

The Importance of Building Legislative and Regulatory Capacity for Strategic Trade Management

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Abstract

This article examines the role of capacity-building on the legislative and regulatory side for establishing as well as maintaining a functional strategic trade management (STM) system. The purpose of the article is to catalog various ways to conduct legislative-regulatory capacity-building and how to match them to the economic and security profile of the target country. This analysis emphasizes how even the most robust STM system can face difficulties in dedicating resources to updating and changing regulations to keep up with the evolving international economic landscape and national political priorities. The article concludes with a survey of current efforts to provide such capacity-building assistance and suggests other methods that may be employed to ensure that newcomers to STM are able to maintain and evolve their STM regulatory environment.

Keywords

Capacity-building, legislative drafting, regulatory drafting, strategic trade management, training, awareness-raising

Introduction: Cart Before the Horse? Setting Capacity-Building Priorities

Discussions on capacity-building in the strategic trade management (STM) realm typically center on a lack of technical capacity and the need to provide targeted equipment, material goods, and training to implement STM practices. However, countries wishing to establish STM systems often suffer from immense challenges in getting started despite the number of

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seminars, workshops, and events held each year emphasizing the importance of having an STM system and an STM law that must underpin such a system. Most outreach initiatives raise awareness about and describe the fundamentals necessary for a comprehensive STM law. However, fewer resources are made available for the act of drafting the STM law and crafting the regulations to ensure they are suitable for the host government. Small countries, especially transit/transshipment hubs where such measures are so urgently needed, struggle to find available capacity within their own government to dedicate to drafting STM legislation and regulations when there are so many other pressing political issues at play.

One of the important topics tackled by this special issue on capacity-building is expanding and defining the way practitioners and scholars use the word “capacity.” Traditionally, in the strategic trade management realm, capacity is most often thought of in material terms. Capacity-building, then, as methods by which governments and nongovernmental organizations (NGOs) expand the functionality of an existing STM system. More often than not, capacity-building is synonymous with equipment donations or training programs. Equipment for effective border security, databases for end-use/end-user screening, training on targeting techniques, or software for collaborative interagency license review are all examples of material assistance that is provided to governments for the purpose of expanding the functionality of an existing STM system. Over the years, initiatives by Export Control and Related Border Security (EXBS) program at the U.S. Department of State and initiatives of other U.S. government agencies (inclusive of offices within Customs and Border Protection, other areas of the Department of Homeland Security, and some offices within the Department of Defense) provide such products to countries with fledgling STM systems as a means of filling “gaps” in capabilities.

However, before anyone can fill in “gaps” in the capabilities of a particular system, there needs to be an actual system that is rooted in law. The road to setting up a STM system is a long road for any country. It requires legislation that broadly outlines the national rationale, grants powers to designated institutions, and establishes some overarching bureaucratic processes for interagency coordination on licensing and enforcement. Next, implementing regulations need to detail bureaucratic processes each designated agency must follow and the important minutiae for conducting interagency licensing consultations, enforcement procedures, government-industry outreach, and cooperation with international bodies. However, to even get to the stage of passing legislation or crafting implementing regulations, there must be a great deal of existing political will and awareness of what sorts of measures are necessary for a robust STM system. The legislative and regulatory design phase must be preceded by a confluence of other variables that take a great deal of encouragement and meticulously customized outreach over time.

Frequently, this confluence of political will and bureaucratic action for setting up a strategic trade management system is extraordinarily fragile. The slightest amount of political turmoil, turnover, or bureaucratic in-fighting can set the entire process back years or shelve the process altogether. Therefore, it is critically important to be able to capitalize effectively on that confluence when it does manifest in a country, especially in countries with developing CBRN technology sectors or those countries that are emerging as major transit/transshipment hubs. Such countries typically attract most of the available external assistance in capacity-building because of their critical importance to global security.

To be able to capitalize on this confluence of political will, regardless of whether it exists due to domestic variables or international pressure, it is important for a government to have the “capacity” to do so. In some instances, “capacity” will mean an understanding of the fundamental elements of a strategic trade management law or consensus about the design of bureaucratic processes such as an interagency vetting of licenses or crafting control lists. However, in more and more instances, “capacity” means raw manpower. Legislative drafters and legal experts can frequently be in short supply in small and medium-sized countries, especially when more immediate legislative priorities are at play.

