



**REGULATORY CONVERGENCE AGAINST NON-TARIFF BARRIERS
IN ASEAN AND THE EFFECTIVENESS OF THE ASEAN TRADE
REPOSITORY (ATR)¹**

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ABSTRACT

The regulation of non-tariff barriers in the context of ASEAN has many complications. One of them is the difficulty of defining and (NTBs) classifying NTBs. This limits the scope of the regulation of NTBs in the existing WTO covered agreements as well as in the ASEAN Economic Community instruments including the ASEAN Trade in Goods Agreement (ATIGA). This paper tries to address that issue by resorting to the soft approach. The soft approach tool selected is the ASEAN Trade Repository (ATR). This paper analyses the electronic content of the ATR which like any regional trade portal embodies the non-tariff measures (NTMs) introduced by ASEAN Member States (AMS) and the laws, regulations and orders on which they are based. This paper finds that the success of the ATR in addressing the NTMs depends on the success of AMS' National Trade Repositories (NTRs). This paper finds that for most AMS, there is connectivity between ATR and NTRs. But there are challenges to the effective implementation of the ATR. This paper concludes by linking the analysis of the ATR to addressing the inadequacies in the regulation of NTBs in ASEAN. The ATR facilitates the identification of NTMs which should be eliminated as NTBs.

Keywords: *Non-Tariff Barriers, Trade Liberalisation, ASEAN Regional Integration, Trade Facilitation*

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INTRODUCTION

The regulation of non-tariff barriers in the context of ASEAN has many complications. One of them is the difficulty of defining and classifying non-tariff barriers (NTBs). This limits the scope of the regulation of NTBs in the existing WTO covered agreements as well as in the ASEAN Economic Community instruments including the ASEAN Trade in Goods Agreement (ATIGA). Some regional trade arrangements (RTAs), like the MERCOSUR in South America, has embarked on an ambitious project to eliminate not only tariffs but also non-tariff barriers as well as harmonise standards etc. but the number of non-tariff measures keeps increasing.² Thus, this paper chooses a rather soft approach to tackling the problem of racing to the bottom as regards NTMs. This paper will first discuss the different ways of defining NTBs and how these definitions pose a challenge to regulating not only NTBs but also NTMs. Then the paper will examine how ASEAN regulates both NTBs and NTMs. This will be followed by an analysis of electronic content of the ASEAN Trade Repository (ATR) which is a regional trade portal developed pursuant to the ATIGA's call for transparency and trade facilitation. How each ASEAN Member State (AMS) responds to the ATR will be evaluated before the paper concludes.

I. UNCLEAR DEFINITION OF NON-TARIFF BARRIERS

Non-tariff barriers refer to all obstacles that distort international trade other than conventional barriers i.e. customs duties.³ OECD defines non-tariff barriers as “those border measure other than tariffs that may be used by countries to prohibit or restrict import or export of products”.⁴ It is important to know what a tariff is. It is a duty (can be in the form of percentage per value or quantity) levied upon importation or exportation of a good at any point of entry into a country whether by sea, air or land. The barriers do not only obstruct import but they also obstruct exports. Examples of NTBs are mentioned in the OECD glossary of statistical terms to include anti-dumping duties, voluntary export restraints, injury-causing subsidies and technical barriers to trade.⁵ Non-tariff barriers are defined by the ASEAN Agreement on Trade in Goods as measures

² UNCTAD, *Non-Tariff Measures in Mercosur: Deepening Regional Integration and Looking Beyond* (UN Publications 2016).

³ Shumba Tapiwa, 'The New Global Economic Order as A Stimulus for Harmonising the Law of Sale in the Southern African Development Community (SADC) Region' (2016) 26(3) *African Journal of International and Comparative Law* 346, 354; J.S. Hillman, 'Nontariff Barriers: Major Problem in Agricultural Trade' (1978) 60(3) *American Journal of Agricultural Economics* 491.

⁴ Organization of Economic Cooperation and Development (OECD), *Indicators of Tariff and Non-Tariff Barriers* (OECD 1997).

⁵ OECD, 'Glossary of Statistical Terms' (28 March 2014) < <https://stats.oecd.org/glossary/detail.asp?ID=1837> > accessed February 2, 2018..

other than tariffs which effectively prohibit or restrict imports or exports of goods within Member States (Article 2(1)(k)).

