

Oh no! What do I do?

Is the concept of Informed Compliance finally taking off in ASEAN?

A very early version of the ATIGA ran to precisely six (6!) pages (including a signatory page). For those interested, a version is still available online: <https://wits.worldbank.org/GPTAD/PDF/archive/ASEAN.pdf>. The rule(s) of origin is notable (article 2.4) for its simplicity. The current version of the ATIGA needs 69 pages, but that is without its many appendices, such as the 33 pages on operational procedures. Still, as FTAs go, that is not bad. The CPTPP runs to about 600 pages, at a much smaller font size, and that is not counting the thousands of pages of country schedules.

So why does that matter? Well, the real world is a complex thing. That includes the real world of international trade in goods. No matter how detailed the legislation, it can never cover everything that may occur in that real world. Nor should it necessarily try, for it would become so hard to absorb as to become useless in practice.

What that means, though, is that on a daily basis events occur that are not (clearly) regulated, yet need a practical resolution. Take a simple example. A company exports a product claiming preferential origin using self certification, i.e. it states on its invoice that a product is originating. Upon importation, the authorities are not willing to accord this product preferential treatment, as they do not believe that the importer is entitled to use self-certification. To help its importing buyer, the exporter decides to apply for a certificate of origin retroactively - something that is specifically provided for under the FTA in question. However, in order for the authorities to issue a certificate of origin, they first need to approve a manufacturing cost statement. Can the exporter retrospectively create such a statement?

Take another simple example. A company pays a royalty to an overseas party for the use of a patented manufacturing process in its facility. Can this royalty be included as qualifying costs in an FTA calculation, because it relates to a process that takes place in the country of export, or can it not, because it is payable to an overseas party (noting that the cost of buying a material from an overseas party cannot be included).

Clearly examples not beyond the realms of reasonable imagination (in fact - they are actual cases). It is also easy to imagine that there will be many, probably thousands, of similar examples like this. Knowing how to handle them is not obvious, not only for importers and exporters, but also for the government officials that are expected to deal with them on a daily basis. It may be possible to obtain formal rulings for some of them. However, that is usually a very time consuming process, and rulings tend to be very narrow by their very nature, meaning that a slight change in circumstances may make a ruling invalid. (imagine the aforementioned licenseable production process getting an upgrade).

Hence when faced with ambiguities in the interpretation of legislation, in practice many companies would either guess and hope (not a great trade strategy), or enter into discussions with relevant officials to come to an understanding, if not agreement, on what should be done. The outcome of such discussions, especially around ASEAN, has traditionally not been shared, either with the business community or with interested officials. Granted, some efforts have been made, such as for example the "[Matrix of Minor Discrepancies](#)" and the "[Matrix of Actual Cases](#)". Nevertheless, it is not uncommon for such efforts to fall short of broad practical value. The establishment of "[ASSIST](#)" was a great initiative. But its conclusions are not published, not even in sanitised versions, and anecdotally companies have had bad experiences of raising issues in practice, in extreme cases bordering on perceived "retribution" from officials.

As understanding, predictability and certainty are essential for traders and regulators alike, more and better guidance on issues of principle (not specifics of cases which may be too detailed or confidential) would be invaluable for all concerned. This is the underlying concept of "informed compliance". Informed compliance refers to the concept of maximising the likelihood that companies are compliant with all relevant laws and regulations governing their activities by educating them on the practical requirements of such laws and regulations, predominantly by sharing as much guidance as possible in relation to the interpretation and implementation of them by the authorities.



Hence the concept of informed compliance is to provide traders and officials with better guidance on issues of principle to aid with speedier clearance and reduce cases of unintentional non-compliance. Such guidance would always be informal, and not carry the weight of law. Informed compliance is not new. It is used, for example, by the UK government in its “Public Notices”, the US CBP’s “Informed Compliance” (See: <https://www.cbp.gov/trade/rulings/informed-compliance-publications>), or the World Customs Organization’s “Advisory Opinions”, “Commentaries” and “Case Studies” (See: <http://www.wcoomd.org/en/topics/valuation/instruments-and-tools/advisory-opinions.aspx>), to name but a few.

The topic of informed compliance was first raised in an ASEAN context by the Joint Business Councils at the Coordinating Committee on Customs (CCC) and ASEAN Trade Facilitation Joint Consultative Committee (ATF-JCC) meetings in the run-up to the ASEAN DGs of Customs meeting in June 2021. Although it has taken a bit of time, real progress has since been made on both understanding of and agreement around the concept, a perceived need for it, and practical ideas around implementation. Bear in mind ASEAN member states made many commitments under both the WTO’s Trade Facilitation Agreement as well as the blueprints for the ASEAN Economic Community in respect of not just publishing legislation, but also making it easily accessible to traders so as to facilitate international trade. The ASEAN trade repository would probably make a great home for informed compliance. Therefore, the stars may be aligning.

That does not mean that further progress and next steps will be easy or obvious. A long list of practical considerations remains to be resolved. Examples of such considerations would be:

1. What goes into informed compliance? In our view, “if in doubt, include” would be a good mantra:
 - Any (sanitised) response to the points of principle at stake in a trader’s question;
 - Any guidance any authority feels would be helpful on the basis of frequent / typical compliance errors;
 - Guidelines on how to implement regulations. including clarification of roles and responsibilities of different stakeholders in import and export, how rules apply in different scenarios etc.
2. What would be the process to add content to informed compliance?
 - Initiated by regulators or private sector?
 - Member state by member state, or ASEAN-wide, or a combination?
 - Resources and responsibility for upload and upkeep;
 - Proactive or reactive?;
 - Timelines;
3. What would be the format of informed compliance?
 - Searchable but structured database;
 - Online / through app (for easy use at port level)
 - Using AI?

Obviously, a lot of work remains to be done. For informed compliance to be valuable for both regulators and traders it is important that open discussions continue about how best to achieve the most desired outcome for both sides. The first and most important steps have been taken. It is now up to everyone involved to keep moving in the right direction.

