual recognition agreements (MRAs), government procurement and rules of origin. ASEAN may also wish to look beyond the traditional topics and craft its own Reference Paper on a select topic(s) in order to ensure that commitments made in the ATISA are actually realized in practice.

Scheduling architecture is an important tool in obtaining market access and national treatment. While theoretically any architectural approach could yield similar results, in practice it is clear from the evidence that a positive list approach almost always is less ambitious and more protectionist than a negative list approach. Importantly for ASEAN, such an approach is also lacking in transparency and does not provide partner governments or traders necessary and useful information regarding the regime. This is not to suggest that the ATISA must use a negative list approach to scheduling commitment. In recent years, several alternative approaches have emerged through bilateral and regional trade agreements—these include the transparency list approach (favored by Japan and familiar to several ASEAN Members), models which blend aspects of a positive and negative list approach and most recently a model which allows some partner countries to use a positive list and others to use a negative list. But these are just models, and ASEAN should not feel constrained by existing formats and approaches but rather should be confident enough to design its own model should it not be comfortable with the others. Again, the goal is not to have a particular model but to work towards integration and a common economic community.

This report concludes that ASEAN should ensure the following aspects are considered and incorporated into the new agreement in order to build upon and improve the foundation of the GATS/AFAS model.

- ASEAN should set ambitious targets for liberalization and while the make-up of ASEAN may necessitate variable geometry this should be limited, clear and transparent.
- While ASEAN has not favored back-loaded commitments, it should ascertain whether phase-in commitments may be utilised in appropriate circumstances to further integrate and expand market access opportunities.
- ASEAN should also ensure that the ATISA contains an MFN clause guaranteeing that Members receive the most favoured treatment, even if an individual Member negotiates a separate FTA with another country or countries.
- Market access should be substantial, and the ATISA should ensure that commitments are not scheduled below the existing regulatory standard/status quo; in other words, Members should not be allowed to have or maintain any gap between the applied regulations at the conclusion of the negotiations and what appears in the ATISA schedule. While this could

be subject to some exceptions and pull-backs, these should be clear, transparent and limited.

- Ideally, commitments will be subject to an upward ratchet and also cover future services, subject to certain exceptions as scheduled.
- The ATISA should also feature strongly worded clauses on transparency, as well as make a genuine attempt to strengthen regulatory coherence and MRAs in order to improve the efficiency of services and opportunities for traders.
- The ATISA should have clearly stated and carefully designed rules of origin.
- ASEAN may consider having the ATISA cover government procurement of services, and clearly state the perimeters within the agreement.
- ASEAN may well consider the usage of emergency safeguards in the ATISA, but should be careful in doing so. Variable geometry, pre-identified sectors and transitional or phase-out periods are recommended for consideration.
- ASEAN may wish to consider the adoption of new Reference Papers, such as in insurance, transportation or energy services; however, it must be remembered that Reference Papers are only useful when the barriers to integration are not trade/ commitment related but when behind the border issues are hampering integration despite services commitments. In this regard, it may be premature for ASEAN to consider the adoption of additional Reference Papers.
- To achieve the objectives set out in the AEC Blueprint and countless other documents, ASEAN must move beyond the traditional positive list approach to scheduling commitments. The positive list approach is proven to deliver lower returns than other formats and will continue to do so absent extreme political will.
- Regardless of scheduling format, the ATISA must ensure that information regarding reservations is available to governments and traders; transparency and predictability in itself can lead to greater efficiencies and economic growth.
- If the negative list approach is not adopted, ASEAN may wish to consider one of the hybrid formats being developed, or develop its own format to scheduling. The adoption of a non-binding transparency list is the smallest step beyond the positive list, but even it can have benefits. Moreover, the ATISA can be designed to have the list transition into a binding list within a set period of time. The adoption of a hybrid such as the TISA or that utilized in the Australia –Chile FTA is a further step in that it blends aspects of the positive and negative list. Not without complexity, such formats would be beneficial for liberalization and integration while still providing some level of comfort to Members uncomfortable with the negative list approach.
- ASEAN should ensure that the ATISA is carefully drafted and makes use of most sophisticated techniques to avoid error and misinterpretation. One example would be in a negative list Annex I to draft a clause allowing Members to add measures which were in force on the date of the agreement but erroneously not added to the Annex to be added at a later date; such a clause ensures that a ‘forgotten measure’ does not become a ‘lost’

measure. Likewise, even in a positive list format a clause should appear which allows Members to correct for mistaken or poorly drafted reservations.

It is imperative that the ATISA be a forward looking and modern agreement which meets the needs of all members and contributes positively to economic growth and integration. This is the key to the success of the agreement and should be at the core of the negotiations. The ultimate objective of an AEC should mandate that the ATISA place its members in a preferable position to all other agreements negotiated by individual members. This will require a certain level of political will and commitment and will require adjustments to the domestic regulatory framework of all ASEAN Members, but is necessary to fulfill the promise of the AEC Blueprint and contribute to the economic growth and success of a fully functional and integrated economic community.

Introduction

Liberalization of trade in services and associated domestic reforms are fundamental to the realization of the ASEAN Economic Community (AEC). The decision by the ASEAN leaders to establish the AEC, including the free flow of services, has highlighted the need for each ASEAN Member State (AMS) to remove restrictions affecting trade in services—including related foreign direct investment—and make related reforms.

Recognizing the growing importance of intra-ASEAN integration in the services sector, the ASEAN Economic Ministers (AEM) signed the ASEAN Framework Agreement on Services (AFAS) in 1995 in Bangkok, Thailand. Under AFAS, Member States engage in successive rounds of negotiations to liberalize trade in services in the ASEAN region. The negotiations aim to achieve increasingly higher levels of commitment, which are set forth in service commitment packages annexed to the Framework Agreement.

Since the signing of AFAS in 1995, ASEAN has concluded eight packages of commitments under AFAS. These include a wide range of services sectors under the purview of the AEM, such as business and professional services, construction, distribution, education, environmental services, healthcare, maritime transport, telecommunications and tourism. In addition to these AFAS packages, there have also been five packages of financial services commitments signed by ASEAN Finance Ministers and seven packages for air transport services signed by ASEAN Transport Ministers.

Consistent with AEC Blue print on Movement of Skilled Labour, ASEAN agreed to establish a Movement of Natural Persons (MNP) Agreement to facilitate movement of natural persons engaged in trade in goods, services and investments. The ASEAN MNP Agreement was signed by AEM in November 2012. ASEAN has also compiled an inventory of barriers to trade in services (similar to the ASEAN NTM database) to enhance transparency and identify limitations to be removed. Public version of the inventory has been uploaded online for traders' reference. ASEAN has also established Mutual Recognition Agreements (MRAs) for selected professions:

- Engineering
- Nursing services
- Architecture
- Land surveying
- Accountancy services
- Dental practitioners
- Medical practitioners

ASEAN Member States are expected to continue expanding the depth and breadth of their services commitments towards achieving free flow of services by 2015.

After two decades of AFAS, the ASEAN Coordinating Committee on Services (CCS) is now considering how AFAS could be enhanced, particularly post-2015 when all AMS are to have completed all the services liberalization schedules in the AEC Blueprint. Potential areas of focus include:

- ***General Rules*** such as transparency and good regulatory practices. These could be applied to domestic regulation (e.g. authorization and licensing procedures), international maritime transport, telecommunication services, e-commerce, computer related services, cross-border data transfers, postal and courier services, financial services, temporary movement of natural persons, government procurement of services, export subsidies and state-owned enterprises;
- ***Special sector provisions,*** such as air transport, financial services or postal and courier services;
- ***Comprehensive coverage of investments*** in service sectors, affording eligible investors the same benefits as the ACIA;
- ***Strengthened movement of skilled persons*** within ASEAN by building up MRAs and operationalizing the Agreement on the Movement of Natural Persons; and
- ***Scheduling new commitments:*** A consistent and comparable approach to approaches being adopted in new services agreements with respect to scheduling commitments, such as using the negative list or a hybrid of negative and positive lists for different modes of supply or obligations (i.e., positive list market access, negative list National Treatment).

The objective of this study is to provide CCS with recommendations to enable ASEAN to incorporate new approaches/provisions to liberalize trade is services in the proposed ASEAN Trade in Services Agreement (ATISA).

1. Liberalizing Trade in Services

Services now play a large role in the world economy. Statistically undercounted for decades, they are now recognized for their important and growing role in the prosperity of all nations.[1] Services are not only important to domestic economies, but increasingly are becoming potential drivers of economic gains and deliverables through bilateral, regional, plurilateral, and multilateral trade agreements. To harness the potential of services, substantial effort will need to be placed into the negotiating and liberalization process.

Without taking anything away from the difficulties in negotiating for the liberalization of trade in goods, trade in services is more complex for a host of reasons. Chief among these is that, in most cases, trade in services requires physical proximity and often interaction between the provider and consumer (Mode 1, cross-border trade, is the exception). The nature of this "behind the border" interface goes some way in explaining why nations restrict foreign providers' market access and give domestic providers preferences. The need to understand and to some extent untangle the web of regulations across areas which have traditionally been separate makes trade in services negotiations even more complex and difficult. Yet another impediment is the diversity among the various service sectors and the multiplicity of market failures and regulatory frameworks to be taken into account in negotiations.

WTO/GATS

The General Agreement on Trade in Services (GATS) was the first successful attempt to incorporate services into the multilateral trade system. The incorporation of services into the system remains incomplete. Not only have issues such as subsidies, procurement and emergency safeguards been left for future negotiations, but the agreement itself always envisaged initial market access and national treatment commitments to be progressively liberalized. Understandably, the GATS differs from the General Agreement on Tariffs and Trade (GATT) in a number of respects, most notably in architecture and the variable geometry of commitments between and among Members. The GATS is based on the positive list model, whereby Members select the sectors, sub-sectors and modes of supply which they are willing to commit to liberalizing combined with the negative listing of limitations to these commitments. In the main,

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[1] The positive correlation between service sector share of GDP to per capita income is well-known. See, ie, Barry Eichengreen and Poonam Gupta, 'The two waves of service-sector growth' Oxford Economic Papers (2011). For an example of a study demonstrating statistical undercounting, see Jane Drake-Brockman, 'Access through presence: Australian perspectives on measuring Mode 3 trade' in Pierre Sauvé, Gloria Pasadilla and Mia Mikic (eds) *Service Sector Reforms: Asia-Pacific Perspectives* (Asian Development Bank Institute and ARTNeT Secretariat, 2011).

the GATS is the result of pragmatic negotiations which resulted in a rich set of rules but a lighter approach in regards to commitments. There is much more work to be done. The fact that the negotiations linger is testament to the practical difficulties of service negotiations.

To date, there have not been any meaningful advances to the GATS. This despite the 'technological revolution' which emerged since the Uruguay Round, leaving services 'with yesterday's rulebook' of 'weak, incomplete, rules and the limited, regulatory precaution-laden, pre-Internet, commitments of 1994.'.[2] Perhaps more discouraging, commitment offers made as part of the Doha Round of trade negotiations have been disappointingly shallow and unambitious.[3]

Advancements in the level of commitments, architecture, and WTO+ and WTO-X outcomes[4] have been achieved in the bilateral and regional settings. (additional market opportunities have also emerged through unilateral action),[5] where advances in several industries, such as banking, insurance, and telecommunications, have led to significant market access opportunities for exporters and economic benefits for the liberalizing host country.[6] That being said, there has also been little movement in any free trade agreement (FTA) in certain sensitive sectors—including audio-visual, certain transport sector, and movement of persons–and many FTAs (particularly South-South FTAs) 'only marginally deepen liberalization commitments beyond the GATS'.[7]

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[2] See Pierre Sauvé, 'Towards a plurilateral Trade in Services Agreement (TISA): Challenges and prospects' (2014) 5(1) *Journal of International Commerce, Economics and Policy* 1, 3.

[3] See Pierre Sauvé and Anirudh Shingal, 'Reflections on the Preferential Liberalization of Services Trade' (2011) 45 *Journal of World Trade* 953, 956; Rudolf Adlung and Hamid Mamdouh, 'How to Design Trade Agreements in Services: Top Down or Bottom-Up?' WTO Staff Working Paper ERSD-2013-08 (2013) 3–4.

[4] The term WTO+ refers to rules or market access commitments which go further than or qualitatively deepen existing rules or commitments. WTO-X refers to advances beyond those in the WTO. See Henrik Horn, Petros Mavroidis, and Andre Sapir, 'Beyond the WTO? An anatomy of EU and US preferential trade agreements,' Bruegel Blueprint Series Vol. VII (2009).

[5] Michael Gasiorek et al., 'Qualitative Analysis of a Potential Free Trade Agreement between the European Union and India,' The European Commission and Centre for the Analysis of Regional Integration at Sussex (2007), available at http://trade.ec.europa.eu/doclib/docs/2007/june/Tradoc_135101.pdf (notes India's 10 percent foreign equity ceiling in its mode 3 Uruguay Round offer for certain key sectors, its 44.8 percent conditional offer in the Doha Round, and its applied rate of nearly a 70 percent ceiling in the sectors). See also Jeffrey Schott and Julia Muir, 'Prospects for services trade negotiations,' Peterson Institute for International Economics Working Paper 12–17 (2012); Juan Marchetti and Martin Roy, 'Service Liberalization in the WTO and in PTAs,' in Juan Marchetti and Martin Roy (eds), *Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations* (Cambridge University Press, 2008).

[6] It is clear that countries have both unilaterally liberalized and offered FTA concessions in more sectors and subsectors and at a deeper level than what they have offered in the Doha Round of trade negotiations at the WTO. See Juan A. Marchetti and Martin Roy, 'The TISA Initiative: An Overview of Market Access Issues,' WTO Staff Working Paper ERSD-2013-11 (2013), p 14; Martin Roy, 'Services Commitments in Preferential Trade Agreements: An Expanded Dataset,' WTO Staff Working Paper, ERSD-11-18 (2011); Martin Roy, Juan Marchetti, and Hoe Lim, 'Services Liberalization in the New Generation of Preferential Trade Agreements: How Much Further than the GATS?' (2007) 6 *World Trade Review* 155.

[7] Aaditya Mattoo and Pierre Sauvé, 'The Preferential Liberalization of Services Trade,' NCCR Working Paper No 2010/13 (2010) 57.

This is not out of the ordinary for the services sector. Nor is the problem of so-called 'water', that is the gap level between the level of commitment and the applied regulatory norm, which is so entrenched that Roy, Marchetti and Lim somewhat bizarrely concluded that FTAs 'generally have provided for significant improvements over GATS commitments, *sometimes even leading to real liberalization of the market*' (emphasis added).[8]

BILATERAL AND REGIONAL FREE TRADE AGREEMENTS

There are now at least 122 bilateral and regional FTAs containing services, and the number is growing.[9] Now, the majority of comprehensive FTAs include a chapter on services, whereas until 2000 only 12 percent (less than 10 in number) included trade in services. Most FTAs follow the negative list or positive list approach, with the former slightly out-numbering the latter and popular in the Americas and with developed countries (including select Asia-Pacific countries such as Australia, Japan, New Zealand and Singapore) and the latter popular with developing and most Asian countries (with the notable exception being the European Union (EU), which until recently favored the positive list approach). Under the negative list approach, parties liberalize all sectors and parts thereof except those identified in the 'reservation lists' which preserve existing non-confirming measure (Annex 1) or make no/limited commitments to current or future measures which can be maintained, modified or adopted (Annex 2)—the equivalent of an 'unbound' in a positive list. Although there is no reason why either approach should result in more or less liberalization than the other,[10] there is solid evidence that the negative list approach results in substantially more liberalization than the positive list approach.[11]

Considerable architectural variation has recently emerged within and across FTAs, with significant experimentation in a growing number of agreements combining negative listing for investment or specific sectors while using a positive list for other sectors or modes of supply.[12] This is an encouraging trend, and a welcome departure from the stringent strictures of past scheduling architecture.