The term non-tariff measures (NTMs) also has its own definition. The United Nations Conference for Trade (UNCTAD) defines non-tariff “policy measures other than ordinary customs tariffs that can potentially have an economic effect on international trade in goods, changing quantities traded, or prices or both”.⁶ The UNCTAD also has made its categorisation of the non-tariff measures which can be divided into: (1) technical measures, and (2) non-technical measures. Technical measures can be further divided into (i) sanitary and phytosanitary measures, (ii) technical barriers to trade, and (iii) pre-shipment inspection and other formalities. Non-technical measures can be further divided into (i) contingent trade-protective measures (anti-dumping and countervailing measures), (ii) non-automatic licensing, quotas, prohibitions and quantity-control measures other than for SPS or TBT reasons, (iii) finance measures, (iv) measures affecting competition, (v) trade-related investment measures, (vi) distribution restrictions, (v) restriction on post-sales services, (vi) subsidies (other than export subsidies), (vii) government procurement restrictions, (viii) intellectual property, and (ix) rules of origin. For exports, non-tariff measures include all export-related measures.⁷

Based on the above descriptions of NTBs and NTMs, despite the fact that both refer to barriers/measures other than tariffs, a question may arise as to whether NTBs are different from NTMs. There is no consensus on how an NTM can turn into an NTB.⁸ Table 1 describes the different categories in which writers view how an NTM can turn into an NTB:

⁶ UNCTAD, *International Classification of Non-Tariff Measures* (2012 Version) (UN Publication 2015).

⁷ UNCTAD, (2015).

⁸ R. Santana and Ann Lee Jackson, 'Identifying Non-Tariff Barriers: Evolution of Multilateral Instruments and Evidence from' (2012) 11(3) *World Trade Review* 462, 465.

Table 1: Different Definitions of NTB based on its Evolution from NTM

Definition	How NTM becomes NTB?	The Test
Definition 1	The NTM restricts trade i.e. restricts access to imports or put them in a disadvantage	Effect
Definition 2	The NTM promotes trade but distorts international market (interfere with trade)	Effect
Definition 3	The NTM is based on governments' intent (NTM is taken for protectionist reasons or is response to domestic lobbies)	Intent

Looking at the table above, an NTM can become an NTB if its introduction is accompanied by protectionist intent or it has the effect of limiting imports.⁹ However, protectionist intent is not easy to prove just as other types of intent such as criminal intent. There will be an issue how to establish protectionist intent and what is the standard of proof required. Hence when predatory intent was first introduced into US anti-dumping law as a requirement to prove actionable dumping, such requirement made an affirmative finding of dumping in the US rare.¹⁰ If one is to compare predatory intent and protectionist intent, it will be even more difficult for protectionist intent to be objectively assessed. The term protectionist is more ill-defined than the term predatory. One may argue that he or she may prefer the term protectionist reasons to protectionist intent. Protectionist reasons can be epitomised in the measure being introduced just to satisfy lobby groups.¹¹

However, we may look at the effect of the NTM, which can be total restriction of imports or distortion of the international market. The latter can be of much interest because it

⁹ Santana and Jackson, (2012) 464.

¹⁰ R. Howse and R. W. Staiger. 2005. 'United States - Anti-Dumping Act of 1916 (original complaint by the European Communities) - recourse to arbitration by the United States under 22.6 of the DSU' (2005) 4(2) World Trade Review 295, 312.

¹¹ Santana and Jackson, (2012) 465.

relates to the notion of economic effect which appears in the “neutral” definition of NTM. As said, NTM has been defined as measures other than tariffs that have an economic effect on international trade in goods, changing quantities traded, or prices or both. By alluding to “economic effect”, it can be suggested that an NTM can become an NTB if it creates a negative economic effect on trading activities. How to measure the negative economic effect? It is pertinent to look at whether a measure other than a tariff will limit the quantities of goods or increase their prices upon importation. This definition is closer to competition law and is not favoured by trade specialists because it sort of denies both legal and economic justifications that permit States to take non-tariff measures. Legally, such measures can go against the spirit of liberalisation but due to the “safety valve” provisions within the General Agreement on Tariffs and Trade (GATT), States may push for them to protect human life (as well as that of animals and plants), conserve natural resources, protect against unfair trade practices, safeguard national security, enforce food security measures etc. Some of these rights are sovereign rights. Economically, the use of NTMs do not necessarily lead to welfare costs and the disuse (phasing out) of them (the NTMs) does not necessarily generate welfare benefits particularly if the NTMs does not discriminate between sources of supply.¹²

As such, some writers suggest that NTMs will become NTBs just as a matter of “legality”.¹³ It means if the imposition of an NTM is inconsistent with international rules particularly the rules of the WTO, it will turn into an NTB. The biggest challenge with this definition is that the legal regimes for some NTMs still contain ambiguities. Among the most popular NTMs used in ASEAN are technical barriers to trade (TBT) and sanitary and phytosanitary measures (SPS).¹⁴ For these two popular NTMs, States have a sovereign right to use them subject to the fulfilment of conditions such as non-discrimination requirements (MFN and national treatment), a necessity requirement and the international standards requirement. As regards those conditions, the States maintain some prerogatives (see *US- Tuna* case (2012)) and the burden of proof is on the complainant State not the State that uses NTMs.

