

THE ROLE OF CAPACITY BUILDING IN ACHIEVING CONSISTENT APPLICATION OF INTERNATIONAL INSTRUMENTS

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Abstract

The international customs community is placing increasing importance on global cooperation, harmonisation and mutual recognition of regulatory compliance assessment. For such strategies to be effective, three basic requirements must be fulfilled: the need for a comprehensive international regulatory framework; the need for consistent interpretation of the framework; and the need for consistent application of the framework. Numerous examples of international regulatory frameworks exist in the form of conventions, agreements, guidelines and the like, which seek to establish global standards in their particular area of relevance. In many but not all cases, member states achieve a reasonably high level of consistency in interpretation, as reflected in their national legislation. Consistency of application, on the other hand, is heavily dependent upon the capacity of an administration and individuals within the administration to effectively apply the regulatory provisions. This paper examines global responses to this issue.

Background

The international customs community is placing increasing importance on global cooperation, harmonisation and mutual recognition of regulatory compliance assessment. For such strategies to be effective, three basic requirements must be fulfilled: the need for a comprehensive international regulatory framework; the need for consistent interpretation of the framework; and the need for a consistent application of the framework.

At the recent World Customs Organization (WCO) Asia Pacific Regional Heads of Administrations Conference in New Delhi (WCO 2008a), the significance of these three basic requirements was raised in the context of the WCO Framework of Standards (WCO 2006), where it was noted that consistent interpretation and application of the Framework represented critical elements in the achievement of mutual recognition of the concept of Authorised Economic Operator (AEO).

Such consistency is a fundamental requirement of the international trading community, which is seeking certainty, clarity, flexibility and timeliness in its dealings with government.¹ This proposition has recently been reinforced by the World Economic Forum (2008, pp. 54-55) which comments: 'professionals view the friendliness of border processes primarily in terms of the transparency and the predictability of clearance procedures'. De Wulf and Sokol (2005, p. 8) make the point rather more bluntly when commenting on the role played by Customs in meeting an economy's international obligations, commenting that 'travellers, businesses, and international air, sea, and land carriers expect services that are uniform, predictable, easy to use, and consistent with international standards and conventions'.

International frameworks

The International Organization for Standardization (2008) describes the concept of international standards in the following manner:

When the large majority of products or services in a particular business or industry sector conform to International Standards, a state of industry-wide standardization exists. The economic stakeholders concerned agree on specifications and criteria to be applied consistently in the classification of materials, in the manufacture and supply of products, in testing and analysis, in terminology and in the provision of services. In this way, International Standards provide a reference framework, or a common technological language, between suppliers and their customers. This facilitates trade and the transfer of technology.

In a similar vein, cross-border regulatory standards emerge when economies reach agreement on the policies and procedures to be applied consistently to the regulation of international trade, transport and travel. Numerous examples of international regulatory frameworks, both binding and non-binding, exist in the form of conventions, agreements, guidelines and the like, which seek to establish global standards in their particular area of relevance, including those established by the World Trade Organization (WTO), WCO, the UN Conference on Trade and Development (UNCTAD) and the UN Economic Commission for Europe (UNECE).

The WCO Framework of Standards, referred to earlier, is one such agreement. The Framework is quite explicit in identifying the need for an internationally consistent approach to cross-border regulatory requirements, stating that ‘Customs administrations should not burden the international trade community with different sets of requirements to secure and facilitate commerce, and there should be recognition of other international standards. There should be one set of international Customs standards developed by the WCO that do not duplicate or contradict other intergovernmental requirements’ (WCO 2006, p. 2).

The importance of international standards in the context of world trade can also be demonstrated by reference to the work of the International Maritime Organization (IMO). According to the IMO, it ‘has made it a practice to pursue the universality of regulation in shipping without detracting from regional practices. As ships move between different waters and jurisdictions, it is imperative that they are governed by uniform standards, applied to and recognised by all... international standards – developed, agreed, implemented and enforced universally – are the only effective way to regulate such a diverse and truly international industry as shipping’ (United Nations 2008).

There are literally hundreds of examples of regulatory frameworks that have been developed in an effort to simplify, harmonise and standardise the cross-border movement of people, goods and modes of transportation, and one would expect the effective global implementation of such frameworks to result in the policy outcomes that have been negotiated and agreed. As previously noted, however, this is unlikely to occur in the absence of a consistent interpretation and application of those agreements.

Consistent interpretation

In many but not all cases, the establishment of international regulatory standards results in a reasonably high level of consistency of interpretation among the relevant member states, as reflected in their national legislation. In the context of Customs, this is most evident in relation to national adoption of the international standards for issues of a more technical nature, such as tariff nomenclature² and customs valuation³.

