

The legal foundations of the AEC on trade in Goods and services

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An analysis of the Charter and the related ATIGA and AFAS

- I consider the AEC and ASEAN institutions from the trade integration perspective
- I compare AEC trade objectives with the tools provided by the Charter, ATIGA and AFAS
- A series of considerations and way forward

Background on ASEAN trade integration

- It started late in 1977
- It was relaunched in 1992 (AFTA)
- AFTA has been affected by exclusion lists, reciprocity clauses, cumbersome RoO
- ASEAN FTAs with ANZ, Japan, South Korea have limited exclusion lists and predictable rules of origin
- ACFTA and AIFTA adopts ASEAN model

The Charter: where do we find trade integration ?

- Para 5 of Article 1 of the Charter:
- To create a **“single market”** and **“production base”** which is stable, prosperous, highly competitive and economically integrated with effective facilitation for trade and investment in which **“there is free flow of goods, services and investment; facilitated movement of business persons, professionals, talents and labour”**; and **“freer flow of capital”**

Where are the tools in the AEC Charter?

- There is no change in doing business in the Charter in terms of decision-making or institution-building
- Single market echoes the EEC founding Rome Treaty and subsequent evolution.
- However in the Rome Treaty the Common Market and the four fundamental freedoms was articulated in 84 articles and supranational institutions.
- There is no definition of “single production base” in the charter
- NAFTA, with by far less ambitious objectives than AEC, adopted a normative approach
- AEC Charter wishes to achieve two objectives with no means

Where are the tools after missing the 2015 deadline ?

- NONE...
- there is nothing in the ASEAN Economic Community 2025 Consolidated Strategic Action Plan
- The plan is a mere listing of best endeavours with no modalities, no timeframe, no enforceable mechanisms
- Example :
 - Explore the possibility of applying automatic Most Favoured Nation (MFN) treatment for import duties ?
 - Enhancing Rules of Origins (ROO)
 - Develop procedures and/or guidelines to effectively address NTMs

A step back : Liberalizing trade in goods - ASEAN Preferential Trading Arrangements (1977)

- Purpose of ASEAN PTA was to start regional trade market access
- What was covered? Snow plows? Nuclear reactors?
 - In 1978, 71 products covered out of 1,700 considered items
- MOP originally 10%, increased to 20-25% by 1980, 25-50% in 1987
 - But MFN rates were very high in those days
- Rule of origin 50 % reduced to 40% by 1987 (AFTA rule)
- Certificates of origin issued by agencies and bodies authorized by ASEAN members
- Estimated that only 2% of products covered by ASEAN PTA in 1984

Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area (1992)

- Although mentioning FTA it was not aimed at establishing an FTA according to article XXIV of GATT 1994
- Tariff reduction was to be achieved gradually from 1993 to 2008 through a schedule of tariff reductions under the Common Effective Preferential Tariff (CEPT) Scheme.
- CEPT rate reduced to 0% by 2010, with CLMV given until 2018 to reduce rates to this level
- The tariff reduction lists were complicated to follow, with scarce transparency and visibility to private sector
- The lack of uniformity in the treatment of individual products by various ASEAN countries caused traders to face in effect not a single free trade area but 45 bilateral preferential agreements within the ASEAN market
- RoO were cumbersome and badly administered

ATIGA(2009)

- Does ATIGA contains the means to achieve the single market and the single production base ? Does ATIGA represents a new deal ?
- After 41 years of tariff negotiations ATIGA, as its predecessors, provides for exceptions on tariff liberalization ... and reciprocity clauses
- A set of burdensome RoO requirements in theory and in application
- No reference to Article XXIV GATT1994
- No credible mechanism to address NTM, TBT and SPS to ensure the free flow of goods
- Lack of intra-ASEAN customs cooperation

