



# **Legal Analysis of Transparency on the Implementation of The ASEAN Trade in Services Agreement (ATISA)**

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## **Abstract**

In international trading system, trade in services covers a wide range of intangible and heterogeneous products and activities which making it complex in the implementation phase. Association of Southeast Asian Nations (ASEAN) had established a progressive agreement on trade in services, the ASEAN Trade in Services Agreement (ATISA) that brings trade liberalization on services by recognizing progressive negative list approach. Nevertheless, there is no clear framework on how this agreement will be applied as ASEAN Member States (AMS) have difference economic policies considered the complexities of services sector. This paper aims to explore the regulation on trade in services, in particular the legal analysis of transparency of the implementation of the negative list approach brought by ATISA. This new agreement has a built-in agenda for AMS to convert their previous commitments of positive approach under ASEAN Framework Agreement on Services (AFAS). This paper is doctrinal research based on secondary data by analysing the existing international legal instruments on trade, ASEAN

agreements and policies on the liberalization of trade in services in the context of the ASEAN single market and production base as well as epicentre of growth. Despite its' potential benefits of ATISA, this article identifies substantial challenges in implementing newly trade in services agreement in ASEAN. This article argues that ASEAN still needs improving the regulatory standards for the service sector and reducing the unnecessary barriers to service trade within ASEAN, as well as increasing the respective regulatory transparency in each AMS.

**KEYWORDS** *ATISA, AFAS, Trade in Services, Negative List*

## Introduction

Free flow of services and free flow of investment, unlike the free flow of goods, are not entirely free, as there are still trade barriers for free flows services and investment.<sup>1</sup> Free flow of services was the recent sector in international trading system after the establishment of the World Trade Organization (WTO) in 1995 as one of the main sectors of the WTO agreements. Regardless of the differences they may have, these sectors are equally important for ASEAN, and ASEAN intends to utilize and maximize these sectors all together. The ASEAN trio economic agreements, goods, services, and investment, are undoubtedly significant factors for the ASEAN economic integration which will lead the region as stable and prosperous region.

This article discusses the latest development of trade in services in particular, the ASEAN Trade in Services Agreement (ATISA). Trade in services becomes the center of world commerce in nowadays global digitalized era as the new herald of trade globalization with considering the rapid development of inter and intra sectoral in the international trade. According to the IMF Working paper<sup>2</sup> and up until now services still constitutes as the backbone of the global economy and an increasingly important component of global production. The 50<sup>th</sup> ASEAN Economic Ministerial (AEM) Meeting and the

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<sup>1</sup> Weeramantry, Romesh. "Full protection and security and its overlap with fair and equitable treatment." *Handbook of International Investment Law and Policy*. Singapore: Springer Singapore, 2021, pp. 341-356.

<sup>2</sup> Loungani, Mr Prakash, et al. *World trade in services: Evidence from a new dataset*. International Monetary Fund, 2017.

17<sup>th</sup> ASEAN Economic Council Meeting saw the conclusion of negotiations on ATISA in 2018 throughout a long discussion. ATISA coupled with ASEAN Framework Agreement on Services (AFAS)<sup>3</sup> are ‘landmark agreements in bolstering trade in services in ASEAN’. In the last few years, ASEAN Member States (AMS) have benefited from trade in services that ranging from communications to transport, finance, education, tourism and environmental services, as their Gross Domestic Product (GDP) increase significantly.

This study is doctrinal research that intends to compose an analysis of legal rules on trade in services in ASEAN particularly the transparency element that brought by the new ATISA. This study analyses the existing ASEAN agreements and policies on the liberalization of trade in services in the context of the ASEAN single market and production base. This article tries to seek the legal framework of the implementation of ATISA as newly agreement on trade services especially the transparency aspect of trade in services. This framework is significance to build governance of services trade in ASEAN region due to the intangible character of services. The study utilizes all the authoritative legal materials such as legislations, official decisions, agreements, statutes, law, and regulations (as primary legal materials), and academic publications, scholarly comments, articles, bulletins, reports, working papers, data base in the official websites, and others (as secondary data legal materials) by which the primary legal materials are explained and examined. In addition, this study uses the tertiary legal materials such as legal dictionary and encyclopaedia. This study also analyze the impact of trade in services in Indonesia and draw a conclusion based on the international index concerning service trade restrictiveness and world competitiveness that Indonesia has gained so far.

## The Significance of Trade in Services for the International Trade and ASEAN

In international trading system, there is no simple definition for trade in services as the term services covers a wide range of intangible and heterogeneous products and activities.<sup>4</sup> International trade in services is covered by a set of rules

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<sup>3</sup> ASEAN. *1995 ASEAN Framework Agreement on Services*. Available online at <https://cil.nus.edu.sg/wp-content/uploads/2019/02/1995-ASEAN-Framework-Agreement-on-Services-1.pdf>

<sup>4</sup> WTO. *Measuring Trade in Services: A training module produced by WTO / OMC in collaboration with the Inter-agency Task Force on Statistics of International Trade in Services*. WTO, 2006.

documented in the General Agreement on Trade in Services (GATS). According to OECD “trade in services records the value of services exchanged between residents and non-residents of an economy, including services provided through foreign affiliates established abroad.”<sup>5</sup> The term service however, is services include any service in any sector except service supplied in the exercise of governmental authority (Art. I. 3 (b) GATS). The WTO describe services as the result of a production activity that changes the conditions of the consuming units (transformation services), or facilitate the exchange of products or financial assets (margin services). In 2019, global services trade reached US\$6.1 trillion, or one quarter of the value of merchandise exports, including goods, and seven per cent of world GDP.<sup>6</sup>

Trade services are usually heavily regulated at the domestic level: the literature mention asymmetry of information, negative external influences, concentration of power amongst dominant players among the typical ground for regulating many services.<sup>7</sup> Employment and output are more likely to be driven by domestic rather than overseas demand, compared with tradable goods sectors.<sup>8</sup> In global merchandise trade, the majority players are developed countries, when it comes to trade in services. The service market is dominated by developed countries, as in the previous two decades when the main service sectors were limited to a few sectors, such as financial services, insurance, and telecommunications, which these sectors had not considered as an immediate priority of developing countries.<sup>9</sup> Nevertheless, majority modern developed countries are service economies, accounted at over 70 per cent of the world’s gross domestic product (GDP).<sup>10</sup>

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<sup>5</sup> OECD. Trade in Services (Indicator). <https://www.oecd.org/en/data/indicators/trade-in-services.html>

<sup>6</sup> UNCTAD. “Fact sheet #5: Total trade in services”, *UNCTAD Handbook of Statistics 2020 - International trade in services*, 2020.

<sup>7</sup> Matsushita, Mitsuo, et al. *The World Trade Organization: law, practice, and policy*. Oxford: Oxford University Press, 2015.

<sup>8</sup> Manning, Chris, and Haryo H. Aswicahyono. *Trade and employment in services: the case of Indonesia*. No. 994717673402676. International Labour Organization, 2012.

<sup>9</sup> Onkonjo-Iweala, N. “How can the World Trade Organization and the Multilateral Trading System Support the Development Goals of Low-Income Countries?” In V.D Merit E. Janow (ed), *The WTO: Governance, Dispute Settlement & Developing Countries*. Juris Publishing, Inc, 2008. p. 165.

<sup>10</sup> Nurindra, I. Panji. “The Importance of Services in Indonesian Trade”. *Research Report*, TPSA Canada – Indonesia Trade and Private Sector Assistance Project, 2016.