In other areas, however, significant inconsistencies are apparent. Again using the WCO Framework of Standards as an example, some members of the WCO have chosen to interpret the concept of Authorised Economic Operator (AEO) quite broadly, by requiring an AEO to demonstrate high levels of regulatory

compliance as well as appropriate security and safety standards. Other members, on the other hand, have approached the issue from the sole perspective of supply chain security.

The AEO pilot which was conducted in Australia last year, and the scheme adopted by Singapore⁴, for example, have a specific focus on supply chain safety and security, recognising that, while potential non-compliance such as under-valuation may impact on the revenue, it is not a relevant factor when determining whether a consignment may or may not pose a security risk. In stark contrast, the administrations of the European Union require an AEO to demonstrate:

- an appropriate record of compliance with customs requirements
- a satisfactory system of managing commercial and, where appropriate, transport records, which allows appropriate customs controls
- where appropriate, proven financial solvency
- where applicable, appropriate security and safety standards.⁵

Without wishing to argue the relative merits of the two opposing interpretations in the current paper, the relevant point here is that an unfortunate casualty of this failure to agree on the basic AEO criteria is the goal of *mutual recognition* which, according to the WCO, is ‘a broad concept whereby an action or decision taken or an authorisation that has been properly granted by one Customs administration is recognised and accepted by another Customs administration’ (WCO 2006, p. 54). If one administration requires a company to demonstrate levels of both general compliance and security compliance before being granted AEO status, and another grants AEO status solely on the basis of security compliance, the achievement of mutual recognition is unlikely. This scenario serves to highlight the potential impact of inconsistent national interpretation on international policy objectives.

Consistent application

Recognising however that, in the main, consistent interpretation of international standards at the regional and national level is achieved or achievable, the challenge is to ensure consistency of application. The achievement of such consistency is heavily dependent upon the capacity of an administration and individuals within the administration to effectively apply the relevant regulatory provisions, and this is an aspect of implementation that is often ignored. Eland (2008) puts this succinctly when he says ‘Capacity building is about delivery. It is no good us concluding instruments in international meetings if we are then unable to implement them effectively’.

The Doha Ministerial Declaration and subsequent decisions of the General Council of the WTO have sought to intensify international commitment to further expedite the movement, release and clearance of internationally traded goods, including goods in transit. The success of the trade facilitation agenda is heavily reliant on the ability of customs administrations to achieve an appropriate balance between international trade facilitation and regulatory intervention, particularly in the current climate of heightened international security concerns. Of particular note is the WTO’s formal recognition that this cannot be achieved without significant technical assistance and support for capacity building, particularly in respect of developing and least developed countries.⁶

The WTO, WCO, World Bank and many other international organisations (as well as individual developed countries) have pledged their commitment to providing technical assistance and support for such capacity building, recognising that developing countries comprise the majority of WTO membership, with over three-quarters of WTO members identifying themselves as such.⁷ The extent of the required assistance to achieve widespread reform is therefore significant, and should not be underestimated. The agreed modalities for negotiations on trade facilitation highlight this point:

As an integral part of the negotiations, Members shall seek to identify their trade facilitation needs and priorities, particularly those of developing and least-developed countries, and shall also address

the concerns of developing and least-developed countries related to cost implications of proposed measures.

It is recognized that the provision of technical assistance and support for capacity building is vital for developing and least-developed countries to enable them to fully participate in and benefit from the negotiations. Members, in particular developed countries, therefore commit themselves to adequately ensure such support and assistance during the negotiations.⁸

Despite some uncertainty about significant aspects of the WTO negotiations, those relating to trade facilitation appear to remain on track, with capacity building considerations remaining firmly on the agenda. In this regard, an economy's ability to comply with the trade facilitation proposals is seen to fall into three basic categories: those which can be implemented immediately; those requiring time to implement; and those for which both time and capacity building support are required.

Turning again to the WCO Framework of Standards as a further example, it is pertinent to note that considerable effort has been made by the WCO and its members to ensure that individual administrations, particularly those from developing and least-developed nations, are assisted in developing the necessary capacity to effectively implement the Framework. In this regard, the WCO views implementation of the Framework as a fundamental capacity building issue:

The SAFE Framework also considers the critical elements of capacity building and requisite legislative authority. While certain aspects of this instrument can be implemented without capacity building, it is recognized that many administrations will need assistance to implement the standards. The SAFE Framework contemplates appropriate assistance with capacity building for those Customs administrations that adopt it (WCO 2006, p. 2).