ASEAN ECONOMIC COMMUNITY BLUEPRINT

Owing to the nature of services, trade liberalization is left devoid of value without a properly designed and functioning broader regulatory environment. In this regard, designing or

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[8] Roy, Marchetti and Lim, above n 6, 33.

[9] There are approximately 400 FTAs, with at least 60 containing at least one Asian country.

[10] See Adlung and Mamdouh, above n 3; Carsten Fink and Martín Molinuevo, 'East Asian Free Trade Agreements in Services: Roaring Tigers or Timid Pandas?' World Bank Trade Issues in East Asia (2007) 17-20.

[11] See, eg, Martin Roy, 'Services Commitments in Preferential Trade Agreements: An Expanded Dataset' WTO Staff Working Paper ERSD-11-18 (2011); Gary Hufbauer and Sherry Stephenson, 'Services Trade: Past Liberalization and Future Challenges' 10(3) *Journal of International Economic Law* 605; Roy, Marchetti and Lim, above n 6; Bernard Hoekman, 'Liberalizing Trade in Services: A Survey' World Bank Working Paper No. 4030 (2006); Marchetti and Roy, above n 5; Adlung and Mamdouh, above n 3, 14-16.

[12] See generally, Aaditya Mattoo and Pierre Sauvé, 'Services' in Jean-Pierre Chauffour and Jean-Christophe Maur (eds) *Preferential Trade Agreement Policies for Development: A Handbook* (World Bank, 2011) 235–274.

maintaining the necessary regulatory framework and environment can contribute to the aims of trade liberalization and indirectly to the aims of the ASEAN Economic Community Blueprint (AEC Blueprint) for a common market.[13] On the other hand, regulation which unnecessarily restricts competition—often the result of the regulator being closely tied or accountable to sectoral interests in the government or industry and in some cases of overlapping regulatory regimes—is a key impediment. Impediments stemming from inappropriate regulation in the finance and several infrastructure-related industries (telecommunications, energy, etc.) are well-known and thoroughly discussed in the literature.

The "free flow of services" can play a large role in the success of the AEC Blueprint for a common market. The AEC Blueprint envisaged the removal of all restrictions to the trade in services by 2015, with priority sectors of air transport, healthcare, e-ASEAN and tourism and logistics having earlier timeframes of 2010 and 2013, respectively. Over the past decade, much work has been accomplished in successive negotiating rounds, notably in the expansion of the number of sectors to be liberalized and the deepening of liberalization commitments to include:

- No restrictions on service delivery via mode 1 (cross-border trade) and mode 2 (consumption abroad), except where there are bona fide regulatory reasons, such as public safety;
- Gradual expansion of the foreign (i.e. ASEAN) equity participation permitted in each sector, to be no less than 70 percent by 2010 in the four priority sectors, and to be no less than 51 percent by 2010 and 70 percent by 2015 in all other sectors; and
- Progressive removal of other limitations on market access via mode 3 (commercial presence) by 2015.

The negotiations were also tasked with setting the parameters of liberalization and limitations on national treatment, liberalization of service delivery via mode 4 (the movement of natural persons) and the liberalization of horizontal limitations on market access (i.e. limitations that apply across the range of services sectors), with commitments to be made in accordance with these parameters. While there were to be no a priori exclusions, the AEC Blueprint allows for some flexibility in achieving these objectives, including via an ASEAN minus-X formula (where countries that are ready to liberalize can proceed first and be joined by others later) and a 15% margin of flexibility (from the 8th package).

Progress to date has been steady, but criticized in some quarters for being too gradual and for not going far enough with liberalization targets and outcomes. There is also a feeling that intra-ASEAN liberalization has not received the same level of attention or ambition seen in some agreements negotiated by ASEAN Members with other non-party countries. The challenges for ASEAN in its integration process are many, with the most prominent among some Members being opposition from domestic industry and sectors fearing displacement, weak regulatory

[13] See ASEAN Economic Community Blueprint, available at http://www.asean.org/archive/5187-10.pdf.

oversight, confusion over necessary steps to liberalization, and the diversity of the Member economies and demographics within the Member States.[14]

The stated objective of this report is to make recommendations to enable ASEAN to incorporate new approaches/provisions to liberalize trade in services as ASEAN transitions from the ASEAN Framework Agreement on Services (AFAS) to the proposed ASEAN Trade in Services Agreement (ATISA). The report will do so following a review of the state of play in ASEAN, the objectives of the ASEAN integration process and the ATISA and brief assessment of liberalization efforts to date. The substantial contribution of this report is, however, the analysis of various scheduling techniques, key issues and protections which could be utilized by ASEAN in the negotiation of the ATISA to further integrate the regional economies while at the same time protecting Member interests.

[14] Some of these issues are developed in Pierre Sauvé, Gloria Pasadilla and Mia Mikic (eds) *Service Sector Reforms: Asia-Pacific Perspectives* (Asian Development Bank Institute and ARTNeT Secretariat, 2011).

2. ASEAN Integration and Trade in Services

NECESSARY STRUCTURAL ADJUSTMENTS

ASEAN could benefit from a more integrated services market. To date, ASEAN's growth model has centered on export-orientation of manufacturables but it has traditionally done so with a fragmented supply chain and disjointed services network. This is not to discount the progress which of the last few decades, and undoubtedly manufacturing and exports would have suffered were it not for the sustained progress and improvements in the supply of a number of key trade facilitating services. Much of this progress appears to have been the result of unilateral action and domestic interests as opposed to negotiations/agreements between ASEAN Members.

As with other regional jurisdictions, continued growth will necessitate a rebalance and structural shifts towards consumption-based growth. At the same time, ASEAN will seek to step up to higher-value manufacturing, home-grown innovations and exports. Correspondingly, most ASEAN Members will undergo a significant change in demographics in the coming years, with a more educated and ageing population. Services will be critical to facilitate these shifts, and will need to be more efficient, responsive and productive in order to produce the growth which governments and citizens have come to expect.

As mentioned, progress has been made—ASEAN almost doubled its share of world trade in services from 2000-2012 (from 4.6% to 8%), and several Members rank in the top-40 exporters of services.[15] That said, growth and productivity is not uniform and when Singapore's exports are excluded, the global share hastily retreats back to the 2000 figure. Moreover, the distribution of services trade is concentrated and remains virtually unchanged from 2000 (Singapore (51%), Malaysia (16%) and Thailand (15%)).[16] The level of competitiveness and productivity thus appears extremely uneven. This is, of course, unsurprising given the extreme disparity in per capita GDP and other measurables between the Member States.[17] There are also extreme gaps in 'Doing Business' and other indicators which, on the whole, indicate weak legal and regulatory framework (i.e. most ASEAN Members score low on government effectiveness, regulatory

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[15] See Pierre Sauvé, 'Services Trade and the ASEAN Economic Community' ADB Seminar Series on Regional Economic Integration and the Asian International Economists Network Speaker Series, 18 July 2013, Slide 6.

[16] Ibid.

[17] This point should not be overstated, however, as excluding Singapore the per capita GDP gap between richest and poorest ASEAN Members is lower than the corresponding gap in the EU.

environment, business environment and trade infrastructure), below average competitiveness, logistics, innovation, human development, corruption perception, etc. regardless of further integration, it is clear that these critical factors must improve should ASEAN truly desire to continue growing and developing.[18]

ASEAN AND FREE TRADE AGREEMENTS

Broadly speaking (and there are exceptions), the GATS commitments of ASEAN Members are fairly unambitious (often status quo minus) and provide sufficient scope for development; in other words, the commitments lack in breadth and depth. Given this, it is not surprising that ASEAN Members have been among the top recipients of requests in the Doha Round. This is encouraging, as it is a sign that others see the potential for economic growth in the region, and the potential for services to significantly contribute to this growth.

In FTAs which contain an ASEAN Member, results are mixed. While not overly ambitious, there is some GATS-plus movement in a number of sectors and modes. Oddly, however, is that such FTAs demonstrate only limited progress in the telecommunications and financial services sectors, the two areas where the most progress has been made at the multilateral level.

Members of ASEAN have gone beyond their GATS commitments in their Doha Round offers, but even more important is that in a number of sectors where they have received requests they have gone even farther in their FTAs.[19] While these vary by sector, the 'best FTA' commitments for countries such as Indonesia, Malaysia, Philippines, Singapore and Thailand are significantly improved upon the GATS commitment for almost every sector (while 'Best FTA' commitments from Vietnam are for the most part the same or similar to GATS commitments).[20] The landscape of select sectors advancing beyond the GATS coupled with incomplete commitments within the modes or in other sectors is rife in the FTAs of ASEAN Members as well as the AFAS and suggests scope for further liberalization commitments and opportunity for the ATISA to harness the potential for regional growth and development. In addition, the issue of commitments (even if extending beyond GATS) not actually leading to market opportunities, with many commitments remaining below the regulatory status quo, is still a problem in most FTAs.[21]

The effect of the services commitments in ASEAN FTAs is one the whole debatable. While ASEAN FTAs with external countries generally exceed the scope and depth of the commitments made in the GATS (and do not exceed the commitments made in the AFAS),[22] none of the ASEAN FTAs provide for any rule-making or innovations, instead closely paralleling the

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[18] Sauvé, above n 15, Slides 8-14; Vo Tru Thanh and Paul Bartlett, Ten Years of ASEAN Framework Agreement on Services (AFAS): An Assessment' REPSF Project No. 05/004 (2006) 39.

[19] On preference margins in the GATS, Doha Round offers and FTAs, see Sauvé and Shingal, above n 3.

[20] Roy, above n 6; Marchetti and Roy, above n 6, 23.

[21] More worryingly, perhaps, are the findings that the substantial majority of FTAs – including every FTA negotiated by ASEAN and its individual Members – contain commitments which are GATS-minus. Adlung and Mamdouh, above n 3, 15-16.

[22] See David Kleimann, 'Beyond Market Access? The Anatomy of ASEAN's Preferential Trade Agreements' (2014) 48 *Journal of World Trade* 629, 668.

architecture of the GATS.[23] Moreover, Member commitments differ greatly between the various FTAs (which indicate that the request-offer approach is still being used in the negotiations) as do the expected gains.

What is even more curious, however, is that external partners that negotiate separately with ASEAN Members tend to negotiate agreements with more ambition and which exceed the scope and depth of plurilateral negotiations with ASEAN. The fact that any commitment made in an ASEAN FTA is automatically extended to all ASEAN Members— a built in liberalization mechanism—while positive in theory, works to discourage Members from making deeper commitments in the plurilateral ASEAN-based negotiations.[24] Negotiating partners have seen this and reacted in order to combat free riding by opting to negotiate separate agreements with ASEAN Members prior to or in exclusion of negotiating with ASEAN (i.e. Japan and perhaps the EU). In this regard, external partners can and are receiving preferences which exceed AFAS obligations in some sectors and sub-sectors.

The situation is thus that AFAS-minus commitments are made in plurilateral-ASEAN FTAs while AFAS-plus commitments are made in FTAs negotiated by individual ASEAN Members with external partners. One commentator found the reason is that external agreements are 'more comprehensive and deeper' due to the fact that they 'overcome the "lowest common denominator" and "free rider" problem of the ASEAN plurilateral negotiation setting'.[25] While beyond the scope of this report, the trends in this regard are worrying and should be addressed in future work.

AEC AND THE ASEAN TRADE IN SERVICES AGREEMENT

The time is ripe for ASEAN to become more ambitious in its internal services commitments. Such a conclusion can be garnered from the ambitious statements contained in official ASEAN documents and statements made by high-placed officials. For instance, the ASEAN Vision 2020 (1997),[26] Bali Concord II (2003),[27] Bali Concord III (2011), and countless other documents envisage accelerated liberalization and integration of ASEAN and lay the initial groundwork for

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[23] It should be noted that the ASEAN–Korea FTA does contain an annex on financial services while the ASEAN–Australia–New Zealand FTA includes annexes on financial services and telecommunications in addition to a chapter on the movement of natural persons.

[24] Kleimann, above n 22, 667.

[25] Ibid at 631 and 638.

[26] ASEAN Vision 2020 (1997) available at http://www.asean.org/news/item/asean-vision-2020.

[27] Declaration of Bali Concord II (2003) available at http://www.asean.org/news/item /declaration-of-asean-concord-ii-bali-concord-ii. The Bali Concord II, in particular, declares that ASEAN 'shall continue its efforts to ensure closer and mutually beneficial integration among its member states and among their peoples' and that it is 'committed to deepening and broadening its internal economic integration and linkages with the world economy to realize an ASEAN Economic Community through a bold, pragmatic and unified strategy.' Section B then sets out a goal of creating a 'stable, prosperous and highly competitive ASEAN economic region in which there is a free flow of goods, services, investment and a freer flow of capital, equitable economic development and reduced poverty and socio-economic disparities in year 2020.'

the attainment of these objectives.[28] The AEC Blueprint (2007) builds upon and encompasses the aims of these documents and stresses the importance of liberalization of services and ultimate objective of the AEC:

> Free flow of trade in services is one of the important elements in realizing ASEAN Economic Community, where there will be substantially no restriction to ASEAN services suppliers in providing services and in establishing companies across national borders within the region, subject to domestic regulations [emphasis added].[29]

This objective is reiterated in a number of ASEAN documents and several statements. For example, Ong Keng Yong, Secretary-General of ASEAN the importance of services liberalization and integration for both internal and external benefits:

> Trade in services cannot be isolated from trade in goods. The services sector is an indispensable part of our economies. Our growth in agriculture, manufacturing and natural resources production is dependent on the quality and spread of the related services. Indeed, without the services, we cannot grow. Without the services, our bargaining power is weakened. If we do not deal with the services sector, our economies will not be as attractive to the foreign investors. To put it very starkly, ASEAN's drive towards the AEC cannot be substantiated without a well-thought out policy of dealing with trade in services. Moreover, ASEAN cannot gain adequate leverage in its FTA negotiations with Dialogue Partners if we do not liberalise and accelerate ASEAN's trade in services [emphasis added].[30]

Numerous other statements have recently been made, including by the ASEAN Economic Ministers, which expressed determination and support for the 'realization of the goals of **ASEAN integration** and commit[ment] towards advancing ASEAN's **trade and investment facilitation and liberalization agenda** so as to continue to bring prosperity and narrow the development gap in ASEAN [emphasis added].'[31] Myanmar's President Thein Sein likewise stressed at the 25th ASEAN Summit Opening Ceremony that 'there is no room to be complacent with our achievements and we should not rest on our laurels made so far. …The evolvement of ASEAN Community in 2015 will be a new beginning for a new ASEAN calling for **greater unity and integration**, enhanced operational efficiency, better coordination, stronger resilience and greater competitiveness of the Community [emphasis added].'[32]

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[28] These build upon the AFAS, which in itself reinforces the notion that trade liberalization and the ASEAN integration into a common market are at the core of its economic relations. See, in particular, the preamble.

