Sowing seeds for transparency

Australia's upcoming entry into Free Trade Agreements with China and other countries provides a unique opportunity for business to sow the seeds for effective, transparent and accountable regimes, writes *Rebecca LaForgia*.

A Free Trade Agreement (FTA) is a highly evolved legal instrument with its own dispute bodies which form a legal framework for trading between countries. Its content is usually the product of intense lobbying mixed in with compromises by pressure groups, business and countries. It covers a wide range of trade in goods, services, investment and more and, as such, permeates the social, cultural and economic makeup of countries party to it as illustrated by the recent debate over the pharmaceutical benefits scheme and the local film industry in the Australia-United States FTA.

In these cases the stakeholders are obvious. Less obvious, however, are stakeholders of the actual provisions and administration of each FTA. Openness, transparency, information, competition, sanctions, incentives, clear rules and regulations that are strictly enforced are enemies of corruption so if Australian business wants transparency it should assume the mantle of stakeholder of these principles.

"Corruption is inherently an activity that thrives on secrecy; it takes advantage of unequal access to information by parties to a transaction and thus becomes widespread, especially where the cost of corrupt conduct is low and the profit high. The elimination of corrupt practices therefore goes beyond a mere moral campaign or sloganeering," claims Christy Mbonu in a recent corruption report to the UN Economic and Social Council.

Business is the natural advocate for effective, transparent and accountable FTA procedures. After all it's business that has to use them. Furthermore, transparency makes good business sense as it's an essential element of a regulatory environment that achieves its set objectives more efficiently while at the same time realising the benefits expected from trade and investment liberalisation.

By requiring that participants adopt high, transparent standards of business practice, FTAs also exercise a subtle form of foreign policy. Given the number and variety of countries involved, which include countries with diverse social and political backgrounds (such as China, Burma, Indonesia and the United Arab Emirates) this is a unique opportunity to mould, in a non-confrontational way, international business practice.

Business should be concerned not only with getting the best deal, but with how the deal will be administered. During the negotiation and formation of any FTA, business should take the opportunity to 'sow' the seeds of a transparent regime through its

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advocacy and interaction with government, as in the case of the Australian Industry Group (AIG) which has just completed a submission to government in relation to the ASEAN New Zealand-Australia FTA. In it the AIG urged that transparency must be the guiding principle for the FTA and frankly points out the corruption issues in some ASEAN countries.

As in the AIG example, business needs to move beyond general observations of an FTA and examine its actual administration. It is hoped that in the same way as business considers other trade issues in detail, it will also devise practical, detailed and useful methods for enhancing transparency. Here is a current example of how this could be done.

TRANSPARENT RULES OF ORIGIN IN FTAS

The Australian Government is forming a uniform policy on the rules of origin of an FTA to determine from where a particular good 'originates'. A good has to pass this rule of origin test to enjoy the advantages of an FTA. This test is crucial as often a single product is the culmination of components from a variety of countries. Without this threshold test a country could simply import a good from a state not party to the FTA and then export the same good to an FTA member, claiming that mere transportation equated with 'originating'. How to set this threshold for a rule of origin test depends on policy considerations such as how much local production is needed to deem a good as originating in a country.

There is no one approach to the test governing rules of origin and Australia has used conflicting approaches in its FTAs. Although there are a variety of tests for rules of origin, all of which are technical and complex in nature, they can all be viewed as asking when and how a good was substantially transformed so as to originate in a certain country. This can be established in three ways: the value-added test, the change in classification test and the specified manufacturing test. The Australian government leans towards the change in classification approach. Once a test is adopted it will have to be administered and this provides business with the chance to demand a transparent, verifiable administration for a non-corrupt trading regime.

The Australian government has invited business to submit policy ideas on how rules of origin are to be defined and administered and business has responded with the formulation of the AUSFTA rules of origin. However, crucially, there was no detailed submission on how the rules of origin should be administered to enhance accountability and transparency.

It is important that business advocates for accurate, verifiable and transparent administration of the rules of origin test, because fraudulent claims are one of the most common circumventions of international trade law. This circumvention is done by importing a good from a non-FTA country, falsifying the certificate of origin and then passing it off as originating from the exporting country, thus gaining the preferential treatment offered by the FTA.

Another reason business needs to advocate for transparent rules of origin regimes is the real risk of trade circumvention. The 2005 US State Report noted Burma (with whom Australia is negotiating an FTA) is "notorious among foreign businesspeople for its complete lack of regulatory and legal transparency". The report says that "corruption is systemic in Burma and is considered by economists and businesspeople to be one of the most serious barriers to investment and business there". The Australian government has also commented on this lack of accuracy and transparency, stating: "Burma's official statistics are not reliable. Published statistics on foreign trade are understated with a flourishing black market and cross border smuggling".

If Australian business does not advocate for transparent rules of origin then trade distortions will occur and goods incorrectly certified will attract unwarranted traffic reductions. More corrosively, a lack of transparency in rules of origin certification could create a culture of unaccountability and permeate other FTA activities and affect the reputation of the importer or exporter who has relied on the certification.

Here are three ways the Australian government could enhance transparency and accuracy of rules of origin. The Thailand-Australia Free Trade Agreement (TAFTA) requires that goods are accompanied by a rule of origin certificate, whereas the AUSFTA does not. To make a policy choice between these models depends on what the guiding principle is. If it means a reduction of red tape there will be a tendency to lean towards the AUSFTA. However, if the guiding principle is the enhancing of transparency and verification then clearly the preference should be given to certification.

Certification is not an end itself. To have value, certification needs to be accurate otherwise a corrosive administrative culture with only the appearance of legality could develop. An example of this is Burma where the US Department of State notes "... corruption is a jailable offence ... and has been since 1948. However, the anti-corruption statute is applied only when the senior generals want to take action ..."

Australia has provision in the TAFTA for mandatory retention of records and the provision for inspections and appeals, as well as a joint committee on rules of origin. However, there has been no audit or review of this process. Business could request that this type of audit be done through TAFTA's Rules of Origin Committee.

The advantages to business are two-fold. First, such a review would provide evidence of compliance, thus enabling best policy choices on the type of administrative procedures for future FTAs. Second, the review demonstrates that Australian business, by auditing its own compliance, demonstrates that it isn't asking other countries to maintain a standard it is unwilling to maintain itself.

BUILDING CAPACITY

Finally, business should request that FTA partners get technical assistance to help comply with rules of origin certification. Australian business needs to know that any FTA partner has the resources to accurately track documentation, keep it secure and understand how to apply the complex trade rules. This can only be achieved through capacity building and without capacity a stable rules of origin regime cannot be created.

President of the Australian Farmers Federation Mr De Landgrafft recently said: "The AWB traded under trying circumstances in Iraq and it is hard to condemn the organisation. I don't think anyone likes it but if you open up the belly of any major international trading organisation you will see varying degrees of the same thing happening." Such a comment is fatalist and negative.

If business does not want to face such limited choices it must actively advocate for each provision in future FTAs to be administered transparently and openly, supported by regular audits, targeted capacity building and verification procedures. Australia's upcoming entry into FTAs with China, ASEAN and others provides a unique opportunity for business to sow the seeds for a new trading regime.

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