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Working Paper

Addressing non-tariff measures in ASEAN

ARTNeT Working Paper Series, No. 130

Provided in Cooperation with:

Asia-Pacific Research and Training Network on Trade (ARTNeT), Bangkok

Suggested Citation: Pasadilla, Gloria O. (2013) : Addressing non-tariff measures in ASEAN, ARTNeT Working Paper Series, No. 130, Asia-Pacific Research and Training Network on Trade (ARTNeT), Bangkok

This Version is available at:

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Addressing Non-tariff Measures in ASEAN



Gloria O. Pasadilla

ASIA-PACIFIC RESEARCH AND TRAINING NETWORK ON TRADE

Working Paper

NO. 130 | SEPTEMBER 2013

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Addressing Non-tariff Measures in ASEAN

Gloria O. Pasadilla*

Please cite this paper as: Gloria O. Pasadilla, 2013, Addressing Non-tariff Measures in ASEAN

ARTNeT Working Paper No. 130, September, 2013, Bangkok, ESCAP.

Available at www.artnetontrade.org.

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Abstract: Intra-ASEAN trade has increased six-fold since 1993 but greater integration challenge looms in addressing non-tariff measures. The paper discusses the various ASEAN work programs on NTMs and assesses the incidence of Members' NTMs on various products. Various ways of accelerating the reduction of non-tariff barriers are discussed, including dispute settlement mechanisms. The paper highlights the importance of a unilateral approach in addressing NTMs and the use of regulatory impact analysis to improve policy making.[†]

JEL Classification: F1

Key words: ASEAN, Trade, Non-tariff, Mutual Recognition, Conformity Assessment, SPS, TBT

[†] The paper was written with the financial support from the Economic Research Institute for ASEAN and East Asia (ERIA) and is being prepared as ERIA Discussion Paper. The author acknowledges the technical support for publication from the ARTNeT Secretariat/ESCAP.

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Introduction

Non-tariff measures had always accompanied trade but were little noticed. Not anymore. As tariff rates went down, NTMs have grown in importance. The challenge of minimizing their trade-impairing effect is now considered the next frontier in trade policy. This task is not easy. The reason is that non-tariff measures nestle at the heart of countries' claim for sovereignty, of the individual country's right to pursue 'public goods' like the protection of citizens from health and environmental risks. Thus, non-tariff measures are unlikely to disappear - which is not necessarily a bad thing. But their effects can be minimized and their number can still be lowered to only the necessary measures that can achieve valid regulatory objectives.

In ASEAN, economic leaders are cognizant of the importance of addressing non-tariff barriers in the region if it is to achieve its goal of regional integration by 2015. There have been many steps – various regional agreements and protocols, from transparency notification to mutual recognition agreements, that aim to limit the adverse effects of ASEAN members' diverse regulatory measures on intra-regional trade. Section 2 highlights these various regional efforts, but are these efforts targeted to the NTMs that truly impact ASEAN trade? Section 3 shows the incidence of NTMs on various products and the prevalence of particular forms of NTMs across ASEAN countries. It confirms that ASEAN programs have been targeted to the NTMs that have the greatest impact such as technical measures and quantity restrictions. In section 4, the paper tackles various ways for ASEAN to address NTMs but puts greater stress in unilateral approach at regulatory reform. Some reduction of NTBs may be achieved through the help of outside prodding, i.e. through regional agreements, but ultimately it rests in each country's political will to carry out the necessary reforms if they accept that doing so is for their own country's interest.

1. Growth in intra-regional trade

Extra-ASEAN imports are on average four times greater than intra-regional trade but since 1993, intra-ASEAN imports grew faster than extra-ASEAN imports. Annual average growth of intra-ASEAN imports since it embarked on the free trade agreement is 13%, while extra-ASEAN's growth over the same period is 10% (see Figure 1). One reason for this simultaneous intra- and extra- ASEAN trade growth, which seems to dispute trade diversion argument against the ASEAN FTA, is that as the region increasingly integrated, economic growth ensued. This, in turn, helped fuel more demand for goods from both within and outside ASEAN. Certainly, the speed of growth among the ASEAN countries varied. Of its 10 members, Singapore, perhaps, benefited the most from the regional integration to become the 'focal point' of the region's trade with the rest of the world. Perhaps, this owes to a 'first mover' advantage. Singapore, because of the ease in governing a city-state, was the first to make major regulatory reforms and investments in its trade infrastructure, especially in its ports. Its economic success had a demonstration effect on its ASEAN neighbors and spilled over to the entire region. As trade in Southeast Asia grew, it further reinforced Singapore's singular advantage in facilitating trade.

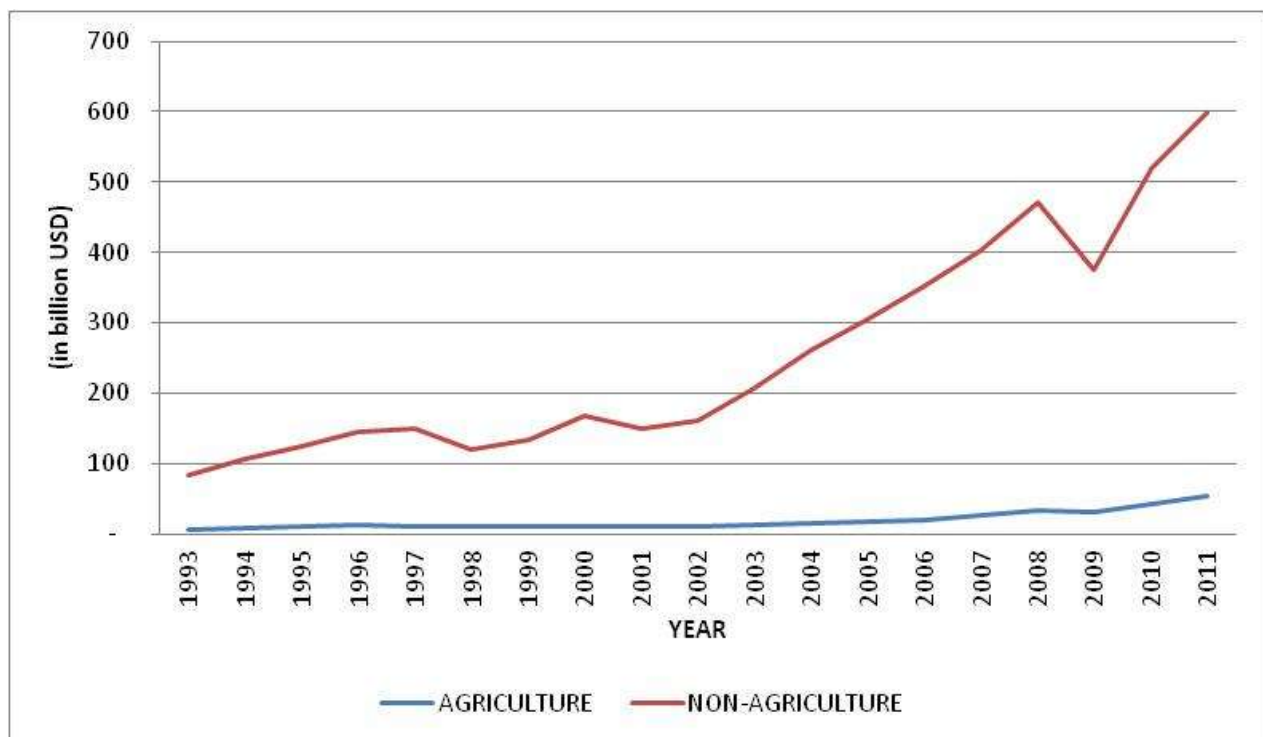
Figure 1: Intra- and extra-ASEAN trade



Source: Based on data from ASEAN Secretariat

Figure 2 shows that, in dollar terms, most of the intra-regional trade growth has come from non-agriculture trade, at least in the earlier years of ASEAN FTA. In terms of growth rates, however, intra-ASEAN trade in agriculture outpaced that of non-agriculture. Over two decades beginning in 1993, intra-regional agriculture trade grew at an annual average growth of 14% compared to non-agriculture's growth of 13%. Perhaps this is due to the fact that the 'starting point' of agriculture trade was very low due to the strong protection that agriculture typically enjoys everywhere. Hence, regional trade liberalization helped spur higher agriculture trade growth despite continuing trade limitations from vestiges of protectionist regulations.

Figure 2: Intra-ASEAN trade: agriculture vs. non-agriculture



Source: ASEAN Secretariat trade data

Table 1 shows how much each individual ASEAN country depends on both extra-regional and intra-regional trade. Except for Laos PDR and Myanmar whose intra-regional trade is far larger than its trade outside the region, all ASEAN countries' extra-regional trade have values that are more than twice the size of its intra-regional trade (column 2, Table 1). However, growth of intra-ASEAN imports has outpaced that of the extra-ASEAN imports in each country except for Brunei Darussalam, Lao PDR, and Viet Nam. Figures in Table 1

show the increasing dependence of ASEAN member economies on each other for trade since the region embarked on a regional free trade area.

Table 1: Intra- and Extra- regional trade of ASEAN countries (average, 1993 – 2011)

| ASEAN Countries | Extra- /Intra-regional Trade | Growth, Intra-ASEAN Trade | Growth, Extra-ASEAN Trade |
|---|-------------------------------------|----------------------------------|----------------------------------|
| Brunei Darussalam 1/ | 2.5 | 10.7 | 13.6 |
| Cambodia 2/ | 3.5 | 27.9 | 16.0 |
| Indonesia | 23.4 | 15.9 | 10.7 |
| Lao PDR 3/ | 0.4 | 35.0 | 61.4 |
| Malaysia | 3.1 | 10.0 | 9.4 |
| Myanmar 4/ | 0.96 | 20.8 | 17.5 |
| Philippines | 5.4 | 14.6 | 7.6 |
| Singapore | 2.75 | 11.5 | 10 |
| Thailand | 4.5 | 15.2 | 10.4 |
| Viet Nam | 4.1 | 18.6 | 21.2 |
| 1/ 1994-2011 ; 2/ 2000-2011 ; 3/ 2003-2011 ; 4/ 1999-2011 | | | |

Source: Author's computation based on ASEAN Secretariat trade data.

2. ASEAN programs on non-tariff measures

Intra-ASEAN's tariff reduction program has no doubt influenced growth in intra-ASEAN trade shown above. But to accelerate further regional integration, the remaining impediments in the form of non-tariff barriers (NTBs) need to be addressed. Thus, ASEAN trade officials launched various region-wide initiatives to mitigate the effects of NTBs. This subsection summarizes parallel efforts within ASEAN that are related to the containment of NTBs.

But first, a definitional note is in order. Non-tariff measures (NTMs) are all policy measures other than custom tariffs that alter the conditions of international trade, changing traded quantities, prices, or both (UNCTAD, 2010). Not all NTMs are trade barriers or NTBs. NTMs are a much wider set of measures while NTBs are a subset of NTMs that are discriminatory and intended to protect or favor domestic producers. However, in practice, it is not always easy to distinguish the two because some NTMs though on its face legitimate, can be applied in such a way as to become obstacles for trade. That the definition of NTMs is so broad also implies that the efforts to address their effect on trade need to rely on a multi-pronged approach.

Under the NTB program, ASEAN adopted the WTO Agreement on Import Licensing Procedures and developed national guidelines that are compatible with the WTO Licensing Agreement. Another major task that ASEAN set out to do was the compilation, identification and verification of NTBs by ASEAN member countries. This database of non-tariff measures is now available at the ASEAN website. As part of the NTB work program, ASEAN member countries have agreed to phase out a few of the NTMs that were identified as NTBs, but the majority, though identified as possible NTBs, are defended by members as legitimate and not as barrier to trade. This suggests that, to eliminate NTBs, ASEAN cannot only rely on self-notification and voluntary removal of NTBs by member countries.

2.1. ASEAN structure and NTMs

Within the governance structure of ASEAN, work on NTBs is centered on the ITWG or the Interim Working Group for the Common Effective Preferential Tariff (CEPT) and AFTA (ITWG) which was later reconstituted as the Coordinating Committee for ATIGA(CCA).¹

¹ ASEAN Trade in Goods Agreement.

The ITWG/CCA supports the work of the Senior Economic Meeting (SEOM), which in turn supports the work of the AFTA Council²; the AFTA Council, in turn, supports the work of the ASEAN Economic Ministers (AEM) which is directly responsible to the ASEAN Summit, the supreme policymaking body of ASEAN which is composed of heads of state. The ASEAN Secretariat supports all three ASEAN bodies – the ITWG/CCA, SEOM, and AEM. The CCA meetings are attended by representatives from ministries dealing with trade, usually including trade ministries and customs. It was also in-charge of collecting and identifying NTBs from the database of NTMs.

2.1.1. ASEAN Consultative Committee on Standards and Quality (ACCSQ)

Besides the CCA, expertise from other ASEAN bodies is necessary to help in the NTB work programme. An important body is the ASEAN Consultative Committee on Standards and Quality (ACCSQ) since one important area of non-tariff barriers reduction depends on the harmonization of national standards with international standards and practices; development and harmonization of technical regulations; as well as efficient, non-duplicative conformity assessment procedures. The ACCSQ was tasked to undertake the harmonization process and to implement mutual recognition agreement (MRAs) of laboratory test reports and conformity certifications. It is supported by three working groups and eight product working groups with their corresponding areas of responsibility as indicated in Table 2. The eight product working groups work on the priority sectors for integration, namely: automotive products, electronics, healthcare, rubber-based products, prepared food stuffs.

² The AFTA Council is composed of high ministry officials, usually up to deputy minister level, from each ASEAN member country plus the ASEAN Secretary-General. They usually meet as needed but at least once a year.