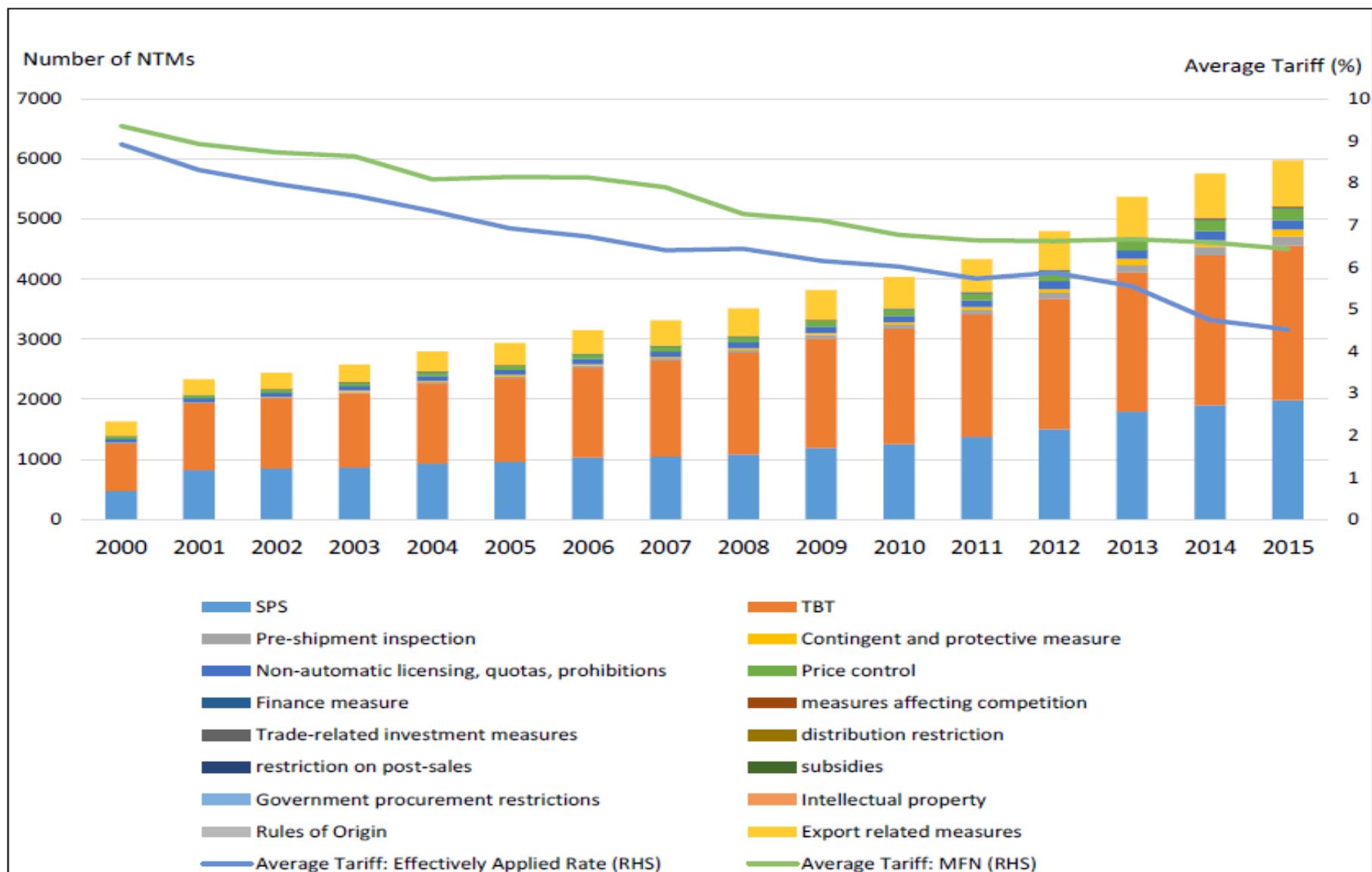
NTM in ASEAN

Table 2.1: NTM Import Coverage Ratios in ASEAN, 2015

	NTM Coverage (simple average) ^a	NTM Coverage (weighted average) ^b	Trade Year Used ^c	Remarks
Brunei Darussalam	65%	57%	2014	
Cambodia	100%	100%	2014 (mirrored)	NTMs on all products since 2008
Indonesia	75%	70%	2014	
Lao PDR	100%	100%	2014 (mirrored)	NTMs on all products since 2012
Malaysia	71%	69%	2014	
Myanmar	42%	42%	2014 (mirrored)	
Philippines	100%	100%	2014 (mirrored)	NTMs on all products since 1976
Singapore	100%	100%	2014	NTMs on all products since 1999
Thailand	100%	100%	2014	NTMs on all products since 1992
Viet Nam	100%	100%	2014	NTMs on all products since 2007

ASEAN = Association of Southeast Asian Nations; Lao PDR = Lao People's Democratic Republic; NTM = non-tariff measure.

Trends of Tariff and Non-tariff Measures in ASEAN 2000-2015



ATIGA NTM/NTB approach

- Unless otherwise agreed by the AFTA Council, the identified NTBs shall be eliminated in three (3) tranches as follows:
 - a) Brunei, Indonesia, Malaysia, Singapore and Thailand shall eliminate in three (3) tranches by 1 January of 2008, 2009 and 2010;
 - b) The Philippines shall eliminate in three (3) tranches by 1 January of 2010, 2011 and 2012;
 - c) Cambodia, Lao PDR, Myanmar and Viet Nam shall eliminate in three (3) tranches by 1 January of 2013, 2014 and 2015 with flexibilities up to 2018

NTMs in the AEC 2015 strategic plan

- *Minimise trade protection impacts and compliance costs of non-tariff measures (NTMs) by addressing the trade distorting effects of Non-Tariff Measures*
 - *Develop procedures and/or guidelines to effectively address NTMs*
 - *Explore stronger disciplines in the ATIGA to address NTMs*
 - *Update and review NTMs*

The role of Trade in service in ASEAN

- ASEAN's growth model has to date primarily centered on manufactured export-led growth in a world of fragmented supply chain production.
- The region's manufacturing prowess could not have occurred without sustained, concomitant, improvements in the supply of a number of key trade facilitating services.
- Much of this appears to have been supplied through unilateral benevolence rather than through concerted (negotiated) collective action.

ASEAN Framework Agreement on Services (1995)

- AFAS objectives:
- Eliminate substantially restrictions to trade in services amongst Member States; and
- 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.

Other Agreements Regarding Services

- 37th ASEAN Economic Ministers' (AEM) Meeting in Vientiane in September 2005: 2015 would be the end-date for the liberalisation of all services sectors, although it was also agreed that flexibility shall be allowed for some sub-sectors.
- Under the Vientiane Action Plan, economic integration towards a single market and production base will begin with eleven sectors which have been identified to be fully integrated by 2010. Of these 11 priority sectors, 4 are services sectors - i.e., Air Travel, e-ASEAN (ICT), Healthcare and Tourism.

Services in the AEC 2015 Strategic plan

- *“Assess the effectiveness of existing flexibilities, limitations, thresholds and carve-outs under the ASEAN Framework Agreement on Services (AFAS) mechanism in the context of ASEAN Trade in Services Agreement (ATISA) with a view to improve services liberalisation within ASEAN.”*
- *“Establish possible disciplines on domestic regulations to ensure competitiveness of the services sector taking into consideration other non-economic or development or regulatory objectives “*

Negotiating Approach

- Approach to negotiating evolved from a ‘request and offer approach’, through a ‘common sub-sector approach’ to the ‘modified common sub-sector’ or ASEAN-X approach which is pursued today.
- The ASEAN-X approach allows two or more members to negotiate liberalisation commitments for specific sectors/sub-sectors. Any other member may become a party to the agreement at a later date, provided it makes similar offers acceptable to the original members.

A few facts

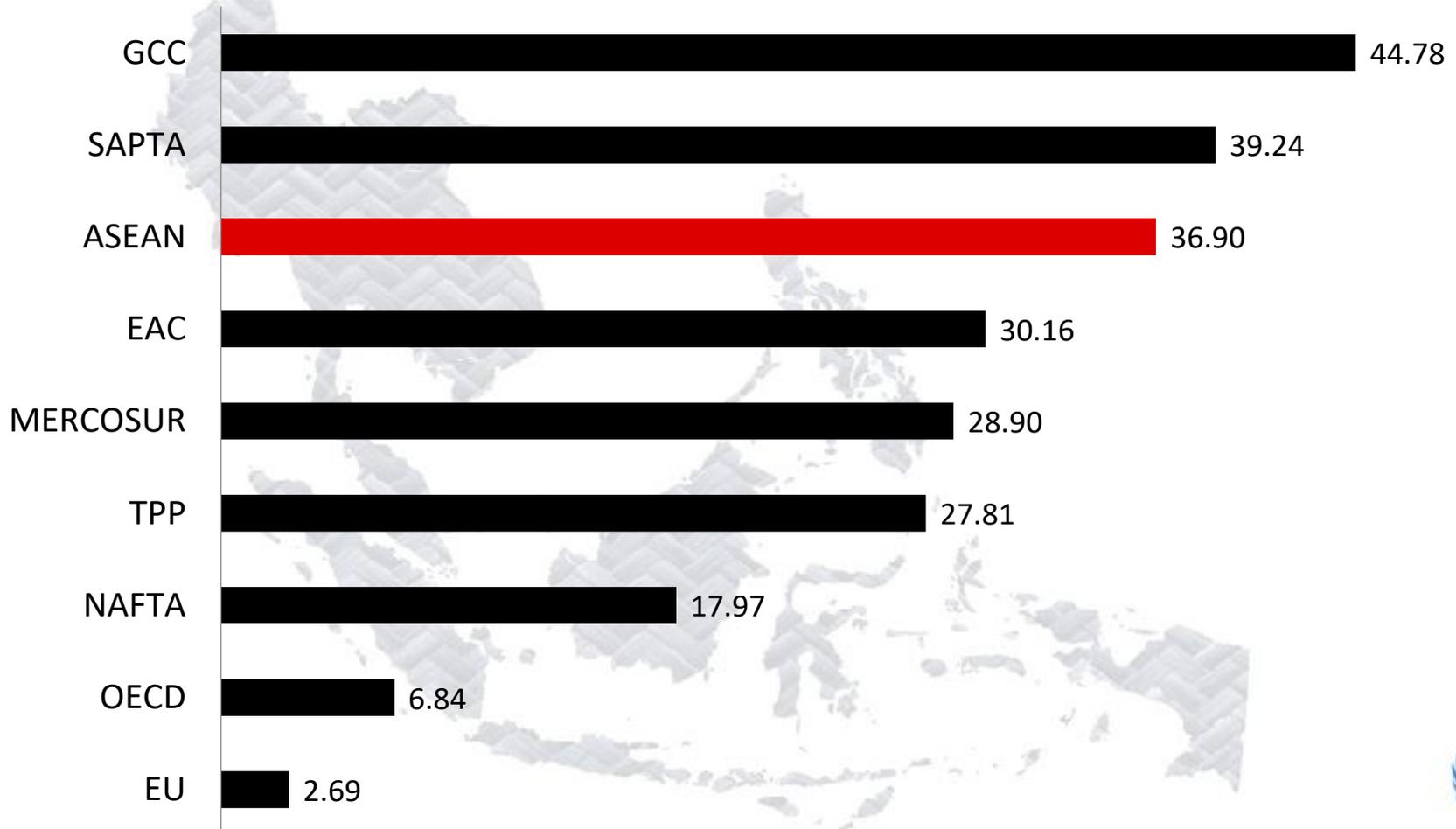
- For Mode 3, i.e. foreign equity participation, all ASEAN countries, except for Singapore, have fallen behind the liberalisation targets.
- Restrictions in terms of equity and land holdings, licensing requirements or lack of transparency continue to act as a barrier to services sector trade.
- As AEC 2005 did not mention challenges with domestic regulations, these are likely to continue as barriers to services trade
- Regarding Mode 4 (movement for people), ASEAN countries have undertaken commitments in eight selected professional areas
- However when looked carefully, the MRAs do not contain any liberalisation commitments.
- They merely try to facilitate mobility of professionals between member states on a voluntary basis. This generates flexibilities and hence de-motivates countries from timely and effective implementation in terms of actual movement of people