Furthermore, of the global trade, like goods, services have continuously been traded as more than two-thirds of world GDP is trade in services.<sup>11</sup> Indeed, services are major part of the global economy, attract over three-quarters of foreign direct investment in developed nations, absorb the most workers, and create abundant new job globally. The share of service value added in GDP are at 73%, 54%, and 47 % on average for high income countries, middle and low-income countries respectively which this numbers are tend to rise significantly with the countries' level of income.<sup>12</sup> Services generally is a core economic activity in the national economy and had been growing in prominence for many years especially in the economies of developed countries.<sup>13</sup> Even in the low-income countries this service sector contribution to GDP is above that of both industry and agriculture. For many years, as consequence of the supply – demand notion in the society of the economies of developed countries, trade in services had been growing prominently.

Currently, the developed countries are still leading on trade in services, for example the top five services exporters are, United State of America, United Kingdom, Germany, Ireland, and France for year 2021.<sup>14</sup> Therefore, in the WTO context, trade in service provisions has become one of the legal elements in the existing multilateral disciplines, the General Agreement on Trade in Services (GATS) as the first agreement of multilateral and legally-enforceable rules aimed at the liberalization of trade in services. Trade in services is very important in the national economy as well as multilateral trade as it is a complement item for trade in goods.

Trade in goods is different with trade in services in some extend. For trade in goods, the producers and the consumers can stay in different places, as the products can be sent across a border to the consumers in another country. Unlike goods, services usually can neither be sent from one place to another, nor be monitored, measured and taxed due to their intangible nature.<sup>15</sup> As international trade developed, so the international community recognized and it became common for companies have provide services abroad which called as

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<sup>11</sup> OECD, *Services Trade: Services trade in the global economy*, <https://www.oecd.org/en/topics/services-trade-in-the-global-economy.html>

<sup>12</sup> D'Andrea, Barbara, et.al. *World Trade Report 2019: The Future of Services Trade*. World Trade Report, The WTO Secretariat, 2019.

<sup>13</sup> S Lester, Simon, Bryan Mercurio, and Arwel Davies. *World trade law: text, materials and commentary*. London: Bloomsbury Publishing, 2018.

<sup>14</sup> UNCTAD. "Fact sheet #5: Total trade in services".

<sup>15</sup> Delimatsis, Panagiotis. *International trade in services and domestic regulations: necessity, transparency, and regulatory diversity*. Oxford: OUP Oxford, 2007.

cross border supply of services. The international trade in services, the General Agreement on Trade in Services (GATS) of the World Trade Organization (WTO) has classified the cross-border trade in services into four modes of supply of services.<sup>16</sup> Mode 1: cross-border supply when service delivered within the territory of Member, from the territory of another Member. Mode 2: is consumption abroad, means service delivered outside the territory of the Member when the customers move across the border to receive the service. The alternative mode is commercial presence, Mode 3: in this mode instead of the customers, the service suppliers move across the border to deliver their services by way of the commercial presence. Lastly, Mode 4: is presence of natural person when the supplier service delivered within the territory of the Member as a natural person on temporary basis. Miroudot beliefs that economic activities related to services and investment in the global value chain (GVC) are increasing important for nations to remain on track with the economic competition of other countries.<sup>17</sup> In light of this, Kimura et.al argue that regional integration is completely relying upon a well-developed services supply chain.<sup>18</sup>

Trade in services and trade in goods have a closed relation one another, in terms that services have put a value added into the goods.<sup>19</sup> Services are defined as ‘the result of a production activity that changes the conditions of the consuming units or facilitates the exchange of products or financial assets.’<sup>20</sup> Services are not generally separate items over which ownership rights can be established and cannot generally be separate from their production’.<sup>21</sup> Thus,

<sup>16</sup> Eaton, Jonathan, and Samuel Kortum. “Trade in goods and trade in services”, in Lili Yan Ing, Miaojie Yu, (Eds). *World Trade Evolution, Growth, Productivity and Employment*. Hongkong: Routledge – ERIA Studies, 2019, p. 82

<sup>17</sup> Miroudot, Sebastian, and C. Cadestin. “Services in Global Value Chains: Trade patterns and gains from specialization”, *OECD Trade Policy Papers*, No. 208, OECD Publishing, Paris, 2017. <http://dx.doi.org/10.1787/06420077-en>

<sup>18</sup> Kimura, Fukunari, et al. "Introduction: Services Supply Chain—The Impact on Trade and Development in East Asian Countries." *Journal of Southeast Asian Economies (JSEAE)* 36, no. 2 (2019): 141-152.

<sup>19</sup> Ariu, Andrea, et al. "The interconnections between services and goods trade at the firm-level." *Journal of International Economics* 116 (2019): 173-188.

<sup>20</sup> IMF. *The IMF Balance of Payment and International Investment Position Manual. 6<sup>th</sup> Edition (BPM6)*. International Monetary Fund, 2007. Retrieved from <https://www.imf.org/external/pubs/ft/bop/2007/bopman6.htm>.

<sup>21</sup> Lennon, Carolina. “Trade in services and trade in goods: Differences and complementarities”, *Working Paper the Vienna Institute for International Economic Studies (wiiw)*, no. 53. 2009. Online at <https://www.econstor.eu/handle/10419/203918>. See also Williams, Marc Andrew. *The Group of 77 in UNCTAD: Anatomy of a Third World coalition*. Diss. London School of Economics and Political Science, 1987; Narlikar,

service transactions frequently require that the supplier and the receiver of the service be in proximity to one another.<sup>22</sup>

As consequence, as describe by Delimatsis that the international trade in services, the service suppliers have to move to that country in providing the services or establish a local branch of the service supplier, because the services cannot be sent.<sup>23</sup> In this sense, services have closed relation with other international factor mobility such as capital and labor. Indeed, factor mobility is integral parts of trade in services. In one hand, nations with its domestic regulations in services should adjust and adopt them by which they will compatible and not contradict with General Agreement on Trade in Services (GATS) as international trade in services regulation. In the other hand, the multilateral trading system can justify and tolerate regulatory diversity in services of nations as the members of WTO.

Every one including policy makers and regulatory bodies should bear in their mind and respect the core general principles of necessity and transparency of trade in services. Transparency is described as commonly shared knowledge about economy, its performance, and way policy influences it.<sup>24</sup> By saying this, they have to be aware that it is a must for the nations as the members of international trade organization allowing the assessment of the consistency with the GATS of the domestic economic policies and regulations in services, both at a horizontal and cross-sectoral levels. Article X:3 (a) GATT provide mechanism in distinguishing transparency between WTO Members and transparency with respect to individual traders. It should make clear that the provision of Article X:3 (a) entitled 'Publication and Administration of Trade Regulations' applies to the administration of laws, regulations, decisions and rulings which are not discriminatory that can be examined for their consistency with the GATT provisions.<sup>25</sup> Therefore, transparency in international trade facilitation is indispensable in achieving growth of international trade. The

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Amrita, and Ngaire Woods. "Sectoral Coalitions: The Case of Services." *Trade Negotiations in Latin America: Problems and Prospects*. London: Palgrave Macmillan UK, 2003, pp. 32-48.

<sup>22</sup> Snape, Richard H. "Reaching effective agreements covering services." *The WTO as an International organization*. The University of Chicago Press, 1998, pp. 279-293.

<sup>23</sup> Delimatsis, Panagiotis. *International trade in services and domestic regulations: necessity, transparency, and regulatory diversity*, p. 34.

<sup>24</sup> Tibana, Roberto J. "The Composite Indicator of Economic Activity in Mozambique (ICAE): Filling in the Knowledge Gaps to Enhance Public-Private Partnership (PPP)". *OECD Development Centre Working Paper No. 227*, (2003).

<sup>25</sup> WTO, *WTO Analytical Index – GATT 1994 – Article X (DS reports)*, WTO Publication, p.17. [https://www.wto.org/english/res\\_e/publications\\_e/ai17\\_e/gatt1994\\_art10\\_jur.pdf](https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art10_jur.pdf)

Members of WTO should have national regulations on management of information disclosure about rules, regulations and laws as their trade policy instruments. In the regional level, ASEAN took the same path by building a framework on levels of transparency on trade in services as reflected in the provision of ATISA.

