



TRADE FACILITATION FOR ASEAN CENTRALITY

**A publication by ARISE Plus
(ASEAN Regional Integration Support by the EU)**

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Table of Contents

Foreword	4
Executive Summary	5
<i>'New Generation'</i> PTAs and ATIGA's Structural Reform	12
Regulatory Transparency and Private Sector Engagement	23
Streamlining of Non-Tariff Measures and Removal of Non-Tariff Barriers	34
Dispute Avoidance and Dispute Settlement.....	43
Agricultural Trade and SPS Facilitation.....	55
Non-Agricultural Trade and TBT Facilitation	67
<i>'ASEAN Centrality'</i> and Rules of Origin	81
ASEAN Supply Chain Connectivity.....	92
Digitalisation and E-commerce Facilitation	102
Trade and Sustainable Development.....	115
Annex: Summary of Key Issues and Recommendations	125

Foreword

This Publication brings to a close the work conducted by the ARISE Plus Programme in relation to ASEAN trade facilitation and private sector engagement since 2017. It wishes to inform the current debate among ASEAN policy-makers, regulators and trade negotiators, with respect to the process of *ATIGA Upgrade*, about the views of the ASEAN business community and private sector on the relevance of trade facilitation for purposes of achieving greater ‘*ASEAN Centrality*’.

The European Union has supported ASEAN in the implementation of the *ASEAN Trade in Goods Agreement* (ATIGA) since 2012, under both the ARISE (2012-2017) and ARISE Plus (2017-2023) programmes. The European Union has unique expertise and experience when it comes to progressively operationalising its internal market and has, therefore, been the natural partner of ASEAN as the latter implements its vision of establishing a single market and production base with free flow of goods within the framework of the *ASEAN Economic Community* (AEC).

Within this process, a key actor is the ASEAN private sector, especially its *Micro-, Small- and Medium-sized Enterprises* (MSMEs), often inclusively owned or managed by women. ARISE Plus has consistently engaged with the private sector throughout the implementation of its various Components of technical assistance, in order to build capacity, increase awareness of key trade facilitation tools like the *ASEAN Trade Repository* (ATR), the *ASEAN Solutions for Investments, Services and Trade* (ASSIST), and the *ASEAN Customs Transit System* (ACTS), and enable greater and more systematic communication between the private sector and ASEAN’s relevant Sectoral Bodies.

This Publication and the earlier work supported by ARISE Plus to conduct a comprehensive legal review of the ATIGA, so as to provide a scientific and comparative basis for ASEAN to upgrade the ATIGA, stands as one of the key trade facilitation legacies of our programmes, together with the ATR, ASSIST, and the ACTS.

Our work would not have been possible without the support and partnership of the ASEAN Secretariat, the cooperation with the ASEAN Member States, the engagement of ASEAN’s private sector (notably ABAC, the Joint Business Councils and many individual companies and trade associations that contributed their views and inputs towards the drafting of this Publication), the dedication of our ARISE Plus Regional Experts, who took responsibility for the individual Policy Briefs, and the work of the entire ARISE Plus Team. A particular word of gratitude goes to Paolo R. Vergano (Key Expert on Trade Facilitation and Regulatory Transparency) and Maria Esperanza ‘Maes’ Alconcel (Senior International Trade Expert) for their passion and enthusiasm in conceptualising, coordinating and finalising this editorial effort.

Paul Mandl

Team Leader

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Executive Summary

Trade facilitation is the undisputed driver of deeper ASEAN regional economic integration, sustainable and inclusive socio-economic development, and greater regional supply chain resilience. This Publication argues and evidences that trade facilitation can and should also be the catalyst for ‘ASEAN Centrality’, which is increasingly seen as a prerequisite for ASEAN to make meaningful progress towards the fulfilment of the ASEAN Economic Community (AEC) objectives and for it to achieve its vision of establishing a single market and production base with free flow of goods within the region.


The ASEAN Charter established the concept of ‘ASEAN Centrality’ as both the objective and the guiding principle for all activities of ASEAN. It describes ‘ASEAN Centrality’ as *“the primary driving force in its relations and cooperation with its external partners”*. This centrality is considered by ASEAN essential to uphold international law and to build an ‘open’, ‘transparent’, ‘inclusive’ and ‘rules-based’ regional architecture. *Inter alia*, the ASEAN Charter provides that *“ASEAN and its Member States shall act in accordance with (...) the centrality of ASEAN in external political, economic, social and cultural relations while remaining actively engaged, outward-looking, inclusive and non-discriminatory”*.

However, there is one element of ‘ASEAN Centrality’ that is arguably not expressly scripted in the ASEAN Charter, but that can be implied and should play an even greater role in cementing ASEAN’s architecture within the region: the economic and trade centrality of ASEAN among its Member States. The ASEAN Charter does indicate that one of the purposes of ASEAN is *“to create a single market and production base which is stable, prosperous, highly competitive and economically integrated with effective facilitation for trade and investment in which there is free flow of goods, services and investment; facilitated movement of business persons, professionals, talents and labour; and freer flow of capital”*. Legal instruments such as the ASEAN Trade in Goods Agreement (ATIGA) are to play a critical role in pursuing these objectives and achieving the ‘economic centrality’ of ASEAN.

The ATIGA has been implemented since 2010 and has had mixed results in advancing the process of regional economic integration. While most tariffs have been abated to 0% and a great degree of trade liberalisation has been achieved on paper, the reality on the ground is often still one of rampant ‘*red tape*’ hampering trade, lack of transparency and rule of law or due process with respect to trade laws, regulations, procedures and requirements, disproportionate or discriminatory non-tariff measures, and several non-tariff barriers, some of which have long been souring trade relations between ASEAN Member States and are referred to as long-standing issues (LSIs).

Trade facilitation is the ‘*holy grail*’ of ASEAN economic integration and it is a systematic principle and objective of most key instruments adopted by ASEAN to regulate and expand intra-ASEAN trade in goods, notably the ATIGA itself, the ASEAN Economic Community (AEC) Blueprint 2025, the ASEAN Trade Facilitation Framework (ATFF), and the Guidelines for the Implementation of ASEAN Commitments on Non-Tariff Measures on Goods (NTMs Guidelines).

As ASEAN embarks on a process of ATIGA Upgrade, in order to improve the ATIGA as a legal instrument and set the stage for greater intra-ASEAN trade, effective regional economic integration, more resilient supply chains, and trade-driven inclusive and sustainable economic development, it appears important and imperative that ‘ASEAN economic centrality’ be pursued through cross-cutting




approaches based on trade facilitation. In this respect, much can be achieved by enhancing the communication and cooperation between ASEAN's policy-makers, regulators and trade negotiators, on one side, and ASEAN's private sector, on the other side.

The process of *ATIGA Upgrade* is a once-in-a-generation chance to shape ASEAN economic integration and usher ASEAN to a new era of socio-economic development. This Publication aims at illustrating how trade facilitation should be the minimum common denominator of all improvements of the ATIGA, particularly as it has the potential to deliver greater '*ASEAN economic centrality*'.

The conclusions and recommendations of this Publication are summarised in a reader-friendly table annexed to the Policy Briefs that follow this Executive Summary. They were drawn after a lengthy process where a group of Regional Experts first researched 10 themes considered relevant for purposes of trade facilitation within the context of ATIGA implementation and in light of the process of *ATIGA Upgrade*. These 10 themes were the following: 1) New generation PTAs and ATIGA's structural reform; 2) Regulatory transparency and private sector engagement; 3) NTMs streamlining and NTBs removal; 4) Dispute avoidance and dispute settlement; 5) Agricultural trade and SPS facilitation; 6) Non-agricultural trade and TBT harmonization; 7) ASEAN centrality and rules of origin; 8) ASEAN supply chain connectivity; 9) Digitalisation and e-commerce facilitation; and 10) Trade and sustainable development. The preliminary findings were then critically peer-reviewed and extensively socialised and discussed among ASEAN's private sector, through numerous meetings with ASEAN's key business councils, business federations, chambers of commerce, trade associations, individual companies and other relevant stakeholders. Dedicated ARISE Plus Roundtable Discussions on Trade Facilitation were held in December 2022 and the endorsed results were codified as '*key takeaways*', which were built in this Publication and formally presented by ARISE Plus in February 2023 to a dedicated session of the *ASEAN Trade Negotiations Committee* for the *ATIGA Upgrade*.

In relevant part, with respect to the topic of '***New generation Preferential Trade Agreements (PTAs) and ATIGA's structural reform***', the structural reform of the ATIGA is an important area for AMSs to consider during the negotiations for the *ATIGA Upgrade*. This Publication builds on the discussions held with ASEAN's private sector and recommends, *inter alia*, that ASEAN systematically proceed to the administrative updating of all future legal instruments into the ATIGA and that sector-specific annexes be adopted in the upgraded ATIGA. In the view of the ASEAN private sector, the administrative updating of all future ASEAN legal instruments of relevance to trade in goods and trade facilitation would facilitate awareness-raising among the private sector of both the evolving rules of the ATIGA and of the implementation of the ATIGA. On the other hand, the inclusion of disciplines related to sector specific annexes would help the private sector in identifying and using the applicable rules and regulations of relevance to trade within the region in the specific areas of their interest, thereby enhancing transparency, the rule of law and the implementation by AMSs of the commitments undertaken. The structural reform of the ATIGA would also allow ASEAN to turn the ATIGA into a '*new generation*' agreement, which is more responsive to the needs of regional economic integration, in line with the PTAs that individual AMSs are increasingly signing with third countries, and better equipped to assist ASEAN in regulating trade-related aspects such as, *inter alia*, sustainable development, supply chain resilience, climate change mitigation, labour and social standards, competition policy, digital trade, and gender equality/equity and inclusivity. If not in general, this




could be progressively achieved in the ATIGA on a sectorial and asymmetrical manner. In turn, such approaches will assist the ATIGA in delivering greater ‘*ASEAN economic centrality*’.

With respect to the topic of ‘**Regulatory transparency and private sector engagement**’, this Publication underlines the need flagged by ASEAN’s business representatives that private sector engagement be strengthened within ASEAN, as the current mechanisms within the ATIGA or in related legal instruments are not effective in addressing the concerns raised by businesses directly or through their representative entities. The ASSIST platform was cited as an example, where the responses and solutions proposed by AMSs often do not address the concerns raised and focus on the process rather than on the outcomes. Discussions also highlighted that NTMs, rather than NTBs, should be the emphasis of the notification and transparency processes under Articles 11 and 13 of the ATIGA. The incorporation of a ‘*name and shame*’ ranking system, similar in structure to the *World Bank’s Ease of Doing Business Index*, should be considered by ASEAN in order to reflect the number of notifications sent by AMSs to the ASEAN Secretariat and SEOM, as an effective option to improve AMSs’ compliance of their transparency obligations. The introduction of a ‘*reverse burden of proof*’ mechanism (on the ATIGA consistency of the adopted measures) could also be considered by ASEAN in the *ATIGA Upgrade*, in order to deter AMSs from neglecting their duties to submit the notifications of proposed measures and to update the ATR with the adopted measures. Finally, the creation of a web-based notification platform, similar to those used by the UNCTAD, the WTO, and some countries or international organisations, dubbed ‘*ePing*’ by the WTO, should be considered by ASEAN in order to allow interested individuals in the private sector to receive near real-time updates on the newly published trade measures of all AMSs. All these possible improvements of the ATIGA would enhance the ease of doing business, help address trade irritants, facilitate trade, improve the rule of law, and foster ‘*ASEAN economic centrality*’.

With respect to the topic of ‘**Non-tariff measures (NTMs) streamlining and non-tariff barriers (NTBs) removal**’, the representatives of the ASEAN private sector recognised the importance of these two key drivers for purposes of facilitating and improving intra-ASEAN trade. Specifically, they highlighted that developing dedicated mutual recognition arrangements (MRAs) in certain sectors (e.g., MRAs on halal, food and beverages standards, and related conformity assessment procedures) would be beneficial and greatly facilitate trade within the region, also enhancing ‘*ASEAN economic centrality*’ in relation to issues that are increasingly becoming areas of global regulation. Such approach would make a desirable contribution to trade within the region by streamlining the procedures, reducing the administrative burdens, and minimising the compliance costs for traders. The ASEAN private sector overwhelmingly endorsed the recommendations put forward in the dedicated Policy Brief of this Publication, notably with respect to the enhanced transparency on NTMs, the introduction of an *ad hoc* consultation mechanism on NTMs, and the greater enforceability of the ATIGA rules and AMSs’ commitments on NTMs and NTBs.


The upgraded ATIGA should better differentiate between NTMs and NTBs. The benchmark for determining whether an NTM constitutes an NTB could refer to the disciplines in the NTMs Guidelines. Managing NTMs involves good regulatory practices. In a similar vein, the NTMs Guidelines urge AMSs to conduct *ex-ante* and *ex-post* consultations and reviews with respect to the design and application of NTMs. Consideration could be given to enhancing the institutional function and role of ASEAN’s tools for trade facilitation and regulatory transparency in order to deal with NTMs, such as adding a feature enabling the private sector to report NTMs through the ASSIST facility. AMSs could also



consider developing the ATIGA provisions related to the review of NTMs by including a specific dialogue and consultation mechanism, as in the *Indonesia-Australia Comprehensive Economic Partnership* or in the *Regional Comprehensive Economic Partnership Agreement*.

With respect to the topic of '**Dispute avoidance and dispute settlement**', the representatives of the ASEAN private sector underlined the need for a more systematic application and operationalisation of the ASSIST facility by AMSs, which should become a mechanism of trade facilitation expressly provided under the upgraded ATIGA. ASEAN's private sector highlighted and emphasised that timely interventions by AMSs, in order to address trade irritants and obstacles within the region, are essential for businesses and for effective regional economic integration. As such, expedited procedures and the swift provision of solutions are the key factors to encourage the ASEAN private sector to make greater use of trade facilitation mechanisms like ASSIST and, through them, play an important role to scrutinise AMSs' behaviour and the effective implementation of the ATIGA and its related instruments and commitments. ASEAN's private sector endorsed the recommendations made in the dedicated Policy Brief of this Publication, particularly with respect to enhanced dispute avoidance and vis-à-vis the possible introduction in the upgraded ATIGA of a '*snapback clause*'. Such clause would provide a rapidly actionable remedy in case of alleged nullification or impairment of certain benefits under the ATIGA. The '*snapback clause*' would be a tool used to induce the recalcitrant party to remove the violation or to enter into dispute settlement under the existing mechanisms. Any '*snapback clause*' would need to be carefully constructed and could be limited to certain sectors, products, or tariff lines. AMSs should also increase the use of ASEAN's dispute settlement mechanisms, since the multilateral dispute settlement avenue within the WTO is currently in the midst of a deep crisis triggered by the demise of its appeals mechanism. There is growing evidence of countries starting to rely on dispute settlement under bilateral/regional PTAs in order to uphold their rights and obligations. Letting long-standing disputes remain unresolved will, over time, undermine ASEAN's character as a rule-based organisation, diminish the attractiveness of ASEAN as a destination for investment, discourage the private sector from expanding regional supply chains, and diminish ASEAN's '*economic centrality*' for its Member States.


With respect to the topic of '**Agricultural trade and sanitary and phytosanitary (SPS) facilitation**', the representatives of the ASEAN private sector recognised the importance of addressing the emerging issues in relation to SPS in the upgraded ATIGA, for instance in relation to antimicrobial resistance (AMR), which threatens animal health, food safety and food security, economic prosperity, and ecosystems worldwide. The new ATIGA could facilitate safe trade through digitalisation, notably by requiring AMSs to exchange trade-related documents, including the electronic Phytosanitary (*e-Phyto*) certificate and the electronic Animal Health (*e-AH*) certificate, through the *ASEAN Single Window* platform. To ensure that the SPS Chapter of the upgraded ATIGA is modern and responsive to the evolving regional and global economic architecture, ASEAN could consider including further commitments on trade facilitation related to SPS measures and compliance, as adopted by the new generation PTAs, especially those of AMSs with third countries or regions. These progressive commitments, *inter alia*, are: the concept of pests and disease-free areas and areas of low pests or disease prevalence, known as '*regionalisation*'; an automatic approval of establishments in the exporting party by the importing party without prior individual inspection or '*pre-listing*' of establishments; and sector-specific consultation mechanism to address NTMs and enhance cooperation on certain SPS matters.



With respect to the topic of '**Non-agricultural trade and technical barriers to trade (TBT) harmonization**', ASEAN's private sector generally endorsed the recommendations provided in the dedicated Policy Brief in this Publication and underlined that, while the trade facilitation potential of Mutual Recognition Agreements (MRAs) is huge, in practice the process for ASEAN to implement an MRA usually takes a long time and it is difficult to get all AMSs to agree and implement it. ASEAN should consider expediting the process with dedicated procedures and timeframes in the upgraded ATIGA. Also, given that a number of MRAs are not reflected in the ATIGA (e.g., *the ASEAN Sectoral Mutual Recognition Arrangement for Inspection and Certification Systems on Food Hygiene for Prepared Foodstuff Products*) adding a specific reference to these MRAs in the main body of the ATIGA or in a dedicated annex to the ATIGA should be taken into consideration. Additionally, further TBT issues that are increasingly relevant, such as halal certification, could be considered for additional MRAs. Currently, the ATIGA does not provide any sector-specific references. A similar approach applied in other PTAs, by including dedicated rules for dedicated working groups vis-à-vis key sectors or products, could be considered in the context of the *ATIGA Upgrade*.


Finally, the private sector highlighted that the extension of the trade facilitative instrument of equivalence to TBT matters is already shown in many relevant international agreements (e.g., the CPTPP). ASEAN could consider including a commitment on equivalence concerning technical regulations within the upgraded Chapter on *Standards, Technical Regulations and Conformity Assessment Procedures* (STRACAP), as the ATIGA already has in the SPS Chapter. The acceptance of equivalence could be considered as the ultimate objective in aligning technical regulations among AMSs and would be an important trade-facilitative tool to foster '*ASEAN economic centrality*'.

With respect to the topic of '**ASEAN centrality and rules of origin**', the representatives of the ASEAN private sector emphasised the central role of ASEAN in the regional economy, as well as in its international economic relations. To that end, in its various PTAs, ASEAN needs to assert its leading role, as well as strengthen intra-regional trade and value chains. As a crucial component of trade agreements, ASEAN's rules of origin should be negotiated and work towards realising such goals through greater harmonisation or convergence of product-specific rules (PSRs) across the ATIGA and the ASEAN+1 FTAs. This will arguably strengthen '*ASEAN economic centrality*' and address the current '*noodle bowl*' complexities, thereby easing the burdens for businesses in complying with a unified set of rules of origin, rather than having different rules across the ATIGA and all the ASEAN+1 FTAs. Strategically, this will also assist ASEAN in developing much needed regional value chains, thereby enhancing security and resilience in certain key economic and industrial sectors. It was also suggested by ASEAN's private sector that the ATIGA needs to be restructured in such a way as to cater for more sectoral needs. This can be done by having chapters and annexes with tailored rules of origin dedicated to certain sectors. As indicated, this could be applied to priority/essential sectors/industries that deserve further attention in upgrading/harmonising PSRs under the ATIGA, in order to achieve more centrality through rules of origin. Noting the earlier attempts to harmonise the rules of origin and/or the PSRs across the ASEAN+1 FTAs, the sectoral approach (rather than covering all tariff lines) would be more practical/feasible if focussed on key sectors. Additionally, the private sector noted that ASEAN should consider relaxing the origin criteria in some priority sectors, namely automotive and textile products.



With respect to the topic of **‘ASEAN supply chain connectivity’**, ASEAN’s private sector underlined that, while there are increasingly important emerging issues that need to be reflected in trade agreements like the ATIGA or the ASEAN+1 FTAs, the fundamental ones like rules of origin and NTBs remain critical when it comes to enhancing ASEAN’s supply chain connectivity. In particular, it was reaffirmed that ASEAN should consider enhancing the existing provisions of the ATIGA on rules of origin and the related Operational Certification Procedures (OCPs). One possible suggestion made was that ASEAN should consider in the *ATIGA Upgrade* to allow for the use of a periodic (e.g., quarterly or annual) ATIGA Certificate of Origin (CO) Form D for the same importer/exporter. The purpose of such initiative would be to reduce paperwork, because ASEAN traders would not have to apply for a CO for every shipment. The private sector participants further noted that such flexibility would only apply when the change in tariff classification (CTC) rule is used, and not when the regional value content (RVC) rule is applied. Another solution offered by the private sector would be for ASEAN to enhance the use of the *ASEAN-Wide Self Certification (AWSC)*, which also aims at reducing the use of CO Form D. Finally, it was noted that the level of awareness and ability of ASEAN traders to comply with ASEAN rules of origin remains rather low. This hinders companies from utilising the ATIGA and the ASEAN+1 FTAs to their fullest extent. It was requested that more information dissemination and capacity building activities be organised to the benefit of ASEAN’s private sector. Lastly, it was also emphasised that digitalisation and sustainability be two key areas to consider in enhancing supply chain connectivity and *‘economic centrality’* within the ASEAN region.

With respect to the topic of **‘Digitalisation and e-commerce facilitation’**, the representatives of the ASEAN private sector widely endorsed the recommendations put forward in the dedicated Policy Brief of this Publication and provided a number of inputs that appear relevant to the design of the regional strategies and initiatives for e-commerce and digitalisation. *Inter alia*, it was suggested that the *ATIGA Upgrade* should incorporate relevant provisions on e-commerce, particularly in managing and facilitating cross-border e-commerce transaction of goods. E-commerce provisions included in other PTAs (e.g. AANZFTA, RCEP, CPTPP, EUVFTA) would be a good starting point or reference for the *ATIGA Upgrade*. The *ASEAN E-commerce Agreement* and its Work Plan should also be annexed into the ATIGA for businesses to be aware of the ASEAN rules and initiatives governing cross-border e-commerce transactions in the region. The private sector also underlined that a balance needs to be struck between facilitating and ensuring MSMEs’ participation in cross-border e-commerce trade and important regulatory issues of data protection and privacy or cybersecurity. Consumer protection for e-commerce within and outside ASEAN is still an area of concern. Upgrading the ATIGA is a good step in building an ecosystem of trust in e-commerce transactions. Provisions on the adoption or maintenance of a legal framework incorporating international standards and principles that ensure the protection of personal information of users of e-commerce should be considered. ASEAN should also recognise the importance of building the cyber-security capabilities of each AMS through exchange of best practices and the use of existing collaboration mechanism. This should be institutionalised in the *ATIGA Upgrade*. Competition policy should also be revisited to consider the complex and rapidly developing digital age. Finally, capacity building initiatives should be institutionalised in order to bridge the market access gap among AMSs and enterprises, given the different levels of development among AMSs and the divergent capacity of enterprises to comply with regulatory requirements. Digital trade and e-commerce could be strong drivers to foster *‘ASEAN economic centrality’* and the new ATIGA should address the issues related to trade in goods.



Finally, with respect to the topic of **‘Trade and sustainable development’**, ASEAN’s private sector provided several inputs that AMSs should take into consideration when designing regional strategies and initiatives for balancing trade openness with social and environmental protection, particularly within the context of the *ATIGA Upgrade*. *Inter alia*, the private sector indicated that trade and sustainable development, particularly in relation to climate change mitigation and environmental protection, is increasingly a big concern for ASEAN firms, notably as it entails substantial compliance and transition costs, hindering MSMEs from meaningfully participating in cross-border trade. Nonetheless, this is an important emerging topic that the private sector believes should be covered in the *ATIGA Upgrade*, especially since such disciplines are progressively being imposed on ASEAN operators and goods by third countries. At the regional level, ASEAN companies have only started to disclose their socio-environmental initiatives to shareholders. Regulatory drivers have only been imposed by AMSs quite recently and there are still improvements to be made in non-critical industries. In sectors such as mining and minerals, where the environmental sustainability of business practices are recognised concerns, companies are subject to fragmented national and regional guidelines for assessing and reporting. ASEAN should agree to a unified strategy towards trade and sustainability matters, particularly towards *‘green growth’*. AMSs should adopt and implement coherent and harmonised regulations and standards, based on international best practices, so as to facilitate compliance of businesses, especially MSMEs. Including a sustainability chapter or annex in the upgraded ATIGA would reflect a cooperative approach on trade and put an emphasis on policy coherence. This amendment would confirm the recognition in the ASEAN Charter, as well as in the AEC and ASCC Blueprints 2025, that economic development, social development, and environmental protection are interdependent and mutually supportive components of international trade and sustainable development. The ATIGA should achieve a certain degree of *‘ASEAN centrality’* also vis-à-vis these emerging topics and important drivers of sustainable regional economic integration.

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‘New Generation’ PTAs and ATIGA’s Structural Reform

Michelle Limenta

1. Introduction

Trade agreements have been widely used as policy instruments to pursue deeper economic cooperation and integration. Whereas traditionally trade agreements were established with the only or primary aim of reducing tariffs, more recent ‘*new generation*’ trade agreements include a range of provisions that go beyond the basic commitment of tariff reduction and trade liberalisation.

The ASEAN Trade in Goods Agreement (ATIGA) came into effect on 17 May 2010 with the objective to provide a legal framework to minimise barriers and enhance free flow of goods in the region as means to establish a single market and production base for regional deeper economic integration.

While the ATIGA has served the ASEAN Member States (AMSs) well, there is a need to review and upgrade its provisions, considering how the trade policies of AMSs have evolved over the past decade, including with respect to commitments made under more recent trade agreements, such as the Regional Comprehensive Economic Partnership (RCEP), or new mega-regional preferential trade agreements (PTAs) that include some AMSs as Parties (*e.g.*, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, or CP-TPP). In fact, the ATIGA is envisaged, under Article 95 thereof, as a ‘*living*’ document that requires periodic review and updating, to ensure that it retains relevance and responsiveness to the changing business and trade practices and vis-à-vis the evolving regional economic architecture.


Furthermore, the number of PTAs reported to the World Trade Organization (WTO) have increased tremendously over the past few decades.¹ Besides the increase in volume, the scope and contents of the trade agreements have also evolved and expanded, both from an intensive perspective (*i.e.*, the specific commitments within a policy area) and from an extensive perspective (*i.e.*, the number of policy areas covered).² Accordingly, the review and potential upgrade of the ATIGA is timely in order for the Agreement to remain relevant to the current and emerging trends, modern, comprehensive, of high-quality, and more responsive to the needs of businesses operating within regional and global value chains.

Structural changes are arguably the most important area for consideration by AMSs. The current provisions and chapters of the ATIGA demonstrate that the Agreement primarily deals with traditional trade concerns. Moreover, future instruments relevant to trade in goods, which are adopted to further certain provisions in the ATIGA, are not well reflected in the ATIGA.

Thus, consideration needs to be given to structural approaches that would facilitate the ATIGA becoming a ‘*new generation*’ agreement, easily and flexibly adapting to future changing circumstances and efficiently amended, as and when necessary. Another consideration should also be given to the mechanics of incorporating in the ATIGA future legal instruments, so as to formally and

¹ According to the database, the cumulative number of such agreements notified to the GATT/WTO Secretariat grew from just 12 in 1980 to 348 in the first quarter of 2021. See: <https://rtais.wto.org/UI/PublicMaintainRTAHome.aspx>.

² Aaditya Mattoo, Nadia Rocha, and Michele Ruta (eds.) *Handbook of Deep Trade Agreements* (2020 the World Bank), p. 3.



administratively updating those instruments into the ATIGA for greater transparency and commercial predictability.

With this notion in mind, this Policy Brief lays down a 6-part discussion on *the ‘New Generation’ PTAs and ATIGA’s Structural Reform*. Following to this **Introduction**, **Section 2** deals with two structural issues, namely the *limited coverage and administrative updating problems* currently experienced by the ATIGA, which could undermine its intended purpose as a ‘living’ instrument adaptable to current and future developments within the international and regional trade contexts. **Section 3** highlights a number of key provisions and mechanisms provided under the ATIGA, which are designed to enable the ATIGA to be a ‘living’ instrument. **Section 4** discusses a mechanism called *specific sectoral annexes* that currently is not provided in the ATIGA, but featured in selected ‘new generation’ PTAs involving a number of AMSs in their individual capacity. Such a mechanism could be a useful and relevant international benchmark to address the structural issues of the ATIGA. **Section 5** reflects the key takeaways derived from the roundtable discussions on trade facilitation, in order to annotate the key messages, findings, conclusions and recommendations that have emerged among relevant stakeholders, notably ASEAN government officials, private sector representatives, experts and academia. Finally, **Section 6** offers a set of final recommendations through which the Policy Brief intends to provide ASEAN with actionable suggestions and outcomes for consideration in light of the General Review of the ATIGA.

2. The ATIGA’s Structural Issues – Limited Coverage and the Lack of Administrative Update

This Section looks at the current structural challenges of the ATIGA, namely its limited coverage (discussed in *Section 2.1*), and the lack of administrative updating of the instruments relevant to the ATIGA (elaborated on in *Section 2.2*).

2.1 Limited Scope of the ATIGA

The scope of trade agreements has gradually evolved and expanded through the years, leading to the emergence of so called ‘*deep trade agreements*’ (DTAs). DTAs are considered those trade agreements that cover not only trade, but also other policy areas that go beyond traditional trade issues. *The Handbook of Deep Trade Agreements* sponsored by the *World Bank Group* classifies these policy areas regulated by DTAs into three categories.³ First, policy areas (*e.g.*, tariff and export taxes) that aim at establishing integration rights, *inter alia* those on free movement of goods. Second, policy areas that aim at supporting and sustaining the economic integration rights. The policy areas that fall into this category are those on, *inter alia*: a) Customs; b) rules of origin; c) trade remedies; d) public procurement; e) technical barriers to trade; f) sanitary and phytosanitary measures; g) State-owned enterprises; h) subsidies; i) digital trade; and j) competition law and consumer protection. Third, policy areas that aim at enhancing the social or consumer welfare. Environmental and labour protection, as well as trade and sustainable development or the protection of human rights, are policy areas relevant to this category.

The ATIGA includes in its chapters disciplines relevant to trade in goods, namely those on: a) Tariff Liberalisation; b) Rules of Origin; c) Non-Tariff Measures; d) Trade Facilitation; e) Customs; f)

³ Mattoo, Rocha, and Ruta (eds.), *Handbook of Deep Trade Agreements*, p. 9.

Standards, Technical Regulations and Conformity Assessment Procedures (STRACAP); g) Sanitary and Phytosanitary (SPS) Measures; h) Trade Remedy Measures; and i) Institutional Provisions.

As a legal instrument, the ATIGA aims at minimising the barriers to trade in goods and at deepening the economic linkages among AMSs. The provisions in the ATIGA establish the integration rights in terms of freer movement of goods across the region and support this integration in certain policy areas. However, the scope of the policy areas covered by the ATIGA appears to be limited to traditional trade concerns. ‘Emerging topics’ related to social issues, such as sustainable development, for example, are not included in the ATIGA, despite the fact that the AMSs gave already committed to ‘ensure sustainable development for the benefit of present and future generations’ in the Preamble of the *ASEAN Charter*, and recognises the importance of sustainable economic development as stated in the ASEAN Economic Community Blueprint 2025.⁴ Furthermore, more recent PTAs involving AMSs as individual parties or as a bloc have already included certain ‘emerging topics’, as can be seen in the table below.

Emerging Topics	Relevant FTAs	Chapter/ Provision	Year Signed
Trade and Sustainable Development (TSD)	RCEP	Preamble	15-Nov-20
	EU-Vietnam FTA	Chapter 13	30-Jun-19
	Indonesia-Australia CEPA	Preamble	4-Mar-19
	Indonesia-EFTA CEPA	Chapter 8	16-Dec-18
	EU-Singapore FTA	Chapter 12	19-Oct-18
	CP-TPP	Chapter 20	8-Mar-18
	ASEAN-Hong Kong FTA	Preamble	12-Nov-17
	Australia – Malaysia FTA	Side Letter on Environment	22-May-12
	Malaysia-Chile FTA	Preamble	13-Nov-10
	NZ – Malaysia FTA	Preamble	26-Oct-09
	ASEAN-Australia-New Zealand FTA	Preamble	27-Feb-09
	Indonesia-Japan EPA	Article 102	20-Aug-07
	Brunei Darussalam-Japan FTA	Preamble; Article 93; Article 101(2)(d)	18-Jun-07
	Malaysia-Japan EPA	Article 90; Article 139	13-Dec-05
	ASEAN-China FTA	Article 7 (2)	4-Nov-02
Trade and gender	CP-TPP	Preamble	8-Mar-18
E-commerce	RCEP	Chapter 12	15-Nov-20
	EU-Vietnam FTA	Chapter 8	30-Jun-19
	Indonesia-Australia CEPA	Chapter 13	4-Mar-19
	EU-Singapore FTA	Chapter 8	19-Oct-18
	CP-TPP	Chapter 14	8-Mar-18
	Australia-Malaysia FTA	Chapter 15	22-May-12
	ASEAN-Australia-New Zealand FTA	Chapter 10	27-Feb-09
	ASEAN-China FTA	Article 7(3)(c)	4-Nov-02
Competition policy	RCEP	Chapter 13	15-Nov-20
	EU-Vietnam FTA	Chapter 10	30-Jun-19
	Indonesia-Australia CEPA	Chapter 16	4-Mar-19

⁴ The ASEAN Charter, available at <https://asean.org/storage/2016/06/2.-February-2015-The-ASEAN-Charter-18th-Reprint.pdf>; the ASEAN Economic Community Blueprint 2025, available at <https://asean.org/book/asean-economic-community-blueprint-2025/>.

	Indonesia-EFTA CEPA	Chapter 7	16-Dec-18
	EU-Singapore FTA	Chapter 11	19-Oct-18
	CP-TPP	Chapter 16	8-Mar-18
	Australia-Malaysia FTA	Chapter 14	22-May-12
	NZ-Malaysia FTA	Chapter 12	26-Oct-09
	ASEAN-Australia-New Zealand FTA	Chapter 14	27-Feb-09
	Indonesia-Japan EPA	Chapter 11	20-Aug-07
	Malaysia-Japan EPA	Chapter 10	13-Dec-05
State-owned enterprises	EU-Viet Nam FTA	Chapter 11	30-Jun-19
	CP-TPP	Chapter 17	8-Mar-18
	US-Singapore FTA	Chapter 12	6-May-03
Public procurement	RCEP	Chapter 16	15-Nov-20
	EU-Viet Nam FTA	Chapter 9	30-Jun-19
	Indonesia-EFTA CEPA	Chapter 6	16-Dec-18
	EU-Singapore FTA	Chapter 9	19-Oct-18
	CP-TPP	Chapter 15	8-Mar-18
	Indonesia-Japan EPA	Chapter 10	20-Aug-07
	Brunei Darussalam-Japan FTA	Article 98	18-Jun-07
	Australia-Thailand FTA	Chapter 15	5-Jul-04
	US-Singapore FTA	Chapter 13	6-May-03
	Singapore-EFTA FTA	Chapter VI	26-Jun-02


Thus, the general review of the ATIGA and the Roundtable Discussions on Trade Facilitation organised by ARISE Plus are opportunities for ASEAN to examine the case for the possible inclusion of relevant ‘*emerging topics*’ into the ATIGA, so as to ensure that its quality, scope and effectiveness remains responsive and relevant to the changing business and trade practices.

2.2 Lack of Administrative Update in the ATIGA

A number of studies have argued that the design of PTAs is relevant and matters for increasing trade flows. The deep PTAs are found to increase trade flows between parties more significantly than shallow PTAs.⁵ Deeper trade arrangements can be pursued through a number of instruments such as harmonisation, mutual recognition, guidelines, and so forth. Such instruments are often agreed as a way to clarify, implement, and further the provisions of the main trade agreement, and therefore their development need to be reflected and administratively annexed to the main agreement as an integral part of the text.

As an illustration, Article 78 of the ATIGA lists a number of instruments under the ASEAN Framework (*e.g.*, *ASEAN Sectoral Mutual Recognition Arrangement for Ethical Arrangement for Electrical and Electronic Arrangement*, *Agreement on the ASEAN Harmonized Cosmetic Regulatory Scheme*, and so forth) in pursuing the objective of deeper Technical Barriers to Trade (TBT) integration. However, the current shortcoming of the ATIGA is that the progressive development of these instruments, including their annexes (*i.e.*, the deeper arrangements), are not reflected well in the ATIGA.

⁵ Leonardo Baccini ‘*The Economics and Politics of Preferential Trade Agreements*’ (2019) 22 Annual Review Political Science 75, 83; Leonardo Baccini, Andreas Dür, Manfred Elsig ‘*Preferential Trade Agreement: Design Matters!*’, 24 November 2013, <https://voxeu.org/article/design-preferential-trade-agreements>.



To better understand the administrative updating function in the ATIGA, the following sub-sections provide three examples of ASEAN instruments that were developed and adopted to facilitate deeper arrangements among AMSs with respect of trade in goods, but that were never administratively updated or annexed to the ATIGA.

2.2.1. ASEAN Cosmetic Directive

Cosmetic products distributed and marketed in ASEAN countries must conform with the *ASEAN Cosmetic Directive* (ACD) and its Annexes and Appendices, including the list of substances, safety assessments, labelling requirements, and good manufacturing practices.

The ACD is a Schedule under the *Agreement on the ASEAN Harmonized Cosmetic Regulatory Scheme* (AHCRC) concluded by AMSs in 2003 in order to harmonise the requirements of cosmetic products and to facilitate the movement of such products across ASEAN, reducing the technical barriers to trade in the region.⁶ The Directive is modelled after the *EU Cosmetic Directive* and the *EU Cosmetic Regulation 1223/2009*.⁷

The ACD has been expanded over time. The *ASEAN Cosmetic Committee* (ACC) and the *ASEAN Cosmetic Scientific Body* (ACSB) meet twice a year to discuss the cosmetic regulations, so as to further enhance harmonisation across the region and reduce the remaining technical barriers to trade.⁸ This activity includes amendments to the ACD Annexes and the commitments contained therein.

While the AHCRC is an integral part of the ATIGA, the progressive development of the ACD under the *Harmonized Cosmetic Regulatory Scheme* is not properly and timely updated in the ATIGA. For the ATIGA to be a 'living' document, the work of the ACD over more than 15 years of operation should be progressively and transparently reflected in the ATIGA by means of administrative updating and annexing of the ATIGA's STRACAP Chapter. This is not just a mere administrative or legal requirement, but a step that would need to be structurally enhanced in the ATIGA and that would serve the interests of ASEAN producers and traders active in the cosmetic sector, thereby enhancing the ASEAN cosmetic market and the related value chains.

2.2.2 Guidelines for the Implementation of ASEAN Commitments on Non-Tariff Measures on Goods ('NTMs Guidelines')


The Guidelines for the Implementation of ASEAN Commitments on Non-Tariff Measures on Goods (hereinafter, '*NTMs Guidelines*') were adopted in Singapore on 29 August 2018 during the 50th ASEAN Economic Ministers Meeting (AEM), in accordance with the ATIGA and the GATT 1994, including its Notes and Supplementary Provisions, as contained in Annex 1A to the Agreement Establishing the WTO. The objectives of the '*NTMs Guidelines*' are to improve the adoption, the transparency and the management of NTMs within ASEAN, and to minimise their trade-distortive effects.⁹

⁶ The *Agreement on the ASEAN Harmonized Cosmetic Regulatory Scheme* was signed during the 35th ASEAN Economic Ministers Meeting on 2 September 2003. The Agreement covers two Schedules, namely: (i) Schedule A: the *ASEAN Mutual Recognition Arrangement of Product Registration Approvals for Cosmetic*; and (ii) Schedule B: the *ASEAN Cosmetic Directive*.

⁷ See <https://asean.org/wp-content/uploads/images/2015/september/outreach-document/Edited%20Cosmetics.pdf>.

⁸ See <https://www.hsa.gov.sg/cosmetic-products/asean-cosmetic-directive>.

⁹ Paragraph 1 of the '*NTMs Guidelines*'.



The '*NTMs Guidelines*' are primarily intended to operationalise a number of ATIGA provisions in respect of enhanced transparency (e.g., Articles 11-13) and the management of NTMs (e.g., Articles 40 and 42) in the ASEAN region. The '*NTMs Guidelines*' also provides a number of features in relation to the implementation of NTMs that are not yet specified in the ATIGA, for instance; (1) *ex-ante* and *ex-post* regulatory reviews based on the regulatory impact assessment approach; (2) private sector engagement based on the *Rules of Procedures for Private Sector Engagement under the ASEAN Economic Community* (AEC); and (3) authoritative and independent review bodies, tasked by the *Coordinating Committee on the Implementation of the ATIGA* (CCA) or the *Senior Economic Officials Meeting* (SEOM) under the ATIGA to assist AMSs in assessing NTMs/NTBs.

While the '*NTMs Guidelines*' are significantly useful to clarify and provide operational guidance for the implementation of certain key provisions of the ATIGA, they are not administratively annexed or properly referred to in the ATIGA. This fact demonstrates the current structure of the ATIGA does not well accommodate and administratively update the instruments adopted post-entry into force of the ATIGA, thereby lacking transparency, resulting in delayed or asymmetric implementation of the obligations by AMSs, and in reduced scrutiny by benefitting stakeholders.

2.2.3 ASEAN Trade Facilitation Framework (ATFF)

The ATFF was adopted on 2 August 2016 in Vientiane, Lao PDR, during the 48th ASEAN Economic Ministers' Meeting (AEM). The ATFF aims at consolidating important drivers and obligations of trade facilitation provided in the *ASEAN Charter*, the *ASEAN Vision 2025: Forging Ahead Together: ASEAN Economic Community Blueprint 2025*, the ATIGA, the *WTO Trade Facilitation Agreement*, and the framework of the *Revised International Convention on the Simplification and Harmonization of Customs Procedures (the revised Kyoto Convention)*.¹⁰

The ATFF provides the basis from which AMSs can further engage and foster greater trade facilitation regionally and within the relevant ASEAN Sectoral Bodies, focusing on effective implementation of the existing ASEAN obligations, commitments and instruments relating to intra-ASEAN- trade in goods and trade facilitation.


The ATFF specifies a number of instruments of trade facilitation (e.g., the *ASEAN Single Window*, the *ASEAN Customs and Transit System*, and the *ASEAN Trade Repository*) that aim at, *inter alia*, improving regional trading opportunities and helping ASEAN businesses, including SMEs, to take advantage of intra-ASEAN trade. Currently, these specific tools are not referred to in Articles 45-46 of the ATIGA.

As it is important to capture the most relevant areas and sectors for trade facilitation to support the operationalisation of the ATIGA, the ATFF and the mentioned trade facilitation instruments should have been progressively incorporated (by means of administrative updating) in sector-specific Annexes to the ATIGA.

3. The ATIGA as a 'Living' Document – Mechanisms Available Under the ATIGA

Upgrading the scope and structure of the ATIGA is one of the most important areas for consideration by AMSs within the framework of the General Review of the ATIGA and, more fundamentally, vis-à-

¹⁰ Paragraph 2 of *ASEAN Trade Facilitation Framework*.



vis the very fabric of ASEAN's legal instruments, beyond the ATIGA. It has now been more than a decade since the ATIGA entered into force and there have been several key developments in the areas covered by the ATIGA, *inter alia* with respect to the progress in ASEAN's economic integration agenda, ASEAN's and AMSs' expanding FTA networks, and the external pressure of an ever faster paced and more complex world. In fact, the ATIGA already provides, under Articles 91, 93, and 94 thereof, for the legal mechanisms to ensure that the ATIGA become a '*living organism*'.

3.1 Expanding the ATIGA by the Virtue of Article 94(1) – Inclusion of Emerging Topics

Article 94 is an expansionary clause in the ATIGA. This provision offers two options for the amendment of the ATIGA, namely the amendment of the main text of the ATIGA and the amendment of the Annexes or Attachments to the ATIGA. According to Article 94, the main provisions of the ATIGA may be modified through amendments mutually agreed upon in writing by AMSs. Meanwhile, the annexes and attachments to the ATIGA may be modified through amendments endorsed by the AFTA Council, and such amended annexes or attachments must be administratively annexed to the ATIGA as integral parts of the Agreement.


Extending the scope of the ATIGA to cover selected '*emerging topics*' might require the amendment of the main text of the agreement. Such modifications would normally trigger the application of Article 94(1), which provides that the provisions of the ATIGA "*may be modified through amendments mutually agreed upon in writing by the Member States*". This approach requires lengthy and cumbersome internal procedures in each AMS, in order for them to ratify, accept or approve such amendments, but has been utilised by ASEAN in the past, for instance for purposes of the amendment of Article 38 of the ATIGA through the *First Protocol to Amend the ASEAN Trade in Goods Agreement* (First Protocol) in which AMSs agreed, *inter alia*, to the terminological switch from '*Certificate of Origin*' to '*Proof of Origin*'.