Table 2: Working Groups and Committees under ACCSQ

| Working Groups Assisting ACCSQ | Assigned Tasks/ Scope of Activities |
|---|---|
| WG1 – Working Group on Standards and MRAs | <ul style="list-style-type: none"> i. Monitoring the implementation of the sectoral MRAs in ASEAN. ii. Establishment of an ASEAN Guide to MRAs. iii. Harmonization of national standards to international standards. iv. Assistance in promoting GRP concept to regulators. v. Confidence building among regulators in the use of harmonized standards. vi. Promotion of transparency of technical regulations. vii. Exploring new areas for development of MRAs and standards harmonization in ASEAN. viii. Development of a mechanism for cooperation between standards bodies and regulatory agencies; and ix. Recommending to the ACCSQ, proposals, activities or issues for ASEAN cooperation in relevant international and regional organizations such as ISO, IEC, APEC and ASEM. |
| WG2 - Working Group on Accreditation and Conformity Assessment | <ul style="list-style-type: none"> i. Enhancing the capability of accreditation bodies in ASEAN member countries to achieve regional/international recognition. ii. (Enhancing the competence of conformity assessment bodies in ASEAN member countries to facilitate the implementation of mutual recognition of test reports and certifications. iii. Assisting new member countries in accreditation and conformity assessment. iv. Monitoring the certification bodies within ASEAN. |
| WG 3 – Working Group on Legal Metrology | <ul style="list-style-type: none"> i. To align legal metrology in ASEAN to support the objectives of the ASEAN Free Trade Area (AFTA) and to ensure that the modernization of legislation in legal metrology by ASEAN Member Countries will not result in the introduction of new technical barriers to trade. ii. To establish ASEAN cooperation in the area of legal metrology and to improve the national legal metrology systems, through cooperation in technology, human resources and management expertise. iii. To hold discussions and promote ASEAN interest in legal metrology with other national, regional and international organizations |
| PRODUCT WORKING GROUPS (PWGs) | |
| JSC EE MRA - Joint Sectoral Committee for ASEAN Sectoral MRA for Electrical and Electronic Equipment | <ul style="list-style-type: none"> i. Listing, suspension, removal and verification of Testing Laboratories and / or Certification Bodies in accordance with the ASEAN EE MRA ; ii. Providing a forum for discussion of issues that may arise concerning the implementation of the ASEAN EE MRA ; iii. Reviewing and proposing amendments to the scope and coverage of the ASEAN EE MRA ; iv. Considering ways to enhance the operation of the ASEAN EE MRA, such as developing outreach programme for capacity building; v. Considering ways on Good Regulatory Practice on electrical and electronic products |
| ACC – ASEAN Cosmetic Committee | <ul style="list-style-type: none"> i. Coordinating, reviewing and monitoring the implementation of the Agreement on ASEAN Harmonized Cosmetic Regulatory Scheme, including the ASEAN mutual Recognition Arrangement of Product Registration Approvals for Cosmetics and the ASEAN Cosmetic Directive; |

| | |
|---|---|
| | <p>ii. Monitoring the implementation of the following technical documents and reviewing and updating these documents when necessary:</p> <p>a) ASEAN Definition of Cosmetics and Illustrative List by Category of Cosmetic Products; b) ASEAN Cosmetic Ingredient Listings and ASEAN Handbook of Cosmetic Ingredients; c) ASEAN Cosmetic Labelling Requirements; d) ASEAN Cosmetic Claims Guideline; e) ASEAN Cosmetic Product Registration Requirements; f) ASEAN Cosmetic Imports/ Export Requirements; and g) ASEAN Guidelines for Cosmetic Good Manufacturing Practice.</p> |
| PPWG – Pharmaceutical Product Working Group | <p>i. Exchange of information on the existing pharmaceutical requirements and regulations implemented by each ASEAN member countries; ii. Review and preparation of comparative study of the requirements and regulations; iii. Study of harmonized procedures and regulatory system currently implemented in others regions on pharmaceutical trade; iv. Development of harmonization of technical procedures and requirements, including appropriate MRAs (full harmonization equivalence of conformance, equivalence of results and/or acceptance of test procedures) applicable to the ASEAN pharmaceutical industry, taking into account other regional and international developments on pharmaceuticals</p> |
| PFPWG – Prepared Foodstuff Product Working Group | <p>i. Exchange of information on standards, regulations, procedures and mandatory requirements in Member Countries related to prepared foodstuff; ii. Review and analyze the comparative study of regulatory regimes among Member Countries; iii. Identify areas for possible harmonization and MRAs; iv. Develop, implement and monitor the sectoral MRAs; and v. Identify the technical infrastructure needs and build-up mutual confidence in testing and conformity assessment</p> |
| APWG – Automotive Product Working Group | <p>i. Exchange of information on standards, rules, regulations, procedures and mandatory requirements in Member Countries related to Automotives sector; ii. Review and analyze the comparative study of regulatory regimes among Member Countries; iii. Identify areas for possible harmonization and MRAs, with the focus on harmonization ASEAN automotives safety and emission standards based on UN ECE regulations; iv. Develop sectoral MRAs; and v. Identify the technical infrastructure needs and build-up mutual confidence in conformity assessment.</p> |
| TMHSPWG – Traditional Medicines and Health Supplements Product Working Group | <p>i. Exchange, review and analyze information on the existing regulatory framework/regime including standard definition, terminologies, and technical infrastructure in Member Countries. ii. Study the existing regulatory frameworks/regime of selected countries and internationally accepted technical guidelines. iii. Enhance the technical infrastructure including mutual confidence in testing and conformity assessment. iv. Identify areas for possible harmonization and MRAs.</p> |
| MDPWG – Medical Device Product Working Group | <p>i. Developing a common submission dossier template for product approval in ASEAN ii. Exploring the feasibility of an abridged approval process for medical devices which regulators of benchmarked countries or</p> |

| | |
|---|---|
| | <p>recognized regulators have approved</p> <p>iii. Exploring the feasibility of adopting a harmonized system of placement of medical devices into the ASEAN markets, based on a common product approval process</p> <p>iv. Formalizing of a post-marketing alert system for defective or unsafe medical devices.</p> <p>v. All ASEAN countries to consider joining the Asian Harmonization Working Party (AHWP) and work in parallel with the Global Harmonization Task Force (GHTF) on technical harmonization efforts</p> |
| WBPWG – Wood-Based Product Working Group | <p>i. To promote transparency of Wood Based Products standards, technical regulations and conformity assessment procedures among Member Countries</p> <p>ii. To identify areas for harmonization of technical regulations and conformity assessment procedures.</p> <p>iii. To harmonize technical regulations and conformity assessment procedures in identified areas under no. (ii)</p> |
| RBPWG – Rubber-Based Product Working Group | <p>i. To enhance cooperation in conformity assessment, development and implementation of standards and technical regulations for rubber based products among ASEAN Member Countries.</p> <p>ii. To strengthen and enhance networking and exchange of information among ASEAN Member Countries pertaining to standards, quality and regulations of rubber based products, with the view to facilitate cooperative undertakings in this area.</p> <p>iii. To identify standards for rubber-based products for ASEAN to harmonize with international standards and quality.</p> <p>iv. To enhance joint actions and approaches on international issues and adopt common positions in relevant international organisations, agreements and arrangements.</p> <p>v. To identify fields of cooperation with related ASEAN Member Countries and Third Party countries and organisations in order to promote the development of standards for rubber based products.</p> <p>vi. To strengthen human resource development in the area of standards and quality for rubber products.</p> <p>vii. To share equal responsibility to the tasks and activities agreed at meetings</p> |
| <p>MRAs = Mutual Recognition Agreements; GRP= Good Regulatory Practice; ISO= International Standards Organization; IEC = International Electrotechnical Commission; ASEM = Asia-Europe Meeting; UNECE = UN Economic Commission for Europe</p> | |

Source: www.ASEAN.org

2.1.2. Key achievements of regulatory cooperation in standards and conformance

Since ASEAN embarked on the elimination of non-tariff barriers, four mutual recognition agreements have been signed and are being implemented (see Table 3). The MRA for electrical electronic equipment which provides for the acceptance of test reports and certification was signed in 2000 and started to be implemented in 2004. The ASEAN MRA on Good Manufacturing Practice (GMP) for pharmaceuticals was signed in 2009. The MRA provides for inspection to be carried by local inspection bodies. The ASEAN cosmetic directive harmonized technical requirements including definitions for cosmetics, allowable

ingredients, etc. started to be implemented in 2008. The ASEAN Harmonized Regulatory Regime for Electrical and Electronic Equipment (AHEER) which harmonized technical regulations and conformity assessment procedures was signed in 2005.

Table 3: Mutual Recognition Agreements (MRAs) in ASEAN

| MRA | Description | Status |
|---|---|--|
| MRA for electrical equipment | <ul style="list-style-type: none"> - Acceptance of test reports based on APLAC MRA and IECEE Certification Body (CB)Scheme; - Acceptance of certification based on PAC MRA and IECEE CB; - Supports implementation of AHEER | Signed in 2000 and implemented in 2004 |
| ASEAN Harmonized Regulatory Regime for Electrical and Electronic Equipment (AHEER) | <ul style="list-style-type: none"> - Harmonized technical regulations based on essential safety requirements for electrical and electronic equipment (EEE); - Listed standards deemed to meet essential requirements (based on IEC standards); - Harmonized conformity assessment procedures (based on ISO/IEC guides 53, 67, & 28); - Registration of EEE and designation of conformity assessment bodies (CABs) | Signed in December 2005; ASEAN members are in the process of transposing national legislation to implement AHEER |
| ASEAN Harmonized Cosmetic Regulatory Scheme | <ul style="list-style-type: none"> - Harmonized technical requirements, including definitions for cosmetics, permitted ingredients and preservatives; | Implemented in January 2008 |
| Pharmaceutical Good Manufacturing Practice (GMP) | <ul style="list-style-type: none"> - Adopts GMP inspection of manufacturers of medicinal products based on PIC/S; - Inspection can be carried out by competent local inspection bodies; - Mutual recognition of inspection | Signed in 2009 |
| <p>APLAC = Asia Pacific Laboratory Accreditation Cooperation is a cooperation of accreditation bodies in Asia Pacific that accredit laboratories, inspection bodies and reference material producers;</p> <p>IECEE = International Electrotechnical Commission (IEC) system for conformity testing and certification of electrotechnical equipment and components;</p> <p>PAC = Pacific Accreditation Cooperation;</p> <p>PIC/S Scheme = Pharmaceutical Inspection Convention and Pharmaceutical Inspection Cooperation Scheme. PIC is a cooperative arrangement between government health authorities, a more formal counterpart of PIC Scheme. PIC whose main purpose is for the mutual recognition of inspections, was established via treaty.</p> | | |

Source: Author's compilation based on Bao (2011) and relevant website information.

Table 4: Summary of activities addressing TBTs in priority sectors

| Sector | Standards/Technical Requirements | Technical Regulations | Conformity Assessment |
|---|--|---|--|
| Automotive | Harmonisation of national standards and technical requirements (mandatory and voluntary) with UNECE Regulations of the 1958 Agreement. | Development of a single regulatory regime in ASEAN for the automotive sector is not in the work programme of the Automotive Product Working Group. | ASEAN MRA for type Approval of Automotive Products. |
| Cosmetics | Harmonisation of technical requirements for limits of cosmetic ingredients. | ASEAN Cosmetic Harmonised Regulatory Scheme (Schedule B - ASEAN Cosmetic Derivative). | ASEAN Cosmetics Testing Laboratory Network. |
| Electrical and electronic equipments | Harmonisation of national standards and technical requirements (mandatory and voluntary) with ICE standards. | ASEAN Harmonised Electrical and Electronic Equipment Regulatory Regime. | ASEAN Sectoral MRA for Electrical and Electronic Equipment. |
| Medical devices | Harmonisation of national standards and technical requirements with ISO standards for medical devices | ASEAN Medical Device Directive (draft stage). | Conformity Assessment and evaluation of medical devices are within the purview of the a national level. No harmonised regional approach for conformity assessment of medical devices. |
| Pharmaceutical | Adoption of the ASEAN Common Technical Requirements and ASEAN Common Technical Dossier for product placement supported by guidelines for its uniform application in the region. | Development of a single regulatory regime in ASEAN for the pharmaceutical sector is not in the work programme of the Pharmaceutical Product Working Group. | ASEAN Sectoral MRA for GMP inspection of Manufacturers of Medicinal Products. |
| Prepared food stuff | Harmonisation of national standards and technical requirements for limits for pesticide residues, fruits, animal vaccines and products, food safety requirements on food additives and contaminants. | Development of a single regulatory regime in ASEAN for the Pharmaceutical sector is not in the work programme of the Prepared Foodstuff Product Working Group. | ASEAN Food Testing Laboratory Network. |
| Rubber-based products (Requirements in this sector are voluntary) | Harmonisation of national standards with ISO standards. | Development of a single regulatory regime in ASEAN for the rubber-based products sector is not in the work programme of the Rubber-based Product Working Group. | Exchange of information and transparency in available accredited conformity assessment bodies for rubber-based products. |
| Traditional medicines and health supplements | Harmonisation of national standards and technical requirements with harmonised requirements for product placement and support supported by guidelines for its uniform application in the region. | ASEAN Regulatory Framework for TMHS (draft stage). | Conformity Assessment and evaluation of traditional medicine and health supplements are within the purview of the national level. No harmonised regional approach for conformity assessment of traditional medicine and health supplements . |

Source: ERIA, unpublished report.

Other works of the different committees and working groups under the ACCSQ are summarized in Table 4. A few technical regulations are yet to be adopted and are still in draft stages such as those for medical devices, traditional medicines and health. Other priority sectors do not contemplate a single regional regulatory regime (rubber, prepared foodstuff. Likewise, for conformity assessment, no harmonized regional approach for

conformity assessments are envisioned for medical devices, traditional medicines and health supplements.³

2.2. Working Group on SPS

Similar to the work being undertaken at the ACCSQ, the Working Group on Sanitary and Phytosanitary (SPS) measures, a body under the Senior Officials of the ASEAN Ministers of Agriculture and Forestry (SOM AMAF), has action plans on NTB elimination in crops, livestock and fisheries. It involves compiling information on NTMs affecting agricultural products and developing MRA of SPS standards to liberalize intra-ASEAN trade in agriculture products. Box 1 details the progress in ASEAN agreement on various harmonization of agricultural products standards based on international standards from Codex, International Plant Protection Convention (IPPC) and World Organization for Animal Health (OIE).

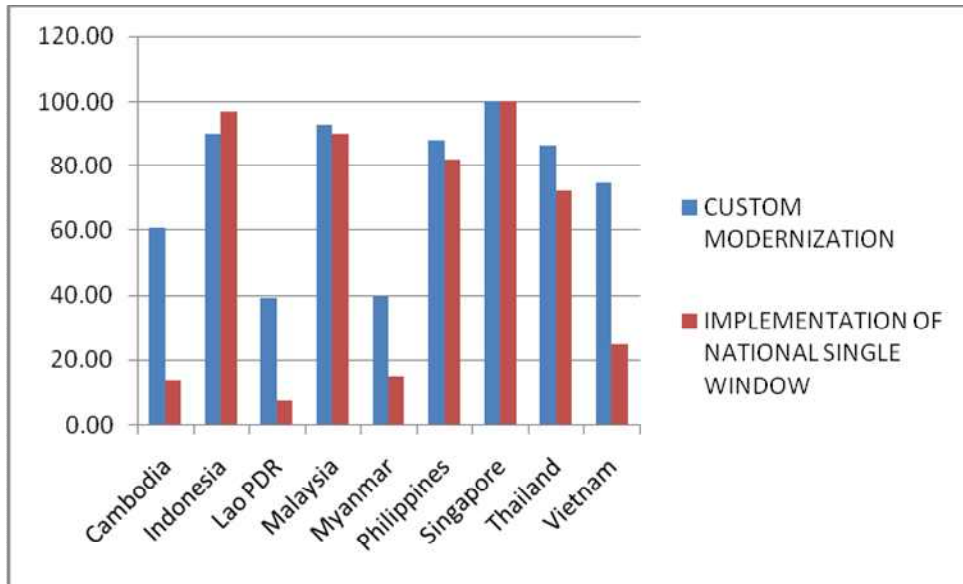
2.3. Single Window Program

Another major program related to addressing non-tariff barriers in ASEAN are all the trade facilitation programs, particularly the ASEAN single window (ASW) concept. The ASW requires the implementation of national single window (NSW) which means having a functioning modern customs processes i.e., risk management, electronic filing, paperless transactions, and having authorized economic operators (AEO).⁴ The ASW is expected to be in operation by 2015, but the possibility of achieving this target largely depends on the attainment of NSW. So far, the pace of progress across ASEAN is widely varied with Singapore leading with 100% completion rate for both modernization of customs and implementation of NSW, and the CMLV countries falling way behind (ERIA, 2012) (see Figure 3).

³ ERIA has prepared a report on the individual ASEAN member's progress in the implementation of standards and conformance in the eight priority sectors. It shows how some countries are way advanced in the implementation of standards but less on conformity assessment, for example in automotive sector, or how most countries are advanced in all aspects: standards, conformity assessment, and technical regulations in certain sectors like electronic and electrical equipment but lag behind in various implementation in other products like cosmetics or prepared foodstuffs. See ERIA (unpublished report).

⁴ AEOs are economic actors – importers, exporters, freight forwarders, consolidators, brokers, carriers, port operators – accredited by Customs, proven to have high quality internal processes that ensure the integrity of information and employees, and have secured access in their premises to prevent tampering with goods for international transport.

Figure 3: Progress on ASEAN Single Window



Source: ERIA (2012)

3. Prioritizing efforts in NTMs

While ASEAN had made some progress in addressing non-tariff barriers in the region as discussed in section 2, some comments can be made on the choice of priority products in which NTBs needed to be addressed. Are the priority sectors those which NTBs are prevalent in? Or, were they chosen merely because of their importance in intra-regional trade? If the sectors are deemed important because of their high volume of trade, might it not be because, precisely, these sectors are not those in which NTBs have been an important factor?