[29] ASEAN Economic Community Blueprint (2007), available at http://www.asean.org/archive /5187-10.pdf.

[30] 'Towards a Free Flow of Services in ASEAN,' Opening Speech by H.E. Ong Keng Yong, the Secretary-General of ASEAN, 5 July 2005, available at http://www.asean.org/resources/2012-02-10-08-47-56/speeches-statements-of-the-former-secretaries-general-of-asean/item /towards-a-free-flow-of-services-in-asean-opening-speech-by-he-ong-keng-yong-the-secretary-general-of-asean.

[31] The 46th ASEAN Economic Ministers' (AEM) Meeting, August 2014, Nay Pyi Taw, Myanmar available at http://www.asean.org/images/Statement/2014/aug/JMS%20AEM%2046%20_Final.pdf.

[32] Statement by H.E. U Thein Sein at the 25th ASEAN Summit Opening Ceremony, 12 November 2014, available at http://www.asean.org/images/pdf/2014_upload/OpeningStatementeng201525summit.pdf. See

Similarly, Le Luong Minh, Secretary-General of ASEAN, summarised the ambitious vision and mood of the ASEAN community (emphasis added):

> ASEAN Leaders, at their 23rd ASEAN Summit [], while emphasizing the need to enhance efforts towards the realization of the ASEAN Community**,** in their Declaration on the ASEAN Community's Post-2015 Vision [,] **reaffirmed that ASEAN's Community building and integration will be further deepened and broadened. The ASEAN Community is envisaged to pursue the realization of a politically cohesive, economically integrated and socially responsible ASEAN.**[33]

These statements can also be summarised in the speech of Hun Sen, Prime Minister of Cambodia (emphasis added):

> To ensure that our common goal of ASEAN Community by 2015 is attainable, ASEAN has to double its efforts at all fronts. … [ASEAN roadmaps, plans, and concords] serve as important tools for **deepening and accelerating the ASEAN integration process** while strengthening external relations and ensuring ASEAN centrality in the evolving regional architecture. Indeed, all these will lead to narrowing development gaps among ASEAN member countries, which is not only a pre-condition for ensuring ASEAN competitiveness and reducing poverty of our peoples but also for **helping ASEAN achieve real regional integration and promoting its centrality** in broader regional and world affairs.[34]

The objective of these documents and statements is clear—a deeply integrated economic community with the free flow of trade and investment. The recommendations of this report will be informed by the stated objectives of ASEAN as highlighted above.

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also Keynote Speech by H.E. Le Luong Minh, Secretary-General of ASEAN, ASEAN Insights Conference 11 September 2014, London, United Kingdom, available at http://www.asean.org/resources/2012-02-10-08-47-56/speeches-statements-of-the-secretary-general-of-asean.

[33] Keynote Address by H.E. Le Luong Minh, Secretary-General of ASEAN, International Workshop on the Post-2015 ASEAN Community: Vision by ASEAN Countries and Vietnam, 3 December 2013, Hanoi, Vietnam, available at http://www.asean.org/resources/2012-02-10-08-47-56/speeches-statements-of-the-secretary-general-of-asean.

[34] Cambodian Prime Minister Hun Sen's Keynote Address on ASEAN Day, 8 August 2012, available at http://www.asean.org/images/2012/documents/cambodian-prime-ministers-keynote-address-on-the-asean-day.pdf.

3. ASEAN Framework Agreement on Services

The AFAS is the longstanding services agreement for the regional bloc. Formalized in December 1995, Article 1 of the AFAS sets out the objectives:

> i. to enhance cooperation in services amongst Member States in order to improve the efficiency and competitiveness, diversify production capacity and supply and distribution of services of their service suppliers within and outside ASEAN;
>
> ii. to eliminate substantially restrictions to trade in services amongst Member States; and
>
> iii. to liberalise trade in services by expanding the depth and scope of liberalisation beyond those undertaken by Member States under the GATS with the aim to realising a free trade area in services.

Despite these lofty goals, the AFAS merely set out the framework to allow for Members to liberalize trade in services to suppliers from Members of both market access and national treatment. The ultimate success of the AFAS was always going to depend upon the will of the ASEAN Members to build upon the framework and continue liberalization efforts through actual commitments. More specifically, the intentions of ASEAN could only be achieved through good faith negotiation of the Members which resulted in liberalization commitments and economic activity among traders.

The framework allowed for this to occur by covering all service sectors (later decisions ceded oversight of some sectors to other Ministerial bodies/mechanism), and sought progressive liberalization "in services in a substantial number of sectors within a reasonable time-frame" by:

- Eliminating substantially all existing discriminatory measures and market access limitations among Member States; and
- Prohibiting new or more discriminatory measures and market access limitations.[35]

To date, successive rounds of negotiations (using progressively more stringent negotiating approaches to facilitate liberalization commitments) have culminated in an 8th package of AFAS commitments.[36] The efforts of members to meet the objectives of the AFAS and negotiating

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[35] AFAS, Article 3.

[36] Operationalization of the Agreement on Movement of Natural Persons (MNP) remains subject to ongoing discussion.

rounds are notable given the high levels of protection which featured in many Member States when the process began.

ASEAN has had some successes in relation to trade and services. For instance, the AFAS is the first FTA to experiment with formula-based market openings, first through AFAS-minus 2 or AFAS-minus 3 approaches, and most recently by adopting the liberalization packages and the ASEAN-X approach. ASEAN has also shown itself to be innovative, such as through the use of variable geometry approaches to market openings for certain Members (e.g., Cambodia, Lao PDR, Myanmar and Vietnam). Thus, ASEAN Members have shown themselves to be steady, if gradual, liberalizers while at the same time realistic in aims and willing to recognize the differing levels of development and capacity among its Members.

In the main, however, the performance of AFAS has not been particularly impressive and likely not met the expectations of many traders. While the AFAS has achieved wider sectoral coverage than in the GATS, the rate of marginal preference is sometimes disappointing.[37] Likewise, the depth of commitments is on the whole rather meager. Furthermore, although ASEAN has made continued efforts to improve transparency and predictability, these issues continue to hamper regional integration efforts and opportunities for traders to capitalize—some of which is due o the continued use of a positive list for scheduling commitments.

That being said, it is important to realize that, for a number of reasons, progress cannot simply be measured by in terms of counting the number of sectors where commitments have been made and measuring the extent of the commitments.[38] For instance, such a count would give equal weight to each sector and mode of delivery whereas in reality some sectors and modes of delivery are more important than others. For air and marine transport services, for example, mode 1 is far more important than in the telecommunications sector, which relies on Mode 3. Mode 2, by contrast, is rarely if ever the most important. And while the AEC Blueprint seeks to bind the current degree of openness in Mode 2, it is questionable whether negotiations have actually increased liberalization or led to tangible economic gains.

Likewise, in every nation and economic partnership some sectors and subsectors are far more important economically and politically than others. The comparative advantage of ASEAN is its linkages with the broader East Asian manufacturing and production networks as well as in the processing and export of primary products. Services that contribute to and advance productivity and efficiencies in these areas will be critical to continued success. For this reason, ASEAN priority sectors include air transport and logistics services. Other related key sectors would seem to include maritime and land transport, telecommunications, energy, insurance, and finance. Even here, some subsectors (banking and insurance) are far more important than others (financial advisory services).

Most important, a simple count of commitments provides no indication of the effect on how actual policies, laws, and regulations are applied. It is well known that there is significant ‘water’

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[37] For comprehensive (if outdated) analysis, see Thanh and Bartlett, above n 18.

[38] See Philippa Dee, ‘Does AFAS have Bite? Comparing Commitments with Actual Practice’ (2013) 7–8.

between commitments in services (and trade) and how policies, laws, and regulations are applied. Since commitments lag far behind practice, commitments beyond the GATS level[39] or even incrementally in an FTA may not result in economic gains. Philippa Dee of the Australian National University writes that 'pending a comprehensive comparison of its commitments with actual practice, it remains an open question whether the services commitments under AFAS have been sufficiently bold to generate actual reform.'[40] As a corollary, a simple count of commitments provides no signal of the work and reform still needed, whether at the domestic regulatory level or at the negotiating level, to resolve remaining difficulties and points of firm disagreement.

It is difficult to assess the actual result of liberalization commitments, and of actual practice versus commitments, due to lack of sufficient information. In research conducted for the Economic Research Institute for ASEAN and East Asia, Dee has gathered information reported by Members and has reached some conclusions on certain sectors. The following draws on a portion of her findings in certain sectors, and each finding has been selected for inclusion in this report because of the differing issues and problems involved with each sector:

COMMITMENTS IN AIR SERVICES ARE (LIKE THE GATS) EXTREMELY LIMITED

Commitments have been undertaken in the 7th package for all ASEAN Members in the three key GATS subsectors—repairs and maintenance, selling and marketing, and computer reservation systems. Most Members have also made commitments in some or all of the following: aircraft rental with and without crew, air freight forwarding, and aircraft catering. Lao PDR has also made commitments for aircraft line maintenance (excluded from the GATS). For virtually all Members in all cases, there are no limitations to the market access or national treatment commitments for Mode 1 (cross-border trade) and Mode 2 (consumption abroad). In Mode 3 (commercial presence), however, the case is different: half the Members failed to make commitments under Mode 3 for at least some services where they have committed under Mode 1 and 2.

Three ASEAN Member States have restricted foreign equity in at least some of the committed service sectors to less than 100 percent, and all of these Members have likewise maintained limits at less than the 70 percent target established in the AEC Blueprint for some subsectors. Commitments in Mode 4 (movement of people) remain horizontal rather than sector-specific.

Commitments involving the exercise of air traffic rights are covered outside of AFAS, in the ASEAN Multilateral Agreement on Air Services, the ASEAN Multilateral Agreement on the Full Liberalization of Air Freight Services, the ASEAN Multilateral Agreement on the Full Liberalization of Passenger Air Services, and the Implementation Framework of the ASEAN Single Aviation Market. While appearing open, the commitments are in fact very limited in

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[39] Several studies have shown that Doha Round offers remain significantly less ambitious than actual practice in many important sectors. See, e.g., Ingo Borchert, Batshur Gootiiz, and Aaditya Mattoo, 'Restrictions on Services Trade and FDI in Developing Countries,' World Bank, mimeo (2010).

[40] Dee, above n 38, 8.

certain key areas (e.g., ownership, destinations of freight-only services, and most notably domestic air services). It is also unclear how the overlapping commitments within the various arrangements and agreements will be coordinated.

Dee finds some lags between commitments and actual practice in the 'few ancillary air transport services for which services trade commitments have been made' and wider gaps (although clearly articulated) in exercise of traffic rights.[41] The main issue seems not so much to be building upon the GATS but more so expanding commitments:

> Thus the services trade negotiations have ensured liberal commitments in the peripheral ground services that are covered by GATS negotiations. But the ASEAN negotiations have not gone further. This has left the conditions of supply of international air services to be determined under so-called 'open skies' arrangements that are still relatively restrictive—they do not allow liberal cross-border trade in freight services, and they do not bind the existing degree of openness to foreign investment in international air transport, airport operation or luggage and freight handling. Furthermore, the current arrangements and new Single Aviation Market initiative seem to leave no venue in which to negotiate the terms of foreign investment in domestic air services.[42]

There is also the potential for serious disconnect between Member laws and regulations and commitments of others. This is particularly the case where the liberal foreign ownership limits for commercial presence in one Member may be nullified by unduly restrictive withholding clauses in the international air services agreements. Dee sets out this problem with an example:

> Singapore currently allows 100 percent foreign ownership of international carriers based in Singapore, but if ASEAN partners only grant traffic rights to Singapore-based airlines that have 'substantial ownership and effective control' by Singaporean citizens, then Singapore's foreign-owned international carriers would not be able to offer international services to other ASEAN members. Greater external discipline on air service agreement negotiations under the Single Aviation Market initiative would be required to ensure that their provisions did not remain inconsistent with services trade commitments. And greater transparency of air service agreements would be needed to ensure that such discipline could be exercised.[43]

In order to truly achieve a connected AEC, it must seek to eliminate these types of inefficiencies.

COMMITMENTS AND ACTUAL PRACTICES IN MARITIME TRANSPORT ARE RELATIVELY LIBERAL, WITH SOME EXCEPTIONS

The AFAS commitments in maritime transport are much more significant than air transport, and appear to be more liberalizing. For instance, every ASEAN Member has committed to free cross-

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[41] Ibid at 11.

[42] Ibid at 12. Dee mentions transport and logistic services as two key areas in which Members can bind practice and be GATS-plus in a manner that would increase foreign investment and the 'connectivity' of ASEAN.

[43] Ibid.

border trade in the basic passenger and freight transport services (Mode 1), which is of course the most important mode for maritime transport. Commitments have also been made in Mode 2, a relatively unimportant mode in this instance. That being the case, every Member with a significant domestic shoreline has excluded cabotage services. In commercial presence (Mode 3), some Members have committed to allowing foreign ownership of 40–60 percent of domestically based companies providing international passenger and freight services, whereas others either allow 100 percent foreign ownership or variations subject to certain conditions.

Likewise, every Member has made commitments in important areas of maritime logistics services, including cargo handling, storage and warehousing, and freight transport agency services (e.g., brokerage and freight forwarding). The structures of those commitments are similar to those of the above, with no limitations on Mode 1 and Mode 2 trade, and a range of foreign equity limits for Mode 3.

A minority of Members have made commitments for maintenance and repair of vessels, pushing and towing, and vessel salvage, whereas no Member has made commitments in pilotage and towing services beyond non-discriminatory access. Disappointingly, only the Philippines has made commitments on port and waterway operation services and only a few Members bordering the Mekong River have made commitments on inland waterways.

The actual practice in this area closely resembles the commitments made. There are instances where Members' actual practice extends beyond their level of commitment or to areas where there are no commitments.[44]

Exceptions, of course, exist—most notably cabotage services and ports. Whereas relaxing regulations to allow access to existing port facilities would require domestic regulatory action, the limits on cabotage could easily be put into practice and significantly improve 'connectivity' in ASEAN. Dee writes:

> In some cases, it is not even clear that the cabotage restrictions serve a useful protective purpose. For example, at least some of the Singapore-based shipping companies that would offer cabotage services to Indonesia (were Indonesia to relax its cabotage restrictions) are in fact Indonesian-invested companies that have chosen to register in Singapore because of the easier regulatory and financing environment there. The rationale sometimes given for retaining cabotage restrictions is that much of the developed world also has them. But this is one area (along with air transport) where making bolder commitments than in the rest of the world will be necessary to ensure efficient transport and logistics services. ASEAN cannot significantly improve its maritime connectivity while it remains impossible for a single international shipping service to make multiple calls within a single country. And private investors will be loath to modernize shipping fleets whose transport routes are restricted by regulation to inefficiently small local services.[45]

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[44] For instance, Brunei, Cambodia, and Singapore appear to allow 100 percent foreign investment in some services where they have made no commitments. Likewise, Malaysia and Vietnam appear to have no regulatory restrictions on entry into services where no commitments have been made.

[45] Dee, above n 38, 14.

Thus the situation with maritime transport appears at first to be relatively liberalized but upon closer inspection several important restrictions remain. These restrictions continue to hamper the integration of the regional network and deeper integration.

