Integrating Market Openness into Regulatory Systems:
Some Experience and Emerging Best Practices

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I. Introduction

In recent years it has become increasingly apparent that the benefits of international trade and investment depend not only upon policy measures directly affecting trade and investment flows but also upon domestic regulations that are economically efficient and favour trade and investment. Past progress in tariff liberalisation has brought attention to focus on other types of impediments to such flows, in particular domestic regulations whose trade and investment effects may be unintentional.

Recognition of this interlinkage between trade and investment liberalisation and efficient regulation is contributing to a strong dynamic in favour of regulatory reform. Countries want to draw full benefit from the strengthened global competition expected to emerge from trade liberalisation; at the same time, the multilateral trading system and the liberalisation achieved under it entail national obligations, including explicit or implicit commitments to adopt certain regulatory practices, e.g. as specified under the TBT and SPS Agreements and in the GATS.

These two factors combine in support of reform that will allow the efficient achievement of regulatory objectives with as little trade restrictiveness as possible. In fact, for regulatory reform to be successful in achieving more efficiently the specified objectives, account must be taken of its international dimension, i.e. of the trade and investment impact of regulations.

The objective of this presentation is to introduce briefly the conceptual framework developed by the OECD Trade Committee for reviewing national experiences with regulatory reform in the perspective of the implications for international market openness. This framework involves six principles of efficient regulation and has already been used (and further developed) in the review of sixteen OECD countries. This presentation will then look at some of the experience and promising approaches that have emerged from these reviews with respect to the six principles and will attempt to set the stage for this session by focusing on how to avoid trade restrictions arising from national practices with respect to customs procedures and standards.

II. Principles of Efficient Regulation

In the context of its ongoing multidisciplinary work on regulatory reform, OECD has considered the implications of domestic regulations for "international market openness" (referring to the extent to which markets are open to global competition, principally through trade and investment). The OECD Trade Committee has identified six "principles of efficient regulation" to help assess the extent to which regulations are both economically efficient and trade- and investment-friendly. These principles in fact broadly underpin the WTO, and can be seen to be particularly relevant in the TBT and SPS Agreements and the GATS when they touch on domestic regulation. They are:

- ***Transparency*** and openness of decision-making, with respect to the development and administration of regulations;
- ***Non-discrimination*** among market participants;
- Avoidance of unnecessary trade restrictiveness when setting up domestic regulations;
- ***Use of international harmonised standards*** or ***recognition of equivalency*** as means for overcoming potential trade impediments from technical measures and standards;

- ***Streamlining conformity assessment procedures,*** particularly so as to avoid duplicative procedures; and
- ***Use of competition principles*** to ensure that open markets ensue from deregulation.

Through studies at OECD that have examined the regulatory regimes of different countries and the ways in which they have implemented these principles, it has become apparent that the principles are in fact interdependent. Together, they form a comprehensive package for creating a level playing field to promote international competition and ensure that countries can reap the benefits of globalisation. In particular they can support efficient regulatory decision-making by:

- Making clear the costs and benefits of regulation to all stakeholders;
- Providing business (domestic and foreign) with predictable conditions;
- Reducing discretionary or arbitrary implementation;
- Facilitating identification of alternatives favouring trade, investment, competition and economic growth.

III. Some emerging "Best practices" for Regulation in a Market Openness Perspective

The analyses conducted so far at OECD allow identification of some approaches to implementing the principles that seem of interest in light of their positive contribution to achieving domestic objectives while maintaining or improving market openness. One of the objectives of the APEC-OECD Co-operative Initiative on Regulatory Reform is to share such emerging results and to consider the experiences of a broader range of countries. It is important to take such experiences into account, since the same regulatory model is not necessarily appropriate for all countries. The choice of regulatory objectives and priorities among them is left to each government, while differing situations of countries may alter the effectiveness of particular means for achieving those objectives.

The remainder of this presentation will now summarise some ideas relating to how to put the different principles into effect. It will conclude up by focusing on customs procedures and internationally harmonised standards, which will be the main subjects of this session.