Services have closed correlation with goods production processes (goods-related services). Modern developed countries depend heavily on the services which have important role in creating jobs and economic value.<sup>26</sup> Besides, they are relying on the services for their role behind the scenes, adding value to almost every segment of goods production, for instance, business services – such as design, legal, and engineering – play an important role in the production chain activities both at the upstream and downstream ends.<sup>27</sup>

Service activities are involved from the beginning to the end of the production chain. The stages include from the research and development in the early stage of the production processes until the final stages which involve marketing and customer services. In addition, services not only involved in the early stage of the goods production, but services can add value to the products. For example, the products would have some values added when in the production processes the company has put a unique branding package for the product which is a part of services such as design product. Even companies may design their products by adding sustainable value on their service systems business models.<sup>28</sup> Furthermore, the new development in information communication technology (ICT), such as the Internet, wireless networks, cell phones and others communications media have transformed the world into a digital economy era, bringing positive effects significantly to communication and trade costs reduction.<sup>29</sup> This e-trading method has also brought new types of services into the global economy, known as cross-border supply services, for example, financial services, insurance services, transportation and travel.<sup>30</sup> Indeed, in the nowadays digital economy era, the ICT has significant impact to exports of transportation services and imports of insurance services, royalty and

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<sup>26</sup> Nurindra, "The Importance of Services in Indonesian Trade".

<sup>27</sup> Nurindra.

<sup>28</sup> Moro, Suzana Regina, Paulo Augusto Cauchick-Miguel, and Glauco Henrique de Sousa Mendes. "Adding sustainable value in product-service systems business models design: A conceptual review towards a framework proposal." *Sustainable Production and Consumption* 32 (2022): 492-504.

<sup>29</sup> Luong, Tuan Anh, and Thu Hang Nguyen. "The impact of ICT on service trade." *The Singapore Economic Review* 66, no. 4 (2021): 1073-1086.

<sup>30</sup> Nath, Hiranya K., and Lirong Liu. "Information and communications technology (ICT) and services trade." *Information Economics and Policy* 41 (2017): 81-87.



license fees, telecommunication services, and travel since they are ICT-enabled, thus, the ICT has important role in the production and delivery of these services.<sup>31</sup> The ICT has significant effect on service export diversification that translate to countries' innovation rank, merchandise exports to the foreign direct investment inflows.<sup>32</sup> Furthermore, in the new model of maritime industry also develops ocean big data which has correlated with the value-added services cost subsidy.<sup>33</sup>

## The Transparency of Trade in Services

According to some literatures on international trade, transparency has strong correlation with trade and investment.<sup>34</sup> Transparency is not only very important to trade and investment, but also for international investment dispute settlement, that is, when transparency enhanced, so that the procedures will put accountability to a wider range of stakeholders.<sup>35</sup> This is particularly important in non-tariff measures which constitute as non-tax measures adopted by a certain government to limit imports. The non-tariff barrier measures constitute as soft infrastructures and considered as the most important methods in trade facilitation of the WTO since the Uruguay Round in reducing tariff barriers.

The non-tariff barriers often criticized for their lack of transparency. Transparency is a principle under the WTO which stipulates that any regulation or policies of the member states which can affect international trading should be clearly communicated to its trading partners. Some examples of non-tariff barriers are, inter alia, voluntary export restraints (VERs), licensing, technical and administrative procedures, quota on imported products, price control, foreign exchange, consular obligations, quantity restrictions, and pre-shipment inspection and rules of origin. There are more on non-tariff barriers for trade in services compare to trade in goods. In addition, unpredictable changes are

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<sup>31</sup> Nath, and Liu

<sup>32</sup> Gnangnon, Sèna Kimm. "Effect of the internet on services export diversification." *Journal of Economic Integration* 35, no. 3 (2020): 519-558.

<sup>33</sup> Wan, Xiaole, et al. "Is quality cost or value-added service cost subsidy: Should the ocean big data supply chain adopt which cost subsidy approach of the government?." *Ocean & Coastal Management* 242 (2023): 106713.

<sup>34</sup> Reinisch, August, and Christoph Schreuer. *International protection of investments: the substantive standards*. Cambridge: Cambridge University Press, 2020.

<sup>35</sup> Nakagawa, Junji, ed. *Transparency in international trade and investment dispute settlement*. London: Routledge, 2013.

happened frequently on trade in services, not only in rules and regulations but also in their scope of application. As consequence, companies have difficulties in adapting and responding to all of these changes.

Trade in services has correlation with investment as investors provide certain services as part of liberation of trade in services but they found investment protection measures in the national investment regulations.<sup>36</sup> With regard to transparency on trade, the ASEAN Comprehensive Investment Agreement (ACIA)<sup>37</sup> in Article 21, provides transparency stipulated that in achieving the objective of the ACIA, each of the AMS shall inform the AIA Council promptly and annually: a). any investment-related agreements or arrangements that has entered into with the preferential treatment approval; b) any new law or amended law, regulations or administrative guideline that affect investments or commitments of the AMS under the ACIA. This Article also stated that every AMS shall publish all kind of relevant laws, regulations and administrative guidelines of general application that relate to or affect investments in the AMS territory. In addition, it stated that all the AMS shall establish or designate an enquiry point for all information relating to the measures required to be published or made available upon request of any natural person, juridical person or any other AMS that may be promptly obtained. In this context, as transparency becomes important for international trade, state members shall disclose all information on rules, regulations, and laws to the trading partners.<sup>38</sup>

There is no provision in ACIA, however, that require AMS to furnish or allow access to any confidential information. For example, information concerning particular investors or investments because the disclosure of which would impede law enforcement or otherwise be contrary to the public interest. In other words, it would prejudice legitimate commercial interest of particular juridical persons public or private. Thus, transparency is an important aspect of trade facilitation, as it relates to, not only the restrictiveness of at-border and behind-the-border policies that matters for international trade but also for the

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<sup>36</sup> Voon, Tania, and Andrew D. Mitchell. "The Trans-Pacific Partnership as a development of the Australia–United States Free Trade Agreement: services liberalisation and investment protection." *The Comprehensive and Progressive Trans-Pacific Partnership: Analysis and Commentary*. Cambridge University Press, 2022, pp. 327-355.

<sup>37</sup> ASEAN. *ASEAN Comprehensive Investment Agreement (ACIA)*, 2009, <https://agreement.asean.org/media/download/20140119035519.pdf>

<sup>38</sup> Turnes, Paloma Bernal, and Ricardo Ernst. "A framework for transparency in international trade." *Investigaciones Europeas de Dirección y Economía de la Empresa* 21, no. 1 (2015): 1-8.

way in which those policies are designed and administered. It can be said that transparency is a board concept, means, that is difficult to measure in its entirety.<sup>39</sup> Transparency, indeed, brings certainty and predictability in particular to service developers as this kind of regimes reduce uncertainty cost for businesses. In the current international trading system, the facilitation of trade has the main mechanisms that include transparency, predictability and consistency of procedures, formalities, as well as export and import regulations. Despite the protectionism that remains exist, this is kind of urgency in improving worldwide collaboration and coordination among nations regarding international trade and related services that would have increased the growth of global transactions as well as reduced the transaction costs.

