Market Economy Status for China: Implications for Antidumping Protection in Australia

Andrew L. Stoler
Institute for International Business, Economics & Law

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Introduction

Over the course of any particular week, it is easy to find articles in the local and international press concerned with the question of whether or not China will be accorded market economy status in this or that jurisdiction. At the end of June, the Financial Review reported that the EU was set to deny Beijing market status. The Americans have embarked on an ambitious dialogue with China in a Structural Adjustment Working Group. New Zealand has accepted that China should be treated as a market economy. China has made it clear that it would not be willing to pursue an FTA with Australia unless it is given market economy status in this country.

We could spend a lot of time – others do – discussing whether or not the Chinese economy has all of the characteristics we might consider it should have in order to qualify as something we should call a "market economy", but the time spent on such an exercise would be wasted. There are no practical consequences to "market economy" status apart from the treatment a country's exporters are accorded for antidumping purposes. Even there, China's treatment as an "Economy in Transition" merely potentially affects just one aspect of an antidumping investigation.

I am not going to spend any time on the issue of whether or not China has a "market economy". Rather, I am going to show that treating China as an "Economy in Transition" is a completely unnecessary "poke in the eye" for Beijing and that Australian industries sensitive to potential dumping in this market of Chinese products are fully protected against injury if China is treated as any other "normal" country for antidumping purposes.

What is the Legal Situation under WTO Rules?

Let me start by making clear just what it is we are allowed to do in respect of China and antidumping. I honestly think there is a certain amount of confusion on this topic.

Of course, before China was a Member of the WTO, we could do whatever we wanted. When China became a Member of the Organization, however, the picture changed dramatically. Australia and all other WTO Members are now obligated to apply the normal rules of the WTO and the Antidumping Agreement in respect of their trade relations with China. There is one temporary exception to this otherwise applicable rule. The exception is a limited one and applies exclusively to the methodologies that are permissible – under limited circumstances – for determining what the Antidumping Agreement calls "normal value" – which – in non-technical terms is the price that a good under investigation should ideally be selling for on the market of the country in which it is produced.

The exceptional treatment is not made possible, as some believe, by the Antidumping Agreement's obscure provision that recognizes that so-called non-market economy countries may need to be treated differently than others in antidumping cases. That clause dates from the mid-1950's and applies only in the case of countries that have a complete or substantially complete government monopoly over international trade and where all domestic prices are fixed by the state. This definition would have fit China many years ago, but it certainly does not characterize China's economy in the current century.

The reason why I think it is important to be clear that this is not the provision that applies is that it would only be if one were relying on this provision to treat China in a discriminatory fashion that the issue of the nature of China's current economy would be relevant. To be clear: because we would all agree already that China does not fit the GATT definition of the 1950's, we have already in effect made a determination that China, for WTO purposes, is a market economy deserving non-discriminatory treatment under the antidumping laws.

Why -- in the case of a WTO Member like China -- the American authorities continue to tie themselves up in knots over whether the country meets Washington's six criteria to qualify as a "market economy" and why the Chinese authorities put up with this exercise is all a bit of a mystery to me. The reviews that were appropriate for non-WTO Members like Russia and Vietnam are clearly not appropriate in the case of China.

So whether China generally deserves to be treated like other WTO Members is already decided. We don't need to get into this issue.

What makes it possible under the WTO to treat China differently for one aspect - and one aspect only – of an antidumping action are certain provisions in China's protocol of accession to the WTO which permit recourse to alternative methodologies in determining "normal value" where non-market forces in the economy appear to be distorting prices. Recourse to these alternative methodologies, like the use of surrogate pricing information from third countries, is somewhat circumscribed by the fact that Chinese exporters are supposed to first be given the opportunity to show that market economy conditions prevail in the industry under investigation.

So, from a practical standpoint, this becomes a question of proof. In an antidumping investigation, can a Chinese exporter provide Australian Customs with verifiable information proving that its price and cost data are real and undistorted by non-market forces? If not, Customs can fall back to other ways of finding normal value.

Now there is another important point that I want to make. That is that from a WTO standpoint, this protocol provision really does nothing that isn't already provided in the Antidumping Agreement for all investigations. Whether exporters under investigation are from an economy in transition or not, they have to provide verifiable information that Australian Customs can trust as accurate. Where that information is not provided, Customs can fall back on best information available – including surrogate third-country information. I'll come back to this point a bit later.

There is one final point to appreciate about what the WTO and China's protocol of accession currently permits and it is this: Whether they are dealing with a situation involving a country in economy in transition status or not, the investigating authorities in Australia need to be able to defend their calculations as accurate. EIT status does not give investigating authorities a *carte*

blanche to do whatever they want. China has allowed through its protocol of accession that WTO Members may pursue a "non-market economy" approach to the calculation of normal value and dumping margins, but China has in no way accepted that this exceptional approach should produce inaccurate or indefensible dumping margins any more than it has accepted that antidumping duties might be imposed without an injury test or demonstration of a causal link. China would be fully within its rights to challenge through the WTO dispute settlement process any dumping margin it believes is not accurately calculated no matter how that margin is arrived at.