A. Transparency and openness of decision-making

Transparency is perhaps the most frequently recurring theme in the application of the other principles of regulatory efficiency. It concerns the provisions of both legislation and subordinate measures, as well as decision-making in the contexts of regulation setting and of the administration of regulations. Six particular approaches are raised here

1. Systematic publication of information about regulations

For the sake of efficiency, a number of countries have established consolidated codes of regulations, thus facilitating the access of business to the various regulations to which they may be subject. This is of course particularly useful for businesses that not incumbent in a market. Moreover, enquiry points can provide an important service to economic actors, as an easily identifiable and accessible source of information, able to respond to queries and provide clear explanations. In the WTO, requirements for enquiry point already exist under the SPS Agreement and the GATS. These approaches have been enhanced by countries that have created internet websites providing extensive regulatory information and permitting enquiries, thus strengthening transparency and reducing business costs.

Even for countries with a good record in these areas, there is often more that can be done. For example, enquiry points should of course not be limited to SPS measures and services. In addition, information facilities remain significantly weaker with respect to sub-federal regulations.

2. Clear commitment to public consultation

When a new regulation is being defined and put into place, "prior consultation" normally consists of a "notice and comment" procedure involving public announcement of the consultation procedures that will be followed, of the proposed regulation and of any comments received. Consultations should be open to foreign as well as domestic parties, and without favouritism in their selection.

Prior consultation provides benefits by ensuring equality of treatment among different stakeholders, including foreign ones, who may be in position to contribute significantly to the development of the local economy. This equality of treatment allows regulatory authorities to make a fuller assessment of stakeholders' views and gives the ensuing regulation a higher degree of legitimacy. It also provides stakeholders with better information on future regulations, including their objectives and rationale, which can be especially important for business.

3. Clear, open procedures for making and implementing rules

Some countries have enacted specific legislation to ensure transparency in administrative procedures for implementing regulations, e.g. including requirements in such areas as publication of objective criteria for judging requests; standard time periods for decisions; and providing explanations when requests are denied.

4. Clearly written rules and simple procedures to ensure predictability of interpretation and implementation

This approach can contribute significantly to efficient procedures at different stages of the process of setting and implementing regulations. It typically calls for rigorous vetting of draft regulations, periodic reviews of existing laws and regulation, and establishment of central enquiry points to clarify rules and their implementation.

5. Clear and open appeals procedures

Regulations will only be accepted and work efficiently if both domestic and foreign economic actors have access to remedies when they consider that they are confronted with overly burdensome or unclear regulatory requirements or unsatisfactory results. This can require:

- Formal legislation or effective informal channels for lodging and advancing complaints, clearly open to domestic and foreign parties;
- Clearly defined time limits for appeals processes;
- Adequate explanations, e.g. when requests are denied.

B. Non-discrimination

The principle of non-discrimination involves both national treatment (i.e. equivalent treatment to national as well as foreign suppliers) and most-favoured nation (MFN) treatment (i.e. no differentiation in treatment among foreign producers). Mention may be made here of three particular issues that are important for the trade-friendliness of domestic regulation.

- *Due process*, or the right to appeal administrative decisions or actions, irrespective of nationality.
- *Regional trade arrangements* by their nature provide preferential (i.e. discriminatory) treatment for their members. Yet arrangements with certain characteristics may be less trade-distortive and may contribute in a positive way to the growth of world trade and competition. This may be the case, e.g. when the net effects of an arrangement are trade-creating rather than trade-diverting; when arrangements abide by WTO rules (e.g. they should not increase trade barriers to third countries and should cover substantially all trade); and when arrangements liberalise trade in areas not yet well covered by the WTO, such as services. Further study is needed to identify better such characteristics.

- *Public procurement* in OECD countries represents approximately 20% of their GDP, according to recent work in OECD. For non-OECD countries the figure is close to 15%. It is thus a significant market, which is often effectively closed to foreign suppliers and may not even be contestable domestically. Greater efficiency and economic benefits can be expected if procedures become more transparent and more strongly based on non-discrimination.