No matter how little effect do NTBs have on the priority sectors, the exercise of harmonization and simplification of conformity assessments through MRAs remain significant. ASEAN cooperation effort in these areas should be considered good initial steps for ASEAN countries to 'learn the ropes' as it moves in the future towards more 'difficult' sectors to integrate. From a political economy perspective, the regional effort at harmonization and MRAs on sectors that are of interest to most ASEAN members made it easy to overcome resistance against regional efforts aimed at domestic regulatory reforms. It should be noted that ASEAN usually prefers a 'non-intervention policy' on ASEAN countries' internal affairs. Yet, the regulatory reforms that NTB elimination required are already a considerable departure from this 'let alone' policy as each country acquiesces to change domestic regulations for the sake of ASEAN integration objectives. Subsequently, the 'learning from experience' that the NTB elimination in the priority sectors provides would help ASEAN countries deal with more future undertakings of NTB removals in other 'non-priority' sectors.

Box 1: Harmonization in ASEAN agriculture products

ASEAN has agreed on the following harmonization:

Codex

ASEAN Task Force on Codex (ATFC) agreed on the harmonization of:

- i) Codex General Standards for the Labelling of Prepackaged Foods,
- ii) Codex General Standard for the Labeling of Food Additives;
- iii) Codex General Guidelines on Claims
- iv) Codex Guidelines on Nutrition Labelling.

International Plant Protection Convention (IPPC)

The ASEAN Working Group on Crops (ASWGC) agreed on the Harmonisation of International Standards for Phytosanitary Measures (ISPMs) Standards Number:

- No. 6 (1997) - Guidelines for surveillance
- No. 7 (2011) - Phytosanitary Certification System
- No. 10 (1999) - Requirements for the establishment of pest free places of production and pest free production sites
- No. 12 (2011) - Phytosanitary Certificates
- No. 13 (2001) - Guidelines for the notification of non-compliance and emergency action
- No. 15 (2002) - Guidelines for regulating wood packaging material in international trade
- No. 17 (2002) - Pest reporting
- No. 19 (2003) - Guidelines on lists of regulated pests
- No. 20 (2004) - Guidelines for a phytosanitary import regulatory system
- No. 23 (2005) - Guidelines for inspection
- No. 24 (2005) - Guidelines for the determination and recognition of equivalence of phytosanitary measures
- No. 25 (2006) - Consignments in transit
- No. 28 (2009) - Phytosanitary treatment for regulated pests
- No. 31(2008) - Methodologies for sampling consignments

World Organization for Animal Health (OIE)

ASEAN Working Group on Livestock (ASWGL) agreed for harmonization of OIE Guidelines for disease reporting (Section 1.1-1.5), import-export risk analysis (Section 3.1), surveillance section (Section 3.4)

Source: ASEAN Secretariat

Subsequent future work on NTBs in other sectors would need a better understanding of the nature and types of NTMs that really affect regional trade. This section makes a preliminary analysis of the incidence of NTM in ASEAN, but some caveats are in order. The section seeks to assess the incidence of specific non-tariff measure in terms of tariff lines⁵ and value of trade. This descriptive analysis does not assess how the NTM impact trade because the paper makes no effort to estimate the value of trade *without NTM* to compare with the actual trade *with NTM*, nor to compute for ad valorem equivalents (AVEs) of the NTMs which are typically the method to assess the impact of a trade measure.⁶ The incidence of NTMs may also falsely give the impression that some countries are more restrictive than others for the simple reason that they have the virtue of being more transparent. Nevertheless, it is useful to get an idea on the patterns of non-tariff measures.

3.1. Profile of NTMs around the world

Part of the difficulty in studying NTMs is the paucity of credible and accurate data as well as its large scope. Generally, data on NTMs are either official data (i.e. provided by the government) or culled from surveys of businesses affected by NTMs. One advantage of the survey data is that it manages to capture the procedural obstacles, i.e. the implementation of an otherwise legitimate measure, which is where non-tariff barriers actually lurk. The downside is that private businesses usually misidentify some NTMs, e.g. reporting them as customs procedures when the measures are actually behind-the-border measures that are administered by another government agency or private actor (Ferrantino, 2010).

Broadly, NTM is defined as all policy-related trade costs incurred from production to final consumer, excluding tariffs (Gourdon and Nicita, 2012). Some NTM measures are behind-the-border (e.g. distribution restrictions, subsidy), some are applied at-the-border (e.g. quota or prohibitions), others are even applied at the border of origin (e.g. pre-shipment inspection). An international inter-agency collaboration spearheaded by UNCTAD, ITC and the World Bank revised the classification of NTMs into import and export measures, and the import measures into technical measures and non-technical ones (see Figure 4 and Appendix 1).⁷

⁵ Only up to four-digit HS level.

⁶ Ferrantino (2010) provides a succinct discussion of the challenges in various methodologies quantifying non-tariff measures.

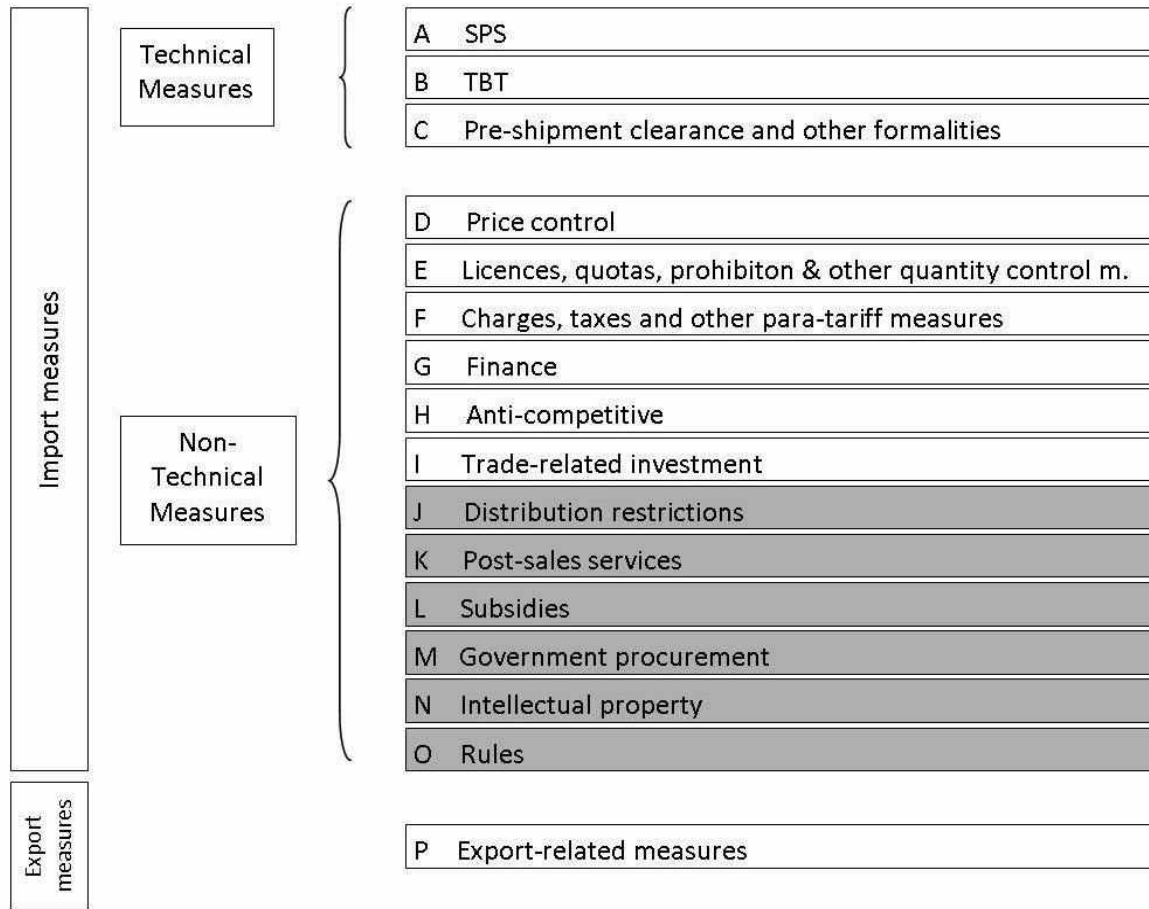
⁷ This classification into technical and non-technical measures is different from the old NTM classification of core and non-core NTMs, where the core NTMs constitute quantity control measures, price control measures, finance measures and monopolistic measures. The reason for the revision of NTM classification is to account better for the changing nature of NTMs where the number of core measures have actually declined relative to what used to be considered non-core. The existing ASEAN database of NTMs are not yet configured into the new UNCTAD classification.

The technical measures are SPS, TBT, and pre-shipment inspection; while the non-technical ones are price control, licenses/quotas/prohibition and other quantity control measures, charges and para-tariff measures, competition policy measures, etc. Based on this classification, Gourdon and Nicita (2012), analyzed collected data from 24 developing countries plus the European Union and Japan. The main findings of their study are as follows:

- Coverage ratios⁸ of NTMs are variable across sectors and vary anywhere between 10 % to 90% of tariff lines. Both developed and developing countries have significant coverage ratios, hence NTMs are not the sole preserve of developed economies;
- Technical measures, especially TBT and SPS, are the most prevalent of all NTMs. TBT affects 30% of international trade and SPS, 15%. SPS measures are mostly applied on agriculture and food products where 60% of products are covered by SPS regulations. Often, TBT and SPS measures are not protectionist in intent but they disadvantage developing countries all the same because of the high cost of compliance;
- Among the non-technical measures, the use of quotas has declined but the use of non-automatic licenses have increased. The decline in the use of quotas is largely attributed to the stringent WTO discipline on the use of the trade policy instrument. Price control measures are rarely used and affect less than 5% of trade.

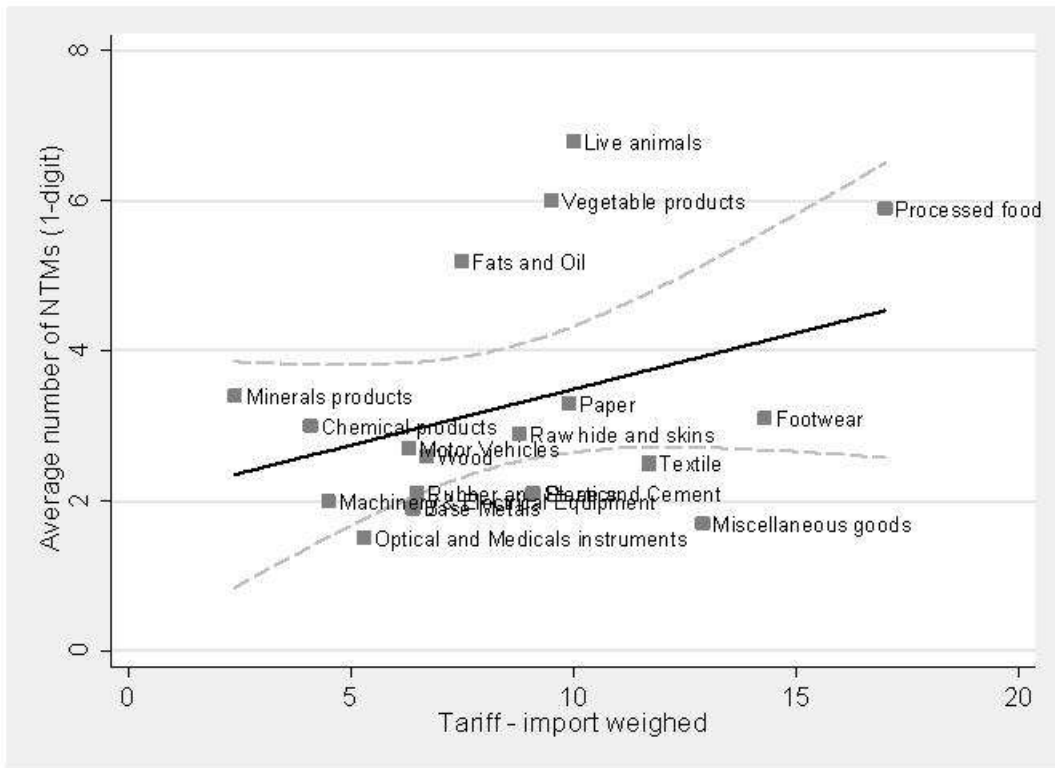
⁸ Percent of tariff lines that have NTMs.

Figure 4: New UNCTAD classification of non-tariff measures



What is most interesting in the Gourdon and Nicita (2011) study is that they find that, instead of non-tariff measures being a substitute trade policy instrument to tariffs, the two appear to be, in fact, complements. They point to evidence of very high correlation of tariff and non-tariff product incidence on various products. Figure 5 shows such positive correlation of products with high tariffs with the products with high incidence of non-tariff measures. Gourdon and Nicita suggest that the evidence point to the possibility that high NTM incidence and high tariffs are driven by the same political economy factors behind the trade protection.

Figure 5: High correlation of tariff and NTM incidence on products



Source: Gourdon and Nicita (2012)

3.2. Incidence of NTMs in ASEAN

In ASEAN, the predominance of technical measures among the NTMs is also evident. Most of the reported non-tariff measures in ASEAN are quantity control measures and technical regulations (Figures 6 and 7). In Indonesia, quantity control measures are related to prohibitions for sensitive products and non-automatic import licensing, while the technical regulations refer more to SPS-related measures. In terms of affected import value, however, Indonesia's monopolistic measure, i.e. single channel imports through its state trading administration,⁹ has the second largest value affected by non-tariff measure next to that by quantity control measures. In Malaysia, import permits take on the biggest quantity control measure, while SPS related measures are the majority of technical regulations. In the Philippines and Thailand, technical regulations and quantity control measures are again the NTMs which have the greatest number of affected tariff lines and value of imports. In the

⁹ This large import volume is likely due to many state-trading enterprises' privilege of tariff-free importation. Thus, even when the private sector is also allowed to import the commodity, many businesses usually course their import demand through the state trading enterprise to avail of the import privilege. (Author's note: I owe this insight from one of the workshop participants).

Philippines, the technical regulations take mostly the form of testing and inspection requirements, while in Thailand, technical regulations are mostly related to quality standards and inspection and testing. As for value of ASEAN imports, automatic licensing has the greatest impact in Thailand. Viet Nam's quantity control measures take mostly the form of prohibitions for sensitive products. In terms of affected value of ASEAN imports, internal taxes and import charges impact trade the most followed by monopolistic measures and quantity control measures.

What appears consistent across ASEAN countries is the prevalence of licensing, both automatic and non-automatic. Automatic licensing is usually not associated with protectionist intention because they are mainly for statistic purposes but non-automatic licensing may be employed as trade protection. They are usually used along with other non-tariff measures like quotas, tariff rate quotas, and other technical regulations. Figure 8 shows that Malaysia employs the greatest number of non-automatic licenses in ASEAN, followed by Indonesia; majority of the non-automatic licenses are applied on non-agricultural products.¹⁰ In Malaysia, Philippines, and Thailand, most of the products with non-automatic licensing are likewise those with SPS/TBT measures, while in Indonesia, non-automatic licensing appears to be associated with the use of quota (see Figure 9).

That any country employs non-automatic licensing on a large number of products, however, is not as problematic and trade-impairing as non-transparency and inefficiency in the handling of measures, including licensing measures. In the case of Malaysia, its licensing procedures are deemed efficient and readily accessible online, thus causing relatively less inconvenience to exporters and importers. In other countries, the application of the same measures may be riddled with inconsistencies and entail an unnecessarily lengthy process.¹¹

¹⁰ That is HS25 and above.

¹¹ See, for example, Table 7 below.