So the bottom line here is that investigating authorities are in all cases required by the WTO rules to calculate accurate antidumping margins whether the country has EIT status or not. Maintaining or removing a country from EIT status does not affect this obligation and it also does not affect in any way injury or causal link determinations. In consequence, removing a country from EIT status should not negatively affect Australia's ability to fully protect industry against legitimate cases of dumping.

What has been the Australian experience with the EIT Rules?

What has been the Australian experience with the operation of "Economy in Transition" or EIT rules for antidumping? Has there been some advantage to Australian industries affected by Chinese dumping as a result of these rules? I think the record shows that there is no additional or special protection that flows from the operation of the EIT rules.

Many people seem to believe that the EIT provisions allow for automatic fall-back to the use of surrogate third country pricing and cost information and that this might somehow guarantee higher dumping margins in cases involving China. This is not the case. There are a number of steps that are normally part of a process leading to the use of surrogate (third country) information even where the investigation involves an EIT. The use of such information is by no means mandatory and Australian Customs has indicated a preference for using domestic prices from other sellers of like goods in the country of export where prices are not affected by a price control situation.

The first step in the special EIT process involves an assertion (supported by prima facie evidence) by the applicant seeking antidumping action of the existence of a price control situation or the supply of significant raw material inputs by a government-owned enterprise. This assertion triggers the use of a special supplementary questionnaire to exporters alleged to be dumping. Customs then uses the answers to the questionnaire to help it assess whether the asserted price control situation or raw material input situation exists in respect of the exporting firm questioned. A number of possible considerations come into play at this stage including, for example, whether cost and pricing decisions of the exporting firm are made in response to market signals.

In practice, where costs for raw material inputs are found to be affected by government-owned enterprises' supply of these materials, Customs will first try to find alternative price information for raw materials supplied by a non government-owned enterprise either to the firm in question or to other exporters in the country where the investigation is centred. If this information is not available, then Customs can fall back to other "reasonable and appropriate" approaches to determining suitable raw material input prices, including (but not limited to) surrogate price information from third countries.

So, surrogate information normally comes into play in the EIT situation at some stage following assertions of price control or raw material input situations. However, it is important to bear in mind that recourse to surrogate information may also be had where such assertions have either not been made or proven and where investigators are unable to obtain verifiable price information on domestic sales prices of the exporting firm or the domestic sales prices of other sellers in the market.

Where surrogate country information is used in an EIT investigation, there are a number of conditions limiting the flexibility of applicants and Customs in determining appropriate comparisons. For example, the domestic market in the surrogate country should be "reasonably representative" of that in the EIT. In addition, the market in the surrogate must be a competitive one without obvious price distortions and producers must manufacture a product like that manufactured in the EIT subject to the investigation.

How recourse to the use of surrogate (third country) information comes about in practice can be illustrated in the concrete case of Australian Customs' 2002 investigation of dumping of Dichlorophenoxy-Acetic Acid (a.k.a. 2,4-D) from China. In the case of one of the Chinese firms subject to the investigation, Jiamusi, Australian Customs examined both the possible existence of a price control situation and a raw material input situation and found that neither existed in the case of the company. For a variety of reasons, Customs was unable to determine normal value by reference to domestic sales of Jiamusi, sales by other sellers on the domestic market , sales to third countries by Jiamusi or a constructed normal value for Jaimusi's own production in China. In the end, Customs concluded that the use of information relating to 2.4-D production and sales in India (the country suggested as a surrogate by the applicant) would be appropriate in determining normal value for 2,4-D produced by Jiamusi in China.

We can see here that the use of the supplementary questionnaire as an extra burden of proof in an investigation involving a firm in an EIT might be said to have had limited utility to Australian industries even under current EIT provisions. Significantly, in the example I've cited involving the dumping of 2,4-D, Customs did <u>not</u> find either price control or raw material input effects. Recourse to surrogate (third country) information occurred <u>not</u> because of these "special" EIT regulations but because the Chinese exporter could not supply verifiable information allowing a calculation of normal value to be made on any other basis. In other words, the company failed the same "burden of proof" standards that a firm under investigation in a non-EIT situation would be expected to satisfy.

<u>EIT – A Distinction without a Difference</u>

By now, you should be wondering why this is even an issue in Chinese – Australian trade relations. It is certainly not clear to me that there are real points of substance in play.

I said earlier that I would come back to the point on verifiable information and its central role in antidumping investigations. The specific case I cited made this point in spades. Even in cases involving dumped exports from China, China's special protocol provisions and Australian EIT regulations really do nothing that isn't already provided in the Antidumping Agreement for all investigations. Whether exporters under investigation are from an economy in transition or not, they have to provide verifiable information that Australian Customs can trust as accurate. Where that information is not provided, in both EIT and "normal" antidumping investigations,

Customs can fall back on best information available – including surrogate third-country information.

In my view, the facts and the rules show clearly that Economy in Transition status – at least for a country like China that enjoys the legal protections associated with WTO Membership – creates a distinction without a difference. The distinction, however, has clearly irritated China without providing any real value to Australian industry. Removing China from EIT status will in no way that I can see disadvantage Australian industry. On the other hand, it is clear that continuing to treat China in what looks to be a discriminatory fashion is standing in the way of improved bilateral trade relations. There is only one conclusion to reach here and that is that Australia should remove China from the EIT category as soon as practicable.

I hope I have made a useful contribution to our discussion today. Thank you very much for your attention.

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