COMMITMENTS IN TELECOMMUNICATIONS ARE CAUTIOUS

One of the factors critical for trade in fixed-line telecommunications services is an access regime of the type outlined in the WTO Reference Paper on Telecommunications. Accordingly, one of the more significant features of the AFAS commitments on telecommunications services is that most ASEAN members have committed to the WTO Reference Paper on Telecommunications, or something like it, as part of their AFAS commitments. There are, however, exceptions. For instance, the wording of Malaysia's commitment is more circumscribed than that of the WTO Reference Paper itself. And not all Members have adopted any of the Reference paper—including Thailand (although it has promised to do so), Lao PDR, and Myanmar.

ASEAN Members adopt a cautious approach to liberalizing telecommunications. Where commitments are made, substantial qualifications remain. No qualifications or limitations are made in Mode 1 and 2 where commitments have been made for the same (or similar) telecommunications services sector in Mode 3, which often contain a number of qualifications. For telecommunications, of course, Mode 3 is often the key mode. Limitations on foreign equity are the most significant qualification, and limits vary widely among Members: some allow 100 percent foreign ownership in all services where commitments are made, whereas others restrict foreign equity to less than 50 percent where commitments have been made. There are other qualifications, such as limiting foreign investment to existing operators or a quantitative restriction on the total number of operators.

In the telecommunications sector, a significant lag exists between Member commitments and actual practice. Foreign equity restrictions are tighter in the AFAS than in practice in at least Indonesia, Malaysia, Singapore, Thailand, and Vietnam; the same may be true in other FTAs and investment treaties. In numerous sectors and subsectors, Members have made no commitments but in practice have few to no limitations. On the other hand, some Members are retaining complete flexibility for services that are not yet available in the country.

This may be an area where the regulatory regime is lagging behind technological developments, or it may be a case where Members are retaining the 'water' for negotiation purposes. This implies that the AFAS is not driving liberalization in the telecommunications sector and that there is scope for further commitments in the ATISA and subsequent negotiations.

CROSS-SECTORAL ISSUES

In more than a few isolated cases, restrictions that do not exist in the AFAS schedules of commitments are being imposed. This seems most prevalent in the professional services, in particular accountancy,[46] banking,[47] and insurance services.[48] It also appears that unscheduled

[46] See ibid at 17–18 (citing restrictions in Brunei, Indonesia and Thailand).

[47] See ibid at 18–19 (citing restrictions in Brunei, Indonesia, Laos PDR, Malaysia, and Vietnam).

derogations from national treatment, in particular the discriminatory application of taxes and subsidies, have not been listed.[49] Such implementation lag, combined with non-AFAS related domestic regulations that further restrict market access, is harmful to the economy and unfriendly to business interests.

EFFECTIVE AND APPLIED REGULATORY TREATMENT

The information we have on ASEAN liberalization from the World Bank's Services Trade Restrictiveness Index (STRI) database paints an unflattering picture of ASEAN's effective (i.e., applied) regulatory treatment of services. Excluding Singapore, which as noted operates the most liberal regime in the region and accounts for 51 percent of the region's services exports, ASEAN scores fairly poorly when measured against other regional groups overall, and particularly in important sectors such as banking, insurance, fixed-line and mobile telecommunications, and retail distribution. In retail distribution, ASEAN ranked near the bottom, above only Gulf Cooperation Council (GCC) and the South Asia Free Trade Agreement (SAFTA). More worryingly, ASEAN scored at the bottom of all regional groupings in the maritime transport, accounting/auditing, and legal sectors. The exception to these negative findings is the air transport (international) sector, where ASEAN is in the middle of the groupings. Just as worrying is the protection by modes, with the STRI showing little liberalization of Mode 2, with slightly better results for Modes 1 and 3.The above suggest that considerable scope exists for ASEAN Members to offer deeper, competition-enhancing reforms in services markets in the ATISA (and FTAs with external partners).

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[48] See ibid at 19–20 (citing restrictions in Thailand and Laos PDR).

[49] See in particular the medical and health services sector.

4. Recommendations—General Principles and Specific Provisions for ATISA

The ATISA represents a once in a generation opportunity to revise the architecture and ambition of the regional services agreement.[50] Increased liberalization and integration is also in line with the aims and objectives of the AEC Blueprint and goal of a common market. It is notable that while the framework of AFAS has never been revised, ASEAN-wide agreements on liberalization have advanced in at least one sector: investment. The Framework Agreement on the ASEAN Investment Area (AIA) was revised and upgraded to the ASEAN Comprehensive Investment Agreement (ACIA), which entered into force in 2012. It is encouraging that Members are seeking avenues such as specialized frameworks to revise and upgrade agreements. The remainder of this section proposes and evaluates several ways in which to revise and upgrade the ASEAN services model and architectural framework.

THE TIMES HAVE CHANGED

Whatever one thinks of the merits of the positive list approach, it cannot be disputed that the trading world is moving beyond it to scheduling services commitments. Continuing to adhere to the positive list approach places ASEAN at a disadvantage vis-à-vis its trading partners and deepens a widening schism between ASEAN Members. Countries that steadfastly maintain such an approach will be excluded from trade agreements being negotiated at this time. This includes not only ambitious bilateral and regional trade agreements but also Geneva-based efforts such as the Trade in Services Agreement (TISA).[51]

Some ASEAN Members, such as Singapore, are well versed and experienced in negotiating a negative list; others have begun the process through a ‘Transparency List’ approach (such as

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[50] To date, ASEAN has not shown much initiative in architectural ambition or rule design. See, e.g., Marise Cremona, David Kleimann, Joris Larik, Rena Lee, and Pascal Vennesson, *ASEAN's External Agreements: Law, Practice and the Quest for Collective Action* (Cambridge University Press, 2015).

[51] It is noteworthy that one of the staunchest supporters of a positive list approach, China, recently agreed to use a negative list in its investment negotiations with the United States. This marks a departure from China’s other 101 bilateral investment treaties. This decision, as well as the decision to grant national treatment in the ‘pre-establishment phase’ of the investment, was reached at the US–China Strategic and Economic Dialogue in July 2013. Len Bracken, ‘China Makes Market-Access Concession Toward Investment Treaty With United States,’ *International Trade Daily*, 12 July 2013.

Brunei and the Philippines). Moreover, and perhaps most notably, Brunei, Malaysia, and Vietnam will be gaining experience in the negative list approach in the Trans-Pacific Partnership (TPP). This willingness of a growing number of Members to negotiate beyond a positive list approach will isolate other Members and could create disharmony within the economic community. This will particularly be the case in relations with external partner countries if (and when) several Members of ASEAN would be willing to adopt a negative list approach and others would not. The impression of ASEAN as a unified trading bloc would be harmed, and its credibility as a trading group would be placed in doubt. Ultimately, ASEAN FTAs with external countries may be reduced to nothing more than a lowest common denominator agreement whereby Members seeking actual liberalization and economic gains would negotiate separate bilateral agreements with the same external countries.

Finally, the unwillingness to move beyond a positive list approach does not seem in the wider interests of ASEAN. If a true and properly functioning economic community is the objective then it is clear that ASEAN must take the necessary steps to do so. While a positive list approach is not theoretically less liberalizing than other approaches, in practice this is the case—almost without exception. A substantial number of empirical studies demonstrate this to be the case. Moreover, even a quick analysis of Singapore's services commitments in various FTAs reveals that negotiating in a negative list approach yields more liberalization than does negotiating with a positive list approach.[52] The same is true when comparing the concessions of Singapore's partner countries.

The temptation to maintain a positive list approach is understandable; for instance, this approach makes it easier to be less ambitious and to entrench protections. One can, in theory, use the positive list approach to substantially liberalize services—but to do so requires immense political will to press ahead and resist the almost built-in expedients of the positive list approach. Moving into the unknown by adopting a negative list approach can be daunting, but proper preparation and careful planning can ensure a smooth transition. The remainder of this section raises issues and makes recommendations taking into account the situation of ASEAN and its Members, including internal and external considerations.

SPECIFIC TARGETS FOR LIBERALIZATION

The continued inclusion of specific liberalization targets into the ATISA is sensible, so long as it does not result in less ambitious commitments in the initial negotiations. The use of specific targets to liberalization can spur future negotiations and ultimately result in a richer set of commitments. But the targets themselves cannot be viewed as a panacea—they could very well lock in restrictions. In this regard, it is understood that the 70 percent foreign equity limitation has not been free of implementation problems.

There are many different forms of specific targets for liberalization. For example, Members should aim to schedule to the prevailing regulatory norm and allow for specific liberalization targets to progressively lower the restrictions. In this regard, the liberalization would not simply

[52] An exception is Singapore's FTA with Japan, which uses a positive list but is more liberalizing than Singapore's negative list agreement with Australia.

reduce 'paper' restrictions but would result in actual liberalization in furtherance of integration and the eventual common market. At the outset, and similar to the TISA, the ATISA could also set out certain perimeters and a framework that establishes no a priori exclusion of sectors or modes of supply, the inclusion of regulatory disciplines, new and better rules, and better offers than under previous negotiations and agreements.

Furthermore, the ATISA could build upon existing targets. For instance, Members could commit to removing all market access and national treatment limitations on Mode 3, other than the 70 percent limit on foreign equity ownership. This perhaps seems more onerous than it is: Where commitments have been made, a decent number of Members have already met this requirement in most sectors. In addition, while the framework set out to remove all but one limitation on national treatment per subsector in addition to the 15 percent margin of flexibility post-2015, it seems appropriate to set out a time period to remove the limitation and the flexibility. Targets could also be set for other existing exclusions (e.g., air transport services involving traffic rights).

Members should also consider setting out numerical benchmarks for future liberalization.[53] For instance, Members could commit to removing *x* percentage of restrictions or to liberalize a minimum number of sectors within a set time period. Similarly, Members should schedule further liberalizations in the Schedule in Commitment to ensure future liberalization through the use of so-called phase-in commitments. In this way, Members commit to abolish existing restrictions or forgo the assumption of new bindings by a specified period of time. Such phase-in commitments have been more popular in WTO accession commitment schedules than in FTAs; but the ATISA presents an opportunity for ASEAN to take the lead in this regard, which seems appropriate given the differing levels of development among ASEAN Members.[54]

Moving to the focus for specific targets, it would seem appropriate to ensure particular attention is given to the priority sectors of tourism, healthcare, e-ASEAN, logistics, and air transport. These sectors are important for growth in ASEAN, but it must also be stated that not all of them can be liberalized through trade policy alone. Cooperation from other regulatory agencies and departments would be necessary to achieve liberalization in quite a few of the sectors and subsectors. It is also recommended that key sectors with the highest levels of protection and most potential to produce economic gains be the focus of specific targets for liberalization. Such sectors would include distribution, energy, education, finance, and even the thorny issue of cross-sectoral movement of persons.

Finally, Members may wish to consider ways to deepen the liberalization packages in order to maximize returns. This would be done and in combination with other negotiation-based deliverables such as a formula-based approach to market access and the removal of sector-specific or modal impediments (i.e., such as limitations on foreign equity or an economic needs test). Members may wish to consider ways to deepen the liberalization packages in order to maximize returns. One way to do so would be to utilize multi-sectoral clustering or the grouping

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[53] In 2005 the GATS negotiators attempted to define numerical benchmarks, but without success. See WTO Document TN/S/M/16 (28 October 2005).

[54] Article XX of GATS specifically allows the use of phase-in commitments.

of sectors with network properties. Examples of clustering would include sectors based around trade facilitation (transportation, distribution, customs brokerage, border management, etc.) and/or IT services, or both. Sectors with network properties would include waste disposal, water and energy, and/or transportation-related services. The idea behind the clustering and grouping is to simultaneously and holistically liberalize interdependent and interconnected and dependent sectors so as to increase efficiencies and increase economic gains. For some commentators, clustering represents a real opportunity to reshape the rules of the game in order to maximize efficiencies and gains.

THE 15 PERCENT MARGIN OF FLEXIBILITY

The 15 percent flexibility of the total modes of supply is a relatively new carve-out, and one that is not in line with the objective of an economic community. This carve-out was announced in the 'Joint Media Statement of the 41st ASEAN Economic Ministers' (AEM) Meeting' in August 2009:

> The Ministers called for greater efforts to sustain the liberalisation goals and looked forward to the recommendations of the Senior Officials on the parameters to liberalise the remaining limitations in trade in services in ASEAN by end of 2009. However, recognising the need for flexibility, they endorsed the proposal for flexibility to be accorded to up to 15 percent of the total modes of supply in each package and to be used only as a last resort.[55]

The reasons for adding this flexibility are not apparent from the statement and cannot be found on the ASEAN website or otherwise. The lack of explanation and transparency of the clause is cause for concern.

Without full information, it is difficult to make a recommendation on whether the 15 percent margin of flexibility should be retained. However, with the objectives of the AEC Blueprint and economic community at the fore, it should be eliminated. If immediate elimination is impossible, it would seem practical and feasible to both disclose the justification for the flexibility and set a timeline in the ATISA for phasing it out. In such circumstances, all Members should be given a defined time period to phase out the flexibility and phase in the negotiated commitments. It may be that the Members will differentiate between and among the membership, with some Members being granted longer and staggered phase-out periods. Regardless, if the ATISA retains the 15 percent flexibility it is advised that an orderly phase-out period be put in place and negotiated into the text.

Moreover, as a legal matter, if the flexibility is to remain in place for any period of time the ATISA must anticipate and forestall any legal debate over the meaning of the clause. Thus, the text of the ATISA should fully explain the meaning of 'up to 15 percent of the total modes of supply in each package' and, perhaps more importantly, of 'to be used only as a last resort.' In terms of the latter, who is to determine whether this languages equates to 'necessary' or whether the flexibility was the 'last resort.' From a legal perspective, the vagueness of the flexibility is

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[55] Joint Media Statement of the 41st ASEAN Economic Ministers' (AEM) Meeting, Bangkok, 13–14 August 2009, para 24, http://www.asean.org/images/archive/JMS-41st-AEM.pdf.

troubling and ripe for dispute. The ATISA must ensure clarity to prevent any dispute over the meaning of the flexibility, and ideally work toward its ultimate elimination.

GENERAL PRINCIPLES

Regardless of the architecture and design of the ATISA, several general principles should be considered and adopted which would make the agreement not only more beneficial to Members but also more easily accessible and advantageous to traders.

Most Favored Nation

Currently, AFAS+ commitments entered into by individual ASEAN Members with third countries do not flow back into ASEAN through an AFAS MFN clause. The effect of a finalized TPP will exacerbate the problem (with Brunei Darussalam, Malaysia, Singapore, and Vietnam as parties to the TPP). The larger service providers in the region enter the most FTAs, and commitments that flow back to the other ASEAN Members would certainly benefit the community. Without doubt, the ATISA should enshrine the principle of MFN. In this regard, the ATISA should ensure that any ATISA+ commitment made by one Member to any nonparty countries in a subsequent FTA would automatically be granted to all other ASEAN Members.

In North-South agreements such as the EU-CARIFORUM, MFN has been criticized for reducing incentives for further South-South liberalization for fear the benefits will flow to the richer party. These risks are not present in ASEAN, where the aim is integration and a common market. While benefits may not flow equally to all Members, the objective is to ensure ASEAN centrality and meaningful integration. These are at risk if Members offer more preferable ATISA+ commitments to nonparty countries.