Figure 6: Affected intra-ASEAN trade value by NTM

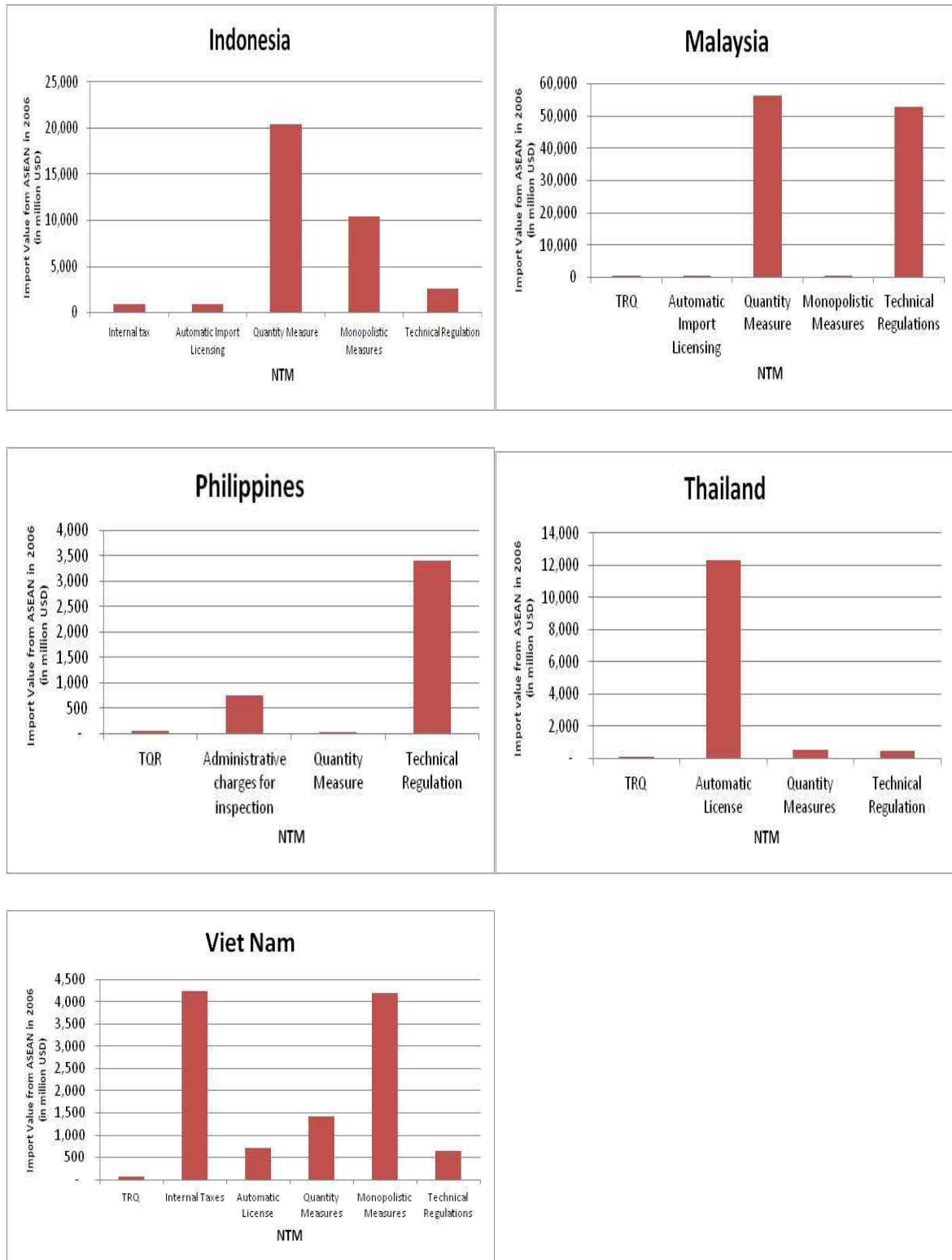


Figure 7: Affected number by NTM at HS 4 digit level

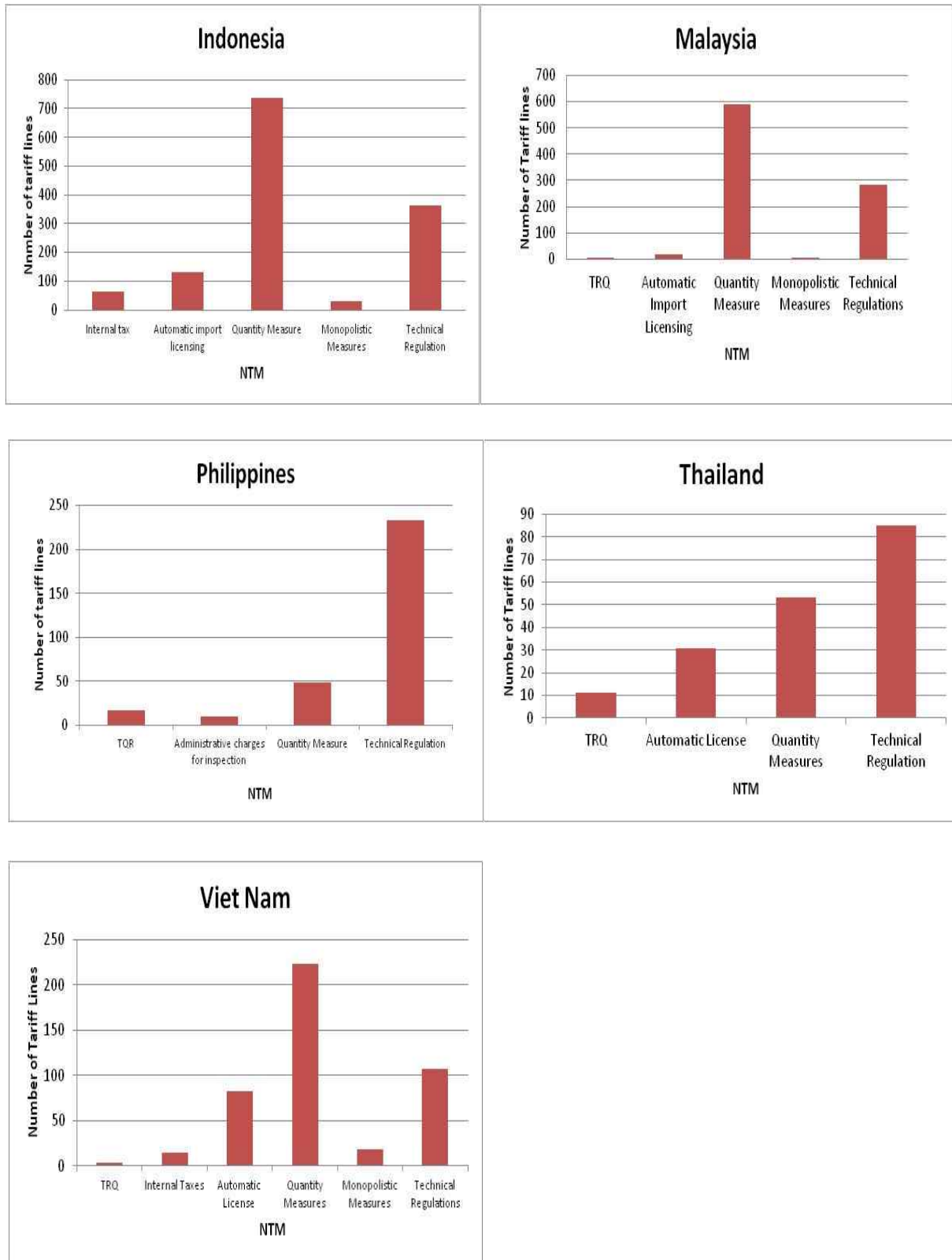
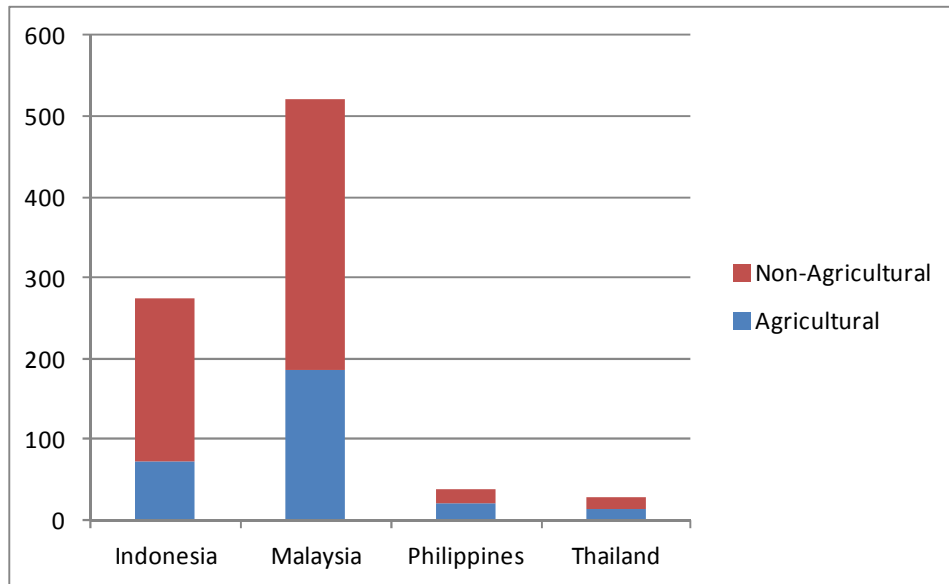
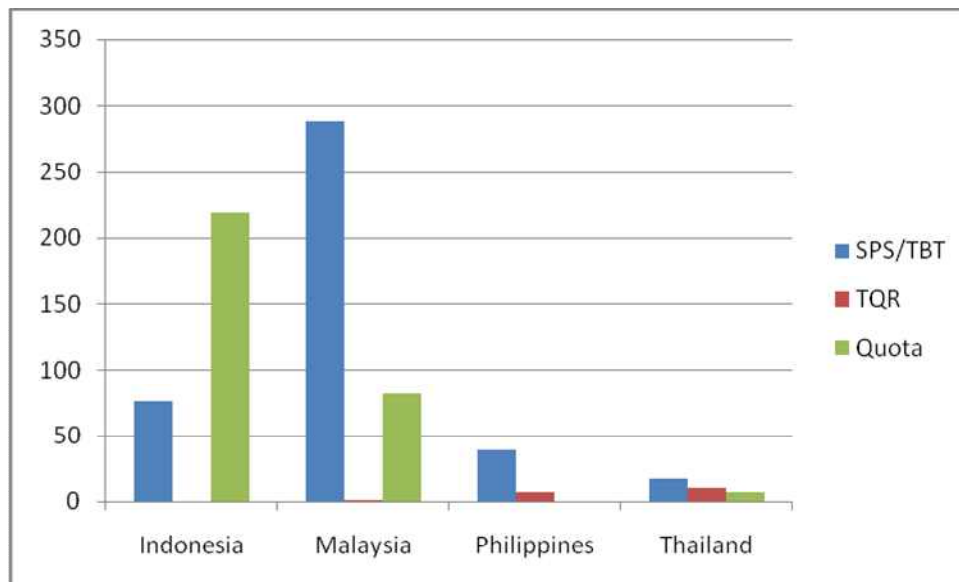


Figure 8: Non-automatic licensing in ASEAN



Source: Author's own computation

Figure 9: NTMs used along with non-automatic licensing measure



Source: Author's own computation

The products that are mostly affected by non-tariff measures are shown in Table 5. Some are agriculture products like coffee, tea, or sugar, edible and prepared fruits; while manufactured goods range from vehicles and boats to plastics and textiles. Table 5 also shows (in bold) that the priority sectors are actually among the top products that are affected by NTM. In particular, technical regulations affect vehicles (auto) and electrical machinery and equipment in Indonesia; in Thailand, pharmaceutical products; and in Viet Nam, both cosmetic and pharmaceutical products. Prepared foodstuffs, such as coffee and tea and dairy are also among the top affected sectors by technical regulations in Malaysia.

Based on Table 5, the choice of five out of the eight priority sectors where NTBs have to be eliminated are warranted. For these, the MRAs and adoption of international standards would greatly help in facilitating intraregional trade. The same cannot be easily said of the other three priority sectors such as traditional medicine and health supplements, medical devices, and rubber-based products, based on the criteria of affected import value alone.

That technical regulations and quantity control measures are the most prevalent of all NTMs is a result that is similar to that found by Gourdon and Nicita (2012). That technical regulations affect many agricultural products like sugar, dairy, live animals, etc. is likewise the same conclusion that the two authors reached using global data.¹² Similarly, an UNCTAD study on emerging NTMs in ASEAN shows the increasing importance of non-core measures, particularly technical measures, relative to core measures. Basu, Kuwahara, and Dumesnil (2012) analyzed NTM data from UNCTAD TRAINS database and found that while in 1994, quantity control measures dominated the number of NTMs, its importance significantly dropped from 57% to 43% in 2005. In contrast, technical measures rose from 39% to 49% (see Table 6).

¹² They used data from 24 developing countries and 2 developed economies, Japan and EU.

Table 5: Affected products by NTM

| Non-tariff Measures | ASEAN Country | Affected Products (with top import values) |
|----------------------------|----------------------|---|
| Quantity Measure | Indonesia | Minerals, sugar, nuclear boiler, electrical machineries, vehicles , plastics, organic chemicals |
| | Malaysia | Sugar, cereals, fish and crustaceans, meat, dairy products, oilseeds, animal/vegetable fats |
| | Philippines | Coffee, tea |
| | Thailand | Edible and prepared fruits , organic chemicals, carpets and textiles, iron and steel, cereals |
| | Viet Nam | Ship and boats, electrical machinery, vehicles, object of arts |
| Technical Regulations | Indonesia | Vehicles , sugar, dairy, fertilizers, electrical machinery and equipment |
| | Malaysia | Live animals, meat, fish and crustaceans, dairy, coffee and tea |
| | Philippines | Copper, aluminum |
| | Thailand | Pharmaceutical products , organic chemicals, coffee/tea/spices, beverages and spirits |
| | Viet Nam | Cosmetic , animal feed, pharmaceutical products , fertilizer |
| Monopolistic measure | Indonesia | Mineral fuels, oils, waxes and bituminous sub, cereals, explosives, matches, pyrotechnic products |
| | Malaysia | Cereals, milling industry products, preps. Of cereals, flour, starch or milk |
| | Viet Nam | Mineral fuels, oils, waxes and bituminous sub, paper and paperboard, articles of paper pulp, nuclear boilers |
| Automatic import licensing | Indonesia | Cereals, sugars and sugar confectionery, nuclear boilers, machinery and mechanical appliances, computers, electrical machinery and equipment |
| | Malaysia | Coffee, tea, mate and spices, milling industry products |
| | Thailand | Mineral fuels, oils, waxes and bituminous sub, articles of apparel and clothing accessories-not knitted or crocheted |
| | Viet Nam | Electrical machinery and equip. and parts , telecommunications equip., medical or surgical instruments and accessories, nuclear boilers, mechanical appliances, computers |
| Internal tax | Indonesia | Sugars and sugar confectionery, vehicles |
| | Philippines | Vehicles other than railway or tramway rolling stock, |
| | Viet Nam | Mineral fuels, oils, waxes and bituminous sub, tobacco and manuf. Tobacco substitutes |

| | | |
|-----|-------------|---|
| TQR | Malaysia | Edible vegetables |
| | Philippines | Sugars and sugar confectionery, coffee, tea, mate and spices |
| | Thailand | Misc. Edible preparations, ed. Fruits and nuts, peel of citrus/melons, oil seeds/misc. Grains/med. Plants/straw |
| | Viet Nam | Sugars and sugar confectionery, tobacco and manuf. Tobacco substitutes |

Source: Author's computation.

Table 6: Type of NTMs applied in ASEAN (percentage)

| | Description | 1994 | 2005 |
|-----------------|------------------------------|------|------|
| Non-core | Automatic licensing measures | 2.0 | 2.4 |
| | Monopolistic measures | 1.5 | 2.7 |
| | Technical measures | 39.2 | 49.0 |
| Core | Price control measures | | 2.8 |
| | Finance measures | | 0.1 |
| | Quantity control measures | 57.3 | 43.1 |

Source: Basu, Kuwahara, and Dumesnil (2012).

3.3. Other evidence of NTM prevalence in ASEAN

The ASEAN data on NTMs, because it is collected as applied per tariff line, is useful for evaluating the type of products in which NTMs have major potential deterrent effect. In principle, because of the ASEAN Secretariat's effort to classify the NTM impact into red, amber and green categories,¹³ ASEAN member countries would have been helped to eliminate many red-colored NTMs and thus reduce more number of NTBs. However, few NTBs have so far been removed from the list because of one public good objective justification and another.

