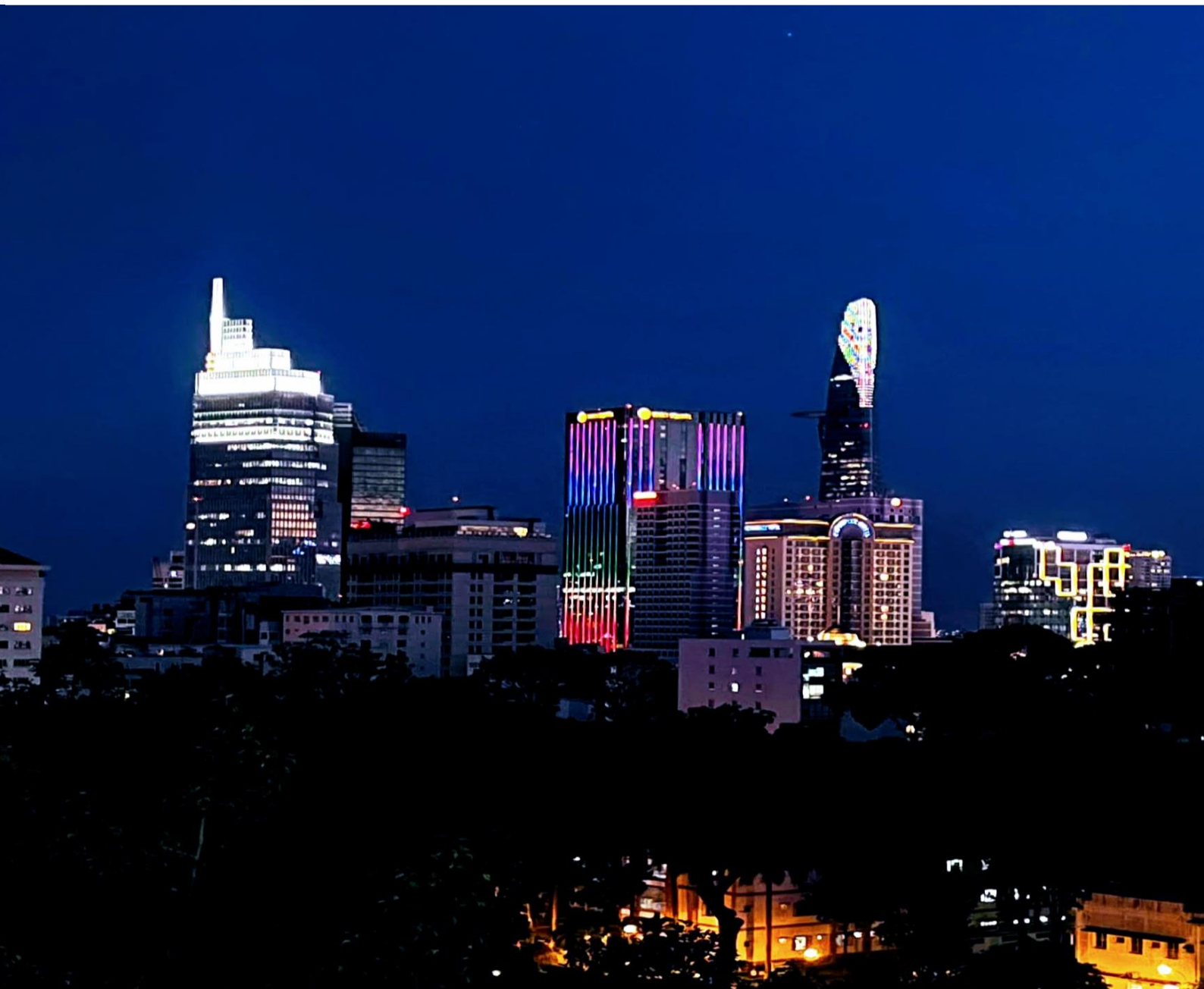




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# NEWSLETTER

## ASEAN TRADE IN SERVICE AGREEMENT



The Government issued last 18 October 2021 Resolution No. 131/NQ-CP ratifying the ASEAN Trade in Service Agreement (the “ATISA”) (the “**Resolution 131**”).

ATISA is an agreement on trade in services among ten ASEAN countries. Following spirit of the ASEAN Framework Agreement on Services (the “AFAS”), ATISA enhances the integration and reduces discriminatory barriers between ASEAN Member States as well as laying a solid legal foundation and a more transparent mechanism for trade in services throughout region.

When coming into force, ATISA will replace AFAS (which has been taking effect since 1995 and is still effective in parallel with ATISA for the next nine years (for Vietnam), or 15 years (for Cambodia, Laos and Myanmar), or seven years (for the remaining countries) in respect of certain service sectors). After that duration, AFAS and its Protocols will cease its effectiveness and completely be replaced by ATISA (and its Annexes).