Thus, should the upgrade of the ATIGA comprise the inclusion of '*emerging topics*' In its basic text (*i.e.*, amendments to the main text or to the very structure of the Agreement), the mechanism under Article 94(1) is available, but would involve the extended timeframes of the internal procedures of each AMSs.

3.2 Deepening the ATIGA by the Virtue of Article 93 and 94(2)

In view of upgrading the ATIGA to correspond to the progress made in ASEAN's economic integration agenda, as pursued internally and externally, developing a feature such as specific sectoral Annexes to the ATIGA should be considered by AMSs. This mechanism would allow AMSs to amend and advance certain elements of the ATIGA on a progressive '*rolling basis*'. In fact, once again, the ATIGA already provides the legal basis for this mechanism under Articles 93 and 94(2) thereof.

Article 93 emphasises the legal status of annexes and attachments to the ATIGA as integral parts of the Agreement and underlines the possibility to adopt future legal instruments pursuant to the provisions of the ATIGA. On the other hand, Article 94(2) provides for the option of modifying the annexes or attachments through amendments endorsed by the AFTA Council, and for such amendments to be administratively annexed to the ATIGA.



AMSs could consider moving certain substantive elements of the ATIGA to its annexes and/or attachments/appendices, which could then be more easily amended and further developed on the basis of the procedure foreseen in Article 94(2) of the ATIGA. For instance, this approach was adopted in the Indonesia-EFTA States CEPA, where the rules for certain chapters, such as rules of origin, trade facilitation, and intellectual property rights, are not in the main text of the agreement, but in dedicated annexes. Furthermore, as discussed in the previous section, there are several instruments that have been adopted over the years by ASEAN to support and implement the provisions of the ATIGA. However, these instruments are not well reflected in the ATIGA. Thus, consideration could be given to the mechanics of incorporating future legal instruments into the ATIGA through specific annexes that define innovative or advanced preferences or trade facilitative mechanisms on a sector-specific basis, developed pursuant to the provisions of the ATIGA.

The issue is that such new instruments, developed pursuant to the provisions of the ATIGA, when adopted, are silent about the need for their administrative update into the ATIGA. Thus, it is recommended that future instruments adopted by AMSs, as relevant to trade in goods and trade facilitation, should have a built-in provision that requires for the administrative updating of said instruments in a dedicated Annex to the ATIGA.

4. International Benchmark – Specific Sectoral Annexes

Sectoral annexes can be understood as the annexes to a chapter that specify the implementation arrangements with respect to specific product sectors. For example, a sectoral annex can be attached to a mutual recognition agreement (e.g., with respect to good manufacturing practices or conformity assessment) for a given product sector (e.g., telecommunication equipment, cosmetics, electronics, pharmaceuticals, etc.).


The scope of the policy areas covered by the ATIGA appears to be limited to traditional trade concerns. ‘Emerging topics’ related to social issues or no-trade concerns, such as sustainable development or gender inclusion, are not included in the ATIGA.

Currently, the ATIGA does not provide for any specific sector or product rules or commitments in its Annexes, particularly with respect to TBT and Sanitary and Phytosanitary (SPS) regulation and trade-related aspects. However, such inclusion in the upgrade of the ATIGA is arguably desirable. Businesses in the region often encounter challenges in navigating multiple rules and technical regulations. Small and medium enterprises shoulder such burden, as they do not have sufficient capacity and the resources of large corporations to understand the applicable rules and comply with them.¹¹

This impediment might undermine the actual advantages and opportunities offered by the rules in the ATIGA, which eventually could also affect intra-ASEAN trade and the very objectives of the ATIGA and of the AEC. Specific sectors and/or goods in sector-specific annexes would allow AMSs to find tailored solutions to certain sector-specific issues and to deliver trade facilitation in a more precise and targeted manner.

There are a number of trade agreements involving individual AMSs that contain sector-specific annexes. The *EU-Viet Nam FTA* is an example where the agreement provides for a sector-specific

¹¹ Asian Trade Center, ‘The Need for Sectoral Annexes in RCEP’, available at <http://asiantradecentre.org/talkingtrade//the-need-for-sectoral-annexes-in-rcep>.



Annex for pharmaceutical/medicinal products and medical devices.¹² The provisions of the Annex are intended to ensure the use of international standards, practices and guidelines for pharmaceutical products or medical devices, utilising those developed by relevant international standard setting bodies, such as the *World Health Organization* (WHO), the *Organisation for Economic Co-operation and Development* (OECD), the *International Council for Harmonisation of Technical Requirements for Pharmaceuticals for Human Use* (ICH), the *Pharmaceutical Inspection Convention and Pharmaceutical Inspection Cooperation Scheme* (PIC/S) and/or the *International Medical Device Regulators Forum* (IMDRF).¹³

Another example is the CPTPP's Chapter 8 on Technical Barriers to Trade, which provides for a number of sector-specific Annexes that address sector-specific elements pertaining to issues such as standards and labelling. More specifically, the CPTPP provides for sector-specific Annexes on *Wine and Distilled Spirits* (Annex 8-A), *Information and Communications Technology Products* (Annex 8-B), *Pharmaceuticals* (Annex 8-C), *Cosmetics* (Annex 8-D), *Medical Devices* (Annex 8-E), *Proprietary Formulas for Pre-packaged Foods and Food Additives* (Annex 8-F) and *Organic Products* (Annex 8-G). While certain Annexes are quite detailed and provide very specific commitments, for instance on labelling (e.g., Annex 8-A on *Wine and Distilled Spirits*), other Annexes, such as Annex 8-G on *Organic Products*, mainly contain 'infant commitments' to exchange information and to cooperate.

As another example of a recent trade agreement that fosters such structural approach, the *EU-Singapore FTA* provides for various sector-specific Annexes to the Chapters. Annexed to Chapter 2 on *Trade in Goods*, the *EU-Singapore FTA* provides for Annex 2-B on *Motor Vehicles and Parts thereof* and Annex 2-C on *Pharmaceutical Products and Medical Devices*. Annexed to Chapter 4 on *Technical Barriers to Trade*, the *EU-Singapore FTA* provides for Annex 4-A on *Electronics*. Finally, specific rules for renewable energy are provided in a dedicated Chapter 7 on '*Non-Tariff Barriers to Trade and Investment in Renewable Energy Generation*'.

The upgrade of the ATIGA could include disciplines with respect to specific sectors in its future annexes, in particular for those priority integration sectors where AMSs have worked together over years to establish sectoral mutual recognition arrangements, such as cosmetics, prepared foodstuff products, medicinal products, medical devices, and those that will see future efforts towards trade facilitation, regulatory convergence, and harmonisation.


5. Key Takeaways from Roundtable Discussion on Trade Facilitation

During the Roundtable Discussions on Trade Facilitation organised by ARISE Plus, the representatives of the ASEAN private sector agreed that the structural reform is an important area for AMSs to consider during the negotiations for the upgrade of the ATIGA. They showed particular interest in the policy paper's recommendations, which they endorsed in full, notably with respect to the suggested administrative updating of all future legal instruments into the ATIGA and with the idea of developing sector-specific annexes.

In the view of the ASEAN private sector, the administrative updating of all future ASEAN legal instruments would facilitate the awareness-raising among the private sector of both the evolving rules of the ATIGA and the implementation of the ATIGA. On the other hand, the inclusion of disciplines

¹² Available at https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157347.pdf (accessed 26 May 2020).

¹³ European Commission, *Guide to the EU-Vietnam Agreements*, p. 33, https://trade.ec.europa.eu/doclib/docs/2016/june/tradoc_154622.pdf.



related to sector specific annexes would help the private sector in finding and using the applicable rules and regulations of relevance to trade within the region in the specific areas of their interest, thereby enhancing transparency, the rule of law and the implementation by AMSs of the commitments undertaken.

6. Recommendations

6.1 Structural Shortcomings of the ATIGA


- (a) Two evident shortcomings reflected in the current structure of the ATIGA are: (i) the ATIGA's coverage and substantive scope, which are limited to traditional trade concerns, despite the impetus in the AEC Blueprint 2025 to engage in other key regulatory areas and the fact that '*new generation*' PTAs consistently extend beyond traditional trade liberalisation disciplines, often also in PTAs to which AMSs are parties in their own right; and (ii) the current lack of administrative updating of relevant instruments adopted pursuant to the provisions of the ATIGA or regulating and overlapping trade in goods and trade facilitation.
- (b) The inability of ATIGA to extend beyond 'business as usual' in terms of the regulatory frameworks affecting trade in goods and trade facilitation, will progressively affect the ASEAN centrality and increase the '*noodle bowl*' complexities for ASEAN traders faced with multiple rules and approaches to AMSs' regulation of trade in goods, as well as preventing AMSs to negotiate with third trading partners in a cohesive and coherent manner on the basis of a common ASEAN benchmark.

6.2 Approaches Provided Under the ATIGA with respect to Structural Changes

- (c) The ATIGA provides several approaches with respect to its modifications and amendments as follows: (i) extending the scope of the ATIGA through the modification of the main text or the very structure of the Agreement by the virtue of Article 94(1); (ii) incorporating future legal instruments into the ATIGA by the virtue of Article 93(2); and (iii) amending annexes/attachments to the ATIGA and administratively updating such amendments into the ATIGA by the virtue of Article 94(2).

6.3 Other Approaches to Consider

- (d) Currently, the ATIGA does not provide for any sector/product/topic-specific annexes. AMSs could consider developing specific sector/product/topic-specific annexes, which would allow to find tailored solutions to certain developing issues or priority integration sectors, delivering trade facilitation in a more precise and targeted manner.
- (e) Another consideration could be that all future legal instruments, adopted by AMSs and relevant to trade in goods and trade facilitation, have a built-in provision that



requires the administrative updating of such instruments into dedicated sector/product/topic-specific annexes of the ATIGA.

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Regulatory Transparency and Private Sector Engagement

Jaruprapa Rakpong

1. Introduction


According to the World Trade Organization (WTO), any country's policies or laws that may affect international trade should be communicated to all trading partners. Arguably, synonymous with 'openness' and 'publicity of appropriate information', transparency is the first and most critical step to establish the accountability of any trading system, irrespective of the degree of trade integration, because only when there is a sufficient degree of transparency can all those affected engage in fair-trading activities in the market, comply with the import or market requirements, and know what their rights are.

This Policy Brief lays down a 5-part discussion on trade-related regulatory transparency in ASEAN. Following this **Introduction**, **Section 2** discusses the key ASEAN transparency obligations, examining in brief the existing obligations and commitments enshrined in the ASEAN Trade in Goods Agreement (ATIGA) and in other related ASEAN instruments; **Section 3** provides international benchmarks for reviewing and analysing the key lessons learned from the transparency features of selected Preferential Trade Agreements (PTAs), especially 'new generation' PTAs and those of relevant multilateral/plurilateral instruments. The transparency afforded by both PTAs and multilateral/plurilateral instruments can be used as a benchmark or best practice *vis-à-vis* the ATIGA's regulatory transparency regime, or provide notional inspiration for ASEAN as it considers ways to reform the text and implementation of the transparency obligations under the ATIGA; **Section 4** reflects key takeaways from roundtable discussions to annotate the key messages, findings, conclusions and recommendations that have emerged from various discussions on trade facilitation amongst entities in ASEAN Member States (AMSs), namely between officials, private sector representatives, experts and academia; and **Section 5** provides the final recommendations part through which the Policy Brief intends to provide ASEAN with a set of actionable suggestions and outcomes for consideration in light of the possible revision of the ATIGA and/or of other ASEAN instruments relevant to intra-ASEAN trade in goods and trade facilitation.¹⁴

2. Key ASEAN Transparency Obligations

At first glance, ASEAN's regulatory transparency framework appears to be a model transparency trade requirement. Textually, the framework established by the ATIGA is perhaps the most ambitious and comprehensive in the world. The ATIGA's trade-related regulatory transparency system is established through a series of procedural obligations with unique '*temporal*' dimensions that arise at various stages of AMSs' decision-making, legislative and/or regulatory processes. However, the framework contains significant weaknesses. In the majority of cases, the critical problem is one of ineffective implementation of the obligations and inefficacy in enforcing transparency, as there has been an evident lack of desire by AMSs to comply with these ambitious transparency requirements. Consequently, whilst the transparency requirements in the ATIGA are impressive on paper, they have

¹⁴ For further information see: the fifth principle of the 2018 ASEAN Good Regulatory Practice (GRP) Core Principles, the fourth characteristic of the AEC Blueprint 2025, the 2017 ASEAN Economic Community 2025 Trade Facilitation Strategic Plan and the ASEAN Trade Facilitation Framework.



so far not translated in the desired results in terms of legal certainty, commercial predictability, trade facilitation and greater regional economic integration.

Articles 11 to 14 and 40 of the ATIGA lay down ASEAN's trade-related regulatory transparency requirements, which are supplemented by other secondary legal instruments, such as the so-called '*NTMs Guidelines*'.¹⁵ To summarise, the ATIGA's transparency provisions impose three main obligations on each AMS: 1) Notification to other AMSs of drafts of new legislation that may affect trade in goods in the early stages of their decision-making process (*i.e.*, ahead of the adoption of the measures); 2) Prompt domestic publication of the new legislation once adopted, well in advance of the implementation date, in order to allow for affected entities in other AMSs to have sufficient time to become acquainted with the legislation and to comply with the new requirements; and 3) Reflection of the adopted and applicable legislation and regulation, in as much as it relates to trade in goods, on the ASEAN Trade Repository (ATR), which needs to be populated with standardised information in English, properly classified and validated by AMSs. Appropriate tools to allow for private sector engagement (PSE) are also to be considered as critical features of ASEAN's trade-related transparency framework.

2.1 Notification Obligations

Notification is a crucial component of regulatory transparency because it enables other AMSs to be informed about the development of a new trading rule that affects market access by their respective economic operators and their goods. However, the appropriate notification duty is not simply a process of notifying the upcoming trading rules; it also requires that certain '*quality*' criteria be met to ensure that the '*right information*' be communicated to '*the right stakeholders*' at the '*right time*' and in the '*right modalities*'. This is to allow adequate participation by the affected entities, at the very least by '*voicing their concerns*' within designated consultative *fora*.

Indeed, this comprehensive form of notification has been established in the ATIGA, primarily in Articles 11 and 40 thereof, which are supplemented by provisions in the '*NTMs Guidelines*' and the ASEAN Trade Facilitation Framework (ATFF). Beginning with Article 11(1) of the ATIGA, each AMS is required to notify other AMSs of any actions or measures that may nullify or impair any benefits of other AMSs or impede the achievement of any ATIGA objective,¹⁶ by notifying such measures ahead of their adoption to the Senior Economic Officials Meeting (SEOM) and the ASEAN Secretariat.¹⁷ While Article 11 of the ATIGA was written for non-tariff barriers (NTBs), its combination with Article 40 of the ATIGA extends its procedural application to non-tariff measures (NTMs).


In particular, Article 11 of the ATIGA establishes criteria for the '*right information*' to be included in AMSs notifications. As a bare minimum, without disclosing confidential information, AMSs must include the following information in their notification of the intended action or measure in their submission to the SEOM and the ASEAN Secretariat: 1) A description of the action or measure to be taken; 2) The reasons for undertaking the action or measure; 3) The intended date of implementation; and 4) The duration of the decision or measure.¹⁸

¹⁵ See the '*Guidelines for the Implementation of ASEAN Commitments on Non-Tariff Measures on Goods*' ('*NTMs Guidelines*'), as endorsed by the AEM-32nd AFTA Council.

¹⁶ Article 11(1) of the ATIGA.

¹⁷ Article 11(3) of the ATIGA.

¹⁸ Article 11(4) of the ATIGA.



Thereafter, the ATIGA designates the ASEAN Secretariat as the primary ‘repository’ for storing all AMSs’ notifications on a dedicated ‘NTMs Database’. Subsequently, potentially affected AMSs can request consultations with the notifying AMS and send written comments and suggestions to that AMS with a view to streamline the proposed NTM, remove possible barrier effects, minimise the compliance costs, and ensure that it be non-discriminatory, proportionate, when needed scientifically-justified, and the least trade restrictive possible.¹⁹ There shall be a timeframe of at least 60 days for all potentially affected AMSs to submit written feedback to the initiating AMS, which can therefore address or take into account the feedback when finalising and adopting the new measure.²⁰ Following receipt of feedback, the AMS that is initiating the action or trade measure must consult with potentially impacted AMSs to explain the planned action/measure.²¹

At first glance, the notification requirement under the ATIGA appears to be very extensive and detailed, incorporating all the necessary notification components of an advanced transparency framework. However, a deeper examination reveals a major systemic and practical problem. Article 11(1) of the ATIGA requires each AMS to self-declare any actions or measures that may constitute a violation of the ATIGA obligations *vis-à-vis* other AMSs.²² In an ideal world, this self-monitoring system would function. However, in practice, it has been shown to be counter-productive, arguably discouraging rather than encouraging AMSs to use the notification system provided under the ATIGA to notify NTBs. This negative inference has also undermined the implementation of Articles 11 and 40 of the ATIGA vis-à-vis legitimate NTMs. As a result, AMSs have seldom utilised the ATIGA’s notification mechanism in relation to their NTMs.

To date, less than 100 notifications have reportedly been submitted by AMSs through the ATIGA system, far less when compared to the 3,982 Sanitary and Phytosanitary (SPS) and Technical Barriers to Trade (TBT) notifications that have been submitted by the same AMSs, as WTO Members, to the WTO.²³ This systemic flaw necessitates a significant rethink and possible rewrite of Article 11 of the ATIGA, in particular Article 11(1) thereof.

2.2 Domestic Publication Obligations and Regional Transparency on the ATR

The publication obligations of the ATIGA are twofold, requiring the domestic publication of AMSs’ laws and decisions that affect trade in goods, as well as, at regional level, the publication of this trade-related information on the ASEAN Trade Repository (ATR), according to a standardised methodology.

2.2.1 Domestic Publication Obligations


¹⁹ Article 11(6) of the ATIGA. This has to be conducted with all other AMSs in a non-discriminatory manner (Article 11(7), read with Article 40(2) and 12 of the ATIGA; the latter contains a direct reference to the GATT Article X(3)(a).

²⁰ Article 11(3) of the ATIGA and Principle 3 of the ‘NTMs Guidelines’; the latter also provides the deadline of when the notifications can be made, namely that at a minimum there shall be 60-day timelapse between the notification and the implementation of the action or measure affecting ASEAN trade in goods. This is to provide ‘an adequate opportunity for prior discussions with the other Member States, before the adoption of the action or measure’.

²¹ Article 11(7) of the ATIGA.

²² To elaborate, these include all measures and decisions that may ‘nullify or impair any benefits of other ASEAN Member States’, whether directly or indirectly and may ‘impede the attainment of any objective’ of the ATIGA.

²³ WTO, ‘ePing SPS & TBT Notification Alert System’ (WTO) <https://www.epingalert.org/en#/browse-notifications>.



Article 12 of the ATIGA incorporates into ASEAN law Article X of the General Agreement on Tariffs and Trade (GATT),²⁴ requiring AMSs to publish their trade measures promptly and, where possible, to make them freely accessible on the Internet.²⁵ Article 65 of the ATIGA also requires AMSs to facilitate the timely publication of laws, decisions and rulings on Customs matters.²⁶ Domestic publications shall then be synchronised with the ATR and the information shall be simplified to reduce any undue burden on the private sector.²⁷ The ATFF further elaborates on the domestic publication obligation, for instance by providing that AMSs shall publish non-binding documents including standards, guidelines and practices related to trade in goods, in addition to their laws, regulations and governmental decisions.²⁸ Furthermore, AMSs should make all the domestic publications available and accessible to all interested parties in a timely manner. It shall be made preferably without any cost or, if a fee is unavoidable, at a reasonable cost.²⁹ Additionally, they shall seek to modernise their information systems and make use of new technologies wherever possible.³⁰

All AMSs must publish their national laws, rules and decisions affecting trade in ASEAN online. However, AMSs' compliance varies significantly, particularly when regarding timely publication and prompt presentation of information on the Internet. For certain AMSs, whose official languages do not include English, most domestic notifications are not available in English. Some AMSs are also only able to provide minimal English content in their respective National Trade Repositories (NTRs). In all cases, it appears that the full information has not yet been synchronised with the information covered in the ATR. AMSs' compliance with the obligation of providing on the Internet accessible and user-friendly information regarding their domestic regulations varies greatly. For instance, the weblinks to the actual laws and regulations, which are provided in the NTR databases of some AMSs, are seldom updated and often not accessible or obsolete. In summary, while the obligation of publication of trade-related information may be (*de jure*) met by AMSs publishing (in their respective languages) in their official gazettes, journals or repositories, in practice (*de facto*) transparency is lacking in terms of making the information accessible and user-friendly on the Internet (in English), to the benefit of ASEAN traders and for purposes of ASEAN transparency.

2.2.2 Regional Transparency on the ATR

Article 13 of the ATIGA sets out the obligation to create the ASEAN Trade Repository (ATR) to serve as a central regional online database containing all required information on AMSs' domestic trade measures affecting trade in goods. There are nine categories of measures to be incorporated into the ATR: (1) Tariff nomenclature; (2) Most-favoured nation (MFN) tariffs, preferential tariffs offered under the ATIGA and other Agreements between ASEAN and its Dialogue Partners; (3) Rules of Origin; (4) Non-Tariff Measures; (5) National trade and customs laws and rules; (6) Procedures and documentary requirements; (7) Administrative rulings; (8) Best practices in trade facilitation applied by each Member State; and (9) Lists of authorised traders of each Member State. All existing AMSs' legislation, which impacts trade in goods within ASEAN, must be covered by the ATR and made accessible to the public in a user-friendly format (notably, in English) on the Internet. While the ATR as an electronic

²⁴ Article 12(1) of the ATIGA.

²⁵ Article 12(1) of the ATIGA.


²⁶ Article 65(1) of the ATIGA.

²⁷ AEC Blueprint 2025, Clauses A1(1) iii (c, d and g).

²⁸ This has a broad scope covering legislation and government decisions that have potential negative affect on trade in goods in ASEAN, incorporating most types of trade measures whether they are implemented by the Member States' governments in whole or in part, as laid down in Article 12 of the ATIGA, referring to Article X of the GATT.

²⁹ Article IV 7(a) of the ATFF.

³⁰ Article IV 7(g) of the ATFF.



interface is managed by the ASEAN Secretariat, all the information uploaded on the ATR, as duly collected, classified, '*packaged*' and validated by AMSs, '*belongs*' to each AMS and remains physically stored in each AMS, merely web-linked to the ATR and easily searchable there. AMSs also have a duty to update any new measure, or the modifications to existing measures, in the ATR, as well as deleting the measures that are repealed or no longer in force.³¹

If the ATR were to ever achieve compliance with all nine categories of trade-related transparency, as mandated by Article 13 of the ATIGA, it would become one of the most comprehensive, complete, detailed and centralised Internet trade databases in the world, serving as an invaluable source of trade information for ASEAN and third country traders that wish to place their goods in the ASEAN market. Additionally, the ATR has the potential to be used as an initial export-import ASEAN helpdesk, with easy online access. This would certainly facilitate ASEAN commerce and become a driver of regional economic integration and investment, which always require legal certainty, commercial predictability and regulatory transparency.

To date, AMSs' record in terms of the progressive operationalising of the ATR and the implementation of Article 13 of the ATIGA is rather disappointing. Over ten years into the implementation of the ATIGA, the ATR remains '*work in progress*', with nowhere close to the quantity of expected information classified, packaged, validated and uploaded by AMSs. Most work has so far been undertaken by ASEAN's development partners and, while many NTMs are by now available on the ATR, especially in the crucial areas of SPS and TBT trade-related regulation, AMSs are not displaying the ownership and political will to meet the ambitious mandate of transparency mandated in the ATIGA and in the related legal instruments.

2.3 Private Sector Engagement

Private sector engagement (PSE) in each AMS's decision-making process is intended to run alongside AMSs' governmental involvement (*i.e.*, consultations and commentaries), as provided in Article 11 of the ATIGA.³² The necessity of incorporating PSE has been identified as a primary objective of the ASEAN Economic Community (AEC) in its AEC Blueprint 2025 and is deemed necessary to ensure that ASEAN can eventually become a regional trade organisation equipped with appropriate trade facilitation tools. The ATIGA, along with other secondary ASEAN instruments, such as the '*NTMs Guidelines*' and the ATFF, has provisions aimed at allowing PSE within the framework of AMSs' decision-making processes.


According to Article 47 of the ATIGA, opportunities for PSE arise throughout AMSs' decision-making processes, right up to the point at which the actual proposals become enforceable legislation. Additionally, AMSs must guarantee the '*observance by non-governmental organisations*', when acting '*in the exercise of a power delegated by central, regional, or local government or authorities within its territory*' of similar PSE obligations.³³ Furthermore, Article 47(b) requires AMSs' authorities to '*endeavour to facilitate and promote effective mechanism for exchanges with the business and trading community, including opportunities for consultation*', at various stages of the decision-making processes, including '*when formulating drafts, implementing, and reviewing rules and procedures*'. Besides that, the ASEAN Solutions for Investments, Services, and Trade (ASSIST)³⁴ has been launched

³¹ Article 40 of the ATIGA and Principle 2 of the '*NTM Guidelines*'.

³² As described in Section 2.1 above.

³³ Article 18 of the ATIGA.

³⁴ See <https://assist.asean.org/en/home>.



to provide a non-binding, consultative, free-of-charge, and Internet-based platform to assist ASEAN business enterprises in communicating with and obtaining feedback from AMSs' governments in relation to obstacles to trade, non-tariff-measures, perceived non-tariff barriers and other practical problems to ASEAN market access.

The '*NTMs Guidelines*' also offer further clarifications on AMSs' best practices in relation to PSE. Under Principle 1 thereof, on '*Necessity and Proportionality*', AMSs must conduct an *ex-ante* regulatory reviews to assess any potential adverse effects of the proposed decisions or trade measures and to seek implementation arrangements or regulatory options that impose the least restrictions on ASEAN's private sector. Subsequently, the findings from such reviews shall be published and made available to all interested private entities.³⁵

More precisely, Principle 2 on '*Participation and Engagement*' establishes that the affected private sector entities, as well as civil society and other interested stakeholders, shall have the opportunity to participate in the domestic public consultations of each AMS, prior to the launch of new governmental decisions or trade measures. This opportunity means that ASEAN has already provided a *forum* for national-level public-private consultation, available early in each AMS's decision-making processes to allow for private entities throughout ASEAN the opportunities to feed their comments to legislators and regulators, if they so wish. This can act as a platform for consultation where mutually agreed alternatives or options can be discussed. To further enhance PSE, the ATFF contains additional good practices, such as urging that AMSs make the information of their proposed decisions or actions available to the private sector upon request, for free or at a fair charge,³⁶ and that each AMS make every effort to foster close consultation and information exchange with business entities in ASEAN.³⁷

In summary, although the PSE provisions in the relevant ASEAN legal instruments are extensive and promising, it remains unclear whether any effective implementation of such obligations and commitments has so far taken place or is even realistic in ASEAN, given that the PSE procedures in the majority of AMSs are not made widely available to general traders. The subject of whether stricter requirements for PSE would be desirable or what more should be done to encourage AMSs to engage in more tangible PSE is discussed in greater detail in Section 3 below.


3. International Benchmarks

The ATIGA's objectives and textual obligations appear to be very comprehensive and perhaps even overly ambitious. However, a closer examination reveals systemic problems in terms of the implementation of ASEAN's transparency framework related to trade in goods. The most apparent flaws can be found in Article 11 on the notification procedures, which requires the AMSs to act as their own '*auditors*', by requiring them to notify any trade measure that could '*potentially nullify or impair*' other AMSs' benefits or '*impede*' the attainment of ATIGA's objectives. It is difficult to imagine an AMS considering adopting or adopting an (illegal) NTB and notifying it to ASEAN under Article 11. When these notification obligations and procedures are mandated *vis-à-vis* (legitimate) NTMs, as per Article 40 of the ATIGA, they are hardly happening in the reality of things, despite the reiterated declarations of intent of ASEAN Leaders and the many '*side instruments*' (e.g., the '*NTMs Guidelines*' and the ATFF) and despite the support of ASEAN's development partners.

³⁵ Clause 7(b) of the '*NTMs Guidelines*'.

³⁶ ATFF IV 7(a).

³⁷ ATFF IV 7(b), (f) and 10.



The even broader and more ambitious transparency obligations of the ATR, as per Article 13 of the ATIGA, are hardly being met by AMSs after over ten years of ATIGA implementation and significant support by ASEAN's development partners, notably the European Union with its ARISE and ARISE Plus Programmes. Furthermore, ASEAN only gives limited participation rights to a restricted group of stakeholders, and even then, the actual implementation is rare and ineffective (as systematically indicated by ASEAN's private sector in its complaints and submissions). The question needs to be asked as to what ASEAN should do to ensure that its transparency obligations and commitments are implemented and reflected in the reality on the ground.

The comparative review and assessment of the relevant examples in other Preferential Trade Agreements (PTAs), especially those that are considered as '*new generation*' PTAs, appears useful to suggest actions for consideration by ASEAN, as it implements the ATIGA and/or as it embarks in the current process of General Review of the ATIGA and its possible revision. The following sub-sections look at specific aspects of trade-related regulatory transparency and PSE, outlining the key features, policy reforms and mechanisms that ASEAN should consider.

3.1 Notification Obligations for Proposed Measures


In addition to the transparency standards for information availability, quality and accessibility, which are already emphasised by the ATIGA, some benchmarked PTAs include enhanced criteria for the obligation to notify of upcoming proposed new legal instruments affecting international trade. For example, the Korea-Vietnam FTA requires each Party to make available to the general public all relevant information about proposed technical regulations, including the objectives and rationales for newly proposed technical measures, as well as the possible conformity assessment procedures. Extending the notification obligation to private stakeholders and '*civil society*' at large, as opposed to confining it to ASEAN governments only as it currently is in the ATIGA, could enhance the transparency process and encourage compliance.³⁸

ASEAN should strive to achieve universal access to high-quality information that meets the needs of all stakeholders, including traders and NGOs, both inside ASEAN and in third countries with which ASEAN has a trade relationship. In other words, high-quality information about measures that are proposed for adoption should be made available in a timely manner to not only AMSs, but also to anyone who may be affected by the adopting AMS's laws and regulations. This degree of transparency of AMSs' notifications would not only enable traders and economic operators to timely adapt their products to the new requirements but would also allow AMSs to refine their measures and take into account a multitude of useful comments and positions, thereby ensuring that the adopted measures are the least trade restrictive, non-discriminatory, scientifically justified and proportionate.

3.1.1 Cross-Notification

Cross-notification is included in the AEC 2025 Trade Facilitation Strategic Action Plan and in Paragraph 23 of the '*NTMs Guidelines*'. The AMSs could consider reviewing the ATIGA rules to mandate the systematic '*cross-notification*' among AMSs, in order to fulfil the notification requirements for matters that are subject to the ATIGA's List of Notifiable Measures (Annex I), as part of its first objective of '*Strengthening the ATIGA further*'.

³⁸ Article 6.7 paragraphs 2 and 3 of the *Korea-Vietnam FTA*.



Furthermore, the WTO offers the example of useful information management systems, which include a comprehensive database that allows users to search all TBT and SPS notifications as well as specific trade concerns raised in the TBT and SPS Committees.³⁹ It is a database that allows users to search for TBT and SPS Enquiry Points, Statements on Implementation, Member Agreements and other TBT and SPS-related documents, and that automatically warns users of information updates. As a result, the ATIGA should rethink Article 11 to include a “*Notification Alert*” that could be issued on the Internet or systematically circulated via e-mail to a database of interested recipients by the ASEAN Secretariat.

3.1.2 Duty to Allow for Notice and Comment

During the notification procedure under Article 11 of the ATIGA, there is no requirement to involve the private sector, but the consultations and commentaries are only foreseen among governments. The ATIGA (Article 47, paragraphs b and i thereof) does make some references to communications and consultations with the ‘*business and trading community*’, but nothing has ever been systematically implemented *vis-à-vis* notified measures. Along the same lines, the ‘*NTMs Guidelines*’ introduced Principle 2 on ‘*Consultations and Engagement*’, which contains specific provisions on consultations with the ‘*private sector and civil society organisations and interested persons*’ when preparing the proposed measures and ahead of their adoption into law. Despite this language, it does not appear that AMSs systematically provide such consultative PSE opportunities in relation to trade-related measures.

From a comparative standpoint, it is noteworthy that the Thailand-Chile FTA emphasises the importance of transparency in the notification process by allowing the private sector to provide statements describing the proposed technical regulation or conformity assessment procedures’ objective and rationale.⁴⁰ As a result, the Thailand-Chile FTA provides the private sector an additional opportunity for notice and comment on any measure that is notified prior to its publication.

ASEAN could also consider institutionalising in the ATIGA or in a dedicated legal instrument the *e-Platform for Consultations with the Private Sector* that has been piloted through the assistance of the European Union under the ARISE Plus Programme. The *e-Platform* was initially piloted to allow only a restricted group of private sector organisations (*i.e.*, the ASEAN Business Advisory Council and the Joint Business Councils) to engage in consultations with AMSs and the relevant ASEAN Sectoral Bodies. The PSE potential of this platform for electronic consultations was and remains significant, especially during and in the aftermath of the *Covid-19* pandemic, but ASEAN does not appear keen to encourage its utilisation and has so far displayed little ownership of it.

Finally, along the lines of what is provided in the Thailand-Chile FTA, ASEAN could consider introducing legal text that encourages or requires AMSs to make public their responses to the comments received from the private sector.⁴¹ Such built-in transparency would encourage the private sector’s participation in the ATIGA notification procedures and also minimise AMSs’ efforts to reply to all comments received.

³⁹ WTO, ‘WTO Technical Barriers to Trade-Information Management System (TBT IMS)’ (WTO), <http://tbttims.wto.org/>; and WTO, ‘The Sanitary and Phytosanitary-Information Management System (SPS IMS)’ (WTO), <http://spsims.wto.org/>.

⁴⁰ Article 7.10(3)(a) of the *Thailand-Chile FTA*.

⁴¹ Article 7.10(5) of the *Thailand-Chile FTA*.



3.1.3 'Name and Shame'

As indicated, the ATIGA's notification system has only seen very limited action by AMSs. Even though Article 11 of the ATIGA provides no effective punishment for the AMSs that do not notify their trade measures through the mandated procedures, a '*naming and shaming*' procedure could be a good 'soft' alternative to encourage AMSs to comply with the transparency requirements and systematically implement the notification procedures.

Using the *World Bank's Ease of Doing Business Index* as an example,⁴² the index uses a ranking system that pushes countries to conform with international standards and modify their business environments to improve their competitiveness. A ranking system based on the quantity of notifications sent by AMSs to the ASEAN Secretariat and SEOM would likely incentivise AMSs to implement Article 11 of the ATIGA.

3.2 Publication of Adopted Measures


The ATR is already a very ambitious system of transparency. ASEAN should consider whether this level of ambition is realistic in light of the significant delays in its implementation and operationalisation by AMSs, and in the relatively low level of ownership so far displayed (*i.e.*, most of the work to progressively operationalise the ATR has been conducted by ASEAN's development partners, primarily the European Union through its ARISE Plus Programme). If the ATR is confirmed (as it should) as the primary tool of regional regulatory transparency, ASEAN should define a mechanism to ensure that AMSs do sustainably comply with Article 13 of the ATIGA and that the many efforts so far made not be lost. Trade-related regulatory transparency requires a constant commitment, systematic approaches, consistent methodologies and inter-institutional cooperation at national level. Perhaps these are areas where ASEAN should continue working with supporting development partners, with a view to ensure the long-term viability, relevance and sustainability of the ATR and the respective AMSs' NTRs.

Another way through which ASEAN could '*nudge*' AMSs to fully implement their transparency obligations, both with respect to the notification requirements and the ATR, would be by introducing a rule whereby, if the AMS were to fail to comply with this set of transparency obligations, a reverse burden of proof mechanism could be established, under which the AMS that has fallen short of its transparency obligations *vis-à-vis* a specific trade-related measure, and has failed to report such proposed or existing NTM, would have to bear the burden of proof to demonstrate to the other AMSs that its unnotified/unreported NTM is consistent with the ATIGA, rather than the usual burden of proof being placed on a complaining AMS to demonstrate the ATIGA inconsistency of the NTM at issue.

3.3 Notification Alerts

The functioning of the ATR makes it somewhat difficult for the private sector and all interested users to get fresh and up-to-date information on the respective AMSs' trade-related information. This forces the private sector to manually monitor on a regular basis the ATR website for new AMSs' uploads or changes to existing measures.

⁴² World Bank Group, '*Ease of Doing Business ranking*', <https://www.doingbusiness.org/en/rankings>.



Technological solutions exist to simplify this task and further enhance transparency. For instance, the WTO has launched a system known as ‘ePing’, which is a collaborative effort of the *United Nations Conference on Trade and Development* (UNCTAD), the WTO and the *International Trade Centre* (ITC). The ‘ePing’ is a web-based platform that enables commercial and private stakeholders to rapidly access, via automatic alerts, the available SPS or TBT notifications of WTO Members that may affect trade in goods and market access opportunities.⁴³ A similar e-alert system could be explored by ASEAN to further support the private sector by enhancing the availability and accessibility of the ATR’s trade-related information with ‘real time updates’ being systematically e-mailed to thematic lists of recipients.

4. Key Takeaways from Roundtable Discussion on Trade Facilitation

During the Roundtable Discussions on Trade Facilitation organised by ARISE Plus, the representatives of the ASEAN private sector reiterated the need to strengthen private sector engagement within ASEAN, as the current mechanisms are not effective in addressing concerns raised by businesses directly or through their representative entities. The ASSIST platform was cited as an example, where the responses and solutions proposed by AMSs often do not address the concerns raised and focus on the process rather than on the outcomes.

The ASEAN private sector endorsed in large part the recommendations made in this policy paper, notably with respect to the proposed mechanisms of the notification alerts, of the ‘reverse burden of proof’, and of the ‘name and shame’ ranking system.

5. Recommendations

5.1 Notification Obligations for Proposed Measures

NTMs, rather than NTBs, should be the emphasis of the notification processes under Article 11 of the ATIGA. Cross-notification should be formally introduced in order to trigger a dialogue between AMSs.


The incorporation of a ‘name and shame’ ranking system, similar in structure to the *World Bank’s Ease of Doing Business Index*, should be considered by ASEAN in order to reflect the number of notifications sent by AMSs to the ASEAN Secretariat and SEOM, as an effective option to improve AMSs’ compliance of their transparency obligations.

5.2 Publication of Adopted Measures

The introduction of a ‘reverse burden of proof’ mechanism (on the ATIGA consistency of the adopted measures), in order to deter AMSs from neglecting their duties to submit notifications of proposed measures and to update the ATR with the adopted measures, should be considered by ASEAN.

5.3 Notification Alerts

⁴³ WTO, ‘SPS & TBT notification alert system: User Guide’ (‘ePing’, June 2018), https://epingalert.org/help/user_guide.html.



The creation of a web-based notification platform, similar to those used by UNCTAD, the WTO, and some countries or international organisations, dubbed ‘*ePing*’ by the WTO, should be considered in order to allow interested individuals in the private sector to receive near real-time updates on the newly published trade measures of all AMSs.

5.4 Private Sector Engagement

A web-based platform for consultations with the private sector, ideally along the lines of the *ePlatform for Consultations with the Private Sector*, which has been previously piloted by ASEAN, should be formally established in order to facilitate consultations between the private sector, AMSs and ASEAN’s relevant Sectoral Bodies.

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Streamlining of Non-Tariff Measures and Removal of Non-Tariff Barriers

Michelle Limenta

1. Introduction

Non-Tariff Measures (NTMs), as defined by the United Nations Conference on Trade and Development (UNCTAD), are policy measures rendered by a State, other than tariffs, that affect international trade in goods.⁴⁴ In general, they include a wide range of policy instruments used to pursue social and environmental objectives, or to ensure compliance with domestic regulations. As the definition of NTMs is broad, the UNCTAD had established in 2006 the Multi-Agency Support Team (MAST), which comprised of eight international organisations, to work on the taxonomy of NTMs. The MAST discussed and developed the International Classification of NTMs and agreed on the first version of the classification in 2012.⁴⁵ The International Classification of NTMs contains useful guidelines to identify and classify technical measures that amount to NTMs, such as sanitary and phytosanitary measures (SPS) and technical barriers to trade (TBT), as well as other measures traditionally used as instruments of international trade policy, such as quotas and import or export restrictions.

While countries may share similar social and/or environmental policy objectives in adopting NTMs, they often apply such NTMs under different standards or technical requirements. Therefore, NTMs might substantially affect trade through information asymmetries and high compliance costs, which present a significant challenge for both exporters and importers alike.⁴⁶ NTMs with trade-inhibiting effects can be regarded as Non-Tariff Barriers (NTBs) when such policy measures become overly trade-restrictive and protectionist or discriminatory. While tariff barriers have been systematically reduced since the late 1940s as a result of successive GATT rounds of tariff negotiations, NTMs have gradually become a more prominent instrument of trade protection including in the ASEAN region.⁴⁷

As the application of NTMs influences the global and regional economy, as well as increases the cost of doing business, the ASEAN Trade in Goods Agreement (ATIGA) under Article 40(1) in general prohibits ASEAN Member States (AMSs) from adopting and maintaining such measures, except in accordance with their rights and obligations under the WTO and the ATIGA. In this regard, the *Guidelines for the Implementation of ASEAN Commitments on Non-Tariff Measures on Goods* ('NTMs Guidelines') state five guiding principles with respect to the application of NTMs by AMSs, namely necessity and proportionality, consultations and engagement, transparency, non-discrimination and impartiality, and periodic review.


Transparency is arguably one of the main challenges with respect to the streamlining of NTMs within ASEAN. While the ASEAN Trade Repository (ATR) has been established by virtue of Article 13 of the

⁴⁴ UNCTAD, 'Non-tariff measures (NTMs)', available at <https://unctad.org/topic/trade-analysis/non-tariff-measures>.

⁴⁵ UNCTAD, 'Classification of NTMs', available at <https://unctad.org/topic/trade-analysis/non-tariff-measures/NTMs-classification>.

⁴⁶ UNCTAD, 'Non-tariff measures (NTMs)', available at <https://unctad.org/topic/trade-analysis/non-tariff-measures>.

⁴⁷ UNESCAP, 'The Rise of Non-Tariff Measures', p. 8, available at https://www.unescap.org/sites/default/d8files/APTIR2019_Introduction.pdf. The NTMs database developed by the Economic Research Institute for ASEAN and East Asia (ERIA) and UNCTAD shows that the number of NTMs in ASEAN has followed an upward trend. See T. Doan and S. Buban (2019), 'Managing Non-tariff Measures in ASEAN', in P. Intal and M. Pangestu, *Integrated and Connected Seamless ASEAN Economic Community*, Jakarta, ERIA, p. 21, available at https://www.eria.org/uploads/media/6.AV2040_VOL4_Managing_NTM_in_ASEAN.pdf.



ATIGA, the operationalisation of the platform is still far from complete, as not all AMSs have validated and uploaded all their NTMs under Category 4 of the ATR taxonomy.

This Policy Brief seeks to assess the approaches provided within ASEAN and other international benchmarks with respect to NTMs streamlining and NTBs removal. Following this **Introduction**, **Section 2** of the Policy Brief highlights a number of key provisions and mechanisms provided under the ATIGA and other relevant ASEAN instruments. **Section 3** discusses the international benchmarks within some of the ‘modern’ preferential trade agreements (PTAs) involving individual AMSs. **Section 4** reflects the key takeaways derived from the roundtable discussions on trade facilitation, in order to annotate the key messages, findings, conclusions and recommendations that have emerged among relevant stakeholders, notably ASEAN government officials, private sector representatives, experts and academia. Finally, **Section 5** offers a set of final recommendations through which the Policy Brief intends to provide ASEAN with actionable suggestions and outcomes for consideration in light of the General Review of the ATIGA.

2. Approaches to NTMs Streamlining and NTBs Removal in the ATIGA and ASEAN Instruments


This Section looks at the approaches to NTMs streamlining and NTBs removal in the ATIGA (discussed in *Section 2.1*) and at other relevant ASEAN instruments, namely *the AEC Blueprint 2025* (elaborated on in *Section 2.2*), *the NTMs Guidelines* (explained in *Section 2.3*), and *the AEC 2025 Trade Facilitation Strategic Action Plan* (discussed in *Section 2.4*).

2.1 NTMs Streamlining and NTBs Removal in the ATIGA – Transparency, Flow of Information, and Regular Review

The ATIGA includes Chapter 4, which is dedicated to NTMs. Article 40 of the ATIGA prohibits AMSs from adopting or maintaining NTMs, unless in accordance with the transparency obligations under the ATIGA stipulated in Articles 11-13 thereof. The NTMs adopted and maintained by AMSs, in fact, are subject to transparency requirements such as notification and publication.