¹³ The color classification of red, amber and green is patterned after the WTO color scheme for subsidies, where red is a trade protectionist measure and must be removed.

3.3.1. Business surveys

Indeed, the limitation in the available NTM data is that the measure might be, on its face, legitimate but the actual applications can be discriminatory and thus a trade barrier. This type of information is very hard to get if official notification were to be the only source. Business perceptions and actual experiences of the trade measures are important additional information that can help identify non-tariff barriers. For example, an UNCTAD survey¹⁴ of exporting and importing firms from the Philippines and Thailand found procedural obstacles such as inefficiency or obstruction (e.g. excessive documentation and requirements), and arbitrariness or inconsistency (usually owing from behavior of public officials) as the major obstacles encountered by both importing and exporting firms (see Table 7). Other types of obstacles that importing firms faced were unusually high charges, lack of transparency (or inadequacy of information on laws and regulations). Legal issues (such as lack of enforcement of rules) appear to be more of a problem for exporting firms than for importing firms, while discriminatory behavior (e.g. favoring local suppliers) seem more of a concern for importers. Survey results such as below point to the need and the urgency of ASEAN programs such as the ASEAN Single Window where electronic filing can reduce inefficiencies arising from duplicative papers and requirements. The Trade Repository that is part of the Single Window program can also help mitigate the problems arising from non-transparency.

Table 7: Reported procedural obstacles in trade (% of cases)

| | By importing firms | | By exporting firms | |
|---|--------------------|----------|--------------------|----------|
| | Philippines | Thailand | Philippines | Thailand |
| Arbitrariness or inconsistency | | 33.3 | 27.4 | 12.7 |
| Discriminatory behavior favoring domestic producers | | | 2.8 | 3.8 |
| Inefficiency or obstruction | 85.7 | 41.7 | 42.9 | 63.2 |
| Non-transparency | | | 6.8 | 4.4 |
| Legal Issues | 14.3 | 8.3 | 1.8 | 0.3 |
| Unusually high charges/fess | | 16.7 | 16.9 | 13.5 |
| Uncategorized | | | 1.4 | 2.1 |

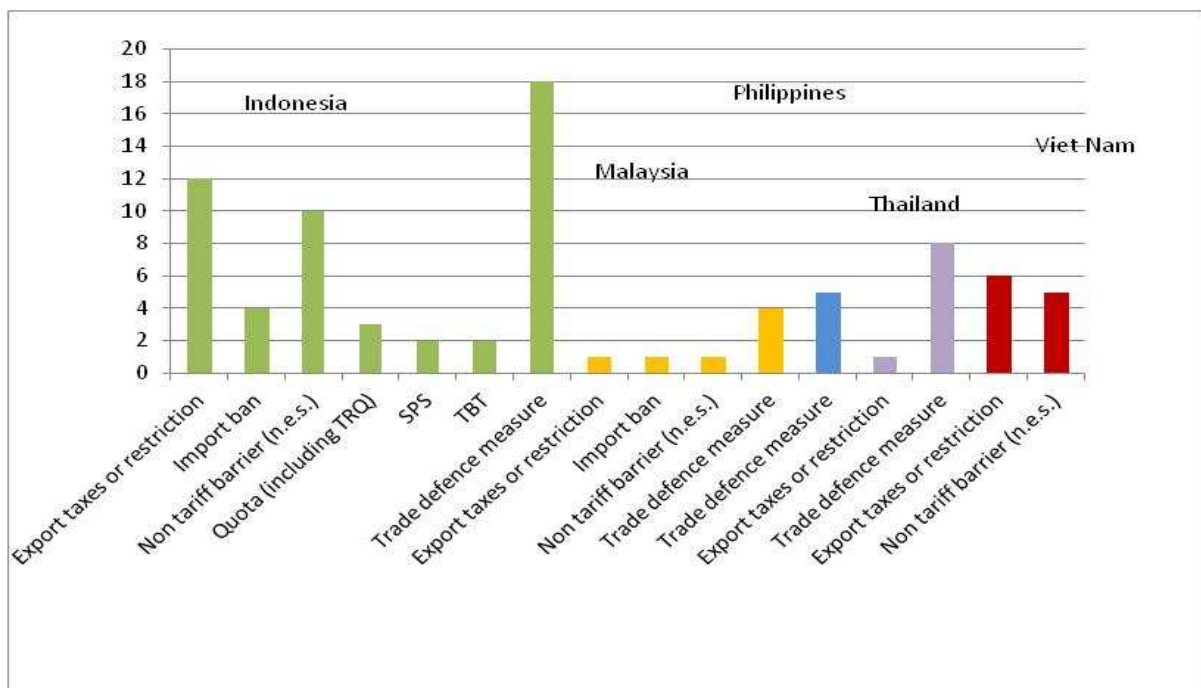
Source: Reorganized by author based on tables from UNCTAD (2009) and Basu, et.al (2012).

¹⁴ See UNCTAD (2009).

3.3.2. Global Trade Alert

Another source of information of non-tariff measures is the Global Trade Alert (GTA) website which collects existing and new measures as well as measures that are being considered that affect global trade since the global economic downturn (in 2009). GTA categorizes measures as red (if it almost certainly discriminates against foreign interests), amber (if the implemented measure may entail discrimination or a measure being considered will almost certainly discriminate against foreign interests), or green (if the measure is nondiscriminatory, or involves liberalization or transparency). Figure 8 shows some selected measures related to NTM that are considered ‘red’ or discriminatory. It shows that, since the global downturn, Indonesia had significantly increased the number of potential NTBs based on GTA’s assessment. Use of trade defense measures like countervailing duties, safeguards, and anti-dumping had increased for Indonesia (18 measures/ cases), Malaysia (4), Thailand (8), and the Philippines (5). Export restrictions and import bans are also prominent in all countries except Philippines, while technical measures (SPS and TBT) are found discriminatory only in Indonesia.

Figure 8: Selected discriminatory trade measures (compiled by Global Trade Alert)



Source: Author’s computation based on data collected by www.globaltradealert.org. Accessed June 4, 2013.

This type of information from an independent monitoring organization supplements the reported official information to the ASEAN Secretariat and helps in the peer monitoring of ASEAN Members' compliance with regional integration programs.

3.3.3. Trade Policy Reviews

Another good source of information for non-tariff measures and potential non-tariff barriers are the periodic trade policy reviews (TPR) of individual WTO countries.¹⁵ Trade policy reviews include a section about the changes in trade policies and practices by measure. Though not presented in an easily analyzable format, the report gives a rich discussion of measures and affected products, their rationales, procedures on obtaining licenses and permits, and the major government agencies responsible for the implementation of various measures. For example, in the most recent WTO TPR report on Indonesia, some information on non-tariff measures and affected products can be culled and are presented in Appendix 2. The TPR also cites WTO members' reported concerns about the complexity and lack of transparency and trade-impairing effects of Indonesia's import licensing requirements, especially with respect to horticultural products, animal and animal products, electronics, ready-made clothes, toys, footwear, food and beverages (WTO, 2013) (see Table 8). Nine out of 11 specific trade concerns raised at the WTO took place from 2007 to 2012 which suggests an apparent surge of protectionist policies in recent years in Indonesia.

These types of information – i.e. concerns on trade-impairing measures - may not necessarily be reflected in the official NTM data submitted by the individual ASEAN member country. Thus, there is need to supplement analysis of NTMs in the ASEAN database by data from various other sources.

¹⁵ Frequency of trade policy reviews depend on the share of the country to global trade. Some are reviewed every three years, others every five or six years.

Table 8: Specific trade concerns raised on Indonesia (since 2007)

| Measure | Raised by | Products affected |
|---|---|---|
| Import permit regulations | European Union, the United States and South Africa | Horticultural products |
| New requirement for hoses to be orange | EU | Rubber hoses for LPG gas stoves |
| Whether new regulation, intended to protect consumers, should apply to certain intermediate goods used in car manufacturing and consumer electronic | South Korea | Zinc coated steel sheet |
| Mandatory certification: concern about the rationale for the measure and its implementation, including conformity assessment procedures | Japan, the Republic of Korea, the European Union, and Chinese Taipei | Hot-rolled steel sheets and coils and zincaluminium-coated steel plates and electrolysis-tin-coated thin steel sheets |
| Transparency in the development of a new regulation and of a notification to the TBT Committee before its entry into force | US | Halal products |
| New requirement limiting the granting of distribution licenses to emergency situations only (later replaced by a labeling requirement) | US, EU | Food, food supplements, drugs, and cosmetics sourced from or contained "un-halal" substances and/or alcohol |
| Labelling requirement, including a requirement for importers (and domestic producers) to submit a sample label to the Ministry of Trade in order to obtain a certification of labelling in the Indonesian language, prior to entry in Indonesian customs area | European Union, Australia, and the United States | Certain imported goods |
| Draft modification to the technical regulation | Mexico and South Africa | Food categories |
| Technical specification and mandatory requirement: issues related to conformity assessment procedures and transparency | US, EU | Toys |
| Import restrictions | Mexico, Australia, Brazil, Canada, the Dominican Republic, and the United States | Pork products |
| New meat import conditions | EU | Meat products |
| Import restrictions | Brazil | Poultry meat, beef |
| Port closure | United States Australia, Canada, Chile, the EU, Japan, the Republic of Korea, New Zealand, and South Africa | |

Source: Compiled by author from WTO (2013).

4. Ways to address NTMs in ASEAN

The discussion above has underlined the importance of focusing efforts at reducing NTMs particularly on two major types: quantity control measures and technical measures. Most of the quantity control measures used in ASEAN countries are non-automatic licensing, import permit requirements, and import prohibitions, while for technical measures, the problems are mostly related to conformity assessment procedures, testing and inspection.

ASEAN's program that tackles harmonization of national standards with international standards, mutual recognition agreement for conformity assessment, accreditation of testing laboratories, etc. is right on target as far as addressing the issue of technical measure. In time, this effort would yield improved efficiencies that can generate greater intra-regional trade in the prioritized sectors. But there are still major gaps that require ASEAN's attention, particularly in the areas of notification and transparency as well as in the countries' commitments to pare down the number of trade-impairing NTMs. This section discusses some ways to address these issues.

4.1. Different strokes for different blocks

NTMs are complex instruments. They affect trade in many ways even without protectionist objectives (Cadot and Malouche, 2012). To deal with NTMs require different approaches for different types of measures. For example, if the NTM is about excessive customs charges, an approach to improve trade is outright elimination or reduction of charges. If the NTM is about a monopolistic measure, i.e. a state trading enterprise that is the only one allowed to import commodities, an advice is to open windows of competition for the monopolist. For technical measures like TBT and SPS, the steps are standards harmonization, conformity assessment improvement and MRAs. For NTMs that are customs related, trade facilitation programs that include infrastructure development and computerization are a help.

For a number of these solutions, there are no major political economy motives that would reasonably block them. For example, customs modernization and many trade facilitation programs have generated wide support from almost all stakeholders, particularly the business community whether they be domestic producers, exporters, or importers. But other approaches require a stronger commitment from the top to push through with the necessary regulatory changes. In particular, for transparency and quantity control measures (especially, non-automatic licensing), the following suggestions can be considered.

4.1.1. Improving transparency through improved notifications and trade portals

The ASEAN Trade in Goods Agreement (ATIGA) contains provisions on notification and transparency. It requires notification to ASEAN Secretariat and SEOM of a measure at least 60 days before it is supposed to come into effect. However, the experience has been that ASEAN members do not religiously follow this obligation so much so that other members learn only about the measures of some ASEAN countries either after they take effect or from the WTO notifications.¹⁶ A simple solution is to require that any notification to the WTO of any changes in regulatory measures that have a trade effect should also be copied and notified to ASEAN. This is doable but would still be limited by the natural perverse incentive problem associated with voluntary reporting, i.e. to report means to open itself to criticisms and objections, hence the presence of an incentive to remain ambiguous.

Other ways to improve transparency is to work with third parties, for example, the Global Trade Alert (GTA) monitors trade-affecting measures and categorizes them as discriminatory (red), possibly discriminatory (amber), or non-discriminatory (green). Knowledge of these measures can augment the database of NTMs that ASEAN has already collected and members have verified. Third party data sources of new measures can also alert the ASEAN Secretariat and the Coordinating Committee for ATIGA (CCA) of a member's non-reporting of new measures.

Business surveys that collect exporters' and importers' experience of difficulties in trading (like what UNCTAD, ITC and others have done) is also another way to improve the quality of NTM information. But conducting periodic surveys is costly besides usually getting very low turnout from business respondents. An alternative can be to develop an electronic ASEAN trade portal where anybody (freight forwarders, shippers, exporters, importers, etc.) can report a trade-impairing measure online.¹⁷ This is somehow similar to the 'reverse notification' that the WTO has encouraged, whereby any WTO member can report other countries' measures if they found them out in the course of their companies doing business there.

¹⁶ Baccheta, Richtering and Santana (2011) notes that the notification system has a basic problem of incentives. Its voluntary nature allows countries to choose whether to notify or not. If they notify, they expose themselves to objections and possible criticisms (of the measure). Lack of notification may reflect either restraint in the use of NTMs (a good thing) or failure to communicate (a bad thing). Another problem with notification is that the trade officials may, themselves, not be aware of all trade-affecting measures because regulations originate from multiple agencies. Some agencies do not see the need to inform trade ministries about a measure, or they are not aware of its trade impact and significance.

¹⁷ The EU depends on online reporting by EU exporters of market access barriers in any country. The European Commission analyzes those reports to check for breach in international trade rules, if any. For a sample of how the EU facilitates the reporting of trade barriers by businesses, see http://madb.europa.eu/madb/complaint_register_form.htm

Notification information should be made available to businesses and should not remain only under the purview of the ASEAN Secretariat and relevant government bodies. ASEAN should accelerate the plan for a trade portal where all relevant trade information can be accessed and where queries on trade measures can be made. The trade portal should be a rich depository of trade data, government measures, and new developments (e.g. possible introduction of new measures) that can impact intraregional trade.

4.1.2. Lowering NTBs by agreeing on reduction targets

One thing is to improve the 'universe' of known non-tariff measures, another is to arrive at modalities to do something about them. In principle, the Coordinating Committee on ATIGA (CCA) is supposed to determine the NTBs out of the known measures but the task of NTB identification is not straightforward. But for some measures like quantity control measures or monopolistic measures, where the effect on volume of intraregional trade is clearly negative, ASEAN members are supposed to agree to remove them. Doubtless, political economy factors prevent members from 'moving first' but if ASEAN can agree on specific targeted reductions then it would lend support for the individual ASEAN member's effort to counter domestic oppositions to reforms. In particular, since our study found that non-automatic licensing is among the most prevalent NTMs among the quantity control measures, an agreement among ASEAN can be made about reducing X% of tariff lines with non-automatic licensing measure every year until a maximum threshold (i.e. maximum number of tariff lines) is achieved where non-automatic licensing is truly deemed necessary.

4.1.3. ASEAN-wide Review of Commitments

Trade policy review mechanism is another solution that can help minimize the protectionist use of NTMs. Unlike in the WTO, ASEAN has no built-in system for trade policy review. But third parties and academics, in fact, do the great service of assessing ASEAN Agreements' implementation but these studies usually come in spurts. Institutionalizing such a system of review will help ASEAN members take their commitments more seriously and within their committed timeline. The ASEAN Secretariat can engage foreign institutional partners to get resources to fund periodic (bi-annual or every three years or five yearly) review of country commitments assuming insufficient operational funds. The review can focus on progress in compliance by individual ASEAN countries, as well as potential new measures that can impact regional trade. If found non-compliant, the reviewer's report's publication can

potentially have a similar effect to the 'name and shame' strategy in other regional blocs such as the EU.

4.2. Improving dispute settlement mechanism

In those cases where the country's evaluation of a measure differs from the affected countries' or affected businesses' evaluation, resort to dispute settlement mechanism is provided for in ATIGA.

