

# 2018 GUIDELINES FOR THE IMPLEMENTATION OF ASEAN-COMMITMENTS ON NON-TARIFF MEASURES ON GOODS

*Adopted in Singapore on 29 August 2018*

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## I. PREAMBLE

1. In accordance with the ASEAN Trade in Goods Agreement (ATIGA) and the General Agreement on Tariffs and Trade 1994 (GATT 1994) including its Notes and Supplementary Provisions contained in Annex 1A to the Agreement Establishing the World Trade Organization (WTO Agreement),<sup>1</sup> **the Guidelines for the Implementation of ASEAN Commitments on Non-Tariff Measures (NTMs) on Goods** (hereinafter referred to as the **Guidelines**) are hereby adopted. The Guidelines shall not add to, alter, or constitute any reinterpretation of the rights and obligations of ASEAN Member States as stipulated in the ATIGA and in the WTO/GATT 1994.
2. The Guidelines:
  - a) **Adhere to** the objectives and principles of the ASEAN Trade Facilitation Framework, the Good Regulatory Practice (GRP) Work Plan, and the GRP Core Principles;
  - b) **Recognise** the relevant action lines in the AEC 2025 Trade Facilitation Strategic Action Plan (ATF-SAP) and the AEC 2025 Strategic Action Plan for Trade in Goods (SAP-TIG); and,
  - c) **Incorporate** the key NTM elements recommended in the Discussion Paper on NTMs/Non-Tariff Barriers (NTBs), drafted by the Coordinating Committee on the Implementation of ATIGA (CCA) and the recommendations of the 32<sup>nd</sup> High Level Task Force on Economic Integration (HLTF-EI) on NTMs and NTBs.

## II. OBJECTIVES

3. In accordance with the ATIGA and the WTO rights and obligations, the Guidelines provide a general framework to:
  - a) Improve the transparency and management of NTMs in ASEAN; and,
  - b) Minimise the trade-distortive effects of NTMs, while allowing ASEAN Member States to pursue legitimate policy objectives.

## III. SCOPE

4. The Guidelines are intended to operationalise the following ATIGA elements: Article 11 (Notification Procedures); Article 12 (Publication and Administration of Trade Regulations); Article 13 (ASEAN Trade Repository); Article 40 (Application of Non-Tariff Measures); and, Article 42 (Elimination of Other Non-Tariff Barriers).

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<sup>1</sup> For the purposes of the Guidelines, the relevant agreements in Annex 1A to the WTO Agreement include, but are not limited to, the Agreement on Agriculture, the Agreement on the Application of Sanitary and Phytosanitary Measures, the Agreement on Technical Barriers to Trade, the Agreement on Trade-Related Investment Measures, the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994, the Agreement on Preshipment Inspection, the Agreement on Rules of Origin, the Agreement on Import Licensing Procedures, the Agreement on Subsidies and Countervailing Measures, and the Agreement on Trade Facilitation.

5. For the purposes of Article 44 (Import Licensing Procedures) of the ATIGA, the Guidelines for the Implementation of Import Licensing Procedures in ASEAN (ILP Guidelines), adopted on 3 August 2011, shall be incorporated into the Guidelines, *mutatis mutandis*.
6. For the purposes of the Guidelines, NTMs comprise trade rules, regulations or specific measures attributable to the relevant levels of legal instruments maintained by an ASEAN Member State. Such legal instruments may include: governmental regulations, executive directives, ministerial and sub-ministerial regulations/directives/circulars, and any other implementing regulations, including administrative, technical, and operational procedures, and their manner of implementation.

#### IV. DEFINITIONS

7. **NTMs**, as defined by the United Nations Conference on Trade and Development (UNCTAD), are policy measures other than customs tariffs that can potentially have an economic effect on international trade in goods, changing quantities traded, or prices or both.
8. **NTBs**, as defined by the ATIGA, are measures other than tariffs, which effectively prohibit or restrict imports or exports of goods within Member States.

#### V. PERMISSIBLE NTMs

9. As specified in Article 40 of the ATIGA, Member States shall not adopt or maintain any NTMs on the importation of any good of any other Member States or on the exportation of any good destined for the territory of any other Member States, except in accordance with its WTO rights and obligations or in accordance with the ATIGA.
10. In line with Paragraph 9, Member States may adopt or maintain NTMs, as provided for under the ATIGA and GATT 1994 provisions, including, but not limited to:
  - a) Article 8 (General Exceptions), Article 9 (Security Exceptions), Article 10 (Measures to Safeguard the Balance-of-Payments), Article 24 (Special Treatment on Rice and Sugar), Paragraph 7 of Article 42 (Elimination of Other Non-Tariff Barriers), Article 44 (Import Licensing Procedures), and the relevant articles in Chapter 6 (Customs), Chapter 7 (Standards, Technical Regulations and Conformity Assessment Procedures), and Chapter 8 (Sanitary and Phytosanitary Measures), of the ATIGA; and,
  - b) Paragraph 2 of Article XI (General Elimination of Quantitative Restrictions), Article XII (Restrictions to Safeguard the Balance of Payments), Article XX (General Exceptions), and Article XXI (Security Exceptions), of the GATT 1994, and the relevant provisions in Annex 1A to the WTO Agreement.<sup>2</sup>