A minority of FTAs include provisions which require a party to an agreement entering into a subsequent agreement and offering better terms/commitments to give consideration to a request by the other party or to enter into consultations regarding the possibility to extend the commitments to the original treaty partner—such a provision exists in the ASEAN–Australia–New Zealand FTA (Chapter 8, Article 7). But given the objective of ASEAN integration, it is recommended that MFN *automatically* apply and any ATISA+ commitment be granted to all ASEAN Members.

The ATISA should at the same time ensure that future FTAs negotiated by ASEAN or any of its Members preclude the automatic extension of existing or future preferential treatment within the ASEAN framework and /ATISA to any third party. The inclusion of such an exclusion clause is common among international investment agreements, but seems critical to services in so far as ensuring the benefits of regional integration are not extended beyond the region, thereby making third parties de facto ATISA Members.

Transparency

Services are heavily regulated and often subject to overlapping jurisdictional governance. Transparency disciplines in FTAs can lessen some of the confusion. Article 3 of the GATS attempts to ensure transparency by setting out obligations. Many FTAs also include an obligation to publish relevant measures and modifications as well as a requirement to notify partners of new

measures potentially affecting trade in services. For the most part, these obligations are mere 'best endeavors' rather than subject to dispute settlement.[56] Recent FTAs, most often with the United States as a negotiating partner, include requirements of a legally binding character. [57]

The AFAS contains no such disciplines on transparency, and this undoubtedly played a role in one review concluding that '[t]ransparency in the AFAS can be viewed as relatively weak,'[58] It is recommended that ASEAN follow the modern trend and impose legally binding transparency disciplines in the ATISA so as to demonstrate the seriousness of the ambition towards greater integration and a common market.

Market Access

In order to preserve the ambition of the ATISA, it would be beneficial if the agreement incorporated the following market access features, regardless of scheduling architecture:

- The ATISA should at a very minimum prohibit the scheduling of GATS-minus commitments. The floor should not be allowed to be lower than the best offer made as part of the ongoing Doha Round or in an FTA with any external country. Such standards should apply in all sectors and modes, including non-discriminatory qualitative restrictions (which was an issue in some early-agreements using a negative list approach).[59]
- Ideally, the ATISA will commit Members to scheduling market access and national treatment commitments to the prevailing regulatory norm, which would guarantee existing levels of access (so-called standstill).[60] In order not to discourage trial measures, the standstill clause could be made to be subject to exceptions to the extent that the Members deem them necessary.
- If the above recommendation is followed, the ATISA should be designed to automatically bind any subsequent liberalization (so-called ratchet). Again, the ratchet clause could be designed to take account of reservations for specified sectors, subsectors, or categories of measures.

The ATISA should be designed to automatically cover new services, which ensures a competitive environment as services develop and change over time. It is well understood, however, that the liberalization effect of such design can and have been subject to significant reservations.[61]

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[56] See, e.g., Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, Chapter 8, Article 11.

[57] See, e.g., US–Colombia FTA, Article 11.8 and Chapter 19.

[58] Thanh and Bartlett, above n 18, 42.

[59] See Article XVI of the GATS Agreement.

[60] The use of a standstill clause is gaining momentum, and currently used in a number of agreements, including the EU–CARIFORUM and in all of Japan's recent bilateral agreements. For an example, see CARIFORUM, Annex 4.VI(9).

[61] See, e.g., the U.S. inclusion of an Annex in its FTAs that reserves its right 'to adopt or maintain any measure that is not inconsistent with [its] obligations under Article XVI of the [GATS].'

Domestic Regulations, Convergence, and Harmonization

Most FTAs do not seriously address the issue of domestic regulation, convergence, and harmonization. If the issue is addressed at all, it is in a GATS Article VI-like manner focusing on procedural aspects of transparency and the prevention of measures that are unduly burdensome or a disguised restriction on trade. One exception is the EU, which ensures through its internal rules that proportionality exists between regulatory means and objectives.[62]

This lack of convergence and harmonization is unfortunate, as regulations are diverse and have led to a problem of regulatory heterogeneity among trading partners. The diversity of regulations also creates additional problems, namely a lack of transparency and predictability for traders. The need for increased regulatory convergence and harmonization would seem even more appropriate to ASEAN as it progresses toward a common market. The AFAS does not specify any disciplines in domestic regulation.

Issues of licensing (requirements and procedures), qualifications, certification, standards, transparency, and even special and differential treatment could be addressed in a more coordinated and progressive manner—again, with the aim of more complete integration of the ASEAN community. Drawing from the negotiating mandate in the Doha Round, and even incorporating by reference any future outcomes of the GATS Article VI:4 mandate, would be a starting point to approaching such issues. Yet it would be advantageous for ASEAN and its Members to take a proactive approach to such issues so as to increase transparency and predictability, reduce costs and delays, and improve efficiencies. This would, of course, include the expansion of breadth (e.g., to other sectors, such as tourism) and depth of mutual recognition agreements (MRAs) in operation and those to be negotiated.

Moreover, by their very nature, most domestic regulations which are liberalized will be done on an (at least de facto) MFN basis. This will only add to the liberalization efforts. The reason is that for most countries it is simply neither feasible nor practical to maintain parallel regulatory regimes. For instance, when liberalizing a domestic regulation which limits the number of partners in a law firm to ten in an FTA, attempting to maintain it for non-FTA partners may result in undue compliance or enforcement costs.[63] This would also be the case for broader domestic regulations covering, among others, financial markets, consumer protection, and the environment.[64]

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[62] This is foreseen in Article VI:4 of the GATS Agreement, which provides: 'With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, inter alia: (a) based on objective and transparent criteria, such as competence and the ability to supply the service; (b) not more burdensome than necessary to ensure the quality of the service; (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.'

[63] Sauvé and Shingal, above n 3, 959.

[64] Ibid.

Rules of Origin

Given the objective of ASEAN integration, it would seem sensible to maintain a restrictive approach to rules of origin (as permissible under Article V:3 of the GATS) so the benefits of ATISA are limited to suppliers owned or controlled by citizens of ASEAN Member States. That being said, Members should be mindful that such restrictions can have negative economic effects, notably by locking in sub-optimal supply chains and production networks. In turn, inferior suppliers can gain a long-lasting advantage (even if benefits are subsequently extended to non-party countries) to the detriment of the competiveness and fortunes of the domestic economy.

The caveat to this recommendation is in commercial presence, where liberal rules allowing any juridical person incorporated in any ASEAN Member State and conducting substantial business in that State to receive the benefits of the ATISA. The reason for this caveat is simple—not only would it be difficult to design precise rules for eligible suppliers, but to do so would be to potentially deny investment into ASEAN (as host and recipient) and all the benefits that come to it.

In time, Members should consider the rules of origin regime in the ATISA with a view to loosening the restrictions.

Government Procurement

ASEAN should consider adding some form of commitments in the area of government procurement to the ATISA. While government procurement is one of the topics for further negotiation in the GATS, Members cannot wait for GATS to lead. The issue is addressed in most North-North FTAs and some North-South FTAs (see also e-commerce). It would seem appropriate for an integrated ASEAN to also address the issue. In this regard, inspiration could be drawn from the CARIFORUM, Annex 6, which not only provides the expected information such as setting out the levels of government procurement to which the commitments are applicable, thresholds (for supplies/services at SDR155,000 and a higher threshold of SDR5,000,000 for construction) and various other technical requirements but also provides a certain level of flexibility to the parties. A specific example of the latter is Article 166(5), which defines ‘eligible suppliers’ as those ‘allowed to participate in the public procurement opportunities of a Party or signatory CARIFORUM state, in accordance with domestic law’– thus leaving each of the parties with the discretion to determine the designation. In this regard, and in contrast to an agreement with full market access, the scope of the commitment is limited only to suppliers deemed eligible by the domestic law of the procuring state.

Being a relatively controversial addition to any services agreement which will burden domestic regulatory agencies, it would be recommended to begin with the basic framework and integrate phase-in commitments over a defined period of time.

Services as Investment

Should ASEAN Members decide to adopt a negative list approach, a variation thereof, or even a transparency list, it would seem to make sense to eventually follow the trend of merging services and investment for scheduling purposes in order to make for cleaner schedules and avoid the possibility of conflicting commitments.

Regardless of scheduling approach, it makes sense to stay with one of the 'cleaner' options of a comprehensive investment agreement covering investments in both goods and services; which means the services agreement covers only three modes of supply and excludes supply by way of commercial presence or to maintain the status quo of the ACIA and have the investment agreement exclude measures covered by the services agreement; meaning the services agreement would cover four modes of supply, including supply by way of commercial presence.[65]

Owing to the overlap and the potential for conflict between the Investment and Services chapters, few FTAs make use of a dual approach with both the investment and services agreements covering all issues and modes—although agreements such as the Singapore–Australia FTA are exceptions. Some of these agreements, including the aforementioned Singapore–Australia FTA, do not even attempt to address the possibility of inconsistencies between the obligations imposed by the two chapters. However, it must be noted that genuine inconsistencies between treaty obligations are rare—a tribunal will likely apply the presumption against conflict and, failing that, the general rules of public international law mediating the conflict of treaty obligations to ascertain the meaning. Even more, the conflict may be more imagined than real, as the reality would be that Members must abide by all parts of the treaty, including the strongest, most liberalizing section of the treaty.

Scheduling Flaws and the Forgotten "Existing Measure"

Scheduling flaws can occur regardless of the architecture for commitments. Scheduling flaws have unfortunately been common in services agreements, including in the GATS. In fact, a recent study found that nearly 20 percent of commitments in the GATS do not fully conform to the specified norms and Scheduling Guidelines.[66] Even a cursory view of FTAs indicates similar scheduling flaws in almost all agreements.

For this reason, ASEAN must ensure that the ATISA allows for technical refinement of schedules while preventing such refinements from negatively altering the substance or scope of the commitment. This can be done regardless of the approach to scheduling.

Going further, one common argument against the negative list or similar hybrid approach is that a forgotten or inadvertently missed existing measure that is not scheduled in Annex 1 or Annex 2 automatically becomes a violation which now must be amended in order for the country to come into compliance with the agreement. This is not necessarily the case, and countries have begun to protect themselves by including a simple clause in the introductory notes to Annex 1. For instance, an 'introductory note' in the Australia–Chile FTA Annex 1 provides:

> Australia reserves the right to maintain and to add to this Schedule any non-conforming measure at the regional level of government that existed at 1 January 2005, but was not listed in this Schedule at the date of entry into force of this Agreement, against the following obligations:

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[65] ACIA, Article 3.4(e).

[66] Rudolf Adlung, Peter Morrison, Martin Roy, and Weiwei Zhang, 'FOG in GATS Commitments – why WTO Members should care' (2013) 12 *World Trade Review* 1. See Scheduling Guidelines, WTO Document S/L/92 (28 March 2001).

(a) Article 9.3 (National Treatment—Cross-Border Trade in Services Chapter) or 10.3 (National Treatment—Investment Chapter);

(b) Article 9.4 (Most-Favoured-Nation Treatment—Cross-Border Trade in Services Chapter) or 10.4 (Most-Favoured-Nation Treatment—Investment Chapter);

(c) Article 9.6 (Local Presence—Cross-Border Trade in Services Chapter);

(d) Article 10.7 (Performance Requirements—Investment Chapter); or

(e) Article 10.8 (Senior Management and Boards of Directors—Investment Chapter).

Such a brief note before the schedule provides comfort by assuring that a measure which exists at the time of conclusion or entry into force of an agreement but was for whatever reason omitted from the schedule can be added to it without penalty. In so doing, a forgotten measure will never be deemed to be inconsistent with the schedule. The addition of this short, introductory note is indeed very powerful and should be reproduced if the ATISA include an Annex 1 type schedule.

OTHER FORMATS FOR SCHEDULING COMMITMENTS

The two most common forms of scheduling are a positive list and a negative list approach. It is worth repeating that while both could be made to produce similar outcomes, the negative list approach is almost always more liberalizing than the positive list approach. There are also important qualitative differences between the formats. Most notably, the negative list approach can have a positive effect on good governance.[67] The reason for this is clear, under a positive list approach the scheduling country does not have to supply information to trading partners relating to its current level and nature of discriminatory or access-limiting measures and regulations. Relatedly, the scheduling country can also make commitments which are below the prevailing norm/regulatory status quo.

This is to be contrasted to the negative list, which in 'Annex I' requires the scheduling country to list reservations to liberalization in the form of the non-confirming measures. In this regard, not only is the negative list approach of Annex I more transparent but it also only allows for reservations on *existing* non-conforming measures. In this regard, the negative list locks in the regulatory status quo and avoids the situation where commitments are below the prevailing regulatory framework (such treaties often contain a 'ratchet'-clause which automatically reduces reservations as the regulatory framework changes, thereby locking in future liberalization).68 It has been suggested that such mechanisms lend credibility to a country and positively impact the flow of foreign direct investment, as investors not only well-informed but also are assured against a reversal in policy.

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[67] See further, Mattoo and Sauvé, above n 7; Richard Baldwin, Simon Evenett and Patrick Low, 'Beyond tariffs: multilateralizing non-tariff RTA commitments' in Richard Baldwin and Patrick Low (eds) *Multilateralizing Regionalism: Challenges for the Global Trade System* (Cambridge University Press, 2009); Sherry Stephenson, 'Regional versus Multilateral Liberalization of Services' (2002) 1(2) *World Trade Review* 187.

[68] The standstill clause and ratchet mechanism is now appearing in South-South FTAs, such as in the agreements for Andean and CARICOM.

The requirement to list the non-conforming measures as a reservation is important, as it provides governments, traders and investors with useful and important information. Moreover, the requirement is also important, and beneficial, to the home country for a host of reasons—better inter-departmental and governmental communication, greater understanding of domestic impediments, easier to negotiate using a formula-based approach in the future, etc.[69] In addition, the generation of useful information can lead to dialogue between and among the various government departments and industry involved in the diverse range of service sectors and allow for a 'regulatory audit' of measures which will allow benchmarking against regional and international standards.

It should be noted that 'Annex II' of the negative list is less transparent as it allows a country to adopt, modify or maintain any non-conforming measure—the equivalent of the positive list 'unbound'. While some FTAs require the listing of existing non-conforming measures in Annex II, it is far from the norm. Moreover, several countries with a federal structure of government make use of Annex II to reserve all sub-national laws and regulations, which can eliminate entire sectors (i.e. insurance, energy, etc.) from the scope of the liberalization commitments in the treaty.

Of course, the negative list approach has other hindrances in addition to Annex 2 being less transparent. The information gathering and coordinated approach to scheduling are administratively difficult and burdensome. Such burdens and difficulties may be, in the short term, beyond the capacity of some developing countries. The detrimental effects of such burdens could perhaps be outweighed by the benefits from improved governance and information garnered from the increased cooperation and a 'regulatory audit.'

Moreover, there is a concern that by locking in to the regulatory status quo of an existing nonconforming measure in Annex 1, the scheduling country is thereafter prevented from introducing additional discriminatory or access-reducing measures. Given the amount of regulatory experimentation occurring in some developing countries, this is a valid concern.

A related concern is that the negative list approach also locks in liberalization and prevents the introduction of new measures even for sectors that did not exist or were not regulated when the agreement was negotiated. While use of an Annex 2 list will go some way to assuaging concerns, there is of course negotiating pressure to limit the amount of reservations in that list.