4.2.1. Protocol on Enhanced Dispute Settlement Mechanism

The ASEAN Protocol on Dispute Settlement Mechanism, signed in 2004, is patterned after the WTO's dispute settlement mechanism. Any dispute starts with request for consultation, and if that fails to resolve the conflict between Member Countries, the SEOM shall establish a panel to recommend a resolution of the issue. The Protocol has also established an appeal procedure similar to that in the WTO, as well as possible arbitration after the panel/appellate body report has been adopted.

As in the WTO, the ASEAN Protocol has strict timelines, in fact, with even tighter deadlines than in the WTO. For example, from the consultation phase to the panel body report adoption, the whole process is envisioned to finish in approximately 7 months, compared to WTO's 12 months. With appeal, the process can take a maximum of approximately 11 months (compared to 15 months for the WTO) (see Table 9). Whether this timeline is realistic is another story. Vergano (2009), for one, contends that to expect the panel to complete its work within 60 to 70 days from its establishment is unrealistic. The panel establishment and determining the composition of the panel alone can already take up to thirty days, leaving the actual panel only 30 to 40 days left to complete its work and submit its report. If expert advice is still needed, the process can also take another significant chunk of time. Thus, it is highly likely that the panel process will not be able to deliver its report according to the statutory timeframe thus diminishing the dispute settlement mechanism's credibility.

Table 9: Timelines for WTO and ASEAN Dispute Settlement Process

| | WTO | ASEAN |
|--|------------------|--------------|
| Consultation, mediation, etc | 60 days | 60 days |
| Panel set up and panel members appointed | 45 days | 45 days |
| Final report to Parties | 6 months | |
| Final report to WTO-DSB or ASEAN-SEOM | 3 weeks | 70 days |
| Adoption of report by DSB or SEOM | 60 days | 30 days |
| Total (if without Appeal) | 1 year | 205 days |
| Appeals Report | 60 – 90 days | 60 – 90 days |
| DSB or SEOM adopts report | 30 days | 30 days |
| TOTAL | 1 year, 3 months | 11 months |

SEOM = Senior Economic Officials Meeting; DSB = Dispute Settlement Body

Source: WTO website; Author's approximate calculation based on the ASEAN Protocol on Enhanced Dispute Settlement Mechanism

The Protocol also contains provisions for an automatic adoption of Panel Body Report (unless Parties appeal the decision) or Appellate Body Report, unless the SEOM agrees *by consensus* not to adopt the report. The consensus requirement makes it very unlikely for any Panel Body/Appellate Body decision not to be adopted by the SEOM. The SEOM, like the WTO Dispute Settlement Body, also includes in its agenda the monitoring and surveillance of the implementation of the Report recommendation until the issue has been fully resolved.

The enhanced ASEAN dispute settlement protocol, on its face, provides some cause for optimism, particularly in view of the 'automaticity' of the adoption of panel or appellate body decisions. However, a few issues in the Protocol cause some concerns.

First, the Protocol provides freedom to Member States to choose the forum for resolving trade conflicts between any two members. This means that ASEAN members may opt to use the WTO dispute settlement mechanism if both parties are members and the issue concerns a violation of both WTO rule ASEAN Agreement. Though using ASEAN dispute settlement mechanism is perhaps relatively less costly compared to having the proceedings done in Geneva under the WTO dispute settlement mechanism, the use of the latter may provide greater 'security' in arriving at a better 'reasoned' result. This is because the WTO-

DSM has a long list of decided cases and has a larger pool of potential panelists that have expertise in trade law. Hence, in cases where both ASEAN agreement and WTO law applies, there is greater likelihood that member countries will opt for the WTO-DSM.

Significantly, the Protocol requires the Parties involved in the case to share in the cost of the dispute settlement process. Unlike in the WTO where the costs of Panel and Appellate Body proceedings are part of the WTO budget, in ASEAN, the Parties in a given case must replenish the drawdowns from the ASEAN DSM Fund, a revolving fund that is separate from the ASEAN Secretariat's regular budget. The panel and appellate body decides on the apportioning of the cost for settling the dispute among the Parties. This is potentially a disincentive for Member Countries to use the ASEAN dispute settlement mechanism, and in the long-run, it is an obstacle to have a rules-based economic community.¹⁸

More than the paying of the cost of the dispute settlement or the absence of case law in ASEAN, the greatest factor that casts doubt on the use of ASEAN-DSM, however, is cultural. ASEAN countries, by culture, are averse to litigations and prefer informal processes, i.e. consultations and bilateral negotiations. This is the reason that thus far, no reported trade conflict among ASEAN has ever reached the formation of a panel body to decide its outcome. In all cases in the past, trade issues were resolved through bilateral negotiations, with senior trade officials (who know each other well) doing the direct negotiations (Siong, 2011). The system had worked in the past without resorting to formal legal processes. This, however, can change over time as trade officials get to be newer, younger, and lacking the same personal familiarity with one another that older ASEAN representatives developed over the years.

Even at the WTO, only one dispute between two ASEAN countries have gone through the dispute settlement process up to the Appellate Body,¹⁹ while others did not reach the panel body phase. Appendix 3 shows various WTO cases where an ASEAN member was a

¹⁸ Other differences from the WTO mechanism include the following:

- In the WTO, the DSB is required to convene, if necessary, to be able to adopt a panel/appellate body report within the statutory 30 days limit. In the ASEAN Protocol, the adoption of the report may be done by circulation, whereby a non-reply is considered as acceptance of the decision
- The Protocol expressly provides that when the losing Party requests a longer period of time to comply with the findings and recommendations of the adopted reports, the other Party must not unreasonably deny such request.
- The ASEAN dispute settlement mechanism does not have provisions for 'non-violation complaints', i.e. in cases of measures by Member Countries which do not conflict with provisions of the WTO covered agreements but directly or indirectly impair or nullify another Member's benefits under the agreement. Non-violation complaints have a potential link with disputes affecting regulations or NTMs that are compliant, on its face, but do have the effect of nullifying a country's concession.

¹⁹ Thailand: Cigarette case (with the Philippines as complainant)

respondent. In all cases, except two,²⁰ the complainants have been all non-ASEAN countries. The exceptions are the dispute between Singapore and Malaysia over the latter's prohibition of imports of polyethylene and polypropylene which ended up being bilaterally; and the cigarette tax dispute between Thailand and the Philippines.

Compared to the EU dispute settlement mechanism, the ASEAN-DSM is 'weak' because of the absence of 'direct effect' of regional agreements. The principle of direct effect in the EU gives citizens the right to invoke EU agreements in national courts directly (see Box 2). In contrast to the EU, ASEAN laws have no direct applicability nor direct effect on individual ASEAN member countries. ASEAN countries still need to transpose ASEAN agreements into national laws for them to be domestically applicable. Neither is there any direct effect of ASEAN agreements on national courts in the sense that a national of any given ASEAN country cannot invoke rights and obligations from ASEAN agreements in their own national courts. The ASEAN agreements bind the individual member states at an inter-governmental level, similar to how the WTO binds its members, and in the absence of national implementation (transposition), ASEAN laws cannot be domestically invoked or enforced by its citizens on national courts.

4.3. Improving the process, design and implementation of NTM

Regional efforts at harmonization and removal of NTBs take a long time, but a unilateral approach to improve NTMs is realizable by each individual ASEAN member. This can be done if each country is convinced that doing so is for their own benefit, for the improvement of their own competitiveness rather than a concession to ASEAN.²¹ NTMs, after all, even the non-protectionist types, if applied to consumer goods, increase the cost to consumers, and if applied to intermediate goods, increase the cost to producers and thereby affect their competitiveness. The challenge is to balance the reduction of business costs against the preservation of 'local public goods' (Cadot and Malouche, 2011). This means not the elimination altogether of NTMs because this may be undesirable especially if the NTMs address a genuine public good, i.e. for protection against health and environmental hazards.

²⁰ Thailand vs. Philippines; Malaysia vs. Singapore

²¹ Hoekman (2011) makes a similar argument for autonomous, unilateral reforms in services regulation. He encourages going beyond the narrow focus on market access, while taking regulatory constraints and reforms seriously. To achieve this requires a more robust governance framework at the national level that accounts for the effects of prevailing policies and the likely impacts of alternative types of reforms. See also Sauve, Pasadilla and Mikic (2011).

It means rather the improvement of NTMs through “better design, smarter enforcement and, ultimately through a robust governance framework.”²²

Improving the design of regulations requires looking into:²³ 1) the market failure (or source of the problem) that justifies government regulation; 2) whether the measure addresses the market failure adequately and with the least cost; and 3) comparison of the costs and benefits of the measure. In other words, this requires that use of regulatory impact analysis (RIA) in policymaking should underpin discussions of whether to introduce new non-tariff measures and maintain existing ones. Its use helps ensure that policies are coherent, efficient and effective. The use of RIA in NTM discussions points to the need for individual ASEAN countries to build and improve analytical capacities.²⁴ Financial commitment to support analytical work is necessary to support an evidence-based approach to regulatory reform. Capacity building efforts towards this end is a wise use of technical assistance money.

While RIA can help inform the policy discussions, at the bottom of a unilateral approach to regulatory reform is a strong top-down political will to act on the results of the analysis, overcoming the expected conflicts between ministries and agencies as well as pressures from economic operators protecting their own self-interest.

²² *Ibid.*, Cadot and Malouche (2012)

²³ See Cadot, Malouche and Saez (2012)

²⁴ Viet Nam has recently adopted regulatory impact assessment in its policy-making. No other ASEAN country, besides Viet Nam, is known to have adopted RIA as part of policy-making.

Box 2: The EU dispute settlement system and its role in European economic integration

Unlike the WTO which relies on panel body and appellate body for decisions on trade disputes, the EU relies on standard court system. The European treaty created the European Court of Justice (ECJ) to decide cases related to EC laws. Over time, the role of the ECJ became pivotal for the increased European integration.

Several factors make the ECJ a supranational institution that is effective in enforcing EC laws. First is the principle of direct effect which gives citizens of EC member countries rights to invoke EC laws in cases before national court. The principle of direct effect allows individual litigants in EU countries to use EC laws to force their own governments to remove national restrictions and to comply with EC law. Through the principle of direct effect, citizens have become partners of the ECJ (and the European Commission) to enforce EC laws. Second is the principle of supranationality which claims that, in case of conflict, European Community law is prior to national law. The principle obliges national courts to disapply a national law if it goes against an EC law according to the ECJ interpretation.

Interestingly, these principles were not stated as such in the European Treaties but were formulated by the ECJ in its case decisions. Once the ECJ principles have been stated, European leaders who wanted to preserve their sovereignty were unable to remove them, partly owing to the different interests by member states and the complex voting requirement for them to undo what has been considered as judicial over-reach by the ECJ.

Since the decisions of the ECJ have been mostly pro-interstate commerce, it had a very strong influence in the increased economic integration in the EU. Most of its influence come through the preliminary reference system whereby national judges can pose questions to the ECJ regarding the meaning and application of EC Law in a given case. The ECJ answers these questions with preliminary rulings which the national judge may use to adjudicate in the case before him. The ECJ also rules on infringement cases but majority of the case laws had grown out of the preliminary reference system. Empirical evidence exist that the growing number of preliminary rulings is highly correlated with growth in inter-regional trade within the EU (see, for example, Gabel and Carrubba, 2009).

One interesting ECJ case that is related to non-tariff measures is the *Cassis de Dijon* case. The case involves a French liquor company that was prohibited by the German government to market Cassis de Dijon fruit liquor with alcohol level of about 15-20% in Germany on the ground that fruit liquors in Germany should contain a minimum alcohol level of 32%. Germany invoked consumer protection, i.e. consumers would buy fruit liquor thinking they get higher alcohol when, in fact, they do not. ECJ used the principle of proportionality to rule against the German measure deciding that it went beyond what was necessary to achieve a valid aim. In the *Cassis* case, protecting consumers was justified but the measure was disproportionate and made intra-community trade unnecessarily difficult. Less burdensome solutions like labeling could achieve the same end of consumer protection.

Summary and Conclusions

Intra-regional trade has increased six-fold since ASEAN member countries embarked on regional economic integration in 1993. Much progress, particularly in tariff reductions, has been achieved over 20 years, but a greater challenge is coming to the fore in eliminating non-tariff barriers that still greatly affect trade. Here, too, ASEAN is taking the right direction in its Trade Facilitation Work Programme which includes reducing the trade-impairing effects of NTMs. It is addressing NTMs through harmonization of ASEAN Members' standards with international ones, where possible, signing mutual recognition agreements to make conformity assessments procedures simpler and to facilitate trade flows overall.

The incidence of NTMs in ASEAN follows the global shift from the use of core NTMs, namely quantity restrictions, price control and finance measures, or monopolistic measures, to greater utilization of technical measures such as TBT and SPS. Still, ASEAN makes use of a good number of quantity restrictions but predominantly non-automatic licensing. Much of the ASEAN effort on NTMs has addressed the technical measures through MRAs and adoption of international standards, but much remains to be done with quantity restriction measures, especially reduction in the use of non-automatic licensing.

Greater transparency of NTMs that are implemented in different ASEAN markets is another important task. But because of the individual countries' perverse incentive to remain ambiguous, other sources of information need to be used to supplement the available information from the ASEAN database. Third party sources, business surveys, reverse notification from other members about measures encountered in another country in ASEAN should be drawn upon to have a more complete picture of real incidence of NTMs. ASEAN should accelerate the development of a 'one-stop-shop', or trade portal, for all relevant trade information to help businesses access the trade measures in the different ASEAN countries. Periodic reviews of how individual member countries are complying with their ASEAN commitments and applying NTMs would be another helpful solution to improve measure applications and transparency.

The enhanced protocol on dispute settlement mechanism supports the transformation of ASEAN into a more rules-based economic community. Patterned after the WTO dispute settlement mechanism, it remains to be seen if the ASEAN-DSM will be used given ASEAN's preference for more informal procedures of consultation and bilateral negotiations. The dispute settlement process in ASEAN comes up short compared to the EU's system

whereby regional economic agreements have direct effects in domestic court's decisions in the individual EU countries.

Despite avowed objective to eliminate NTBs, the pace of its agreed reduction in ASEAN has been slow. Part of the reason is the difficulty of assessing whether an NTM is truly an NTB. Several countries had changed many of what the ASEAN Secretariat proposed as NTBs into 'green' NTMs by invoking a 'legitimate' rationale. This type of reaction is perhaps endemic in the process, thus unless individual ASEAN member countries themselves have the political will to remove NTBs and to make NTMs that impose the least cost on trade, NTB reduction will remain hostage to a mercantilist-inspired negotiation processes. One important approach that can inform policy discussions on NTMs and provide the necessary support for regulatory reforms is the use of regulatory impact analysis (RIA). But this requires strong analytical capabilities and strong financial commitment to support analytical work.

In the work on NTMs, major capacity building assistance is necessary. To inform policy discussions through analytical work requires building capabilities in national governments. Implementing standards harmonization and mutual recognition agreements in conformity assessments require training of more technical experts to carry out inspection, testing, or accreditation, and to effectively participate in standards setting. Success in streamlining NTMs might, in the final analysis, rely on the capacity building activities and support that national governments undertake.