A still very restrictive policy stance

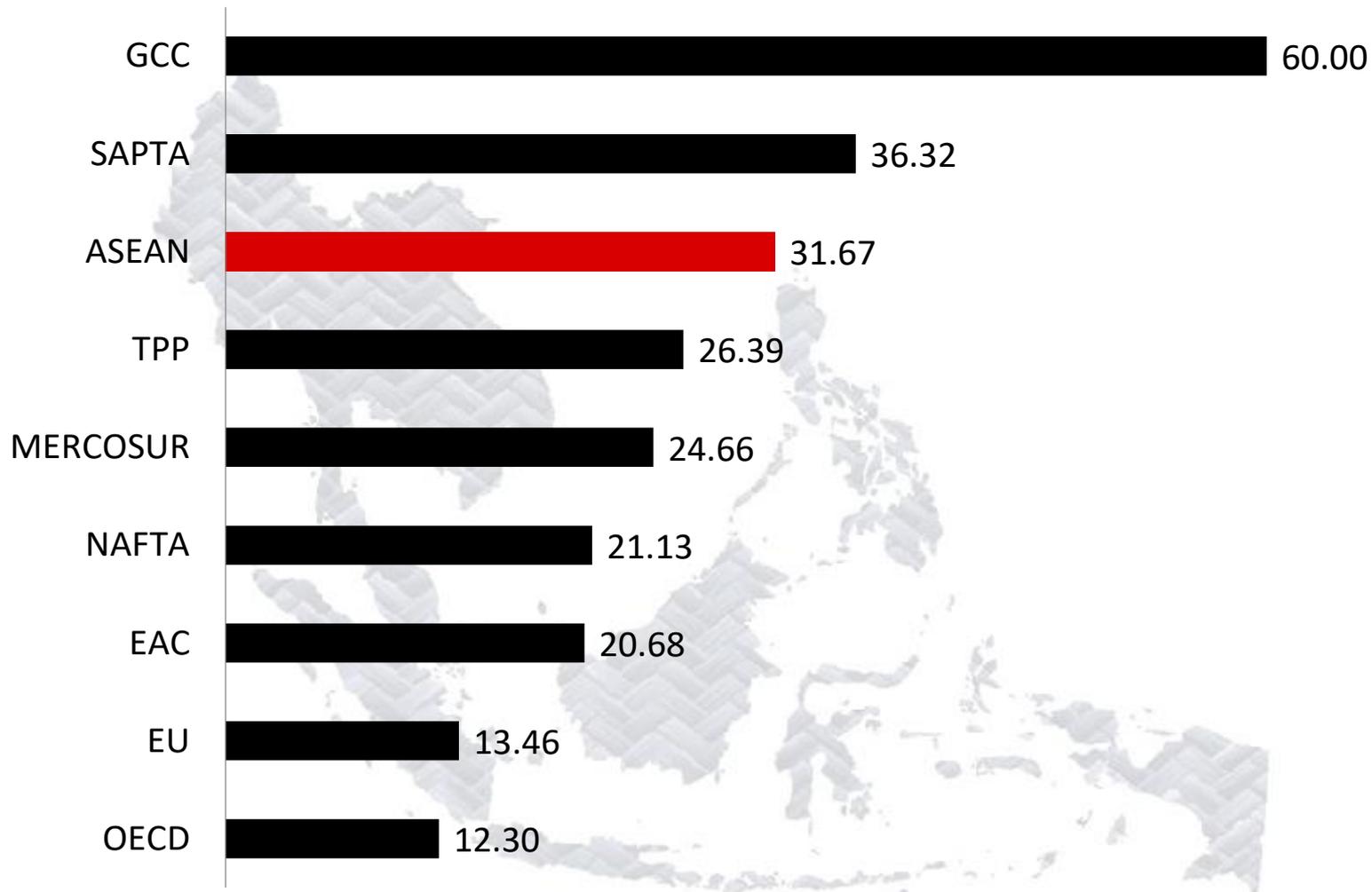
- The World Bank's Services Trade Restrictiveness Index (STRI) database paints a generally unflattering picture of ASEAN's effective (i.e. applied) regulatory treatment of services. Data from Sauv  and Imola Strehov.
- Considering the region's weak (generally *status quo* minus) level of bound commitments under the GATS, AFAS and even some of its PTAs, such results suggest that considerable room exists for deeper, competition-enhancing, reforms in services markets.
- An important caveat: the World Bank data does not include Singapore arguably the most liberal ASEAN member accounting for 51% of the region's services exports.