Without sufficient “capacity,” that is, manpower, knowledge, and consensus, the confluence of opportunity to establish a strategic trade management system can quickly fade. Yet, assuming that such opportunity is capitalized upon and a robust STM system exists, there is still a need for legislative and regulatory capacity. After laws and regulations are put into place, most assistance providers focus on ways to improve the existing infrastructure by providing “material” capacity to fill “enforcement gaps.” For example, x-ray machines, radiation portals, density busters, radiation pagers, fiber-optic cameras, and other detection tools are commonly donated equipment.² Training now focuses on the proper use of provided equipment, targeting and risk analysis, and commodity identification. The core focus of the capacity-building conducted in this phase is implementing, not updating and maintaining the existing system.

However, like any complex machine, a functioning STM system also requires modification and adjustment over time as part of routine maintenance. Control lists must be updated, regulations must be amended to reflect new economic priorities and new security environments, and bureaucratic procedures must continually evolve to meet modern challenges in international STM as well as the challenges faced by the individual country. Too often, strategic trade management systems are entrenched and automated, unable to accommodate changes in priorities. The U.S. strategic trade management system is an illustrative example of such stagnation.³ Within the U.S. system, much of the regulatory framework dates back to the 1990s and is subject to interpretation of those tasked with implementation. Altering control lists in the United States, de-listing items, moving categories of items, or adding new items requires different processes, some of which require action by the United States Congress. In the United States and in other nations, for systems to change and evolve, resources, specifically regulatory drafters and political decisionmakers must be marshaled for such purposes. Aside from political will, again, there must be capacity, both manpower as well as training on the latest best practices in order to effectively update the regulatory environment.

2 A survey of EXBS press releases catalogs numerous equipment donations, joint law enforcement exercises, and training seminars on the implementation of an STM system. See “EXBS News,” U.S. Department of State, <<https://www.state.gov/t/isn/ecc/c58701.htm>>. More day-to-day announcements are made on the Twitter Feed for the U.S. Department of State – International Security and Nonproliferation Bureau. See <<https://twitter.com/StateISN>>. Further, the 1540 Assistance page details the types of donations/assistance offered by donor countries. See 1540 Committee, “Offers from Member States,” United Nations, <<https://www.un.org/en/sc/1540/assistance/offers-of-assistance/offers-from-member-states.shtml>>.

3 The Congressional Research Service (CRS) publishes a report cataloging the status of and reforms made to the U.S. strategic trade management system. The latest version of the report, published in October 2018, illustrates the vulnerabilities in the U.S. system identified in 2007 and efforts to address said vulnerabilities. See “The U.S. Export Control System and the Export Control Reform Initiative,” Congressional Research Service, October 30, 2018, <<https://fas.org/sgp/crs/natsec/R41916.pdf>>.

Legislative and Regulatory Capacity: Designing the System

All systems require a law, or more typically, a series of laws, setting forth the types of strategic goods and the types of transfers to be regulated and in what manner. The modern preference is to pass one large omnibus strategic trade management law that covers all transfers of all types of “strategic” goods, effectively checking all of the requisite boxes for complying with United Nations Security Council resolution 1540 and meeting international standards.

Frequently, however, governments find themselves with laws already on the books that partially meet their STM obligations and are then faced with the challenge of finding legislative ways, through law or executive order, to “stitch” together a legal and regulatory tapestry that interacts seamlessly. Or, governments are faced with the challenge of adding to existing legislation and filling “gaps” in coverage, such as brokering controls, catch-all controls, and regulations on intangible technology transfers. Depending on the constitution or type of government involved or level of political urgency assigned, this can be a simple and straight-forward process or a deeply complex process. Methods for doing so can range from drafting and passing new legislation through a committee or parliamentary process, to issuing executive decrees, which are typically limited in scope, to administrative actions, where institutions are given guidance to adopt new duties with the hope that legislation authorizing those duties will come in the near future.