Under Article 11 of the ATIGA, AMSs are required to notify their proposed measures, ahead of their adoption, to the Senior Economic Officials Meeting (SEOM) and the ASEAN Secretariat, when such measures “*may nullify or impair any benefit to other Member States [..]*” or when the measures may “*impede the attainment of any objective of this Agreement*”. In other words, AMSs must notify their proposed NTBs prior to adoption. While ambitious and perhaps even idealistic in nature, this is in practice not realistic and, in fact, it has reportedly never happened. It is hard to imagine an AMS wishing to adopt a NTB that is, by definition, illegal and yet notifying it to other AMSs.

Thus, it is important to distinguish between NTMs and NTBs. Only NTBs should be eliminated, while NTMs should be streamlined and made transparent, so as to minimise their burden and cost for the private sector. The differentiation between NTMs and NTBs is discussed in *Section 2.3* below. Additionally, as there is an endemic lack of notifications of NTMs by AMSs, consideration needs to be given to the inclusion of ‘*cross-notification*’ in the upgrade of the ATIGA. Through it, AMSs may notify NTMs introduced by another AMS, if these measures have not been notified as per Article 11 of the ATIGA by the adopting AMS. This would enable AMSs to improve their collective monitoring and review of NTMs, with a view to their removal (if deemed NTBs) or streamlining (if disproportionate



NTMs). *Section 2.4* below highlights again the instrument of ‘cross-notification’ as a tool to enhance Article 11 of the ATIGA.

Furthermore, Article 12 of the ATIGA, which incorporates Article X of the GATT 1994 into the ATIGA, obliges AMSs, to the extent possible, to publish their respective laws, regulations, decisions and rulings, making them available on the Internet. Meanwhile, Article 13 of the ATIGA provides a very ambitious and comprehensive system of transparency. AMSs are obliged to publish all their trade-related information, ideally through national trade repositories, and by means of populating the ASEAN Trade Repository (ATR) database. The ATR, which was set to contain the trade and customs laws and procedures of all AMSs, is a central regional online database containing all required information on AMSs’ domestic trade measures affecting trade in goods, including NTMs.

Aside from the transparency requirements, Article 42 of the ATIGA requires AMSs to review regularly the NTMs uploaded on the various national and regional databases, with a view to eliminating NTBs. The elimination of NTBs is to be dealt with by the Co-ordinating Committee for the Implementation of the ATIGA (CCA), the ASEAN Consultative Committee on Standards and Quality (ACCSQ), the ASEAN Committee on Sanitary and Phytosanitary (AC-SPS), the working bodies under ASEAN Directors-General of Customs and other ASEAN Bodies. In consultation with the relevant ASEAN Sectoral Bodies, the CCA is tasked to review any NTMs notified by AMSs.

2.2 NTMs Streamlining in the AEC Blueprint 2025 – International Standards Alignment and MRAs

Reducing the cost of NTMs and removing NTBs is a key component of ASEAN’s trade facilitation strategy, as stated in the *AEC Blueprint 2025*. Measures to streamline NTMs include: (i) accelerating work towards full elimination of non-tariff barriers; (ii) standards and conformance measures (*e.g.*, equivalence in technical regulations, standards harmonisation, alignment with international standards and mutual recognition arrangements, also known as MRAs); and (iii) streamlining procedures and reducing requirements for certificates, permits and licenses to import or export.⁴⁸


Furthermore, measures that give rise to a trade facilitative regime in ASEAN include: (i) exploring the adoption of stringent criteria and sunset clauses on trade-protective NTMs; (ii) embedding good regulatory practices (GRPs) in the implementation of domestic regulations and practices, thereby minimising the compliance costs of meeting NTM requirements; (iii) strengthening the coordination with ASEAN’s private sector in determining, prioritising and minimising the unnecessary regulatory burdens of NTMs on the private sector; and (iv) exploring alternative ways of addressing NTMs, such as sectoral or value chain approaches.⁴⁹

The *AEC Blueprint 2025* clearly highlights the alignment with international standards and MRAs, as well as streamlining procedures and reducing the administrative burdens, as relevant approaches for NTMs streamlining, in addition to the systematic flow of information and transparency, as required in the ATIGA.

In practice, AMSs have launched a number of initiatives to develop and establish MRAs in certain sectors, such as cosmetics, automotive, pharmaceuticals, electrical and electronic equipment. The progress, albeit slow, appears to be promising in removing NTBs, reducing the compliance costs for the private sector, and eventually facilitating intra-ASEAN trade.

⁴⁸ The ASEAN Economic Blueprint 2025, p. 4.

⁴⁹ Ibid, p. 5.



2.3 Streamlining NTMs in the 2018 NTMs Guidelines – Permissible/Prohibited NTMs and Good Regulatory Practice

The *NTMs Guidelines*, adopted by the ASEAN Economic Ministers in Singapore on 29 August 2018, provide clarifications and guidelines with respect to the operationalisation of the ATIGA's key provisions concerning NTMs, namely Articles 11, 12, 13, 40, and 42. In this regard, the *NTMs Guidelines* identify several guiding principles and approaches that are useful in administering and streamlining NTMs, such as the distinction between NTMs and NTBs, private sector engagement, and the periodic review of NTMs.

2.3.1 Permissible or prohibited NTMs


To streamline NTMs, it is important to distinguish the '*permissible*' non-tariff measures from the prohibited ones. Nonetheless, the dividing line between NTMs and NTBs is not always clear. The ATIGA in particular does not provide a specific definition with respect to NTMs, nor does it clarify the differences between these measures. The *NTMs Guidelines* appear to fill this gap by referring to a definition of NTMs provided by the UNCTAD and by specifying the types of '*permissible*' NTMs to be distinguished from the '*prohibited*' NTMs (*i.e.*, the NTBs) under Article 40 of the ATIGA.

According to the *NTMs Guidelines*, the non-exhaustive list of '*permissible*' non-tariff measures in the ATIGA includes, for instance, Article 8 on General Exceptions, Article 10 on Measures to Safeguard the Balance-of-Payments, Article 44 on Import Licensing Procedures, and the relevant articles in Chapter 6 on Customs, Chapter 7 on Standards, Technical Regulations and Conformity Assessment Procedures, and Chapter 8 on Sanitary and Phytosanitary Measures.

Importantly, Paragraph 27 of the *NTMs Guidelines* notes several criteria to be taken into account by AMSs in assessing whether an NTM constitutes an NTB. Such criteria, under the guiding principle of '*non-discrimination and impartiality*', are as follow: (i) whether the NTM complies with the relevant ATIGA or WTO obligations; (ii) whether the NTM is applied equally to domestic and imported products; (iii) whether the NTM has any restrictive, distortive, or discriminative trade impact on the other AMSs or on third countries; and (iv) whether the NTM addresses any market failure.

2.3.2 *Ex-ante* and *ex-post* consultations and reviews

Streamlining NTMS would involve and require good regulatory practices. Stakeholder consultation and regulatory impact assessments (RIAs), as part of good regulatory practices, are necessary approaches in order to obtain the inputs and comments from various elements of society and to assess the positive and negative effects of both proposed and existing NTMs. The '*good regulatory practices*' value is reflected in the *NTMs Guidelines*. The *Guidelines* urge AMSs to conduct *ex-ante* and *ex-post* consultations and reviews with respect to the design and application of NTMs. Under the principle of '*consultations and engagement*', AMSs must provide adequate opportunity and timeframe for the relevant stakeholders (*i.e.*, private sector, civil society organisations, and interested persons) to comment on the proposed draft NTMs.



AMSs are also required to conduct a periodic review of their NTMs in order to ensure that they remain relevant measures in addressing the public's interests, and to minimise or eliminate the distorting effects. The periodic, *ex-post* reviews of the NTMs can be done through regulatory impact assessments or other similar approaches. Similarly, under the principle of '*necessity and proportionality*', AMSs are encouraged to conduct an *ex-ante* regulatory review processes using the RIA methodology or similar approaches in ensuring that a particular NTM is necessary and proportional.⁵⁰

2.4 AEC 2025 Trade Facilitation Strategic Action Plan – Cross-Notification, Standstill and Rollback, and Institutional Enhancement

The *AEC 2025 Trade Facilitation Strategic Action Plan* contains strategic measures and action lines pertaining to addressing the trade distorting effect of NTMs, which are important to consider for the development of the ATIGA, in particular Chapter 4 thereof.

In particular, the *AEC 2025 Trade Facilitation Strategic Action Plan* calls for the '*cross-notification*' procedure among AMSs, to enhance Article 11 of the ATIGA, and to conduct feasibility studies when undertaking standstill and rollback commitments for measures relevant to trade facilitation, including NTMs that have barrier effects.

The *AEC 2025 Trade Facilitation Strategic Action Plan* does not define what '*cross-notification*' may constitute. However, the term is generally understood as referring to a mechanism/procedure where the institution (*i.e.*, the ASEAN Secretariat) or other AMSs notify on behalf of a non-compliant or non-reporting AMS. The *AEC 2025 Trade Facilitation Strategic Action Plan* provides, instead, the definition of standstill and rollback commitments. A '*standstill commitment*' is defined as the undertaking by and among AMSs to not introduce new or additional NTMs that would impede *intra*-ASEAN trade. Meanwhile, a '*rollback commitment*' means the undertaking by and among AMSs to phase out or eliminate NTMs that would impede *intra*-ASEAN trade.⁵¹ The standstill and rollback commitments, when combined, produce a '*ratchet effect*' in trade liberalisation, where the liberalisation measures are '*locked in*', as they cannot be rescinded or nullified over the time.⁵² Standstill and rollback commitments are not new instruments to the five original ASEAN Member States and to Brunei, as in 1987 they signed the *Memorandum of Understanding on Standstill and Rollback on Non-Tariff Barriers Among the ASEAN Countries*, where they agreed that standstill and rollback commitments should cover both NTMs and NTBs.


While '*cross-notification*', as well as '*standstill*' and '*rollback*' commitments, could be positive and may present forward-looking approaches in enhancing transparency mechanism and to further trade in goods liberalisation, the inclusion of these approaches in the ATIGA rests on the political will of AMSs in deciding collectively the level of ambition that they wish to pursue in the upgrade of the ATIGA.

Furthermore, the *AEC 2025 Trade Facilitation Strategic Action Plan* calls for the inclusion of a feature enabling ASEAN's private sector to report disproportionate NTMs or NTBs through the ASEAN

⁵⁰ The NTMs Guidelines, principle '*necessity and proportionality*' and principle '*periodic review*'.

⁵¹ AEC 2025 Trade Facilitation Strategic Action Plan, footnote 1. See also, the Memorandum of Understanding on Standstill on Non-Tariff Barriers Among the ASEAN Countries, Manila, 15 December 1987, available at <https://asean.org/memorandum-of-understanding-on-standstill-and-rollback-on-non-tariff-barriers-among-the-asean-countries-manila-philippines-15-december-1987/>.

⁵² OECD '*Mechanisms for Standstill, Rollback and Listing of Country Specific Reservations*', available at <https://www.oecd.org/daf/mai/pdf/dg2/dg2953r1e.pdf>.



Solutions for Investments, Services and Trade (ASSIST) mechanism, as well as by strengthening the role and function of the National Trade Facilitation Coordinating Committees through the inclusion of a regulatory oversight function on NTMs to the Committees' scope of action. These strategic measures seek to enhance the institutional function and role of the ASEAN trade facilitation tools in dealing with NTMs, which in turn could have significant benefits for purposes of NTB removal.

3. International Benchmark – Built-In Review and Consultation Mechanisms For NTMs


Paragraphs (1) and (3) of Article 42 of the ATIGA provide for the review mechanism conducted either by AMSs, with a view to identify NTBs and other than quantitative restrictions, or by the Co-ordinating Committee for the Implementation of the ATIGA (CCA) in consultation with the relevant ASEAN Sectoral Bodies, based on the notifications or reports submitted by AMSs or by the private sector with a view to determine whether a measure constitutes an NTB. However, these two paragraphs are formulated in a very short and general manner. AMSs could consider to develop paragraphs (2) and (3) of Article 42 in the General Review of the ATIGA, so as to have more advanced feature of NTM-specific review and/or consultation mechanism.

Taking other recent PTAs as benchmarks, there are a number of bilateral and/or plurilateral trade agreements involving individual AMSs that contain built-in review and consultation mechanisms with respect to NTMs that do not fall within the ambit of the consultation and dispute settlement Chapters of such PTAs, such as the Indonesia-Australia Comprehensive Economic Partnership (IA-CEPA) and the Regional Comprehensive Economic Partnership (RCEP). For instance, Article 3.2 of the IA-CEPA provides for dedicated procedural rules including a specific time-frame for the review mechanism. If a Party to the IA-CEPA considers that an NTM of another party is unnecessary and becomes an obstacle to trade, such Party may submit the measure for review by the Committee of Trade in Goods.

The RCEP Agreement, also under Article 2.18 thereof, provides for technical consultations on NTMs. An RCEP Party may request technical consultations with another Party on any NTM that it considers negatively affecting its trade. The RCEP provisions with respect to technical consultations on NTMs provide flexibility to the requesting and requested Parties to conduct such consultations via any mutually agreed means, with a view to reach a mutually agreed solution within 180 days of the request for consultations. The Committee on Good does not necessarily get directly involved with the bilateral consultations between the requested and requesting Parties. However, each Party must submit an annual notification containing a summary of the progress or outcomes of the consultations to the Committee.


Establishing a built-in review and consultation mechanisms in the ATIGA could foster and enable continuous monitoring and discussion of NTMs, with a view to streamlining NTMs and removing NTBs. The provisions in the IA-CEPA and the RCEP Agreement could be a good term of reference in formulating such a mechanism under the Upgrade of the ATIGA. The details of the consultation mechanism in the IA-CEPA and the RCEP Agreement can be seen in the table below.

Trade Agreement	Consultation Mechanisms
IA-CEPA (Article 3.2)	(a) An affected Party may nominate an NTM for review by the Committee on Trade in Goods by notifying the other Party at least 30 days before the date of the next scheduled meeting of the



	<p>Committee. The nomination must include the NTM for review and reasons, along with possible solution.</p> <p>(b) The Committee on Trade in Goods shall establish procedures to review the NTMs within 360 days of the entry into force of the IA-CEPA.</p> <p>(c) The review shall include consideration of the commercial significance of the trade impacted by the NTM, whether other less trade-restrictive alternatives exist, or if any progress is achieved elsewhere.</p> <p>(d) The Committee on Trade in Goods shall be supported in its review of NTMs by the Sub-Committee of Sanitary and Phytosanitary Matters, Technical Barriers to Trade, Trade Facilitation, and other relevant technical bodies.</p> <p>(e) After reviewing the NTMs, the Committee on Trade in Goods must provide advice to the Joint Committee on any NTMs that should receive priority consideration, along with providing guidance and solutions.</p> <p>(f) Chapter 20 (Consultation and Dispute Settlement) of IA-CEPA shall not apply to the mechanism under Article 3.2. This Article also shall not prejudice the rights of the Parties under Chapter 20.</p>
RCEP Agreement (Article 2.18)	<p>(a) The request for technical consultation on NTMs by the requesting Party to the requested Party shall be made in writing and shall clearly identify the measure and concerns regarding the measure that adversely affects trade</p> <p>(b) The request for technical consultation shall be circulated to all the other Parties. Other Parties may request to join the technical consultations, subject to the consent of the consulting Parties.</p> <p>(c) The requested Party must respond to the requesting Party and enter into technical consultations within 60 days of the receipt of the written request, with a view of reaching a mutually satisfactory solution within 180 days of the request.</p> <p>(d) Technical consultations can be conducted via any means mutually agreed by the consulting Parties.</p> <p>(e) If the requesting Party consider that a matter is urgent or involves perishable goods, it may request for the technical consultation to take place within a shorter time frame.</p> <p>(f) Each Party are required submit an annual notification to the Committee on Goods and shall contain a summary of the progress and outcome of the consultation.</p> <p>(g) Technical regulations under this Article shall not prejudice the rights and obligations of the Parties under Chapter 19 on Dispute Settlement and the WTO Agreement.</p>

4. Key Takeaways from Roundtable Discussions



During the Roundtable Discussions on Trade Facilitation organised by ARISE Plus, the representatives of the ASEAN private sector recognised the importance of streamlining NTMs and removing NTBs as the key drivers to facilitate and improve intra-ASEAN trade. Specifically, they highlighted that developing dedicated mutual recognition arrangements (MRAs) in certain sectors (*e.g.*, MRAs on halal, food and beverages standards and conformity assessment procedures) would be beneficial for them and greatly facilitate trade within the region, also enhancing ASEAN centrality in relation to issues that are increasingly becoming areas of global regulation.

Such approach would make a desirable contribution to trade within the region by streamlining the procedures, reducing the administrative burdens, and minimising the compliance costs for traders. It was highlighted that AMSs should include the strategic initiatives to streamline NTMs and remove NTBs in the Upgraded ATIGA. The ASEAN private sector overwhelmingly endorsed the recommendations put forward in this policy brief, notably with respect to the enhanced transparency on NTMs, the introduction of an *ad hoc* consultation mechanism on NTMs, and the greater enforceability of the ATIGA rules and AMSs' commitments on NTMs and NTBs.


5. Recommendations

5.1 Approaches Provided Under the ATIGA with respect to NTMs Streamlining and NTB Approval

- (a) NTMs streamlining and NTBs removal are of fundamental importance for a more integrated ASEAN Economic Community. The commitment of AMSs to minimise the cost of NTMs has been cemented by the adoption and implementation of the ATIGA, where since 2010 AMSs have been prohibited under Article 40 of the ATIGA from adopting or maintaining NTMs, unless in accordance with the transparency obligations under the ATIGA, as stipulated in Articles 11-13 thereof.
- (b) While the ATIGA has served AMSs well, several improvements could be brought to the provisions of the ATIGA, whether it is to clarify, enhance and make more enforceable the rules on NTMs, foster advance notification and the implementation of the transparency obligations on NTMs for them to be reflected in the ATR, or whether it is about ensuring a more effective and actionable set of provisions and tools to identify and remove NTBs.

5.2 Approaches Provided Under the ASEAN Instruments with respect to NTMs Streamlining and NTB Approval

- (a) In light of NTMs streamlining and NTBs removal, the ATIGA should better differentiate between NTMs and NTBs. AMSs may apply '*permissible*' NTMs to the extent that they are not excessive or disproportionate vis-à-vis the legitimate objectives being sought and insofar as they do not become disguised barriers to international trade. The benchmark for determining whether an NTM constitutes an NTB could refer to Paragraph 27 of the *NTMs Guidelines*. Managing NTMs involves good regulatory practices. In a similar vein, the *NTMs Guidelines* urge AMSs to conduct *ex-ante* and *ex-post* consultations and reviews with respect to the design and application of NTMs.

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- (b) Reducing the cost of NTMs is a key component of the ASEAN trade facilitation strategy in the *AEC Blueprint 2025*. The ATIGA could take into account the specific strategic measures in the Blueprint, pushing toward the convergence of trade facilitation regimes among AMSs and the use of global best practices in order to achieve a highly integrated and cohesive ASEAN economy. These measures include equivalence in technical regulations, alignment with international standards and MRAs, and minimising the regulatory and administrative burdens of NTMs on private sector.
 - (c) AMSs could consider enhancing the notification procedures under Article 11 of the ATIGA by deleting the ‘discouraging’ reference to the typical elements of NTBs (e.g., nullification and impairment), as well as by including ‘cross-notification’ as an institutionalised tool and by further liberalising trade in goods under the ATIGA through the introduction of ‘standstill’ and ‘rollback’ commitments on NTMs. These two strategic options are proposed in the *ASEAN Economic Community 2025 Trade Facilitation Strategic Action Plan*.
 - (d) Consideration could also be given to enhancing the institutional function and role of ASEAN’s tools for trade facilitation and regulatory transparency in order to deal with NTMs, such as adding a feature enabling the private sector to report NTMs through the ASSIST facility and by means of a regulatory oversight function on NTMs within the scope of the National Trade Facilitation Coordinating Committees. This latter institutional enhancement approach is also already listed in the *AEC 2025 Trade Facilitation Strategic Action Plan*. This approach could facilitate and expedite the interaction and consultations between AMSs and ASEAN’s private sector.

5.3 Other Approaches to Consider

- (a) AMSs could consider developing the provisions related to the review of NTMs stipulated in paragraphs (2) and (3) of Article 42 of the ATIGA by including a specific dialogue and consultation mechanism, as in the *Indonesia-Australia Comprehensive Economic Partnership* or in the *Regional Comprehensive Economic Partnership Agreement*. The system could be built with a view to enabling AMSs to consult and identify mutually satisfactory solutions to trade irritants, disproportionate NTMs or alleged NTBs, all within a specific time-frame. The system would not amount to dispute settlement but would greatly assist AMSs in finding satisfactory solutions before these matters escalate to full-fledged disputes.

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Dispute Avoidance and Dispute Settlement

Michelle Limenta

1. Introduction

ASEAN Member States (AMSs) in the *ASEAN Charter* agree to resolve all disputes peacefully and to establish and maintain dispute settlement mechanisms in all fields of ASEAN cooperation.⁵³ Of the three pillars of the ASEAN community, economic cooperation is arguably the most advanced and rule based one. The process of deeper economic integration is bound to involve disagreements over the interpretation and implementation of various economic agreements. In this regard, ASEAN has established a dispute settlement mechanism to settle disputes concerning ASEAN economic agreements, which is laid out in the *ASEAN Protocol on Enhanced Dispute Settlement Mechanism* (*ASEAN Protocol on EDSM*), adopted on 29 November 2004 and amended in 2019.⁵⁴

The *ASEAN Protocol on EDSM* has similarities to the *WTO dispute settlement rules and procedures under the Dispute Settlement Understanding (DSU)*, such as the strict timeline and procedures to ensure that the panel and Appellate Body reports are adopted, unless there is a consensus against their adoption (the so called ‘negative consensus’ approach).⁵⁵ However, as AMSs have never used the *ASEAN Protocol on EDSM*, an assessment of its efficacy in resolving economic disputes cannot be made.


In practice, AMSs have so far appeared to prefer resorting to the WTO dispute settlement in order to address commercial disputes between themselves, instead of going through the internal ASEAN mechanisms, such as the EDSM. To date, there have been three trade-in goods-related disputes between ASEAN Member States that were brought before WTO dispute settlement. They are as follows: (1) DS1, 1995: *Malaysia — Prohibition of Imports of Polyethylene and Polypropylene* (complainant: Singapore); (2) DS371, 2008: *Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines* (complainant: the Philippines); and (3) DS496, 2015: *Indonesia — Safeguard on Certain Iron or Steel Products* (complainant: Viet Nam).

Many scholars and commentators have debated the reasons as to why ASEAN Members prefer to use other international dispute settlement systems than the internal ones and this debate is beyond the scope of this Policy Brief. Suffice to say that it boils down to a lack of political will among AMSs and the reliance to a dispute settlement system, such as the one at the WTO, that is well tested, reliable and funded under the existing WTO budget, all features that are not perceived as characterising the EDSM. This state of affairs is unfortunate, as it diminishes ASEAN centrality and the rule of law within the region, but it is emblematic of an ASEAN in its infancy of regional economic integration and institutional development.

⁵³ ASEAN Charter, Article 22.

⁵⁴ ASEAN Charter, Article 24(3). NUS Centre for International Law, available at <https://cil.nus.edu.sg/databasecil/2019-asean-protocol-on-enhanced-dispute-settlement-mechanism/>.

⁵⁵ The ASEAN Trade Dispute Settlement Mechanism. In R. Howse, H. Ruiz-Fabri, G. Ulfstein, & M. Zang (Eds.), *The Legitimacy of International Trade Courts and Tribunals* (Studies on International Courts and Tribunals, pp. 365-402). Cambridge: Cambridge University Press. doi:10.1017/9781108335690.012, available at <https://www.cambridge.org/core/books/abs/legitimacy-of-international-trade-courts-and-tribunals/asean-trade-dispute-settlement-mechanism/5E12F753C685002585B6F114247307F6>.



Dispute resolution mechanisms in the *ASEAN Trade in Goods Agreement* (ATIGA) are provided in Articles 88 and 89. Article 88 thereof states that the *ASEAN Consultations to Solve Trade and Investment Issues* (ACT) and the *ASEAN Compliance Monitoring Body* (ACB) may also be invoked to settle a dispute arising under the ATIGA. The ACT, loosely adapted from the *EU SOLVIT*⁵⁶ mechanism when initially implemented by ASEAN, was a non-legal and non-binding problem-solving online platform. The ACT established a network of ASEAN Government focal points to allow private sectors to cut through red tape and achieve speedy resolution with respect to the implementation of the ASEAN economic agreements.⁵⁷ The ACB, modelled after the *WTO Textile Monitoring Body*, is notionally a peer adjudication mechanism where the ACB Members States not involved in the dispute, upon request, will review and issue non-legally binding findings within a specified timeframe.⁵⁸

The ATIGA also refers to a ‘*formal*’ dispute mechanism under Article 89. The provision stipulates that the ASEAN Protocol on EDSM shall apply in any dispute and differences that arise between AMSs concerning the interpretation or application of the ATIGA. While dispute settlement under Article 89 adopts a more legalistic approach than the advisory and consultative mechanisms under Article 88, these provisions together offer three institutional options to resolve trade grievances arising under the ATIGA. Structurally, the complaining party could opt to proceed directly to dispute settlement under Article 89 if it did not wish to avail itself of the consultative avenues under Article 88. In practice, however, all these three institutional options have been long ineffective, not resorted to by AMSs, or never been utilised by the eligible stakeholders. In the case of the ACT, it eventually morphed in the system of ASEAN Solutions to Investments, Services and Trade (ASSIST).

This policy brief discusses not only the mechanisms provided in ASEAN for dispute avoidance and dispute settlement to resolve trade-in-goods grievances, but also identifies elements or aspects that could be useful to enhance the available mechanisms. Following this **Introduction**, **Section 2** highlights a number of key provisions and mechanisms of dispute avoidance and dispute settlement provided under the ATIGA and key ASEAN instruments. **Section 3** discusses the international benchmarks that can be referred to from key Preferential Trade Agreements (PTAs) and/or other legal instruments. **Section 4** reflects the key takeaways derived from the roundtable discussions on trade facilitation, in order to annotate the key messages, findings, conclusions and recommendations that have emerged among relevant stakeholders. Lastly, **Section 5** offers a set of final recommendations through which this policy brief intends to provide ASEAN with actionable suggestions and outcomes for consideration in light of the possible upgrading of the ATIGA.

2. Dispute Avoidance and Dispute Settlement Mechanisms to Resolve Trade-in-Goods Concerns in ASEAN


This section looks at the trade-in-goods dispute resolution mechanisms provided in the ATIGA and in other ASEAN legal instruments, which are relevant for dispute avoidance (discussed in *Section 2.1*) and the formal settlement of dispute (discussed in *Section 2.2*).

2.1 Dispute Avoidance in the ATIGA

⁵⁶ SOLVIT is a service provided by the national administration in each EU country and in Iceland, Liechtenstein, and Norway, dealing with issues related to EU rights and citizens. See https://ec.europa.eu/solvit/what-is-solvit/index_en.htm.

⁵⁷ Annex 1, the 2003 Declaration of ASEAN Concord II, adopted by the Heads of State/Government at the 9th ASEAN Summit in Bali, Indonesia on 7 October 2003.

⁵⁸ Ibid.



This sub-section discusses the mechanisms available in ASEAN that could work as dispute avoidance. For now, they might be underutilised, but the mechanisms, if fully operationalised, could be useful to ease trade tensions, defuse trade irritants, and prevent such grievances to escalate to formal dispute settlement.

2.1.1 Early notification and *ex-ante* review

The ATIGA contains a notification obligation requiring AMSs to report trade measures prior to their adoption to SEOM and the ASEAN Secretariat. As required in Article 11 of the ATIGA, the notification of a proposed regulation must be done at least 60 days prior to the measure taking effect.

The notification obligation is intended to ensure the flow of information among AMSs and to shed light on their regulatory activities. This early stage notification enables AMSs to engage each other to improve the quality of a measure and to avoid unnecessary trade disruption, before the measure comes into effect.

Nonetheless, paragraph 5 of Article 11, which requires the notification to be confidential, including its contents and all related information, appears to undermine the spirit of transparency embodied in Article 11. Furthermore, paragraph 8 of Article 11 gives a relatively short period of time (*i.e.*, 15 days from the notification), for other AMSs to comment on a proposed draft measure, thereby making it practically impossible for the process to unfold effectively.


As a comparison, the notification procedures in the WTO are more transparent. For instance, the WTO, in collaboration with the United Nations and International Trade Centre, launched the *ePing*, an online alert system that allows public and private stakeholders to access and keep track of relevant SPS and TBT notifications made by WTO Members to the WTO.⁵⁹ Moreover, both the WTO's TBT and SPS Committees recommend a normal time period of minimum 60 days for comments on notifications to be received. The WTO Members that are able to provide a time limit beyond 60 days are encouraged to do so.

Stakeholder consultations and regulatory impact assessments (RIAs) are part of good regulatory practices. The value of these engagements is recognised and reflected in the so-called ASEAN *NTMs Guidelines*.⁶⁰ The Guidelines urge AMSs to conduct *ex-ante* (and *ex-post*) consultations and reviews with respect to the design and application of NTMs. Under the principle '*consultations and engagement*', AMSs must provide adequate opportunity and timeframes for the relevant stakeholders (*i.e.*, private sector representative entities, civil society organisations, and interested persons) to comment on the proposed draft NTMs.

Notifications under the ATIGA should serve the purpose of informing other AMSs and their industries about the proposed regulatory changes at a sufficiently early stage. The procedures should also include a reasonable period of time for relevant parties to comment on a draft. These would allow other AMSs to become aware of regulatory activities that might impact trade, to conduct initial assessments of potential trade implications, and to comment on the proposed measures, which would

⁵⁹ *ePing* – SPS&TBT Platform, <https://epingalert.org>.

⁶⁰ Guidelines for the Implementation of ASEAN Commitments on Non-Tariff Measures on Goods, <https://asean.org/wp-content/uploads/2022/03/Guidelines-for-the-Implementation-of-ASEAN-Commitments-on-Non-Tariff-Measures-on-Goods.pdf>.



in turn help in improving the quality of the measures and avoid potential trade problems or costly disputes.

2.1.2 Raising Specific Trade Concerns within ASEAN's Relevant Sectoral Bodies

Several sectoral Committees have been established under the ATIGA to oversee the implementation of the respective chapters of the Agreement. Importantly, the ATIGA explicitly bestows the ASEAN Committee on Sanitary and Phytosanitary Measures (AC-SPS) with 'consultative' functions, although the Agreement is not that clear on whether other technical Committees also hold this function. Article 82 states that the AC-SPS is tasked with the functions to: (i) facilitate exchange of information on SPS matters, including the changes or introduction of SPS regulations and standards that might affect trade; and (ii) to endeavour to resolve SPS matters with a view to facilitate trade. The AC-SPS may establish *ad hoc* task forces to undertake science-based consultations to identify and address specific issues that may arise from the application of SPS measures. Under this 'consultative' mandate, AMSs could develop a mechanism for addressing specific trade concerns (STCs), if anything within the SPS area of trade-related regulation.

In the WTO, the consultative functions of the SPS and TBT Committees (provided in Article 13 of the Agreement on Technical Barriers to Trade and Article 12 of the Agreement on the Application of Sanitary and Phytosanitary Measures), together with the spirit of dialogue encouraged by the provisions on transparency, serve as a basis for the practice of STCs.⁶¹ STCs raised in the WTO technical committees are discussion platforms to diffuse potential conflicts through dialogue and exchange of technical, legal and commercial information. Such platforms are used to seek information and clarification regarding the measures put in place by other WTO Members, and to voice concerns on the compliance of a measure with the rules of the applicable WTO Agreements. While STCs have mostly been associated with the TBT and SPS Committees, they have also been used as tools to raise concerns in other WTO bodies.


The discussion of trade concerns would help AMSs to get a better understanding of the rationale behind other AMSs' regulations, as well as to shed light on details regarding implementation and enforcement. In certain cases, this mechanism has effectively facilitated the resolution of trade issues arising between WTO Members and this dispute avoidance role would also unfold within ASEAN.⁶²

AMSs could consider facilitate the resolution of specific trade concerns through their '*technical committees*' (i.e., the many available Sectoral Bodies) by tasking them with such institutionalised roles in the upgrade of the ATIGA. For instance, this consultative function could be extended to other Sectoral Bodies such as the ASEAN Consultative Committee for Standards and Quality (ACCSQ) and requiring the use of this mechanism ahead of any other consultative or adjudicative dispute resolution mechanism.

2.1.3 Advisory Mechanism – The ASEAN Consultation to Solve Trade and Investment Issues (ACT) and the ASEAN Solutions for Investments, Services, and Trade (ASSIST)

⁶¹ Marriana B. Karttunen, *Transparency in the WTO SPS and TBT Agreements* (Cambridge University Press, 2020), 95.

⁶² WTO, Trade Concerns Database, <https://tradeconcerns.wto.org/en>.



In pursuance of an integrated economic community, a High-Level Task Force on ASEAN Economic Integration was formed and tasked to assess and recommend, *inter alia*, the improvement of the ASEAN dispute settlement mechanism. In the Annex to the *2003 Bali Concord II*, the High-Level Task Force recommended the creation of the ACT and ACB mechanisms, which were subsequently formed in 2004.⁶³ Their concepts and elements can be found in Annex I to the *2003 Bali Concord II*. While the Annex of *Bali Concord II* includes the ACT and ACB in the category of ‘*Mechanism of the Dispute Settlement*’, their roles as advisory and consultative mechanisms were designed to resolve trade grievances outside the formal adjudication mechanism provided under the *2004 ASEAN Protocol on EDSM*.

The ACT, which was conceived as an Internet-based problem-solving facility with no binding nature, was intended to allow AMSs, on behalf of private individuals or businesses faced with operational problems arising from ASEAN economic commitments, including the ATIGA, to highlight their concerns on the platform/website. The ACT was expected to provide a speedy resolution by resolving the complaints within 30 days.⁶⁴ Shortly after its conceptualisation and implementation through an online facility, the ACT was effectively abandoned by AMSs, with cases not addressed and IT glitches that resulted in its demise.

To modernise and implement further the ACT, the system of *ASEAN Solutions for Investments, Services, and Trade* (ASSIST) was launched in 2016, with support from the European Union. The ASSIST process is quite straightforward: (1) ASEAN enterprises submit their complaint on the website; (2) the Central Administrator (*i.e.*, ASEAN Secretariat) reviews the complaint and, when accepted, conveys such complaint to the Destination Contact Point (*i.e.*, relevant national body/focal point of the AMSs against which the complaint is raised); (3) after the Destination Contact Point accepts that ASSIST is an appropriate *forum* to entertain the specific complaint, the Responsible Agency in that AMS will search for the solution to the issue; and (4) after a solution is proposed through ASSIST, the Central Administrator will notify it to the complainant.⁶⁵ The solution is expected to be offered or made through ASSIST within 20 to 40 working days from the date of acceptance of the complaint by the Destination Contact Point.⁶⁶ Throughout the online proceeding, the Home Contact Point (*i.e.*, relevant national body/focal point of the AMSs where the complainant is duly registered) shall monitor the process and may step in to discuss the matter at a government-to-government level with the challenged AMS and may even trigger dispute settlement to address the matter through adjudicative mechanisms.

The upgraded ATIGA should specifically reflect the advisory mechanism under ASSIST, the modernised instrument of the ACT, as the website and mechanism have been increasingly utilised by ASEAN’s private sector, albeit not as often as anticipated. The ASSIST system, if institutionalised by ASEAN and systematically used by the private sector, would be an important platform to facilitate private-public and inter-State communication to address trade irritants and intra-ASEAN cross-border trade problems. The mechanism is designed not only to provide the private sector with direct and expedited access to the competent authorities to report their trade concerns, but also to facilitate trade and avoid disputes. ASSIST is fully online, free of charge, based on simplified and user-friendly procedures, non-adjudicative in nature and expedited, therefore ideal for private sector users, especially small and medium enterprises (SMEs).

⁶³ Joint Media Statement of the 36th ASEAN Economic Ministers Meeting, Jakarta, Indonesia, 3 September 2004, para. 10.

⁶⁴ *Ibid.*

⁶⁵ See ASEAN ASSIST, ‘What is ASSIST?’, available at <https://assist.asean.org/en/home>.

⁶⁶ *Ibid.*



2.2 Dispute Resolution

The sub-section below discusses the mechanisms available in ASEAN that are intended to work as dispute settlement, namely peer-adjudication and quasi-adjudication mechanisms.

2.2.1 Peer Adjudication – ASEAN Compliance Body (ACB)

As mentioned, the creation of the ACB was recommended by the High-Level Task Force on ASEAN Economic Integration as an alternative instrument to resolve trade irritants outside the ASEAN adjudication mechanism. The ACB uses mediation and peer adjudication systems to resolve inter-State complaints. The complaints submitted to the ACB are to be reviewed by the ACB AMSs that are not the parties to the dispute, and the findings are to be issued within 90 days.⁶⁷ The ACB's findings or opinions of non-compliance are not legally binding. However, the AMS, whose measure was viewed not to be compliance by the ACB, should seriously consider to modify such measure, notably in order to rectify its non-compliant aspect.⁶⁸ The ACB findings would be tabled as an input should the case be brought before the binding ASEAN dispute settlement mechanism (*i.e.*, the EDSM).⁶⁹

Unlike the ASSIST system, the ACB (similar to the EDSM) has never been utilised by AMSs. Thus, its effectiveness in practice remains to be seen. It is also not clear whether the consent of the AMS accused of non-compliance would be required in order to commence the ACB process.⁷⁰

As a peer-to-peer consultative mechanism, the ACB, if operationalised and triggered by AMSs, would offer a 'soft' approach in resolving an inter-State trade concern.⁷¹ It is an institutional option to the formal panel hearings under the ASEAN DSM, but it appears that ASEAN has no 'appetite' for such mechanism and is aware of the limits that the non-binding nature of the ACB entail. Arguably, the alternative mechanism suggested above with respect to STC would seem to be more fitting of ASEAN's preferred inter-governmental approach and would allow more technical interactions and the identification of possible solutions.

2.2.2 Formal Dispute Settlement in the ATIGA

In the ATIGA, dispute settlement is regulated in Article 89 thereof, which makes reference to the ASEAN Protocol on EDSM.⁷² This is in line with the ASEAN Charter, in particular Article 24(3) thereof, stating that disputes arising from specific economic agreements are to be settled in accordance with the ASEAN Protocol on EDSM.

The *2004 ASEAN Protocol on EDSM* was signed by the ASEAN leaders in Vientiane, Laos in 2004, superseding the 1996 Manila Protocol on Dispute Settlement Mechanism. Similar to the ACT and ACB, the *2004 ASEAN Protocol on EDSM* was established based on the recommendations of the High-Level

⁶⁷ Joint Media Statement of the 36th ASEAN Economic Ministers Meeting, Jakarta, Indonesia, 3 September 2004, para. 10.


⁶⁸ Annex 1, the 2003 Declaration of ASEAN Concord II.

⁶⁹ Ibid.

⁷⁰ Robert Beckman et. al., *Promoting Compliance: The Role of Dispute Settlement and Monitoring Mechanisms in ASEAN Instruments* (Cambridge University Press, 2016), 126.

⁷¹ Ibid.

⁷² 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism, available at <https://cil.nus.edu.sg/wp-content/uploads/2019/02/2004-ASEAN-Protocol-on-Enhanced-Dispute-Settlement-Mechanism-1.pdf>.



Task Force on ASEAN Economic Integration. In the Preamble to the *2004 ASEAN Protocol on EDSM*, AMSs reaffirm their commitments to build ‘*stronger and effective institutions of ASEAN*’ through strengthening dispute settlement mechanisms to be consistent with a rules-based ASEAN community. The *2004 ASEAN Protocol on EDSM* was later revised in 2019 by the *ASEAN Protocol on Enhanced Dispute Settlement Mechanism*.

2.2.2.1 The 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism (EDSM)

The *2004 ASEAN Protocol on EDSM* provides the procedures to settle dispute among AMSs arising within the scope of the covered ASEAN economic agreements and future agreements as listed under Appendix I of the *2004 ASEAN Protocol on EDSM*, which consists of, *inter alia*, the ATIGA and the *Protocol to Amend the Protocol Governing the Implementation of the ASEAN Harmonised Tariff Nomenclature*.

The *2004 ASEAN Protocol on EDSM* is modelled on the WTO’s dispute settlement system regulated under the *Dispute Settlement Understanding (DSU)*, whereby both agreements: (1) provide for consultation and alternative dispute settlement, such as conciliation and mediation, before resorting to the adjudicative method of dispute settlement; (2) include the establishment of panels established by the SEOM under the *2004 ASEAN Protocol on EDSM*, along the same lines of what is done by the WTO Dispute Settlement Body under the WTO DSU; and (3) provide provisions on appellate review, as well as on the implementation of findings and recommendations, compensation, and ‘*retaliation*’.

Notwithstanding the similarities between the *2004 ASEAN Protocol on EDSM* and the WTO DSU, one of the main differences between the two dispute settlement systems is the fact that the former does not have special provisions on the specific treatment for least-developed countries. In contrast, Article 24 of the WTO DSU provides specific treatment for least-developed countries.⁷³

Although the *2004 ASEAN Protocol on EDSM* is largely modelled on the WTO DSU, it has been rather unsuccessful as a dispute settlement mechanism, as no AMSs has ever had recourse to the *2004 ASEAN Protocol on EDSM* in order to resolve its dispute with another AMS. AMSs have resorted to the WTO dispute settlement mechanism to resolve their disputes, so the fact that the *2004 ASEAN Protocol on EDSM* has not been used is a deliberate choice dictated by the perceived flaws of this ASEAN instrument (*e.g.*, inflexible and too short procedural timeframes, costs of the use of the system to be paid by the disputing parties, lack on institutionalised support and Appellate Body not yet established, etc.) and not by the lack of disputes among AMSs.

2.2.2.2. The 2019 ASEAN Protocol on Enhanced Dispute Settlement Mechanism

Through the amended *2019 ASEAN Protocol on Enhanced Dispute Settlement Mechanism*, the AMSs recognised the need to improve the *2004 ASEAN Protocol on EDSM* and to include additional special procedures that involve the least-developed AMSs, which are now provided in a dedicated Chapter.⁷⁴

⁷³ Gorda, et. al., *The Analysis of Tendency on Choice of Forum in the Settlement of Dispute of International Trade Among ASEAN Countries*, Volume 13 Number 1, (Arena Hukum, 2020) available at <https://arenahukum.ub.ac.id/index.php/arena/article/view/861>.

⁷⁴ Preamble of the 2019 ASEAN Protocol on Enhanced Dispute Settlement Mechanism, available at <https://api.dtn.go.th/files/v3/5d6fce97ef41406e35540d75/download>.

As stipulated under Article 27 thereof, the *2019 ASEAN Protocol on EDSM* will enter into force when all ten AMSs have notified the depository of the completion of respective internal procedures for ratification of the *2019 ASEAN Protocol on EDSM*. However, to date, the *2019 ASEAN Protocol on EDSM* has not yet entered into force, as Indonesia, Cambodia, and Brunei Darussalam still have to notify complete their domestic procedures.⁷⁵

The *2019 ASEAN Protocol on EDSM* also added new features that were not found in the previous version, *inter alia* the participation of a non-disputing Member State in bilateral consultations, an indicative list of panellists, and expeditious arbitration. The list of covered agreements in Appendix I is non-exhaustive, considering that the ASEAN Secretariat may, by virtual of Article 26 of the *2019 ASEAN Protocol on EDSM*, administratively update the list from time to time, upon the SEOM's approval.

As indicated, special procedures concerning the least-developed AMSs are now provided under Article 23. For example, when matters involving a least-developed AMSs are raised under the special procedure involving a least-developed AMS, AMSs are to exercise due restraint. This includes the event of nullification or impairment found as a result of measures taken by least-developed ASEAN Members, when the complaining parties have to exercise due restraint in seeking compensation or seeking 'retaliation'.

Article 13 of the *2019 ASEAN Protocol on EDSM* introduced more detailed provisions regarding the rights and obligations of third parties in the dispute settlement process, compared to the *2004 ASEAN Protocol on EDSM*. The new rights and obligations include, *inter alia*, the following prerogatives: (1) to be present at the first and second substantive meeting of the panel with the parties to the dispute; (2) to make at least one written submission prior to the first substantive meeting; (3) to make an oral statement to the panel, and respond to questions from the panel; and (4) to respond, in writing to any questions from the panel directed to the third parties. With the agreement of the parties to the dispute, a panel may grant additional or supplemental rights to any third party regarding their participation in panel proceedings.


