

New Developments: Regulatory Impact Assessment in Developing Countries: Tales from the road to good governance

Camilla Adelle, Centre for the Study of Governance Innovation, Department of Political Sciences, University of Pretoria, Pretoria, South Africa. Camilla.adelle@up.ac.za
Camilla Adelle is a Senior Research Fellow at the Centre for the Study of Governance Innovation at the University of Pretoria.

Donald Macrae, Independent Consultant, London
donald@dmacrae.co.uk

Donald Macrae is an independent consultant working mainly for the World Bank Group and UN but also advised both the Dutch and UK governments on regulatory issues. He was formerly Director General for Law and Regulation in the Department for Environment, Food and Rural Affairs in the UK

Andreja Marusic, World Bank Group, Nairobi
AMarusic@ifc.org

Andreja Marusic leads the business regulatory work in Sub-Saharan Africa as part of the Investment Climate Department of the World Bank Group.

Faisal Naru, Organization for Economic Cooperation and Development, Paris.
Faisal.NARU@oecd.org

Faisal Naru is a Senior Economic Advisor in the Regulatory Policy Division of the Organization for Economic Cooperation and Development.

Abstract

This article sets out the challenges facing the practice of Regulatory Impact Assessment (RIA) in developing countries and then goes on to propose a set of guiding principles with which to attempt to overcome these. The discussion is based on the findings of a practitioner workshop on 'The Challenges and Opportunities of Regulatory Impact Assessment in Developing Countries' held on 7-8 April 2014 at the University of Pretoria, South Africa.¹

Key Words

Developing countries; regulatory impact assessment; better regulation; regulatory reform; policy appraisal

Introduction

Regulatory Impact Assessment (RIA) is about embedding good regulatory governance into the rule producing machinery of government in order to improve the quality of decision making: Poor quality regulation can impede innovation and stifle competition in any country but is a particular challenge in developing countries. RIA introduces a systemized process or tool for making policy, including a way of institutionalizing stakeholder participation. At the very least, RIA can act as a 'damage control' filter for bad policy

¹ This workshop was attended by 28 RIA experts and practitioners from around the world who considered the state of play of RIA in 17 developing countries, namely: South Africa, Kenya, Botswana, Egypt, Uganda, Ghana, Mexico, Ecuador, Columbia, Chile, Brazil, Mongolia, Nigeria, Guyana, Malaysia, Viet Nam and Indonesia.

decisions. It can also empower developing countries to assess and develop their own policies rather than accept 'precooked' policies from elsewhere. However, despite some notable efforts to establish RIA in a number of developing countries over a decade or more, RIA appears to be failing to take root.

At the same time research on RIA in developing countries is manifestly lacking (but see Kirkpatrick in press). Ten years ago, Peter Ladegaard (2005, p. 13) warned us that '[t]he debate on how to apply RIA in developing countries has so far consisted of recycling well-known broad conceptual frameworks, spiced up with appropriate anecdotes from OECD countries and occasional warning that countries' different traditions and implementation capacities need to be taken into account'. Crucially, the academic debate has hardly moved on in that time while the practitioner-based literature and experience is fragmented and often vested in the expertise of a few individuals. This article presents a mainly practitioner based perspective on RIA in these countries. Ultimately, however, the article attempts to stimulate fresh research efforts from both the practitioners and academics in order to move the debate forward and improve the practice of RIA in developing countries.

The Essential Elements of RIA

Radaelli (2005, p. 924) argues RIA is a concept which has 'travelled lightly' around the world producing 'diffusion without convergence'. Different factors affect the form and function RIA takes in a particular context (Adelle and Weiland 2012). However, most RIA systems draw on certain common elements, some of which are considered essential in the context of developing countries (see World Bank 2009 and OECD 2008 and 2009), including:

- *A sustained high level political commitment.*
- *An institutional infrastructure for implementing RIA.*
- *Clear criteria for screening and selecting policy proposals for RIA.*
- *Stakeholder consultation.*
- *Training and awareness raising programmes.*

Key Challenges of RIA

Establishing and practicing RIA in developing countries through these essential elements poses the same challenges, at the micro, meso and macro levels of analysis, as in developed countries, although more pronounced:

At a micro level, RIA is severely hampered by *a lack of financial and human resources* as well as a high turnover and low motivation of technical staff. As one government official put it: 'if a civil servant is not happy with his salary he may ask less questions'! A lack of trained personnel ultimately results in *a lack of capacity* to implement RIA. While to some extent capacity issues can be addressed through carefully planned and executed internationally funded projects, these issues tend to resurface when the period of funding comes to an end (see sustainability issues below).