The center of the international trading system is the balancing of mechanism between international liberal system of international trade in services and the national WTO member governments' desire to protect national interests including social, economic, cultural values through their national service regulations. It is discourses between trade liberalization and protectionism, which the former claims lower consumer costs that increase efficiency and economic growth, the latter characterized by strict barriers and market regulation. It is often in the export and import procedures involve bureaucracy in terms of the number of documents required in customs which give a sense to public the existing trade barriers and protected policies to restrict the free flows of goods and services. According to Goldberg and Reed protectionism could make the world less resilient, more unequal, and increasingly conflict-prone.<sup>40</sup> Moreover, a survey found that regulations that inconsistency and confused policies as well as their implementation resulted into a significant negative economic impact on global business.<sup>41</sup> The international trading system of WTO is based on some principles, such as the general principles of necessity and transparency, by which one can assess the consistency with the GATS of domestic regulations in services at a horizontal and cross-sectoral level.

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<sup>39</sup> Damuri, Yose Rizal. "Services Sector Development in Indonesia and the Implementation of AEC Measures in Services". *CSIS Working Paper Series, Economics Working Paper 03* (WPECON – 201603), 2016.

<sup>40</sup> Golberg, Pinelopi K., and Tristan Reed. "Growing Threats to Global Trade", in Gita Bhatt (ed), *Trade-Disrupted. IMF: Finance and Development (F&D)*. A Quarterly Publication of IMF, Vol 60. Number 2, June 2023.

<sup>41</sup> Ching, Stephen, Clement Yuk-Pang Wong, and Anming Zhang. "Non-tariff barriers to trade in the pacific rim." *Pacific Economic Review* 9, no. 1 (2004): 65-73.

Since the transparency has closed relation to the ability of the government to control the flow of information and disclose it to the public, the outcome of transparency will refer to complete predictability, for example, in a transparent international or regional trading system, output is entirely predictable from knowing the input. In this point, it assumes that international trading system is not similar to the liberal international order, as the latter is not based on international law, but on power-based system. Indeed, individuals' business people, corporations alike need transparency in trade, as their economic activities much rely on profit and time. In light of this, the stakeholders for transparency in international trading system and regional trading system alike involve all state members of the groupings making it apparent that any transparency would need build on a balanced consideration of common interests.

In the WTO context, Article X of the General Agreement on Tariffs and Trade (GATT) 1994 stipulated that the WTO commits to maintain transparency through its communication internally and externally. Therefore, the WTO always keep the information and dialogue with its' stakeholders flow smoothly by conducting its operations as far as transparent through effective and prompt dissemination of all information. Similarly, the WTO members also have to publish and disseminate rules, regulations and policies, as well as judicial decisions that have relevant correlation with the international trade. Thus, it is essential that all trade regulations should be published before the government applied them since by apply this mechanism, the predictability of the application and enforcement of the trading rules would be coexistence.

Transparency on trade-related measures contributes to preserve the confidence in global supply for international trade. It has been shown that when transparency inherent into the business environment, the flow of international trade increased significantly.<sup>42</sup> In this context, in the multilateral trading system, two methods can be used either the WTO obligate the government members to inform the specific measures, policies or laws on trade through regular notifications, or the WTO conducts regular reviews of trade policies, regulations, and measures of state members, called as the trade policy reviews. Transparency in international trade brings some incentives to the free flow of goods and services that include efficiency the logistics procedures, improving trader compliance, reducing delays in port and logistics hubs, boosting up

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<sup>42</sup> Duval, Yann, and Chorthip Utoktham. *Trade facilitation in Asia and the Pacific: Which policies and measures affect trade costs the most?*. No. 94. ARTNeT Working Paper Series, 2011.

documentary procedures among export and imports stakeholders by which in the end of the day reduces trade costs.

## The ATISA and Related Agreements of ‘Troika’ in ASEAN

The AEM signed the ASEAN Trade in Service Agreement (ATISA)<sup>43</sup> by which if it is implemented together with the ASEAN Trade in Good Agreement (ATIGA) and the ASEAN Comprehensive Investment Agreement (ACIA), would become the third and final part of the ‘troika’ of ASEAN agreements that will improve ASEAN's economic and sectoral integration.<sup>44</sup> ATISA aims to enhance the free flow of services in ASEAN by further reducing trade barriers for services suppliers to create a more stable and transparent regime as well as a predictable environment for trade in services in the region based on the AMS legally binding commitments under AFAS through the reduction of discriminatory regulatory barriers.

The service sector is often classified as non-tradable, partly for convenience in comparison with the more obviously tradable goods industries, agriculture, mining and manufacturing.<sup>45</sup> However, there have been a mistaken perception that markets for services are relatively open than trade in goods since most of the existing barriers to trade in services in ASEAN region remain in place. Accordingly, barriers to trade in goods within the AMS were dismantled much more quickly than barriers to trade in services, a consequence of the high level of sensitivity in many services sectors. Indonesia for example, the 2022 Service Trade Restrictiveness Index is high which indicate that Indonesia still have stringent regulations on services trade across most sectors.<sup>46</sup> In order to loosening the investment environment for foreign investors, Indonesia has reformed the investment regulations, by introducing a new investment regulation aims as trade liberalization by opening a wider market access in certain sectors. Indonesia, however, still has worked on the liberalization of

<sup>43</sup> ASEAN. *Factsheet: Conclusion of the ASEAN Trade in Services Agreement (ATISA) Annex B*. ASEAN, 2019.

<sup>44</sup> ASEAN. *Opening Remarks by Minister Chan Chun Singapore, the 6<sup>th</sup> RCEP Ministerial Meeting*. ASEAN, 2018. Retrieved from <https://asean.org/wp-content/uploads/2018/08/Opening-Remarks-by-Minister-Chan-Chun-Sing-at-6th-RCEP-Ministerial-Meeting-on-30-Aug-2018.pdf>.

<sup>45</sup> Manning and Aswicahyono, *Trade and employment in services: the case of Indonesia*, p. 8.

<sup>46</sup> OECD, OECD Services Trade Restrictiveness Index (STRI): Indonesia – 2022, Key findings. [https://www.oecd.org/trade/topics/services-trade/documents/oecd-stri-country-note-idn%20\(002\).pdf](https://www.oecd.org/trade/topics/services-trade/documents/oecd-stri-country-note-idn%20(002).pdf)

trade services because the existence of rules restrictions on foreign entry in some service sectors, such as legal services, accounting services, telecommunication and insurance services.<sup>47</sup> In this context, if ATISA was fully implemented, it is enable ASEAN to address in timely manner urgent and important regional political and security issues and situations of common concern likely to disturb regional peace and harmony. Simultaneously, it would serve to elevate and enhance ASEAN integration, ASEAN's unity and solidarity that lead to its effectiveness. Singapore, Malaysia, and Thailand have already ratified ATISA. In addition, Vietnam has ratified ATISA by Resolution No. 131/NQ-CP on 18 October 2021.<sup>48</sup> Indonesia after the long discussion with the Parliament, also has ratified the Agreement by issued President Regulation No. 3 Year 2023 on 16 January 2023.<sup>49</sup> This ratification reflects the commitment of Indonesia in liberalizing its' national trade services.

## Negative List Approach Under ATISA

The liberalisation of service sector in ASEAN, in particular under the previous agreement, AFAS, stipulates the following: removing restrictions on trade in services by 2010 for four priority services sectors (air transport, e-ASEAN, healthcare, and tourism); by 2013 for logistics and by 2015 for all other services sector (such as construction, distribution, maritime transport, education, environmental services).<sup>50</sup> Eventually, when ASEAN in the process of establishing the ASEAN Economic Community (AEC), AMS then experienced that AFAS was ineffective in reducing the trade cost and trade in services barriers. In realizing the deeper integration on services within the region, ASEAN replaced AFAS, after the signing the 10<sup>th</sup> package of the agreement, with ATISA. The AMS have come to decision to have a regional trading system which allowing to form more open and well-regulated services markets in the region altogether more sustainable trading system.