The arguments above illustrate the murkiness in the definition of NTBs hence the difficulty of separating between them and NTMs. In the end, it is possible to just abandon the term NTB and use the term NTM instead. This however, will create the chicken and egg situation that not all NTMs are harmful. Thus, it is important to see how NTMs and NTBs are regulated in ASEAN.

¹² J. Beghin, A-C Disdier, S. Marette, and F Van Tongeren, ‘Welfare Costs and Benefits of Non-Tariff Measures in Trade: A Conceptual Framework’ (2012) 11(3) *World Trade Review* 356.

¹³ A. Lang, *World Trade Law after Neoliberalism: Re-Imagining the Global Economic Order* (Oxford University Press 2011).

¹⁴ Haniff Ahamat, ‘Reducing Non-Tariff Barriers in a More Integrated ASEAN: Will ASEAN Economic Community (AEC) Be the Best Option?’ (2017) 2(1) *Southeast Asian Social Science Review* 18.

II. NON-TARIFF MEASURES AND NON-TARIFF BARRIERS IN ASEAN

Tariffs rates have reduced tremendously in the ASEAN region. For ASEAN-6 (Thailand, Malaysia, Indonesia, the Philippines, Singapore and Brunei), the tariff range for 99% of their products in the Common Effective Preferential Tariff (CEPT) list is already between 0% to 5%. For CLMV, 80% of their products are in and the CEPT list 66% of them have a tariff range between 0-5%. However, there is an increase of the use NTMs by ASEAN Member States. As of 2016 the following is the total number of NTMs taken by all ASEAN Member States (AMS) (see Table 2).

Table 2: Distribution of total NTMs according to ASEAN Member States

Member State	Total Number of NTMs
Thailand	1613
Malaysia	855
Indonesia	713
Brunei	634
Singapore	516
Vietnam	514
Laos	330
Cambodia	291
Myanmar	243
Total	172

*Source: ERIA

What is possibly indicated by the Table above is that countries with high number of NTMs are matured in their production base (Thailand, Philippines, Malaysia and Indonesia). Countries with a low number of NTMs include Vietnam. Considering the production capabilities of Vietnam, there is a possibility that while tariffs are reduced in Vietnam, certain NTMs may increase. Countries with a medium number of NTMs have very low tariff rates (Brunei and Singapore) and are open economies. Countries with a low number of NTMs (Laos and Myanmar). There is a need to look at whether NTMs can serve legitimate objectives for the country.

Then it is important to see how non-tariff barriers (NTBs) are regulated in ASEAN. The AEC Blueprint 2015 provides that 'Elimination of Non-Tariff Barriers' is part of the commitments of ASEAN Member States towards the establishment of the ASEAN Single Market and Production Base.¹⁵ The focus by the AEC is that in by 2015 there would be the full elimination of NTBs in intra-ASEAN trade. Among the actions undertaken by ASEAN are:

¹⁵ ASEAN, *ASEAN Economic Community Blueprint* (ASEAN Secretariat 2008), 6.

- i. enhance transparency,
- ii. abide by standstill and roll-back on NTBs, and
- iii. removal of all NTBs by 2010 for ASEAN-5, by 2012 for the Philippines, and by 2015, with flexibilities to 2018, for Cambodia, Laos, Myanmar and Vietnam.¹⁶

The hard law approach will require us to look at what the ASEAN Trade in Goods Agreement (ATIGA) provides for the regulation of NTBs. The ATIGA only creates a general obligation to eliminate quantitative restrictions in accordance with the WTO obligations. These restrictions are considered outright non-tariff barriers which should be prohibited, including quotas and non-automatic licences.¹⁷ As regards other barriers, there is an obligation to identify other barriers for elimination. Whether there is an objective mechanism for such identification to take place is not clear. More importantly this should be part of the second approach to NTBs i.e. regulatory collaboration and convergence.¹⁸