This Newsletter will highlight remarkable points of ATISA.



## 1. Structure and main contents of ATISA

In ATISA, the parties commit to open up all service sectors, except for those listed in List of Non-Conforming Measures of each ASEAN Member State. This method of market opening is called ‘*negative list approach*’, under which all services sectors are committed as liberalised by default.

List of Non-Conforming Measures (the “**NCM List**”) is a list of circumstances in which a Member State is permitted to use measures that do not conform with general principles of ATISA. The NCM List shall be set up separately by each Member State and shall vary depending

on each State. A Member State shall specify in the NCM List the areas of service subject to reservation of market opening and the corresponding specific conditions and levels of reservation. For sectors, sub-sectors, and service activities that are not listed in the NCM list, the Member State must open its market and treat services, service suppliers in accordance with general principles of ATISA.

This approach thus offers services and service suppliers of Member States a more favourable market access method than the former method in AFAS, which is ‘*positive list approach*’.

ATISA has six parts, including:

- (i) ATISA documents;
- (ii) Annex on financial services;
- (iii) Annex on telecommunication services;
- (iv) Annex on air transport ancillary services;
- (v) Annex I – List of Non-Conforming Measures (in accordance with Clause 1, Article 11 of ATISA); and
- (vi) Annex II – List of Non-Conforming Measures (in accordance with Clause 2, Article 11 of ATISA).

Among the above contents, parts from (i) to (iv) are general regulations and applied for all the Member States and parts (v) and (vi) shall be separately identified and proposed to ASEAN General Secretary by each Member State.

## 2. Major Obligations in ATISA

### a) Group of core obligations

Core obligations under ATISA are listed in Section II of that agreement, including all compulsory treatment principles that a Member State must adhere to with respect to any services and/or service suppliers of/from the other Member States, unless otherwise reserved.

Those obligations include:

❖ **National Treatment**

Each Member State shall accord to services and service suppliers of another Member States, in respect of all measures affecting the supply the services, treatment no less favourable than that it accords, in *'like circumstances'*, to its own services and service suppliers.

The assessment whether it is a *'like circumstances'* should be based on comprehensive criterion e.g. public benefit target, competition, business, market background.

In addition, it shall be considered as *'less favourable'* only if the applied measures modify the competition conditions in favour of services or service suppliers of one Member State as compared to the *'like services, or service suppliers'* of any other Member State.

❖ **Most - Favoured - Nation Treatment ("MFN")**

Each Member State shall accord to services and service suppliers of another Member States no less favourable than that that Member State accords, in *like circumstances*, to service suppliers of any other Member State or a non-Member State.

ATISA, however, offers certain exceptions where a Member State is not required to fulfil this obligation, including the following:

- any preferential treatment granted by a Member State to service suppliers of any other Member State or any non-Member State and to their services, under (i) agreements and arrangement concluded or signed before the signing date of ATISA and future amendments thereof, and (ii) future agreements

and arrangements, to which a Member State is a party, extending on MFN basis to all Member States;

- provisions of financial services, which shall be governed by regulations under Annex on Financial Service of ATISA;
- the application by a State Member of measure(s) so as to facilitate border neighbours to promote service exchange in contiguous border areas;
- any more preferential treatment measures in specific service sectors granted by a Member State to one or several ASEAN countries under a separate liberalisation agreement.

Vietnam, in addition to the above, is entitled to not follow MFN principle in four sectors including telecommunication, shipping, fishing and air transport ancillary services.

❖ **Market Access**

This principle requires each Member State not to adopt, maintain or apply any of the following measures which may limit the service provision activities of other ASEAN's service suppliers:

- limiting number of service suppliers; total value of transactions or assets; total number of services provided or total number of output products by unit; capital contribution ratio of the foreign side;
- requiring an economic needs test or limiting the total number of individuals (i) that may be employed in a specific service or by a service supplier and (ii) who are necessary for and

directly related to the provision of such service;

- limiting selection or requiring service suppliers to follow a specific legal form or joint venture to provide services.

❖ **Local Presence**

This principle requires each Member State not to require ASEAN's service suppliers, when providing cross-border service in its territory, to satisfy following conditions:

- establishing or maintaining a representative office or organisation under any other legal form (i.e. branch, enterprise, etc.) in that Member State's country;
- being a permanent resident in that Member State's territory.

Notwithstanding this principle, the Member States still have the right to adopt or maintain legal measures relating to the use and location of server systems or data processing and storage systems for business purposes.

❖ **Senior Management and Board of Directors**

This principle requires each Member State not to establish any nationality condition towards any juridical person holding the leading positions of enterprises, household, organisation.

Vietnam is however still allowed to set citizenship or permanent residency requirements in Vietnam for majority of enterprise's board of directors if this requirement does not significantly affect the foreign investor's right to manage the investment.