In pushing toward an integrated ASEAN, Members must recall that liberalization in services is unlike that of goods. For example, the long-term advantages that accrue to partner countries from preferential access in services are not necessarily reversed through the subsequent extension of benefits to other countries. This is because of the natural limit in the number of viable suppliers in certain sectors and because location-specific sunk costs play an important role in numerous sectors. Long-term advantages of preferential access include first mover status, and better access to discretionary licenses, access in other regulated areas (in particular where there are no GATS

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[69] See Mattoo and Pierre Sauvé, above n 7; Pierre Sauvé and Simon Lacy, 'A Handbook on Negotiating Preferential Service Agreements: Services Liberalization' Produced for United Nations ESCAP (2013).

commitments), and familiarity with the supply chain network, with the customer base, and with societal and business norms.

Relatedly, Fink, and Mattoo identified the importance of sequencing of liberalization in services due to the location-specific costs often necessary to establish and operate in most service sectors. This is especially the case with services, such as energy distribution, telecommunications, and transportation, requiring large and expensive infrastructure or networks and where even temporary preferential access provides long-term market advantages and discourages market entrants.[70]

Holistically speaking, one can only conclude that ASEAN has an opportunity to provide an advantage to its Members in sensitive sectors where access has not been granted to external trading partners and is unlikely to be granted in the short and medium term, and where such advantages may produce lasting effects. The architecture of the ATISA, together with the ambitions of Member commitments, will determine whether the opportunity is grasped or missed.

Transparency List

The least ambitious break from the positive list approach is the transparency list, used in conjunction with a positive list. The parties agree to make public a nonbinding list, drafted in a format closely resembling that of an Annex 1 reservations document under a negative list approach, setting out all existing inconsistent measures. In addition to being nonbinding, the transparency list cannot be used against the scheduling country in dispute settlement or otherwise. Yet this transparency list Annex 1 has purposes and benefits. For instance, it enhances transparency and good governance, doing so in three ways:

- First, the transparency list forces a regulatory audit from the scheduling country, benefiting the scheduling country in the long term and enabling it to better study and ascertain its own regulatory structure between and among the sectors and ministries.
- Second, the private sector and trading partners can use the information to gauge the barriers to market entry and plan accordingly.
- Third, governments can use and update the list to devise formulas for liberalization of sectors, subsectors, and modes.

Japan is the biggest proponent of the transparency list and has made extensive use of it, including with several ASEAN Members. Japan in most instances uses the transparency list in conjunction with the positive list approach to scheduling but also requires that its trading partners schedule to the prevailing regulatory framework and status quo. In most FTAs that use the transparency list, the parties must list all restrictions on market access and national treatment, regardless of whether a commitment has been made in the schedule.

To illustrate, the text of Article 82 of the Japan–Brunei Economic Partnership Agreement is reproduced:

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[70] Carsten Fink and Aaditya Mattoo, 'Regional Agreements and Trade in Services: Policy Issues,' World Bank Policy Research Working Paper No. 2852 (June 2002).

> 1. The competent authorities … shall endeavour, upon request by service suppliers of the other Party, to promptly respond to specific questions from, and provide information to, the service suppliers with respect to matters referred to in paragraph 1 of Article 3.
>
> 2. Within two years from the date of entry into force of this Agreement, each Party shall prepare, forward to the other Party and make public a list providing all existing measures, within the scope of this Chapter, which are inconsistent with Article 75 [MA] and/or 76 [NT], whether or not these measures are included in its specific commitments in Annex 7. The list shall include the following elements and shall be reviewed every three years and revised as necessary:
>
> (a) sector and sub-sector;
>
> (b) type of inconsistency (i.e. Market Access and/or National Treatment);
>
> (c) legal source or authority of the measure; and
>
> (d) succinct description of the measure.
>
> Note: The list under this paragraph will be made solely for the purposes of transparency, and shall not be construed to affect any rights and obligations of a Party under this Chapter.

As stated above, this provision requires interaction with service suppliers (which is standard in most transparency provisions in services agreements) as well as the provision of information in the form of a transparency list which is identical to that required under an Annex I reservations in a negative list approach.

If ASEAN were to adopt the transparency list, it would be sensible to ensure that it includes a built-in liberalization mechanism. While such a measure would be unprecedented, it could provide a framework for gradually reducing market access restrictions by either requiring a liberalization commitment target. This target would be met through a reduction by a set percentage every five years (or other suitable timeframe) or by the slightly weaker variant of further negotiations within set periods of time. Either way, the ultimate goal would be to use the transparency list as a starting point to substantially reduce or eliminate known restrictions to trade in services within the region.

Different Models of Hybrids

In recent years, many hybrid forms of scheduling have emerged from bilateral and regional FTAs.[71] These are worth consideration, but it is important to remember that there is no need for the ATISA to be constrained by any of the existing models of scheduling. New hybrids are constantly being developed, and perhaps the time is ripe for ASEAN to craft its own model. Just as importantly, however, it must be recognized that every hybrid introduces a level of complexity and potential confusion. For this reason, careful consideration and drafting must accompany any

[71] It should also be noted that alternative approaches to scheduling have precedent in the WTO in the form of the Understanding on Commitments in Financial Services, included into the final act of the Uruguay Round (but not formally part of the GATS) and providing for an alternative approach to market access, national treatment, and additional commitments in the sector.

attempt to design or use a hybrid approach to scheduling commitments. The remainder of this section reviews four hybrid approaches to scheduling before offering concluding remarks.

Variations of the Positive List

As implied throughout this report, perhaps the simplest way to produce a hybrid is to start with a positive list approach and create variations. These variations add liberalizing elements to the positive list approach. Liberalizing elements include a requirement not to schedule below the prevailing regulatory framework or status quo; inclusion of a ratchet clause; and a requirement to increase the number of commitments (with no exclusions) within a defined time period.[72] The ultimate goal is elimination of all restrictions within a set time period.

This modified-positive list format could be further enhanced with other negotiation-based deliverables such as a formula-based approach to market access, negotiating clusters, and other techniques described in a previous section of this report. ASEAN has already adopted some of these techniques, which indicates that more is required.

One useful modification would be for ASEAN to not only require an explanation for restrictions on market access and national treatment, but also to mandate that the country making the reservation provide information on existing restrictions—most importantly, the law or regulation relevant to the reservation. Ideally, the requirement would apply regardless of whether any commitments have been made in the sector or subsector, but application only where a commitment has been made is a good starting point. The objective is of course greater transparency, which would benefit traders in addition to other ASEAN Member governments.

Positive List for Market Access, Negative for National Treatment

A more complicated and high-profile hybrid is the TISA. The agreement proposes to maintain the GATS-based positive list approach to market access commitments while liberalizing national treatment-inconsistent measures through a negative list.[73] The reason for this particular hybrid model is likely the relative ease of eliminating discriminatory regulations, thus allowing for some competition in the market, compared with eliminating or reducing impediments to market access such as quantitative restrictions.[74] Such an approach has some obvious liberalization benefits. For instance, it ensures the principle of equal opportunity among all traders. But such an approach also has several potential downsides. For instance, Sauvé writes:

> [A] number of GATS disciplines—for instance on payments and transfers under Article XI—would automatically apply to all measures affecting trade and investment in services that are left off the negative list of national treatment-inconsistent measures but would only be applicable in sectors and modes of supply

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[72] See, e.g., MERCOSUL, Protocol of Montevideo on Trade in Services (not yet in force).

[73] See Juan A. Marchetti and Martin Roy, 'The TISA Initiative: An Overview of Market Access Issues,' WTO Staff Working Paper ERSD-2013-11, (November 2013), p 4.

[74] See, e.g., 'Office of the United States Trade Representative, U.S. Trade Representative Ron Kirk Notifies Congress of Intent to Negotiate New International Trade Agreement on Services,' (January 15, 2013, available at http://www.ustr.gov/about-us/press-office/press-releases/2013/january/ustr-kirk-notifies-congress-new-itas-negotiations.

> where positively listed market access commitments were scheduled. Such dual treatment would appear largely devoid of a sensible policy rationale, all the more so when one considers that the frequency of quantitative restrictions to services trade is typically greater than that of discriminatory measures.[75]

Sauvé is also skeptical of this approach with respect to future regulatory conduct of discriminatory measures, as the negative list approach will lock in measures at the existing level of nonconformity and 'oblige signatories to accept that all future measures in the same sector or, more controversially still, in new (i.e., future) sectors be automatically bound at free.'[76] Such worries could be addressed through the use of Annex 1 and Annex 2 lists to preserve the rights of signatories to introduce new nonconforming measures and hence provide the scope to carve out wide swaths of sectors. Of course, the use of such lists will undoubtedly add complexity to the schedules.[77]

Negative List with a Market Access Twist

A related approach was adopted in the Australia-Chile FTA. Under this approach, a negative list is used as usual in the Annex 1 reservations, but there is a twist for the Annex 2 reservations: Market access (both discriminatory and nondiscriminatory measures) has been placed in Annex 2 and is subject to a positive list approach. Thus, if a sector is not listed in Annex 2, no commitment is being made, and the country reserves the right to adopt, maintain, or amend any measure in the sector. Moreover, as the market access commitments are listed in Annex 2, such commitments are not subject to a ratchet clause.

When scheduling, the approach is therefore to reserve the right to adopt or maintain any measure on market access in a sector or subsector, except for the listed sectors and subsectors subject to the limitations and conditions. The listed limitations and conditions then resemble a positive list approach to scheduling, complete with use of the four modes.

This novel scheduling technique is intended to apply to predominantly to market access commitments (and does not apply to national treatment absent explicit listing of national treatment under the category of obligation) and in reverting to the positive list approach could result in more conservative liberalization commitments. For this reason, it may be a good approach to consider when there is a divergence of opinion in regards to scheduling; it is a pragmatic way to utilize a negative list while still providing some comfort to those uncomfortable with such an approach.

As with any diversion from the prevailing norms, there is an element of complexity in this approach. For instance, in some cases the architecture provides for items being listed in both Annex 1 and Annex 2. This occurs where an existing measure/inconsistency with national treatment is scheduled and bound in Annex 1 but where the market access commitment is either limited or nonexistent and scheduled in Annex 2 (or not listed at all, if no commitment is

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[75] Sauvé, above n 2, 8.

[76] Ibid.

[77] Sauvé recognizes this, and mentions audiovisuals, education, and health as potential Annex 2 reservations for the EU. Ibid.

undertaken). In order to understand the full extent of the commitments undertaken, it is therefore necessary for officials and traders to closely read both Annex 1 and Annex 2. A careful reading of both the Australian and Chilean Annex 1 and Annex 2 schedule reveals that, indeed, several scheduling errors have occurred where a measure has been listed as a reservation to market access in Annex 2 but failed to be listed as a reservation to national treatment in Annex 1 when in fact it should have been listed.[78]

To some, this novel approach reaches the same end point as a traditional Annex 2 reservation list, by other means. This is an oversimplification. The approach is truly novel in its use of a positive list format within a negative list—and in limiting the approach to market access within Annex 2. In so doing, it liberalizes only those sectors and subsectors listed, which in itself ensures protection of sensitive and future services. Regarding future services, the approach seems to be a cleverer and limited way of dealing with market access and future technologies than the U.S. approach, which excludes in Annex 2 any measure that is inconsistent with U.S. obligations under Article XVI of the GATS.

While this approach provides some flexibility to Members, it does add complexity to scheduling. If this approach is to be considered, careful attention must be paid to scheduling in the Annex 1 and Annex 2 lists to safeguard and ensure the schedule represents the desires of the negotiating Member.

Variable Geometry

Another alternative would be an approach using variable geometry, where some Members can adopt a negative list or variation thereof whole other Members could continue operating on a positive list approach. There is nothing to prevent dissimilar scheduling, and in fact such an approach has recently been adopted in Chapter 8 of the Australia–China FTA, where Australia has used a negative list and China maintains a positive list on the scheduling of services commitments.[79] The signal it sends, however, is not positive and all Members may not be comfortable with dissimilar scheduling. For comfort, perhaps those using a positive list could commit to transition to a negative list or variation thereof (see above and below) within a set period of time. Care would also have to be taken to ensure equal levels of commitments despite the disparity in approaches to scheduling. Moreover, and importantly, allowing certain Members to continue using a positive list approach does nothing to alleviate concerns regarding transparency or enhance liberalization efforts in order to lead to an economic community. In short, if such an approach is to be considered, careful attention must be paid to the details in order to assure that the benefits are not outweighed by the negative characteristics.

Sectoral or à la Carte Approach

Instead of scheduling entirely with a positive list or negative list approach or using a pre-existing hybrid, ASEAN may want to consider creating and adopting a mixed approach whereby the Members agree to certain sectors being scheduled with a negative list approach and the remaining

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[78] It should be noted that the GATS scheduling guidelines whereby a limitation on a market access commitment automatically covers national treatment does not seem to be used in the Australia–Chile FTA.

[79] The same format is used for investment in Chapter 9.

sectors using a positive list approach. The benefits of such an approach would be quicker and deeper liberalization, increased transparency, and potentially easier and deeper negotiations in the future.

In order to prevent limited ambition, it is recommended that the Members agree not only on a minimum threshold for the use of a negative list (e.g., 50 percent of sectors) but also on a timeline to convert the positive list sectors to a negative list (e.g., an additional 20 percent every five years). By using a staggered approach, Members could select the 'low-hanging fruit' for the initial negative list; then, only once all Members are more accustomed to the format, the approach could allow for the addition of more sensitive sectors within the agreed-upon timeframe. In this regard, Members unfamiliar or uncomfortable with the negative list format to scheduling commitments could thus ease their way into it and reserve more sensitive sectors until a later date. While such an approach to scheduling would be complex, it would provide for more transparent schedules and further enhance the objectives of the AEC Blueprint.

ASEAN may also look at whether the à la carte approach to scheduling may benefit Members. Under such an approach, Members could select modes for which the positive list will be maintained and those for which the negative list would be used. Here, it would seem appropriate for liberalization purposes for the positive list to be used for cross-border trade and the negative list for commercial presence. Regardless, it would be advisable for the agreement to include further particulars when reservations on commitments are made, as outlined above.

The above examples are just two of any number of variations which could be introduced into the ATISA to meet the objectives of the AEC Blueprint, to further liberalize and to have the agreement play a large role in ASEAN's integration. These suggestions not only provide a boost to liberalization and integration, but also serve to enhance transparency and even governance. At the same time, they provide some comfort to hesitant Members who are not yet entirely at ease with a negative list approach to scheduling commitments.

Scheduling Targets or Future Liberalization

If a negative list or variation thereof is adopted, ASEAN could consider creating an Annex 3 for scheduling targets or future liberalization. The creation of an additional annex would allow Members to reserve entire sectors or subsectors where the modalities have been worked out (or can be worked out) to convert protected sectors to the Annex 1 list in due course. This would be useful where Members have agreed to liberalize sectors, or subsectors (or modes), or where Members have agreed to percentage targets within a set period of time. In other words, sectors and subsectors placed in Annex 3 would be subject to a phase-in commitment within a set period of time.

Concluding Remarks

The above presents a non-exhaustive list of possibilities for scheduling of commitments beyond the positive or negative list approach. Other possibilities exist, and of course ASEAN should not feel constrained by any pre-existing model. It may be that the Members believe a new model would better suit the needs and situations within the Association. Such creativity is to be encouraged, with the caveat being that each variation brings its own complexities and must be

fully thought out and schedules carefully drafted to ensure the commitments are as intended by the Members.