In short, the *2019 ASEAN Protocol on EDSM* appears to be more up-to-date and procedurally apt to address AMSs' trade concerns. Thus, the ATIGA should refer to the *2019 ASEAN Protocol on EDSM* as the legal instrument of choice to resolve trade disputes between AMSs. However, as previously stated, AMSs have had never recourse to the *ASEAN Protocol on EDSM* and have so far preferred to resolve their disputes under the WTO dispute settlement system. From the changes brought to the *ASEAN Protocol on EDSM*, it does not appear evident that this reluctance by AMSs at addressing disputes through a regional adjudicative system is bound to change.

Overall, the following distinctions can be drawn from the available mechanisms to address trade concerns under the ATIGA.

Table 1: Available Mechanisms to address trade concerns in the ATIGA

Elements	Dispute Avoidance	Dispute Settlement
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⁷⁵ ASEAN Legal Instruments, 2019 ASEAN Protocol on EDSM, available at <http://agreement.asean.org/agreement/detail/373.html>.



	Early Notification	STCs	ACT/ASSIST	ACB	ESDM
Nature	Transparency	Discussion	Advisory	Mediation/Peer Pressure	Adjudicatory
Complaining party	None	Concerned Members	Private business/individual	AMSs	AMSs
Third-party review	None	None	None	ACMB members, upon the request of an AMS	Ad-hoc panellists, upon SEOM's establishment
Outcome	Better quality of a measure	Resolution of concern	Proposed solution	Non-legally binding finding	Binding finding and recommendations
Enforcement	None	None	None	None	Possible 'retaliatory' measures approved

3. International Benchmark


In theory, the ATIGA includes a wide range of mechanisms for dispute avoidance and dispute settlement. In practice, however, these mechanisms are hardly utilised by AMSs to resolve their trade concerns. By looking at a number of bilateral/regional FTAs, this Section identifies the concept of a 'snapback clause' applied in dispute settlement proceedings that AMSs could consider introducing, within the process of the upgrade of the ATIGA, in order to provide 'teeth' to the enforcement mechanism in economic disputes. Arbitration mechanisms could also be considered, in line with the best practices and trends under several 'new generation' bilateral/regional Preferential Trade Agreements (PTAs). These tools would ensure both a greater degree of implementation of ASEAN commitments and more systematic recourse by AMSs to the adjudicative mechanisms of the *ASEAN Protocol on EDSM*, thereby fostering legal predictability, commercial certainty and the rule of law within the region.

3.1 'Snapback' Remedy Provision

The 'snapback clause' is often introduced and applied as a type of safeguard measure. In this context, a snapback provision would allow countries to revert to the non-preferential (MFN) import tariff rate in order to counter the lack of proper implementation by the trading partner of commitments undertaken within a PTA.

In the United States – South Korea FTA (KORUS), the parties agreed to include a 'snapback clause' as part of a special dispute settlement and remedial mechanism in the context of trade in motor vehicles. In short, Article 5 of Annex 22-A on 'Alternative Procedures for Disputes Concerning Motor Vehicles', essentially provides the United States with the right to re-impose pre-existing MFN tariffs on cars from South Korea if South Korea were found to engage in unfair trading practices (and, at least theoretically, *vice-versa*).

More specifically, Article 5 of Annex 22-A reads, "If, in its final report, the panel determines that: (a) the Party complained against has not conformed with its obligations under this Agreement or that its



*measure is causing nullification or impairment in the sense of Article 22.4(c); and (b) the non-conformity or the nullification or impairment that the panel has found has materially affected the sale, offering for sale, purchase, transportation, distribution, or use of originating goods of the complaining Party, the complaining Party may increase the rate of customs duty on originating goods under tariff heading 8703 to a level not to exceed its prevailing most favoured-nation applied rate of duty on those goods”.*⁷⁶

As seen in the KORUS, AMSs could consider designing and introducing the so-called ‘snapback’ provision or mechanism in order to improve the implementation and enforcement of certain elements of the ATIGA.

The inclusion of such an instrument could prevent certain actions taken or maintained by AMSs (*i.e.*, certain NTBs that negatively affects trade between two or more AMSs) and would provide a rapidly actionable remedy in case of the alleged nullification or impairment of certain benefits under the agreement. Such tools would be available even against the backdrop of a general reluctance at resorting to the adjudicative procedures of the Protocol on the Enhanced Dispute Settlement Mechanism.

However, the ‘snap back’ clause needs to be carefully constructed by limiting it to certain sectors, products, or tariff lines, and be linked to formal dispute settlement proceedings to fit the ‘ASEAN way’ of engaging in dispute settlement and resolving trade irritants.

3.2 Increasing the use of *ad-hoc* arbitration

There is a growing trend of countries seeking to settle their trade grievances using dispute settlement mechanism provided in their bilateral or regional trade agreements, instead of the usual multilateral trade tools, such as the WTO dispute settlement process. For example, an arbitration panel has been established in December 2021 to settle the dispute between the EU and the South African Customs Union (SACU) concerning SACU’s safeguard on imports of frozen bone-in chicken cut.⁷⁷ The dispute settlement procedure under Trade and Sustainable Development Chapter of the EU-Korea trade agreement was invoked to address concern on Korea’s implementation of EU-Korea FTA labour rights provisions.⁷⁸ Another dispute settlement proceeding under a bilateral trade agreement took place between the EU and Ukraine under the Association Agreement (EU-Ukraine AA)⁷⁹, addressing in December 2020 Ukraine’s export prohibition of unprocessed timber.

Ad hoc arbitration mechanisms and the procedures in the EU-Ukraine AA are stipulated in Articles 306-316 thereto. Three arbitrators were selected as a result of mutual consultations of the parties to resolve the matter. The arbitration panel must render its ruling within 120 days (in certain circumstances no later than 150 days) from the date of its establishment. In conducting its assessment, the EU-Ukraine AA arbitrating panel referred to WTO case law as a number of WTO provisions are incorporated in the EU-Ukraine AA. Under Article 311, the parties commit to comply in good faith with the arbitration panel ruling.


⁷⁶ Annex 22–A of Korea – US FTA, see

https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file973_12721.pdf.

⁷⁷ See https://trade.ec.europa.eu/doclib/docs/2021/december/tradoc_159966.pdf.

⁷⁸ See <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2238>.

⁷⁹ See [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22014A0529\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22014A0529(01)&from=EN).



The EU-Ukraine AA also provides procedures in case of non-compliance. In such event, the complainant may request the respondent to present an offer for temporary compensation (Article 315.1). If the parties to dispute cannot reach an agreement on the compensation, the complainant is entitled to *'suspend its obligations arising from any provision contained in the Chapter on the free-trade area at a level equivalent to the nullification or impairment caused by the violation'* (Article 315.2). In suspending obligations, the complainant may opt for increasing the tariff rates to the level applied to other WTO Members (Article 315.3), which again recalls the concept of *'snapback'*.

This recent trend should provide AMSs with the alternative avenues to settle their disputes, so as to mitigate the impact of the impasse of the WTO appellate review mechanism, which is crippling the WTO dispute settlement process, and offer a less prescriptive and less complex/costly mechanism than the one under the *ASEAN Protocol on EDSM*.

4. Key Takeaways from Roundtable Discussions

During the Roundtable Discussions on Trade Facilitation organised by ARISE Plus, the representatives of the ASEAN private sector showed particular interest with respect to the more systematic application and operationalization of the ASSIST facility by AMSs, which should become a mechanism of trade facilitation expressly provided under the Upgraded ATIGA.


The ASEAN private sector highlighted and emphasised that timely interventions by AMSs, in order to address trade irritants and obstacles within the region, are essential for businesses. As such, expedited procedures and the swift provision of solutions are the key factors to encourage the ASEAN private sector to make greater use of trade facilitation mechanisms like ASSIST and, through them, play an important role to scrutinise AMSs' behaviour and the meaningful implementation of the ATIGA and its related instruments and commitments.

The ASEAN private sector endorsed the recommendations made in this policy brief, particularly with respect to enhanced dispute avoidance and vis-à-vis the possible introduction in the Upgraded ATIGA of a *'snapback clause'*.

5. Conclusions and Recommendations

5.1 Approaches Provided Under the ATIGA with respect to Dispute Avoidance and Dispute Settlement

- (a) A number of mechanisms could be incorporated in the ATIGA and/or better applied for purposes of enhanced dispute avoidance, namely the early notification of trade-impacting measures, the expression of specific trade concerns, and the use of ASSIST. The ATIGA also provides a peer-adjudication system under the ACB and a quasi-adjudicative mechanism under the *ASEAN Protocol on ESDM*, with a view to providing inter-State settlement of disputes.
- (b) AMSs need to strengthen these mechanisms so that the businesses and traders operating in the region shall have access to more effective procedures to address trade irritants and remove trade barriers (some of which have turned into long-standing issues), thereby contributing to regional economic integration, greater



investments and regional supply chains, and rule of law. Some improvements could be brought with respect to the mechanisms for dispute avoidance, for instance by: (i) enhancing transparency in the process of early notification and offering more time for other AMSs to comment on the proposed draft regulation, thereby improving the quality of the adopted measure; (ii) developing the practice and procedure of raising specific trade concerns within the respective ASEAN Sectoral Bodies; and (iii) ensuring the full operationalisation and greater utilisation of the ASSIST platform, thereby providing the private sector with access to the competent AMS authorities and an effective interface to report their trade concerns and find trade facilitative solutions.

5.2 Other Approaches to Consider

- (a) To ‘beef up’ ASEAN dispute settlement mechanism, AMSs could consider introducing a ‘*snapback clause*’ to improve the implementation and enforcement of certain elements of the ATIGA, notably the commitments and obligations thereby undertaken by AMSs. Such clause would provide a rapidly actionable remedy in case of alleged nullification or impairment of certain benefits under the ATIGA. Such ‘*snapback clause*’ would be a tool used to induce the recalcitrant party to remove the violation or to enter into dispute settlement under the existing mechanisms. Any ‘*snapback clause*’ would need to be carefully constructed, could be limited to certain sectors, products, or tariff lines, and could be linked to formal dispute settlement proceedings or be de-coupled from them, in line with the ‘*ASEAN way*’.
- (b) AMSs should increase the use of ASEAN dispute settlement mechanisms, since the multilateral dispute settlement avenue within the WTO is currently in the midst of a deep crisis triggered by the demise of its appeals mechanism. There is growing evidence of countries starting to rely on dispute settlement under bilateral/regional PTAs in order to uphold their rights and obligations, as demonstrated by the recent EU-Ukraine and EU-Korea arbitration panels.

Letting long-standing disputes remain unresolved will, over time, undermine ASEAN’s character as a rule-based organisation, diminish the attractiveness of ASEAN as a destination for investment, and discourage the private sector from expanding regional supply chains. It is time for ASEAN to have confidence in its own internal dispute settlement mechanism and embrace it as a physiological aspect of regional economic integration.

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Agricultural Trade and SPS Facilitation

Panadda Dasananda

1. Introduction

In general terms, agricultural and food items, fish, and animal products account for a large share of the goods traded internationally. The shares of intra-ASEAN agricultural exports and imports⁸⁰ in 2019 were 9.9 and 7.4 percent of total trade, respectively. Given the importance of the agricultural sector for intra-ASEAN trade, sanitary and phytosanitary (SPS) measures play a significant role in trade between ASEAN Member States (AMSs) and other ASEAN trading partners.

SPS measures that deal with food safety and animal and plant health aim at ensuring two equally important objectives: a country's consumers are supplied with food that is safe to eat, and strictly regulated health and safety measures are not being utilised as an excuse to protect or insulate domestic producers from fair competition.

The ASEAN Trade in Goods Agreement (ATIGA), the comprehensive agreement that superseded the Common Effective Preferential Tariff (CEPT), came into force in May 2010. The ATIGA builds on the commitments under the existing ASEAN economic agreements to provide a legal framework for realising the free flow of goods in the region, resulting in fewer trade barriers and deeper economic linkages among AMSs. It contains comprehensive coverage of commitments related to trade in goods, including the following: tariff liberalisation, removal of non-tariff barriers, rules of origin, trade facilitation, customs, standards and conformance, and sanitary and phytosanitary, and mechanisms for its implementation, as well as institutional arrangements. The ATIGA is also largely based and modelled on the prevailing WTO disciplines that regulate trade in goods.

Following ASEAN's and AMSs' expansion of FTA networks, the progress in ASEAN's economic integration agenda, and several developments in the areas covered by the ATIGA, a critical review of whether the ATIGA encompasses the right degree of SPS facilitation to regulate agricultural trade within the region appears necessary and timely in light of the ongoing process of ATIGA review and likely upgrade.

This Policy Brief on agricultural trade and SPS facilitation is formulated along five parts. Following **Section 1** (Introduction), **Section 2** highlights the key obligations and commitments embodied in the relevant ASEAN instruments. **Section 3** assesses the international benchmarks and provides a brief analysis of the salient disciplines under key Preferential Trading Agreements (PTAs) and/or multilateral/plurilateral instruments that may stand as best practices, and model texts or notional inspirations. **Section 4** annotates the key takeaways from the roundtable discussions entertained with the ASEAN private sector, and the final part, **Section 5**, proposes a set of concrete conclusions and recommendations in relation to the upgrade and possible enhancement of the ATIGA SPS Chapter.

2. Key ASEAN Obligations

⁸⁰ Exports and imports share of agriculture sector in ASEAN in 2019. Source: ASEAN Statistical Yearbook 2020, ASEAN Secretariat.



2.1 ASEAN Trade in Goods Agreement (ATIGA)⁸¹

The ATIGA SPS Chapter not only sets out the basic framework for developing, adopting, and applying SPS measures for the purpose of protecting human, animal or plant life or health, but also aims at facilitating trade by providing a framework and guidelines on the requirements in the application of SPS measures among AMSs. In doing so, the ATIGA reaffirms AMSs' rights and obligations under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.

Article 83 (Notification under Emergency Situation) of the ATIGA, which requires AMSs to notify all contact points and the ASEAN Secretariat in case of a food safety crisis, is the only provision that explicitly refers to '*food safety*', while Article 85 (Cooperation), which calls for cooperation, technical assistance, collaboration, and information exchange, focuses on cooperation related to the control and eradication of pests and disease outbreaks, and other SPS emergency cases in general. Article 85 is also silent about the issue of addressing the distorting effects of the SPS-related Non-tariff Measures (NTMs).

Additionally, the ATIGA SPS Chapter does not have any specific reference to transparency on rules and regulations related to SPS measures. The transparency of NTMs in general is cited under Article 40 (Application of Non-tariff Measures), while Article 81 (General Provisions and Obligations) mandates the laws, regulations, and procedures for application of SPS measures shall be listed in Annex 9. The ATIGA transparency obligations, which are relevant also for SPS NTMs, are under multiple articles such as Article 11 (Notification), Article 12 (Publication and Administration of Trade Regulations), and Article 13 (ASEAN Trade Repository), and in combination with one another as stated under Article 40 (Application of Non-Tariff Measures).

The ASEAN Committee on Sanitary and Phytosanitary Measures (AC-SPS) was established to perform the functions required in Article 82 of the ATIGA (Implementation and Institutional Arrangements). With a view to facilitate trade between and among AMSs, the AC-SPS is tasked to endeavour to resolve sanitary and phytosanitary matters of relevance to intra-ASEAN trade. The AC-SPS is tasked to regularly report to the AFTA Council, through SEOM, on key developments and recommendations for the implementation of the SPS Chapter. The review of Article 82 and of the Terms of Reference of the AC-SPS within the context of the ATIGA Upgrade could ensure greater consistency of the role and responsibilities of the AC-SPS.


2.2 ASEAN Food Safety Policy⁸²

The ASEAN Food Safety Policy (AFSP) adopted in 2015 by the Ministerial Bodies responsible for health, trade, and agriculture is an overarching policy comprising of 10 core principles that provides a common basis for current and future efforts of the relevant ASEAN Ministerial Bodies responsible for health, agriculture, and trade in improving the protection of health, ensuring consumer rights, and improving the quality of food products produced and traded within ASEAN.

The objectives of the AFSP are to provide guidance for the establishment and implementation of food safety measures, harmonisation of food safety measures, and control procedures within ASEAN, and

⁸¹ This document is available at <https://asean.org/asean2020/wp-content/uploads/2020/12/ASEAN-Trade-in-Goods-Agreement-Cha-am-Thailand-26-February-2009.pdf>.

⁸² This document is available at https://asean.org/storage/2012/10/ASEAN-Food-Policy-030516_2.pdf.



efforts in strengthening national food control systems. The AFSP also aims at facilitating the development of a sustainable and robust food safety regulatory framework in ASEAN.

2.3 ASEAN Food Safety Regulatory Framework⁸³

In conformity with the agreed principles of the ASEAN Food Safety Policy which aims to provide a basis for ASEAN to facilitate the free flow of food, as well as to ensure the protection of consumers' health and food safety, *the ASEAN Food Safety Regulatory Framework (AFSRF)* provides for a coherent and integrated approach and gathers the initiatives under the ASEAN Food Safety Policy in a new legal framework.

The ATIGA SPS Chapter does not provide a definition of '*food safety*' and elaborated SPS provisions regarding food safety. To ensure alignment of the ASEAN objectives on '*food safety*', its concept should be defined and incorporated in Article 80 of the ATIGA. The only reference to '*food safety*' that requires AMSs to notify all contact points and the ASEAN Secretariat in case of a food safety crisis is made under Article 83 (Notification under Emergency Situation), while Article 85 (Cooperation) focuses on cooperation concerns for the control and eradication of pests and disease outbreaks, and other emergency cases related to SPS measures in general.

2.4 Agreement on the Establishment of the ASEAN Coordinating Centre for Animal Health Zoonoses⁸⁴

The *Agreement on the Establishment of the ASEAN Coordinating Centre for Animal Health Zoonoses (ACCAHZ)*, which was adopted in October 2016 and subsequently came into effect in September 2021, aims at facilitating trade in animal products and provides for the legal framework of cooperation and coordination among AMSs with relevant ASEAN Dialogue Partners in relation to the control, and eradication, of transboundary animal diseases and zoonoses in the ASEAN region.


Amid the massive fallout from the COVID-19 outbreak, the human fear of zoonotic diseases is on the rise and cooperation in the animal health and human health sectors is ever more important. The provisions of the *Agreement on the Establishment of the ACCAHZ* are of relevance to the ATIGA SPS Chapter, particularly Article 85 (Cooperation). A more unified approach and the broader framework of regional coordination will help enhance the animal health sector's capacity to effectively collaborate with the human health sector. It will also advance the cooperation of AMSs with ASEAN's Dialogue Partners, relevant stakeholders, and international organisations such as the World Health Organization (WHO), World Organization for Animal Health (OIE), and Food and Agriculture Organization (FAO) in addressing future zoonoses and improving animal health and food safety.

2.5 Vision and Strategic Plan for ASEAN Cooperation in Food, Agriculture, and Forestry 2016-2025⁸⁵

⁸³ This document is available at <https://asean.org/wp-content/uploads/2016/08/ASEAN-Food-Safety-Regulatory-Framework.pdf>.

⁸⁴ This document is available at <http://agreement.asean.org/media/download/20161108071810.pdf>.

⁸⁵ This document is available at <https://cil.nus.edu.sg/wp-content/uploads/formidable/18/2016-2025-Vision-and-Stgc-Plan-ASEAN-Coop-in-Food-Agri-Forestry.pdf>.



The *Vision and Strategic Plan for ASEAN Cooperation in Food, Agriculture and Forestry (FAF) 2016-2025* was adopted in September 2015 during the 37th ASEAN Ministerial Meeting on Agriculture and Forestry (AMAF). To implement the post-2015 vision, the new Strategic Plan (SP) for the FAF sector was designed to guide ASEAN towards the completion of the Millennium Development Goals and the post-2015 Sustainable Development Goals (SDGs), and to achieve the related UN SDG's goal no. 2 on 'Zero Hunger'. The implementation of the Strategic Plan (SP) and coordination with all ASEAN Bodies will be carried out by the ASEAN subsidiary bodies under AMAF.

Although 'food safety' is under the ambit of the ATIGA SPS Chapter, the entire Chapter does not provide for any cooperation on the development and implementation of food safety policies in ASEAN. As previously mentioned, for instance, Article 85 of the ATIGA only refers to cooperation in the eradication of pests and disease outbreaks. The action programmes related to food safety identified under the Strategic Thrust No. 3 of the SP for the FAF sector, which aims at ensuring food security, food safety, better nutrition, and equitable distribution, should therefore be subsumed under Article 85 (Cooperation).

2.6 ASEAN Economic Community 2025 Strategic Action Plan for Trade in Goods (2016-2025)⁸⁶

The strategic measures of the ASEAN Economic Community 2025 Strategic Action Plan (SAP) for Trade in Goods (2016-2025) were adopted with a view to achieving the AEC 2025 vision, namely reducing or eliminating the border and behind-the-border regulatory barriers that impede trade. Action lines under the Strategic measure 2.1 of the SAP for Trade in Goods aim at addressing the trade-distorting effects of NTMs, focusing on the coordination of SPS-related activities under the ATIGA SPS Chapter with various existing ASEAN Working Groups and Task Forces relevant to SPS matters, consultations on trade irritants and problems related to SPS measures, and updating of activities related to Notification of Emergency Situation (Article 83), Equivalence (Article 84) and Cooperation (Article 85) of the ATIGA SPS Chapter.

2.7 ASEAN NTMs Guidelines⁸⁷

In accordance with the ATIGA and the relevant WTO rights and obligations, *the ASEAN NTMs Guidelines*, which were adopted by the AEM-32nd AFTA Council in 2018, provide a general framework to improve the transparency and management of NTMs in ASEAN, including SPS measures, and to minimise the trade-distortive effects of NTMs, while allowing AMSs to pursue legitimate policy objectives. To ensure that NTMs conform to the main principles of necessity and proportionality, consultations and engagement, transparency, non-discrimination and impartiality, and periodic review, the Guidelines not only operationalise the NTM-related elements of the ATIGA, but they also incorporate the Guidelines for the Implementation of Import Licensing Procedures in ASEAN (ILP Guidelines), adopted on 3 August 2011, *mutatis mutandis*. AMSs are required to endeavour to implement the Guidelines by further strengthening and/or establishing their national institutions, such as a national NTM focal point or a similar organisation for the implementation of the Guidelines.

⁸⁶ This document is not publicly available online.

⁸⁷ This document is available at <https://asean.org/wp-content/uploads/2022/03/Guidelines-for-the-Implementation-of-ASEAN-Commitments-on-Non-Tariff-Measures-on-Goods.pdf>.



2.8 ASEAN Trade Facilitation Framework (ATFF)⁸⁸

The *ASEAN Trade Facilitation Framework (ATFF)* was adopted in 2016, with the aim to effectively implement the existing ASEAN obligations, commitments, and instruments relating to trade facilitation, *i.e.*, the ASEAN Vision 2025: Forging Ahead Together, the ASEAN Economic Community Blueprint 2025, and the ATIGA. The added value of the ATFF rests in the desire of AMSs to provide a coordinated and renewed impetus towards trade facilitation in minimising the impact of non-tariff measures (NTMs), achieving the elimination of non-tariff barriers (NTBs), and fostering an effective and responsive regional approach to efficiently address NTMs with a view to pursuing legitimate policy objectives while reducing cost and time of doing business in ASEAN. In line with the overarching rationale of trade facilitation under ATIGA and AEC Blueprint 2025, the 10 key principles of the ATFF provide guidance and direction for the further development and implementation of the ASEAN trade facilitation programme. As part of its key principles, the rules and procedures relating to trade must be consistently and promptly made available to all interested parties through a number of transparency mechanisms.

2.9 ASEAN Framework Agreement on the Facilitation of Goods in Transit⁸⁹

In realisation of the commitment to foster the smooth, rapid, and efficient movement of goods between and among AMSs, ASEAN adopted the ASEAN Framework Agreement on the Facilitation of Goods in Transit (AFAFGIT) in December 1998, which came into effect in October 2000. The AFAFGIT provides the most effective arrangement for facilitating inter-state traffic and transit transport between and among AMSs and aims to establish an effective, efficient, integrated, and harmonised transit transport system in ASEAN.

In relation to SPS facilitation and for purposes of facilitating the movement of goods in their territories while ensuring compliance with the laws and regulations that the relevant AMSs' authorities are responsible for enforcing, Article 19 (Establishment of Sanitary and Phytosanitary Measures) of the AFAFGIT requires the establishment of SPS measures to be specified in Protocol 8 (Sanitary and Phytosanitary Measures to Implement the AFAFGIT). Protocol 8 requires AMSs to ensure easy accessibility of their SPS laws, regulations, and procedures for the transit of goods in their respective territories to any interested AMS and to mutually consult with each other in order to establish multilateral or ASEAN sanitary and phytosanitary arrangements and inspection procedures to facilitate the transit of particular goods.

Since there is no reference to the facilitation of Customs regulations and procedures for goods in transit across ASEAN in Chapter 6 (Customs) of the ATIGA, Article 54 (Customs Procedures and Control) should be reviewed to include Customs procedures and controls for goods in transit, as provided under Article 17 (Harmonization and Simplification of Customs Procedures) of the AFAFGIT. The reference to the ASEAN Customs Transit System (ACTS), which is a computerised Customs transit management guided by the AFAFGIT and its Protocols, could also be considered as a dedicated Annex to the ATIGA Upgrade.

⁸⁸ This document is available at <https://asean.org/wp-content/uploads/2022/03/ASEAN-Trade-Facilitation-Framework.pdf>.

⁸⁹ This document is available at https://www.asean.org/wpcontent/uploads/images/2012/Economic/AFTA/Common_Effective_Preferential_Tariff/ASEAN%20Framework%20Agreement%20on%20the%20Facilitation.pdf.



3. International Benchmarks

3.1 Malaysia-New Zealand Free Trade Agreement (MNZFTA)

This Agreement, which entered into force in August 2010, establishes a free trade agreement between Malaysia and New Zealand, consistent with Article XXIV of GATT 1994 for trade in goods.

According to the definition of the WTO SPS Agreement, '*regionalisation*' is a concept where an area of a country may be recognised as pest- or disease-free or with low pest or disease prevalence. Trade from such area is allowed even if the health status in the rest of the country is not favourable.

As part of its objectives to establish a mechanism to facilitate trade between the Parties, while protecting human, animal or plant life or health in the Parties' territory, Chapter 6 (Sanitary and Phytosanitary Measures) of the MNZFTA allows the Parties to recognise the concept of regionalisation, zoning, and compartmentalisation, including the recognition of pest- or disease-free areas or areas of low pest or disease prevalence as provided under Article 6.9 (Regionalisation). The Parties may mutually decide principles, procedures, and/or certification provisions applicable to regionalisation decisions and record them in an Implementing Arrangement. The introduction of the concept of '*regionalisation*' or similar disciplines into the ATIGA would be instrumental for ASEAN to achieve SPS facilitation.


3.2 Free Trade Agreement between the European Union and the Republic of Singapore

When it comes to food safety, animal and plant health, both the EU and Singapore have stringent laws and procedures in place. The EU-Singapore FTA (EUSFTA), which came into effect in November 2019, is the first FTA between the EU and an ASEAN country. It aims to facilitate exports of products of animal origin, as provided under Article 5.9 thereof (Trade Facilitation) and Annex 5-B (Requirements and Provisions for Approval of Establishments for Products of Animal Origin). For instance, the EU and Singapore have agreed to evaluate each other's inspection and certificate systems for meat-producing establishments, rather than requiring individual abattoirs or food processing plants to be inspected by the other party before they can export.

The concepts of pest- or disease-free areas and areas of low pest or disease prevalence, in accordance with the SPS Agreement, the OIE, and the International Plant Protection Committee (IPPC) standards, guidelines, and recommendations are recognised by the Parties to the EUSFTA in accordance with Article 5.10 (Measures Linked to Animal and Plant Health). The SPS Committee referred to in Article 5.15 (Committee on Sanitary and Phytosanitary Measures) may define further details for the procedures for the recognition of such areas in cases where there has been an outbreak. The possible recognition and establishment of such trade facilitative tool on pest or disease-free geographic areas could greatly enhance ASEAN SPS trade facilitation.

3.3 Agreement between New Zealand and Singapore on a Closer Economic Partnership (upgraded 2020)

Following its entry into force in January 2001, the upgraded Agreement between New Zealand and Singapore on a Closer Economic Partnership (ANZSCEP) came into effect in January 2020. Taken as a whole, the CEP upgrade contains improved trade rules and provisions that are in line with newer FTAs



to which Singapore and New Zealand are parties. To ensure that food imports are held to stringent and robust food safety requirements, while reducing trade barriers that impede trade, Chapter 5 (Sanitary and Phytosanitary Measures) incorporates the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) such as adaption to regional conditions, including Pest- or Disease-Free Areas of Low Pest or Disease Prevalence under Article 5.6.

In addition, the Implementing Arrangements (IAs) under the SPS Chapter have been concluded to enhance the transparency of SPS regulations and better compliance with the SPS requirements. The IA 1 concerns the *Arrangement between New Zealand and Singapore on Competent Authorities and Contact Points*, while IA 2 caters for the *Arrangement between New Zealand and Singapore on the Recognition of the Equivalence of Foreign Disease and Pest Control and Zoning Measures as They Apply to Trade*. These elements, for example the commitment to pursue the equivalence of technical regulations and the disease/pest-free zones, could be taken into consideration during the review of the ATIGA SPS Chapter.

3.4 Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam

The EU-Viet Nam Free Trade Agreement (EUVFTA) entered into force in July 2020 was the second FTA concluded between the EU and an ASEAN country. The EUVFTA aims to facilitate market access through the removal of unjustified and unnecessary barriers.

According to Article 6.8 (Procedure for Listing of Establishments), once an importing party approves a category of food products from the exporting party and is confident that the relevant competent authority in the exporting party can check and monitor compliance with the food safety requirements in the exporting party's domestic establishments, the importing party will automatically allow imports from all of such establishments. This automatic approval of establishments in the exporting party by the importing party without prior individual inspection is known as '*pre-listing*'. The competent authority of the importing party has to prepare lists of approved establishments and these lists have to be made publicly available as required by Annex 6 of the EUVFTA (Requirements and Procedures for Approval of Establishments for Products), which contains the detailed rules on the relevant requirements and procedures. AMS could consider including a more progressive commitment in establishing procedures for the pre-listing of export establishments in the ATIGA during the ATIGA Upgrade.

3.5 Agreement between the United States of America, the United Mexican States, and Canada

The United States-Mexico-Canada Agreement (USMCA), effective in July 2020, is an updated version of the North American Free Trade Agreement (NAFTA) and entered into force in July 2020. The USMCA SPS Chapter establishes a new mechanism for technical consultations to resolve issues between the Parties. Recognising that trade matters arising under this Chapter are best resolved by the appropriate competent authorities, Article 9.19 (Technical Consultations) of the USMCA's SPS Protocol requires a Party to have recourse to technical consultations to resolve any SPS matter that may adversely affect trade between the Parties, prior to invoking the dispute settlement under Chapter 31 (Dispute Settlement). While Article 82 of the ATIGA addresses the overall implementation of the SPS Chapter, the ATIGA does not generally provide for sector-specific consultation mechanisms to address non-tariff measures and to coordinate and cooperation on certain issues.



3.6 EU-Mercosur Trade Agreement: The agreement in principle and its texts

The EU-Mercosur Free Trade Agreement (FTA), which is part of a wider Association Agreement between the two regions, consolidates the strategic political and economic partnership between the EU and Mercosur countries (*i.e.*, Argentina, Brazil, Paraguay, and Uruguay). The two regions reached an agreement in principle in 2019, while the entry into force of the EU-Mercosur FTA is pending the finalisation of the text and completion of internal legal procedures by all Parties.

The SPS Chapter of the EU-Mercosur FTA includes an Annex (Procedures for Recognition of Zones, Compartments and Pest Status), which provides detailed rules on notification, the establishment of a list of regulated quarantine and non-quarantine pests to allow continued exports from non-affected zones despite a disease present in some areas, or the so called '*regionalisation*'. To enhance ATIGA trade facilitation in relation to SPS, the progressive commitment on '*regionalisation*', should be considered to be included into the ATIGA.

3.7 Economic Partnership Agreement between the European Union and Japan

The EU-Japan Economic Partnership Agreement (EU-Japan EPA), which entered into force in February 2019, is still considered one of the most advanced '*new generation*' trade agreements of the EU. The EU-Japan EPA is a particularly important agreement for benchmarking purposes.


Similar to the EU, Japan has some of the highest food safety standards in the world. For example, Japan does not allow the use of growth hormones in its beef production, and regulations controlling GMOs are of great importance to Japanese consumers. Similar to other EU trade deals, the EU-Japan agreement fully preserves the right of the parties to apply the '*precautionary principle*', which means the parties safeguard the rights to regulate for public policy purposes, including public health, safety or the environment, in the absence of science but in order to be on the safe and prudent side. A reference to the precautionary approach is explicitly made in the Trade and Sustainable Development Chapter of the agreement and relevant provisions in other chapters (*i.e.*, SPS, TBT, Good Regulatory Practices (GRP) and Regulatory Cooperation, are consistent with the principle).

An express provision on the '*precautionary principle*' should be considered by ASEAN within the context of the ATIGA Upgrade and for purposes of aligning with WTO law and the majority of new generation preferential trade agreements.

3.8 New EU-Mexico Free Trade Agreement

The EU and Mexico have reached an '*agreement in principle*' on a new EU-Mexico Association Agreement in April 2018. The new EU-Mexico FTA, once ratified, will replace the pre-existing Agreement of 2000. The modernisation of the new agreement has led to a full cooperation in SPS matters and provides many specific trade facilitation measures.

Recognising the international standards set out by the OIE, OIE Terrestrial and Aquatic Code, and IPPC, both Parties agreed to an ambitious provision on '*regionalisation*', aiming to limit trade restrictions to the specific areas suffering the outbreak. Article 7 (Adaptation to Regional Conditions, Including Pest-



or Disease-Free Areas and Areas of Low Pest or Disease Prevalence) stipulates that the importing Party shall normally base its determination of the areas on the information provided by the exporting Party.

To provide a framework for dialogue and cooperation in enhancing the protection and welfare of animals and reaching a common understanding concerning animal welfare standards, and in order to strengthen the fight against the development of anti-microbial resistance, the EU and Mexico concluded a Chapter on Cooperation in Animal Welfare and Anti-Microbial Resistance. The Parties agreed to cooperate to reduce the use of anti-microbials in animal production and to ban their use as growth promoters with the aim to combat anti-microbial resistance. Realising the importance of the issue in relation to animal welfare and anti-microbial resistance, AMSs could consider recognising the relevance of these issues to trade within the ATIGA and addressing them during the ATIGA Upgrade.


3.9 Regional Comprehensive Economic Partnership

The Regional Comprehensive Economic Partnership Agreement (RCEP) is a plurilateral treaty-level agreement negotiated initially between the ten ASEAN Member States, including Brunei-Darussalam, Cambodia, Indonesia, Laos People's Democratic Republic, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Viet Nam, and their free trade agreement partners, notably Australia, China, India, Japan, South Korea, and New Zealand. India withdrew from the RCEP negotiations in November 2019. Following the signing in November 2020, the RCEP Agreement entered into force on 1 January 2022 for Australia, New Zealand, Brunei Darussalam, Cambodia, China, Japan, Lao PDR, Singapore, Thailand, and Viet Nam. RCEP then entered into force for the Republic of Korea and Indonesia on 1 February and 30 August 2022, respectively.

In addition to the WTO SPS Agreement, and consistently with the provisions of the WTO Trade Facilitation Agreement, the SPS Chapter of the RCEP Agreement includes the objectives to protect (human, animal or plant life or health) while facilitating trade. Trade facilitation measures include improving the efficiency of border procedures and strengthening cooperation, communication, and consultation among the RCEP Parties. The reference to facilitating trade is additional to the WTO SPS Agreement.

Several important provisions in the RCEP are important to consider vis-à-vis the upgrade of the ATIGA with respect to the SPS Chapter:

- (a) Article 5.11 (Emergency measures), which lays down the actions required, namely notification, discussion, and review, when a Party adopts an emergency measure for SPS reasons that may affect trade. Such emergency measure is subject to a review by the importing Party within a reasonable period of time or upon request by the exporting Party.
- (b) Article 5.5 (Equivalence) provides that the equivalence of an SPS measure must be recognised by an importing Party if an exporting Party objectively demonstrates that such measure achieves the same level of protection or has the same effect in achieving the objective as the importing Party's measure. Within the WTO system, an SPS measure can be recognised as equivalent if the exporting Member can demonstrate that it achieves the importing Member's appropriate level of SPS protection, while under the RCEP the provision on equivalence sets another benchmark, which is "*the same effect in achieving the objective*". The RCEP Article 5.5 also allows the recognition



of equivalence with respect to a single measure, a group of measures, or on a systems-wide basis.

- (c) Article 5.6 (Adaptation to regional conditions including pest-or disease-free areas and areas of low pest or disease prevalence) stipulates the procedures for the determination of regional conditions to acquire confidence in the procedures followed by each Party for such recognition.
- (d) Article 5.7 (Risk analysis) considers the risk management options that are not more trade-restrictive than required to achieve the Party's appropriate level of SPS protection, in addition to scientific evidence and economic factors as required by the WTO SPS Agreement.
- (e) Article 5.9 (Certification) calls for the certification requirements to be applied only to the extent necessary to protect human, animal or plant life or health.
- (f) Article 5.10 (Import checks) aims at establishing '*non-arbitrary*' and '*cooperative*' SPS-related import checks by allowing discussions on the lack of compliance to ensure that appropriate remedial actions are taken towards full compliance.
- (g) Article 5.12 (Transparency) mandates RCEP Parties to notify the proposed measures or changes to SPS measures that may have a significant effect on trade through the online WTO SPS Measures Notification Submission System.
- (h) Although Article 5.14 (Technical consultations) provides for a mechanism for RCEP Parties to resolve any concerns on specific issues arising from the application of SPS measures, the enforceability of the SPS Chapter under the RCEP is relatively weak given the non-application of the dispute settlement chapter as stipulated under Article 5.17 (Dispute settlement).


4. Key Takeaways from Roundtable Discussions

During the Roundtable Discussions on Trade Facilitation organised by ARISE Plus, the representatives of the ASEAN private sector generally endorsed the recommendations provided in this policy brief and voiced the following key takeaways:

4.1 Recognising the importance and addressing the emerging issues in relation to SPS

According to the Food and Agriculture Organisation of the United Nations (FAO), antimicrobial resistance (AMR) threatens animal health, food safety and food security, economic prosperity, and ecosystems worldwide. Given the significance of these emerging issues, the ATIGA upgrade could consider the relevance of these emerging issues in relation to SPS and address or reduce the implications under the SPS Chapter.

4.2 Facilitating safe trade through digitalisation



Since 2019, all AMSs have participated in the ASEAN Single Window (ASW) Live Operation, which allows AMSs to exchange trade-related documents including electronic Phytosanitary (e-Phyto) certificate and electronic Animal Health (e-AH) certificate, through the ASW platform. Noting that paperless SPS systems can improve traceability throughout SPS supply chains, reduce trade costs, and lower fraudulent certificates, AMSs could consider enhancing the relevant ATIGA Chapters in accelerating the implementation of e-SPS certificates to facilitate cross-border trade within ASEAN and its trading partners.

4.3 Enhancing intra-ASEAN trade through the streamlining of SPS measures

Although the ATIGA aims at facilitating trade while providing the level of health protection deemed appropriate, in practice several SPS procedural measures appear to hinder trade flows within the ASEAN region. The ATIGA upgrade should take into consideration this aspect and allow AMSs to regularly review, streamline, and simplify the documentary requirements and procedures involved in the implementation of SPS measures. The improved transparency and minimised trade-distortive effects of NTMs would help reduce trade costs and enhance intra-ASEAN trade.

4.4 Strengthening implementation of ATIGA commitments by AMSs

Business sector participants highlighted that the poor implementation by AMSs of their ATIGA commitments, especially in relation to the streamlining of NTMs and the removal of NTBs, remains a key challenge. The success of the ATIGA upgrade in increasing intra-ASEAN trade depends on the effective implementation of ATIGA commitments and initiatives.

5. Conclusions and Recommendations


The following conclusions and recommendations on sanitary and phytosanitary measures in relation to the ATIGA Upgrade are drawn from the comparative analysis and review of the key ASEAN obligations and commitments embedded in the pertinent ASEAN instruments and from the relevant preferential trade agreements that were highlighted and assessed in the previous sections of this Policy Brief.

5.1 Uphold the principles and application of the WTO SPS Agreement

In advancing the implementation of the WTO SPS Agreement, it is important to align the objectives of the ATIGA SPS Chapter with those of the WTO SPS Agreement and the text of Article 79 could be reviewed to include the WTO objectives as well as the enhancement of transparency and understanding of the application of SPS measures as one of the objectives of the ATIGA.

5.2 Provide regulatory coherence with the existing SPS provisions of the salient PTAs

To ensure that the ATIGA SPS Chapter is modern and responsive to the evolving regional and global economic architecture, ASEAN could consider including further commitments on trade facilitation related to SPS measures and compliance, as adopted by the new generation PTAs, especially those of



AMSs with third countries or regions. These progressive commitments, *inter alia*, are the concept of pests and disease-free areas and areas of low pests or disease prevalence, known as ‘*regionalisation*’; an automatic approval of establishments in the exporting party by the importing party without prior individual inspection or ‘*pre-listing*’ of establishments, and sector-specific consultation mechanism to address NTMs and enhance cooperation on certain SPS matters.

5.3 Address the emerging issues or global health concerns in relation to SPS

Currently, the ATIGA does not provide any rules or commitments on the issues of animal welfare and anti-microbial resistance. Given the increasing importance of that consumers and society at large confer to animal welfare, AMS could consider recognising this issue and its relevance to trade within the ATIGA. In this context, the issue of anti-microbial resistance could also be addressed.

5.4 Include the key aspects and elements of the relevant ASEAN instruments/commitments

Given the several achievements and agreements in ASEAN’s economic integration agenda since the entry into force of the ATIGA, it is recommended that these legal instruments and their related disciplines be referred to and/or incorporated into a dedicated annex when undertaking the ATIGA review exercise. For example, Protocol 8 to the AFAFGIT (Sanitary and Phytosanitary Measures to Implement the AFAFGIT), the ASEAN Customs Transit System (ACTS) for transport and trade facilitation, and the Agreement on the Establishment of the ASEAN Coordinating Centre for Animal Health Zoonoses, the ASEAN Food Safety Policy, and the ASEAN Food Safety Regulatory Framework, should be better integrated into the SPS Chapter or a related Annex of the ATIGA.

5.5 Enhance the role and responsibilities of the ASEAN Committee on Sanitary and Phytosanitary Measures (AC-SPS)

The ATIGA SPS Chapter stipulates the establishment of the AC-SPS to ensure effective implementation of the SPS provisions. The AC-SPS could play a significant role in coordinating with the existing ASEAN bodies relevant to SPS matters under the agriculture sector and various ASEAN Plus FTAs in supporting the implementation of the ATIGA SPS Chapter. It appears necessary to review Article 82 (Implementation and Institutional Arrangements) and the Terms of Reference of this Committee in order to ensure consistency of its role and responsibilities in accordance with the upgraded SPS Chapter of the ATIGA.

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Non-Agricultural Trade and TBT Facilitation

Panadda Dasananda

1. Introduction

Although standards play a vital role in facilitating international trade, promoting inter interoperability, and ensuring product safety, differences between technical regulations and conformity assessment procedures adopted by various countries can be burdensome and increase trade costs. To ensure that businesses and enterprises can fully benefit from the growth in international trade, tariff liberalisation undertaken must be accompanied by the removal of unjustified technical barriers.

The Agreement on Technical Barriers to Trade (TBT) of the World Trade Organization (WTO) Agreement, establishes multilateral rules to ensure that regulations, standards, testing, and certification procedures do not create unnecessary obstacles to trade. The WTO TBT Agreement aims at ensuring that standards serve a genuine purpose, rather than become a trade hindrance, and that they be genuinely adopted and in order to pursue legitimate policy objectives (e.g., the protection of human health and safety, or of the environment). The TBT Agreement strongly encourages WTO Members to base their measures on international standards as a means to facilitate trade and to harmonise their standards..

The ASEAN Trade in Goods Agreement (ATIGA), which is a comprehensive legal instrument- regulating intra-ASEAN trade in goods, builds upon the commitments under the existing ASEAN economic agreements to provide a legal framework for realising the free flow of goods in the region, resulting in fewer trade barriers and deeper economic linkages among ASEAN Member States (AMSs). The ATIGA, which superseded the Common Effective Preferential Tariff (CEPT), became effective in May 2010. It contains wide-ranging commitments related to trade in goods, which include rules on tariff liberalisation, on the removal of non-tariff barriers, on rules of origin, on trade facilitation, on customs procedures, on standards and conformance, and on the application of sanitary and phytosanitary measures, as well as mechanisms for its implementation and institutional arrangements.