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<sup>47</sup> OECD, 2022

<sup>48</sup> Vietnam. "Vietnam Ratifies ASEAN Trade in Services Agreement: The Vietnamese Government on October 18 issued Resolution 131/NQ-CP ratifying the ASEAN Trade in Services Agreement (ATISA)", Ministry of Industry and Trade of the Socialist Republic of Vietnam, October 20, 2021. <https://moit.gov.vn/en/news/latest-news/vietnam-ratifies-asean-trade-in-services-agreement.html>

<sup>49</sup> See Republic of Indonesia, Presidential Decree No. 3 of 2023 on the Ratification of the ASEAN Trade in Services Agreement.

<sup>50</sup> Yean, Tham Siew, and Sanchita Basu Das, eds. *Services liberalization in ASEAN: foreign direct investment in logistics*. ISEAS-Yusof Ishak Institute, 2017.

ASEAN has agreed to further broaden and deepen services integration in the region, ASEAN's integration into the global supply chains in both goods and services, and enhance ASEAN Member States' competitiveness in trade services. Through the subsequent rounds of negotiations under AFAS, ASEAN has continued to broaden the coverage and reduce the limitations on market access and national treatment across services sectors, which go beyond similar effort at the WTO. The objectives of the Member States under AFAS are, on one side is to enhance cooperation in services amongst Member States in order to improve the efficiency and competitiveness, diversity production capacity and supply and distribution of services of their service suppliers within and outside ASEAN. On the other side, the objective is to eliminate substantially restrictions to trade in services amongst AMS and 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.

Under the previous AFAS the Member States liberalized intra-regional service trade in the region or specifically, to enhance cooperation among AMS in improving efficiency, competitiveness and supply of services. Basically, trade liberalization in services under AFAS is similar to ATISA, namely concerns with abolishing substantially all existing discriminatory measures and market access limitations amongst member States, and prohibiting new or more discriminatory measures and market access limitations by which the region will become a more liberal, stable and predictable environment for foreign service suppliers.<sup>51</sup> The ratification of ATISA as an agreement to liberalize trade in services according to the Vice Indonesian Ministry of Trade, will bring some benefits to Indonesia, ATISA is expected not only increase the trade in services but also widening the opportunity of investment, develop services industry, create a single market and production base.<sup>52</sup>

Under ATISA, the AMS intended to implement the negative list approach. Under this approach, all services sectors are regarded as liberalized by default. Only if the one of the AMS would like to take certain measure that would run against to the State Member's obligations to the Agreement, then this State would have listed for those sectors or sub-sectors only. The ATISA

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<sup>51</sup> ASEAN. "ASEAN Signs Trade in Services Agreement", *ASEAN*, October 23, 2020. <https://asean.org/asean-signs-trade-in-services-agreement/>

<sup>52</sup> Santia, Tira. "Sederet Keuntungan Kerja Sama Dagang ASEAN untuk Ekonomi Indonesia", *Liputan 6*, April 12, 2021. Retrieved from <https://www.liputan6.com/bisnis/read/4529837/sederet-keuntungan-kerja-sama-dagang-asean-untuk-ekonomi-indonesia?all&page=2>

should move beyond the traditional positive list approach to scheduling commitments. Compare to other approach, the positive list approach could not gain maximum return and if remain to do so may lead to the absent of extreme political will.<sup>53</sup> In this case, some services may have a lack of data and information that may lead to difficulties to ascertain the impact of liberalisation on those services activities, and thus inadequate domestic information in such would contribute to the reluctance of AMS to commit towards liberalising a particular service sector.<sup>54</sup>

Under the positive list approach, when previously the AMS had to explicitly list all sectors or subsectors in which it intended to liberalize, the negative list approach uses a reverse method, as it considers all sectors and subsectors to be changed by default. If a state wants to take measures on specific sectors, then it lists the sectors in which it plans to take measures (known as non-conforming measures).<sup>55</sup> This approach aims to establish a legally binding set of commitments to enhancing predictability and transparency under the tenet of liberalization. On a longer term, liberalization enhances competition and investment in the service sectors while ensuring greater regulatory transparency. Accordingly, the AMS would liberalize their service sectors and gradually phase out barriers to trade in services. Previously, nothing in the ASEAN provisions compel the AMS to bind or liberalize any specific service sector, and the individual ASEAN Member could indefinitely choose to keep a certain sector outside the scope of its commitments. This is so, because the AFAS as the previous pact let each member to decide where and when to undertake liberalization commitments for different services sectors. ASEAN has taken this negative approach as this format is easier to negotiate, requires less preparation and intergovernmental coherence, but this lead to 'fewer commitments, meaningless liberalization, and restrained economic integration.'<sup>56</sup> This agreement, however, will provide a new foundation in

<sup>53</sup> Hsieh, Pasha L., and Bryan Mercurio, eds. *ASEAN law in the new regional economic order: global trends and shifting paradigms*. Cambridge: Cambridge University Press, 2019.

<sup>54</sup> Yean, Tham Siew. "ASEAN Trade in Services Agreement (ATISA): Advancing Services Liberalization for ASEAN?." *PERSPECTIVE ISEAS – Yusof Ishak Institute*, no. 54 (2019).

<sup>55</sup> ASEAN. The 50<sup>th</sup> ASEAN Economic Ministers' (AEM) Meeting Joint Media Statement. 29 August 2018, Singapore. Retrieved from <https://asean.org/joint-media-statement-of-the-50th-asean-economic-ministers-meeting-aem/>.

<sup>56</sup> ASEAN. Opening Remarks by Minister Chan Chun Singapore, the 6<sup>th</sup> RCEP Ministerial Meeting, 2018. Retrieved from <https://asean.org/wp-content/uploads/2018/08/Opening-Remarks-by-Minister-Chan-Chun-Sing-at-6th-RCEP-Ministerial-Meeting-on-30-Aug-2018.pdf>.



pursuing and boosting the service trade in the region and increase the competitiveness of companies on services export in ASEAN.

Under the negative list approach, all sectors and modes of supply are automatically liberalized unless there are limitations to the contrary. This approach has been utilized by Australia New Zealand Closer Economic Agreement (ANZCERTA).<sup>57</sup> That means the FTA between Australia and New Zealand covers all services traded between the two countries, except those inscribed by each Government on separate 'negative lists' which reviewed periodically and the number of the items in the list is reduced over time.<sup>58</sup> Arguably, this approach enhances transparency, since potential suppliers can be reassured that, except for the scheduled limitations, they enjoy full market access and national treatment in all services sectors. For ASEAN, a negative list approach will give the best chance to achieve meaningful results, as transparency and predictability brought by this approach can lead to greater efficiencies and economic growth which are critical elements of the ASEAN single market and production base of the AEC. Therefore, this regional integration in ASEAN can truly liberalize trade in services between AMS without raising barriers for others as this regional trade liberalization would have become a step forward to liberalization of trade in multilateral level.

## Trade Barriers to the Services Industries in the ASEAN Single Market

ATISA aims specifically, first, to eliminate all restrictions on Mode 1 and Mode 2 supply services; second, allowing ASEAN equity participation up to 70%; third, significantly eliminating restrictions regarding market access on Mode 3 supply of services; eliminating restrictions concerning national treatment Mode 3 for maximum of one out of 128 sub-sectors.<sup>59</sup> ASEAN does not mention at all Mode 4 supply of services, means, ASEAN is not liberalizes presence of natural person that allow the supplier service delivered within the territory of the Member as a natural person on temporary basis. Trade barriers

<sup>57</sup> Delimatsis, *International trade in services and domestic regulations: necessity, transparency, and regulatory diversity*, p. 20.