Another challenge is the marked *lack of available data* for developing countries with which to assess potential impacts. Even when data is available in certain parts of the government or the private sector, it can be difficult to acquire due to a reluctance to share information. This *culture of secrecy* is often compounded by *limited technical capacity to employ analytical tools* and particularly economic analysis such as Cost Benefit Analysis (CBA), which at times has become unwieldy. Related to this is *the lack of transparency* surrounding

the legislative process in many countries. Very often, proposed legislation is deemed 'confidential' until its enactment by Cabinet, and a public consultation process is rarely a statutory requirement. There is also a misunderstanding about the type of data that is needed for RIA – in many cases even fairly rudimentary information based on sensible assumptions is better than no data at all.

At meso level, there are challenges associated with creating ownership of RIA and *overcoming the institutional norms and behaviours* that RIA seeks to replace. There can be a deep seated resistance to RIA within government departments as it brings with it a new set of institutions and incentives, heightened levels of transparency, and can ultimately *change the power relations* between actors leading to fears from both politicians and policy makers that they will lose control over decision making. In political cultures where accountability levers are few or absent, RIA can place greater responsibility and pressure on government to produce regulations that will work, or at least be popular. These political aspects of RIA are not usually made explicit in the, mainly positivist, practitioner and the academic literature on RIA (though see: Cashmore et al. 2010; Radaelli and Meuwese 2010). Furthermore, ownership of RIA can at times be inhibited by the perception that RIA is imposed by the international donor community. In these circumstances RIA can become just another box to tick.

Linking RIA to the wider policy making process and planning procedures is also a major challenge in developing countries. There is a tendency for RIA to become separate from the policy making process, especially if it is carried out late or if the policy direction has already been chosen. An extreme situation has arisen in South Africa where RIAs are conducted by external consultants at the request of the Cabinet, sometimes in almost complete isolation from the departmental government officials drafting the policy proposal.² Weak policy planning can also severely limit the ability of stakeholders, both internal and external to government, from contributing to RIAs. It is necessary to know what policy proposals are likely to be on the policy agenda and plan for RIAs across government so as to allocate resources efficiently. This is critical for prioritizing and phasing in the implementation of RIA across government in developing countries. *Competition and confusion between RIA and other reforms of the public administration* for scarce resources, including political support, has also been highlighted as an issue in some countries, such as Viet Nam (Naru and Nguyen 2010).

At a macro level, the major challenge is ensuring the sustainability of RIA. In OECD and EU member states RIA systems have proved to be dynamic, evolving over time and in many cases have been established over several decades (Adelle and Weiland 2012). The OECD has found that countries often face setbacks in their implementation of regulatory reforms and RIA. Those countries that have invested in the long term with a sustained effort have been the most successful in institutionalizing RIA. For example, the roots of the UK's RIA system can be traced back to the introduction of the Compliance Cost Assessment (CCA) procedure in 1986 (Renda 2006; Radaelli 2005). It was not until 1996 that the CCA procedure was gradually transformed into the broader 'regulatory appraisal' and in 1998 the 'proper' RIA procedure was introduced (EVIA 2008). The duration and complexity of developing and sustaining RIA systems is not always (or often) reflected in the time frames of regulatory reform programmes or supporting international funding.

² While other countries (including developed countries) also use consultants to conduct some RIAs, the majority are conducted by government officials.