**b) Group of market access obligations**

This group contains reservation circumstances where a Member State is not required to follow in specific ways, conditions and levels.

The reservation commitments include:

- general reservation commitments applied to all Member States; and
- specific reservations, which are identified by each Member State.

The Ministry of Planning and Investment, following Resolution 131, is preparing list of reservations of Vietnam for submission to ASEAN General Secretary.

**c) Group of commitments on transparency, cooperation, ensuring competition, freedom payment**

This group of commitments is listed in Sections IV and V of ATISA.

The spirit of this group is to:

- ensure the transparency, consultation and predictability in (i) drafting, promulgation and application of measures related to trade in services; and (ii) performance of administrative procedures, especially licensing procedure;
- promote cooperation in certificate recognition, participation of MSMEs, technical assistance;
- ensure competition conditions for exclusive or privileged service suppliers;
- protect freedom of payment and remittance rights and restrictions on these rights.

**3. Services Committed under ATISA**

By offering the negative list approach, ATISA governs all services, except for:

- services supplied in the exercise of governmental authority within the territory of each Member State;
- laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale;
- cabotage;
- subsidies and grants;
- air traffic rights, granted, or services directly related to the exercise of traffic rights; and
- air transport services except air transport ancillary services as set out in Annex on Air Transport Ancillary Services.

#### 4. Specialised Commitments in ATISA

##### a) Finance sector

The commitments in relation to finance fields are separately set out in Annex 1 of ATISA.

In brief, Annex 1 provides for a list of financial services governed by ATISA's commitments. In other words, each Member State, shall only be bounded with ATISA's commitments if such financial service falls within:

- insurance services and insurance-related services: original insurance (life, non-life), reinsurance and ceding reinsurance; central insurance period; insurance support;
- banking and other financial services: receiving deposits, giving loans, financial leasing, payment and remittance, guarantees and commitments, some business activities on their own and customers' accounts listed, securities issuance, monetary brokerage, assets

management, clearing financial assets, providing and transferring financial information, consulting brokerage intermediaries for a number of financial services.

When providing the above-listed financial services, a State Member's service supplier should be aware of following notable commitments in Annex 1:

- Annex 1 provides exclusive exceptions for a Member State to take safeguard measures (*in financial service field*) e.g. to protect its investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, to ensure the integrity or stability of the financial system';
- Annex 1 regulates a stricter transparency obligation e.g. only interested persons are allowed to comment on draft law or regulation relating to the supply of financial services;
- Regarding any new financial service that has not been regulated in the host country (*but has already been regulated in another State Member*), then the host country must assess the application file as the same way it assesses application file of its domestic suppliers in '*like circumstances*'.

##### b) Telecommunication sector



These commitments are listed in Annex II, including (i) commitments related to management and operation of public telecommunication networks and services, publicised



telecommunications resources; and  
(ii) compulsory codes of conduct for major telecommunication service suppliers.

Certain commitments relating to the assurance by a Member State that:

- service suppliers of other Member States are able to access and utilize public communication service including leased channels, within its territory or across its borders;
- its telecommunication service suppliers must connect with other Member State's telecommunication service suppliers;
- it must publicise information on (i) procedure for connection with major suppliers; and (ii) interconnection agreements and proposals of major suppliers.

## 5. Self-defence measures

A Member State is allowed to apply self-defence measures in case that Member State implements ATISA and application of self-defence measures has material adverse effect on a certain service of that Member State.

The application of self-defence measure shall have to follow below chronological steps:

- Step 1: The defaulting Member State requests consultation with one or more of the Member States concerned, and notifies to the remaining Members;
- Step 2: The requested Member State(s) must conduct the consultation;
- Step 3: The consultation result must be notified to all Member States as soon as possible and shall not be later than the nearest ASEAN Ministers Meeting.

Any safeguard measures shall only be applied during the time prior to completion

of WTO Multilateral Negotiation on Self-defence Measure. Afterwards, the Member State shall review such negotiation result and discuss to amend the ATISA accordingly.

## 6. Commitments for micro, small and medium enterprises (MSMEs)

A notable point in ATISA relates the commitments set thereunder for super small enterprises, while CPTPP and EVFTA do not.

In brief, the Member States' commitments under ATISA cover the following:

- building capacity for MSMEs e.g. training, consulting activities, organizing seminars and workshops to inform MSMEs their benefits from ATISA;
- establishing supporting programs for MSMEs to attend supply chain, global value chain;
- identifying and handling any potential barriers towards MSMEs during its participation in foreign market access;
- identifying and obtaining common solutions to improve the capacity of MSMEs engaged in trade and investment activities; and
- exchanging information to assist other Member States in the management and enforcement of ATISA in relation to MSMEs.



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