The AEC Blueprint 2025 on the other hand continues to recognise the relevance of the AEC Blueprint 2015. It seeks to minimise the trade protection and compliance costs in dealing with NTMs. However, it mainly repeats what is in the AEC Blueprint 2015 including the call for full elimination of NTBs. But what makes the AEC Blueprint 2025 a little more specific than the AEC Blueprint 2015 is that it makes elimination of NTBs part of the embarkation on the Trade Facilitation mechanisms and initiatives.¹⁹

How have the AEC Blueprints as well as the ATIGA fared when it comes to reduction of NTBs by AMS. The number of NTMs keep increasing. Does this mean that the AEC Blueprints 2015 and 2025 fail to achieve their goals? Or is that the Blueprints only pay lip service? We need to understand the unique nature of the ASEAN the regulatory framework. ASEAN deploys a rather soft approach. For example, as regards national standards and mutual recognition arrangements (MRAs), the ASEAN Consultative Committee on Standards and Quality (ACCSQ) was established to harmonise the standards and monitor the MRAs. What the ATIGA requires AMS to do is to harmonise national standards, TRs and CAP with international standards. The ATIGA provides that international standards are preferred in formulating national standards. But deviation from international standards can still occur.

For example, the ATIGA allows technical regulation to deviate from international standards for legitimate reasons. ATIGA also says CAPs in ASEAN must follow international standards but where there is a difference in legitimate objectives, differences must be minimised. As regards transparency, all AMS are required to establish the ASEAN Trade Repository which contains all laws, regulations and

¹⁶ ASEAN, (2008), 7.

¹⁷ UNCTAD, (2016).

¹⁸ UNCTAD, (2016).

¹⁹ ASEAN, *ASEAN Economic Community Blueprint 2025* (ASEAN Secretariat, 2015).

measures on standards, TRs and CAPs. But this obligation must be balanced with the right of AMS to maintain confidentiality if it is in their national security to do so.

III. ASEAN TRADE REPOSITORY (ATR)

The ASEAN Trade Repository (ATR) provides a single point of access to information of AMS which relates to trade. The ATR should inter-link National Trade Repositories (NTRs) of all AMS that provide and maintain information related to the national-level trade and the actual contents. In other words, each AMS will have to develop its own NTR. The information goes under 9 different topics:

- Tariff nomenclature;
- MFN tariffs, preferential tariffs offered under the ATIGA and other Agreements of ASEAN with its Dialogue Partners;
- Rules of origin;
- Non-tariff measures;
- National trade and customs laws and rules;
- Procedures and documentary requirements;
- Administrative rulings;
- Best practices in trade facilitation; and
- List of authorised economic operators.

The obligation to create the ATR is clearly mentioned in Article 13 of the ATIGA which provides that “an ASEAN Trade Repository containing trade and customs laws and procedures of all Member States shall be established and made”. All the 9 topics are also stipulated in Article 13. However, in reality, the response from AMS to the obligation to develop ATR linking their NTR varies. Table 3 indicates the ATR-readiness of each AMS:

Table 3: ATR Readiness of ASEAN Member States

Member State	ATR is hyperlinked to National trade repository / trade portal	National trade repository contains reference to NTM regulations	National trade repository is hyperlinked to NTM regulations	National trade repository allows search by product and measure	National trade repository allows search by regulatory agency
Brunei	X	X (ATR contains such reference)	X	X	X
Cambodia	√	√	√	√	√
Indonesia	√	√	√	√	√
Lao PDR	√	√	√	√	√
Malaysia	√	√	X	X	X
Myanmar	√	√	√	√	√
Philippines	X	X	X	X	X
Singapore	X	X (ATR contains such reference)	X	X	X
Thailand	√	√	√	√	√
Vietnam	X	X (ATR contains such reference)	X	X	X

The table shows that not all AMS have established their national trade repository or trade portal let alone that count the ATR is hyperlinked to the NTR of all AMS. Brunei, Philippines, Singapore and Vietnam are the AMS that do not have NTR. This should not count as a non-compliance by these AMS because Article 13 only requires the ASEAN Secretariat to form and run the ATR. There is no obligation on AMS to introduce an NTR or national trade portal. As shown in the Table, the ATR can still contain a list of NTM regulations introduced by the relevant AMS as in the case of Brunei, Singapore and Vietnam. NTM regulations here refer to laws, regulations, orders etc which form the source of legal authority to the NTMs. Thus, users can still know the NTM regulations of those countries by accessing the ATR webpage. However, if the ATR webpage is not hyperlinked to the relevant page on which the NTM regulations are situated (for example in the case of Brunei, it is the webpage of the Bruneian Attorney General Chambers

(AGC)),²⁰ the usefulness of the ATR will be much watered down. For Singapore the ATR is linked to different government agencies including the Agri-Food & Veterinary Authority of Singapore (AVA) and Singapore's AGC).²¹ The only AMS which does not have reference to NTM regulations via the ATR is the Philippines.

