Experiences with Origin Certification Procedures – ASEAN and ASEAN+

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An event dedicated to certification is extremely relevant because in my experience it is these procedures and how they are drafted, interpreted and applied that determine whether or not the full potential of a trade agreement is realised.

I have over 20 years of experience with the ASEAN and ASEAN + agreements, including time as a government negotiator, a customs auditor and as a business sector user - the experiences I share today reflect all 3.

I'm grateful for the opportunity to share these experiences as well as my thoughts on what works and what doesn't – and why.

Governments spend quite a bit of time studying FTA utilization rates, and from this research it is evident that utilization is linked to the useability of an agreement, i.e. how it's operationalised.

This is not a surprise – AND yet – these same governments often put into place unnecessary or complex Certification Procedures that negatively impact utilization rates.

The ambition of a trade agreement is determined by its market access provisions including Rules of Origin. These reflect domestic politics, defensive and offence interests and are normally negotiated by officials from Ministries of Foreign Affairs & Trade with the underlying intent to grow trade between the Parties. This can only be achieved if the agreement is operationalised in a manner sympathetic the desired outcome.

However, the certification procedures are negotiated by other ministries – usually customs who bring an enforcement mindset, and/or commerce ministries who are in the main domestically oriented.

As a result, customs priority is managing revenue risk (imports) whereas commerce ministries manage process and the issuance of documentation – in this case for exports.

This is where some interesting practices emerge.

Revenue risk lies where the goods are imported, therefore you would think tough certification requirements are driven by importing countries.

However, this is not always so – and overlie complex certification is often due to ministries in the exporting country – ministries who are wedded to process (not risk); are often unable or unwilling to embrace change; and don't fully appreciate the nature of the risk (in terms of border management they're a policy agency not an operational agency) and in some cases are protecting the revenue stream associated with issuing certification.

To give an example – it's not uncommon in ASEAN for issuing bodies to demand exporters submit costing /accounting data for applications based on CTC/tariff shift rules – and without this they will not issue certification.

Apart from being irrelevant to these rules, the collection of this data adds time, complexity & costs to the certification process, and is in some cases is unlawful when agreement text offers the right of choice to the applicant.

Oddly, the same rigour may not apply to importations which is where the revenue risk is, and this is left to normal customs risk processes, in effect creating a TBT for your own exporters whilst facilitating the import of foreign goods.

Also oddly – these processes co-exist with agreements based on exporter self-certification, meaning an exporter is trusted sometimes but not others.

To answer the question – is ASEAN moving in the right direction with certification of origin – mostly yes, but their older agreements need to be reviewed and updated to align more with their newer agreements. The concept of convergence.

ASEAN is a very positive force in the region, but it does move slowly, and at the pace of its slowest member. Depending on the specific provision being negotiated – the slowest member is not always the same member and the dynamics within the ASEAN caucus can rearrange the deck chairs. This makes change slow, but also inconsistent.

However, change is afoot, mainly due to new (and influential) negotiating parties such as the EU who come with a more liberal certification ideology. A good example is direct consignment where the EU prefers to focus on the goods and what happens to them rather than the route they take to market. Hopefully this will be reflected in new ASEAN agreements - but also to older ones as they are reviewed.

Understanding this helps explain some of our **Experiences.**

Many of the inconsistent decisions made by border officials is not of their making. They work with what they have – and if the agreement text (which of course becomes the law) or any implementing regulation or policy is poorly worded or doesn't reflect actual events in the supply chain – disputes are inevitable.

Using direct consignment as an example, OCP negotiators are wedded to documents such as *through BOL* to support an origin claim. Through Bills in the way negotiators envision them don't exist – shippers buy freight from the place the goods are receipted to the place they are delivered with an ETD and an ETA. Where the vessel goes on this journey is irrelevant to and largely unknown and sometimes also to the carrier who issues the transport document.

Another example is date alignment between documents; a common one being a date difference between the 'shipped on board' date on the BOL and the 'shipment date' on the origin certification.

These don't always align because they are 2 different events, but if neither the agreement text or implementing regulation make a distinction to guide border officials – it leads to misunderstanding.

3rd Party (or country) invoicing is also an ongoing problem. It shouldn't be – it's been around a long time and is normal commercial practice.

The Parties are clearly defined in the General Definitions Chapter at the front of all trade agreements. Yet somehow, a person located in a Party but is not the producer/exporter of the goods has crept into ASEAN regulations and procedures as 3rd Party invoicing.

This can't be, because the General Definitions say otherwise, however, and to get 3rd Party invoicing past the slowest member, this is now embedded in ASEAN procedures. Origin is about 'the where not the who' and this interpretation should not exist.

Better outreach by trade officials to exporters, importers, service providers, banks, etc and a glossary of real-world trade terms for negotiators, drafted in collaboration with the trading sector would be helpful to resolve many negative & ongoing experiences.

For agreement text, ASEAN negotiators also like the comfort of the familiar – they negotiate from the same baseline (ATIGA) and this in part explains the recurring nature of some of the problems we experience.

Considering that all the ASEAN customs as well as their trading partners have adopted intelligence-based risk assessment processes its illogical as to why applications for and acceptance of origin certification doesn't leverage this capability and philosophy more than it does.

Saying this, there has been good progress as evidenced by E-Form D's and ASEAN's ratification of agreements based on self-certification.

A point of note, is that nearly all origin verifications focus on the certification – the goods are almost never queried or examined. Such verifications add little value as the certification pretty much duplicates information already on the normal commercial documents.

The answer to improving the border experience for both traders and government is easy – simplify certification and risk manage the goods as happens with other border risks.

A final point is about post entry customs audits. The principle behind these audits is good, but with origin certification these audits increase the quantum of risk significantly – or from a customs point of view – the quantum of the reward.

If a non-compliance is detected as the goods cross the border the financial risk (duties & penalties) is limited to a single consignment. With a post entry audit this risk could cover 3 to 5 years' worth of imports. This makes an attractive target for customs looking to meet their KPIs and we have experienced dubious audit outcomes of significant value which are rectified through legal action.

In summary

Sharing our experiences in this way is useful. If nothing else, we identify the things that add value – and those that reduce value. To make this exercise worthwhile, these experiences need to be shared with the policy makers in a position to drive change.

Key learnings for policy makers.

- Exporter certification based on process - not risk, is a serious impediment to the facilitation of originating goods and to the increase of FTA utilization rates.

- There are fundamental and embedded misunderstandings by negotiators and border officials of basic terms and practices used in the global supply chain. This leads to rules that inevitably end in conflict, appeals and litigation which is a cost & resource burden to both business and government.

- Operational Certification Procedures need to be more reflective of current & future risk-based border management and verification processes that take into account the capability and capacity of border agencies.

- Verification should be managed where the revenue risk lies and by the person or entity who benefits from any tariff preference – the importer.

Business is grateful for the benefits that trade agreements make possible. However, all trade agreements add complexity to the trading environment. This should not be more arduous than it needs to be.

Manufacturers, certification issuing bodies, exporters/importers, carriers, banks, customs brokers and border officials must all have confidence in the processes to balance the available preferences with the administrative burden, cost and risk to access and administer them.

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