C. Avoidance of unnecessary trade restrictiveness

This far-reaching principle remains far from clearly defined. It is not intended to replace other legitimate objectives that governments may choose but rather to provide a tool for helping to select the most appropriate and efficient means for achieving such objectives. Among the approaches so far identified for reducing the potential burden of government formalities on trade and investment, the following have attracted particular interest:

1. *Fostering awareness of the trade and investment implications of regulations, including when undertaking Regulatory Impact Analysis*

Regulatory impact analysis (RIA) has been developed as a process for ensuring that regulatory decisions are made on the basis of easy access to all information relevant for understanding the benefits and costs of proposed regulations. The rationale of RIAs is thus to help ensure the adoption of regulations that are efficient in achieving their objectives. A trend has been observed in a number of countries toward increasing public involvement and more transparent RIA procedures. There is also increasing recognition of the usefulness of including consideration of trade and investment effects, in particular to help identify options that are least restrictive of trade and investment. In order to do this, RIAs should consider the purpose of a regulation, its impact and possible alternatives.

It is worth recognising that some countries (in particular developing countries) have expressed concern that requirements to conduct RIAs may be a heavy and costly administrative burden that is incommensurate with their governmental capacity. In such cases, a lighter (though less effective) alternative could be simply to publish the rationale for new or proposed regulations.

2. Favouring trade-friendly approaches to regulation and its implementation

This issue arises when defining standards and technical regulations. When based on design standards, they are susceptible to “regulatory capture” by established interests and tend to discourage innovation aimed at greater efficiency, in particular by new market entrants. Similarly, qualification requirements for professional services (e.g. based on nationality) may be overly burdensome. The preferable approach in such cases is to define requirements in terms of ***performance criteria***, which are usually more directly linked to the objectives sought.

Another issue relates to the institutional character of regulators. Greater efficiency can usually be achieved in attaining regulatory objectives when the regulatory body is separate from any suppliers subject to the regulations. Similarly, the decisions and procedures of regulators should be non-discriminatory among all market participants. Such an approach is reflected in the WTO Reference paper on Basic Telecommunications, which foresees that regulators in this sector should be separate from suppliers who are subject to the regulations. This is intended to facilitate transparent, non-discriminatory and balanced implementation.

D. Streamlining conformity assessment procedures

Excessive costs that arise from cumbersome conformity assessment procedures, and particularly duplicative requirements in different countries, may be reduced through mutual recognition agreements (MRAs), typically covering testing results or certification. However, given the complications frequently encountered in negotiating such agreements, attention has recently focused on alternative approaches, in particular recognition of supplier's declarations of conformity (SDOCs), which reflect tests by the manufacturer or by a third party. Progress can also be made through unilateral recognition of conformity assessment results reported in other countries, which is possible when the same or similar technical regulations are applied. In some instances, voluntary arrangements between conformity assessment bodies in different countries have also been effective.

E. Use of competition principles

Anti-competitive practices are normally addressed through national processes. However, an interesting example of a multilateral effort to establish a framework for this approach can be seen in the GATS Reference Paper for Basic Telecommunications, which stresses the concept of effective access to networks. This provides guidelines for avoiding practices such as discrimination in interconnection, cross-subsidisation, excessive charges not based on costs, as well as lack of transparency and discrimination in access conditions.

Other policy elements that appear relevant for ensuring that regulatory reform enhances competition include encouragement to industry associations to maintain membership and dissemination of information that are open to all potential market participants. In addition, it will be important for effective complaint procedures to exist for such parties concerning perceived impediments to competitive opportunities.

IV. A focus on how customs procedures and standards harmonisation can contribute to open markets

A. Customs

Procedures relating to customs clearance can often impose significant delays and costs on traders. Notable benefits can be secured by enforcing the principles of transparency and least trade restrictiveness.