Assuming the political will exists to pass strategic trade management law(s) (omnibus or otherwise), the next step is marshalling domestic resources. In smaller countries, especially island countries and transit/transshipment hubs, there is no political priority for STM other than as a response to international pressure. But there may be a distinct willingness to meet international obligations with the aspirations of becoming a regional leader and/or looking to economic growth in the future. In many of these countries, such as some islands in the Caribbean, there are less than five persons tasked with drafting any and all legislation and regulations for the country.⁴ Typically, those tasked with legislative drafting are not trained in requirements of nonproliferation or security or dual-use trade. It is the job of assistance providers to build their professional capacity by providing training, but more pointedly, by assisting in the actual drafting process.

Recently, in Panama, a number of outside assistance providers were brought in to help draft and markup the executive decree that underpins the Panamanian system and to help design interagency and licensing processes that would work for Panama based on examples from other countries. The process took months of workshops, revisions, mark-ups, and weekly phone consultations to hammer out effective language within the decree. These activities are still

4 Personal interviews conducted with government officials in St. Lucia, Antigua & Barbuda, and St. Kitts & Nevis. All indicated two to five personnel tasked with drafting legislation and implementing regulations. Interviewees indicated that was not uncommon through the Caribbean community.

ongoing, with an aim to artfully and intelligently implement a licensing process.⁵ Capacity-building in the legal and regulatory sphere means developing a pool of knowledgeable personnel within the government agencies. However, it is important that the management or decision-makers in those agencies are receptive to the ideas of these knowledgeable personnel as well as willing to take advantage of the temporary boost to in-house expertise provided by the external assistance providers.

Legislative and Regulatory Capacity: Maintaining the System

If legislation and regulations are smartly designed, maintenance could be relatively automatic in the system. For a functional strategic trade management system, control lists and blacklists must be regularly updated, all relevant institutions must be integrated into the appropriate processes, and there must be processes to respond to industry feedback if license requirements and restrictions are found to not be user-friendly. For example, more often than not, control lists can remain stagnant for years, as some technologies become obsolete or more widely available on the open market, making controls a hindrance to business. Also, if license approvals, denials, and processes are left solely up to the interpretation of licensing officers, then any turnover within the government is going to create confusion and systemic inefficiencies, which would hinder trade as well as security.

An often-told tale of the U.S. export control system in the 1990s was aerospace contractors applying for simple dual-use export licenses to the Bureau of Industry and Security at the Department of Commerce. The license would be granted for one transaction and then rejected months later with the same item and same end-user.⁶ The regulations, which were incredibly outdated, were subject to interpretation by any particular licensing officer reviewing the application at the time. Detailed criteria and written guidelines for license approvals or denials were established to deal with this challenge.

Outdated regulations can create a number of issues for any sized economy. Inefficiencies in licensing processes can create unrest among industry and political pressure against strategic trade management practices or an uptick in willful violations. Low penalties, not adjusted for inflation, can create a situation where fines and violations are a cost of doing business and factored into business transactions. Finally, out-of-date legal language can create loopholes that can be exploited by skilled trade attorneys to avoid penalties or sanctions.

Frequently, once a law and institutions are put into place, those legislative and regulatory drafters and other personnel not directly relevant to STM move on to other priorities. If the government is attempting to merely meet international standards and the system is a placeholder, STM

5 In a previous issue of *Strategic Trade Review*, Juan Hernandez articulated his involvement with the design of the Panamanian system, where he himself was a resource to boost capacity within the licensing office for the goal of designing and implementing licensing processes. See Juan Hernandez, “Facilitating the Implementation of Strategic Trade Controls in the Republic of Panama,” *Strategic Trade Review*, Vol. 4, Issue 6 (Spring 2018).

6 Personal interviews with corporate officials and representatives of the aerospace industry as part of research on export control legislative development in the United States.

regulations may be filed away with other obscure legal minutiae and not be revisited for years. Furthermore, many involved in the process of drafting and setting up the STM system may move to other places in government, or retire, or other careers, creating a brain drain as well as one less person that would be motivated to conduct any sort of maintenance.

