What it Would Mean for Australia to Treat China as a Market Economy: Impact of Removing China from EIT Status for Antidumping Purposes

Andrew Stoler
Executive Director
Institute for International Business, Economics & Law
The University of Adelaide

Australia and China are in the advanced stages of discussing a possible Free Trade Agreement. China has said that no FTA would be possible until Australia ends the discriminatory treatment currently accorded to China for antidumping purposes under Australian antidumping legislation’s “Economy in Transition” (EIT) provisions. In the following pages, we reply to typical questions posed by the business community in connection with the possible removal of China from EIT status.

Question 1: “Would removing a country from the economies in transition (EIT) category affect Australia’s ability to protect industry against legitimate cases of dumping and arrive at accurate anti-dumping margins?”

Response: In my opinion, removing a country from the EIT category would in no material way affect Australia’s ability to protect industry against legitimate cases of dumping and arrive at accurate antidumping margins. To begin, answering this country in any other way would imply that the operation of a WTO-consistent antidumping regime for cases involving market economy countries is somehow deficient in protecting against injurious dumping. More to the point, antidumping actions involve determinations of dumping, injury and a causal link between the two and EIT status affects only the question of the procedure through which one determines “normal value” in connection with the necessary comparison of the normal value and export price for the product in question.

EIT status presumes that the normal value cannot be determined by reference to the price of the product sold in the ordinary course of trade in the country of origin and also that information provided by producers in the course of a cost of production calculation will not be verifiable as accurate. In effect, a presumption is created that – from the start - it will be necessary to fall-back to best information available from sources other than the producers. However, even in non-EIT cases, it is necessary for investigating authorities to be able to verify the accuracy of the information they are using to calculate normal value and where that information is not provided by the producers, recourse can be had to best information available.

A key point here is that under either scenario, the investigating authorities 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. To take the example of China, 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 in accurate 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
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 to calculate
accurate antidumping margins whether the country has EIT status or not. Removing a country
from EIT status does not affect this and it also does not affect 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.

**Question 2:** “Is recourse to the use of surrogate (third country) information to determine
the normal value of a product under investigation available where the product is from a
country which is not in the EIT category?”

**Response:** If the antidumping investigation at issue does not involve a country treated outside
of the normally applicable rules for normal value determinations (a country not in the EIT
category), then the Antidumping Agreement is clear that investigating authorities must look first
to “the comparable price, in the ordinary course of trade, for the like product when destined for
consumption in the exporting country” (Article 2.1). If prices of those sales do not permit a
proper comparison, investigating authorities can fall back to use of either (there is no hierarchy)
(a) the comparable price of the like product when exported to an appropriate third country or (b)
with the “cost of production in the country of origin, plus a reasonable amount for
administrative, selling and general costs and for profits” (Article 2.2) (emphasis added)

So far, by way of answer to this question, Article 2.2 limits the investigators to the use of
information on the cost of production in the country of origin – meaning surrogate third-country
information is not appropriate. However, Article 6.8 of the Agreement makes clear that where
the interested party under investigation refuses access to or otherwise “does not provide,
necessary information” the investigating authorities are free to make their determinations on
the basis of the facts available. (emphasis added)

Annex II, which governs recourse to “facts available” or “best information available” makes
clear that those under investigation cannot escape application of the “facts available” simply by
cooperating and providing the investigating authorities with any kind of local information. The
first phrase of paragraph 3 of the Annex makes it clear that the information provided in the
course of the investigation must be (inter alia) “verifiable”, (emphasis added) In other words,
“necessary information” is “verifiable” information. Where the locally provided information is not
verifiable, then the investigating authorities may fall back on “information from a secondary
source” (Annex II, para 7) (emphasis added). At this point, there is nothing in the Agreement
that precludes the investigating authorities from using “surrogate (third country) information” to
reach their determination – although paragraph 7 urges circumspection.

So the answer to question 2 is “yes”, provided the authorities have jumped through all of the
necessary hoops to get to a point where it is decided information in the country of origin on the
cost of production is not verifiable (or alternatively has simply not been provided through lack of
cooperation).
**Question 3:** “How is surrogate (third country) information applied in anti-dumping cases in Australia involving EIT?”

**Response:** The conditions governing the use of information from surrogate (third country) sources in Australian antidumping cases involving exports from a country considered as an economy in transition (EIT) are described in some detail in the Australian Customs Service “Dumping and Subsidisation” manual (Vol. 22). According to the manual, 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 Customs has 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 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 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.