Une image vaut mille mots

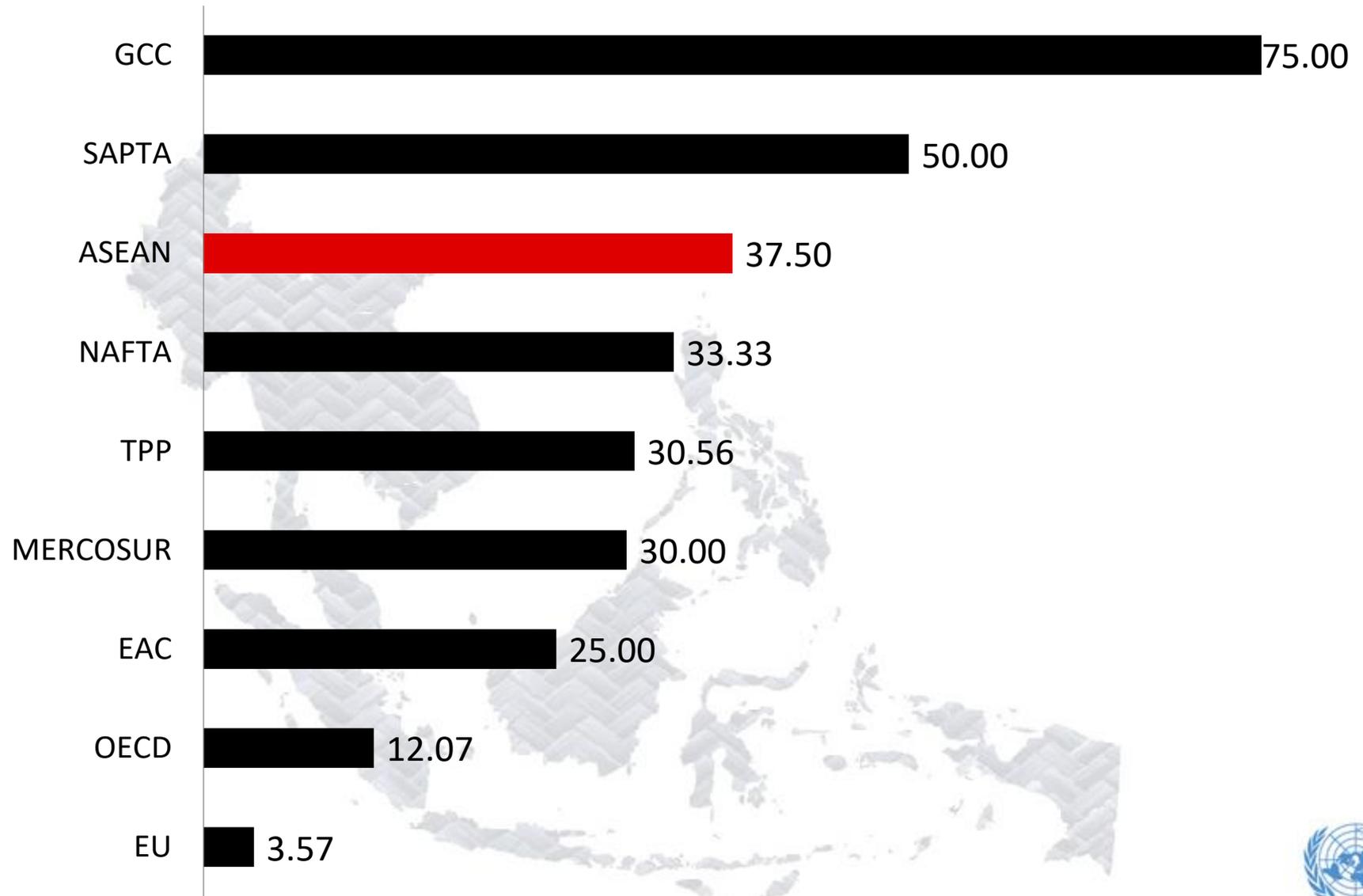
Banking Services: STRI by Regional Groupings



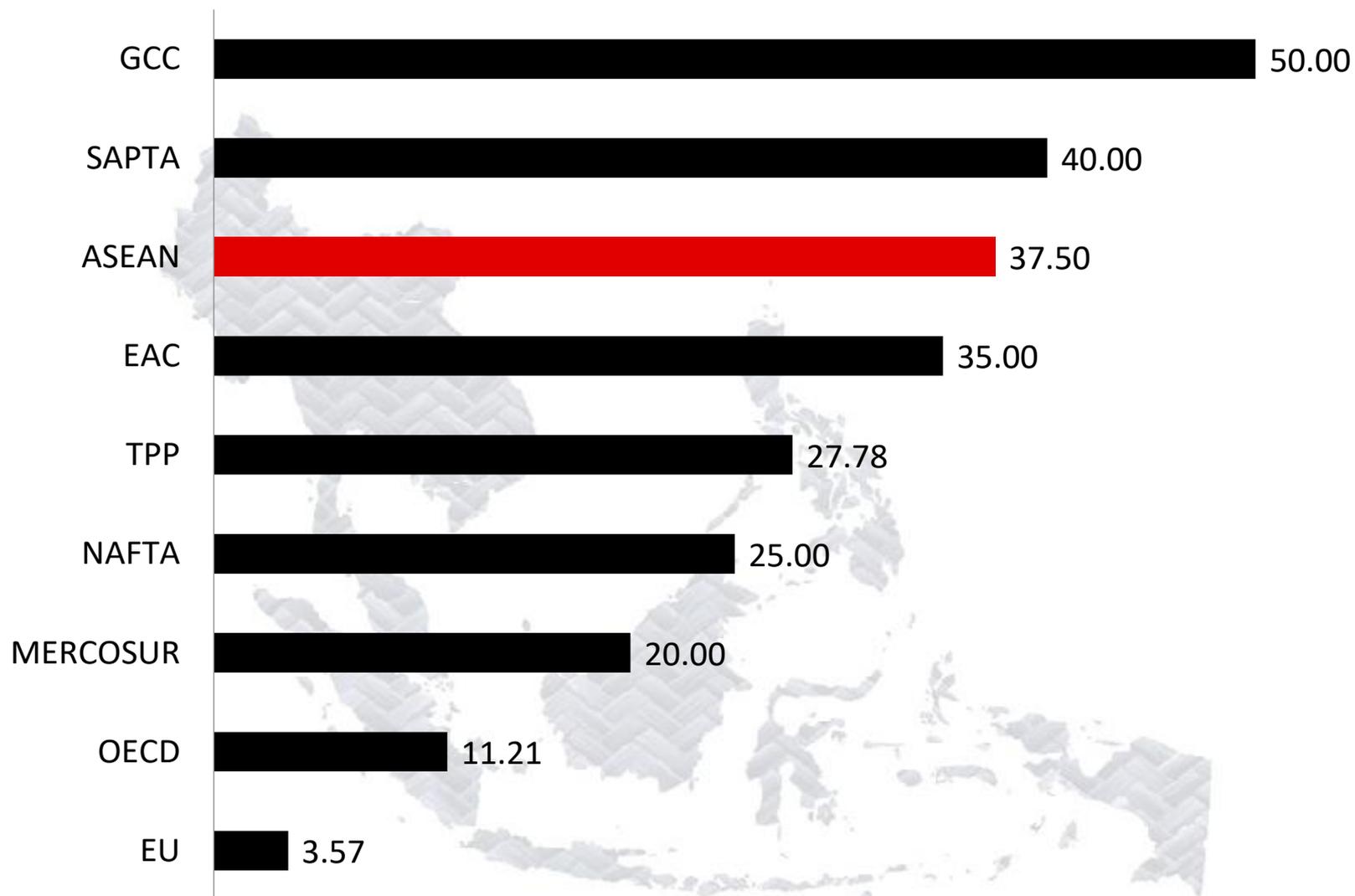
Insurance Services: STRI by Regional Groupings