There are several examples where a lack of maintenance and a lack of legislative or regulatory capacity resulted in setbacks for strategic trade management efforts. As illustrated earlier, despite many years of STM experience, the United States' STM system has shown over the years stark indicators of a poorly maintained system.⁷ While functional and effective, the regulations, which have been open to multiple interpretations over the years, led to glaring inefficiencies and gaps in control.⁸ Starting with the Obama administration and with the advent of a new strategic trade management law under the Trump administration, the U.S. has been conducting STM system maintenance to address these concerns and "build higher fences around a smaller list of items," more reflective of the current high-tech manufacturing and trade environment.⁹

In the United Arab Emirates, as trade and security threats grew, a law establishing an STM system was passed in 2007 with supplementary legislation governing nuclear goods established in 2009. However, in 2019, although licensing institutions exist, the UAE is still faced with the challenge of publishing comprehensive regulatory guidelines and procedures maintaining and updating the STM system.¹⁰

In Thailand, the government issued guidance in 2015 for industry to prepare for the implementation of a strategic trade management system. The 2015 guidance constituted a major push toward the passage and establishment of a comprehensive strategic trade management system under new draft legislation. The new draft legislation, however, the "Trade Controls on Weapons of Mass Destruction Act," has yet to be implemented as of January 2019. From 2015 – 2019, a number of measures were taken to establish control lists, electronic license processing, industry outreach, and other elements of a robust STM system. However, turnover of officials and political unrest have led to continued delays in legislative passage and formal

7 Personal interviews with corporate compliance officers and government officials (U.S. Department of Commerce and U.S. Department of State) indicate a regulatory environment where license applications have, in the past, been approved or denied based on an interpretation and individual judgment of a licensing officer as opposed to a course of process. Further, without updated regulatory guidance, it can be difficult to obtain consistent judgments on commodity classifications or reasons for license denials. However, evidence indicates that as strategic trade control reform became a priority of the Obama administration, many of these complaints have been addressed.

8 The 2018 CRS Report on the U.S. Strategic Trade Management System outlines these inefficiencies, gaps in control, and measures to address them. "The U.S. Export Control System and the Export Control Reform Initiative," Congressional Research Service, October 30, 218, <<https://fas.org/sgp/crs/natsec/R41916.pdf>>.

9 "Export Control Reform Initiative: Strategic Trade Authorization License Exception," U.S. Department of Commerce, Bureau of Industry and Security, June 16, 2011, <https://www.bis.doc.gov/index.php/licensing/forms-documents/doc_view/85-plastic-injection-molding-1989>. More details on the U.S. Export Control Reform Initiative can be found at <<https://2016.export.gov/ecr>>.

10 Personal interviews with government officials and corporate compliance officers indicate a strong willingness and dedication within the UAE to promote strategic trade management, however, differences remain in regulatory approach for conducting system maintenance.

implementation.^{11,12,13}

In a previous issue of *Strategic Trade Review*, Karla Mae G. Pabeliña provides a chronicle of STM efforts in the Philippines.¹⁴ She describes the “long and arduous” journey of the Philippines toward passage of the Strategic Trade Management Act (STMA) in November of 2015 and all of the capacity-building activities put toward the development of said legislation and preparing the Philippines for its implementation. However, political turnover in Manila in 2016 greatly slowed said implementation. In 2017, Filipino officials were working with EXBS to conduct tabletop exercises testing proposed licensing procedures.¹⁵ Further, a recent presentation by the Strategic Trade Management Office of the Philippines noted that the STMA would now have a phased implementation, with companies registering as traders during the first quarter of 2019, applying for export licenses in the third quarter of 2019, with further implementation and services rolling out until the end of 2021.¹⁶

System maintenance, therefore, is key to a robust system and is especially crucial in an environment where political will is low and regulatory “upkeep” is a minimal day-to-day priority of government employees. While the multilateral export control regimes provide a consistent source of control list updates and guidance on best practices, it is up to legal experts within relevant government ministries to best internalize those processes and “translate” those into domestic regulations. Some governments have selected an interagency body tasked with such regulatory revision as part of regular scheduled meetings, others integrate control list updates by default – by simply referencing the EU control list or the multilateral regime lists directly in their legislation.