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<sup>2</sup> For the purposes of this paragraph, the relevant provisions in Annex 1A to the WTO Agreement may include, but are not limited to, the Understanding on Balance of Payments Provisions of GATT 1994; Article 2 (Basic Rights and Obligations) of the Agreement on the Application of Sanitary and Phytosanitary Measures; Article 2.2 (Preparation, Adoption and Application of Technical Regulations by Central Government Bodies) of the Agreement on Technical Barriers to Trade; the Agreement on Import Licensing Procedures; and Article 8 (Identification of Non-Actionable Subsidies) of the Agreement on Subsidies and Countervailing Measures.

## VI. GUIDING PRINCIPLES

11. Member States shall ensure that NTMs conform to the following main principles: *necessity and proportionality, consultations and engagement, transparency, non-discrimination and impartiality, and periodic review.*
12. In this regard, Member States shall also take into consideration the need to adhere to the ASEAN Good Regulatory Practice Core Principles, which comprise: (i) Clarity in policy rationale, objectives, and institutional frameworks; (ii) Produce benefits that justify costs and be least distortive to the markets; (iii) Be consistent, transparent, and practical; (iv) Support regional regulatory cooperation; (v) Promote stakeholder engagement and participation; and (vi) Be subject to regular review for continued relevance, efficiency, and effectiveness.

## VII. IMPLEMENTING ASEAN NTM COMMITMENTS AND THE GUIDING PRINCIPLES

### Principle 1: Necessity and proportionality

13. Member States shall ensure that NTMs are not more restrictive than necessary in fulfilling their legitimate public policy objectives and shall consider their proportionality in addressing public risks or market externalities. In accordance with Article 40 of the ATIGA, trade measures shall not create unnecessary obstacles to trade.
14. In ensuring that a particular NTM is necessary and proportional, the Member State preparing the measure shall endeavour to conduct an ex-ante regulatory review process, based on the Regulatory Impact Assessment methodology or similar approaches. The review process should identify:
  - a) Whether there are potential barrier effects of the proposed NTM to the extent that it will reduce imports from other Member States or increase the costs of compliance by exporters of other Member States, to the advantage of traders, manufacturers, or other parties in the issuing Member State or in any other Member State;
  - b) Implementation arrangements of the proposed NTM, which may include: administrative and institutional issues, mechanisms for enforcement, monitoring and evaluation, information and publication requirements, and compliance costs; and,
  - c) Alternative regulatory and non-regulatory options, that are economically and technically feasible, and ATIGA/WTO-consistent, which would achieve the same legitimate objectives as the originally proposed NTM.
15. In implementing Paragraph 14, Member States may wish to strengthen their respective National Trade Facilitation Committees (NTFCs) to include regulatory oversight functions in reviewing newly introduced and existing NTMs and undertaking coordination on NTM notifications and private sector engagement. The absence of an NTFC shall not limit the work on NTM review. The establishment of national NTM or ATF-JCC focal point/s could be considered in undertaking the coordination, either under the NTFCs or as a separate body.

### Principle 2: Consultations and engagement

16. In preparing an NTM, Member States shall seek to provide adequate opportunity and timeframe for the relevant private sector and civil society organisations and interested persons in the issuing Member State and other Member States, to comment on the proposed draft NTM.
17. Member States, in conducting domestic public consultations, shall endeavour to:
  - a) Undertake timely consultations with the affected stakeholders, prior to the adoption of NTMs;
  - b) Publish proposed or amended NTMs, including results of ex-ante regulatory impact analyses; and,
  - c) Clearly establish and publish the procedures by which the relevant stakeholders may submit comments.
18. In consulting and engaging with the private sector and interested persons in other Member States, the issuing Member State may wish to refer to the Rules of Procedures for Private Sector Engagement under the ASEAN Economic Community, as endorsed at the 23<sup>rd</sup> ASEAN Economic Ministers' Retreat in March 2017.

### Principle 3: Transparency

19. The preparation, adoption, and application of NTMs shall be transparent and clear to the public and to other Member States. Member States shall seek to notify the NTMs, before their adoption, to ASEAN to allow for comments by other Member States.
20. Member States, in introducing or amending NTMs or other trade measures, shall seek to provide advance notifications to the Senior Economic Officials' Meeting (SEOM) and the ASEAN Secretariat. In compliance with Article 11 of the ATIGA, the notifications shall:
  - a) Be provided 60 days before the action or measure is to take effect;
  - b) Provide an adequate opportunity for prior discussions with other Member States, before the adoption of the action or measure; and,
  - c) Contain description, rationale, and implementation date and duration of the NTM action or measure.
21. In providing the advance notifications to ASEAN, Member States shall extend their respective WTO notifications to the SEOM through the ASEAN Secretariat, for compilation. The ASEAN Secretariat shall provide copies of the notifications to the ASEAN Trade Facilitation Joint Consultative Committee (ATF-JCC) and the CCA for information and reference, and to the relevant ASEAN bodies for appropriate actions.
22. Under urgent or emergency circumstances, in which provisional public safety, security and protection measures are considered necessary, and in accordance with the relevant ATIGA or WTO obligations,<sup>3</sup> in lieu of the requirements stipulated in Paragraphs 20 and 21, a Member State shall