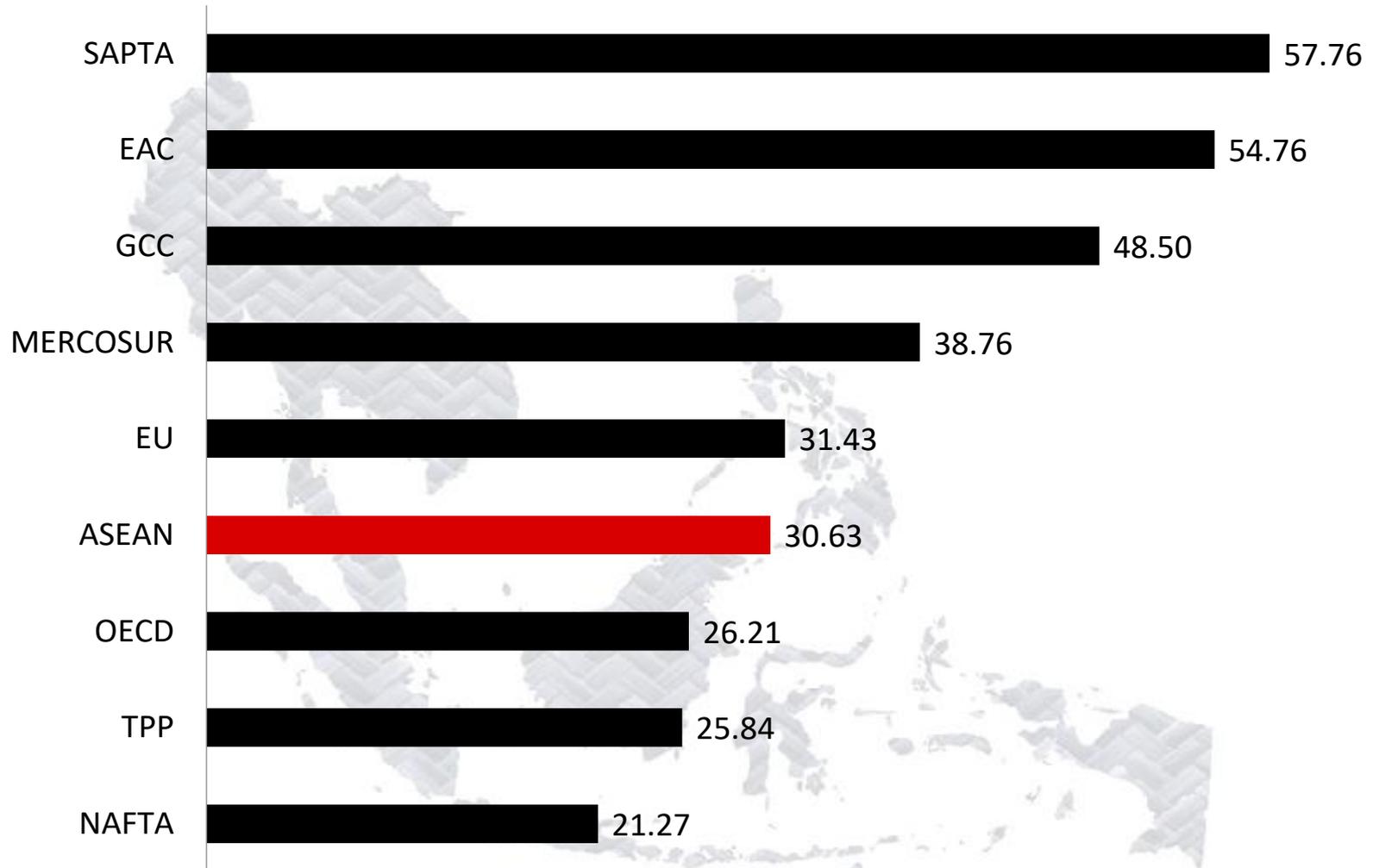
Fixed-line Telecommunications Services: STRI by Regional Groupings



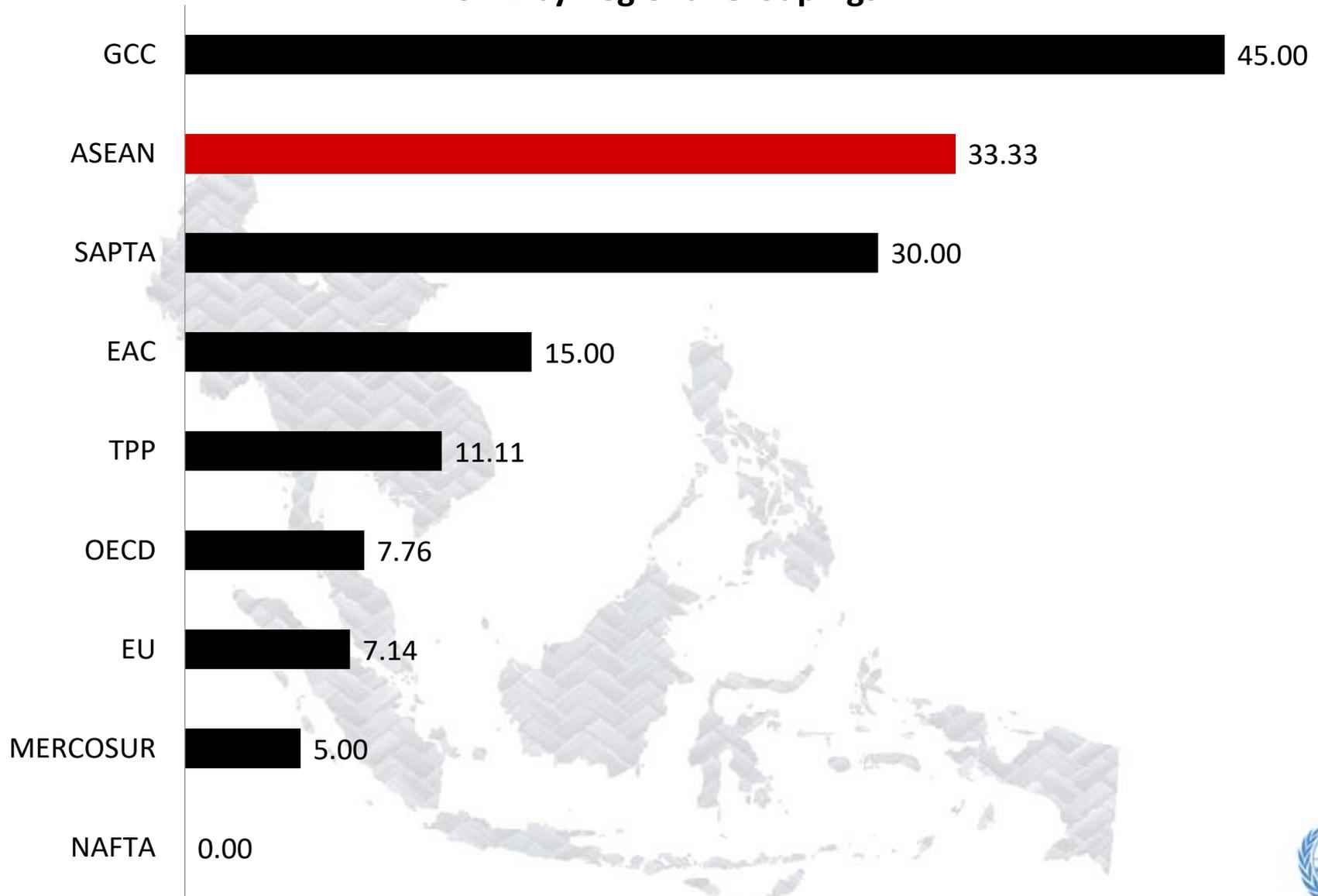
Mobile Telecommunications Services: STRI by Regional Groupings