The Pretoria Principles

So what can be done to overcome these challenges and establish RIA systems in developing countries that are appropriate, effective and sustainable? We propose that RIA should not be regarded as an exact science that can be replicated in different contexts if the 'correct' steps are followed. Rather we argue that RIA can be seen as a set of guiding principles that are ultimately intended to improve outcomes in terms of decision making. We therefore propose the following principles for promoting RIA in developing countries:

Clarify what is to be achieved by RIA. Is the objective to make sure that the costs outweigh the benefits? If so, detailed CBA is needed. However, we argue that more fundamental questions are whether regulation is necessary and if the proposed policy is going to work. In this case the focus needs to be on identifying and assessing the appropriate impacts and testing assumptions. In Kenya, for example, a very simple cost-effectiveness exercise revealed that the proposed social housing regulation would have an insignificant impact on the growing problem of sub-standard living conditions and the proposal was redesigned. RIA should also address implementation and compliance issues. For example, Inmetro, the Brazilian technical regulator, uses RIA to check that the delivery chain can support the new regulation before they adopt it (e.g. will there be enough laboratories with accreditation in the new procedures to enable manufacturers to get certification). In developing economies, these practical issues are arguably more important than a CBA of whether the benefits will outweigh the costs.

Manage expectations from the outset. There has been a tendency to 'oversell' the potential outcomes of RIA as well as when these will be achieved. This is in part due to the environment in which RIA is introduced which can be characterized by short term objectives and demand for immediate results from international funding. RIA will not work perfectly or radically change policy making decisions on every occasion. It is a cumulative learning process. Agreeing clear, focussed and measurable objectives and building in performance measurement and avoiding programmes that are 'too general and abstract' can help manage expectations. Furthermore, RIA will not stop politicians from making policy through impromptu speeches to the media nor will it provide solutions to intractable political problems. The impact on policy making may be more subtle than first anticipated: Rather than directly informing concrete decisions by providing specific information on the design of policies, RIA may lead to a more conceptual form of learning which slowly enlightens policy makers by feeding in new information, ideas and perspectives (Hertin et al 2009).

Build momentum through champions, platforms and incentives at all levels both inside and outside government to create a demand for RIA. A case for RIA needs to be 'sold' to policy makers as well as central government. At the 'street level' this can be done by demonstrating how RIA can help the officials do their jobs better and is not just something imposed by central government or international donors. For example, regulators conducting the pilot RIA's in Kenya and Botswana very quickly realized the usefulness of RIA as a tool to promote the quality of the legislation they are drafting. Furthermore, there can be opportunities to introduce RIA from the bottom up: In Brazil Inmetro initiated RIA independently of central government because they found it useful. In addition, nurturing high level political champions for RIA can also help sustain political commitment by providing the sometimes necessary authority or permission to *supply* RIA. In Malaysia, this empowerment has come from the highest levels of the civil service which is a less risky 'top down' approach than relying on politicians who may change in the future.

Target capacity building through 'learning by doing'. It is important to raise awareness and conduct training, both at the outset and then continuously, in particular by helping officials apply RIA to real life proposed legislation. Internationally funded programmes have often concentrated on training up large numbers of civil servants and stakeholders but failed to always target the 'right' ones, such as those who are actually involved in drafting a policy at the time or those who are the 'gatekeepers' in the rule making machinery. These training programmes have also tended to concentrate on general RIA training without focusing on 'real life' practical examples. Pilot projects can be used to make RIA training more targeted and relevant, which helps secure buy-in of the regulators who are to implement RIA. These can range from the large scale rolling out of RIA in selected government departments to very small scale half day workshops to discuss a particular RIA with policy makers and stakeholders. In addition these pilot projects can be employed to identify ways to improve and design the RIA system – as long as a mechanism exists to feed back lessons learnt.

Focus on institution building. Efforts must be made to build strong institutions to provide oversight, scrutiny, challenge, support and guidance for RIA long after the initial programme to establish RIA has ended. This includes systems and processes with which to embed RIA in the machinery of government, such as formally connecting RIA with the cabinet or council of Ministers decision making process, nurturing a network of institutional supporters and capacities, piloting and developing standard operating procedures for the oversight body to implement. Internationally funded programmes have often provided capacity building for individuals but not for building institutions. In Uganda support was provided by donors in both regards, for building individual capacities and institutionalizing RIA at the centre of government. This helped to increase the resilience of the RIA systems in the medium and long-term despite periods when RIA was effectively rendered dormant when certain critical individuals left the government.