POSSIBLE USE OF EMERGENCY SAFEGUARDS

Article XX.1 of the GATS Agreement contemplates the existence of emergency safeguard measures:

> There shall be multilateral negotiations on the question of emergency safeguard measures based on the principle of non-discrimination. The results of such negotiations shall enter into effect on a date not later than three years from the date of entry into force of the WTO Agreement.

Unfortunately, like much else the negotiations have floundered and notwithstanding the passage of twenty years there is still no agreement. This is also despite the fact that safeguards were apparently viewed as an 'integral component' and a key factor in some developing countries' agreeing to negotiate the GATS.[80] Of note, the continuing negotiations are part of the rules negotiations (as opposed to being part of a Member's revised GATS schedule). Here, ASEAN Members have been among the most vocal advocates for an emergency safeguard measure; yet curiously there is no such feature in the AFAS.

If applied, emergency safeguard measures in services could operate similarly to safeguard measures for goods, as disciplined by the GATT's Agreement on Safeguards. It sets out the rules for application of safeguard measures pursuant to Article XIX of GATT 1994. Essentially, safeguards are safety valves that allow governments to temporarily and on an MFN basis protect the domestic industry if it is injured by increased international competition resulting from liberalization commitments. In services, safeguards could be invoked under certain specified conditions. These safeguards would impose or increase protection to relieve an actual serious injury, or threatened one, arising as an unintended or unanticipated consequence of liberalization commitments made and liberalization obligations assumed in trade agreements. Such protection would be imposed or increased on a 'temporary and extraordinary basis.'[81]

The argument heard most often in favor of safeguards is actually the weakest—protection against the adverse impacts of liberalization. Liberalization of trade in goods most often affects the least efficient producers, and safeguards cost taxpayers money to temporarily prop up failing industries. Using safeguards to protect against the negative effects of liberalization is bad economically and sometimes bad politically. Even so, the difficulty in foreseeing and predicting the economic and developmental shifts resulting from liberalization of services is acknowledged and in certain key industries the 'adverse impacts' argument could possibly be sustained.

However, several other arguments for safeguards are more persuasive. Safeguards can:

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[80] See WTO, 'Further thoughts on Emergency Safeguard Mechanism,' communication from Brunei, Indonesia, Malaysia, Myanmar, The Philippines, and Thailand, JOB(04)/xxxx, February 24, 2004, para 7 fn 2.

[81] Ibid, para 1.

- Act as temporary relief when the regulatory framework is found to be insufficient in effectively regulating and monitoring the sector. In many developing countries, the regulatory or institutional framework is still in its infancy; even if appropriate regulations are in place, enforcement could nevertheless be lacking. Examples here could include regulations on competition, the environment, labor, and securities regulations.
- Provide a diversion from the rigidity of committing to the regulatory status quo (e.g., negative list, Annex 1), which could be particularly useful for Members with a raft of new regulations, nascent regulatory structures, and rapidly evolving infrastructure. The reality sees markets quickly evolving, meaning standards and other regulations may need to evolve in order to maintain a secure and predictable business environment. The use of safeguards could temporarily protect altered regulations pending withdrawal or renegotiation in due course.
- Provide space in the case of domestic injury as a result of unexpected competition owing to improper scheduling, which can only be permanently corrected through renegotiation of the commitment (provided, of course, there is no built-in correction method such as the one described above).
- Spur the binding of unilateral liberalization and more ambitious commitments from Members armed with the knowledge that in case of emergencies there can be room to temporarily maneuver. This fourth argument may be the most important.[82]

Finally, while some would counter that regulatory measures rather than safeguards could address such issues, it is doubtful that regulatory measures would be sufficient in every instance.

There is, however, good reason why the GATS negotiations continue and no FTA has seriously addressed the issue of safeguards in services[83]: namely, they are more difficult in practice to apply than in goods where a simple increase in tariff rate or quantitative restriction will suffice. To some, the application of safeguards in services is simply unfeasible.[84] This seems particularly the case with the usual GATT-based safeguard mechanism of tariff rises and quantitative restriction. While a quota on, say, the number of professional foreign service providers (such as foreign accounting firms or lawyers) is feasible, a tax on the fees of such professionals is unrealistic given the wide range of fees on offer and difficulty in determining 'like' services.

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[82] WTO, 'Communication from Brunei, Indonesia, Malaysia, Myanmar, The Philippines, and Thailand,' above n 16, paras 10–11. See also Mario Marconini, 'Emergency Safeguard Measured in the GATS: Beyond Feasible and Desirable,' UNCTAD/DITC/TNCD/2005/4, 2005.

[83] The WTO Working Party on GATS rules recently released a compilation of all safeguard-type provisions in FTAs. Most do not substantially address the issue directly or provide solid, hard rules. WTO, 'Safeguard-Type Provisions in International Economic Integration Agreements—A Consolidated List as of 31 July 2014—Based on Notification to the WTO Under Article V of the GATS' S/WPGR/W/64, 4 September 2014.

[84] Ibid. Parashar Kulkarni, 'Emergency Safeguard Measures in GATS: Policy Options for South Asia,' in BS Chimni, and BL Dal (eds), *Multilateralism at Cross-roads: Reaffirming Development Priorities*, (The South Asian Yearbook of Trade and Development, 2006). The authors state that WTO Members have accepted that 'an all-encompassing horizontal [safeguard] is neither feasible nor desirable.'

Another difficulty would be the determination of what or who is a domestic supplier, since foreign suppliers with a commercial presence (Mode 3) may have registered domestic interests and, depending upon the definition, could be deemed a domestic company. Even if categorization as domestic is defined as something more than registration, it would seem possible if not easy for sophisticated providers to evade the regulations.[85]

Another issue would be the consistency with a Mode 3 safeguard (once commercial presence is established) with commitments under investment treaties. The winding back of investor rights (for example, recently privatized public utilities) would likely be viewed as a compensable illegal expropriation under the investment chapter of an FTA or a bilateral investment treaty. In addition, there may also be practical difficulties in defining a like or directly competitive service supplier. Questions such as whether large and sophisticated service suppliers are 'like' smaller firms could become an issue and would need clarification. For instance, is a single legal practitioner focusing on property transactions or accountant whose practice is limited to individual taxes 'like' a large international law or accounting firm?

Moreover, the worthiness of safeguards in all sectors can be questioned as safeguards in certain sectors and modes seem easy to evade. For example, a safeguard for Mode 1 in, say, accounting or advertising services, could potentially be evaded through entry by Mode 3. Likewise, restrictions on Mode 3 can sometimes also be evaded through the use of locals in registration (as is common in many South Asian countries in most professional services). In addition, as mentioned above, it is hard to see how a safeguard could apply to existing operators under Mode 3 given commitments in other trade and investment agreements.[86] (Therefore the safeguard may have to operate with regards only to prospective market entrants, notwithstanding the risk of unsettling conditions of competition.) To some, safeguards can only be applied to Mode 1, notwithstanding the possibility of evasion,[87] whereas they would also seem easy to apply to Mode 4. The relevancy of safeguards to Mode 2 is in doubt.

These are just a few of the many potential problems in implementing safeguards in the services context. On top of these difficulties, there is little empirical evidence to substantiate the position that services cause undue harm to local *public welfare* and interests (as opposed to merely vested domestic interests). The only cases ever presented are privatizations of public utilities infrastructure under Mode 3. (As noted above, the use of safeguards in such cases could be inconsistent with other treaty obligations). To this end, the European Union (EU) stated that discussions on safeguards remain in the 'abstract' and asserted that no WTO Member has ever identified a concrete example of when and how a safeguard could be utilized.[88] The lack of

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[85] For a perspective from the GATS negotiations, see WTO, Working Party on GATS Rules—Treatment of the Concept of 'Domestic Industry' under the Anti-Dumping, Subsidies and Safeguards Agreements—Informal Note by the Secretariat' JOB(09)/146, 22 October 2009; and Corrigendum dated 29 October 2009.

[86] For the ASEAN suggestion from 2004 in this regard, see WTO, 'Communication from Brunei, Indonesia, Malaysia, Myanmar, The Philippines, and Thailand,' above n 80, para 12(d).

[87] Pierre Sauve, 'Completing the GATS Framework: Addressing Uruguay Round Leftovers,' OECD Trade Directorate, 2002.

[88] WTO, 'Scope for Emergency Safeguard Measures in GATS,' Communication from the European Communities, S/WPGR/ W/41, 3 March 2003.

empirical evidence pointing to the necessity of safeguards in other modes should not be discounted. Likewise, the second paragraph of Article X of the GATS has been activated only by the United States (after the WTO decision in *US–Gambling)*, casting doubts on the need for a safeguard provision.

The EU also says that safeguards are not necessary in a positive list format, as the ability to schedule commitments arguably allows for sufficient flexibilities.[89] The U.S. position is similar yet slightly more flexible: Members could simply schedule safeguard-type provisions into specific commitments.[90]

The strongest supporter of an emergency safeguard mechanism has, of course, been ASEAN (less Singapore).[91] Pursuing a broad GATT-type safeguard covering all commitments and modes (and in the 2004 paper, without compensation) to be broadly applied (1) in an unforeseen emergency (without predefining or determining the situation, sector, or mode of supply); (2) where the supply of a service by a foreign supplier has increased; and (3) the domestic industry has suffered injury, the communications do not delve into technical detail or discuss the necessity of a safeguard.

While respecting these earlier positions, it is posited that not only has the trade world has moved on since the early 2000s but so has the developmental level of ASEAN Members. This is not to suggest that ASEAN should not consider the addition of safeguards, but merely that it should take a more nuanced and practical position in the ATISA negotiations.

In the ATISA, if any form of a negative list approach is undertaken, it is recommended that an emergency safeguard mechanism be included so as to encourage ambitious commitments while providing the knowledge and comfort that temporary assistance is available in case of an unexpected outcome that is severely injuring the domestic industry. While the form would be subject to negotiation, a nondiscriminatory pullback or withdrawal of a commitment for a renewable period of three years upon demonstration of continued injury would seem appropriate (the issue of whether compensation is payable could likewise be subject to negotiation).[92] The imposition and continued use of the safeguard should, of course, be subject to dispute settlement in order to avoid abuse and maintain standards.

At the outset, however, it is important to remember that safeguards are not a substitute for due diligence. Members must study, understand, and assess the regulatory structure needed for each

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[89] See ibid. See also Luis Abugattas Maljuf, 'Safeguards in Agreements to Liberalise Services: Issues for Consideration of CARICOM Member States in the WTO, the FTAA and in Application of Article 47 of the Revised Treaty of Chaguaramas,' 2002.

[90] WTO, Communication from the United States, S/WPGR/W/17, 13 March 1997.

[91] WTO, *Concept Paper: Elements of a Possible Agreed Draft of Rules on ESMs for Trade in Services*, Communication from ASEAN, S/WPGR/W/30, 14 March 2000; WTO, 'Communication from Brunei, Indonesia, Malaysia, Myanmar, The Philippines, and Thailand,' above n 80.

[92] The renewal period could be indefinite or limited to one-term, in which case the Member concerned would have to determine whether to eliminate the safeguard or withdraw or modify the commitment.

sector before making commitments; only through detailed and rigorous preparation can appropriate commitments and limitations be determined.

The liberalization and protection of services require in-depth understanding of the domestic regulatory framework; it is therefore important to get the domestic structure right. Safeguards are not a substitute for poorly formulated domestic law. Therefore, while it is often posited that the lack of competition policy is a reason to include an emergency safeguard mechanism into a services agreement, such thinking is backward and perverse. If the lack of a functioning competition policy is an impediment to economic progress, the imperative is to adopt or revise the competition law, not institute an emergency safeguard mechanism.

The addition of an emergency safeguard mechanism into the ATISA will require careful consideration and precise drafting; it is not the case that a simple provision in the text will suffice. On the contrary, safeguards should be carefully considered and negotiated with the knowledge of the potential effect on each sector and mode of supply. Safeguards can be a useful safety valve and provide comfort to newly liberalizing economies, but safeguards can also be dangerously misused or easily evaded.

For this reason, this author only cautiously recommends that the ATISA should allow for safeguards and further recommends that the ATISA limit their use to certain sectors and modes and truly extraordinary situations. The reason for such a recommendation is the difficulty in applying safeguards to all sectors (and modes, if using a positive list) and the objective of ASEAN to promote further integration and eventual common market.

The recommendation is that Members may seek to apply both a rules and schedule approach whereby the overarching framework for use of an emergency safeguard mechanism is detailed in the text but use is limited to specific sectors where Members have reserved the right.[93] While such an approach would force Members to predetermine and foresee ‘emergencies’ and negotiate accordingly, it is also transparent and encourages liberalization and integration.[94]

In terms of the rules of use, it is strongly recommended that Members craft common terminology and terms so as to prevent ambiguity, uncertainty, disagreement and disputes. While the use of a safeguard could be based on the GATT-style situations of (i) the situation faced by the domestic industry concerned must result from the implementation of a Member’s commitments undertaken under the ATISA; (ii) there must be a sudden increase in the supply of the service by supplier(s) of another Member; (iii) injury or threat of serious injury must have been determined in the relevant domestic industry; (iv) causality between the injury or threat thereof and the increase in supply of the relevant service must be clearly established; (v) the situation must be of the nature

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[93] Alternatively, the ATISA could allow for safeguards in every sector but limit compensation to situations where the possibility of a safeguard was not predetermined.

[94] See, for instance, Mexico’s use of market share caps in NAFTA. The agreement increased the foreign ownership threshold, but the caps allowed Mexico the right to use a safeguard to slow the growth if foreign ownership rose above a certain threshold by a certain time. The emergency safeguard could be in place for a nonrenewable period of three years. What is noteworthy, however, is that this safeguard has not been inserted into other trade agreements.

of an emergency;[95] it is also strongly recommended that use be subject to a public interest test to protect consumers and public interest from well-connected private interests misusing and abusing the system.

As safeguards would be subject to commitments and therefore negotiation, Members could schedule a 'limited window' or time limit for the use of the safeguard (e.g., to be phased out within a set time period, say, five or ten years) or make no commitment to phase out the potential use of the safeguard.[96] Regardless, procedures for the moderation of schedules would remain intact, and a Member could always withdraw or modify a commitment (including a safeguard mechanism) subject to the rules under the relevant Article in the ATISA. It is understood that such an approach depends on the skill and negotiating capacity of all ASEAN Members to identify sensitive sectors and design an appropriate safeguard mechanism.

It is further proposed that Members place a cap on the total number of sectors that can be subjected to a safeguard. While the number and formula would be subject to negotiations, one could imagine a limit of 10 percent of fully or partially liberalized sectors.

Throughout the rules and schedules, the ATISA could provide special and differential treatment to certain Members. Such treatment could include longer phase-out times, a higher cap on potential sectors covered with safeguards, etc.

Other detailed and technical issues also must be noted and carefully considered. Perhaps most importantly, care must be taken to ensure that safeguards only apply in the ATISA where commitments go beyond those made in other FTAs and bilateral investment treaties (BITs). While this is a significant limitation, the logic behind it is simple: external FTAs and BITs do not contain a safeguards clause and its use would be inconsistent with obligations in these services or investment chapters. Practically, the safeguard could be limited to apply to an extent not greater than that granted to an external party; thus, the MFN principle would apply to ASEAN Members. The alternative, which would be to apply the safeguard to ASEAN Members on all commitments but not to any affected external partners, seems counter to the objective of ASEAN integration and a common market.