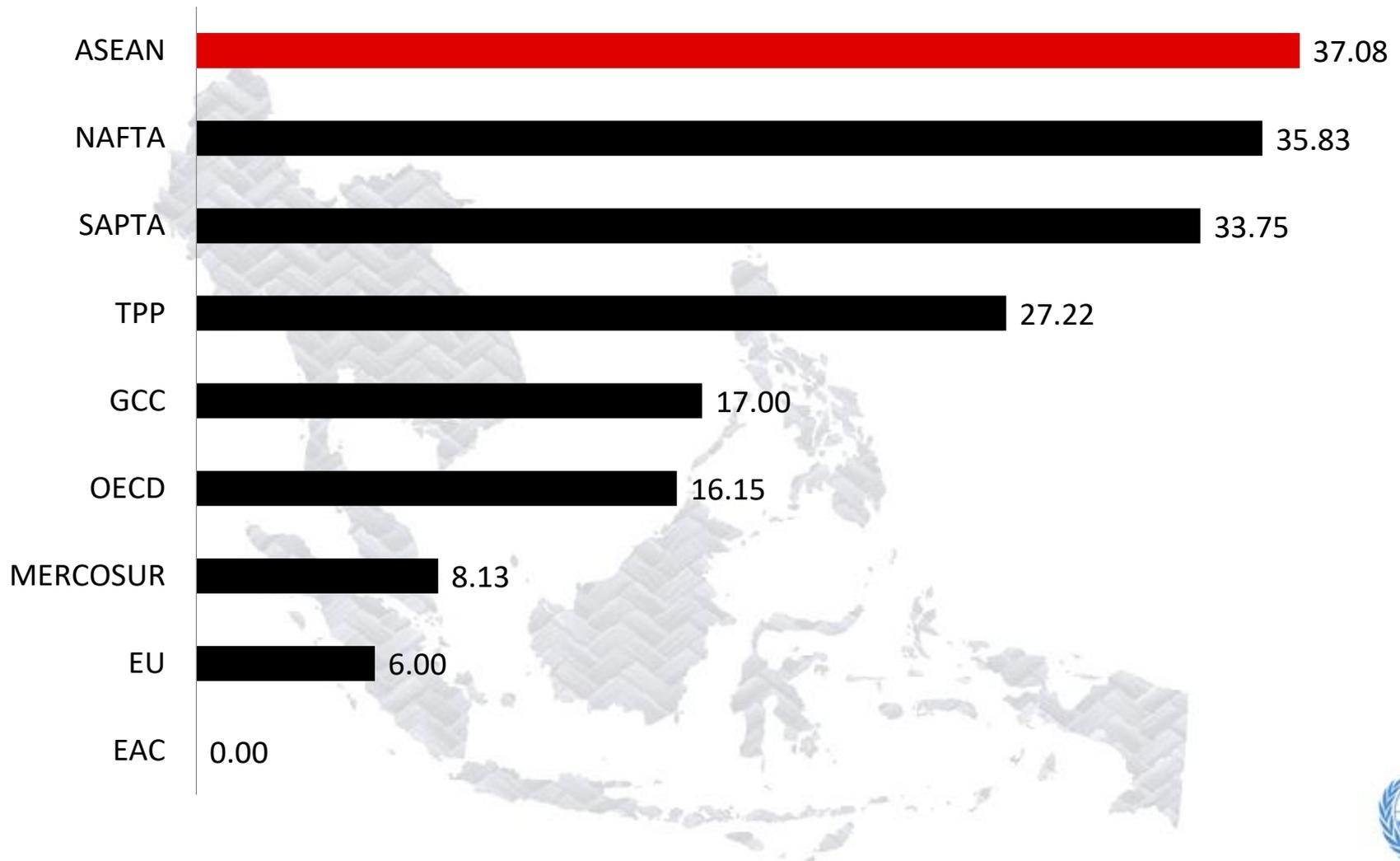
Air Transport (Intl) Services: STRI by Regional Groupings



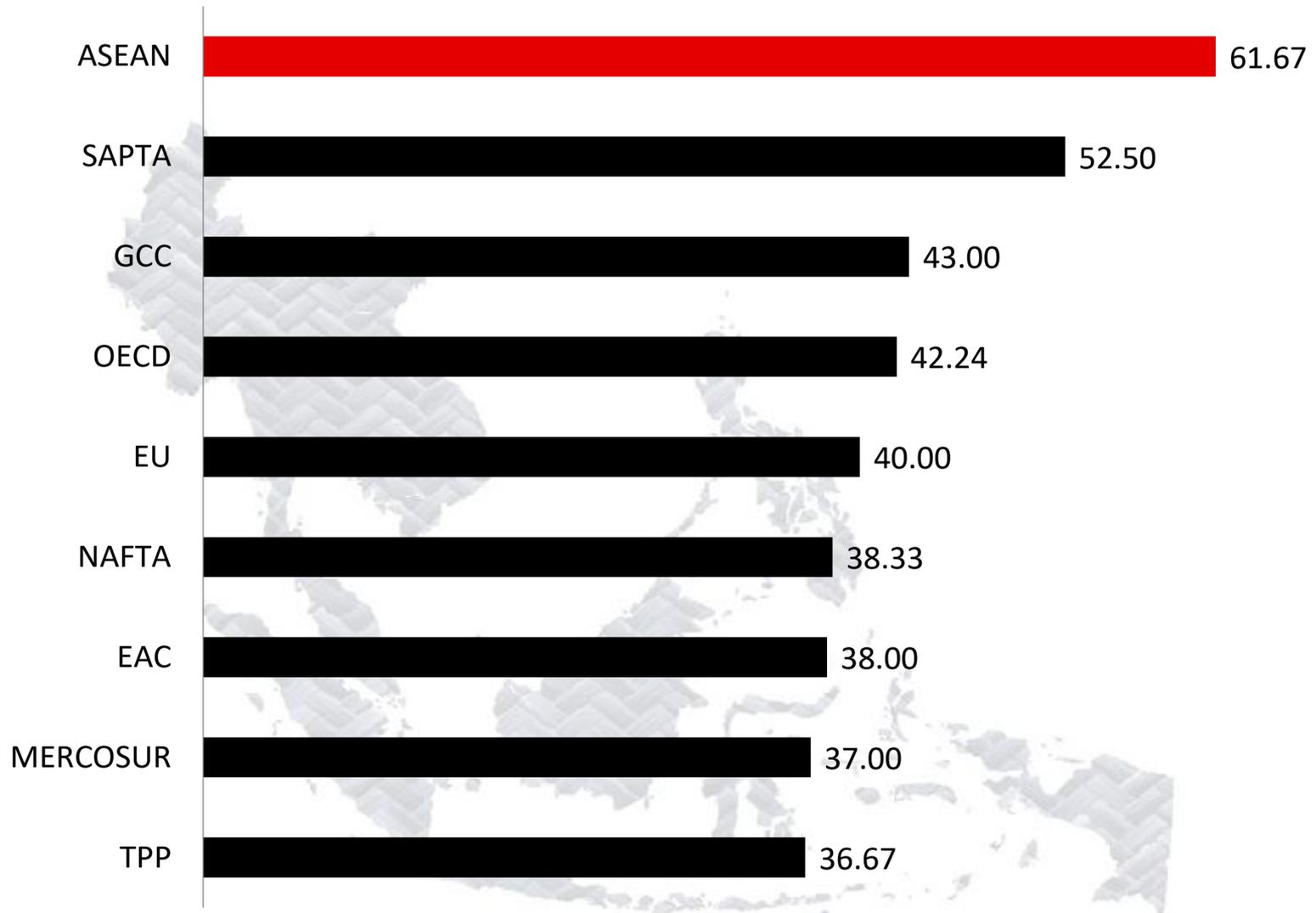
Retail Distribution Services: STRI by Regional Groupings