Building capacity to maintain a strategic trade management system is a more challenging endeavor than building capacity for legal drafting or initial regulations. The latter assumes political will, cooperation, and a desire for assistance while the former requires the host government to admit dereliction in maintaining the system. The best capacity-building efforts for maintenance involve putting measures in place that enhance automation. Databases, lists,

11 “Thai Export Reform Is Fewer Than 6 Months Away. Are You Export Ready?,” Global Trade News, August 2018, <<https://blogs.integrationpoint.com/en-us/53-export-management/7704-thai-export-reform-is-fewer-than-6-months-away-are-you-export-ready.html>>.

12 “Tight Controls Imposed on Export of Dual-Use Goods,” *Bangkok Post*, June 2015, <<https://www.bangkokpost.com/business/news/583773/tight-controls-imposed-on-export-of-dual-use-goods>>.

13 “Export of Dual-Use Items: Are You in Control or Will you be Caught Out?,” *Bangkok Post*, July 2017, <<https://www.bangkokpost.com/business/news/1292847/export-of-dual-use-items-are-you-in-control-or-will-you-be-caught-out->>.

14 Karla Mae G. Pabeliña, “The Strategic Trade Management System in the Philippines,” *Strategic Trade Review*, Vol. 2, Issue 2 (Spring 2016).

15 “U.S. and Philippines Conduct Strategic Trade Management Licensing Tabletop Exercise,” U.S. Embassy in the Philippines, October 4, 2017, <<https://ph.usembassy.gov/us-philippines-conduct-strategic-trade-management-licensing-tabletop-exercise/>>.

16 Presentation given at a joint industry outreach workshop with Singapore in 2018, available at: “Philippine Strategic Trade Management: Overview and Updates,” Philippine Department of Trade and Security, Strategic Trade Management Office, <<https://www.customs.gov.sg/-/media/cus/files/business/resources/courses-events/joint-industry-outreach-2018/presentation-by-philippines.pdf>>.

and end-use/end-user screening data that draws from regularly updated international sources is key. Moreover, a schedule for review and revision must be embedded into the law to force government institutions to update the system and contract to outside assistance if necessary. Any resources or efforts to keep government officials engaged in regularly updated sources of information or discussions will build capacity for more effective maintenance, and if needed, prompt government officials to bring in outside hands, or “manpower,” to assist with any regulatory drafting that may be needed. In some instances, such efforts can be prompted by bureaucratic change. New leadership at the ministerial level or at the mid-management level can trigger a review of current activities. In some countries, outdated websites, old licensing forms, and antiquated regulatory information was removed upon the ascension of a new administration. Sometimes, new management may also bring experts to overhaul existing regulations as well as design new methods of dissemination.

Conclusions

Legislative and regulatory capacity-building is, in a nutshell, the provision of any sort of tools that assist a government in the creation, design, *and upkeep* of a strategic trade management system. Instead of X-Ray vans and radiation pagers, legal and regulatory assistance takes the form of legal markups, trainings, and best practice sharing. A number of public and private entities provide workshops and trainings related to STM system models on how to meet international standards, how to update control lists, and how to set up uniform practices for consistent and efficient license application vetting. Further, governments are able to contract or receive direct legal assistance to physically draft, edit, and revise laws and regulations. Each of these types of capacity-building measures are focused on “knowledge” and “manpower.”

The key challenge, however, is absorbing that assistance and developing sustainable capacity to ensure that outside parties do not need to continually be shepherding government officials or an existing system. A secondary challenge is routinizing the maintenance of the existing system so that it too is not always prompted by outside parties or changes in international standards but occurs automatically as the economic and security environment of the country evolve.

Each of these challenges can be met by providing, through internal and external sources, awareness raising of the importance of strategic trade management practices and maintenance. The practitioner community should focus on implementation capacity for strategic trade management systems. But it should remain mindful of the health of the less visible bureaucratic procedures for maintenance and updates. These are, ultimately, the procedures that make capacity-building assistance successful and enable recipient countries to field robust STM systems.