<sup>58</sup> See Ministry of Foreign Affairs and Trade New Zealand, *The Australia – New Zealand Closer Economic Relationship*, 2005. Retrieved from <https://www.mfat.govt.nz/assets/Trade-agreements/Australia-NZ-CER/anzcer-cep-booklet.pdf>

<sup>59</sup> La, Meeryung. "ASEAN economic integration on services: An analysis of economic impacts and implications." *KIEP Research Paper, World Economy Brief*(2021): 21-29.

are defined by Oxford Dictionary as ‘an impediment to free trade; specifically, a policy or regulation that restricts or discourages trade between countries.’. In the trade in goods context, the main barriers can in the form of tariffs, even though in some cases it can be in the form of non-tariffs barriers. In simple way, trade barriers commonly are tariffs or taxes that governments placed on goods entering their countries. The relationship of international trade and investment is complex and evolved over time. Global value chains (GVCs) have sharpened the interdependencies all of countries concerning trade in goods and services and investment.

Unlike goods which their barriers are easily to identify, in the case of trade in services, either mentioning type of services or identifying barriers to services is notoriously difficult to measure and monitor. Indeed, this is a challenge for states to identify barriers to cross-border services. Cross-border is defined between different countries, or involving people from different countries.<sup>60</sup> Cross-border service in this point defines as the supply of services (e.g. financial services, insurance, or air navigation services) that are provided in a country other than the country where the registered office, place of business, head office, or branch of the services provider is located.<sup>61</sup> In other words, the services are provided for foreign customers because the place of business and home address of the clients are not similar to the service providers. Under the international trade terminology, it falls in the category of a mode of service supply, mode 1 in which trade where services are supplied from the territory of one member of a trade agreement into the territory of another.<sup>62</sup>

Most of impediments to trade in services is in the form of non-tariff barriers which is embedded in domestic laws and regulations. Since services play an essential role in the overall functioning of markets, the legal impediments to trade in services export are often overlooked in discussions on market access. These impediments are actually not directly and specifically discriminated against foreign providers, instead, the government designed them in order to protect existing local providers from both domestic and foreign newcomers. Historically the governments tend to protect the domestic industries by applying policies on tariffs and non-tariffs barriers which some scholars regarded these policies as partly responsible for the severity of the subsequent world economic depression.

<sup>60</sup> See Garner, Bryan A. *Garner's dictionary of legal usage*. Oxford: Oxford University Press, 2011.

<sup>61</sup> Garner.

<sup>62</sup> See Goode, Walter. *Dictionary of trade policy terms*. Vol. 4. Cambridge: Cambridge University Press, 2003.

Apparently, trade barriers can come in all shapes and sizes, and this will lead to ‘war of tariffs’ and can eventually lead to world depression. Despite its important role in trade, the service sector remains heavily regulated for a variety of reasons in many countries, both developed and developing countries. Trade protection measures that are applied to protect domestic industries producing goods from foreign competition are ineffective means of protecting domestic service suppliers. For example, a cross-border financial services delivery which is indeed invisible and instantaneous and therefore no customs official can stop its cross-border movement. Custom or immigration authorities cannot detect the value or volume of any services transactions that occur in their territories due to the service sector intangibility and invisibility characters. They can identity the transactions after the services have been produced/consumed. As consequent, the countries tend to issue regulations on sale of services through the domestic regulatory processes rather than through overt controls on cross-border control to rule over the free flow of services. All of these facts are the challenges that Indonesia and other AMS will count over. The challenges will include transfer of data and movement of natural persons among the region of AMS.

Tariffs have been reduced by repeated international agreements, but they remain high, probably higher than in the nineteenth century.<sup>63</sup> Trade barriers still exist even in this age of globalization. Trade policy decisions affect foreign interests; this is why trade policy is an arm of diplomacy and may embrace international negotiations and rulemaking. In the case of trade in goods, the border measures – tariffs and quotas – have been prominent barriers when the aim was the protection of domestic industries producing goods from foreign competition. Nonetheless, such measures are ineffective means of protecting domestic service suppliers.<sup>64</sup>

Trade in services is similar with trade in goods in terms they also can be traded to foreign countries which referred as a cross-border trade in services. In 2018, cross-border trade in services represent more than 20 percent of international trade in goods and services, this is relatively higher than some eight years earlier that was only 19.6 percent.<sup>65</sup> In addition, as the sector’s global output, trade in services reached US\$49 trillion, it provided employment for

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<sup>63</sup> Simon, Mercurio, and Davies. *World trade law: text, materials and commentary*.

<sup>64</sup> See Delimatsis, *International trade in services and domestic regulations: necessity, transparency, and regulatory diversity*.

<sup>65</sup> See Loungani, et al. *World trade in services: Evidence from a new dataset*.

1.8 billion people in the world.<sup>66</sup> In ASEAN region, during the last decade, the total trade in services has more than tripled from US\$252.2 billion to US\$844.6 billion (2005-2019).<sup>67</sup> In the same period, total ASEAN exports of services and imports of services increased significantly accounted of US\$444.8 billion and US\$399.8 billion respectively. Thus, all of this have confirmed that service sectors were one of the economic activities and source of employment in the world economy as well as in ASEAN region.

Currently ASEAN has entered into the second phase of economic integration, under the 2025 AEC Blueprint (AEC 2025), ASEAN has a vision of having a region that is highly integrated, competitive, innovative, dynamic and integrated with the global economic.<sup>68</sup> This vision should be maintained by the AMS. Ideally, all national trade regulations and policies on regional trading system would have been adjusted and adapted to the ASEAN economic agreements on trade in goods, services, investments, and skilled labors. Having said that, both regional agreements and national regulations of AMS would have built similar vision in establishing a region that is highly competitive and integrated with the global economic. For achieving this ASEAN vision, it should be on the responsibility of all the AMS to participate in Global Value Chain (GVC) as this participation is increasing vital for the individual AMS strategic position in the supply chain. The GVCs is important for growth as a powerful driver of productivity growth, job creation, and increased living standards and most importantly boost employment.<sup>69</sup> In the long term after the establishment of AEC there would be multinational firms conduct business and long-term investment in certain AMS that have ability to foster international trade and promote a hospitable investment climate. It is important and favorable for the AMS to have strong linkage with multinational firms. Due to the fact that Indonesia has high non-tariff measures (NTMs) and insufficient trade facilitation for import products resulted into low share of foreign value added in its export products. As consequence, Indonesia still remains as

<sup>66</sup> Peters, Ralf and Mesut Saygili. *Trade in Services and Employment*. UNCTAD, 2018. Available at [https://unctad.org/system/files/official-document/ditctncd2018d1\\_en.pdf](https://unctad.org/system/files/official-document/ditctncd2018d1_en.pdf)

<sup>67</sup> ASEAN. *ASEAN Key Figures 2020*. Jakarta: The ASEAN Secretariat, 2020. Available online at [https://www.aseanstats.org/wp-content/uploads/2020/11/ASEAN\\_Key\\_Figures\\_2020.pdf](https://www.aseanstats.org/wp-content/uploads/2020/11/ASEAN_Key_Figures_2020.pdf)

<sup>68</sup> ASEAN. *ASEAN Economic Community Blueprint 2025*. Jakarta: The ASEAN Secretariat, 2015. Online at <https://asean.org/wp-content/uploads/2021/08/AEC-Blueprint-2025.pdf>

<sup>69</sup> Zhong, Sheng, and Bin Su. "Investigating ASEAN's participation in global value chains: Production fragmentation and regional integration." *Asian Development Review* 38, no. 2 (2021): 159-188.

protectionist country that Indonesia has low share of foreign value added in its export products.<sup>70</sup> Therefore, Indonesia considered as a state has limited participation in the GVC because Indonesia's trade more focus on the domestic market than foreign markets. In this case, the Indonesia's production obtains input from domestic economy and tends to be a downstream production.<sup>71</sup>

In another perspective and in line with the ASEAN vision, Indonesia had changed its economic policies due to some facts, one of them is the increasing of trade in services in Indonesia. It is reflected in the statistical data published in 2023. It is shown that in 2015, only 44.92 percent workers in Indonesia were employed in the service sectors, compare to agriculture and industry sectors which accounted at 33.04 percent, 22.04 percent respectively. This statistical number has a modest changed in 2021, the Indonesian workers who worked in service sectors was 49.25 percent while agriculture 28.99 percent and industry sectors was 21.76 percent.<sup>72</sup> From this data, it is clear that service sector is the main sector for Indonesian workforce. In other words, Indonesia's economy has become increasingly dependent on trade, in particular trade in services. Therefore, this sector is crucial important for Indonesia to determine economic policies in loosening the impact of trade on employment that as major concern for Indonesia. In light of this, this current paper argues that Indonesia has to change it international trade policies that more focus on trade in services to tap the benefits of the trade liberalization brought by AEC deal.