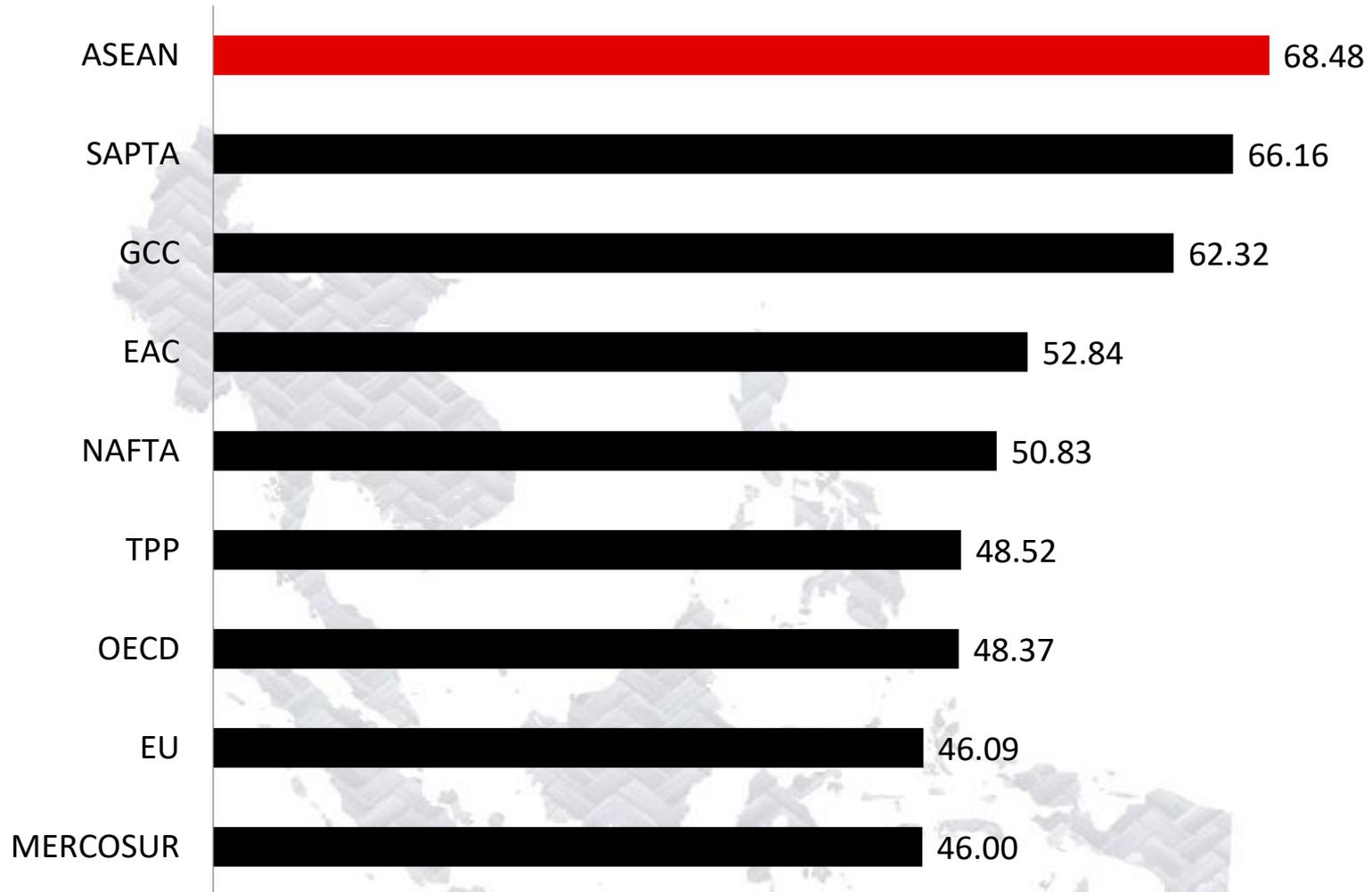
Maritime Transport (Intl) Services: STRI by Regional Groupings