Activate key stakeholders not just in government but also in the private sector, civil society, media, and parliament. This creates demand for RIA as well as helps provide external scrutiny and thus aids the sustainability of RIA. Evidence and arguments should also be provided to the private sector on what RIA can do for the business environment. Similarly the results of RIA should be communicated to bring about an awareness of the benefits and potential savings made by RIA. For example, the UK's Regulatory Policy Committee uses (R)IAs to publish a report annually on the total net costs and benefits of regulatory changes on UK business and civil society organizations (see Regulatory Policy Committee 2014).

Keep RIA methodology simple and apply it flexibly. RIA is not CBA. CBA should be an occasional tool rather than the central component of RIA in developing countries. Complex quantification techniques do not need to be included in the design of RIA methodologies, at least in the first instance. The assessment of impacts does not have to be accurate. At the very simplest RIA can help properly define the problem, go through the policy options, work through a simple check list of pros and cons, make some reasonable assumptions, and validate these with stakeholders before building this up towards a more complex model - which may or may not be completed. In Viet Nam, the 200X Law on Laws required a variety of impacts to be assessed by policy makers, which made the prospect of doing RIA overwhelming and unrealistic.

Monitor, evaluate and refine RIA. RIA is often put in place without performance measurement systems that can demonstrate the benefits of RIA or identify areas of improving the RIA process. Measuring performance also provides an incentive for greater compliance by regulators with the RIA requirements. In Australia, the Office of Best Practice

Regulation in the Department of the Prime Minister and Cabinet produces a *Best Practice Regulation Report* which shows how well the RIA requirements have been followed by each Ministry and agency.

Improve collection and access to data. Until national statistical databases are improved, regulators should collect, keep and make publicly available the data they use in developing policies. Data does not have to be perfect but by documenting and opening it up for scrutiny and correction in the RIA process data can be improved over time.

Conclusions

At its most simple the practice of RIA in developing countries can be seen as a form of damage control limiting unintended negative impacts and saving scarce resources. At its best, RIA is a way to increase integrity and trust in the policy making process and improve regulatory outcomes by promoting informed decision making which is targeted, proportional, consistent, accountable and transparent. Establishing and implementing RIA systems that live up to this potential, however, is not proving an easy task in many developing countries. This article aims to distil the key lessons learnt from 'real world' attempts to establish RIA in the developing countries. Although the challenges facing RIA in these countries may not be substantially different from those facing developed countries, they are often of a different order of magnitude. Furthermore their solutions need to be construed within the very different and diverse contexts of developing countries. It cannot be considered appropriate to simply transfer 'best practice' models rooted in different economic, social and political contexts of developed countries (Zhang and Thomas, 2009). However, there is limited literature on the experiences of RIA in developing countries. We argue, therefore, that a much more deliberate and concentrated research focus on the practice of RIA in developing countries is needed. This will go some way to help tease out the vast array of social, economic and political contexts in which RIA is implemented and begin to link these with appropriate solutions to common challenges.

This exercise may lead to some radical rethinking and debate about how to promote and adopt RIA in developing countries. For example, following the lead of Inmetro in Brazil, is it possible to build sustainable RIA systems elsewhere entirely from the bottom up without any top down initiatives? Such ideas are likely to be controversial amongst practitioners while at the same time providing fresh empirical evidence for political scientists with which to play out long-standing debates. On this and other aspects of RIA, such a voyage into uncharted research waters is likely to be rewarding for researchers and practitioners alike: It is an increasingly rare example of where RIA research and practice can move in parallel and actively inform each other (see Adelle et al 2012). The voyage is also likely to be a lengthy one: experience of RIA in OECD countries demonstrates that RIA systems are dynamic and undergo many years, often decades, of revision and improvement. In that sense, those of us interested in RIA in developing countries can expect a similarly enduring, but nevertheless exciting, ride.

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