Given the proliferation of FTA networks concluded by ASEAN and AMSs, the progress in ASEAN's economic integration agenda, and several developments in the areas covered by the ATIGA, particularly on standards, technical regulations and conformity assessment procedures, the regional architecture has considerably evolved over the past decade. ASEAN believes that it is timely to undertake a general review of the ATIGA, which should be comprehensive in scope and coverage to ensure that it remains a high-quality, modern, as well as responsive and facilitative legal instrument.

This Policy Brief on non-agricultural trade and TBT facilitation consists of five parts: **Section 1**, which provides a short introduction; **Section 2**, which highlights the key obligations and commitments embodied in the relevant ASEAN instruments; **Section 3**, which assesses the international benchmarks and provides a brief analysis of the salient Preferential Trading Agreements (PTAs) and/or multilateral/plurilateral instruments that may stand as best practices, model texts or notional inspirations; **Section 4**, which annotates the key takeaways from roundtable discussions entertained with ASEAN's private sector; and the final part, **Section 5**, which offers a set of concrete conclusions and recommendations in relation to the review and possible enhancement of the ATIGA Chapter 7 on Standards, Technical Regulations, and Conformity Assessment Procedures (STRACAP).



2. Key ASEAN Obligations

2.1 ASEAN Trade in Good Agreement (ATIGA)⁹⁰

The ATIGA Chapter 7 (STRACAP) aims to establish provisions on standards, technical regulations and conformity assessment procedures to ensure that these do not create unnecessary obstacles to trade in establishing ASEAN as a single market and production base, and at the same time to ensure that the legitimate objectives of AMSs are met.

Article 73 (General Provisions) and Article 74 (Standards) of the ATIGA reaffirm ASEAN's commitment to abide by the rights and obligations under the WTO Agreement on Technical Barriers to Trade (TBT Agreement) and to accept and follow the Code of Good Practice for the Preparation, Adoption, and Application of Standards as contained in Annex 1A to the TBT Agreement. AMSs are required to mitigate, if not entirely eliminate, unnecessary TBT by harmonising national standards with relevant international standards and practices, developing and implementing ASEAN Sectoral Mutual Recognition Arrangements (MRAs) and ASEAN Harmonised Regulatory Regimes, and encouraging cooperation among National Accreditation Bodies and National Metrology Institutes (NMIs), including relevant legal metrology authorities in ASEAN, to facilitate the implementation of MRAs.

Article 78 (Implementation) of the ATIGA provides for the existing ASEAN instruments to implement the STRACAP Chapter. It also allows for any future instruments agreed upon by AMSs to be included and form an integral part of the ATIGA. Article 78 also lays down the roles and responsibilities of the ASEAN Consultative Committee for Standards and Quality (ACCSQ), established by the 24th ASEAN Economic Ministers (AEM) meeting in 1992 in order to facilitate and enhance ASEAN Economic Integration through the removal of technical barriers to trade posed by standards, technical regulations, conformity assessment procedures, accreditation, scientific and legal metrology, and market surveillance in the AMSs.


2.2 ASEAN Standards and Conformance Strategic Plan 2016-2025⁹¹

The *ASEAN Standards and Conformance Strategic Plan 2016-2025 (ACCSQ Strategic Plan 2016-2025)*, which was adopted in April 2015, contains the immediate priorities for the ACCSQ to complete its commitment to eliminate TBT. The Strategic Plan (SP) entails six strategic thrusts, which are designed to elaborate future policies, identify and support the review of existing agreements, the development of new agreements, and related mechanisms that will support the further removal of the remaining technical barriers to trade. It is recommended to reflect and/or incorporate the relevant thrusts under the ACCSQ SP 2016-2025 into Chapter 7 of the ATIGA.

The ACCSQ SP contains crucial initiatives to ensure the effective implementation of STRACAP provisions of the ATIGA (e.g., strengthening joint ASEAN approaches on issues related to STRACAP, adopting common approaches on risk assessment methodologies, adopting a concerted approach to identify and participate in global organisations, deepening the regional implementation of trade-

⁹⁰ This document is available at <https://asean.org/asean2020/wp-content/uploads/2020/12/ASEAN-Trade-in-Goods-Agreement-Cha-am-Thailand-26-February-2009.pdf>.

⁹¹ This document is available at <https://asean.org/wp-content/uploads/2021/01/ASEAN-Standards-and-Conformance-Strategic-Plan-2016-2025.pdf>.



facilitative STRACAP initiatives in new areas, and enhancing the development of policies). An unavailable specific cooperation provision that lists different types of approaches, initiatives, and cooperation mechanisms with respect to STRACAP should be included in the ATIGA Chapter 7.

2.3 ASEAN Agreement on the Medical Device Directive⁹²

The ASEAN Agreement on the Medical Device Directive, which entered into force in January 2020, concerns, *inter alia*, the principles of safety and performance, registration and placement of products on the market, as well as the related technical documents and labelling schemes. It provides that an AMS must undertake all necessary measures to ensure that only medical devices that conform to the provisions of the Agreement and its Annexes be placed on the market of that AMS. Under Article 1 of *the ASEAN Agreement on the Medical Device Directive*, the medical device must be registered with the Regulatory Authority. Article 3 also requires medical devices to meet the essential principles of safety and performance set out in Annex 1 of the Agreement. Furthermore, a conformity assessment on a medical device intended to be placed on the market by the Regulatory Authority or any appointed body is mandatory, as required under Article 5 of the Agreement.

At present, this Agreement is not reflected in Article 78 of the ATIGA. AMSs should consider making reference to the ASEAN Agreement on the Medical Device Directive in Article 78 of the ATIGA.

2.4 Agreement on the ASEAN Harmonised Electrical and Electronic Equipment Regulatory Regime⁹³

The Agreement on the ASEAN Harmonised Electrical and Electronic Equipment (EEE) Regulatory Regime, adopted in December 2005, aims at enhancing the cooperation to ensure the protection of human health, safety, property, as well as to- foster the preservation of the environment, while eliminating restrictions to the trade of electrical and electronic equipment, through the harmonisation of technical requirements. Pursuant to Article 2 of the Agreement, this instrument applies to all instances where an AMS carries out regulatory activities with respect to Electrical and Electronic Equipment (EEE).


The Agreement is referred to in Article 78 of the ATIGA and there are certain provisions such as Article 4 (Implementation), Article 6 (Compliance with Essential Requirements), and Article 10 (Other Areas of Cooperation) that are particularly relevant. However, given the slow progress of implementation of the *ASEAN Harmonised EEE Regulatory Regime*, an establishment of a reporting mechanism with respect to the implementation of harmonised regulatory regime commitments tied to the transparency provisions of the ATIGA should be taken into consideration during the ATIGA Upgrade.

2.5 Agreement on the ASEAN Harmonised Cosmetic Regulatory Scheme⁹⁴

⁹² This document is available at <https://asean.org/storage/2016/06/22.-September-2015-ASEAN-Medical-Device-Directive.pdf>.

⁹³ This document is available at <https://cil.nus.edu.sg/wp-content/uploads/formidable/18/2005-Agreement-On-The-ASEAN-Harmonized-Electrical-And-Electronic-Equipment-Regulatory-Regime.pdf>.

⁹⁴ This document is available at <https://www.asean.org/wp-content/uploads/2012/10/20707.pdf>.



The *Agreement on the ASEAN Harmonised Cosmetic Regulatory Scheme*, effective since 2003, concerns an ASEAN harmonised cosmetic regulatory scheme, technical documents and other areas of cooperation. It intends to enhance cooperation for ensuring the safety, quality, and claimed benefits of all cosmetic products, and to eliminate restrictions to the trade of cosmetic products through the harmonisation of technical requirements, the mutual recognition of product registration approvals, and the adoption of the *ASEAN Cosmetic Directive*. Since Article 78 of the ATIGA already refers to the Agreement on the ASEAN Harmonized Cosmetic Regulatory Scheme, AMSs could consider moving the reference to specific MRAs into an Annex of the upgraded ATIGA, which would facilitate keeping the list administratively up to date.

2.6 ASEAN Framework Agreement on Mutual Recognition Arrangements⁹⁵

The *ASEAN Framework Agreement on Mutual Recognition Arrangements*, which was adopted in December 1998 and entered into force in February 2009, regulates the general principles for developing Sectoral MRAs among AMSs and other related cooperative activities. It provides the general conditions under which each AMS that is subject to a Sectoral MRA is to accept or recognise the results of conformity assessment procedures conducted by the Conformity Assessment Bodies of other AMSs. The Framework Agreement contains provisions on, *inter alia*, elements of sectoral MRAs, listing, verification of technical competence, compliance and monitoring of conformity assessment bodies. *The Framework Agreement on MRAs* is referred to in Article 76 (Conformity Assessment Procedures) and Article 78 (Implementation) of the ATIGA.

2.7 Guidelines for the Development of Mutual Recognition Arrangements⁹⁶

The *Guidelines for the Development of Mutual Recognition Arrangements* (Guidelines for MRAs), which were published in 2014, serve as a common reference for the development of sectoral MRAs to ensure that the MRAs are properly developed and efficiently meet their declared objectives. It helps facilitate the development of a coherent set of MRAs, supporting the establishment of the ASEAN Economic Community.

The Guidelines emphasise that mutual recognition and harmonisation of regulatory regimes are significant tools to remove technical barriers to trade, especially in the field of conformity assessment procedures (*i.e.*, eliminating the need for multiple testing and certification for goods traded within the region).

Given the significant potential for intra-ASEAN trade facilitation of MRAs, ASEAN should consider reflecting this legal instrument within Chapter 7 of the upgraded ATIGA, ideally through a provision referencing it in the main text of the ATIGA and then by incorporating the 2014 Guidelines for the Development of Mutual Recognition Arrangements in a dedicated Annex to the ATIGA.

⁹⁵ This document is available at <https://cil.nus.edu.sg/wp-content/uploads/2019/02/1998-FA-on-MRAs-1.pdf>.

⁹⁶ This document is available at <https://www.asean.org/storage/images/Community/AEC/Sectoral/standarandconformance/Guidelines%20for%20The%20Development%20of%20Mutual%20Recognition%20Arrangements-rev3-FA.pdf>.

2.8 ASEAN Mutual Recognition Arrangement for Bioequivalence Study Reports of Generic Medicinal Products⁹⁷

The objective of the *ASEAN Mutual Recognition Arrangement for Bioequivalence Study Reports of Generic Medicinal Products (ASEAN MRA on Bioequivalence)*, which came into force in November 2017, is to enable the mutual recognition of Bioequivalence (BE) Study Reports of generic medicinal products in order to facilitate the movement of these goods within ASEAN. Under this MRA, several important provisions on BE of relevance to Article 78 (Implementation) are adopted. For instance, Article 4 of the MRA provides that the scope of the ASEAN MRA on BE applies to BE Study Reports of generic medicinal products, issued by Listed BE Centres located in the territories of AMSs. Currently, Article 78 (Implementation) of the ATIGA does not refer to this MRA. AMSs could consider adding a reference to the *ASEAN MRA on Bioequivalence* or a dedicated annex to the upgraded ATIGA.

2.9 ASEAN Sectoral Mutual Recognition Arrangement for Inspection and Certification Systems on Food Hygiene for Prepared Foodstuff Products⁹⁸

The *ASEAN Sectoral Mutual Recognition Arrangement for Inspection and Certification Systems on Food Hygiene for Prepared Foodstuff Products (Sectoral MRA for Prepared Foodstuff Products)*, which was adopted and effective in April 2018, sets out the arrangement to ensure that AMSs' inspection and certification systems on food hygiene are consistent with its provisions and annexes, in order to facilitate trade within ASEAN and protect the health of consumers. Currently, Article 78 (Implementation) of the ATIGA does not refer to this MRA. AMSs could consider adding a reference to the *Sectoral MRA for Prepared Foodstuff Products* or a dedicated annex to the upgraded Article 78 of the ATIGA.

2.10 ASEAN Sectoral Mutual Recognition Arrangement for Good Manufacturing Practice Inspection of the Manufacturers of Medicinal Products⁹⁹

The *ASEAN Sectoral MRA for Good Manufacturing Practice (GMP) Inspection of the Manufacturers of Medicinal Products (ASEAN Sectoral MRA on GMP Inspection of Manufacturers of Medicinal Products)*, which entered into in April 2009, aims at facilitating the movement of medicinal products in ASEAN through mutual exchange and recognition of GMP inspection reports and certificates. Under this MRA, all AMSs have to accept and recognise the GMP certificates and/or inspection reports of another AMS's Listed Inspection Service. The scope and coverage of the Sectoral MRA include, *inter alia*, the criteria for listing the Inspection Service, a description of the mutual recognition obligations, the verification of technical competency, the implementation, and dispute settlement. At present, there is no reference of the *Sectoral MRA on GMP Inspection of Manufacturers of Medicinal Products* in the ATIGA. AMSs could consider adding a reference to this sectoral MRA in the upgraded Article 78 of the ATIGA and/or incorporating this legal instrument in a dedicated Annex to the ATIGA.


2.11 ASEAN Sectoral Mutual Recognition Arrangement for Electrical and Electronic Equipment¹⁰⁰

⁹⁷ This document is available at <http://ariseplus.asean.org/wp-content/uploads/2018/12/MRA-BE-Book-FINAL.pdf>.

⁹⁸ This document is available at <http://agreement.asean.org/media/download/20180522045752.pdf>.

⁹⁹ This document is available at <https://cil.nus.edu.sg/wp-content/uploads/formidable/18/2009-ASEAN-Sectoral-MRA-for-GMP-Inspection-of-Manufacturers-of-Medicinal-Products.pdf>.

¹⁰⁰ This document is available at <https://cil.nus.edu.sg/wp-content/uploads/2020/03/2002-EE-MRA.pdf>.



The *ASEAN Sectoral Mutual Recognition Arrangement for Electrical and Electronic Equipment* (EEE MRA), which came into effect in April 2002, applies to all instances where test reports and/or certifications issued by listed certification bodies are used as a basis for regulatory action in respect of electrical and electronic equipment. The preamble of this ASEAN Sectoral MRA shows that ASEAN Member States were mindful that mutual recognition or acceptance of test reports and equipment certification will enhance trade of electrical and electronic equipment in ASEAN and facilitate the implementation of the AFTA and the FTA for ICT sector. Given that Article 78 (Implementation) of the ATIGA already refers to the EEE MRA, AMSs could consider moving the reference to the specific MRAs into an annex of the upgraded ATIGA, which would facilitate keeping the list administratively up to date.

2.12 ASEAN Guidelines on Standards, Technical Regulations and Conformity Assessment Procedures¹⁰¹

The *ASEAN Guidelines on Standards, Technical Regulations and Conformity Assessment Procedures* (AG-STRACAP), published in 2015, is an update of the previous guidelines, known as the *ASEAN Policy Guideline on Standards and Conformance* (APGSC). The new Guidelines, which incorporate the relevant Ministers' and Leaders' decisions and agreements, aim at providing guiding principles for the implementation of individual and joint efforts of AMSs in the area of standardisation, technical regulation, conformity assessment, metrology, and other related activities, both in regulated and non-regulated sectors.

The following actions, stipulated in the AG-STRACAP, need to be undertaken in order to facilitate intra-ASEAN trade and deepen ASEAN integration in the areas of standards, technical regulations and conformity assessment procedures, as required under Articles 74-78 of the ATIGA:


- (a) Harmonisation of standards, technical regulations, and conformity assessment procedures;
- (b) Develop the mutual recognition of conformity assessment in regulated and non-regulated sectors;
- (c) Enhance regulatory cooperation among AMSs;
- (d) Develop harmonised regulatory regimes; and
- (e) Participate in relevant regional and global mutual recognition arrangements in the areas of standards, metrology, conformity assessment and technical regulation.

AMSs should consider reflecting these actions in Chapter 7 of the upgraded ATIGA and then incorporating the AG-STRACAP in a dedicated Annex to the ATIGA.

2.13 ASEAN Economic Community Blueprint 2025¹⁰²

¹⁰¹ This document is available at <https://asean.org/storage/2017/09/ASEAN-Guidelines-on-Standards-Technical-Regulations-and-Conformity-Assessment-Procedures.pdf>.

¹⁰² This document is available at https://www.asean.org/storage/2016/03/AECBP_2025r_FINAL.pdf.



Following its adoption in 2015, the *ASEAN Economic Community (AEC) Blueprint 2025*, which builds on the AEC Blueprint 2015, charts the path for ASEAN's economic integration from 2016 to 2025 and aims at achieving the vision of the ASEAN Economic Community by 2025, taking into account regional priorities, global developments and challenges. Fostering facilitative standards and conformance, the AEC Blueprint 2025 involves the accelerated implementation of the harmonisation of standards and technical regulations, the improvement of quality and capability of conformity assessment, and the enhanced information exchange on laws, rules, and regulatory regimes on standards and conformity assessment procedures. Additionally, it also involves regional cooperation and agreement on measures to facilitate MSMEs upgrading their products towards regionally or internationally agreed standards. AMSs could consider updating and incorporating the strategic measures under the AEC Blueprint 2025 within Chapter 7 of the upgraded ATIGA.

3. International Benchmarks

3.1 New Zealand – Singapore Closer Economic Partnership


Following the entry into force of the original *Agreement between New Zealand and Singapore on a Closer Economic Partnership (ANZSCEP)* in January 2001, the CEP upgrade entered into force in January 2020. The upgraded ANZSCEP incorporates several elements of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). As an example, besides the two Annexes on Electrical and Electronic Equipment (EEE) and Wine and Distilled Spirits, Chapter 6 (TBT) also incorporates the CPTPP Annexes on Cosmetics, Medical Devices, and Pharmaceuticals, to ensure transparent and trade-facilitative marketing authorisation procedures. Currently, the ATIGA does not provide for any sector-specific provisions or annexes. AMSs could consider addressing specific sectors and/or goods in sector-specific annexes of the upgraded ATIGA.

3.2 Singapore – Australia Free Trade Agreement

The *Singapore-Australia Free Trade Agreement (SAFTA)* first entered into force in December 2003. The subsequent amendment of the SAFTA, effective since 2017, formalises the trade outcomes under the auspices of the Australia-Singapore Comprehensive Strategic Partnership (CSP). In light of the CPTPP, both sides agreed to promote common regulatory approaches by incorporating into the SAFTA the CPTPP's sector-specific rules on: (i) cosmetics, medical devices, which provide commitments relating to the technical requirements of these industries; and (ii) wine and distilled spirits, which provide guidance on labelling (e.g., specific minimum requirements for labels for wine and spirits products). The ATIGA does not currently provide for any sector- or product-specific rules or commitments in relation to TBT regulation. AMSs could consider including specific sectors and/or goods in sector-specific annexes to the upgraded ATIGA.

3.3 GCC-Singapore Free Trade Agreement

The Gulf Cooperation Council (GCC)-Singapore Free Trade Agreement (GSFTA), which entered into force in September 2013, is a milestone agreement in strengthening ties between Singapore and the GCC countries, namely, Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates. Under the GSFTA, the GCC countries recognised the halal certification of Singapore's *Majlis Ugama*



Islam Singapura (MUIS), through an exchange of letters of recognition. The two sides further committed to negotiate and make arrangements to provide for the recognition by the GCC Member States of Singapore's Halal Certification Standards and Halal Mark within one year of its entry into force.

The relevance and importance of MRAs are underlined and embedded in the ATIGA Chapter 7. Notably, Article 78 (Implementation) of the ATIGA lists the various ASEAN Sectoral MRAs, which AMSs are required to implement. Although AMSs have not yet fully completed the implementation of the ASEAN Sectoral MRAs that are part of the ATIGA, given the increasing relevance of halal certification, this specific area could be considered for additional MRAs to be negotiated and annexed to the upgraded ATIGA.

3.4 Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam


The EU-Viet Nam Free Trade Agreement (FTA), which was concluded in December 2015 and became effective in July 2020, is an integral part of the framework established by the EU-Viet Nam Partnership and Cooperation Framework Agreement. The two sides made far-reaching commitments on sector-specific Annex 2-B on Motor Vehicles and Motor Vehicles Parts and Equipment, which build on the technical requirements included in the United Nations Economic Commission for Europe (UNECE) Regulations, despite Viet Nam not yet being a UNECE member. Another example is the sector-specific annex on pharmaceutical/medicinal products and medical devices, whose provisions aim at ensuring the use of international standards, practices, and guidelines for pharmaceutical products or medical devices developed by relevant international standard-setting bodies. Currently, the ATIGA provides all substantive provisions in the main text of the ATIGA. It is recommended that AMSs consider having specific sectors and/or goods in sector-specific annexes to the upgraded ATIGA.

3.5 Comprehensive and Progressive Agreement for the Trans-Pacific Partnership

The Comprehensive and Progressive Agreement for the Trans-Pacific Partnership (CPTPP) is a trade agreement between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Viet Nam. Following its entry into force in December 2018 for Australia, Canada, Japan, Mexico, New Zealand, and Singapore, in January 2019 for Viet Nam, and in September 2021 for Peru, the CPTPP will enter into force 60 days after the two remaining parties (*i.e.*, Brunei Darussalam and Chile) conclude their ratification process. Malaysia submitted officially submitted the instrument of ratification for the CPTPP on 30 September 2022.

With the aim of facilitating trade, enhancing transparency, and promoting good practices and greater regulatory cooperation, Article 8.9 (Cooperation and Trade Facilitation) encourages CPTPP Parties to take into account the existing mechanisms to ensure that products conform to their technical requirements. Article 8.9(2)(d) promotes the acceptance of the technical regulations of another Party as equivalent and Parties are required to explain the reasons if they do not accept a technical regulation of the other Party as equivalent. Currently, the ATIGA's Chapter 7 does not provide for any rules or commitments on equivalence. AMSs could consider including a commitment on equivalence not only in the SPS Chapter, but also in the TBT Chapter of the upgraded ATIGA.

To address sector-specific elements pertaining to issues such as standards and labelling, the TBT Chapter of the CPTPP includes a number of sector-specific annexes. For instance, sector-specific



annexes on wine and distilled spirits (Annex 8-A), information and communications technology products (Annex 8-B), pharmaceuticals (Annex 8-C), cosmetics (Annex 8-D), medical devices (Annex 8-E), proprietary formulas for pre-packaged foods and food additives (Annex 8-F), and organic products (Annex 8-G). AMSs could consider addressing specific sectors and/or goods in sector-specific annexes as part of the upgraded ATIGA.

3.6 Korea-United States Free Trade Agreement

After the entry into force of the Korea-United States Free Trade Agreement (KORUS) in March 2012, the United States and Korea entered into a negotiation to renegotiate parts of the agreement in 2017, so as to address significant trade imbalances and resolve market access problems in Korea for US exports. The new modified agreement was signed in September 2018.

Article 9.7 (Automotive Standard and Technical Regulations) provides for trade-facilitative measures related to motor vehicles, in particular the harmonisation of testing requirements, as well as Korea's recognition of US standards for auto parts. With respect to the harmonisation of testing requirements, an exchange of letters on *Specific Autos Regulatory Issues* was made to express Korea's commitment to double the number of US automobile imports entering the Korean market without further modification. The Agreement also reduces the labelling requirements for auto parts. Currently, the ATIGA does not provide for any sector-specific rules and commitments, nor any sector-specific references to relevant standards. AMSs could consider adopting a similar approach in the upgraded ATIGA, with respect to important and highly regulated sectors, such as motor vehicles and auto parts, or certain priority sectors.

3.7 Comprehensive Economic and Trade Agreement between the EU and Canada (CETA)

The Comprehensive Economic and Trade Agreement (CETA), which entered into force in September 2017, is an extensive trade agreement, between the European Union and Canada. The CETA *Protocol on the mutual acceptance of the results of conformity assessment* stipulates that the EU and Canada accept each other's conformity assessment certificates for specific sectors (*e.g.*, electrical and electronic equipment, toys, construction products, and machinery). This means that a designated conformity assessment body (CAB) in the EU can test EU products for export to Canada according to Canadian rules and *vice versa*. To ensure mutual trust in the technical competence of the respective conformity assessment bodies, the CETA requires close cooperation between the two sides. This cooperation has been translated into an agreement between the European Cooperation for Accreditation (EA), an association of national accreditation bodies in Europe, and the Standards Council of Canada. Given the relevance and importance of Article 76 (Conformity Assessment Procedures) of the ATIGA, AMSs could consider elaborating on the provisions related to conformity assessment and mutual recognition to include more formalised cooperation in the upgraded ATIGA.

3.8 EU-Japan Economic Partnership Agreement

The EU-Japan Economic Partnership Agreement (EU-Japan EPA), which came into effect in February 2019, is one of the most advanced '*new generation*' trade agreements. The EU-Japan EPA addressed many NTMs as some Japanese technical requirements and certification procedures often made it difficult to export safe European products to Japan.



As provided under Article 7.6 (International Standards) for detailed specific international standard-setting bodies, the TBT Agreement puts the focus on the mutual commitment to ensure that the standards and technical regulations adopted by both sides are based on international standards to the greatest possible extent. Article 4 (Relevant International Standards and Standardising Body) of Annex 2-C provides a number of specific commitments on the standards for motor vehicles and parts. This ensures that the EU and Japan fully align themselves to the same international standards on product safety and the protection of the environment, meaning that their respective cars will be subject to the same requirements in both markets and will not need to be tested and certified again when exported to the trading partners' market. Currently, Chapter 7 of the ATIGA only provides for rather general commitments on standards, technical regulations, and conformity assessment procedures. AMSs could consider enhancing the rules on standards, technical regulations, and conformity assessment procedures in the upgraded ATIGA to include more specific commitments on certain standards or for certain sectors and/or products.


The EU-Japan EPA provides for a number of specific commitments on standards. For example, Japan has accepted to refer to the International Council on Harmonisation of Technical Requirements for Pharmaceuticals for Human Use (ICH) as the relevant international standards-setting body and to use ICH guidelines as the basis for its legislation for pharmaceutical product standards. Regarding care labels on textiles, Japan has agreed to reform its system and already aligned it with the relevant ISO standard used by the EU textiles industry. Considering the importance of certain products (*e.g.*, motor vehicles or pharmaceuticals) to facilitate trade, AMSs could consider harmonising the use of standards in the upgraded ATIGA.

3.9 EU-Mexico Free Trade Agreement

The EU and Mexico reached an agreement in principle to modernise their existing EU-Mexico Free Trade Agreement (FTA) in April 2018. The upgraded agreement will only enter into force once the EU and Mexico have completed the respective ratification processes. Article X.5 (International Standards) of the TBT Chapter of the EU-Mexico Global Agreement recognises the importance of international standards. It stipulates that the standards developed by international organisations, as listed in Annex 1 thereof, are considered to be relevant international standards. Annex 1 of the TBT Chapter of the modernised EU-Mexico Global Agreement includes a list of international organisations that have developed international standards, such as the International Organisation for Standardisation (ISO), the International Electrotechnical Commission (IEC), and the International Council on Harmonisation of Technical Requirements for Pharmaceuticals for Human Use (ICH). Currently, the ATIGA does not refer to any specific standards-setting bodies. AMSs could consider enhancing the rules on standards, technical regulations, and conformity assessment procedures in the upgraded ATIGA by including more specific commitments on certain standards, either within a chapter of the main text of the new ATIGA or within one of its annexes.

3.10 Regional Comprehensive Economic Partnership

The Regional Comprehensive Economic Partnership Agreement (RCEP) is a regional free trade agreement between the ten member states of the Association of Southeast Asian Nations (ASEAN) and its six FTA partners (Australia, China, India, Japan, New Zealand, and the Republic of Korea). Negotiations among Parties began in 2012 and originally included India, which dropped out of the



negotiations in 2019. Following the signing in November 2020, the RCEP Agreement took effect on 1 January 2022 for Australia, New Zealand, Brunei Darussalam, Cambodia, China, Japan, Lao PDR, Singapore, Thailand, and Viet Nam. The RCEP then entered into force for the Republic of Korea and Indonesia on 1 February and 30 August 2022, respectively.

Chapter 6 (STRACAP) of the RCEP Agreement aims at addressing the trade barriers and costs associated with standards, technical regulations, and conformity assessment procedures. Since the RCEP STRACAP Chapter provides for more comprehensive and detailed provisions with respect to standards, AMSs could consider incorporating several important elements contained in Article 6.5 and 6.6 of the RCEP Agreement, such as modifications to the contents or structure of the relevant international standards and cooperation among relevant standardising bodies, within the upgraded ATIGA.

Article 6.7 (Technical Regulations) encourages RCEP Parties to accept technical regulations from other Parties as equivalent to their own, to use international standards as the basis for their technical regulations, and to take a performance-based approach to product requirements. AMSs could consider including a commitment on equivalence not only in the SPS Chapter, but also in the STRACAP Chapter of the upgraded ATIGA.


Article 6.8 (Conformity Assessment Procedures, or CAP) of the RCEP Agreement requires the use of relevant international standards or the relevant parts thereof as a basis for conformity assessment procedures. In addition to MRAs the RCEP Agreement provides a range of mechanisms to facilitate the acceptance of CAP conducted in other Parties, such as cooperative/voluntary arrangements, the use of accreditation, unilateral recognition, and manufacturer or supplier's declarations of conformity. These mechanisms could also be considered by AMSs in the ATIGA Upgrade.

Article 6.9 (Cooperation) of the RCEP Agreement encourages cooperation in relation to STRACAP, such as through advice, technical assistance or capacity building, cooperation between conformity assessment bodies, and cooperation in areas of mutual interest in the work of relevant regional and international bodies. AMSs could consider including a bilateral technical consultation mechanism to amicably resolve STRACAP concerns in the upgraded ATIGA.

The RCEP Agreement contains the dedicated provision of Article 6.11 (Transparency) in relation to STRACAP. On that basis, an RCEP Party is mandated to provide the full text of its technical regulations. Contact points are also to be developed in order to exchange relevant information between the RCEP Parties. This could be considered by AMSs within the context of the ATIGA Upgrade in addition to the general transparency provisions.

The ATIGA STRACAP Chapter 7, unlike the ATIGA SPS Chapter, does not mandate the designation of contact points for communication and cooperation. Considering the importance of the designation of a contact point for facilitating communication for STRACAP matters, as provided under the RCEP Agreement's Article 6.12 (Contact Points), AMSs could consider the inclusion of such provision also in the upgraded ATIGA.

4. Key Takeaways from Roundtable Discussions



During the Roundtable Discussions on Trade Facilitation organised by ARISE Plus, the representatives of the ASEAN private sector generally endorsed the recommendations provided in this policy brief and voiced the following key takeaways:

4.1 Accelerating the implementation of MRAs through like-minded approaches

Mutual Recognition Agreements (MRAs), which provide an exporting country with the authority to test, inspect and/or certify products against the regulatory requirements of the importing country, are one of the instruments used by ASEAN to remove NTBs. However, in practice, the process for ASEAN to implement an MRA usually takes time, and it is difficult to get all AMSs to agree and implement it. Given the increasing importance of additional MRAs vis-à-vis certain TBT issues such as halal certification, AMSs could consider expediting the process by agreeing on another form of recognition such as an MoU or a dedicated agreement between like-minded countries.

4.2 Reviewing the roles and responsibilities of relevant ASEAN bodies in relation to the STRACAP Chapter

With the aim of removing the technical barriers to trade posed by STRACAP in AMSs, the ACCSQ was formed by the ASEAN Economic Ministers (AEM) in 1992. To date, ASEAN established 13 ASEAN bodies comprising sectoral committees, working groups, and product workings groups under the ACCSQ to address and/or implement specific measures on STRACAP and to make the necessary recommendations related to ACCSQ's objectives. The review of the ACCSQ Term of Reference (ToRs) could help avoid the overlapping duties of the relevant bodies and to ensure the efficient implementation of the upgraded STRACAP Chapter of the ATIGA.

4.3 Strengthening the implementation of ATIGA commitments by AMSs


Business sector participants highlighted that poor implementation by AMSs of their ATIGA commitments, especially in relation to the streamlining of NTMs and the removal of NTBs, remains the primary challenge within the ATIGA. The success of the ATIGA in increasing intra-ASEAN trade rests on the implementation by AMSs of ATIGA commitments and initiatives.

5. Conclusions and Recommendations

The following conclusions and recommendations on Standards, Technical Regulations, and Conformity Assessment Procedures (STRACAP) in relation to the ATIGA Upgrade are drawn from the comparative analysis and review of the key ASEAN obligations and commitments embedded in the pertinent ASEAN instruments, as well as from the relevant preferential trade agreements that were highlighted and assessed in the previous sections of this Policy Brief.

5.1 Adding reference to the MRAs in Article 78 (Implementation) of the ATIGA

Given that a number of MRAs are not reflected in the Agreement (*e.g.*, the *ASEAN Sectoral Mutual Recognition Arrangement for Inspection and Certification Systems on Food Hygiene for Prepared*



Foodstuff Products) adding a reference to these MRAs in Article 78 (Implementation), or in a dedicated annex to the ATIGA could be taken into consideration. Additionally, further TBT issues that are increasingly relevant, such as halal certification, could be considered for additional MRAs. Consideration could be extended to the inclusion of future legal instruments that may have been negotiated and agreed upon among all AMSs within the framework of other PTAs, in order to formalise those preferential treatments within ASEAN and preserve the centrality of the ATIGA.

5.2 Inclusion of specific-sector rules for key sectors/products

Currently, the ATIGA does not provide any sector-specific references. A similar approach applied in other PTAs, by including dedicated rules for dedicated working groups vis-à-vis key sectors or products, could be considered in the context of the ATIGA Upgrade. This approach would allow AMSs to address specific issues and to agree on concrete issues of cooperation, as well as to deliver trade facilitation in a more precise and targeted manner.

5.3 Inclusion of specific cooperation provisions in relation to STRACAP


To enhance the implementation of the ATIGA TBT Chapter, ASEAN could consider including certain cooperation provisions. For instance, joint ASEAN approaches on issues related to STRACAP, the adoption of common approaches on risk management methodologies, and the deepening of regional implementation of trade-facilitative STRACAP initiatives in new areas. In addition, in order to expedite the implementation of the Agreement, ASEAN could consider establishing specific monitoring and reporting mechanisms in the upgraded ATIGA to measure the progressive implementation of Chapter 7 of the ATIGA.

5.4 Reflecting and/or incorporating relevant trusts under the ACCSQ Strategic Plan 2016-2025

In order to expedite the implementation of all sectoral MRAs and ASEAN harmonised regulatory regimes in the areas where progress remains slow (*i.e.*, cosmetics, electrical and electronic equipment, and medical devices) it is important to strengthen the role of the ACCSQ, particularly on the timely transposition of the agreed MRAs principles and harmonised regimes into domestic AMSs' laws and regulations. ASEAN could consider reflecting or incorporating specific cooperation provisions that list different types of approaches, initiatives, and cooperation mechanism concerning STRACAP, as provided under the Strategic Thrust 3 (Strengthen joint ASEAN approaches on issues related to STRACAP) of the ASEAN Standards and Conformance Strategic Plan 2016-2020, in the upgraded ATIGA to ensure the effective implementation of STRACAP provisions.

5.5 Inclusion of a commitment on equivalence

The extension of the trade facilitative instrument of equivalence to TBT matters is shown in many salient international agreements (*e.g.*, the CPTPP). ASEAN could consider including a commitment on equivalence concerning technical regulations within the upgraded STRACAP Chapter, as the ATIGA already has in the SPS Chapter (Article 84). The acceptance of equivalence could be considered as the ultimate objective in aligning technical regulations among AMSs and would be an important trade-facilitative achievement. Further approaches to facilitate and enhance the equivalence commitment



could also be considered. For example, establishing a dialogue mechanism on equivalence or facilitating another Party that has an interest in developing a similar technical regulation by providing information, document, and/or studies.

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‘ASEAN Centrality’ and Rules of Origin

Duy Dinh Khuong


1. Introduction

The concept of “*ASEAN centrality*”, engraved in the ASEAN Charter as one of its key purposes and principles, signifies that ASEAN needs to play a central role in the multinational frameworks of the Asia-Pacific region. In other words, ASEAN should be positioned at the centre of the regional economic architecture, allowing it to set the scope and depth of regionalism in the relations with its partners. In the field of trade, retaining “*ASEAN centrality*” in global and regional engagements may be interpreted as ensuring ASEAN’s role as the initiator and facilitator of the processes and progresses in regional trade integration. “*ASEAN centrality*” also relates to the central role that ASEAN must play in the economic relations of all ASEAN Member States (AMSs) vis-à-vis their respective trading partners, ensuring that the relations with other AMSs always be the most open, integrated, liberalised and ambitious.

In the past few decades, trade ties have been progressively strengthened among AMSs through the ASEAN Trade in Goods Agreements (ATIGA). Closer ties between ASEAN and its strategic partners have also been established through a series of so-called ASEAN+1 Free Trade Agreements (FTAs) and through the Regional Comprehensive Economic Partnership (RCEP) agreement. However, it has become clear that, while “*ASEAN centrality*” in trade may have been well embraced until the early 2010s, recent developments in the complex network of trade relations in East Asia have posed a threat to the role of ASEAN as a central node.¹⁰³

To enhance “*ASEAN centrality*” in trade, the ATIGA and ASEAN+1 FTAs need to be able to better facilitate intra-regional trade and foster ASEAN-centric value chains. Among the areas of rule-making that may contribute to the attainment of this goal, rules of origin (ROO) are of key importance both under the ATIGA and in the ASEAN+1 FTAs, as they are the gateway to unlocking the opportunities offered by these preferential trade agreements. By setting out origin requirements imposed on locally produced goods that seek to claim the preferential tariffs under a particular FTA, ROO may determine the breadth and depth of regional economic integration and shape regional value chains. In fact, ROO are established with two primary objectives: (i) to prevent traders in third countries from arbitraging external tariff differences in FTA partner countries; and (ii) to prevent superficial operations, with little or no value addition, that would otherwise extend the preferential market access to non-eligible intermediate suppliers. In other words, in the context of ASEAN’s FTAs, ROO differentiate between goods that are accorded (or not) preferential treatment under by these agreements and encourage regional sourcing of inputs to increase the chance of origin qualification, which works toward solidifying substantive trade cooperation among AMSs and preferential trading partners, forging in the process ASEAN-centric value chains. It should be noted that, despite such positive objectives, the formulation and implementation of ROO may result in low utilisation of ASEAN’s FTAs by forcing inefficient sourcing and increasing compliance cost due to the burdensome paperwork and bureaucratic requirements associated with trade and proof of origin.

¹⁰³ Seng Tan (2016), “Rethinking ‘ASEAN Centrality’ in the Regional Governance of East Asia”, *The Singapore Economic Review* 62(3) 721–40, <https://doi.org/10.1142/S0217590818400076>.



Given the essential role that ROO play in the ATIGA and other ASEAN's FTAs, this Policy Brief aims at discussing whether the ROO in these agreements have worked towards realising “ASEAN centrality”. In particular, this Policy Brief provides a 5-prong methodological review, as follows: **Section 2** provides a review of key ASEAN instruments, which examines in brief the link between “ASEAN centrality” and ROO in the ATIGA and in other ASEAN legal instruments, including its +1 FTAs; **Section 3** provides an analysis of ROO in the ATIGA, ASEAN+1 FTAs, and the RCEP Agreement from an “ASEAN centrality” perspective; **Section 4** deals with some international benchmarks that may shed light on how ROO in ASEAN's FTAs should be improved to enhance “ASEAN centrality”; **Section 5** highlights the key takeaways from roundtable discussions amongst relevant stakeholders within ASEAN, notably its private sector; and **Section 6** provides the key recommendations for consideration by AMSs in reviewing the ATIGA and/or other ASEAN's FTAs, so as to enhance “ASEAN centrality”.

2. The Nexus between “ASEAN Centrality” and Rules of Origin in ASEAN's Key Legal Instruments

The most important ASEAN legal instruments that emphasise the importance of “ASEAN centrality” include the ASEAN Charter and the ASEAN Economic Community (AEC) Blueprint 2025.

2.1 ASEAN Charter


Article 1.15 (Purposes) of the ASEAN Charter provides that maintaining the centrality of the ASEAN is one of the purposes of ASEAN, which seeks *“To maintain the centrality and proactive role of ASEAN as the primary driving force in its relations and cooperation with its external partners in a regional architecture that is open, transparent and inclusive”*.

This purpose statement makes it clear that the centrality of ASEAN is considered as the *“primary driving force”* in the association's external relations, which should be construed to include external economic and trade relations. Such understanding is further affirmed in Article 2(m) (Principles) of the Charter, which enshrines the principle that ASEAN and its Member States shall act in accordance with the following principle: *“The centrality of ASEAN in external political, economic, social and cultural relations while remaining actively engaged, outward-looking, inclusive and non-discriminatory”*.

Article 41.3 of the Charter (Conduct of External Relations) further affirms the above purpose and principle by emphasising that *“ASEAN shall be the primary driving force in regional arrangements that it initiates and maintain its centrality in regional cooperation and community building”*.

2.2 The ASEAN Economic Community (AEC) Blueprint 2025

Paragraph 6(ix) of the AEC Blueprint underlines that the AEC is envisioned to *“reinforce ASEAN centrality in the emerging regional economic architecture by maintaining ASEAN's role as the centre and facilitator of economic integration in the East Asian region”*. To this end, paragraph 9 of the AEC Blueprint 2025 asserts that *“ASEAN will continue to reduce or eliminate border and behind-the-border regulatory barriers that impede trade, so as to achieve competitive, efficient, and seamless movement of goods within the region”*. In particular, paragraph 10(i) of the AEC Blueprint 2025 considers *“further strengthening the ATIGA”* one of the strategic measures to entrench “ASEAN centrality”, stating that, *“In view of the ongoing review of the ASEAN+1 FTAs and the RCEP negotiations, commitments in the*



ATIGA will be reviewed and refined to, among others, enhance provisions to entrench ASEAN centrality, strengthen the ATIGA's notification process, and bring down further the remaining tariff barriers in ASEAN towards the free flow of goods in the region".

2.3 The ATIGA and other ASEAN's FTAs


While there is no unambiguous indication or definition of "ASEAN centrality" in the ATIGA and in the ASEAN+1 FTAs, the spirit of such centrality is indirectly manifested through the ATIGA's desire to establish ASEAN *"as a single market and production base characterised by free flow of goods, services, investment, skilled labour and freer flow of capital"*. Moreover, given the vital role of ASEAN in its FTAs with strategic partners, arguably these FTAs will work towards reinforcing "ASEAN centrality", should AMSs manage to utilise preferences to embrace ASEAN's trade and production networks, as well as to establish a more unified market for ASEAN's economic operators and consumers. Such interpretation is reaffirmed by the AEC Blueprint 2025, which asserts in paragraph 79 thereof that *"These FTAs/CEPs have been strengthening ASEAN's position as an open and inclusive economic region, and lay the foundation for ASEAN to retain its centrality in global and regional engagements, where possible"*.

A review of the ASEAN instruments that emphasise the concept of ASEAN centrality reveals that ASEAN considers it as a driving force in its external relations and cooperation, including trade and economic relations. While no definition of "ASEAN centrality" is provided in any of these legal instruments, the ACE Blueprint 2025 has prescribed some strategic measures necessary to establish and retain such centrality.

2.4 The Nexus between "ASEAN Centrality" and ROO in ASEAN's FTAs

As part of the strategic measures to eliminate regulatory barriers that impede trade, and in order to achieve seamless movement of goods within the region so as to retain the central role of ASEAN in regional trade, Paragraph 10(ii) of the AEC Blueprint 2025 calls for the simplification and strengthening of the implementation of ASEAN's ROO, so that ROO implemented by AMSs *"should be simplified, business-friendly and trade-facilitative, to benefit the region's trade, in particular the participation of MSMEs to encourage them to expand, upgrade, and deepen their linkages within the region. Towards this end, priority sectors for Product Specific Rules (PSRs) can be negotiated, and processes for the determination of origin criteria streamlined"*.

Put it simply, there is a positive link between *"simplified, business-friendly and trade-facilitative"* ROO and "ASEAN centrality". This Policy Brief would take these qualities as benchmarks when reviewing ROO in ASEAN's FTAs in order to assess whether the said ROO work towards realising "ASEAN centrality". The review would cover both types of origin rules: product-specific rules (PSRs) and regime-wide rules. In brief, PSRs specify the minimum degree of local transformation needed to qualify for preferential treatment, which may be detailed at the product level. A PSR takes into account changes in tariff classification (CTC) undergone by non-originating inputs, the level of value added or regional value content (RVC), or the technical requirements such as specific processing methods (SPMs). Meanwhile, regime-wide rules are those applied across the board, irrespective of the products. By nature, they are general rules used to determine the originating status of all products (e.g., the treatment of packaging materials or of minimal operations) and the procedural rules relating



to the certification and verification of origin (e.g., direct transportation and record-keeping requirements).