References

- ASEAN. 2009. ASEAN Trade in Goods Agreement. Downloadable:
<http://www.asean.org/communities/aseaneconomiccommunity/category/asean-trade-in-goods-agreement>
- Bacchetta, M., J. Richter, and R. Santana. 2012. "How Much Light do WTO Notifications Shed on NTMs?" In O. Cadot and M. Malouche, eds, *Non-tariff Measures: a Fresh Look at Trade Policy's New Frontier*. Washington, D.C.: Center for Economic Policy Research and World Bank.
- Bao, H. 2011. "Experiences of ASEAN Consultative Committee on Standards and Quality (ACCSQ)". Presentation at the WTO Workshop on Regulatory Cooperation, Geneva, November 8-9.
- Basu, S., H. Kuwahara, and F. Dumesnil. 2012. "Evolution of Non-tariff Measures: Emerging Cases from Selected Developing Countries." Policy Issues in International Trade and Commodities Study Series No. 52. Geneva: UNCTAD.
- Cadot, O. and M. Malouche. 2012. "Overview". In O. Cadot and M. Malouche, eds, *Non-tariff Measures: a Fresh Look at Trade Policy's New Frontier*. Washington, D.C.: Center for Economic Policy Research and World Bank. Downloadable:
http://www.cepr.org/pubs/books/cepr/NTM_measures.pdf
- Cadot, O., M. Malouche, and S. Saez. 2012. *Streamlining Non-tariff Measures: A Toolkit for Policy Makers*. Washington, D.C.: World Bank Group
- ERIA. 2012. Mid Term Report of the Implementation of the AEC Blueprint: Executive Summary. October. Downloadable:
<http://www.eria.org/MidTerm%20Review%20of%20the%20Implementation%20of%20AEC%20Blue%20Print-Executive%20Summary.pdf>
- ERIA. Draft Final Report on AEC Scorecard, Phase 2. Jakarta: Unpublished report.
- Ferrantino, M. 2010. "Methodological Approaches to the Quantification of Non-tariff Measures." In M. Mikic, ed. *Non-tariff Protectionism and Crisis Recovery*. Bangkok: Asia-Pacific Research and Training Network on Trade and UN Economic and Social Commission for the Asia and the Pacific
- Gourdon, J. and A. Nicita. 2012. "NTMs: Interpreting the New Data". In O. Cadot and M. Malouche, eds, *Non-tariff Measures: a Fresh Look at Trade Policy's New Frontier*. Washington, D.C.: Center for Economic Policy Research and World Bank.
- Gabel, M. and C. Carrubba, 2009. "The European Court of Justice as an Engine of Economic Integration: Reconsidering evidence that the ECJ has expanded economic exchange in Europe." Downloadable: <http://ssrn.com/abstract=1444500>
- Hoekman, B. 2011. "Harnessing Services Trade Reform for Inclusive Growth: Lessons from the 1980s vs the 2000s." In P. Sauve, G. Pasadilla and M. Mikic, eds., *Service Sector*

Reforms: Asia-Pacific Perspectives. Bangkok: ADB Institute and Asia-Pacific Research and Training Network on Trade.

Sauve, P., G. Pasadilla, and M. Mikic, eds. 2011. *Service Sector Reforms: Asia-Pacific Perspectives*. Bangkok: ADB Institute and Asia-Pacific Research and Training Network on Trade.

Siong, D. 2011. "Trade Dispute Settlement within ASEAN." In L. Young, ed. *ASEAN Matters: Reflecting on the Association of Southeast Asian Nations*. Singapore: World Scientific.

UNCTAD. 2009. *Non-tariff Measures: Evidence from Selected Developing Countries and Future Research Agenda*. Geneva: UNCTAD.

UNCTAD. 2010. "Non-tariff Measures: Evidence from Selected Developing Countries and Future Research Agenda." *Developing Countries in International Trade Studies*. Geneva: UNCTAD.

UNCTAD. 2012. *Classification of Non-tariff Measures*. February. Downloadable: http://unctad.org/en/PublicationsLibrary/ditctab20122_en.pdf

Vergano, P. 2009. "The ASEAN Dispute Settlement Mechanism and its Role in a Rule-Based Community: Overview and Critical Comparison." Paper submitted to the Asian International Economic Law Network (AIELN) Inaugural Conference, 30 June 2009. Downloadable: http://aieln1.web.fc2.com/Vergano_panel4.pdf

WTO. 2013. *Trade Policy Review: Indonesia*. Geneva: WTO.

Appendix 1: Brief description of NTM chapters

Chapter A, on sanitary and phytosanitary measures, refers to measures affecting areas such as restriction for substances, restrictions for non eligible countries' hygienic requirements, or other measures for preventing dissemination of diseases, and others. Chapter A also includes all conformity assessment measures related to food safety, such as certification, testing and inspection, and quarantine.

Chapter B, on technical measures, refers to measures such as labelling, marking, packaging, restrictions to avoid contamination or other measures protecting the environment, standards on technical specifications, and quality requirements.

Chapter C classifies the measures related to pre-shipment inspections and other custom formalities.

Chapter D, contingent trade protection measures, i.e., measures implemented to counteract particular adverse effects of imports in the market of the importing country, including measures aimed at unfair foreign trade practices. They include antidumping, countervailing, and safeguard measures

Chapter E, licensing, quotas and other quantity control measures including tariff rate quotas. Chapter E also covers licenses and import prohibitions that are not SPS or TBT related.

Chapter F, on charges, taxes and other para-tariff measures, refers to taxes other than custom tariffs. Chapter F also groups additional charges such as stamp taxes, license fees, statistical taxes, and also decreed customs valuation.

Chapter G, on finance measures, refers to measures restricting the payment of imports, for example when the access and cost of foreign exchange is regulated. It also includes measures imposing restrictions on the terms of payment.

Chapter H, on anticompetitive measures, refers mainly to monopolistic measures, such as state trading, sole importing agencies, or compulsory national insurance or transport.

Chapter I, on trade-related investment measures, groups the measures that restrict investment by requesting local content and thus restricting import, or requesting that investment should be related to export in order to balance imports.

Chapter J, on distribution restrictions, refers to restrictive measures related to the internal distribution of imported products. These measures would hinder trade from taking place because there would be difficulty in distributing the products once entering the country.

Chapter K, on the restriction on post-sales services, refers to difficulties in allowing technical staff to enter the importing country to install or repair technological goods imported.

Chapter L contains measures that relate to the subsidies that affect trade.

Chapter M, on government procurement restriction measures, refers to the restrictions bidders may find when trying to sell their products to a foreign government.

Chapter N, on intellectual property measures, refers to the problems arising from intellectual property rights.

Chapter O, on rules of origin, groups the measures that restrict the origin of products so that they could benefit from reduced tariffs according to certain rules often set in multiple simultaneous agreements with different countries.

Chapter P, on export measures, groups the measures a country applies to its exports. It includes export taxes, export quotas or export prohibitions, etc.

Source: UNCTAD (2012)

Appendix 2: Indonesia: Non-tariff measures and affected products

| Measures | Affected Products |
|---|---|
| Port of entry restrictions: Licensing procedures and pre-shipment inspection | (a) food and beverages, toys, electronics, footwear and garments; (b) horticultural products; (c) pearls; (d) ozone depleting substances; (e) salt; (f) alcoholic beverages; and (g) hazardous materials |
| Pre-shipment inspection | (a) sugar; (b) rice; (c) salt; (d) precursors; (e) optical discs (empty and filled), and machines and materials used to produce them; (f) textiles and textile products; (g) ozone-depleting substances; (h) nitro cellulose; (i) hazardous materials; (j) colour multifunctional machines, colour photocopying and printing machines; (k) non-hazardous and toxic waste; l) used capital goods; (m) certain imports of electronics, ready-to-wear clothes, children's toys, footwear, and food and beverages; (n) ceramics; (o) sheet glass; (p) pearls; and (q) horticulture products; (r) iron and steel; (s) tires; |
| Import prohibition | Certain shrimp species |
| Quantitative restrictions | rice, sugar, animals and animal products, salt, alcoholic beverages and certain ozone depleting substances |
| Import Licensing/ Permits (some are required on a per shipment basis) | rice, sugar, animals and animal products, salt, as well as certain textiles and textile products; LPG and LPG gas containers; used capital goods; oil and gas; cloves; sodium tripolpy phosphate; horticultural products, and fertilizer -2,060 tariff lines affected (1/5 of total tariffs) |
| New requirements for import licensing | horticultural products (2012); pearls (2012); animal and animal products (2011); used capital goods (2011); sodium tripolpyphospate (2011); fertilizer (2011) oil and gas (2009); nonhazardous and non-toxic waste (2009); LPG and LPG gas containers (2008); certain food, beverages, medicine, cosmetics, clothing and footwear (2008); electronic goods and children's toys (2008); and colour multifunctional machines and colour photocopying and printing machines (2007). |

Source: Compiled by author from WTO (2013).

Appendix 3: WTO cases where respondent is an ASEAN member country

| DS NO. | COUNTRY | DISPUTE SETTLEMENT CASES | COMPLAINANT/S | AGREEMENTS CITED | ISSUE | PANEL REPORT CIRCULATED | PANEL REPORT FINDINGS |
|------------------|-----------|--------------------------|---|---|---|-------------------------|--|
| DS54, 55, 59, 64 | Indonesia | Autos | <ul style="list-style-type: none"> • European Communities • Japan • United States (October 1996) | <ul style="list-style-type: none"> • TRIMs Art. 2.1 • GATT Arts. I:1 and III:2 • ASCM Arts. 5(c), 6, 27.9 and 28 | <p>Measure at issue: (i) "The 1993 Programme" that provided import duty reductions or exemptions on imports of automotive parts based on the local content percent; and (ii) "The 1996 National Car Programme" that provided various benefits such as luxury tax exemption or import duty exemption to qualifying (local content and etc.) cars or Indonesian car companies.</p> <p>Product at issue: Imported motor vehicles and parts and components thereof.</p> | 2 July 1998 | <ul style="list-style-type: none"> • TRIMs Agreement Art. 2.1 (local content requirement): The Panel found the 1993 Programme to be in violation of Art. 2.1 because (i) the measure was a "trade-related investment" measure; and (ii) the measure, as a local content requirement, fell within para. 1 of the Illustrative List of TRIMs in the Annex to the TRIMs Agreement, which sets out trade-related investment measures that are inconsistent with national treatment obligation under GATT Art. III:4. • GATT Art. III:2, first and second sentences (national treatment - taxes and charges): The Panel found that the sales tax benefits under the measures violated both Art. III:2, first and second sentences. The Panel noted that under the Indonesian car programmes, an imported motor vehicle would be taxed at a higher rate than a like domestic vehicle in violation of Art. III:2, first sentence, and also, any imported vehicle would not be taxed similarly to a directly competitive or substitutable domestic car due to these Indonesian car programmes whose purpose was to promote a national industry. • GATT Art. I:1 (most-favoured-nation treatment): The Panel found the measures to be in violation of Art. I:1 because the "advantages" (duty and sales tax exemptions) accorded to Korean imports were not accorded "unconditionally" to "like" products from other Members. • ASCM Art. 5(c) (serious prejudice): The Panel found that the duty and sales tax exemptions under the 1996 National Car Programme were "specific |

| | | | | | | | |
|-------|-----------|--|---------------------------------|---|--|--|---|
| | | | | | | | subsidies" which had caused "serious prejudice" (through significant price undercutting under Art. 6.3(c)) to like imports of EC (but not US) imports under Art. 5(c) |
| DS455 | Indonesia | Importation of horticultural products, animals and animal products | United States (January 2013) | <ul style="list-style-type: none"> • GATT 1994: Art. X:3(a), XI:1 • Agriculture: Art. 4.2 • Import Licensing: Art. 1.2, 3.2, 3.3 | <p>Indonesia subjects the importation of horticultural products, animals and animal products into Indonesia to non-automatic import licenses and quotas, thereby restricting imports of goods.</p> <p>These licensing regimes have significant trade-restrictive effects on imports and are used to implement what appear to be WTO-inconsistent measures. The multi-step licensing process is more administratively burdensome than absolutely necessary to administer the measure. The issuance of RIPH and RPP recommendations, a critical part of the licensing process, appears to be delayed or refused by the Indonesian authorities on non-transparent grounds. The Indonesian licensing measures do not inform traders of the basis for granting licenses. The licensing regimes do not appear to be administered in a uniform, impartial and reasonable manner, because the measures are applied inconsistently and unpredictably.</p> | | Panel established, but not yet composed |
| DS1 | Malaysia | Prohibition of Imports of Polyethylene and Polypropylene | Singapore (January 1995) | <ul style="list-style-type: none"> • GATT 1994: Art. X, XI, XVIII • Import Licensing: Art. 3 | <p>Product at Issue: Polyethylene and Polypropylene importation (plastic resins) from Singapore</p> <p>Measure at Issue: Restrictive trade policies regarding the import of plastic resins</p> <p>As the Government of Malaysia is aware, the Government of Singapore has, since 1991, expressed its deep concern over the Malaysian</p> | | Settled or terminated (withdrawn, mutually agreed solution) (29 March 1995) |

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| | | | | | Government's restrictive trade policies regarding the import of plastic resins. These policies are of particular concern since, up until the recent imposition of the import prohibitions. Singaporean producers exported a significant volume of plastic resins to Malaysia. Unfortunately, these approaches have not resulted in a removal of the Malaysian Government's trade restrictions. Instead, the Malaysian Government has formalised its restrictive policies through the recent imposition of import prohibitions on PE and PP in violation of its obligations under GATT 1994 and the Agreement Establishing the WTO. | | |
| DS74, DS102 | Philippines | Measures Affecting Pork and Poultry | United States (April 1997 and October 1997) | <ul style="list-style-type: none"> • Agriculture: Art. 4 • GATT 1994: Art. III, X, XI • Import Licensing: Art. 1, 3 • Trade-Related Investment Measures (TRIMs): Art. 2, 5 | The US contends that the Philippines' implementation of these tariff-rate quotas, in particular the delays in permitting access to the in-quota quantities and the licensing system used to administer access to the in-quota quantities, appears to be inconsistent with the obligations of the Philippines under Articles III, X, and XI of GATT 1994, Article 4 of the Agreement on Agriculture, Articles 1 and 3 of the Agreement on Import Licensing Procedures, and Articles 2 and 5 of TRIMs. The US further contends that these measures appear to nullify or impair benefits accruing to it directly or indirectly under cited agreements. | | Settled or terminated (withdrawn, mutually agreed solution) (13 March 1998) |
| DS195 | Philippines | Measures Affecting Trade and Investment in the Motor Vehicle Sector | United States (May 2000) | <ul style="list-style-type: none"> • GATT 1994: Art. III:4, III:5, XI:1 • Subsidies and Countervailing Measures: Art. 3.1(b) • Trade-Related Investment | <p>Product at Issue: motor vehicles and parts and components thereof.</p> <p>Measure at Issue: Philippines' Motor Vehicle</p> | | Panel established, but not yet composed |

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| | | | | <p>Measures (TRIMs): Art. 2.1, 2.2, 5.2, 5.5</p> | <p>Development Program ("MVDP"), including the Car Development Program, the Commercial Vehicle Development Program, and the Motorcycle Development Program</p> <p>The United States asserted that:</p> <ul style="list-style-type: none"> the MVDP provided that motor vehicle manufacturers located in the Philippines who meet certain requirements are entitled to import parts, components and finished vehicles at a preferential tariff rate; Foreign manufacturers' import licenses for parts, components and finished vehicles are conditioned on compliance with these requirements. Among the requirements referred to by the United States are the requirement that manufacturers use parts and components produced in the Philippines and that they earn a percentage of the foreign exchange needed to import those parts and components by exporting finished vehicles; and The United States considered that these measures are inconsistent with the obligations of the Philippines under Articles III:4, III:5 and XI:1 of the GATT 1994, Articles 2.1 and 2.2 of the TRIMS Agreement, and Article 3.1(b) of the SCM Agreement. | | |
| DS215 | Philippines | Dumping Measures Regarding Polypropylene Resins from Korea | Republic of Korea <i>(December 2000)</i> | <ul style="list-style-type: none"> Anti-dumping (Article VI of GATT 1994): Art. 2, 3, 5, 6, 7, 9, 12, Annex II GATT 1994: Art. VI | <p>Measure at issue: Preliminary and Final Determinations of the Tariff Commission of the Philippines on Polypropylene Resins from Korea</p> <p>Korea considered that errors were made by the</p> | | In consultations |