The idea behind the allowance of a safeguard is to promote greater market access and the integration of ASEAN and the common market, but allow for the protection of sensitive sectors in emergency situations. In this regard, Members are encouraged to be ambitious in their commitments while still receiving some level of comfort should an emergency arise. The identification of sensitive sectors and identification of the appropriate safeguard measure will require care and skill, but will protect against arbitrary political action and again in so doing protect the overall objective of ASEAN integration.

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[95] See WTO, 'Communication from Brunei, Indonesia, Malaysia, Myanmar, The Philippines, and Thailand', above n 80, para 12(e).

[96] Alternatively, the text of the ATISA could set a limited window for a definitive period following the entry into force of the agreement.

REFERENCE PAPERS BEYOND TELECOMMUNICATIONS

The WTO Reference Paper for Basic Telecommunications contains a set of common regulatory commitments inscribed into Member schedules as additional commitments, in full or with reservations, covering a wide range of domestic issues such as transparency, access to essential facilities, and safeguards for competition. In other words, the Reference Paper is an agreement of Members on common regulatory principles and pro-competitive disciplines backed up through the schedules. These commitments came into force upon the participation of a 'critical mass' of the membership.[97] The reference paper essentially acts as the regulatory component of the basic telecommunications agreement. The paper consists of a set of 'common guidelines for a regulatory framework that countries should follow to support the transition of the telecommunications sector to a competitive marketplace and to guarantee effective market access and foreign investment commitments.'[98] The reference paper discusses six regulatory principles: competitive safeguards, interconnection, universal service, licensing, allocation and use of scarce resource, and creation of independent regulator.

A similar initiative at the WTO is The Understanding on Commitments in Financial Services, which contains core commitments on market access, public procurement, the treatment of new financial services and a standstill commitment. Most OECD countries incorporated the Understanding into their schedules on an MFN basis.

Should ASEAN adopt Reference Papers for any selected sectors beyond telecommunications? The first step to determining such an issue is understanding why ASEAN should be interested in additional Reference Papers. The answer can be found in the genesis of the Reference Paper on Basic Telecommunications: the belief that market access in the sector could easily be undermined through governmental measures not subject to GATS disciplines, namely competition laws and regulations.[99] To combat this belief, Members crafted a short document setting out the specific regulatory and other features essential for meaningful liberalization in the sector. Importantly, and it must be remembered, there is little point to adopting any additional Reference Paper if the will to liberalize is not strong: the Reference Paper ensures that liberalization commitments in the schedule are not undermined by other governmental measures, but serves no purpose if protections remain enshrined in the text and schedules.

When looking at drafting new Reference Papers the starting point would be the usual GATS-like language of requiring Members to 'ensur[e] that measures relating to qualification requirements

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[97] The Agreement came into force in 1998, for the 69 Members (representing 55 schedules) signatories.

[98] Boutheina Guermazi, 'Exploring the Reference Paper on Regulatory Principles,' available at http://www.wto.org/english/tratop_E/serv.../guermazi_referencepaper.doc.

[99] Ibid at 2 ('The reference paper was driven by the concern that free trade principles, market access and national treatment commitments are insufficient to guarantee effective competition in the basic telecommunications sector without rules to ensure that major suppliers do not abuse their position. In this respect, important elements of competition policy such as the notion of major supplier, dominance, essential facilities and competitive safeguards were introduced.'). See also Stuart Harbinson and Bart de Meester, 'A 21st Century work program for the multilateral trading system,' prepared for the National Foreign Trade Council (2012), available at http://www.nftc.org/default/trade /WTO/NFTC21stCenturyTradeAgenda2012.pdf.

and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services.' In certain sectors, however, there is a belief that sector-specific provisions going beyond technical standards, qualifications, and licensing are required to create true market access. In such cases, standardization in the form of a Reference Paper could be desirable. It would thus seem that the Reference Paper approach could be beneficial if the 'horizontal' approach is not conducive to the sector and all subsectors. When the field is wide, varied, and heterogeneous, the same disciplines are not appropriate for all the subsectors; the use of 'Disciplines' (such as the WTO Accountancy Disciplines, under Article VI of the GATS) could lead to ambiguities over national treatment and uncertainty over whether a commitment has been made in this regard. Such issues go beyond transparency and market access and to the core of the prerequisites for liberalization.

One sector that might be ripe for a Reference Paper is insurance. This industry is unique among financial services in that its products often last for long periods (say, 40 or more years for life or pension insurance) and therefore it would particularly benefit from a guarantee of a stable environment. The Understanding on Commitments in Financial Services does not serve this role, as it more so codified existing standards and practice (in market access and national treatment) among signatories than it further liberalized any particular subsector. (Experience since its inception also has revealed differing interpretations and, with a slight exception, little effect on actual best practices). And while some aspects of a Reference Paper on insurance could be covered in a 'disciplines' approach——for instance, certain best practices such as general transparency and the role of the independent regulatory authority—other industry-specific issues such as creditworthiness, rating organizations, and ensuring a competitive market do not. Moreover, other issues such as solvency, prudential focus, and monopolies do not seem possible to fit into an alternative approach.

As with telecommunications, the insurance industry needs a document that caters to industry-specific issues and combats anticompetitive regulations, situations, and attitudes—in short, when liberalization in the schedule is not enough to provide stable market opportunities on the ground. An insurance (or any additional) Reference Paper need not be long or attempt to provide intricate details, but rather should be short, sharp, and to the point: the Reference Paper on Basic Telecommunications is three pages. The objective would be a document to ensure a coherent marketplace for insurers in ASEAN, and could simply contain the measures or actions that prudent regulators would expect to take and which would allow parties to attract investment on competitive and recognized terms with the guarantee of best industry practices.

Other sectors would similarly benefit from a Reference Paper: maritime, where negotiations have been held to develop additional commitments on access to and use of port facilities; air transport, including access to landing slots and facilities; rail transport, including access to infrastructure; energy, including electricity and access to gas transmission infrastructure; and legal services, postal services, and e-commerce. Logistics services, however defined, would also seem ripe for a

Reference Paper given the role these services play as a 'critical determinant of countries' physical connectivity to global markets and their competitiveness.'[100]

Logistics services encompass transportation, distribution, and communication technologies, and require physical access to infrastructure. As a result, logistics services are subject to a multitude of restrictive and often overlapping and uncoordinated regulations. The integration of logistics would undoubtedly bring efficiencies and economic gains to the region[101]—and it is a perfect illustration of a services sector where commitments may not be enough to unleash the potential of the sector and where a Reference Paper approach would be desirable.[102]

Further liberalization in most of the above-listed sectors could provide for greater efficiencies and significant economic opportunities; however, given the level of commitments and development in ASEAN in these and other sectors, ASEAN Members may not be ready to take the lead in drafting a Reference Paper. Frankly, it is not evident that Members are willing to offer the necessary market opportunities in the schedule and, as mentioned above, without that commitment a Reference Paper is unnecessary. The objective of any additional Reference Paper should be to ensure liberalization and integration in sectors where the barriers to market opportunities are not the schedules but rather are complex non-GATS/ATISA regulations and other obstacles which hamper liberalization and integration.

MUTUAL RECOGNITION ARRANGEMENTS

The purpose of MRAs is set out in Article VII of GATS:

> [f]or purposes of the fulfillment … of its standards or criteria for authorization, licensing or certification of services suppliers … Members may recognize education or experience obtained, requirements met, or licenses or certifications granted in particular country.… Such recognition… may be achieved through harmonization or otherwise,.. Based upon an agreement or arrangement.

MRAs could be more useful in breaking down regulatory heterogeneity and adding transparency and predictability to the ASEAN integration process. ASEAN has completed seven MRA arrangements on services, namely engineering (2005), nursing (2006), architecture (2007), surveying (2007), medicine (2009), dentistry (2009), and accountancy (2009 and 2014). The MRAs are not all fully implemented and are uneven in their scope and ambition, and even in

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[100] Charles Kunaka, Monica Alina Antoci, and Sebastian Saez, 'Trade Dimensions of Logistics Services: A Proposal for Trade Agreements' (2013) 47 *Journal of World Trade* 925, 925.

[101] See, e.g., Bernard Hoekman and Alessandro Nicita, 'Trade Policy, Trade Costs, and Developing Country Trade,' (2011) 39 World Development 2069; Claire Hollweg and M.H. Wong, 'Measuring Regulatory Restrictions in Logistics Services,' ERIA Discussion Paper Series (2009), available at http://www.eria.org/publications/discussion_papers/measuring-regulatory-restrictions-in-logistics-services.html.

[102] Kunaka, Antoci, and Saez, above n 100, 945–48

design.[103] In truth, some appear more hortatory while others are considerably more prescriptive. Owing to the significant differences among sectors, these differences are unsurprising.

The imperative at this stage is not only to expand the coverage to other sectors but also to enhance the existing framework agreement and MRAs. While regulatory convergence and MRAs have limits, the addition of increased targets and perhaps a 'necessity test' for domestic regulations would be beneficial and add to the effectiveness of the MRAs. At the same time, there remains a need for regulatory differences and thus variable geometry within the arrangements in order to promote forward movement and faithful adoption of the MRAs by licensing bodies in regulated professions. For this reason, the 'necessity' should not be the same for each Member; rather, the particulars of the standard should depend upon the circumstances of the individual Member and its regulators. Another yet to be addressed issue with MRAs is ensuring their proper implementation and enforcement. Here, clear guidelines and perhaps even a review mechanism could play an important role in delivering the expected result of the MRAs.[104]

While fully recognizing the controversial nature of movement of persons, and despite the lack of a Mode 4 roadmap under the AEC, the issue should be addressed in some manner, for it is highly questionable whether there can there be deep and meaningful services market integration through MRAs without enhanced labor mobility. The ATISA negotiations present an opportunity for Members to consider and present a framework for greater integration in the longer term.

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[103] An assessment in 2006 called progress on MRAs 'extremely pedestrian.' Thanh and Bartlett, above n 18, 35.

[104] See ibid at 54.

5. Conclusion and Final Recommendations

ASEAN has taken giant steps since 1992 in opening market access opportunities and working toward a more integrated community. In the process, it has liberalized trade and contributed to the rising economic prosperity of the Members. The AEC Blueprint envisages even greater integration and economic community. The services sector could play a large role in contributing to future economic growth and ultimately in determining the success of the economic community.

Services are a relatively new negotiating topic, and one that is inherently different from and more complicated to negotiate than goods. In many sectors, impediments to liberalization and integration are not trade barriers; domestic regulations pose the obstacle. For this reason, negotiations on trade in services need the participation and cooperation of large groups of stakeholders. Further complicating negotiations is the nature of ASEAN and its Members. ASEAN consists of a diverse group of nations, all proud and culturally rich but of varied stages of economic development and with vastly different interests.

To date, ASEAN has taken the less controversial but less ambitious route to trade in services and taken a GATS-style, positive list approach to scheduling commitments in its AFAS. This is understandable, as such a format is easier to negotiate than a negative list and requires less preparation and intergovernmental coherence. It also results in fewer commitments, meaning less liberalization, and restrained economic integration.

The trading world and several ASEAN Members have moved beyond a positive list approach to scheduling commitments. This has resulted not only in more liberalization, but also in increased transparency and predictability for traders. ASEAN should take the opportunity of the transition to the ATISA and embrace the objectives of the AEC Blueprint.

Regardless of the approach to scheduling utilized in the ATISA, ASEAN should adhere to several key principles to build upon and improve the foundation of the GATS/AFAS model. These are:

- ASEAN should set ambitious targets for liberalization; and while ASEAN’s makeup may necessitate variable geometry, this should be limited, clear, and transparent.
- While ASEAN has not favored back-loaded commitments, it should ascertain whether phase-in commitments may be utilised in appropriate circumstances to further integrate and expand market access opportunities.

- ASEAN should also ensure that the ATISA contains an MFN clause guaranteeing that Members receive the most favored treatment, even if an individual Member negotiates a separate FTA with another country or countries.
- Market access should be substantial, and the ATISA should ensure that commitments are not scheduled below the existing regulatory standard and status quo; in other words, Members should not be allowed to have or maintain any gap between the applied regulations at the conclusion of the negotiations and what appears in the ATISA schedule. While this could be subject to some exceptions and pullbacks, these exceptions and pullbacks should be clear, transparent and limited.
- Ideally, commitments will be subject to an upward ratchet and also cover future services, subject to certain exceptions as scheduled.
- The ATISA should also include strongly worded clauses on transparency, as well as make a genuine attempt to strengthen regulatory coherence and MRAs in order to improve the efficiency of services and opportunities for traders.
- The ATISA should have clearly stated and carefully designed rules of origin.
- ASEAN may consider having the ATISA cover government procurement of services, and clearly state the perimeters within the agreement.
- ASEAN may well consider the use of emergency safeguards in the ATISA, but should be careful in doing so. Variable geometry, pre-identified sectors, and transitional or phase-out periods are recommended for consideration.
- ASEAN may wish to consider adopting new Reference Papers, such as in insurance, transportation or energy services; however, it must be remembered that Reference Papers are only useful when the barriers to integration are not trade and commitment related but when behind the border issues are hampering integration despite services commitments. In this regard, it may be premature for ASEAN to consider adopting additional Reference Papers.
- In order to achieve the objectives set out in the AEC Blueprint and countless other documents, ASEAN must move beyond the traditional positive list approach to scheduling commitments. The positive list approach is proven to deliver lower returns than other formats and will continue to do so absent extreme political will.
- Regardless of scheduling format, the ATISA must ensure that information regarding reservations is available to governments and traders; transparency and predictability in itself can lead to greater efficiencies and economic growth.
- If the negative list approach is not adopted, ASEAN may wish to consider one of the hybrid formats being developed, or develop its own format for scheduling. The adoption of a nonbinding transparency list is the smallest step beyond the positive list, but even it can have benefits. Moreover, the ATISA can be designed to have the list transition into a binding list within a set period of time. The adoption of a hybrid such as the TISA or the format used in the Australia –Chile FTA is a further step in that it blends aspects of the positive and negative list. Though tending to be complex, such formats would help with

liberalization and integration while still providing some level of comfort to Members ill at ease with the negative list approach.

- ASEAN should ensure that the ATISA is carefully drafted and uses the most sophisticated techniques to avoid error and misinterpretation. One example would be to include in a negative list Annex 1 a clause allowing Members to add measures that were in force on the date of the agreement but erroneously not added to the annex to be added at a later date; such a clause ensures that a 'forgotten measure' does not become a 'lost' measure. Likewise, even in a positive list format a clause should appear which allows Members to correct for mistaken or poorly drafted reservations.

ASEAN has a once in a generation opportunity to redesign and craft the trade in services regime. The opportunity should not be treated lightly or squandered—trade in services has the potential to play a much larger and more sustained role in regional trade and growth. Its liberalization will not only benefit traders but also enhance economic growth among Members and region-wide. It is understandable for Members to be apprehensive as ASEAN transitions from the AFAS to the ATISA, but in order for the region to maintain and build upon its position as a trading bloc, it must be ambitious and not allow protectionist tendencies to override long-term opportunities. The risk of not showing leadership and ambition is that ASEAN as a trading group becomes the lowest common denominator with the real market access opportunities coming from and being given to external partner countries. Such a situation can and should be avoided. The ATISA can and should be an ambitious 21st century agreement that accounts for the differing levels of economic development among its Members and delivers economic growth and prosperity for the entire region.