The rest of the AMS have established their national trade repositories and in some AMS they are called trade portals. In Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar and Thailand, their NTRs make reference to their NTM regulations (such as trade and customs laws, regulations, orders etc) which are the basis of the introduction of NTMs on imports and exports. However, in the case of Malaysia, its NTR stops there as it is not hyperlinked to Malaysia's NTM regulations. A user will have to go to the webpage of the relevant government agencies to gain access to the relevant NTM regulations.

The following countries are considered to have the most comprehensive NTRs:

- Cambodia
- Indonesia
- Lao PDR
- Myanmar, and
- Thailand

The NTR of these AMS has "stored" the NTM regulations that each of the AMS has and allowed them to be directly accessible via hyperlinks. The NTM regulations have also been digitised and made user-friendly because the NTRs allow searches to be made by product or measure. Further, they allow searches to be made by regulatory agencies. These features of the NTRs are an important tool to enhance transparency. They will make it easier for exporters and importers, especially the small and medium enterprises (SMEs), within ASEAN to know the regulatory requirements, and to assess the regulatory risks of exporting to or importing from any AMS. The information deficit caused by the complexity of the NTM regulations which are scattered under the governance of different agencies can be reduced, also to the benefit of intra-ASEAN producers, importers and exporters.

The success of the ATR will depend on the regulatory convergence of the NTRs of all AMS. However, certain challenges will be faced by ASEAN and the AMS in ensuring sustainable implementation of the ATR at the ASEAN level and the NTRs at AMS level. The NTRs need to be updated so that any changes to the NTM regulations will be given effect in the NTRs. Furthermore, the information embedded in the NTRs must be "adequately" comprehensive. In this regard, the use of digital technology should be

²⁰ ASEAN, ASEAN Trade Repository (Brunei) (ASEAN Trade Repository, 2016)
<http://atr.asean.org/links/result?level=3&id_topic1=44&id_topic2=62&id_topic3=146&country_code=bn&key=>
accessed February 10, 2018.

²¹ ASEAN, ASEAN Trade Repository (Singapore) (ASEAN Trade Repository, 2016)
<http://atr.asean.org/links/result?level=3&id_topic1=44&id_topic2=62&id_topic3=&country_code=sg&key=>
accessed February 10, 2018..

further expanded. As the ATR becomes more popular, more traders will rely on the information supplied by the NTRs to the ASEAN Secretariat. The effectiveness of the ATR will be reduced if the information in the ATR is not accurate. Worse still, the information may contradict what is implemented on the ground. There is also the asymmetry issue. The AMS that have done the most to get their NTR to be accessible via the ATR will benefit not only their traders but also traders from other AMS and in fact other countries in the world. However, where certain AMS do not do the same, the traders from the “compliant” AMS will not get the same benefits from the former. This can create unfairness especially for sectors and products where there is competition between States within ASEAN itself. Thus, for the sake of greater convergence, it is better for all the NTRs to be standardised according to what is envisaged by the ATIGA.

CONCLUSION

The ATR is highlighted as one of the soft approach to addressing the use of NTBs in ASEAN. What then is its effect on the difficulty in defining and regulating NTBs there. As discussed earlier, there can be overlap between NTMs and NTBs. On the other hand, the obligation under the ATIGA at the moment is for the AMS to identify their NTMs that have turned into NTBs for elimination. The ATR can facilitate this process because the embedding of NTM information into a regional portal which is also digitised and made available to all can help distinguish between NTMs that are justified and those which are not justified. The exposing of those NTMs in a manner that can be easily intelligible can be a leapfrog to greater objectivity and transparency, especially for countries whose laws, regulations, orders etc are not written or expressed in English. One of the topics in the ATR other than NTMs as prescribed by the ATIGA is administrative rulings. Alluding to this requirement, AMS are expected to publish their administrative rulings, including those which concern the imposition of NTMs. This can pave the way for countries that do not have administrative courts (such as Malaysia and Brunei) to establish customs appeal tribunals whose rulings can be scrutinised if made available on the ATR.

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