Following the adoption of the Framework of Standards, the WCO initiated what it has called the Columbus Programme which is specifically designed to assist members to effectively implement the Framework and related international obligations. The significance of the Columbus Programme lies in the sheer size and extent of its application. The Programme is comprised of three distinct phases: a comprehensive diagnostic needs assessment of the current state of play within the customs administration; implementation; and monitoring. At the time of writing, over 100 diagnostic needs assessments had been undertaken or were scheduled, and the implementation phase had commenced in over 60 administrations (WCO 2008b, p. 5).

Due to the broad scope of activities undertaken across some 100 countries, the Columbus Programme provides a wealth of data from which conclusions can be drawn concerning actual and potential impediments to effective national implementation of global policy initiatives. The WCO analysis of the results of Phase 1 of the Columbus Programme has revealed a broad range of developmental needs among its members, ranging from those economies with minimal developmental needs and no requirement for external capacity building support, through to those requiring comprehensive technical assistance and capacity building support. Falling between these two extremes are economies which have already established the underlying infrastructure requirements, but require specific training and technical assistance, some of which also require assistance with policy development and change management support.

The fact that such comprehensive and, in some instances, quite basic developmental requirements have been identified in relation to this particular international regulatory framework is significant. These findings point not only to the need for extensive capacity building support requirements to implement the WCO Framework of Standards, but also to a potential inability of many economies to effectively implement the hundreds of conventions, agreements and guidelines to which they have made an international commitment without first being provided with significant capacity building support. The following conclusions of the WCO are of equal significance as they indicate the need for a different approach to capacity building assistance in the future (WCO 2006, p. 64):

The support that is needed will change. The WCO will have to put more resources into planning, recruitment of experts, donor matchmaking, the development of management skills and skills to handle modernization (like e.g. project management, reform management, tendering/contracts, monitoring, ICT and technical specifications, etc.).

In this regard, Mikuriya (2008), comments: 'While the technical area of procedures, infrastructure and technology remain important, sustainable capacity building also requires change management ... including a change in culture'.

Working closely with the academic community, the WCO has already advanced a number of these initiatives through its Partnership in Customs Academic Research and Development (PICARD) program. In particular, the development of management skills has been addressed in a way which seeks to establish internationally consistent development standards that are designed to maintain and raise the academic standing of the customs profession. According to the WCO (2008c), the primary objective in developing such standards is to 'establish benchmarks which can be developed into job profiles for the purposes of customs recruitment; against which the in-house training of member administrations may be measured; and against which academic development can be designed or procured'. A further use to which the standards should be applied is performance assessment, whereby a determination may be made as to whether employees are meeting the knowledge, skill and competency requirements of their position.

The resultant standards (WCO 2008d), are now being used by a number of universities to develop educational programs which provide internationally recognised professional qualifications for customs professionals from both the public and private sectors. They focus specifically on the senior and middle manager, and support the WCO's contention that 'The role of Customs in the 21st century, as it faces the challenges posed by globalisation, trade facilitation initiatives, and security concerns necessitates a renewed professional approach to the management and operations of Customs administrations across the globe' (WCO 2008d, p. 9).

Conclusions

While considerable progress has been made by the international community in relation to the establishment and agreement of standards, there is a long way to go in ensuring that individual economies have the necessary capacity to translate the theory into practice. The exercise conducted by the WCO suggests that consistent global application of existing and future conventions, agreements and guidelines relating to border management is unlikely in the absence of significant capacity building support. Further, there is no reason to suggest that such findings are limited to cross-border matters. Indeed, they are likely to apply equally to international frameworks concerning other areas of government regulation.

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Endnotes

- 1 See, for example, David Widdowson 2007, 'The changing role of customs: evolution or revolution?', *World Customs Journal*, vol. 1, no. 1, pp. 31-37.
- 2 The World Customs Organization's International Convention on the Harmonized Commodity Description and Coding System 1983, as amended, generally referred to as the 'Harmonized System' or simply 'HS'.
- 3 The World Trade Organization's Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (GATT) 1994, generally referred to as the 'WTO Valuation Agreement'.
- 4 The Singapore program, launched in May 2007, is referred to as the Secure Trade Partnership (STP).
- 5 See European Commission 2007, 'Authorised Economic Operators: guidelines', Working Document TAXUD/2006/1450, EU, Brussels.
- 6 See, for example, David Widdowson 2005, 'International trade facilitation: the Customs imperative', a paper presented to the APEC Workshop on the WTO Trade Facilitation Negotiations, Kuala Lumpur, March 2005.
- 7 Estimate by the Economic Research Service, US Department of Agriculture, <http://www.ers.usda.gov/Briefing/WTO/DevelopingCountries.htm>.
- 8 Annex D of the WTO General Council Agreement of 31 July 2004 (known as the 'July Package'), paragraphs 4 and 5.

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