Some approaches in this regard seem relevant for ***administrative procedures in general***, both on entry to a country (where customs takes place) and within the domestic market. Examples include the streamlining and automating of documentary requirements and administrative procedures, including access to information relating to them. Another example is the provision of seamless service: "One-stop shop" for information; "one-window" for transactions; interoperability of computer systems used for customs.

In contrast, some approaches are more specifically relevant when considering what happens ***on entry to a country***. A number of WTO Agreements already have implications for customs procedures. These include the Agreements on Customs Valuation, on Import Licensing Procedures, on Preshipment Inspection, on Rules of Origin, on TBT and on SPS. In the preparations on "trade facilitation" for the 5th WTO Ministerial, consideration is being given to whether these provisions need to be strengthened and made more coherent.

At the national level, two particular approaches may be mentioned with a view to ***streamlining and automating customs procedures***, particularly to accelerating clearance:

a) An important cluster of actions focuses on achieving *faster movement of low-risk goods*, through such techniques as pre-arrival processing, to allow expedited clearance upon arrival; risk-assessment techniques, to minimise interventions when consignments cross borders; moving from transaction-based control procedures to audit-based controls, thus eliminating intervention during movement of goods; and co-operation between customs and other government agencies, and also between customs administrations of different countries;

b) International *harmonisation of customs procedures* as under the International Convention on the Simplification and Harmonisation of Customs Procedures (Kyoto Convention) revised in 1999.

When pursuing these approaches, it is important to keep in mind the *costs and benefits* of their implementation. For example, the costs of implementing the Kyoto Convention are considered to be significant and may be a factor in the very slow progress toward its implementation. At the same time, this Convention is expected to bring benefits to developing countries such as more efficient revenue collection.

B. Internationally harmonised measures and recognition of equivalent measures

The diversity of standards in different markets is often perceived a barrier to trade and investment. One of the most evident ways to overcome the burden that this may impose on market participants and to facilitate market competition is through the *use of international standards* as a basis for regulations. This in fact is required by the TBT and SPS Agreements, where feasible. However, when international standards do not exist, some positive effects can be achieved by striving to improve the transparency of standards applied and by ensuring broad participation in the development of standards.

In this regard, transparency and openness in standards development processes can make a significant contribution to predictability and elimination of cumbersome requirements. These processes should be in conformity with agreed international disciplines, such as the TBT Code of Good Practice for the Preparation, Adoption and Application of Standards. They should be accessible to the range of relevant stakeholder interests and should aim to provide a balance between them. There should be clear and adequate timeframes for public comment before decisions on standards and their implementation. Furthermore, standards-setting bodies should be accountable for the decisions they take by providing public explanations. Drawing on experience at the national level, it is then important for national bodies and interests to participate actively in international standards-making efforts.

In cases where international harmonisation is not feasible, *recognition of foreign measures as equivalent* for attaining the same regulatory objectives should be explored, as foreseen in the SPS Agreement. Typically this will involve a close comparative assessment of the objectives and effects (through risk assessment) of measures in different countries.

V. Concluding remarks

OECD's trade-related "principles of efficient regulation" have been identified on the basis of concepts underpinning the GATT/WTO system. They are general and seem relevant for all countries -- although our understanding of them evolves in the light of particular national experiences. Knowledge of best practices has grown out of experiences collected in a number of OECD countries (so far including five APEC countries: US, Japan, Mexico, Canada and Korea). There should be no presumption that these practices are valid in all cases, since situations may differ significantly among sectors and countries; nevertheless, these practices are worth consideration in the context of national efforts at regulatory reform.

The practices identified could also be considered in the context of international co-operation and co-ordination that aims at promoting market-opening regulatory reform. They could moreover be relevant as and when there is interest in considering whether or to what extent multilateral disciplines have a role to play in contributing to predictability. Thus national experiences may provide insights for the effective implementation of WTO disciplines and for possible strengthening and clarifying of international approaches. Meetings such as this one, organised under the APEC-OECD Co-operative Initiative on Regulatory Reform, can play a highly productive role in advancing understanding in this regard.