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.

As summarised above, surrogate information normally comes into play in the EIT situation at some stage following assertions of price control or raw material input situations. However, 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.

Wherever surrogate country information is utilised 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 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 is illustrated in the concrete case of Australian Customs’ investigation of dumping of Dichlorophenoxy-Acetic Acid (a.k.a. 2,4-D) from China (See Trade Measures Report No 58 of 2 December 2002). 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 described in the report, 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 Jiamusi’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.

**Question 4: “How can surrogate (third country) information be applied to countries that are not EIT under Australian legislation/regulations?”**

**Response:** Under Australian legislation / regulations, recourse to surrogate (third country) information in investigations of firms in countries not covered by EIT provisions is possible only where Customs is forced to make a determination on the basis of “all relevant information” (“facts available” in the case of the Antidumping Agreement’s Article 6.8, or “best information available” in the case of the Agreement’s Annex II). Recourse to use of “all relevant information” arises in situations of non-cooperation by exporters under investigation and/or where the information provided is unreliable.

Australian Customs therefore appears to recognise that a situation where information provided is not verifiable can lead to eventual use of surrogate (third country) information (see response to question 2 above). However, it must be recognised that since Australian Customs does not have a preference for the use of such information in the first instance even in cases involving firms in EITs, the authorities would likely exhaust all other approaches to determining normal value before falling back on the use of surrogate (third country) information.

**Question 5: “Based on international experience, are there elements in the EIT regulations that would be important to Australian industry to incorporate in the regulations applying generally to trading partners under Australia’s antidumping legislation? For example, can we still have regard for how prices are derived in the case of inputs?”**

**Response:** In my view, it is not necessary to consider incorporating elements taken from the EIT regulations into regulations applying generally to trading partners under Australia’s antidumping legislation. Depending upon the circumstances, both the price control concept and the raw material input provisions of the EIT regulations should be adequately covered by Australian subsidies and countervailing duties legislation and regulations. Of course, in order to constitute “countervailable” subsidies, the effect of the government price control or government-owned enterprises’ provision of raw material inputs would need to satisfy the WTO Subsidies Agreement’s “benefit” and “specificity” requirements. Where those requirements cannot be satisfied, it is generally assumed that there is no trade distortion resulting from the practice.
**Question 6:** “Under EIT arrangements, the onus is on the exporter to cooperate with an antidumping investigation. What are the “burden of proof” implications if a country is removed from the EIT category, including the impact on Australian industry’s [ability] to mount an antidumping case?”

**Response:** Exporters in non-EIT antidumping investigations also are expected to cooperate with an antidumping investigation. The only extra onus falling on exporters under the EIT provisions is the requirement to furnish additional information through the supplementary questionnaire designed to assist Customs in its findings on the existence of a price control situation and/or raw material input price distortions. Removing a country from EIT regulations coverage would remove this requirement from the process of the investigation, but that should not materially impact the Australian industry’s ability to mount an antidumping case.

Assuming that the use of the supplementary questionnaire is the only extra burden of proof aspect to an investigation involving a firm in an EIT, and assuming also that the questionnaire is focussed only on the price control situation and raw material input aspects of an EIT investigation, this extra aspect to an EIT investigation might be said to have had limited utility to Australian industries even under current EIT provisions. For instance, in the example cited above involving the Jiamusi company’s production of 2,4-D, Customs did not find either price control or raw material input effects. Recourse to surrogate (third country) information occurred not because of these “special” EIT regulations but because Jiamusi 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.

**Question 7:** “Under WTO requirements, is recourse to surrogate information available to applicants in making applications for anti-dumping relief in the same way as for the authority investigating the anti-dumping claim?”

**Response:** Following on from the answer to question 2, and from the last phrase of paragraph 1 of Annex II, we know that the Agreement envisages that the “information from a secondary source” may include facts “contained in the application for the initiation of the investigation by the domestic industry”. (emphasis added) There would therefore appear to be nothing in the WTO Agreement that would stand in the way of a petitioner including in its application for initiation information from third-country sources that the petitioner believes may be relevant to the investigation. So the answer to this question is “yes”. Of course, the investigating authorities would – in a non-EIT situation – only have recourse to this petitioner-supplied surrogate information where they had (a) got to the Article 2.2 cost of production calculation and (b) found reason to reject in-country information because it either was not provided or was provided but was not verifiable.