3. Evaluating Rules of Origin in ASEAN's FTAs from an "ASEAN Centrality" Perspective ASEAN's ROO: Simple yet Divergent


In comparison to the ROO in large and more advanced FTAs, such as the United States–Mexico–Canada Agreement (USMCA, formerly known as NAFTA) or the system of ROO in the European Union's (EU's) FTAs, ASEAN's ROO have a simpler structure. The part dedicated to regime-wide rules comprises of about 15 commonly found provisions, accompanied by an annex on operational procedures, which clarifies the related certification and verification process. Regarding the PSRs, ASEAN traders can in principle choose between a RVC at 40% threshold (RVC40) and a change of tariff classification at heading (CTH) or subheading (CTSH) level.¹⁰⁴ In this respect, ASEAN's ROO can support trade in the region, "*strengthening ASEAN's position as an open and inclusive economic region*" as mandated by the AEC Blueprint 2025.

However, when exploring further, ROO remain rather divergent across the ATIGA and various ASEAN+1 FTAs. Discrepancies are found in both regime-wide rules and operational procedures, as well as in PSRs. For instance, the methods to calculate regional content in the RVC rule under the ASEAN-China FTA (ACFTA) and the ASEAN-Japan Agreement (AJCEP) deviate from those used in the remaining ASEAN+1 FTAs. Regarding PSRs, the ACFTA uses primarily the RVC rule and uses less combined criteria (e.g., "*RVC40 + CTSH*"), whereas combined criteria are more common in the ASEAN-Australia-New Zealand FTA (AANZFTA). Particularly, the ROO in the ASEAN-India FTA (AIFTA) do not include an annex on PSRs, but apply a general rule (i.e., "*RVC35 + CTSH*") to all products. The types of PSRs devised for a certain sector or HS chapter are not consistent across ASEAN's FTAs. For instance, for its Chapter 73 (Articles of Iron and Steel), the ATIGA applies the rule "*RVC or CC*" (with complicated exceptions detailed at 6-digit level), the RCEP Agreement applies the rule "*CTH or RVC40*" for the whole chapter, while the AJCEP applies the "*RVC40*" rule to most of the subheadings listed in this chapter.

When it comes to operational procedures, the differences among ASEAN's FTAs are even more sophisticated. Most significantly, self-certification of origin is considered as an option available to traders under the ATIGA and the RCEP Agreement, while in other FTAs only certification by the competent governmental authorities is accepted. Such divergence creates difficulties for traders when navigating the ROO in these agreements and increases compliance costs, which goes against the aim of establishing a single market and production base with free flow of goods within AMSs. Moreover, the divergence of ROO in ASEAN's FTAs implies that the involvement of ASEAN in these FTAs did not lead to a homogenisation of outcomes, calling into question ASEAN's ability to ensure coherence in its external FTAs and, therefore, also to act as a leader in multilateral negotiations, thereby diminishing its ability to achieve '*centrality*' and use ROO in order to achieve greater regional value chains and economic integration.

3.1 Restrictiveness of ASEAN's ROO

¹⁰⁴ "*RVC40*" means that the good must obtain a regional value content of not less than 40 per cent. "*CTH*" means that all non-originating materials used in the production of the good have undergone a change in tariff classification at the 4-digit level, while "*CTSH*" requires all non-originating materials used in the production of the good to undergo a change in tariff classification at the 6-digit level.



Despite the relatively simple and transparent structure of ASEAN's ROO, a 2017 analysis of trade flows revealed that the latter may have substantial trade-inhibiting effect. The simple average of the *ad valorem* equivalent of ASEAN's ROO, across instruments and HS sections, is estimated at 3.40%, implying that ROO inhibit ASEAN's trade by an amount roughly equivalent to one quarter of ASEAN's MFN tariffs.¹⁰⁵ Put differently, ASEAN's ROO appear to 'nullify' one quarter of the effect of the tariff preference margins under the ATIGA.

However, the effect was found to be heterogeneous across sectors. While it is small in sectors like electronics or capital equipment, where MFN tariffs are low so trade is only weakly affected by preferences, it peaks in sectors that matter for the development of ASEAN's poorest AMSs like fats (6.7%), leather products (9%), textile and apparel (8.3%), footwear (12.7%), or automobiles (6.9%). Overall, ASEAN's relatively restrictive ROO may not have a huge impact on trade flows as a large proportion of international trade in the Asia-Pacific area is in the electronics and capital equipment sector, where the attractiveness of preferences is (with or without ROO) limited anyway, due to low MFN tariffs. Thus, the low take-up rates may simply reflect the fact that most trade is in product lines that do not stand to benefit very much from tariff reductions.


3.2 ASEAN's PSRs and Regime-Wide Rules Need Enhancement

A comprehensive review of ASEAN's ROO shows that a number of regime-wide provisions, which are commonly found in new generation FTAs and partly introduced into RCEP Agreement, are not included in the ATIGA and in the ASEAN+1 FTAs. While these provisions may not substantially affect the qualification of ROO, they may increase the consistency and predictability of rules, which benefit traders in complying with ASEAN's ROO. For instance, a provision on outward processing, which may be necessary to regulate working processes carried out outside the exporting AMS, is not included in any of ASEAN's ROO. At times, certain provisions exist, but their flexibility needs reconsideration. An example may be that of the *De Minimis* rule in the ATIGA, which sets out the threshold as a percentage of value only, while the percentage of weight option is adopted by a number of FTAs for certain products.¹⁰⁶ Likewise, the rule on direct shipment remains rather rigid in ASEAN's ROO, while this rule has been transformed into a "*non-alteration*" rule in various FTAs of relevance to ASEAN or AMSs (e.g., EU-Singapore FTA), so as to better reflect the nature of this requirement.

While cumulation is one of the most important regime-wide rules, cumulation options are found to be relatively limited in the ATIGA and in the ASEAN+1 FTAs. In brief, the cumulation rule allows originating products of country A to be further processed or added to products originating in country B, just as if they had originated in country B, so long as countries A and B are both parties to the same FTA. Cumulation rules form integral part of FTAs and enable production sharing within the FTA territory. In this way, production may be aggregated with other countries' inputs, thereby offering additional opportunities to source input materials and enhance regional value chains within the parties to an FTA. The higher the degree of cumulation is, the more liberal the rules are, and the easier it is for exporters to satisfy them.

¹⁰⁵ Oliver Cadot and Lili Yan Ing (2017), "How Restrictive Are ASEAN's Rules of Origins?", ERIA Policy Brief November 2017, <https://www.eria.org/ERIA-PB-2017-04.pdf>.

¹⁰⁶ Article 33 of the ATIGA provides that: "A good that does not undergo a change in tariff classification shall be considered as originating if the value of all non-originating materials used in its production that do not undergo the required change in tariff classification does not exceed ten percent (10%) of the FOB value of the good and the good meets all other applicable criteria set forth in this Agreement for qualifying as an originating good".



There are three common types of cumulation: bilateral, diagonal, and full cumulation. Bilateral cumulation operates between two countries, while diagonal cumulation operates between more than two countries, both requiring that only originating goods be considered eligible for cumulation purposes in another partner country. In several FTAs, diagonal cumulation may be extended to allow for cumulation with inputs originating in other trading partners outside the FTA (e.g., with country C, with whom country A and country B both have entered into separate FTAs). This cumulation option is referred to as cross-cumulation, which is increasingly adopted in new generation FTAs. Meanwhile, full cumulation considers all FTA partner countries as one area for purposes of origin determination, thus value addition at any production stage taking place in any FTA partner country will be counted. In other words, the origin requirements shall be fulfilled within the FTA zone as a whole. In that respect, full cumulation allows for greater fragmentation of the production process than the bilateral or diagonal cumulation options, and thus is deemed to be more liberal. It is noted that the ATIGA and the ASEAN+1 FTA agreements only allow for bilateral cumulation and diagonal cumulation options, without an extension to cross-cumulation.¹⁰⁷ Full cumulation has just been introduced in the RCEP Agreement for future consideration.¹⁰⁸ Such approach to cumulation may dwindle the incentive to source inputs regionally, and in particular discourage the fragmentation of production (i.e., the value chains) across AMSs.

While PSRs in the ATIGA and in the ASEAN+1 FTAs are found to be of moderate restrictiveness, a comparative analysis thereof reveals that there is room for enhancement. As mentioned earlier, a number of PSRs in ASEAN's FTAs are formulated using combined criteria, which causes extra burden to exporters since the latter need to comply with cumulative origin requirements. Moreover, the ATIGA and most ASEAN+1 FTAs apply at the same time a general rule to determine origin (i.e., "RVC40/CTC") for all goods not listed in the annexes on. This structure may cause inconvenience for traders in identifying the applicable rule. Coupled with the lack of consistency in the type of rules used for each sector, such structure of ASEAN's ROO may make it even more difficult for traders to select and apply the most favourable origin criteria available. Undoubtedly, such structure of PSRs is rather outdated given the recent developments in new generation FTAs, including the RCEP Agreement, where a comprehensive list of PSRs (detailed at 4-digit level) including all HS chapters is included.

That being said, a comparative analysis would show that PSRs in the ATIGA are in general not more restrictive than those in the RCEP Agreement. In fact, for various sectors, such as agricultural products and textile and apparels, the PSRs in the ATIGA are found to be more liberal than those in the RCEP Agreement. While it is arguable that the PSRs in the ATIGA should always be the most liberal, certainly as compared to those in the RCEP Agreement and ASEAN+1 FTAs, evidence shows that the PSRs in the ATIGA often do not qualify as the most liberal ones. This raises the question as to ASEAN's role and ability in maintaining a consistent level of ROO restrictiveness across its various FTAs. Therefore, in relation to ROO and the role that they play to foster regional economic integration and regional value chains, the ATIGA is not acting as a benchmark for ASEAN+1 FTAs and is not always guaranteeing "ASEAN centrality".

¹⁰⁷ It is noted that the ATIGA includes a "partial cumulation" option, according to which a good shall be deemed eligible for partial cumulation if at least 20% of the RVC of the good is originating in the AMS where working or processing of the good has taken place.

¹⁰⁸ Article 3.4(2) of the RCEP agreement provides that: "The Parties shall commence a review of this Article on the date of entry into force of this Agreement for all signatory States. This review will consider the extension of the application of cumulation 2 For the purposes of determining the origin of goods of sea-fishing and other marine life, "rights to exploit" in this subparagraph include those rights of access to the fisheries resources of a coastal State, as accruing from any agreements or arrangements between a Party and the coastal State. 3-5 in paragraph 1 to all production undertaken and value added to a good within the Parties. The Parties shall conclude the review within five years of the date of its commencement, unless the Parties agree otherwise".



4. The International Benchmarks

4.1 The Revised Kyoto Convention

The Revised Kyoto Convention (RKC) is a trade facilitation customs convention developed by the World Customs Organization, which entered into force in 2006.¹⁰⁹ It updated and revised the International Convention on the Simplification and Harmonization of Customs Procedures (Kyoto Convention) adopted in 1974. The RKC aims at facilitating trade by harmonising and simplifying customs procedures and practices. To this end, it provides standards and recommended practices on various areas, including ROO.

In particular, Annex K of the RKC defines the concepts of country of origin, rules of origin, and substantial transformation. The Annex also puts forward a number of standards and recommended practices that seek to harmonise the formulation and implementation of ROO. For instance, Recommended Practice 4 (Chapter 1, Specific Annex K) proposes that, *“in applying the substantial transformation criterion, use should be made of the International Convention on the Harmonized Commodity Description and Coding System (HS)”*.

4.2 The WTO Agreement on Rules of Origin

The WTO Agreement on Rules of Origin (ARO) recognises that *“clear and predictable”* ROO can facilitate the flow of international trade, emphasising the need to harmonise and clarify ROO.¹¹⁰


In particular, the ARO provides comprehensive definitions for non-preferential and preferential ROO. It is noted that the ARO mainly governs non-preferential ROO, used in non-preferential commercial policy instruments defined in Article 1.2 of the General Agreement on Tariff and Trade (GATT), namely in the application of most-favoured-nation (MFN) treatment under Articles I, II, III, XI and XIII of GATT; anti-dumping and countervailing duties under Article VI of GATT; safeguard measures under Article XIX of GATT; origin marking requirements under Article IX of GATT; and any discriminatory quantitative restrictions or tariff quotas. Non-preferential ROO also include those used for government procurement and trade statistics.

Therefore, the harmonisation of ROO under the ARO covers exclusively non-preferential ROO. While this means that there is no mandatory obligation for WTO Members to apply the objectives and principles set out in Article 9 of the ARO, when formulating their preferential ROO, there is also no limitation if they opt to do so. Similar to the standards and recommended practices in the Specific Annex K of the RKC, the principles set out by the ARO are reasonable recommendations that may help enhance the quality of preferential ROO, should they be adopted. To cite just one example, ARO Article 9.1(e) suggests that ROO *“should be administrable in a consistent, uniform, impartial and reasonable manner”*.

¹⁰⁹ See

<https://unstats.un.org/unsd/trade/ws%20bangkok06/workshop%20materials/kyoto%20convention.pdf>.

¹¹⁰ See https://www.wto.org/english/docs_e/legal_e/22-roo_e.htm.



The ARO includes an Annex II on *Common Declaration with Regard to Preferential Rules of Origin*, which provides a list of criteria that WTO Members agree to comply with. While the declaration shall not technically hinder the discretion and flexibility of WTO Members in negotiating preferential ROO, they help to ensure that ROO in FTAs meet certain benchmarks. One of the most relevant criteria is the requirement that ROO provide a clear definition of their general application and the conditions to be fulfilled. Besides, WTO Members agree that preferential ROO are based on positive standards, which means preferential ROO that state what does not confer preferential origin (negative standard) should only be used as part of a clarification of a positive standard (*i.e.*, a rule that states what confers preferential origin).

4.3 The European Union's Approach to "Universal" Rules of Origin and the PEM Convention

Learning from good practices may be useful for mitigating the divergence across ASEAN's ROO. A WCO's study on preferential ROO reveals that, to a large extent, there is convergence of the ROO in all preferential trade agreements (PTAs) to which the EU is a contracting party.¹¹¹ The general origin provisions are generally similar across the EU's FTAs with its trading partners (*e.g.*, the provisions on treatment of neutral elements, fungible goods, and principle of territoriality).¹¹² As for PSRs, though specific criteria may differ slightly from one EU's FTA to another, the structure of PSR annexes and the "*formula*" used to set the origin rules for each sector are highly consistent across agreements.¹¹³ A comparison of ROO in the EU's FTAs with Viet Nam, Korea, Singapore and with a number of African, Caribbean and Pacific (ACP) countries, respectively, reaffirms such observation. To cite just an example, the provisions on verification of origin are largely identical across these FTAs. As for the PSRs, these FTAs all include a comprehensive annex on PSRs, which covers all HS chapters, and a sectoral comparison proves that the PSRs are harmonised.¹¹⁴

As a further step towards convergence of ROO, the Pan-Euro-Mediterranean (PEM) Convention on Preferential ROO aims at establishing common ROO and cumulation among the partner countries and the EU, so as to facilitate trade and integrate the supply chains within the zone. The objective of the initiative is to move towards the application of identical ROO for the purpose of cumulation of origin for goods traded between all the countries concerned. Ultimately, the PEM Convention will replace the network of about 60 bilateral protocols on ROO in force in the Pan-Euro-Mediterranean zone.¹¹⁵

5. Key Takeaways from Roundtable Discussions

During the Roundtable Discussions on Trade Facilitation organised by ARISE Plus, the representatives of the ASEAN private sector generally endorsed the recommendations put forward in this Policy Brief


¹¹¹ WCO (2017), *Comparative Study on Preferential Rules of Origin*, available at: http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/origin/instruments-and-tools/reference-material/170130-b_comparative-study-on-pref-roo-master-file-final-20_06_2017.pdf?la=en.

¹¹² A comparison among EU's FTAs can be made by using the International Trade Centre (ITC) database developed in collaboration with WCO and WTO "*findrulesoforigin.org*".

¹¹³ See, for instance, the slight difference in PSRs applicable to textile products (HS code 6201) in the EU's FTAs with CARIFORUM states, Korea, Singapore, Vietnam: <https://findrulesoforigin.org/en/home/compare?reporter=381&partner=388,410,702,704&product=6201200019>.

¹¹⁴ For more information, see: <https://findrulesoforigin.org/en/home/compare?reporter=381&partner=388,410,702,704&product=2007109920>.

¹¹⁵ For more information, see: <https://trade.ec.europa.eu/access-to-markets/en/content/pan-euro-mediterranean-convention-pem>.



and underlined that, in terms of trade and economic cooperation, the notion of ASEAN centrality must further emphasise the central role of ASEAN in the regional economy, as well as in its international economic relations. To that end, in its various FTAs, ASEAN needs to assert its leading role, as well as strengthen intra-regional trade and value chains. As a crucial component of trade agreements, ASEAN's ROO should be negotiated and work towards realising such goals through greater harmonisation or convergence of PSRs across the ATIGA and the ASEAN+1 FTAs. This will arguably strengthen ASEAN's centrality and address the current '*noodle bowl*' complexities, thereby easing the burdens for businesses in complying with unified set of ROO, rather than having different rules across the ATIGA and all the ASEAN+1 FTAs. Strategically, this will also assist ASEAN in developing much needed regional value chains, thereby enhancing security and resilience in certain key economic and industrial sectors.


It was also suggested by ASEAN's private sector that the ATIGA needs to be restructured in such a way as to cater for more sectoral needs. This can be done by having chapters and annexes with tailored ROO dedicated to certain sectors. As indicated, this could be applied to priority/essential sectors/industries that deserve further attention in upgrading/harmonising PSRs under the ATIGA in order to achieve more centrality through ROO. Noting the earlier attempts to harmonise ROO/PSRs across the ASEAN+1 FTAs, the sectoral approach (rather than covering all tariff lines) would be more practical/feasible if focussed on key sectors. Additionally, the private sector noted that AMSs should consider relaxing the origin criteria in some priority sectors, namely automotive and textile products.

6. Conclusions and Recommendations

"*ASEAN centrality*" in regional trade is questionable when looking at the content of the various ASEAN+1 FTAs, which have been criticised for their lack of ambition, and which differ significantly in their contents and degrees of commitment. The diversity of ROO across ASEAN's FTAs is a striking example, which showcases AMSs not having managed to ensure consistency in negotiating such FTAs. Consequently, it is recommended that the ROO across the various FTAs to which ASEAN is a contracting party be reformed in order to achieve convergence among their respective ROO.

The first step should arguably be to establish a set of uniform ASEAN ROO, as in the case of the EU. A counterargument may be that ASEAN is not so integrated as the EU to be able to introduce such single origin system. While ASEAN may lack economic and political power in order to harmonise the ROO in its various FTAs, gradual harmonisation can be achieved through upgrading the ROO in the ATIGA and in the ASEAN+1 FTAs. As discussed above, ROO include two components: general origin provisions and PSRs. While it remains challenging to harmonise origin criteria in PSRs, the structure of PSRs in the ATIGA and in the ASEAN+1 FTAs should be revised taking into account the fact that a single list of PSRs covering all HS chapters is increasingly used in modern FTAs, including in the RCEP Agreement. This approach should be replicated in the ATIGA and in the ASEAN+1 FTAs, so as to enhance consistency, and thus "*ASEAN centrality*". Introducing detailed PSRs in an Annex to the ATIGA would allow for greater legal certainty and commercial predictability, avoiding confusion with respect to the application of ROO.

The next feasible step should perhaps involve a comprehensive review of the types of origin rules used for each sector towards harmonisation across ASEAN's FTAs. For instance, if a CTC-based rule is used by the ATIGA for a certain HS chapter, this pattern should also be adopted in other ASEAN+1 FTAs. In essence, while specific origin criteria may still differ across FTAs, the convergence in the type of rule may facilitate ASEAN traders in inventory management and book-keeping practices.




Convergence of PSRs may also be attained through the observation of shared standards. It is suggested that PSRs in ASEAN's FTAs be provided at the 4-digit level (as in the case of RCEP Agreement), instead of the 6-digit level (as in the case of the ATIGA), so as to reduce the number of rules and mitigate the influence of changes in later HS versions. For certain products (*e.g.*, some headings under Chapters 85 - Electrical machinery and equipment and parts thereof, and Chapter 87 - Vehicles other than railway or tramway rolling-stock and parts and accessories thereof), the ATIGA and ASEAN+1 FTAs should consider using alternative criteria to make the rules more lenient. As a principle, the use of combined rules, such as "*CTSH and RVC35*", should be avoided because a combination of origin criteria creates more restrictive origin requirements.

In addition, there may be gains to reap from the simplification of ROO in sectors like textile and apparel or footwear, which currently represent a low proportion of Asia-Pacific trade but may represent substantial opportunities for export-led growth and thus poverty reduction in some of the region's poorest countries. The same applies to prepared foods. Automotive also stands out as a sector where the relaxation of ROO might be considered, or at least carefully coordinated with plans to build up '*deep*' value chains within the region. Thus, the simplification and streamlining of ROO should prioritise light industries like textile and apparel, footwear, and prepared foods, with such approach becoming part of ASEAN's internal development and poverty reduction strategy. Future research should be carried out to assess the specific gains that ASEAN's poorer AMSs would reap from less stringent ROO.

Likewise, a convergence of general origin provisions could be achieved through the comprehensive review of ROO in the ATIGA and in the ASEAN+1 FTAs. The initial step should be to eliminate discrepancies, if any, in these rules, noting that to a large extent they already are similar. The next step should be to upgrade the origin provisions in all ASEAN's FTAs, including in the ATIGA, to reflect the evolution of ROO worldwide. Aligning ROO in the ATIGA and in the ASEAN+1 FTAs to global standards would substantially contribute to the establishment of uniform ASEAN ROO across its FTAs. Such initiative would also reinforce the centrality and competitiveness of ASEAN. In addition, it would benefit intra-ASEAN trade by helping ASEAN traders navigate ROO and comply with them more efficiently.

To emphasise the central role of ASEAN as an initiator, AMSs should start by upgrading the ROO in the ATIGA, enhancing existing commitments and introducing innovative features to modernise the rules, before upgrading the ROO in the ASEAN+1 FTAs. It is suggested that, *inter alia*, AMS should: (i) include more detailed rules and commitments related to specific aspects of ROO, such as to the concept of '*Non-Alteration*' and '*Sets of Goods*'; (ii) include provisions that allow importers to apply for post-importation claims for preferential tariff and the competent authority of the importing Party to reach out directly to the importer, exporter, or producer for additional information for the purposes of verification; (iii) revise the RVC provision so that traders could have more flexibility in selecting their preferred method of RVC (build-up or build-down); and (iv) consider extending the possibilities related to outward processing.

Reforming ROO to maintain "*ASEAN centrality*" in trade also entails the need to encourage the use of more local content, which ultimately supports regional value chains. To this end, it is highly recommended that full cumulation in the ATIGA be adopted by AMSs, so as to pave the way for deeper regional integration. Full cumulation shall take into account every bit of value addition in the region, instead of counting only inputs that have been deemed originating, or those containing at least 20% of RVC (partial cumulation). Therefore, the adoption of full cumulation could encourage production



collaboration among AMSs and direct the value chains inward so that a larger share of value is generated within ASEAN. As a further step, cross-cumulation among ASEAN+1 FTAs should also be considered, in order to maximise the use of regional inputs. The cross-cumulation option, as adopted in a number of new generation FTAs, could allow originating products under an ASEAN+1 FTA to be regarded as originating inputs for the purpose of determining origin under another ASEAN+1 FTA or the ATIGA.

In the long run, learning from the example of the EU's PEM Convention, AMSs should head towards even more liberal cumulation options, such as those within bilateral FTAs between individual AMSs and third countries. Ultimately, an *"area of cumulation"* should be established so that products originating under any FTA to which an AMS is a member, and the processes carried out in any AMS, would be eligible for cumulation. If and when such cumulation area is established, AMSs could enter into bilateral FTAs without impeding regional integration, which certainly works towards retaining *"ASEAN centrality"*. Such ambitious reform of ROO would be in line with the process of *'multilateralisation of regionalism'*, which describes the attempt to transform bilateral or regional networks of FTAs into a global tariff-free zone to overcome the *'spaghetti bowl'* problem and the related complexities for traders, especially micro, small, and medium enterprises (MSMEs). While a set of common rules, as in the case of PEM system, is perhaps premature for ASEAN, expanding cumulation options to enhance regional integration would appear to be viable and advisable.

Another recommendation takes into account the prospect of harmonising non-preferential ROO in the region. Considering the purposes of non-preferential ROO mentioned earlier, it would benefit *"ASEAN centrality"* if a single set of non-preferential ROO could be established for use in all AMSs. While such single regional non-preferential ROO are unlikely to be established soon, an initiative to review the non-preferential ROO in place in each AMS, with the view to harmonising them, is arguably a feasible and recommendable option.

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ASEAN Supply Chain Connectivity

Duy Dinh Khuong

1. Introduction

Connectivity in ASEAN encompasses the physical (*e.g.*, transport, ICT, and energy), institutional (*e.g.*, trade, investment, and services liberalisation), and people-to-people linkages (*e.g.*, education, culture, and tourism) dimensions that are the foundational supportive means to achieving the economic, political-security, and socio-cultural pillars of an integrated ASEAN region.

While production activity is resuming within the ASEAN Recovery Framework, as lockdowns have been eased and vaccination against the disease has been rolled out in all AMSs, uncertainty remains as weak global demand and unemployment are likely to prevail for the foreseeable future, with particular concern on the informal sector, tourism, and manufacturing, with highly disrupted value chains and the effects of high inflation and the trade constraints dictated by the war in Ukraine and other international crises.

This Policy Brief focuses on regulatory excellence's role in strengthening ASEAN's supply chain connectivity as a key driver of regional economic integration and socio-economic development. It aims at showcasing the legal basis of economic connectivity within ASEAN and how it relates with trade facilitation mechanisms under the ATIGA as a means of enhancing regional connectivity. The Policy Brief also aims at discussing how the reduction of non-tariff barriers (NTBs) and the implementation of trade facilitation measures are key to enhance supply chain connectivity in the region.


For that purpose, the Policy Brief includes five sections, as follows: Section 1 provides a review of key ASEAN instruments to identify the commitments that ASEAN Member States (AMSs) have made with respect to supply chain connectivity. Section 2 contains an analysis of the current state-of-play of ASEAN's efforts to remove NTBs and facilitate regional supply chain connectivity, while Section 3 reviews the key international benchmarks that might provide guidance on the way forward for AMSs to enhance regional supply chain connectivity. Section 4 then provides the key takeaways from the roundtable discussions held with ASEAN's private sector, while Section 5 offers a number of key recommendations for consideration by AMSs in enhancing regional supply chain connectivity through an upgraded ATIGA.

2. ASEAN Supply Chain Connectivity in the Key ASEAN Instruments

2.1 Master Plan on ASEAN Connectivity 2025

The Master Plan on ASEAN Connectivity (MPAC) 2025¹¹⁶, adopted by ASEAN Leaders at the 28th and 29th ASEAN Summits in Vientiane, Lao PDR in September 2016, aims at achieving a seamlessly and comprehensively connected and integrated ASEAN that will promote competitiveness, inclusiveness, and a greater sense of Community. It comprises 15 initiatives in the five strategic areas of: (a)

¹¹⁶ Full text of the instrument available at: https://asean.org/wp-content/uploads/2021/08/8_compressed.pdf.



Sustainable Infrastructure; (b) Digital Innovation; (c) Seamless Logistics; (d) Regulatory Excellence; and (e) People Mobility.

The MPAC 2025 highlighted the need for effective institutional support and a participatory consultative mechanism for regulatory reform within the region. It was also highlighted that there exist gaps in the capabilities of translating the visions of ASEAN into practical implementation on the ground. This strategic area focuses on implementing good regulatory practice (GRP) in issues that are important for purposes of enhancing ASEAN Connectivity. GRP outlines the stages of the regulatory process that should be improved: consultation, design, implementation, and review. In terms of the specific regulatory areas where this improvement should focus, businesses in ASEAN highlight two key areas as priorities to be addressed: standardisation, conformance assessment and technical regulation; and the management and removal of NTBs to trade.


The MPAC 2025 emphasised that standardisation, conformance assessment, and technical regulation often lead to significant barriers to trade across borders. For example, the product requirement “*Certificated According to National Technical Regulations*” is the most frequently reported issue among cases of trade barriers within ASEAN. Addressing this type of often fragmented requirement among the ten ASEAN Member States (AMSs) will directly ease movements of goods across the region, and onwards to other international trade partners. While tariffs have fallen quickly within the ASEAN region, other types of barriers or of non-tariff measures (NTMs) are falling more slowly. By the time the MPAC was adopted, over 2,000 NTMs still remained in use and the ASEAN Trade Repository now indicates about 6,000 NTMs having been adopted among the ten AMSs. Even though many of these NTMs are totally legitimate and well-intentioned with regard to product safety and environmental protection, *inter alia*, some act against trade and regional integration. Business surveys have highlighted that NTMs and especially NTBs are the highest priority areas to manage and streamline in order to enhance regional economic integration.

2.2 Hanoi Plan of Action on Strengthening ASEAN Economic Cooperation and Supply Chain Connectivity in Response to the COVID-19 Pandemic

The Hanoi Plan of Action (PoA) was adopted by ASEAN Leaders in June 2020 at the 36th ASEAN Summit.¹¹⁷ It implements the Declaration of the Special ASEAN Summit on Coronavirus Disease 2019 (COVID-19) adopted by the ASEAN Heads of State/Government on 14 April 2020. In particular, it fosters the mandate to implement the ASEAN Economic Ministers’ Statement on Strengthening ASEAN’s Economic Resilience in Response to the Outbreak of COVID-19, issued on 10 March 2020, and explores a temporary arrangement to preserve supply chain connectivity during the duration of the COVID-19 pandemic. The Hanoi PoA demonstrates ASEAN’s determination to work closely to identify and address trade disruptions to the flow of essential goods, including food, medicines, and medical and other essential supplies in the region. This is part of the concerted efforts to not only contain and mitigate the economic impact of the COVID-19 pandemic on the region, but also to strengthen supply chain connectivity and to make supply chains more resilient and less vulnerable to similar challenges in the future.

AMSs aim at ensuring that the response to the COVID-19 pandemic is not only for the short-term. The COVID-19 pandemic has exposed the vulnerability of supply chains in all regions, including ASEAN.

¹¹⁷ The 36th ASEAN Summit and related meetings took place virtually on 26 June 2020 due to the COVID-19 pandemic and were hosted by Vietnam, where the summit was initially scheduled to take place. Full text of the instrument is available at: <https://asean.org/wp-content/uploads/2020/06/Hanoi-POA.pdf>.



Therefore, efforts should also be geared towards strengthening supply chain connectivity in the long term. The Hanoi PoA has put forward a number of solutions to strengthen supply chain connectivity, including:


- (a) Collaborating with external and development partners to strengthen regional and global supply chain resilience and sustainability.
- (b) Leveraging on technologies to put in place a robust mechanism for regional information sharing and coordination in responding to economic challenges such as the COVID-19 pandemic.
- (c) Encouraging sharing of information and best practices on new technologies, systems or mechanisms adopted to facilitate trade.
- (d) Building on existing trade facilitating platforms in ASEAN to promote and support supply chain connectivity and ensure the unimpeded flow of goods and services in supply chains.
- (e) Taking proactive action in enabling an effective trade facilitation to ensure the flows of goods amongst AMSs and intensify efforts to address barriers.
- (f) Strengthening the engagement with stakeholders such as the private sector by having them as significant partners in strengthening regional supply chains.
- (g) Promoting the use of science, technology and innovation, digital economy, and provide mechanisms to facilitate customs clearance and processing.
- (h) Strengthening regional and global supply chains to combat the COVID-19 pandemic and its economic impacts without prejudice to AMSs' rights and obligations under the WTO.
- (i) Identifying and implementing appropriate measures/initiatives to boost confidence in Southeast Asia as a trade and investment hub.
- (j) Continuing the implementation of the ASEAN Work Program on Electronic-Commerce in support to businesses that will use technologies and digital economy to continue operation.

2.3 ASEAN Comprehensive Recovery Framework and its Implementation Plan¹¹⁸

The ASEAN Comprehensive Recovery Framework (ACRF) has been developed within the mandate given by ASEAN Leaders, and was adopted in November 2020 at the 37th ASEAN Summit in order to lay the foundation for sustainable recovery.¹¹⁹ The objectives of the ACRF include: (i) Articulate and guide ASEAN sectors to assess, realign or expedite work and priorities; and (ii) Outline a reference for

¹¹⁸ Full text of the instrument is available at: <https://asean.org/asean-comprehensive-recovery-framework-and-its-implementation-plan/>.

¹¹⁹ The 37th ASEAN Summit and related meetings, hosted by Vietnam, were held virtually by video conference from 12-15 November 2020.



cross-pillar engagement with and contribution from broader stakeholders. In order to implement the ACRF, an Implementation Plan is also developed.

Overall, ASEAN's recovery efforts will focus on five Broad Strategies that are deemed most impactful to take the region through the recovery process and its aftermath, and each of the Broad Strategies will, in turn, be pursued through several Key Priorities. Since the post-pandemic recovery requires more, not less, trade and investment, *Broad Strategy 3: Maximizing the Potential of Intra-ASEAN Market and Broader Economic Integration* emphasises priorities that intensify intra-ASEAN trade and investment and establish ASEAN as a competitive market. Given the region's reliance on trade and its vulnerability to external shocks, there is a need to further increase intra-ASEAN trade and investment by enhancing supply chain connectivity and resilience and regional value chains. While removing trade barriers is needed to increase the competitiveness of the ASEAN markets, the region also needs to seize the opportunities presented by the broader regional integration. To that end, the ACRF's *Broad Strategy 3* has identified ten key priority areas as follows:


- (a) Keeping markets open for trade and investment.
- (b) Strengthening supply chain connectivity and resilience.
- (c) Enabling trade facilitation in the new normal.
- (d) Elimination of NTBs and cutting down market-distorting policies.
- (e) Setting up a travel bubble/corridor framework.
- (f) Strengthening transport facilitation/connectivity.
- (g) Accelerating sectoral recovery and safeguarding employment in most affected sectors.
- (h) Streamlining and expediting investment facilitation and joint promotion initiatives.
- (i) Enhancing public-private partnerships (PPP) for regional connectivity.
- (j) Signing and early entry into force of the Regional Comprehensive Economic Partnership (RCEP).¹²⁰

2.4 ASEAN Economic Community (AEC) Blueprint 2025

The AEC Blueprint 2025, adopted by the ASEAN Leaders at the 27th ASEAN Summit on 22 November 2015 in Kuala Lumpur, Malaysia, provides broad directions through strategic measures for the AEC from 2016 to 2025.¹²¹ It succeeded the AEC Blueprint 2015, adopted in 2007, whose implementation contributed to, *inter alia*: eliminating tariffs and facilitating trade; liberalising and facilitating investment; and promoting connectivity among AMSs.

¹²⁰ The RCEP Agreement was formally signed on 15 November 2020 during the 37th ASEAN Summit and entered into force in January 2022 after ratification by seven AMSs and three non-ASEAN countries. As of October 2022, the Philippines and Myanmar are the only countries yet to ratify the Agreement.

¹²¹ Full text of the instrument is available at: https://asean.org/wp-content/uploads/2021/08/AECBP_2025r_FINAL.pdf.



The AEC Blueprint 2025 aims at achieving the vision of establishing an AEC by 2025 that is: highly integrated and cohesive; competitive, innovative and dynamic; with enhanced connectivity and sectoral cooperation; and a more resilient and inclusive community, integrated with the global economy. To that end, the AEC Blueprint 2025 consists of five interrelated and mutually reinforcing characteristics, namely: (i) A Highly Integrated and Cohesive Economy; (ii) A Competitive, Innovative, and Dynamic ASEAN; (iii) Enhanced Connectivity and Sectoral Cooperation; (iv) A Resilient, Inclusive, People-Oriented, and People-Centred ASEAN; and (v) A Global ASEAN.

The AEC Blueprint 2025 sets out the strategic measures under each of the five characteristics of AEC 2025. To operationalise the Blueprint's implementation, these strategic measures are to be further elaborated and implemented through the work plans of various sectoral bodies in ASEAN. Sectoral work plans are reviewed and updated periodically to ensure their relevance and effectiveness. Partnership arrangements with the private sector, industry associations and the wider communities at the regional and national levels are also to be actively fostered to ensure an inclusive and participatory approach to the integration process. Institutions will be strengthened, and monitoring mechanisms will be developed to facilitate the effective implementation of the AEC Blueprint 2025.


With respect to trade in goods, the Blueprint continues to focus on attempts to reduce or eliminate border and behind-the-border regulatory barriers that impede trade, so as to achieve competitive, efficient, and seamless movement of goods within the region. Strategic measures, therefore, include: (i) Strengthening the ATIGA by reviewing and refining its commitments towards embracing ASEAN centrality, enhancing its notification process, and bringing down the remaining tariff barriers in the region; (ii) Simplifying and fostering the implementation of the rules of origin (ROO) implemented by AMSs to make them become more business-friendly and trade-facilitative; and (iii) Accelerating and deepening the implementation of trade facilitation measures towards convergence in trade facilitation regimes among AMSs.

3. Enhancing ASEAN supply chain connectivity by eliminating NTBs and improving trade facilitation: the state-of-play

The ASEAN instruments cited above, while developed with different objectives, all emphasise the need to tackle NTBs and improve trade facilitation initiatives in order to enhance supply chain connectivity in the region.

3.1 Eliminating NTBs

It seems clear that AMSs have taken some steps to reduce NTBs in the years since the ATIGA's establishment. In fact, ASEAN has made repeated commitments over the past decade to tackle the rising tide of non-tariff barriers to trade. Starting well before the ASEAN Trade in Goods Agreement (ATIGA) came into force in 2008, AMSs recognised the harm that could be done by allowing non-tariff measures to be used as disguised barriers to cross-border trade. The most recent formal attempt to tackle the problem, the ASEAN NTM Guidelines, were adopted in August 2018. To achieve the agenda, ASEAN has placed the oversight of NTBs into various specialised bodies. There are at least three institutional bodies, notably the Coordinating Committee on the Implementation of the ATIGA (CCA), the ASEAN Consultative Committee on Standards and Quality (ACCSQ), and the ASEAN Committee on Sanitary and Phytosanitary Measures (AC-SPS), which have been established within ASEAN's



governance structure, whose work is directly linked with the identification and assessment of non-tariff measures.

However, in recent years, NTMs have increased sharply, despite the commitments made to reduce them or at least streamline them. As a matter of fact, there remain various long-standing issues (LSIs) that have long been discussed within the CCA, but that have not been resolved through negotiations. There seems to be little interest among AMSs to address these disputes under ASEAN's Enhanced Dispute Settlement Mechanism (EDSM). Softer systems, namely the ASEAN Solutions for Investments, Services and Trade (ASSIST)¹²² have not been able to translate into NTBs being eliminated or solutions provided to the grievances of the private sector. The underutilisation of the ASSIST and similar platforms may be attributed to the unawareness of the private sector, and to the untimeliness and inadequacy of the solutions provided by AMSs to reported cases.

There are some broad reasons that may explain why initiatives on NTB removal have not delivered fruitful outcomes. On one hand, the commitments may have not always addressed the right issues. On the other hand, the untimely and ineffective implementation of the commitments contracted under the ATIGA have impaired the effectiveness of the efforts made to tackle existing barriers. For instance, AMSs have attempted to address obstacles to trade related to standards through certain trade facilitation tools (*i.e.*, harmonisation, mutual recognition, etc.). While these clearly matter and should continue to stay in the mix of policies reviewed by AMSs, the firm-level interviews conducted in several survey show that companies face challenges that go beyond the mere problems of inconsistent product standards.¹²³

3.2 Trade Facilitation


Trade facilitation is considered a driver of economic development and regional integration. It plays a key role with respect to realising the goal of establishing ASEAN as a stable, prosperous, highly competitive and economically integrated single market and production base, which embraces the free flow of goods, services and investment.

ASEAN has taken an early global lead in the area of trade facilitation through the Agreement to Establish and Implement the ASEAN Single Window (ASWA) in 2005. Various trade facilitation initiatives such as the ASEAN Customs and Transit System (ACTS), the ASEAN Trade Repository (ATR) with the inter-operative network of National Trade Repositories (NTRs), and the ASEAN-wide system of Self-Certification (AWSC) have been established. In particular, AMSs have also adopted an ambitious trade facilitation agenda in the AEC Blueprint 2025.

An UNESCAP report (2017) found that AMSs had already implemented various trade facilitation related measures, in particular transparency measures. However, the implementation of such measures remains quite heterogeneous across AMSs. In particular cross-border paperless trade

¹²² ASSIST, launched in 2015, is a non-binding and consultative mechanism for the expedited and effective solution of operational problems encountered by ASEAN enterprises on cross-border issues related to the implementation of ASEAN economic agreements and within the framework of the AEC have been launched.

¹²³ The survey was carried out by the ASEAN Business Advisory Council in 2019 and its results were analysed in the report titled, *Non-Tariff Barriers (NTBs) in ASEAN and Their Elimination from a Business Perspective*, available at <https://trungtamwto.vn/file/19104/NTBs-Study%20Report%20June%202019.pdf>.



implementation and the use of inclusive trade facilitation measures to foster SMEs and women participation in trade remained low.¹²⁴

While most AMSs have already established their national trade facilitation committees (NTFCs) or equivalent agencies led by government officials, who make attempts to maintain close engagement with the private sector, for example by requesting comments on proposed regulations from the public and concerned stakeholders, effective public-private coordination, cooperation and dialogue remain the exceptions. In addition, the performance of AMSs in terms of release and clearance formalities has been modest and the slow progress of most initiatives in this area (*e.g.*, the ASW, the AWSC, and mutual recognition agreements on authorised economic operators) has also contributed to the underperformance of the NTFCs or competent agencies. Moreover, many of the AMSs still do not have an integrated automated risk management system with a national risk management framework, and the implementation of their national single windows is in the early stages.

4. Some international benchmarks and good practices

4.1 WTO Trade Facilitation Agreement

The WTO Trade Facilitation Agreement (TFA), which entered into force in 2017, aims at streamlining, speeding up and coordinating trade procedures across countries. It contributes significantly to lowering trade costs globally and providing a significant boost to international trade, particularly in developing countries. The benefits from the TFA also include faster global economic growth and greater export diversification in implementing countries.

The TFA's provisions enhance certain aspects of existing WTO agreements, while also creating a number of new disciplines. In particular, the TFA contains measures related to the publication and availability of information, the opportunity to comment before the entry into force of new/amended laws and regulations, advance rulings, appeal procedures, non-discrimination and transparency, fees and charges, release and clearance of goods, border agency cooperation, movement of goods, import/export/transit formalities, freedom of transit, and customs cooperation.


4.2 The European Union's internal market

Inter alia, the European Union (EU) aims at ensuring the free movement of goods, services, capital and persons in the single EU internal market. The EU's common internal market is one of the most important forces behind EU cohesion. Based on the four pillars of free movement, it allows goods, services, capital and people to move between and among its Member States. As one of the world's biggest single markets with no tariffs between member countries, the EU facilitates trade between businesses, including around 22 million small and medium sized enterprises (SMEs). It also fuels growth, inspires innovation and creates jobs.¹²⁵ However, some barriers within the single market remain, and the EU is working to further harmonise:

- (a) Fragmented national tax systems;

¹²⁴ UNESCAP (2017), *Trade Facilitation and Paperless Trade Implementation in ASEAN*, available at https://www.unescap.org/sites/default/files/publications/Trade%20Facilitation%20and%20Paperless%20Trade%20Implementation%20in%20ASEAN_13%20Nov%2017.pdf.pdf, p.3.

¹²⁵ See <https://www.eu2020.de/eu2020-en/news/article/-/2406352>.

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- (b) Separate national markets for financial services, energy and transport;
 - (c) Varied e-commerce rules, standards and practices between EU countries; and
 - (d) Complicated rules on the recognition of vocational qualifications.

4.3 The Regional Comprehensive Economic Partnership (RCEP) Agreement¹²⁶

The RCEP Agreement emphasises regulatory coherence' underpinning the intention of RCEP members to work closely to coordinate national regulations impacting external trade. While RCEP eliminates tariffs on about 90% of traded goods, there are still many NTBs that are in place that can impede the free flow of goods and services within member countries. In order to facilitate trade, all RCEP signatories must ensure that the available international standards are adhered to so as to reduces trade costs, particularly among SMEs.