Accounting and Auditing Services: STRI by Regional Groupings



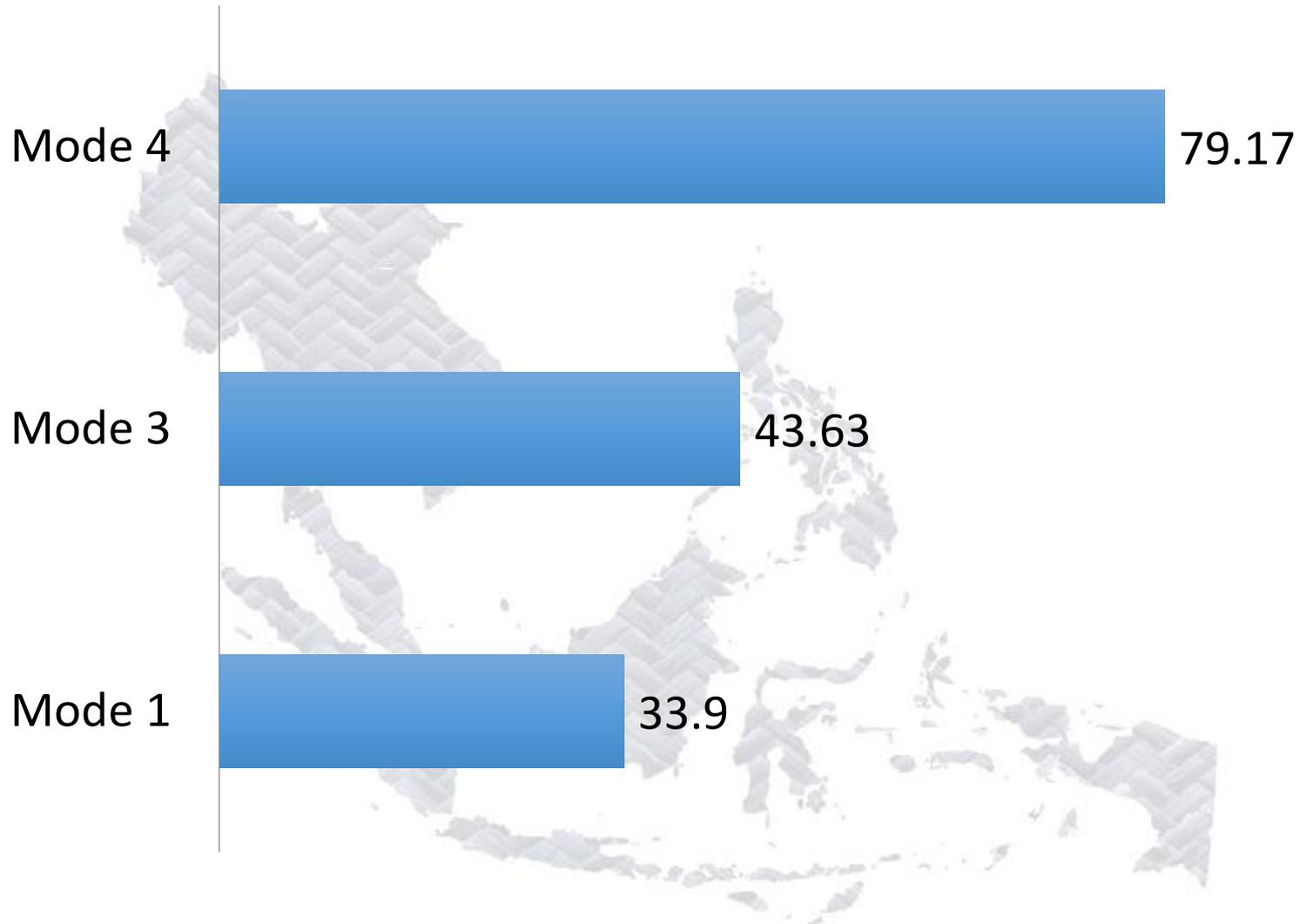
Legal Services: STRI by Regional Groupings



Ranking of ASEAN STRI by Level of Protection



ASEAN STRI by Mode of Supply



More paradoxes

- The static, incomplete, nature of the AFAS rule-book, which Member states have never deemed necessary to revisit and update since the mid-1990's. This stands in marked contrast to investment policy, where ASEAN Members have upgraded from the AIA to ACIA.
- The proliferation of extra-regional PTAs, especially bilateral PTAs between individual ASEAN Members and third countries from the OECD area, has generated significant AFAS+ commitments which do not automatically flow back into ASEAN.
- A completed CTPP an RCEP , will significantly deepen such a gap in key sectors.

MRAs: Less (alas) than meets the eye

- MRAs evidence an ASEAN-wide problem with trade-related labour mobility. There is, still today, no clear Mode 4 roadmap under the AEC. Can there be deep services market integration without full factor mobility?
- MRAs vary significantly in design, scope, and likely effectiveness, revealing marked sector-specific differences in underlying political economy; some are mere hortatory frameworks for possible adoption, others are considerably more prescriptive in character.
- Need for a variable geometry approach towards such agreements to promote forward movement and their adoption by typically reluctant licensing bodies in regulated professions.

Some conclusions



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Dealing with NTMs: A comparison between ATIGA and EU

- ATIGA article 40
- Each Member State shall not adopt or maintain any non- tariff measure on the importation of any good of any other Member State or on the exportation of any good destined for the territory of any other Member State, **except in accordance with its WTO rights and obligations or in accordance with this Agreement**
- ATIGA article 41
- Each Member State undertakes not to adopt or maintain any prohibition or quantitative restriction on the importation of any goods of the other Member States or on the exportation of any goods destined for the territory of the other Member States, except in accordance with its WTO rights and obligations or other provisions in this Agreement To this end, Article XI of GATT 1994, shall be incorporated into and form part of this Agreement, *mutatis mutandis*

Dealing with NTMs: A comparison between ATIGA and EU

- EEC Treaty Article 30:
- *“Quantitative restrictions on importation and all measures with equivalent effect shall, without prejudice to the following provisions, hereby be prohibited between Member States.”*
- *EEC treaty Article 36: “The provisions of Articles 30 to 34 inclusive shall not be an obstacle to prohibitions or restrictions in respect of importation, exportation or transit which are justified on grounds of public morality, public order, public safety, the protection of human or animal life or health, the preservation of plant life, the protection of national treasures of artistic, historical or archaeological value or the protection of industrial and commercial property*
- *Such prohibitions or restrictions shall not, however, constitute either a means of arbitrary discrimination or a disguised restriction on trade between Member States.”*

Dealing with Tariffs and NTMs: A comparison between ATIGA and EU

- ECJ judgement 1 Van Gend and Loos (1962)
- Background :Van Gend and Loos , a private company imported chemical products from Germany into Holland and Dutch customs authorities imposed duties. The Company sued customs in front of Dutch national courts invoking EC treaty provisions:
 - *The Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States **but also their nationals.***
 - *...,Community law therefore not only imposes obligations on individuals but is also intended to confer **upon them rights which become part of their legal heritage***

Dealing with Tariffs and NTMs: A comparison between ATIGA and EU

- ECJ judgement 2 Cassis de Dijon (1978)
- Background: Rewe a German private company imported into a Germany a liquor (cassis de Dijon) from France. The German authorities argued that such liquor was potentially harmful to consumer because of low alcohol content. Rewe challenged that rule under a German court as in conflict with EEC article 30
- The ECJ ruled: *” There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State; the sale of such products may not be subject to a legal prohibition on the marketing of beverages with an alcohol content lower than the limit set by the national rules. “*

A way forward in the ASEAN way : a maximalist approach?

- **Group 1**: A new Charter, revised ATIGA, NEW ATISA
- **Group 2**: Introduction of a mechanism to ensure that ATIGA and ATISA provisions can be relied upon in national ASEAN courts to challenge non implementation of ASEAN commitments by National Authorities
- **Group 2**: New Binding DSM
- **Group 3**: More powers for ASEAN Secretariat:
 - Right of inquiry and lead
 - Right of proposal
 - Right of initiation of a process for failure to fulfill ASEAN Obligations
- **Group 4** ALL OF THE ABOVE

Thank You for your kind attention

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