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<sup>3</sup> For the purposes of this paragraph, the relevant ATIGA and WTO obligations may include, but are not limited to, Article 83 (Notification under Emergency Situation) of the ATIGA, Paragraph 6 of Annex B (Transparency of Sanitary and Phytosanitary Regulations) of the Agreement on the Application of Sanitary and Phytosanitary Measures, and Paragraph 2.10 of the Agreement on Technical Barriers to Trade.

endeavour to immediately notify the ASEAN Secretariat with an overview of the NTM, including the products covered and impacted, the objective and rationale of the measure, and the nature of the circumstances.

23. Should an issuing Member State not be able to comply with the above notification procedures, other Member States may notify the relevant ASEAN bodies and the ASEAN Secretariat of the NTM being introduced or amended by the issuing Member State.
24. In implementing Articles 12, 13 and 40 of the ATIGA, and in accordance with Article X of GATT 1994, Member States shall ensure that their advance notifications of proposed NTMs and the adopted and enforced NTMs and national trade and customs laws and rules, are made available on their respective National Trade Repositories (NTRs) and properly linked to the ASEAN Trade Repository (ATR). The published notifications and NTMs should be categorised and classified according to the UNCTAD NTM Classification.<sup>4</sup>

#### Principle 4: Non-discrimination and impartiality

25. NTMs shall be applied to products from other Member States and third countries in a manner no less favourable than that accorded to like products of national origin.
26. In accordance with Article 42, Paragraphs 4 and 5, of the ATIGA, the CCA, in consultation with the relevant ASEAN bodies, shall review any NTM notified or reported by any other Member State or by the private sector to determine whether the measure results in trade-distorting effects and constitutes an NTB, in which case the NTM will be subject to removal by the corresponding Member State. The CCA shall take into consideration cases submitted by the private sector through the ASEAN Solution for Investment, Services, and Trade (ASSIST) and/or other ASEAN bodies.
27. In determining whether any notified or reported NTM constitutes an NTB, and for the purposes of verification, assessment, and consultations, the respective Member States, the CCA, and the relevant ASEAN bodies, may wish to consider the following criteria:
- a) Whether the NTM complies with the relevant ATIGA or WTO obligations;
  - b) Whether the NTM is applied equally to domestic and imported products;
  - c) Whether the NTM has any restrictive, distortive, or discriminative trade impact on other Member States or third countries; and,
  - d) Whether the NTM addresses any market failure.<sup>5</sup>
28. The Guidelines for the Matrix of Actual Cases on NTMs/NTBs (MAC Guidelines) shall apply in addressing, resolving, and removing identified NTBs.

#### Principle 5: Periodic review

29. Member States shall endeavour to periodically review their NTMs to ensure that NTMs: (i) met or contributed to the intended policy objectives; (ii) remain relevant to the public interests being addressed; and, (iii) minimise/eliminate the trade-distortive effect.

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<sup>4</sup> To ensure consistency, Member States may wish to cross-reference the notifications and NTMs in their respective NTRs and ATR with the notifications published in the Integrated Trade Intelligence Portal (I-TIP) of the WTO.

<sup>5</sup> For the purposes of the Guidelines, "market failure," as defined by the World Bank, is a situation whose outcome is sub-optimal from a collective point of view.

30. For this purpose, Member States may wish to undertake periodic, ex-post reviews of the respective NTMs through Regulatory Impact Assessments or similar approaches.

#### **VIII. IMPLEMENTATION ARRANGEMENT FOR THE GUIDELINES**

31. Member States shall endeavour to implement the Guidelines by further strengthening their national institutions, including by considering the establishment of a national NTM focal point or a similar organisation<sup>6</sup> that would be responsible to undertake: (i) ex-ante NTM reviews; (ii) public consultations and private sector engagement; (iii) internal coordination on notification and publication of NTMs; (iv) the removal of NTBs or barrier elements of NTMs; and, (v) ex-post regulatory impact analyses.
32. The Guidelines will be implemented, in accordance with the relevant articles of the ATIGA, as stipulated in Paragraph 4 of these Guidelines, by the relevant ASEAN bodies and the Member States.
33. The implementation of the Guidelines shall be periodically reviewed and monitored by the AFTA Council, through the ATF-JCC.

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<sup>6</sup> To ensure efficiency and effectiveness, Member States may wish to consider establishing the national NTM committee or working group as part of the NTFCs or as a separate body, and assigning it with clear mandate and organisational structure.