5. Takeaways from Roundtable Discussions


During the Roundtable Discussions on Trade Facilitation organised by ARISE Plus, the representatives of the ASEAN private sector overwhelmingly endorsed the recommendations put forward in this Policy Brief and underlined that, while there are increasingly important emerging issues that need to be reflected in trade agreements like the ATIGA or the ASEAN+1 FTAs, the fundamental ones like ROO and NTBs remain critical when it comes to enhancing ASEAN's supply chain connectivity.

It was suggested by the private sector that ASEAN should consider enhancing the existing provisions of the ATIGA on ROO and the related Operational Certification Procedures (OCPs). One possible suggestion made was that AMSs consider allowing the use of a periodic (*e.g.*, quarterly or annual) ATIGA Certificate of Origin (CO) Form D for the same importer/exporter. The purpose of such initiative would be to reduce paperwork, because ASEAN traders will not have to apply for a CO for every shipment. The private sector participants further noted that such flexibility would only apply when the change in tariff classification (CTC) rule is used, and not when the regional value content (RVC) rule is applied.

On this note, another solution offered by the private sector would be for AMSs to enhance the use of the AWSC, which also aims at reducing the use of CO Form D. Some private sector representatives, however, manifested their concerns vis-à-vis using the AWSC, as the responsibility to ensure that the products comply with the ATIGA ROO would then rest heavily on the exporters. In this respect, experiences from other regions should be studied in order to conduct a more precise assessment and, where deemed necessary, to make modifications to the ATIGA OCPs.

Finally, it was noted that the level of awareness and ability of ASEAN traders to comply with ASEAN ROO remains rather low. This hinders companies from utilising the ATIGA and the ASEAN+1 FTAs to their fullest extent. It was requested that more information dissemination and capacity building activities be organised to the benefit of ASEAN's private sector. Lastly, it was also emphasised that

¹²⁶ The RCEP was signed on 15 November 2020 and entered into force on 1 January 2022. Full text of the agreement is available at: <https://rcepsec.org/legal-text/>.



digitalisation and sustainability are key areas to consider in enhancing supply chain connectivity within the ASEAN region.


6. Recommendations

Supply chain connectivity in the region is key to regional economic cooperation and it requires the shared efforts of AMSs to lower the remaining tariffs, remove NTBs and foster trade facilitation measures. Lengthy customs and other cross-border administrative procedures create bottlenecks and increase trade costs, while inconsistent and incompatible regulatory requirements and NTBs hinder deeper integration, which altogether set back supply chain connectivity in the region. To energise seamless regional supply chains, AMSs are advised to focus on simplifying and expediting border formalities to make cross-border trade faster, cheaper, and more predictable.

In order to enhance supply chain connectivity through improved trade facilitation and reduced NTBs, it is highly recommended that ASEAN start by strengthening the utilisation of the existing mechanisms. With regards to trade facilitation, a number of platforms have already been launched and progressively implemented to expedite the flow of goods across the region and to cut trade costs, including the ATR, the ASW, the AWSC, and the ACTS. In the years to come, these mechanisms should be further utilised by all AMSs, particularly by making them more accessible to the private sector. On the elimination of NTBs, AMSs are advised to make better use of frameworks designed to identify and collect information on NTMs and NTBs, such as the ATR or the ASSIST frameworks, ultimately for purposes of streamlining NTMs and removing NTBs. AMSs should actively promote the use of both ASSIST and the ATR at the domestic level within the respective business communities. It is noted that these initiatives will only yield desirable outcomes if they are adequately implemented by all AMSs and if the private sector sees value in them in terms of reliability and accuracy of information, effectiveness of solutions and actual trade facilitation.

While trade facilitation requires enhanced cooperation among competent authorities, the streamlining of NTMs and the elimination of NTBs, as ways to foster regional supply chains, call for a reform of the current mechanisms on notifying and handling such measures. On the one hand, AMSs need to better and more systematically comply with the notification procedures under the *ASEAN NTMs Guidelines*, which in turn will lead to greater regulatory transparency through the ATR and the national-level NTRs. On the other hand, once NTBs have been identified and reported, AMSs need to effectively manage their removal. Beyond making targeted and time-bound NTB reduction commitments, AMSs need to develop clearer procedures and institutional frameworks for tracking the elimination of identified NTBs. To date, the removal of NTBs mainly relies on discussions under relevant Sectoral Bodies such as CCA, which are only as effective as AMSs' willingness to find negotiated solutions. The long list of unresolved LSIs is proof that the current approach is not working. It is highly recommended that more formalised approaches, such as by having NTBs reviewed by an adjudicating panel of independent experts under the EDSM, be entertained. The WTO's experience in using the dispute settlement mechanism to tackle NTBs within the multilateral trading system sets a good example for ASEAN in upgrading the ATIGA and implementing many of the existing tools that have so far sat idle.

In conclusion, trade facilitation, streamlining of NTMs and removal of NTBs should be the centre of any upgraded ATIGA. It is recommended that the ATIGA's Chapter 5 on Trade Facilitation incorporate key standards embraced by the WTO's Trade Facilitation Agreement, and that its Chapter 7 and 8 on NTMs be expanded to include fortified obligations on removing NTBs by establishing follow-up



processes to ensure compliance and to hold non-compliant AMSs accountable. Where possible, more active participation by the private sector in such processes should be encouraged. All of these efforts would undoubtedly translate in greater ASEAN supply chain connectivity.

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Digitalisation and E-commerce Facilitation

Kristine Alcantara

1. Introduction

Electronic commerce (e-commerce) has the potential to provide extraordinary stimulus to the growth of trade within the Southeast Asian (SEA) region. With the widespread adoption and advances of information and communication technologies (ICT), e-commerce over the Internet has also become the new way of conducting business – especially during the lockdowns imposed to contain the COVID-19 pandemic. As the most dynamic sector of the Internet economy, e-commerce in SEA accounted for just over \$ 5.5. Billion Dollars in Gross Merchandise Value (GMV) in 2015 but had grown exponentially to \$23 Billion by 2018 and is expected to exceed \$100 Billion by 2025.¹²⁷


In order to drive e-commerce among the Member States of the Association of Southeast Asian Nations (ASEAN) towards the next century as a channel for new products, markets, and opportunities, the region's regulatory framework on doing business and trade must be re-examined. Currently, intra-ASEAN digital transactions or trade between ASEAN Member States (AMSs) are governed by the ASEAN Trade in Goods Agreement (ATIGA). Signed on the 26th of February 2009 and entered into force on the 17th of March 2010, the ATIGA sought to facilitate the free flow of goods in the ASEAN region, minimising barriers and deepening economic linkages among AMSs, lowering business costs, increasing trade, investment, and economic efficiency, and creating a larger market with greater opportunities and larger economies of scale for the businesses of AMSs¹²⁸. However, the ATIGA has not fully provided for trade through digital means. Article 58 of the ATIGA only mentions and encourages the application of information technology in customs operations based on the expeditious clearance and release of goods. There is no provision or chapter in the ATIGA that discusses other digital or electronic facilitation measures, such as electronic authentication of signatures and paperless trading, consumer and privacy protections, and cybersecurity.

This Policy Brief proposes recommendations and enhancements to the ATIGA to further facilitate the growth of e-commerce in the region. The Policy Brief, following **Section 1** or the Introduction, is structured as follows: **Section 2**, which takes stock of all ASEAN instruments on digitalisation and e-commerce transactions for potential inclusion in the ATIGA. Thereafter, **Section 3** makes a comparative analysis of the e-commerce chapters of the more recent free trade agreements, which are of importance to ASEAN or can be used as best-case studies for enhancements in the ATIGA. **Section 4** contains the key takeaways collected during the outreach roundtable discussions entertained with ASEAN's private sector. Finally, **Section 5** provides conclusions and several possible recommendations to be taken into account by ASEAN, particularly within the context of the general review of the ATIGA and its possible upgrade through dedicated provisions on e-commerce trade and facilitation.

2. ASEAN Instruments on E-commerce Transactions

¹²⁷ Page Four (4), "e-Economy SEA 2018: Southeast Asia's Internet Economy hits and Inflection Point", Google and Temasek (2018). Retrieved from https://asean.org/wp-content/uploads/2021/09/e-Economy_SEA_2018_by_Google_Temasek.pdf.

¹²⁸ Preamble, ASEAN Trade in Goods Agreement (2010).



Intra-ASEAN trade is governed and regulated by the ATIGA. While there is no specific provision for digitalisation of processes or on how to treat e-commerce transactions, AMSs are guided by other ASEAN instruments.

ASEAN first recognised the opportunities offered by ICT and e-commerce by signing the E-ASEAN Framework Agreement on 24 November 2000 to cover measures facilitating the growth of e-commerce in ASEAN by expeditiously putting in national laws and policies relating to e-commerce transactions based in international norms; facilitating the establishment of mutual recognition of digital signature frameworks and secure electronic transactions, payments and settlements, through mechanisms such as electronic payment gateways; adopting measures to foster intellectual property rights; taking measures to promote personal data protection and consumer privacy; and encouraging the use of alternative dispute resolution mechanisms for online transactions.

Under its Third Characteristic or Element on “*Enhanced Connectivity and Sectoral Cooperation*”, the AEC Blueprint 2025 highlights in a separate section on e-commerce the key role that digital transactions play in cross-border trade, facilitating foreign investment through the supply of intermediary services, and its importance in significantly lowering barriers to entry and operating costs for businesses that are beneficial to MSMEs.¹²⁹ Moreover, the AEC Blueprint 2025 defined e-commerce as the “*sale or purchase of goods or services, conducted over computer networks by methods specifically designed for the purpose of receiving or placing of orders. The goods and services are ordered by those methods, but the payment and ultimate delivery of the goods or services do not have to be conducted online*”.¹³⁰ Finally, the AEC BLUEPRINT 2025 aims to put into place the following strategic measures to facilitate cross-border transactions in ASEAN: (a) harmonised consumer rights protection laws; (b) harmonised legal framework for online dispute resolution, taking into account available international standards; (c) inter-operable, mutually recognized, secure, reliable and user-friendly e-identification and authorization schemes; and (d) coherent and comprehensive framework for personal data protection.¹³¹


To operationalise the e-commerce section of the AEC Blueprint 2025, the ASEAN Senior Economic Officials established the ASEAN Coordinating Committee on Electronic Commerce (ACCEC) and the ASEAN Work Programme on Electronic Commerce (AWPEC) 2017 to 2021 on November 2016 to focus on the following important areas: ICT infrastructure, e-legal and regulatory framework, trade facilitation education and technology competency, electronic payment and settlement, online consumer protection, cybersecurity, and logistics to facilitate e-commerce, *inter alia*.

In July 2018, the ACCEC finalised the ASEAN Digital Integration Framework (DIF), which was adopted and endorsed at the AEC Council in November 2018. The ASEAN DIF identifies six priority areas to address in the short term the critical barriers and to accelerate the existing ASEAN platforms and plans to realise digital integration, namely by means of: (a) facilitating seamless trade through digital integration; (b) protecting data while supporting digital trade and innovation through the ASEAN Framework for Personal Data Protection; (c) enabling seamless digital payments; (d) broadening the digital talent base; (e) fostering entrepreneurship to assist budding digital MSMEs; and (f) coordinating digital integration processes through the ACCEC.

¹²⁹ Paragraph 52, AEC Blueprint 2025 (2015).

¹³⁰ Footnote to Sub-chapter C.3. E-Commerce citing the OECD Guide to Measuring the Information Security 2011, OECD (2011), AEC Blueprint 2025 (2015).

¹³¹ Paragraph 53, AEC Blueprint 2025 (2015).




To operationalise the DIF, the ASEAN Economic Ministers (AEM) signed the ASEAN Digital Integration Framework Action Plan 2019 to 2025 (DIFAP) and proposed five policy areas that can help ASEAN overcome the barriers to digital integration, namely: (a) digital connectivity and affordable access; (b) financial ecosystems; (c) commerce and trade; (d) workforce transformation; and (e) business ecosystem. The DIFAP also incorporates the related action plans of the AEC Blueprint 2025 the ASEAN ICT Master Plan 2020, the AWPEC, the Master Plan on ASEAN Connectivity (MPAC) 2025, and the relevant Strategic Action Plans (SAPs). The DIFAP identifies six priorities to address the critical barriers for realizing digital integration, notably:

- (a) Priority 1: **Facilitate seamless trade** to include the full operationalisation of the ASEAN Single Window (ASW); implement the ASEAN-Wide Self-Certification (AWSC) system; simplify customs clearances, procedures, and documentation; and improve ASEAN logistics services to facilitate e-commerce.
- (b) Priority 2: **Protection of data**, while supporting digital trade and innovation through the harmonisation of domestic data protection policies, strengthening the data ecosystem, and developing an ASEAN Framework on Digital Data Governance.
- (c) Priority 3: **Enable seamless digital payments** through the development of guidelines on electronic payment solutions and the development of a work plan to foster interoperability between real-time retail payment systems.
- (d) Priority 4: **Broaden the digital talent base** through the dissemination to business actors of the best practices in the use of the Internet for the improvement of their business, develop formal or informal mechanisms for cross-border cooperation, such as *memoranda* of understanding, and regular interaction with international organisations.
- (e) Priority 5: **Foster entrepreneurship** by providing policy directions for the formalization and promotion of schemes for digitalised micro enterprises, with the aim of producing the Action Agenda on the Digitalisation of ASEAN MSMEs through capacity building programs.
- (f) Priority 6: **Coordination of actions** through the review and update of the DIFAP and the development of a monitoring and reporting mechanism to measure its implementation.

In 2019, the ASEAN Agreement on Electronic Commerce (E-Commerce Agreement) was signed by the ASEAN Economic Ministers as an ASEAN response to the increasing role of e-commerce in driving economic growth and social development in the region. The E-Commerce Agreement contains the following relevant provisions that can be referred to:

- (a) **Article 5 of E-Commerce Agreement** mandates AMSs to consider internationally adopted model laws, conventions, principles, or guidelines in its regulatory frameworks supporting e-commerce.
- (b) **Article 6 of the E-Commerce Agreement** provides for the enhanced cooperation in areas such as ICT infrastructure, online consumer protection, e-commerce legal and regulatory frameworks, electronic transaction security, including the



protection of online personal information, electronic payment and settlement, trade facilitation, intellectual property rights, cybersecurity, and logistics to facilitate e-commerce.


- (c) **Article 7 of the E-Commerce Agreement** sought to further contribute to creating an environment of trust and confidence in the use of e-commerce in the region¹³² through the facilitation of cross-border e-commerce by means of: (a) paperless trading; (b) electronic authentication and electronic signatures; (c) provision for online consumer protection; (d) cross-border transfer of information by electronic means; (e) online personal information protection; and (f) the establishment of regulatory requirements regarding the use of computing facilities.
- (d) **Article 8 of the E-Commerce Agreement** encouraged AMSs to recognise the importance of building the capabilities of national entities responsible for cybersecurity and using collaboration mechanisms to cooperate on cybersecurity.
- (e) **Article 9 of the E-Commerce Agreement** recognised the importance of safe, sufficient, secure, efficient, and interoperable e-payment systems.
- (f) **Article 10 of the E-Commerce Agreement** encourages AMSs to recognise the importance of efficient cross-border logistics.
- (g) **Article 11 of the E-Commerce Agreement** mandates AMSs to regularly engage with relevant stakeholders to exchange information and generate inputs on the development of e-commerce.
- (h) **Article 12 of the E-Commerce Agreement** directs AMSs to, as soon as possible, adopt or maintain practicable laws, and regulations governing electronic transactions.

In the same year, the ACCEC adopted the Guideline on Accountabilities and Responsibilities of e-Marketplace Providers (Guidelines) for use by online intermediaries selling online goods and services. The Guidelines went on to define “*e-Marketplace*” as an online intermediary that allows participating merchants to exchange information about products or services to enter into an e-commerce transaction, which may or may not provide information/services about payments and logistics.¹³³ Under the Guidelines, e-Marketplace providers are encouraged to consider and incorporate the four guiding principles of: (a) clear policies on personal data protection; (b) adoption of good practices on e-contracting, particularly on the accountabilities and responsibilities of merchants and customers; (c) honest advertising; and (d) development of consumer-friendly terms of dispute resolution.

Finally, following the adoption of the ASEAN Digital Integration Index (ADII) methodology in 2020, the ACCEC presented the first iteration of the ADII Report 2021, which provided evidence-based measures in assessing the achievement of its goals under the ASEAN DIF. The ADII presented the following key recommendations to operationalise the DIF by improving on the six ASEAN ADII Pillars, namely: (a) Digital Trade and Logistics; (b) Data Protection and Cybersecurity; (c) Digital Payments and Identities;

¹³² Article 2, ASEAN Agreement on Electronic Commerce (2019).

¹³³ Scope and Definition, Guideline on Accountabilities and Responsibilities of e-Marketplace Providers (2019).



(d) Digital Skills and Talent; (e) Innovation and Entrepreneurship; and (f) Institutional and Infrastructural Readiness.

While trade in goods across ASEAN is governed by the ATIGA, AMSs are also mandated to improve on their digital frameworks – both physical and legally, to cater to electronic commerce. The directives on digitalisation, however, remains on a national level and frameworks are improved only as opted by or fostered by AMSs. There is no framework or cooperation mechanisms on how transactions will be processed digitally across two or several AMSs, as the ATIGA operates only on an “*analogue*” or paper system. To pave the way for seamless and efficient digital trade, the provisions on digitalisation and e-commerce from ASEAN digital-specific instruments should be included in a specific e-commerce chapter of the ATIGA.

3. E-commerce Chapters in Other Relevant Free Trade Agreements

In the period from 2004 to 2011, the Asia-Pacific region adopted a mixed approach towards digital trade regulations in its preferential trade agreements. Chapters on e-Commerce with provisions on customs duties, Domestic Regulatory Frameworks, Electronic Authentication and Digital Certificates, Online Consumer Protection, Online Personal Data Protection, Paperless Trading, Cooperation on E-Commerce began appearing as critical or important negotiating points for parties to a trade agreement. This was, perhaps, driven by the Free Trade Agreement between Singapore and Australia (SAFTA) signed in 2003, which included a whole e-commerce chapter.¹³⁴ The SAFTA is considered as the first instrument to focus on e-commerce, with provisions applying the general principles of trade law and the UNCITRAL Model Law on Electronic Commerce,¹³⁵ as well as provisions covering a broad scope of emerging issues in e-commerce. Parties that adopted the UNCITRAL Model also committed to the following:

- (a) Continuing not to levy customs duties on digital products;
- (b) Making online availability of all existing publicly available trade administration documents;
- (c) Cooperating to enhance the acceptance of electronic versions of trade administration documents bilaterally and internationally;
- (d) Maintaining electronic authentication legislation;
- (e) Providing protection for e-commerce consumers;
- (f) Working to mutually recognise electronic signatures;
- (g) Encouraging the inter-operability of digital certificates by business; and
- (h) Adopting measures to protect personal data.

¹³⁴ Free Trade Agreement between Singapore and Australia (2003), retrieved from <https://www.dfat.gov.au/trade/agreements/in-force/safta/Pages/singapore-australia-fta>.

¹³⁵ Retrieved from https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_commerce.



3.1 Relevant Preferential Free Trade Agreements entered by ASEAN Member States

The Agreement on New Zealand-Singapore Closer Economic Partnership (ANZSCEP) was signed on 14 November 2000 and entered into force on 1 January 2001, or almost nine years before the ATIGA entered into force¹³⁶. The ANZSCEP was upgraded on 1 January 2020 and included standard provisions on e-commerce that are included in most of the recent preferential trade agreements that Singapore and New Zealand are parties to such as:

- (a) The upgraded ANZSCEP now provides for innovative provisions on cooperation in logistics, as well as on electronic invoicing. Specifically, Article 9.14 of the ANZSCEP provides that the Parties recognise the importance of efficient cross-border logistics that would help lower the cost and improve the speed and reliability of supply chains.
- (b) With respect to electronic invoicing, Article 9.15 of the ANZSCEP mandates the Parties to recognise the importance of an e-invoicing system that would help improve the speed and reliability of electronic commerce transactions and to share best practices on e-invoicing systems.

The China-Singapore Free Trade Agreement (CSFTA), signed on 23 October 2008 and entered into force on 1 January 2009. The CSFTA provides for a dedicated chapter on e-commerce, dealing with various technical aspects of e-commerce, including electronic authentication and electronic signatures, paperless trading, and online consumer protection.¹³⁷

The EU-Vietnam Free Trade Agreement (FTA) was signed on 30 June 2019 and entered into force in July 2020. Chapter 8 on Liberalisation of Investment, Trade in Services and Electronic Commerce of the FTA contains the Parties' commitments on e-commerce or digital transactions. The EU and Vietnam both agreed to prohibit customs duties on electronic transmissions, establish a forum to discuss issues related to the provision on e-commerce of services, provide exemptions from liability of online intermediaries, consistent treatment of unsolicited commercial information, and the pledge of cooperation on e-commerce matters.¹³⁸

The Indonesia-Australia Comprehensive Economic Partnership Agreement (IA-CEPA), which was signed on 10 February 2019 and took effect on 5 July 2020, provides for a detailed chapter on e-commerce containing commitments to help facilitate cross-border trade and the use of electronic signatures and other digital trade administration documents.¹³⁹ Specifically, Chapter 13 of the IA-CEPA provides for detailed provisions on paperless trading, online consumer protection, protection of personal information, unsolicited commercial electronic messages, cross-border transfer of information by electronic means, and the location of computing facilities.

¹³⁶ Agreement between New Zealand and Singapore on a Closer Economic Partnership (2000), retrieved from <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/nz-singapore-closer-economic-partnership/cep-text/>.

¹³⁷ China-Singapore Free Trade Agreement (2008), retrieved from <https://www.enterprisesg.gov.sg/non-financial-assistance/for-singapore-companies/free-trade-agreements/ftas/singapore-ftas/csfta>.

¹³⁸ EU-Vietnam Free Trade Agreement (2019), retrieved from <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>.

¹³⁹ Indonesia-Australia Comprehensive Economic Partnership Agreement (2019), retrieved from <https://www.dfat.gov.au/trade/agreements/in-force/iacepa/iacepa-text/Pages/default>.

3.2 Relevant Preferential Free Trade Agreements with E-commerce Chapters

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)¹⁴⁰ is a trade agreement between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore, Vietnam. It was signed by the eleven countries on 8 March 2018 in Santiago, Chile and entered into force on 30 December 2018 (Australia, Canada, Japan, Mexico, New Zealand, Singapore), on 14 January 2019 (Vietnam), and 19 September 2021 (Peru), and sixty (60) days after ratification (Brunei Darussalam, Chile, Malaysia).

The CPTPP is heralded as a landmark agreement on digital trade as it promotes the free flow of data across borders for service suppliers and investors as part of their business activities. Chapter 14 on Electronic Commerce of the CPTPP prohibited the imposition of customs duties on electronic transmissions, non-discriminatory treatment of digital products, maintenance by the Parties of a legal framework governing electronic transactions consistent with the UNCITRAL Model on Electronic Commerce 1996 or the United Nations Convention on the Use of Electronic Communications in International Contracts, allowance of electronic authentication and electronic signatures, provision for online consumer protection and personal information protection, and encouragement for paperless trading.


Finally, the Regional Comprehensive Economic Partnership Agreement (RCEP) is an ASEAN-led free trade agreement grouping the ten ASEAN Member States (*i.e.*, Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam), and the five regional countries which ASEAN has free trade agreements with (*i.e.*, Australia, China, Japan, South Korea, and New Zealand. India also has a preferential trade agreement with ASEAN, but withdrew from the RCEP negotiations).¹⁴¹ Signed on 15 November 2020, and entered into force on 1 January 2022, the RCEP contains a dedicated chapter on e-commerce¹⁴², where the importance of facilitating the development and use of digital trade facilitation, transparency, and cyber-security is affirmed. The RCEP contains the following important provisions that can be referred to in the context of the enhancement of the ATIGA:


- (a) **Article 12.3 of the RCEP** defines the scope of the measures contained in the Chapter to apply to all e-commerce excluding government procurement and information held or processed by the Party or measures related to such information collection, location of computing facilities, and cross-border transfer of information by electronic means.
- (b) **Article 12.5 of the RCEP** obliges Parties to work towards implementing initiatives that provide for the use of paperless trading – considering the methods agreed on by international organisations including the World Customs Organisation (WCO), accept trade administration documents submitted electronically as the legal equivalent of the paper version, and endeavour to make trade administration documents available to the public in electronic form.

¹⁴⁰ Comprehensive and Progressive Agreement for Trans-Pacific Partnership (2018), retrieved from <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/toc-tdm.aspx?lang=en>.

¹⁴¹ Regional Comprehensive Economic Partnership Agreement, retrieved from <https://rcepsec.org/legal-text/>.

¹⁴² Chapter 13, Regional Comprehensive Economic Partnership Agreement retrieved from <https://rcepsec.org/wp-content/uploads/2020/11/Chapter-12.pdf>.

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- (c) **Article 12.6 of the RCEP** mandates that Parties shall not deny the legal validity of a signature solely on the basis that the signature is in electronic form. Moreover, the Parties must also consider the international norms for electronic authentication, permit participants in an electronic transaction to determine appropriate electronic authentication technologies and implementation models for their electronic transactions without limitation and permit the participants to prove that their electronic transactions comply with its laws and regulations. Interoperable electronic authentication between Parties is also highly encouraged.
 - (d) **Article 12.7 of the RCEP** instructs Parties to adopt or maintain laws or regulations for consumers using e-commerce against fraudulent and misleading practices that cause harm or potential harm to such consumers.
 - (e) **Article 12.8 of the RCEP** provides for the adoption or maintenance of a legal framework, consider international standards and principles, that ensures the protection of personal information of users of e-commerce.
 - (f) **Article 12.9 of the RCEP** also mandates Parties to adopt or maintain measures regarding unsolicited commercial electronic messages, *i.e., ability of recipients to stop receipt, require consent, minimisation*.
 - (g) **Article 12.10 of the RCEP** cites the UNCITRAL Model Law on Electronic Commerce 1996 and the United Nations Convention on the Use of Electronic Communications in International Contracts, as legal frameworks that Parties can use in the creation, adoption, or maintenance of e-commerce legal frameworks.
 - (h) **Article 12.11 of the RCEP** holds all Parties to the commitment to maintain their current practices of not imposing customs duties on electronic transmissions between the Parties, in line with the WTO Ministerial Decision of 13 December 2017 in relation to the Work Programme on Electronic Commerce. This does not preclude Parties, however, from imposing taxes, fees, or other charges on electronic transmissions.
 - (i) **Article 12.13 of the RCEP** recognises the importance of building the cyber-security capabilities of the Parties through exchange of best practices and the use of existing collaboration mechanism.
 - (j) **Article 12.14 of the RCEP**, like the CPTPP, also prohibits Parties from requiring investors or those intending to do business to use or locate computing facilities in the Party's territory as a condition for conducting business.
 - (k) **Article 12.15 of the RCEP** provides that a Party shall not prevent the cross-border transfer of information by electronic means where such activity is for the conduct of the business of a covered person.
 - (l) **Article 12.16 of the RCEP** provides that the Parties recognise the value of dialogue in promoting the use of electronic commerce, particularly in cooperating with other Parties, current and emerging issues such as cross-border data flow and



treatment of digital products, and other matters relevant to development on the use of electronic commerce.


- (m) **Article 12.17 of the RCEP** provides that consultations to reach mutually agreed solutions are preferred and, when bilateral consultations fail to resolve disputes, the matter is referred to the RCEP Joint Committee. Chapter 19 of the RCEP on dispute settlement does not apply to e-commerce matters.

Any and all enhancements to the ATIGA should also take note of the commitments made in the CPTPP and RCEP to make the current free trade agreement in the region beneficial and efficient not just for intra-ASEAN trade, but also for global trade.

4. Key Takeaways from Roundtable Discussions

During the Roundtable Discussions on Trade Facilitation organised by ARISE Plus, the representatives of the ASEAN private sector widely endorsed the recommendations put forward in this Policy Brief and provided a number of inputs that appear relevant to the design of the regional strategies and initiatives for e-commerce and digitalisation. *Inter alia*, the following points were made:

- (a) ASEAN is dominated by smaller firms, which make up at least 97% of the companies in each AMS and account for significant employment. For trade integration to work for ASEAN, it requires arrangements that promote and facilitate participation of MSMEs. The ATIGA Upgrade should incorporate relevant provisions on e-commerce, particularly in managing and facilitating cross-border e-commerce transaction of goods. E-commerce provisions included in other FTAs (e.g. AANZFTA, RCEP, CPTPP, EUVFTA) would be a good starting point or reference for the ATIGA Upgrade. The ASEAN E-commerce Agreement and its Work Plan should also be annexed into the ATIGA for businesses to be aware of the ASEAN rules and initiatives governing cross-border e-commerce transactions in the region.
- (b) There is a need to strike a balance between facilitating and ensuring MSMEs' participation in cross-border e-commerce trade and important regulatory issues of data protection and privacy or cybersecurity. Consumer protection for e-commerce within and outside ASEAN is still an area of concern. Updating the ATIGA is a good step in building an ecosystem of trust in e-commerce transactions. Provisions on the adoption or maintenance of a legal framework incorporating international standards and principles that ensure the protection of personal information of users of e-commerce should be considered.
- (c) AMSs should also recognise the importance of building the cyber-security capabilities of each AMS through exchange of best practices and the use of existing collaboration mechanism. This should be institutionalised in the ATIGA Upgrade. Competition policy should also be revisited to consider the complex and rapidly developing digital age.
- (d) Capacity building initiatives should also be institutionalised in order to bridge the market access gap among AMSs and enterprises, given the different levels of



development among AMSs and the divergent capacity of enterprises to comply with regulatory requirements.

5. Conclusions and Recommendations on a Proposed E-commerce Chapter in the ATIGA

In 2010, when the ATIGA entered into force, most preferential trade agreements did not cover e-commerce transactions. However, most bilateral agreements included paperless or digital trading as one of its chapters or provisions. Article 47(g) in the Trade Facilitation Chapter of the ATIGA provides for continuous modernisation as a core principle of trade facilitation: *“Modernisation and use of new technology: Rules and procedures relating to trade to be reviewed and updated if necessary, taking into account changed circumstances, including new information and new business practices, and based on the adoption, where appropriate, of modern techniques and new technology. Where new technology is used, relevant authorities shall make best efforts to spread the accompanying benefits to all parties through ensuring the openness of the information on the adopted technologies and extending co-operation to authorities of other economies and the private sector in establishing inter-operability and/or inter-connectivity of the technologies”*¹⁴³ [emphasis added].

Updating or upgrading the ATIGA through the inclusion of provisions on e-commerce to allow for the development and enhancement of digital transactions and trade will further boost and develop the ASEAN digital economy. These enhancements could form part of a Second Protocol to Amend the ATIGA, an attached Annex, or included as a Chapter in the upgraded ATIGA.

5.1. Principles and Objectives

The preamble in the proposed Second Protocol or Chapter on E-Commerce can contain the objectives written in the Third Characteristic *“Enhanced Connectivity and Sectoral Cooperation”* of the AEC Blueprint 2025, which states that e-commerce plays a key role in digital transactions and cross-border trade, facilitating foreign investment through the supply of intermediary services, and is important in significantly lowering the barriers to entry and the operating costs for businesses in a way that is particularly beneficial to MSMEs.¹⁴⁴

The proposed chapter on E-commerce can also follow the provisions in the AEC Blueprint 2025, which aims to put into place the following strategic measures to facilitate cross-border transactions in ASEAN: (a) harmonised consumer rights protection laws; (b) harmonised legal framework for online dispute resolution, taking into account available international standards; (c) inter-operable, mutually recognised, secure, reliable and user-friendly e-identification and authorisation schemes; and (d) coherent and comprehensive framework for personal data protection.¹⁴⁵

The UNCITRAL Model Law on Electronic Commerce and the United Nations Convention on the Use of Electronic Communications in International Contracts can also be recognised as sources or models in updating the legal framework on digital trading transactions.

¹⁴³ Article 47(g), the ASEAN Trade in Goods Agreement (2010), retrieved from <https://tariff-finder.asean.org/index.php?page=atiga>.

¹⁴⁴ Paragraph 52, AEC Blueprint 2025 (2015).

¹⁴⁵ Paragraph 53, AEC Blueprint 2025 (2015).



5.2. Definitions

The proposed chapter on E-Commerce can adopt the AEC Blueprint 2025 definition of e-commerce, as the *“sale or purchase of goods or services, conducted over computer networks by methods specifically designed for the purpose of receiving or placing of orders. The goods and services are ordered by those methods, but the payment and ultimate delivery of the goods or services do not have to be conducted online”*.¹⁴⁶ All other definitions such as computing facilities, electronic authentication, electronic signature, unsolicited commercial electronic commerce, and the like could be adopted from the language in the E-Commerce Agreement and the RCEP.

5.3. Digital Trade Facilitation

The Second Protocol could adopt Article 7 of the E-Commerce Agreement in terms of further contributing to creating an environment of trust and confidence in the use of e-commerce in the region¹⁴⁷ and foster the facilitation of cross-border e-commerce through: (a) paperless trading; (b) electronic authentication and electronic signatures; (c) provision for online consumer protection; (d) cross-border transfer of information by electronic means; (e) online personal information protection; and (f) establish regulatory requirements regarding the use of computing facilities. The following articles of RCEP are also recommended:

- (a) **Article 12.5 of the RCEP** on Paperless Trading obliges Parties to work towards implementing initiatives that provide for the use of paperless trading – considering the methods agreed on by international organisations including the World Customs Organisation (WCO), accept trade administration documents submitted electronically as the legal equivalent of the paper version, and endeavour to make trade administration documents available to the public in electronic form.
- (b) **Article 12.6 of the RCEP** on Electronic Signatures and Authentication mandates that Parties shall not deny the legal validity of a signature solely on the basis that the signature is in electronic form. Moreover, the Parties must also – considering the international norms for electronic authentication, permit participants in an electronic transaction to determine appropriate electronic authentication technologies and implementation models for their electronic transactions without limitation and permit the participants to prove that their electronic transactions comply with its laws and regulations. Interoperable electronic authentication between Parties is also highly encouraged.


The RCEP provisions also contain the current state of digital transactions in ASEAN and would capture the nuances suggested by the AMSs by virtue of it being the most recent agreement in the region.

5.4. Building an Ecosystem of Trust in e-Commerce Transactions

The following provisions of the RCEP could also be considered:

¹⁴⁶ Footnote to Sub-chapter C.3. E-Commerce citing the OECD Guide to Measuring the Information Security 2011, OECD (2011), AEC Blueprint 2025 (2015).

¹⁴⁷ Article 2, ASEAN Agreement on Electronic Commerce (2019).

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- (a) **Article 12.8 of the RCEP** provides for the adoption or maintenance of a legal framework, considering international standards and principles, that ensures the protection of personal information of users of e-commerce.
 - (b) **Article 12.9 of the RCEP** also mandates the Parties to adopt or maintain measures regarding unsolicited commercial electronic messages (*i.e., ability of recipients to stop receipt, require consent, minimisation*).
 - (c) **Article 12.13 of the RCEP** recognises the importance of building the cyber-security capabilities of the Parties through exchange of best practices and the use of existing collaboration mechanism.

The provisions of the RCEP could also be supplemented by Article 8 of the E-Commerce Agreement, which encourages the building of capabilities of national entities responsible for cybersecurity and using collaboration mechanisms to cooperate on cybersecurity.

5.5. Promotion of Cross-Border E-Commerce and Review Mechanism

The ASEAN Digital Integration Framework and the ASEAN Digital Integration Framework Action Plan 2019 to 2025 can be referenced in the possible sub-chapter to the upgraded ATIGA on promotion of cross-border e-commerce, as well as the related action plans of the AEC Blueprint 2025, the ASEAN ICT Master Plan 2020, the AWPEC, the Master Plan on ASEAN Connectivity (MPAC) 2025, and relevant Strategic Action Plans (SAP).


The ACCEC can be tasked to review and update the e-commerce chapter on the following areas: ICT infrastructure, e-legal and regulatory framework, trade facilitation education and technology competency, electronic payment and settlement, online consumer protection, cybersecurity, and logistic to facilitate e-commerce, *inter alia*.

5.6. Dispute Settlement

Consideration could be given to the establishment of a regional online dispute-resolution scheme for handling domain-name disputes. There are already several schemes in operation, at national and regional levels, and these could be studied to gain insights into possible approaches to establishing an ASEAN scheme. In time, this scheme could broaden its coverage to include other types of online disputes, particularly consumer-related ones, building confidence in online transactions, and relieving pressure on the existing court systems.

In conclusion, enhancements in the trading framework of ASEAN are critical in accelerating growth and development in the region. Currently, commitments to services trade in digital sectors are not covered and this leads to inconsistencies and gaps in intellectual property rights management and limited protection in digital investments.

The inclusion of a chapter on digital services or E-Commerce in preferential trade agreements have been an increasingly popular approach by AMSs, either through adhesion to the CPTPP, the RCEP, or various other bilateral agreements. Deeper set of rules for digital trade, involving not just e-commerce as an '*umbrella*' or '*catch-all*' term, but to capture all forms of services, investment, data rules and



regulations, intellectual property rights, standards, online consumer protection, MSMEs' development, and capacity building, is needed in order to fully harness and take advantage of the burgeoning digital economy.

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Trade and Sustainable Development

Kristine Alcantara

1. Introduction

Sustainable development is an overarching policy objective of the international community and the signatories to the 2030 Agenda for Sustainable Development¹⁴⁸ have made a commitment to support these goals in their countries' internal and external policies. Particularly, increased economic transactions between and among nations and regions require that trade and investment mutually support environmental protection, social development, and do not come at the expense of the environment or of labour rights.

Currently, transactions between the Member States of the Association of Southeast Asian Nations (ASEAN) are governed by the ASEAN Trade in Goods Agreement (ATIGA). Signed on the 26th of February 2009 and entered into force on the 17th of March 2010, the ATIGA seeks to facilitate the free flow of goods in the ASEAN region, minimise barriers and deepen economic linkages among ASEAN Member States (AMSs), lower business costs, increase trade, investment, and economic efficiency, and create a larger market with greater opportunities and larger economies of scale for the businesses of AMSs and beyond¹⁴⁹. However, the ATIGA currently does not contain any policy tools that balance trade openness with social and environmental objectives as there is no chapter nor any individual provision on Trade and Sustainable Development.


Despite this, several AMSs have recognised the importance of including policy tools on responsible trade and investment. Singapore, Viet Nam, and Indonesia have recently concluded and/or in the process of concluding bilateral trade deals that include substantive environmental commitments or even a dedicated chapter on sustainable development.¹⁵⁰

Moreover, on 20 September 2021, AMSs held the first ASEAN Ministerial Dialogue on Accelerating Actions to Achieve the Sustainable Development Goals (SDGs). Attendees of the meeting, composed of representatives of AMSs and the relevant ASEAN sectoral bodies, recalling the complementarities between the ASEAN Community Vision 2025 and the United Nations 2030 Agenda for Sustainable Development, approved the development of the Complementarities Roadmap 2020-2025 and the establishment of the ASEAN Centre for Sustainable Development Studies and Dialogue (ACSDSD). Following the conduct of the said Ministerial Dialogue, AMSs resolved to undertake measure to *“ensure that that national policies, development plans, and programmes are reviewed and recalibrated to reflect the changing landscape of achieving the SDGs because of the COVID-19 pandemic, and other mega trends affecting the ASEAN region such as climate change, biodiversity loss and environmental degradation, food insecurity, digitalisation, increasing social and gender*

¹⁴⁸ Resolution adopted by the General Assembly on 25 September 2015, United Nations A/RES/70/1 dated 21 October 2015,

¹⁴⁹ Preamble, ASEAN Trade in Goods Agreement (2010).

¹⁵⁰ See Chapter 12 of the EU-Singapore Free Trade Agreement (2019), Chapter 13, EU-Vietnam Free Trade Agreement (2020), proposed Chapter 10, EU-Indonesia Free Trade Agreement.



*inequalities within and among countries, rapid urbanisation, and varying demographic trends, among others”.*¹⁵¹

In recognition of the emerging awareness and concern among AMSs of the importance of sustainability within the context of deepening regional integration, so as to better cope with and recover more quickly from global shocks such as the COVID-19 pandemic, it is more than apt that the ATIGA be upgraded to expressly contain sustainability-related aspects and provisions. Such principles, levels of commitment, and approaches will assist AMSs in framing their negotiations with third countries through a harmonised approach, negotiate for or contain consistent concessions, and maintain or raise a high ASEAN benchmark for sustainable development in the context of trade.

This Policy Brief proposes a number of recommendations and possible enhancements to the ATIGA in the form of labour and environmental issues – including climate change mitigation and sustainability provisions. The discussion, following this Introduction, is structured around four parts: **Section 2** takes stock of all ASEAN instruments on sustainable development for potential inclusion in the upgraded ATIGA, while **Section 3** contains a comparative analysis on the sustainable development chapters of the most recent preferential trade agreements that are of relevance to ASEAN or that can be used as best-case studies when considering possible enhancements to the ATIGA. **Section 4** highlights the key takeaways from the roundtable discussions held with ASEAN’s private sector representatives, while **Section 5** concludes the analysis and provides recommendations or suggestions on the contents of a proposed additional Chapter on Trade and Sustainable Development in the upgraded ATIGA.

2. ASEAN Instruments on Trade and Sustainable Development

While intra-ASEAN trade is governed and regulated by the ATIGA, there is no specific provision in the ATIGA for sustainable development or for dealing with labour and environmental issues. AMSs are guided to implement the ASEAN vision by other ASEAN instruments.

2.1 ASEAN Instruments with Broad Provisions on Trade and Sustainable Development


The commitment to ensure sustainable development was enshrined in no less than the ASEAN Charter – the founding instrument that codifies the region’s norms, rules and values, and that sets clear targets for AMSs to be achieved through agreed-on accountability and compliance frameworks. In the Charter’s preamble, AMSs “*resolved to ensure sustainable development for the benefit of present and future generations and to place the well-being, livelihood, and welfare of the peoples at the centre of the ASEAN community building process*”.¹⁵²

In 2015, AMSs set out the ASEAN Economic Community Blueprint 2025 (AEC Blueprint) and recognised the importance of sustainable economic development in the region’s growth strategy. AMSs further confirmed that protection of the environment and natural resources supports economic growth and committed to actively promoting green development through the use of clean energy and related technologies, including renewable energy through green technology, and the enhancement of sustainable consumption and production by including it in national development plans.¹⁵³ Moreover,

¹⁵¹ Paragraph 1, Joint Statement of the ASEAN Ministerial Dialogue on Accelerating Actions to Achieve Sustainable Development Goals (2021).

¹⁵² Preamble, ASEAN Charter (2008).

¹⁵³ Paragraph 40, Section B.8, ASEAN Economic Community Blueprint 2025 (2015).



the AEC Blueprint 2025 envisioned that AMSs would create a more dynamic and resilient ASEAN, capable of responding and adjusting to emerging challenges through robust national and regional mechanisms that address food and energy security issues, natural disasters, economic shocks, and other emerging trade-related issues, as well as global mega-trends.¹⁵⁴

Considering that AMSs have recognised the importance of and have made commitments towards sustainable economic development in the region, it would be natural and beneficial to have dedicated principles and provisions on sustainability codified or written into a new chapter or annex in the upgraded ATIGA, in line with the AEC Blueprint 2025.

2.2 ASEAN Instruments on Trade and Labour

The ASEAN Socio-Cultural Community Blueprint 2025 (ASCC Blueprint) shows the achievement of a sustainable environment in the face of social changes and economic development. In particular, the ASCC envisions the empowerment of its people through the promotion of non-discriminatory laws, policies, and practices by developing effective, responsive, accountable, and transparent institutions at all levels¹⁵⁵. The vision in the ASCC Blueprint is operationalised in the ASEAN Labour Ministers' (ALM) Work Programme 2021-2025, where labour dispute and labour justice are designated as the Thematic Area No. 6, strengthening labour inspection as Thematic Area No. 7, and the expansion of social protection to all workers as Thematic Area No. 8.

There is, however, no specific ASEAN instrument on trade and labour. An additional chapter in the upgraded ATIGA on trade and sustainable development, with specific mention of labour standards could be considered in order to formalise or codify trade-related commitments between AMSs, in line with the ASCC Blueprint 2025 and the related ALM Work Programme 2021-2025.