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| | | | | | Philippines in those determinations which resulted in erroneous findings and defective conclusions with regard to, among others, like product, dumping, injury, and causality, as well as the imposition, calculation and collection of anti-dumping margins which are incompatible with the obligations of the Philippines under the provisions of the Anti-Dumping Agreement, in particular, but not necessarily limited to, Articles 2, 3, 5, 6 (including Annex II), 7, 9, and 12, and Article VI of GATT 1994. | | |
| DS396, DS403 | Philippines | Taxes on Distilled Spirits | <ul style="list-style-type: none"> European Communities (<i>July 2009</i>) United States (<i>January 2010</i>) | <ul style="list-style-type: none"> GATT 1994: Art. III:1, III:2 | <p>Measure at issue: Philippines' current Excise Tax regime on distilled spirits</p> <p>Product at Issue: imported spirits</p> <p>A low flat tax is applied by the Philippines to spirits made from certain designated raw materials, while significantly higher tax rates are applied to spirits made from non-designated materials.</p> <p>In the Philippines, all domestic distilled spirits (mostly gins, brandies, rums, vodkas, whiskies and tequila-type spirits) are made from one of the designated raw materials, cane sugar, whereas the vast majority of imported spirits are made from non-designated materials (e.g. cereals or grapes). Consequently, all domestic spirits are subject to the low flat tax, while the vast majority of imported spirits are subject to one of the higher tax rates.</p> <p>The United States considers that the Philippines' taxes on distilled spirits discriminate against imported distilled spirits by taxing them at a substantially higher rate than domestic spirits.</p> | | <ul style="list-style-type: none"> The Panel found that because imported spirits are taxed less favourably than domestic spirits, the Philippine measure, while facially neutral, is nevertheless discriminatory and thus violates the obligations under the first sentence of Article III:2 of the GATT 1994. The Panel found that, through its excise tax, the Philippines subjects imported distilled spirits made from non-designated raw materials to internal taxes in excess of those applied to "like" domestic distilled spirits made from the designated raw materials, thus acting in a manner inconsistent with Article III:2, first sentence, of the GATT 1994. The Panel also found that the Philippines has acted inconsistently with Article III:2, second sentence, of the GATT 1994 by applying dissimilar taxes on imported distilled spirits and on "directly competitive or substitutable" domestic distilled spirits, so as to afford protection to Philippine production of distilled spirits. On appeal, the Appellate Body upheld the Panel's finding that each type of imported distilled spirit at issue — gin, brandy, rum, vodka, whisky, and tequila — made from non-designated raw materials, is "like" the same type of distilled spirit made from designated raw materials. As a consequence, the Appellate Body upheld the Panel's finding that the Philippines has acted inconsistently with Article III:2, first sentence, of the GATT 1994 by imposing on each type of imported distilled spirit internal taxes in excess of those applied to the same type of like domestic distilled spirit. The Appellate Body reversed the Panel's finding that <i>all</i> imported distilled spirits made from non-designated raw materials are, irrespective of their type, "like" all domestic distilled spirits made from designated raw materials. However, the Appellate Body upheld the Panel's findings that all imported and domestic distilled spirits at issue are "directly competitive or substitutable" within the meaning of Article III:2, second |

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| | | | | | | | <p>sentence, of the GATT 1994. The Appellate Body also upheld the Panel's finding that dissimilar taxation of imported distilled spirits, and of directly competitive or substitutable domestic distilled spirits, is applied "so as to afford protection" to Philippine production of distilled spirits. As a consequence, the Appellate Body upheld the Panel's finding that the Philippines has acted inconsistently with Article III:2, second sentence, of the GATT 1994 by applying dissimilar internal taxes to imported distilled spirits and to directly competitive or substitutable domestic distilled spirits, so as to afford protection to domestic production.</p> <ul style="list-style-type: none"> • The Panel's finding that all imported and domestic distilled spirits are "directly competitive or substitutable products" applied also to the European Union's claim. As a consequence, it concluded that the finding, that the Philippines acted inconsistently with Article III:2, second sentence, of the GATT 1994 by subjecting imported distilled spirits to dissimilar taxation, applied to both the European Union and the United States. • At the DSB meeting on 28 January 2013, the Philippines reported that "An Act Restructuring the Excise Tax on Alcohol and Tobacco Products" was passed by Congress on 11 December 2012, and approved by the President on 19 December 2012. |
| DS122 | Thailand | H-Beams | Poland (April 1998) | <ul style="list-style-type: none"> • Anti-dumping (Article VI of GATT 1994): Art. 2, 3, 5, 6 • GATT 1994: Art. VI | <p>Measure at issue: Thailand's definitive anti-dumping determination.</p> <p>Product at issue: H-beams from Poland.</p> <p>Poland asserted that provisional anti-dumping duties were imposed by Thailand on 27 December 1996, and a final anti-dumping duty of 27.78% of CIF value for these products, produced or exported by any Polish producer or exporter, was imposed on 26 May 1997. Poland further asserted that Thailand refused two requests by Poland for disclosure of findings. Poland contended that these actions by Thailand violate Articles 2, 3, 5 and 6 of the Anti-Dumping Agreement.</p> | 28 September 2000 | <ul style="list-style-type: none"> • ADA Art. 5 (initiation of investigation): The Panel rejected Poland's claim that the Thai authorities' initiation of the investigation could not be justified due to the insufficiency of evidence originally contained in the application. The Panel considered that the application need not contain analysis, but only information. The Panel also rejected Poland's claim that Thailand violated Art. 5.5 by failing to provide a written notification of the filing of application for initiation of investigation. The Panel considered that a formal meeting could satisfy the requirement. • ADA Art. 2.2 (dumping determination - constructed normal value): As the Panel found that, (i) for the purpose of calculating a dumping margin under Art. 2.2, Thailand used the narrowest product category that included the like product; and (ii) that no separate reasonability test was required in choosing a profit figure for constructed normal value, the Panel concluded that Thailand had not violated Art. 2.2. • ADA Art. 3.4 (injury determination - injury factors): As the Appellate Body upheld the Panel's interpretation of Art. 3.4 that an investigating authority should consider all the injury factors listed in Art. 3. standard of review 4, the Appellate Body upheld the Panel's finding that |

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| | | | | | | | <p>Thailand acted inconsistently with Art. 3.4.</p> <ul style="list-style-type: none"> • ADA Arts. 3.1 (injury determination) and 17.6 (standard of review): (Thailand only appealed the Panel's legal interpretations of Arts. 3.1 and 17.6, and not the Panel's substantive findings of a violation of certain Art. 3 provisions.) The Appellate Body reversed the Panel's interpretations that Art. 3.1 requires an anti-dumping authority to base its determination only upon evidence that was disclosed to interested parties during the investigation. Similarly, it also reversed the Panel's interpretation that, under Art. 17.6, panels are required to examine only an investigating authority's injury analysis based on the documents shared with the interested parties. The Appellate Body found that the scope of the evidence that can be examined under Art. 3.1 depends on the "nature" of the evidence, not on whether the evidence is confidential or not. A panel should consider all facts, both confidential and non-confidential, in its assessment of the establishment and evaluation of the facts by investigating authorities under Art. 17.6. |
| DS370 | Thailand | Customs Valuation of Certain Products from the European Communities | European Communities <i>(January 2008)</i> | <ul style="list-style-type: none"> • GATT 1994: Art. I, II, III, VII, X, XI • Customs valuation (Article VII of GATT 1994): Art. 1.1, 1.2, 5, 11, 12, 16, 22 • Agreement Establishing the World Trade Organization: Art. XVI:4 | <p>Product at Issue: Alcoholic beverages and other products from the European Communities</p> <p>Measure at Issue: Thai customs' valuation of alcoholic beverages and other products from the European Communities</p> <p>The European Communities disputes the application by the Thai customs authorities of an "assessed value", which it considers to be arbitrary, to replace the declared transaction value of alcoholic beverages and other products from the European Communities. This assessed value is calculated by deducting (i) a standard margin of profit and general expenses and (ii) the customs duty and internal taxes paid from (iii) the wholesale price of those goods in the Thai market, regardless of the transaction price provided by the importer. According to the European Communities, broad standard margins of profit and general expenses have been fixed by the Thai customs authorities on the basis of sources that have never been explained or disclosed.</p> | | In consultations |

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| DS371 | Thailand | Customs and Fiscal Measures on Cigarettes from the Philippines | Philippines (February 2008) | <ul style="list-style-type: none"> • GATT 1994: Art. II:3, III:2, III:4, V II:1, VII:2, VII:5, X:1, X:3, X:3(a), II:1(b) • Customs valuation (Article VII of GATT 1994): Art. 1.1, 1.2, 1.2(a), 1.2(b), 2, 3, 4, 5, 6, 7, 10, 13, 16 | <ul style="list-style-type: none"> • Measure at issue: Thailand's customs and tax measures. • Product at issue: Cigarettes imported from the Philippines. <p>On 7 February 2008, the Philippines requested consultations with Thailand concerning a number of Thai fiscal and customs measures affecting cigarettes from the Philippines. Such measures include Thailand's customs valuation practices, excise tax, health tax, TV tax, VAT regime, retail licensing requirements and import guarantees imposed upon cigarette importers. The Philippines claims that Thailand administers these measures in a partial and unreasonable manner and thereby violates Article X:3(a) of the GATT 1994.</p> <p>In addition, the Philippines makes separate claims in respect of various customs valuation measures affecting imports of cigarettes. The Philippines claims that as a result of these measures, Thailand acts inconsistently with various provisions of the Customs Valuation Agreement and the interpretative notes to these provisions, as well as paragraphs 1 and 2 of the</p> | 15 November 2010 | <ul style="list-style-type: none"> • CVA Art. 1.1 and 1.2(a) (valuation in a related-party transaction): In determining the acceptability of the transaction value declared by the importer in a related-party transaction, customs authorities must (i) examine the circumstances of the sale in the light of the information provided by the importer or otherwise; (ii) communicate to the importer the grounds for preliminarily considering that the relationship influenced the price; and (iii) give the importer a reasonable opportunity to respond so that the importer can submit further information. The Panel found that Thai Customs acted inconsistently with Arts. 1.1 and 1.2(a) in rejecting the transaction value of the imported cigarettes because it failed to properly examine the circumstances of the transaction between the importer and the seller. • CVA Art. 16 (customs' explanation of valuation decision): Under Art. 16, when requested, the customs authority must provide a written explanation that is sufficient to make clear and give details of how the customs value of the importer's goods was determined. The Panel concluded that the basis for rejecting the transaction value as provided in Thai Customs' letter to the importer (i.e. "it cannot be proven whether the relationship has an influence on the determination of customs values or not") was inadequate to explain the reason for rejecting the transaction value within the meaning of Art. 16. • GATT Art. III:2 (national treatment - taxes and charges): Thailand's measure |

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| | | | | <p>General Introductory Commentary; and various provisions of Articles II and VII of the GATT 1994. According to the Philippines, Thailand does not use transaction value as the primary basis for customs valuation as required and fails to conform to the sequence of valuation methods mandated by the Customs Valuation Agreement, rather it uses a valuation method with no basis in the Agreement.</p> <p>The Philippines also claims that Thailand's <i>ad valorem</i> excise tax, health tax and TV tax, on both imported and domestic cigarettes, are inconsistent with Article III:2, first and second sentence and Article X:1 of the GATT 1994 which requires the publication of trade laws and regulations of general application.</p> <p>The Philippines also claims that Thailand's VAT regime is inconsistent with Articles III:2, first and second sentence, III:4 and X:1 of the GATT 1994.</p> <p>In addition, the Philippines claims that Thailand's dual license requirement that requires that tobacco and/or cigarette retailers hold separate licenses to sell domestic and imported cigarettes is inconsistent with Article III:4 of the GATT 1994, because it provides less favourable treatment for imported products than for like domestic products.</p> | | <p>subjected resellers of imported cigarettes to VAT when they do not satisfy conditions for obtaining input tax credits necessary to achieve zero VAT liability; resellers of like domestic cigarettes are never subject to VAT liability by reason of a complete exemption from VAT. The fact that resellers of imported cigarettes may take action to achieve zero VAT liability under Thailand's measure does not preclude a finding of inconsistency. The Appellate Body upheld the Panel's finding that Thailand acted inconsistently with Art. III:2, first sentence.</p> <ul style="list-style-type: none"> • GATT Art. III:4 (national treatment - domestic laws and regulations): The analysis must be grounded in close scrutiny of the "fundamental thrust and effect of the measure itself". Such examination normally requires an identification of the implications of the measure for the conditions of competition between imported and like domestic products in the marketplace; this may be discerned from the design, structure, and expected operation of the measure and need not be based on empirical evidence as to the actual effects. When imported and like domestic products are subject to a single regulatory regime with the only difference being that imported products must comply with additional requirements, this would provide a significant indication that imported products are treated less favourably. The Appellate Body upheld the Panel's finding that Thailand treats imported cigarettes less favourably than like domestic cigarettes by imposing additional administrative requirements only on resellers of imported cigarettes. • GATT Art. X:3 (b) (trade regulations - prompt review of administration action on customs matters (guarantee decisions)): "Prompt review and correction" under Art. X:3(b) requires review and correction performed in a quick and effective manner and without delay. The nature of the specific administrative action at issue also informs the meaning of "prompt". For review of a customs guarantee to be timely and effective, it must be possible to challenge the guarantee during the time it serves as a security. Thai law delays review of guarantee decisions because they can only be challenged once a notice of assessment of final duty liability is issued. The Appellate Body found that this system does not ensure prompt review of administrative action and upheld the Panel's finding that Thailand acted inconsistently with Art. X:3(b). |
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Appendix 4: Detailed data for figures 6 and 7

| Indonesia | | | |
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| NTM | NTM Description | # Of Tariff Lines (HS4) | ASEAN Import Value in 2006 (million US \$) |
| 2300 | Internal tax | 62 | 900 |
| 5100 | Automatic import licensing | 131 | 955 |
| 6000 | Quantity Measure | 736 | 20,431 |
| 6300 | Quantity Control Measure-Prohibitions | 348 | 4,090 |
| 6100 | Import licensing | 247 | 14,200 |
| 7110 | Monopolistic Measures | 30 | 10,400 |
| 8000 | Technical Regulation | 364 | 2,643 |
| 8100 | Technical regulation_SPS | 168 | 1,250 |
| Malaysia | | | |
| NTM | NTM Description | # Of Tariff Lines (HS4) | ASEAN Import Value in 2006 (million US \$) |
| 1400 | TRQ | 1 | 111 |
| 5000 | Automatic Import Licensing | 19 | 225 |
| 6000 | Quantity Measure | 590 | 56,353 |
| 6100 | Import Licensing_import permit | 492 | 55,500 |
| 6170 | non-automatic licensing_sensitive product | 63 | 324 |
| 7100 | Monopolistic Measures | 5 | 261 |
| 8100 | Technical Regulations | 282 | 52,800 |
| Philippines | | | |
| NTM | NTM Description | # Of Tariff Lines (HS4) | ASEAN Import Value in 2006 (million US \$) |
| 1400 | TQR | 17 | 46 |
| 2300 | Administrative charges for inspection | 10 | 747 |
| 6000 | Quantity Measure | 49 | 24 |
| 6100 | Import permit | 39 | 24 |
| 8000 | Technical Regulation | 233 | 3,393 |
| 8100 | Technical Measure_Testing, inspection, sampling, testing and requirements | 228 | 3,392 |
| Thailand | | | |
| NTM | NTM Description | # Of Tariff Lines (HS4) | ASEAN Import Value in 2006 (million US \$) |
| 1400 | TRQ | 11 | 76 |
| 5100 | Automatic License | 31 | 12,297 |
| 6000 | Quantity Measures | 53 | 529 |
| 6370 | Prohibition_sensitive product | 16 | 155 |
| 6170 | Import Licence_sensitive products | 11 | 176 |
| 8000 | Technical Regulation | 85 | 439 |
| 8110 | Technical regulation -quality and standards | 35 | 134 |
| 8150 | Technical regulation_Testing, inspection, quarantine reqt | 35 | 131 |
| Viet Nam | | | |
| NTM | NTM Description | # Of Tariff Lines (HS4) | Import Value in 2006 (million US \$) |
| 1400 | TRQ | 4 | 63 |
| 2300 | Internal Taxes | 15 | 4,240 |
| 5100 | Automatic License | 82 | 719 |
| 6000 | Quantity Measures | 223 | 1,428 |
| 6370 | Prohibition_sensitive product | 222 | 1,390 |
| 7100 | Monopolistic Measures | 18 | 4,190 |
| 8000 | Technical Regulations | 107 | 654 |

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