According to the 2020 Report of the Ministry of Trade of Indonesia, based on the SWOT analysis, the AMS including Indonesia would have gained benefits when they apply ATISA from the economic macro as well as economic sectoral.<sup>73</sup> The Report suggests the government of Indonesia to ratify the ATISA promptly as ATISA, if it is applied, it would have attracted the foreign service investors to Indonesia. In short, the Report concluded that Indonesia have

<sup>70</sup> Damuri, Yose Rizal, Rocky Intan, and Dandy Rafitrandi. "Strategic interests, regional integration and international economic policy in Indonesia." In *Navigating Prosperity and Security in East Asia*. Canberra: ANU Press, 2023, pp. 119-142.

<sup>71</sup> Felipe, Jesus, et al. *Policies to support the development of Indonesia's manufacturing sector during 2020–2024: A joint ADB–BAPPENAS report*. Asian Development Bank, 2019.

<sup>72</sup> O'Neill, Aaron. "Employment by economic sector in Indonesia 2021", *Statista*, Oct 13, 2023, <https://www.statista.com/statistics/320160/employment-by-economic-sector-in-indonesia/>

<sup>73</sup> Kementrian Perdagangan. "Laporan Akhir Analisis SWOT, Analisis Biaya dan Manfaat serta Prognosa Implementasi ATISA" *Kemendag Indonesia*, 2021. Retrieved from [http://bppp.kemendag.go.id/media\\_content/2021/08/lampiran\\_kajian\\_20210813090659Laporan\\_Akhir\\_Analisis\\_SWOT,\\_Analisis\\_Biaya\\_dan\\_Manfaat\\_serta\\_Prognosa\\_\\_Implementasi\\_ASEAN\\_Trade\\_in\\_Services\\_Agreement\\_\(ATiSA\).pdf](http://bppp.kemendag.go.id/media_content/2021/08/lampiran_kajian_20210813090659Laporan_Akhir_Analisis_SWOT,_Analisis_Biaya_dan_Manfaat_serta_Prognosa__Implementasi_ASEAN_Trade_in_Services_Agreement_(ATiSA).pdf).

adequate capability to implement ATISA regardless the weaknesses that Indonesia may have, as there is Indonesia's strength to gain the most benefits of ATISA.

Under ATISA, more than 70 per cent of services sectors in ASEAN region will be liberalized. This could be opportunities as well as challenges for Indonesia. In this case, with respect to professional services, Indonesia shall provide for adequate procedures to verify the competence of professionals of any other AMS. Concerning the recognition of the education and experience obtained, requirements met, or licenses or certifications, Indonesia may recognize such kinds of factors for the purpose of licensing or certification of service suppliers. In this context, it can refer to the ASEAN Agreement on Movement of Natural Persons (MNP) signed in 2012 which aims to eliminate the substantially all restrictions in the temporary cross-border movement of natural persons involved in the provision of trade in services.<sup>74</sup> Indonesia also has to reduce 'beyond – the – border' barriers for companies that will create the businesses' environment in Indonesia more stable and predictable.

In addition, the Indonesian government has to provide information about recent regulations (Art.14 para.8 (b) ATISA) and give the updated the authorized applications of the companies in a timely manner (Art.16. para.3 (a) ATISA) which will increase legal certainty and transparency. In this sense, Indonesia shall improve its' rank of the Ease of Doing Business (EODB), according to the World Bank annual ratings (2021) Indonesia ranked 73 out of 190 economies surveyed, with score of 69.6 that constituted as the sixth lowest in ASEAN region.<sup>75</sup> Indonesia's rank is below Singapore, Malaysia, Thailand, and Brunei Darussalam, and Vietnam, which their ranks are 2, 12, 21, 66, and 67 respectively. Therefore, Indonesia has to keep pace with the other AMS regarding to the provision on transparency and predictability which can categorize by some indicators which Indonesia has low ranks (above 100) such as registering property (score 106), starting a business (140), trading across borders (116) and enforcing contract (139). Moreover, in the regional scope, Indonesia has shown its' commitment within the ASEAN Economic Community which dealt with the liberalization of trade in services aims to increase intra-ASEAN market access and transparency. In light of this, the current ASEAN framework on liberalization of trade in services can be used as

<sup>74</sup> ASEAN. *ASEAN Integration in Services*. Jakarta: The ASEAN Secretariat, 2013. <https://asean.org/wp-content/uploads/2021/08/ASEAN-Integration-in-Services-2021.01-Final.pdf>

<sup>75</sup> The World Bank, "Doing Business archive", 2020, <https://archive.doingbusiness.org/en/data/exploreconomies/indonesia>

good opportunity for Indonesia competing with other ASEAN Members which at the same time Indonesia could become a vast potential market for them.<sup>76</sup>

Doing business analyzes regulations that encourage efficiency and support freedom to do business with some phases including opening business, getting a location, accessing finance, dealing with day-to day operations, and operating in a secure business environment.<sup>77</sup> In addition, the area of business regulation measured covers various aspects including starting a business, employing workers, dealing with construction permits, getting electricity, registering property, getting credit, paying taxes, trading across borders, enforcing contracts, and resolving insolvency. This is a challenge for Indonesia to improve its' EODB. Therefore, the government intends to significantly reduce the procedure of starting a business from 11 procedures to only 3 procedures. The contract enforcement indicators will be improved by reducing the time period from 1 year to only 43 days as well as the registering property that need to be improved so it then will more effective and efficient than before.<sup>78</sup> By improving the indicators of EODB, Indonesia will reform its regulations that become business-friendly regulations. In this context, the policy makers, the officials and the like have to be aware of the importance of business-friendly regulations since it is associated with Indonesian economic growth. In other words, a simplicity of business ecosystem will boost business creation and annual per capita growth as it eventually will reduce poverty and create more job opportunities.

Based on economic science research, an improvement of 10 points in the overall ease of doing business score is linked to an increase of around 0.5 new businesses per 1,000 adults.<sup>79</sup> All of those efforts above mentioned are supposed will not too difficult since Indonesia has Omnibus Law on Job Creation, Law No 11 Year 2020, signed in November 2020 and it has been in place and implemented. This Omnibus Law is implementing a structural reform by compressing 76 regulations into one comprehensive law. The purpose of this

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<sup>76</sup> Magdariza, Magdariza. "Challenges for Indonesia in Case of Liberalization of Trade in Services in The ASEAN Economic Community." *Indonesian Journal of International Law* 15, no. 1 (2017): 47-59.