2.3 ASEAN Instruments on Trade and the Environment

The ASCC Blueprint 2025 shows the achievement of a sustainable environment in the face of social changes and economic development.¹⁵⁶ Particularly, it strives to achieve the conservation and sustainable management of biodiversity and natural resources¹⁵⁷ and to enhance participatory and integrated approaches in urban planning and management for sustainable urbanisation towards a clean and green ASEAN¹⁵⁸. The ASCC Blueprint vision is further elaborated and operationalised in the Vision and Strategic Plan for ASEAN Cooperation in Food, Agriculture, and Forestry 2016-2025. Provisions or action plans in the ASEAN Cooperation in FAF document that promote sustainability, such as the use of sustainable '*green*' technologies, are intended to encourage sound management and maintenance of natural resources, enhance collaboration to minimise trans-boundary pollution and Green House Gas (GHG) emissions, and strengthen forest law enforcement and governance. Their relation to intra-ASEAN trade and sustainable economic integration is evident.

In 2020 and during the ASEAN Ministers of Energy Meeting (AMEM), the endorsed provisions of the ASEAN Plan of Action for Energy Cooperation (APAEC) Phase 1: 2016-2020 and Phase II: 2021-2025


¹⁵⁴ Paragraph 6(vi), AEC Blueprint.

¹⁵⁵ Paragraph 9 (A.2.iv), ASEAN Socio-Cultural Community Blueprint 2025 (2015).

¹⁵⁶ Paragraph 14, ASEAN Economic Community Blueprint 2025 (2015).

¹⁵⁷ Paragraph 16 (C.1), ASCC.

¹⁵⁸ Paragraph 16 (C.2), ASCC.



confirmed the AMSs' commitment towards sustainability and clean or renewable energy. AMSs committed to develop a set of rules to support and promote the use of clean and/or related energy, as well as broader sustainability objectives and principles.

Moreover, in order to support the AEC Blueprint 2025 vision, AMSs formulated the ASEAN Minerals Cooperation Action Plan Phase I: 2016-2020 and Phase II: 2021-2025 to underscore the supporting role of the minerals sector in the AEC in stimulating and enhancing business and trade integration. Calls were made, in the Cooperation Action Plan, for the definition of ASEAN sustainable development and environmental, social and governance (ESG) standards. Efforts are also directed to boost minerals development, production, and trade, but to achieve these objectives while balancing them against the backdrop of increased sustainability by imposing environmental and social licensing requirements on operators.

3. Relevant Preferential Free Trade Agreements entered by ASEAN Member States

Various AMSs, such as Indonesia, Singapore and Viet Nam, have already entered into bilateral agreements with third countries or trading partners containing commitments or even a dedicated chapter on trade and sustainable development. If and when the ATIGA is updated to reflect commitments on trade and sustainable development, the agreements already entered into by several AMSs should be taken into consideration when negotiating and drafting the sustainability chapter or annex of the upgraded ATIGA.

3.1 Relevant Instruments on Trade and Labour


The European Union-Vietnam Free Trade Agreement (EVFTA) was signed on 30 June 2019 and entered into force in July 2020, five years after the ATIGA entered into force. Chapter 13 on Trade and Sustainable Development aims at promoting sustainable development, notably by fostering the contribution of trade- and investment-related aspects of labour and environmental protection. EU and Viet Nam both reaffirmed their commitment to promote the development of their bilateral trade in a way that is conducive to full and productive employment and decent work for all, including for women and young people.¹⁵⁹

The EU-Singapore Free Trade Agreement (EUSFTA), signed on 19 October 2018 and made effective in 2019, likewise contains a chapter on Trade and Sustainable Development, where the EU and Singapore reaffirmed their commitment to develop and promote international trade and bilateral trade and economic partnership in such a way as to contribute to sustainable development.

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)¹⁶⁰ is a trade agreement between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore, Vietnam. It was signed by the eleven countries on 8 March 2018 in Santiago, Chile and entered into force on 30 December 2018 (Australia, Canada, Japan, Mexico, New Zealand,

¹⁵⁹ Article 13.4, EU-Vietnam Free Trade Agreement (2019), retrieved from <https://trungtamwto.vn/upload/files/fta/196-chua-ky-ket/199-viet-nam--eu-evfta/248-noi-dung-hiep-dinh/13%20CHAPTER%2013%20Trade%20and%20Sustainable%20Development.pdf>.

¹⁶⁰ Comprehensive and Progressive Agreement for Trans-Pacific Partnership (2018), retrieved from <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/toc-tdm.aspx?lang=en>.



Singapore), on 14 January 2019 (Viet Nam), and 19 September 2021 (Peru), and sixty days after ratification (Brunei Darussalam, Chile, Malaysia). The CPTPP contains a Labour Chapter that promotes compliance with internationally-recognised labour rights, enhanced cooperation and consultation on labour issues, and effective enforcement of labour laws in CPTPP Parties. Specifically, CPTPP Parties are required to have laws governing acceptable working conditions of work relating to minimum wages, hours of work and occupational health safety.¹⁶¹

Finally, the Regional Comprehensive Economic Partnership Agreement (RCEP) is an ASEAN-led free trade agreement grouping the ten AMSs (*i.e.*, Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Viet Nam), and the five regional countries that ASEAN has free trade agreements with (*i.e.*, Australia, China, Japan, South Korea, and New Zealand. India also has a preferential trade agreement with ASEAN. But withdrew from RCEP negotiations).¹⁶² Signed on 15 November 2020, and entered into force on 1 January 2021, the RCEP does not contain a specific chapter on sustainable development, but mentions the commitments throughout the text: (a) The RCEP Preamble not only mentions sustainable development, but it further mentions that the three pillars of sustainable development (*i.e. economic viability, environmental protection, and social equity*) are interdependent and mutually reinforcing, and that economic partnership can play an important role in promoting sustainable development.¹⁶³

In terms of labour commitments, the RCEP tries to accommodate the capability gap among its members in pursuing the SGD as a Member's level of development could profoundly impact its capability and effectiveness in using trade and investment policies in promoting sustainable development. For instance, it has been observed that some developing Members States and least developed Member States adopt low national environmental or labour standards with a purpose to attract foreign investment. It was, thus, necessary for the RCEP to accommodate development gaps among its members in pursuing the SDGs, in line with their state of development. The preamble makes mention and allows for "*special treatment*" for the developing or least developed Members.

3.2 Relevant Instruments on Trade and the Environment

EU and Viet Nam, in the recently-signed EVFTA, likewise recognise the value of multilateral environmental governance and agreements as a response of the international community to environmental challenges and stress the need to enhance the mutual supportiveness between trade and environment.¹⁶⁴ Further, the EVFTA also contains a chapter on Non-Tariff Barriers to Trade and Investment in Renewable Energy Generation which contains specific rules for the renewable energy sector on non-discriminatory treatment in licensing and authorisation procedures.

Moreover, Chapter 12 of the EUSFTA confirms that the EU and Singapore recognise the value of international cooperation and agreements on employment and labour affairs as a response of the international community to economic, employment, and social challenges and opportunities resulting from globalisation.¹⁶⁵


¹⁶¹ Chapter 19, CPTPP.

¹⁶² Regional Comprehensive Economic Partnership Agreement, retrieved from <https://rcepsec.org/legal-text/>.

¹⁶³ Preamble, RCEP.

¹⁶⁴ Article 13.5, EVFTA.

¹⁶⁵ Article 12.3, EU-Singapore Free Trade Agreement (2018), retrieved from https://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151766.pdf.



The Partnership Cooperation Agreement between the European Union and the Republic of Indonesia, signed on 26 April 2014, affirmed the Parties' desire to promote economic and social progress for their peoples, taking into account the principle of sustainable development and environmental protection requirements.¹⁶⁶ Commitments on eco-friendly tourism¹⁶⁷, affordable access to energy and sustainable energy production,¹⁶⁸ conservation and management of natural resources in a sustainable manner¹⁶⁹ were declared and codified in the text.

On 16 December 2018, the European Free Trade Association (EFTA) and Indonesia entered into a Comprehensive Partnership Agreement (CEPA) to provide access for major export products such as fish and marine products, agricultural and food industry products, industrial and technical products, chemicals, and pharmaceuticals. In addition to the usual free trade chapters on trade in goods and services, investment, intellectual property rights, and government procurement, the EFTA-Indonesia CEPA contains a Chapter on Trade and Sustainable Development. This chapter addresses the Parties' obligations on environmental protection, fundamental rights of workers, sustainable forest management, as well as sustainable management of the vegetable oils sector and of trade in products thereof.¹⁷⁰

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) also yielded outcomes and a chapter on the environment, which aims at promoting sustainable development through mutually supportive trade and environmental policies, and to achieve higher levels of environmental protection in CPTPP countries. The CPTPP recognises that international environmental agreements play an important role in protecting the environment, and that implementation of these agreements is critical for them to be effective. The CPTPP also recognises that trade and environmental policy, including international trade and environmental agreements, should be mutually supportive. Further, the CPTPP Environment Chapter requires CPTPP Parties to take measures to control production, consumption and trade of certain substances that can significantly deplete or otherwise modify the ozone layer.¹⁷¹

The Agreement Between the European Union and Japan for an Economic Partnership (EU-Japan FTA) is also a good model to consider as it contains the most progressive and comprehensive provisions for a chapter on trade and sustainable development. The EU-JAPAN FTA provides that the Parties recognise full and productive employment and decent work for all as key elements to respond to economic, labour, and social challenges. It also recommended that Parties further recognise the importance of promoting the development of international trade in a way that is conducive to full and productive employment and decent work for all. Moreover, the following internationally recognised principles concerning the fundamental rights of workers are itemised:

- (a) Freedom of association and the effective recognition of the right to collective bargaining;

¹⁶⁶ Preamble, Partnership Cooperation Agreement between the European Commission and the Republic of Indonesia (2014), retrieved from <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/d9e40005-57d1-4e2e-8afb-353f3cff22c8/details>.


¹⁶⁷ Article 17, Partnership Cooperation Agreement.

¹⁶⁸ Article 23, Partnership Cooperation Agreement.

¹⁶⁹ Article 26, Partnership Cooperation Agreement.

¹⁷⁰ Chapter 8, EFTA-Indonesia Comprehensive Partnership Agreement (2018), retrieved from <https://www.efta.int/sites/default/files/documents/legal-texts/free-trade-relations/indonesia/efta-indonesia-main-agreement.pdf>.


¹⁷¹ Chapter 20, CPTPP.

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- (b) Elimination of all forms of forced or compulsory labour;
 - (c) Effective abolition of child labour; and
 - (d) Elimination of discrimination in respect of employment and occupation.

Moreover, the EU-Japan FTA provided for the following commitments in balancing trade with sustainable development:

- (a) Parties should not encourage investments by relaxing their own levels of environmental protection;
- (b) To ensure effective environmental protection, Parties shall not derogate from environmental laws, regulations, and measures to promote trade;
- (c) Procedures and arrangements are to be established to ensure public participation, notably by providing opportunities to comment on environmental laws, regulations, measures, and policy making, as well as by means of regulatory transparency obligations;
- (d) Parties recognise the importance of multilateral environmental agreements and shall improve the implementation of the agreements to which they are both contracting Parties, fulfilling their obligations under these agreements;
- (e) Requests Parties to conduct regular and irregular reviews and assessment of the environmental impact of the FTA;
- (f) Parties recognise the importance of the principles concerning fundamental rights at work, decent work for all, and fundamental values of freedom, human dignity, social justice, security and non-discrimination for sustainable economic and social development and efficiency, as well as the importance of seeking better integration of those principles into trade and investment policies;
- (g) Parties shall strive to facilitate and promote trade and investment in environmental goods and services, in a manner consistent with the FTA;
- (h) Parties shall strive to facilitate trade and investment in goods and services of relevance to climate change mitigation, such as those related to sustainable renewable energy and energy efficient goods and services, in a manner consistent with the FTA; and
- (i) Parties shall strive to promote trade and investment in goods that contribute to enhanced social conditions and environmentally sound practices, including goods that subject to labelling schemes, and recognise the contribution of other voluntary initiatives, including private ones, to sustainability.

Finally, and while the Regional Comprehensive Economic Partnership Agreement (RCEP) does not contain a specific chapter on sustainability, its Investment Chapter provides that covered investments



shall be accorded fair and equitable treatment and full protection and security,¹⁷² interests of which are closely linked with several SDGs such as affordable and clean energy as well as peace, justice, and strong institutions. Clearly, and while the provisions of the RCEP are helpful in pursuing the SDGs, its effectiveness will likely be limited, due to the lack of a chapter on commitments on sustainability.


The same can be said for the current ATIGA which can be helpful but cannot fully operationalise or monitor commitments to or improvements made to achieve SDGs. A stand-alone Trade and Sustainable Development chapter or annex of the upgraded ATIGA, dealing exclusively with environmental and labour rights issues, would go a long way towards the development of a monitoring and enforcement mechanism in ensuring that sustainable development is indeed a vision to be achieved by AMSs.

4. Key Takeaways from Roundtable Discussions

During the Roundtable Discussions on Trade Facilitation organised by ARISE Plus, the representatives of the ASEAN private sector endorsed the recommendations put forward in this Policy Brief and provided several inputs that AMSs should take into consideration when designing regional strategies and initiatives for balancing trade openness with social and environmental protection, particularly within the context of the ATIGA Upgrade. The following issues were highlighted by the ASEAN private sector:

- (a) Trade and sustainable development, particularly in relation to climate change mitigation and environmental protection, is increasingly a big concern for ASEAN firms. This entails substantial compliance and transition costs for businesses, hindering MSMEs from meaningfully participating in cross-border trade. Nonetheless, this is an important emerging topic that should be covered in the ATIGA Upgrade.
- (b) At the regional level, ASEAN companies have only started to disclose their socio-environmental initiatives to shareholders. Regulatory drivers have only been imposed by AMSs quite recently and there are still improvements to be made in non-critical industries. In sectors such as mining and minerals, where the environmental sustainability of business practices are recognised concerns, companies are subjected to fragmented national and regional guidelines for assessing and reporting.
- (c) Moreover, sustainability reporting and other compliance or regulatory requirements appear to overwhelm small producers and small communities. This is especially a concern for micro, small, and medium-sized enterprises (MSMEs), small-holder farmers, labourers in the informal sector, and other vulnerable groups.
- (d) ASEAN should agree on a unified strategy towards trade and sustainability matters, particularly towards green growth. AMSs should adopt and implement coherent and harmonised regulations and standards, based on international best practices, so as to facilitate compliance of businesses, especially MSMEs.

¹⁷² Article 10.5, RCEP.

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- (e) Capacity building initiatives should be institutionalised in order to bridge the market access gap among AMSs and enterprises.

5. Conclusions and Recommendations on a Proposed Trade and Sustainable Development Chapter or Annex in the ATIGA

In 2010, when the ATIGA entered into force, most preferential trade agreements did not have a chapter on sustainable development. However, and due to issues on climate change and the growing recognition that trade and regional economic developments must be balanced with commitments on the peoples' general welfare, most free trade agreements have since included texts on sustainability.

Including a sustainability chapter or annex in the upgraded ATIGA would reflect a cooperative approach on trade and put an emphasis on policy coherence. This amendment would confirm the recognition in the AEC and ASCC Blueprints 2025 that economic development, social development, and environmental protection are interdependent and mutually supportive components of international trade and sustainable development.

The enhancements as recommended in Section 3, could form part of a Second Protocol to Amend the ATIGA, to be signed by all AMSs (Second Protocol). The following sub-chapters recommendations are made, taking into consideration the current and existing obligations of ASEAN under the relevant ASEAN instruments and other preferential trade agreements it has entered, either by some of its AMSs or as a region.¹⁷³

5.1 Objectives and Scope

The context and objectives of the proposed chapter on trade and sustainable development of the upgraded ATIGA could include an inventory of all the universal commitments on sustainable development entered by AMSs (i.e., *SDGs*, *ILO Declarations on the Fundamental Principles and Rights at Work*), as well as of the commitments and obligations contained in the relevant ASEAN instruments and in various preferential trade agreements entered into individually by AMSs.


The vision in the ASEAN Charter, as well as the ASCC and AEC Blueprints 2025, to ensure sustainable development for the benefit of present and future generations and to place the well-being, livelihood, and welfare of the peoples at the centre of the ASEAN community building process,¹⁷⁴ would be a good starting point for the proposed chapter on trade and sustainability of the upgraded ATIGA.

5.2 Trade and Sustainable Development: Labour Standards and Labour Cooperation

Article 16.3 of the EU-Japan FTA is a good model to follow for incorporating labour standards and conventions in the proposed additional chapter, annex, or workplan of the upgraded ATIGA, as it would allow to summarise the commitments made under the ASEAN Labour Ministers' (ALM) Work Programme 2021-2025, the EVFTA, EUVFTA, and CPTPP. The codification and listing of the rights are

¹⁷³ See Article 94(1) of the ATIGA which allows for amendments as mutually agreed upon in writing by Member States.

¹⁷⁴ Preamble, ASEAN Charter (2008).



essential in making sure that there is policy coherence across all AMSs and for purposes of enhancing the monitoring and compliance requirements.

5.3 Trade and Sustainable Development: Environmental Aspects

Article 16.4 of the EU-Japan FTA is a good model to follow for incorporating environmental obligations in the proposed additional chapter, annex, or workplan of the upgraded ATIGA, as it would allow to summarize the commitments made under the ASCC Blueprint, various environmental-related ASEAN instruments, the EUSFTA, EVFTA, the CPTPP, and the RCEP. The proposed model text stresses the importance of multilateral environmental agreements, those to which the parties are signatories to, as a means of multilateral environmental governance for the international community to address global or regional environmental challenges. Moreover, specific recognition should be given in the upgraded ATIGA to the need for AMSs to address the urgent threat of climate change, and the role that intra-ASEAN trade could play to that end.

5.4. Trade and Sustainable Development on Investment

Finally, the upgraded ATIGA should also be updated to recognise the importance of enhancing the contribution of trade and investment to the goal of sustainable development in its economic, social, and environmental dimensions. The new chapter on Trade and Sustainable Development could contain provisions that strive to promote trade and investment in goods that contribute to enhanced social conditions and environmentally sound practices, including goods that are the subject of labelling schemes, and it should recognise the contribution of other voluntary initiatives, including private ones, to sustainability.

In conclusion, the addition of provisions on trade and sustainable development in the upgraded ATIGA appears to be a priority for ASEAN. Various provisions of key ASEAN instruments and of other related or relevant international instruments have shown that not only new provisions on environmental, social and labour protection commitments or standards have been added, but also that the monitoring and implementation of such commitments has been strengthened by the newly introduced possibility of establishing a panel of experts to make recommendations towards the resolution of any issue that may arise. While the latter development (*i.e.*, enforcement and compliance disciplines in the area of trade and sustainable development) may be premature for ASEAN and for the upgraded ATIGA, AMSs should consider the possibility that such instruments be eventually adopted and applied vis-à-vis specific obligations on trade and sustainable development, if not the entire Chapter.

Consistently reviewing the ATIGA and adding concrete commitments on trade and sustainable development is one way in which AMSs can contribute to realizing the vision in the ASEAN Charter.

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Annex
Summary of Key Issues and Recommendations

ISSUES	RECOMMENDATIONS
1. Regulatory Transparency and Private Sector Engagement	
<ul style="list-style-type: none"> ATIGA's notification provision (Article 11) focuses on an AMS' self-declaration of its NTBs 	<ul style="list-style-type: none"> Address this 'textual flaw' by changing the wording from 'NTB' to 'NTM' (i.e., no judgement on the legitimacy of the measure)
<ul style="list-style-type: none"> Weak compliance/ implementation of ATIGA commitments by AMSs (e.g., delayed notification and publication of new regulations, ATR still 'work in progress') 	<ul style="list-style-type: none"> Adopt a 'name and shame' ranking system, similar to the World Bank's Ease of Doing Business (EoDB), where the number of notifications submitted by AMSs to ASEAN will be reflected. This could improve AMSs' compliance with their transparency obligations. Apply the 'reverse-burden-of-proof' mechanism, where AMSs may have to prove the consistency of their 'unpublished' measures with the applicable ATIGA obligations and commitments. This aims at deterring AMSs from neglecting their duties to submit notifications of new measures and to ensure that the ATR is continuously and timely updated with their newly adopted measures (sustainability effects).
<ul style="list-style-type: none"> Lack of business awareness on the ATR and its benefits 	<ul style="list-style-type: none"> Institutionalise the holding of regular outreach sessions on the ATIGA trade facilitation mechanisms, including the ATR, for businesses both at the regional and national levels to raise the level of business awareness and usage.
<ul style="list-style-type: none"> Lack of/weak/ineffective private sector engagement 	<ul style="list-style-type: none"> Establishment of a real-time notification alert system, similar to the WTO's <i>ePing</i>. Increase the use of the bespoke '<i>e-Platform</i>' for ASEAN Consultations with the Private Sector. Private sector's statements pre- and post- each AMS's decision-making process.
2. Streamlining of Non-Tariff Measures (NTMs) and Removal of Non-Tariff Barriers (NTBs)	
<ul style="list-style-type: none"> Diverging technical requirements and standards applied by AMSs 	<ul style="list-style-type: none"> Streamlining of NTMs and removing NTBs as a key component of ASEAN's trade facilitation strategy: <ul style="list-style-type: none"> Align with international best practices and standards and adopt MRAs on specific sectors/products (i.e., sectoral approach), e.g., halal, food and beverage sector.
<ul style="list-style-type: none"> Weak compliance/ implementation of ATIGA commitments to address NTBs and/or the barrier components of NTMs (e.g., transparency, flow of information, regular review) 	<ul style="list-style-type: none"> Strengthen implementation of ATIGA commitments on the removal of NTBs and streamlining of NTMs: <ul style="list-style-type: none"> Implement the NTM Guidelines, particularly the following: <ul style="list-style-type: none"> Distinguish and specify 'permissible' NTMs from 'prohibited' ones;

ISSUES	RECOMMENDATIONS
	<ul style="list-style-type: none"> - Criteria in assessing the presence of NTBs (whether compliant with ATIGA/WTO, whether applied equally to domestic and imported products, whether they have restrictive, distortive or discriminatory trade impacts on other AMSs, and whether they address any market failure); and - Conduct ex-ante and ex-post consultations and reviews on the design and application of NTMs. ○ AEC 2025 Trade Facilitation Strategic Action Plan: <ul style="list-style-type: none"> - ‘Cross-notification’ procedure among AMSs (to enhance ATIGA Article 11); - Explore inclusion of ‘standstill’ and ‘rollback’ commitments for measures relevant to trade facilitation to lock-in AMSs’ commitments on trade liberalization and promote greater regulatory predictability and stability; - A platform enabling ASEAN’s private sector to report disproportionate NTMs or NTBs (e.g., ASSIST) - Strengthen the role and function of NTFCCs through the inclusion of a regulatory oversight function. ● Adopt measures that give rise to a trade facilitative regime in ASEAN: <ul style="list-style-type: none"> ○ Adopt stringent criteria and sunset clauses on trade-protective NTMs; ○ Embed good regulatory practices (GRPs) in the implementation of domestic regulations and practices; ○ Strengthen coordination with ASEAN’s private sector in determining, prioritizing and minimizing unnecessary regulatory burdens of NTMs to the private sector; and ○ Periodic review of NTMs, through regulatory impact assessments (RIAs), to assess positive negative effects of existing and proposed new NTMs in order to minimise or eliminate trade-distorting effects: <ul style="list-style-type: none"> - Ex-ante review to ensure that the proposed new NTM is necessary and proportional (i.e., principle of ‘necessity and proportionality’); and - Ex-post review to determine whether existing NTM remains relevant in addressing public interests.
<ul style="list-style-type: none"> ● Lack of consultative mechanism between governments and the private sector 	<ul style="list-style-type: none"> ● Ex-ante and ex-post consultations and reviews as part of good regulatory practices (GRPs): <ul style="list-style-type: none"> ○ Conduct regular and continuous stakeholder consultations to obtain inputs; ○ AMSs must provide adequate opportunity and timeframe for relevant stakeholders to provide comments on proposed draft NTMs; and ○ Review of NTMs to include specific dialogue and consultative mechanism (e.g., RCEP, Indonesia-Australia CEP).
3. Agricultural Trade and SPS Facilitation	
<ul style="list-style-type: none"> ● Weak implementation of existing ATIGA commitments by AMSs in relation to addressing SPS issues ● Although ATIGA SPS Chapter aims at facilitating trade while providing the level of adequate protection, in practice, 	<ul style="list-style-type: none"> ● Strengthen implementation of existing ATIGA mechanisms to address SPS issues: <ul style="list-style-type: none"> ○ Transparency, notification, technical cooperation; ○ Uphold the principles and application of the WTO SPS Agreement in the upgraded ATIGA; and ○ Enhance the role and responsibilities of the AC-SPS to ensure effective implementation of the ATIGA SPS Chapter. ● Conduct regular/periodic review of SPS measures applied by AMSs, with the aim of streamlining and simplifying the documentary requirements and procedures in the implementation of SPS measures.

ISSUES	RECOMMENDATIONS
<p>several SPS procedural measures appear to hinder trade flow in ASEAN (i.e., procedural obstacles to trade)</p>	<ul style="list-style-type: none"> • Allow technical consultations to resolve issues in specific sectors (i.e., sectoral approach) between Parties • Allow active participation of the private sector to provide inputs/comments by institutionalising consultations/dialogues.
<ul style="list-style-type: none"> • Address emerging SPS issues 	<ul style="list-style-type: none"> • Recognise the importance and address the emerging issues in relation to SPS, such as antimicrobial resistance (AMR), which threatens animal health, food safety and food security, economic prosperity, and ecosystems worldwide, in the ATIGA upgrade. • Strengthen existing SPS-related provisions in the ATIGA by including more progressive commitments included in some PTAs/FTAs, e.g., on 'regionalisation' (e.g., Malaysia-New Zealand FTA, EUSFTA, RCEP), on 'pre-listing' (e.g., EUVFTA), and on 'equivalence' (e.g., RCEP, New Zealand-Singapore FTA). • Facilitate safe trade through digitalisation by: <ul style="list-style-type: none"> ○ Enhancing the relevant ATIGA chapters to accelerate implementation of electronic Phytosanitary (e-Phyto) certificate and electronic Animal Health (e-AH) certificate, through the ASW platform, to facilitate cross-border trade within ASEAN and its trading partners; and ○ Leveraging digital technology to improve traceability throughout the SPS supply chains, and through paperless SPS systems that can reduce trade costs and lower fraudulent certificates.
<h4>4. Non-Agricultural Trade and TBT Facilitation</h4>	
<ul style="list-style-type: none"> • Weak implementation of existing ATIGA commitments by AMSs in relation to addressing TBT issues • Several TBT procedural measures appear to hinder trade flow in ASEAN (i.e., procedural obstacles to trade) 	<ul style="list-style-type: none"> • Review the roles and responsibilities of relevant ASEAN bodies in relation to the STRACAP Chapter to avoid overlapping duties and strengthen the implementation of ATIGA TBT-related commitments: <ul style="list-style-type: none"> ○ The ACCSQ was formed by the ASEAN Economic Ministers (AEM) in 1992. To date, ASEAN established 13 ASEAN bodies comprising sectoral committees, working groups, and product workings groups under the ACCSQ to address and/or implement specific measures on STRACAP and to make the necessary recommendations related to ACCSQ's objectives. The review of the ACCSQ TOR could help avoid the overlapping duties of the relevant bodies and to ensure the efficient implementation of the upgraded STRACAP Chapter of the ATIGA. • Reflect/incorporate relevant thrusts under the ACCSQ Strategic Plan 2016-2025. • Accelerate implementation of MRAs through like-minded approaches to expedite the process and address pressing TBT issues.
<ul style="list-style-type: none"> • Further enhancement of existing provisions/mechanisms to address existing and emerging TBT issues 	<ul style="list-style-type: none"> • Address TBT issues in specific priority/essential sectors/products (i.e., sectoral approach) by incorporating sector-specific provisions/annexes to allow AMSs to find tailored, more precise and targeted solutions to certain sector-specific issues. This approach of dedicated rules and working groups for key sectors/products has been included in some PTAs/FTAs (e.g., New Zealand-Singapore CEPA, Singapore-Australia FTA, EUVFTA, CPTPP).


ISSUES	RECOMMENDATIONS
	<ul style="list-style-type: none"> • Adopt more progressive commitments included in some PTAs/FTAs, e.g., on ‘equivalence’ (CPTPP, RCEP, New Zealand-Singapore CEPA), and on technical regulations, cooperation and contact points (RCEP). • Specific areas could be considered for additional MRAs (e.g., halal certification).
5. Dispute Avoidance and Dispute Settlement	
<ul style="list-style-type: none"> • Weak implementation of dispute avoidance provisions under the ATIGA 	<ul style="list-style-type: none"> • Improve existing mechanisms in the ATIGA for dispute avoidance: <ul style="list-style-type: none"> ○ Enhance transparency in the process of early notification and offering more time for other AMSs to comment on the proposed draft regulation; ○ Develop the practice and procedure of raising specific trade concerns within respective ASEAN Sectoral Bodies; and ○ Ensure full operationalisation and greater utilisation of the ASSIST platform.
<ul style="list-style-type: none"> • Non-implementation of ASEAN dispute settlement mechanism 	<ul style="list-style-type: none"> • Other approaches to consider for the purpose of ASEAN dispute settlement: <ul style="list-style-type: none"> ○ AMSs could consider introducing a ‘snapback clause’, which could be applied to certain sectors/products (i.e., sectoral approach), to improve the implementation and enforcement of certain elements of the ATIGA; ○ The ‘snapback clause’ would need to be carefully constructed and could be linked to formal dispute settlement proceedings or be de-coupled from them, in line with the ‘ASEAN way’; ○ AMSs should ‘beef up’ the use of ASEAN dispute settlement mechanisms, as there is growing evidence of countries starting to rely on dispute settlement under bilateral/regional PTAs. This will also address the weak implementation of ATIGA commitments to promote regulatory transparency and address non-tariff concerns/challenges of ASEAN traders, which were raised in previous topics (under items 1 and 2 above).
6. ‘ASEAN Centrality’ and Rules of Origin (ROO)	
<ul style="list-style-type: none"> • Divergent ROO across the ATIGA and ASEAN+1 FTAs; discrepancies found in PSRs, as well as in regime-wide rules and operations procedures 	<ul style="list-style-type: none"> • Establish a uniform set of ROO through gradual harmonization or convergence of PSRs across the ATIGA and ASEAN+1 FTAs, which can be applied to specific sectors/products (i.e., sectoral approach). This will address ‘noodle bowl’ complexities and maintain ‘ASEAN centrality’. • Undertake a comprehensive review of the ROO used/applied for each sector towards harmonization across ASEAN’s FTAs. • PSRs at the 4-digit level (e.g., RCEP) could be applied in the ATIGA and ASEAN+1 FTAs to reduce the number of rules and mitigate the impact of changes in later HS versions. • Possible harmonization of non-preferential ROO in the ASEAN region.
<ul style="list-style-type: none"> • ASEAN’s ROO may have substantial trade-inhibiting effect, which peaks in 	<ul style="list-style-type: none"> • Restructure ATIGA to cater for more sectoral needs by having chapters and annexes dedicated to certain priority/essential sectors (i.e., sectoral approach). This will be more feasible/practical (given that the earlier attempt to harmonise ROO/PSRs failed).

ISSUES	RECOMMENDATIONS
sectors that matter for the development of least developed AMSs	<ul style="list-style-type: none"> • Simplify and streamline ROO in light industries (e.g., textile and apparel, footwear, prepared food products), as part of ASEAN's economic development and poverty reduction strategy. • Consider making modifications to the ATIGA OCP to allow for a possible use of a periodic (e.g., quarter or annual) CO Form D for the same trader.
<ul style="list-style-type: none"> • Non-inclusion in the ATIGA and in the ASEAN+1 FTAs of regime-wide provisions commonly found in new generation FTAs and partly introduced into RCEP 	<ul style="list-style-type: none"> • Enhance existing commitments and introduce innovative features to modernise rules in the ATIGA: <ul style="list-style-type: none"> ○ Include more detailed rules and commitments related to specific aspects of ROO, such as to the concept of 'Non-Alteration' and 'Sets of Goods'; ○ Include provisions that allow importers to apply for post-importation claims for preferential tariff and the competent authority of the importing Party to reach out directly to the importer, exporter, or producer for additional information for the purposes of verification; ○ Revise the RVC provision so that traders could have more flexibility in selecting their preferred method of RVC (build-up or build-down); and ○ Consider extending the possibilities related to outward processing.
<ul style="list-style-type: none"> • The ATIGA and most ASEAN+1 FTAs apply at the same time a general rule to determine origin (<i>i.e.</i>, "RVC40/CTC") for all goods not listed in the annexes, causing inconvenience/confusion to traders in identifying the applicable rule 	<ul style="list-style-type: none"> • Adopt a single list of PSRs covering all HS chapters (e.g., RCEP) in the ATIGA and ASEAN+1 FTAs to enhance transparency, consistency, and thus 'ASEAN centrality'.
<ul style="list-style-type: none"> • Some PSRs in the ATIGA are less liberal compared to those in the RCEP and some ASEAN+1 FTAs 	<ul style="list-style-type: none"> • Adopt full cumulation in the ATIGA to pave the way for deeper regional integration. • In the long run, AMSs should adopt even more liberal cumulation options, such as those within bilateral FTAs between individual AMSs and third countries.
7. ASEAN Supply Chain Connectivity	
<ul style="list-style-type: none"> • NTMs increased sharply, despite the commitments made to reduce them or at least streamline them • Several long-standing issues (LSIs) discussed in CCA that have yet to be resolved through negotiations, indicating that the current approach is not working; but there is also little interest among AMSs to address these 	<ul style="list-style-type: none"> • Strengthen implementation of existing ATIGA commitments and utilisation of related mechanisms (similar to recommendations in mentioned in previous topics, <i>i.e.</i>, items 1 to 5). • Streamline NTMs and eliminate NTBs, as a strategy to foster regional supply chains, but calls for a reform of current mechanisms on notifying and handling such measures. • Establish more formalized approaches to identify NTBs, e.g., reported possible NTBs to be reviewed by an adjudicating panel of independent experts under the EDSM applying the criteria specified under the ASEAN NTM Guidelines (whether compliant with ATIGA/WTO, whether applied equally to domestic and imported products, whether it has restrictive, distortive or discriminative trade impact on other AMSs, and whether it addresses any market failure). WTO's experience

ISSUES	RECOMMENDATIONS
<p>issues through ASEAN's Enhanced Dispute Settlement Mechanism (EDSM)</p> <ul style="list-style-type: none"> Other mechanisms to resolve trade-related issues, e.g. ASSIST not widely used to eliminate NTBs and provide timely solutions 	<p>in using the dispute settlement mechanism to tackle NTBs within the multilateral trading system sets a good example for ASEAN.</p> <ul style="list-style-type: none"> Once NTBs have been identified/reported, AMSs need to effectively manage their removal. Beyond targeted and time-bound NTB reduction commitments, AMSs need to develop clearer procedures and institutional frameworks for tracking the elimination of identified NTBs. ATIGA's Chapter 7 and 8 on NTMs should be expanded to include fortified obligations on removing NTBs by establishing follow-up processes to ensure compliance and to hold non-compliant AMSs accountable. Encourage active participation by the private sector in policy-making processes by institutionalizing regular consultations/dialogues.
<ul style="list-style-type: none"> Implementation of trade facilitation measures remains heterogeneous across AMSs. In particular, cross-border paperless trade implementation and the use of inclusive trade facilitation measures to foster SMEs and women participation in trade remained low Slow progress in the implementation of initiatives related to release and clearance formalities (e.g., the ASW, AWSC, AEO) due to underperformance of NTFCs or AMSs' competent agencies Many AMSs still do not have an integrated automated risk management system with a national risk management framework, and their NSW implementation still in early stages 	<ul style="list-style-type: none"> To enhance supply chain connectivity through improved trade facilitation, utilisation of existing mechanisms (e.g., ATR, ASW, AWSC, ACTS) should be further improved, particularly by making them more accessible to the private sector (outreach program, capacity-building). Moreover, these initiatives will only yield desirable outcomes if they are adequately implemented by all AMSs, and if the private sector sees value in them in terms of reliability and accuracy of information, effectiveness of solutions and actual trade facilitation. Organise more information dissemination and capacity building activities. Reduce the responsibility of exporters/producers in complying with the ATIGA ROO under the AWSC. ATIGA's Trade Facilitation Chapter should incorporate key initiatives/standards covered in WTO's Trade Facilitation Agreement (TFA), which are also included in the RCEP. Encourage active participation by the private sector in policy-making processes by institutionalizing regular consultations/dialogues. Incorporate digitalisation and sustainability elements/aspects to further strengthen ASEAN supply chain connectivity.
8. 'New Generation' PTAs and ATIGA's Structural Reform	
<ul style="list-style-type: none"> ATIGA's coverage and substantive scope limited to traditional trade concerns, progressively affecting ASEAN centrality and not reflecting transparently the 	<ul style="list-style-type: none"> The ATIGA is envisaged as a 'living document' that requires periodic review and updating to retain its relevance and responsiveness to the changing business and trade practices and vis-à-vis the evolving regional economic architecture. The AEC Blueprint also mandates to engage in other key regulatory areas.

ISSUES	RECOMMENDATIONS
<p>wealth of ASEAN instruments that have been adopted which ASEAN traders should be aware of</p>	<ul style="list-style-type: none"> • ATIGA provisions should be reviewed and upgraded to include relevant instruments adopted in relation to ATIGA provisions (e.g., ASEAN Cosmetic Directive, ASEAN E-commerce Agreement, MRAs) 'new and emerging FTA issues' (e.g., e-commerce, gender, competition policy, state-owned enterprises, public procurement, trade and sustainable development) using as basic references ASEAN's more recent trade agreements (e.g., RCEP) and new mega-regional trade agreements where some AMSs are Parties to (e.g. CPTPP, IPEF). • AMSs should also consider developing specific sector/product/topic-specific annexes, which would allow to find tailored solutions to certain developing issues in priority/essential sectors (e.g., food, healthcare), delivering trade facilitation in a more precise and targeted manner.
<ul style="list-style-type: none"> • Lack of awareness on the structure and mechanisms in the implementation of the ATIGA, as a result of the lack of administrative updating of relevant instruments adopted pursuant to the provisions of the ATIGA/regulations and overlapping trade in goods and trade facilitation 	<ul style="list-style-type: none"> • There is a need for a structural reform in the upgrade of the ATIGA: <ul style="list-style-type: none"> ○ The ATIGA provides several approaches with respect to its modifications and amendments as follows: <ul style="list-style-type: none"> (i) Extend the scope of the ATIGA through the modification of its main text [Article 94(1)]; (ii) Incorporate future legal instruments into the ATIGA [Article 93(2)]; and (iii) Amend ATIGA annexes/attachments and administratively update such amendments into the ATIGA [Article 94(2)]. ○ In addition, all future legal instruments, adopted by AMSs that relevant to trade in goods and trade facilitation, should have a built-in provision that requires the administrative updating of such instruments into dedicated sector/product/topic-specific annexes of the ATIGA. • Such mechanisms will enhance the business sector's greater awareness on the ATIGA implementation, and better understanding and ease of reference on specific disciplines applicable to a particular sector.
<p align="center">9. 'Digitalisation and E-commerce Facilitation'</p>	
<ul style="list-style-type: none"> • ATIGA Trade Facilitation Chapter recognizes that continuous modernization is a core principle of trade facilitation. However, it has not been updated to reflect the current state of technology and transactions made digitally 	<ul style="list-style-type: none"> • Update the ATIGA taking into account changed circumstances, new information, and new business practices, and to leverage modern techniques and digital technology to facilitate intra-ASEAN trade. • Enhancements on digitalisation and e-commerce facilitation in the ATIGA could form part of an additional and dedicated chapter or as an attached annex. • The ATIGA should also refer to the ASEAN E-commerce Agreement and its Work Plan, particularly on matters concerning cross-border e-commerce transactions of goods.
<ul style="list-style-type: none"> • Lack of policy coherence on cross-border e-commerce transactions among AMSs; e-commerce transactions are governed in some ASEAN FTAs (e.g., AANZFTA, 	<ul style="list-style-type: none"> • Update the ATIGA to harmonize e-commerce provisions of all relevant e-commerce-related agreements/documents (i.e., E-ASEAN Framework Agreement, the various ASEAN Work Programmes on Electronic Commerce, the ASEAN Digital Integration Framework Plan, and the ASEAN Agreement on Electronic Commerce and its Work Plan).

ISSUES	RECOMMENDATIONS
<p>RCEP) and in FTAs where AMSs are Parties to (e.g., CPTPP, EUVFTA) but not in the ATIGA</p>	<ul style="list-style-type: none"> Consider best case practices contained in internationally adopted model laws, conventions, principles, or guidelines in amending the regulatory framework of the ATIGA to be able to adequately support e-commerce transactions. Paperless trading initiatives can also be considered. Include in the ATIGA and harmonize e-commerce provisions across ASEAN FTAs using other FTAs provisions (e.g., AANZFTA, RCEP, CPTPP, EVFTA) as basic reference to ensure that intra-ASEAN and global digital trade is done in a coherent and streamlined manner.
<ul style="list-style-type: none"> Consumer protection for e-commerce within and outside ASEAN remains a concern 	<ul style="list-style-type: none"> Updating the ATIGA is a good step in building an ecosystem of trust in e-commerce transactions. In particular, provisions on the adoption or maintenance of a legal framework incorporating international standards and principles that ensure the protection of personal information of e-commerce consumers/users should be considered. This should include setting up a mechanism to manage risks (e.g., fraud, deceptive practices) and ensure the legitimacy of cross-border e-commerce transactions, including compliance with product safety and quality standards, in the ASEAN region. Competition policy must also be revisited to consider the complex and rapidly developing digital age. Institutionalise capacity building activities on digital trade and e-commerce regulatory aspects in order to enhance cooperation and harmonise domestic legislations among AMSs.
<ul style="list-style-type: none"> Implementation gaps within AMSs and between smaller players 	<ul style="list-style-type: none"> The upgraded ATIGA should recognize the different levels of development across AMSs, which is also highlighted in the ASEAN E-commerce Agreement. Institutionalise capacity building initiatives in order to bridge the market access gap among AMSs and enterprises, such as in the areas of data protection and privacy or cybersecurity, to ensure that MSMEs can participate in cross-border e-commerce trade.
<p align="center">10. 'Trade and Sustainable Development'</p>	
<ul style="list-style-type: none"> No specific chapter/provisions in the ATIGA on Trade and Sustainable Development as a policy tool to balance trade openness with social and environmental objectives or for dealing with labour and environmental issues. 	<ul style="list-style-type: none"> AMSs should acknowledge that increased economic transactions between and among nations and regions require that trade and investment mutually support environmental protection, social development, and do not come at the expense of the environment or of labour rights. The ATIGA should be upgraded to expressly contain sustainability-related aspects and provisions, recognizing the emerging awareness and concern among AMSs of the importance of sustainability within the context of deepening regional integration, so as to better cope with and recover more quickly from global shocks such as the COVID-19 pandemic. Such principles, levels of commitment, and approaches will assist AMSs in framing their negotiations with third countries through a harmonized approach, negotiate for or contain consistent concessions, and maintain or raise a high ASEAN benchmark for sustainable development in the context of trade.



ISSUES	RECOMMENDATIONS
	<ul style="list-style-type: none"> Enhancements on trade and sustainable development in the ATIGA can form part of an additional and dedicated chapter or as an attached annex.
<ul style="list-style-type: none"> No policy coherence among AMSs in terms of trade and sustainable development 	<ul style="list-style-type: none"> Include a sustainability chapter or annex in the upgraded ATIGA to reflect a cooperative approach on trade and put an emphasis on policy coherence. This would also confirm the recognition in the AEC and ASCC Blueprints 2025 that economic development, social development, and environmental protection are interdependent and mutually supportive components of international trade and sustainable development. Other PTAs/FTAs, where some AMSs are Parties to, such as the CPTPP and EUVFTA, could be used as basic references with respect to provisions relating to labour and/or environmental standards and conventions. The codification and listing of the rights are essential in making sure that there is policy coherence across all AMSs and for purposes of enhancing the monitoring and compliance requirements. Specific recognition should also be given in the upgraded ATIGA to the need for AMSs to address the urgent threat of climate change, and the role that intra-ASEAN trade could play to that end. Recognize in the upgraded ATIGA the importance of enhancing the contribution of trade and investment to the goal of sustainable development in its economic, social, and environmental dimensions. The new chapter on Trade and Sustainable Development could contain provisions that strive to promote trade and investment in goods that contribute to enhanced social conditions and environmentally sound practices, including goods that are the subject to labelling schemes, and it should recognise the contribution of other voluntary initiatives, including private ones, to sustainability.
<ul style="list-style-type: none"> There will be implementation gaps within AMSs and between smaller players. 	<ul style="list-style-type: none"> The upgraded ATIGA should recognize the different levels of development across AMSs and the capacities of enterprises. Institutionalise capacity building initiatives in order to bridge the market access gap among AMSs and ensure compliance of MSMEs with relevant regulations and standards to ensure MSMEs can continue to participate in cross-border trade.



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