<sup>77</sup> Muco, Sagita. "Ease of Doing Business in ASEAN", *IAI – AMCI Webinar*, July 13, 2021. World Bank Group. Investment Climate Unit. [https://web.iaiglobal.or.id/assets/files/file\\_publikasi/EoDB%20in%20ASEAN%20Presentation\\_SAGITA%20MUCO.pdf](https://web.iaiglobal.or.id/assets/files/file_publikasi/EoDB%20in%20ASEAN%20Presentation_SAGITA%20MUCO.pdf)

<sup>78</sup> Badan Koordinasi Penanaman Modal (BKPM). *Laporan Kinerja 2020*. <https://ppid.bkpm.go.id/wp-content/uploads/2022/09/Laporan-Kinerja-BKPM-2020.pdf>

<sup>79</sup> Muco, "Ease of Doing Business in ASEAN".

law is to adjust and amend several inefficient government regulations and enhance the economy growth by increasing competitiveness and creating jobs. There are 11 issues related to ease of doing business in Indonesia that have been changed based on the provisions of the Job Creation Law. Even recently Indonesia issued a policy on one-man company for a further ease of doing business in Indonesia.<sup>80</sup> Eventually, starting business in Indonesia will much easier than before. Indeed, the first concern of the government is to address the issue of overregulation in Indonesia which had impeded the economic growth and discouraged international investment in Indonesia.

Under this new Omnibus Law, by its operational regulation, the President Regulation 49/2021 that cancelled the previous President Regulation 10/2021, the government has cancelled the Negative Investment List and replaced it with a Positive Investment List in 2021. In this new regulation, almost all business sectors in Indonesia are open for foreign investment. This is in line with the ATISA approach that requires the listing of sectors exempt from liberalization (a negative list approach). This new law only exempts the business sectors that are closed for foreign investors and the specific sectors that can exclusively for the Indonesian centered government. The closed business sectors are the industry that alcoholic beverages (KBLI 11010) and alcoholic beverage from grape (KBLI 11020) and malt (KBLI 11031).<sup>81</sup> Indeed, this Omnibus law aims to attract foreign investment, strengthen Indonesia's economy, increase the ease of doing business and create jobs. In this context, Indonesia should not issue new rules or economic policies frequently which aim to change the implemented rules in order to maintain a legal certainty for the foreign investors.

Furthermore, in implementing this new Job Creation Law, beside has changed the Negative Investment List (DNI) to Investment Positive List (DPI), the government has launched the latest version of the Online Single Submission (OSS) which based on the Risk-Based Approach (RBA). Indeed, Indonesia has expected to improve the business climate and encourage foreign investors to invest in Indonesia as this provide greater transparency for the foreign service

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<sup>80</sup> Spaltani, Bitu Gadsia, Uni Tsulasi Putri, and Muhammad Farid Alwajdi. "One-Man Company Policy and Its Impact on Improving Citizen Welfare", *Yuridika* 38, no. 1 (2023): 121-142.

<sup>81</sup> Republic of Indonesia. Presidential Regulation Number 49 of 2021 concerning Amendments to Presidential Regulation Number 10 of 2021 concerning Investment Business Sectors (Peraturan Presiden Nomor 49 Tahun 2021 tentang Perubahan atas Peraturan Presiden nomor 10 Tahun 2021 tentang Bidang Usaha Penanaman Modal). <https://peraturan.bpk.go.id/Details/168534/perpres-no-49-tahun-2021>



suppliers. More importantly, Indonesia should establish a market trade services that open and well-regulated to accommodate the economic system post pandemic which it will strengthen Indonesian resilience toward future shocks as well as promote a sustain national trading system. Having say this, the regulators and policy makers in Indonesia have to put serious attention in providing clear regulations to minimize barriers to trade services which can reduce trade costs for services providers that lead to increase gains from digital transformation and boost competitiveness. In light of this, the current' position Indonesia in the IMD Global Competitiveness Index in year 2023 has increased to rank 34 of 64 countries in the world which has risen 10 points than last year rank because the massive infrastructure development.<sup>82</sup> This rank is a leap frog, as previous Indonesian rank was at 44. The International Institute for Management Development (IMD) World Competitiveness Yearbook is a comprehensive annual report and worldwide reference point on the competitiveness of countries that analyze and rank countries according to how they manage their competencies in achieving long-term value creation.<sup>83</sup> This rank shows the national trade environment based on efficient infrastructures, institutions, and policies.

Like other parts of the world where many countries remain heavily regulate their service sectors for various reasons, the AMS also do the similar conducts, regardless the fact that the services industries are increasingly important sector not only in large domestic economic terms but also in international trade terms. Indeed, the service industries constitute as industry that commonly as heavily regulated that an inevitable by-product of the nature of services, that neither be sent from one place to another, nor be monitored, measured, and taxed due to their intangible nature.

The AMS have already made considerable progress for trade in services, but that further gains can be made in terms of reducing 'hidden' trade barriers and controlling unofficial payments that usually entrenched in non-trade measures in service sectors. In addition, since trade in services often involve extensive regulations therefore transparency is very important. ASEAN has agreed to further broaden and deepen services integration in the region,

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<sup>82</sup> Nasution, Rahmad (Ed). "Competitiveness ranking up 10 places due to infra development: Widodo", *ANTARA News*, September 13, 2023. <https://en.antaranews.com/news/293583/competitiveness-ranking-up-10-places-due-to-infra-development-widodo>

<sup>83</sup> IMD, "From Government Policy to Business Acumen: Strategizing for Competitiveness in a Fragmented World", IMD World Competitiveness Center, at <https://imd.widen.net/s/rzpp6psbnc/from-government-policy-to-business-acumen>

ASEAN's integration into the global supply chains in both goods and services, and enhance ASEAN Member States' competitiveness in services. By liberalizing trade in services under this new ATISA will transform the domestic economy of AMS through international links and the AMS businesses that are able to exploit opportunities which can increase inflows not only services, but also goods, investment, and skilled labours. Basically, ATISA would brought a deep trade liberalization on services that previously had applied under AFAS that only concerns with existing discriminatory measures and market access limitations amongst AMS, as well as prohibit new or more discriminatory measures and market access limitations.

The implementation of ATISA that employ negative list approach with specific timeline will put some pressures to all of AMS including Indonesia. Once ATISA has implemented in the region, all sectors are liberalized unless otherwise specified. In this context, Indonesia has to reform its investment regulations to overcome the issue of overregulation which show Indonesia's commitment to ASEAN and create transparent regulations. In 2020, the Indonesian government had issued the Omnibus law on Job Creation, Law No 11 Year 2020, which confirm Indonesia effort to reform all of procedural administrative legal framework related to trade service which provides greater transparency on the details of its current service regime in order to give the foreign service-suppliers a higher level of confidence in Indonesia that in line with the regulatory of ATISA. This new law indicates the existing trade liberalization in Indonesia. In spite of this liberalization, Indonesia, in some sectors still have restrictions rules that more restrictive on foreign entry than Indonesia' regional trade partners. In this context, the AMS will enjoy the joyride of symphony of trade in services among the members which would have significantly enhanced the transparency that lead to greater transparency and efficiency in trade.

## Conclusion

Trade in services are increasingly important area of international trade. They are notoriously difficult which its' measurement and monitoring are fundamental challenges as the form of non-tariff barriers that embedded in the domestic laws and regulations. Proper identification of the barriers is central to cross-border services and have played a key role in the export of services in all sectors. AMS have ratified ATISA with the negative list approach in the national level. Transparency is a crucial and critical aspect of trade facilitation due to restrictiveness at the border and behind the border policies, Implementing

ATISA with a negative list approach may not be easy considering the various problem in the AMS, however, the adoption of ATISA indicates and shows their individual commitments. In this context, ASEAN should start to lay the regulatory framework for regional obligation and disciplines on regulating trade in services. In the fullness of ATISA implementation, and this new pact will transform ASEAN into a stable and predictable climate for trade service and prepare for a thoroughly integration and liberalization of the services sector in ASEAN. The achievement of ATISA objectives are crucial for all AMS, including Indonesia where the issue of overregulation in Indonesia can discouraged international investment in Indonesia. Indonesia shall provide for adequate procedures to verify the competence of professionals of any other AMS promptly.

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