

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

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Introduction

Thank you for inviting me to speak to you today. As I think you know, I have a number of China-related projects at the Institute these days, many of them associated with my role as a Senior Advisor to the Shanghai WTO Affairs Consultation Centre. I have also done some work for the Department of Foreign Affairs and Trade in connection with the Australia –China FTA scoping study with a particular focus on what's been called the non-market economy issue. This will be the focus of my comments this afternoon.

Over the course of any particular week, it is easy to find articles in the local and international press about whether or not China will be granted 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. For their part, 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. Of immediate interest to us is the fact that 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.

What's this all about?

We could spend a lot of time – others do – discussing whether or not the Chinese economy qualifies as something we should call a “market economy”. In my view, the time spent on such an exercise would be wasted.

From a practical standpoint, there are no consequences to “market economy” status apart from how a country's exporters are treated for antidumping purposes. Even there, China's current treatment here in Australia as an “Economy in Transition” merely potentially affects just one aspect of an antidumping investigation.

What does it mean to be treated as an Economy in Transition? Well, what it really means, and what some people think it means are at the centre of the current debate linked to the proposed FTA.

In a nutshell, protectionists want to continue to treat China as an EIT because they believe when Australian Customs conducts an antidumping investigation against the Chinese, Customs will reject Chinese price information as unreliable. That will allow the petitioners to claim that information from a third-country – like India – should be used instead. The use of this “surrogate information”, they reckon, will inflate home market price data leading to higher dumping margins for the Chinese goods under investigation. Higher margins increase the likelihood of a finding of injury to an Australian industry and the probability that antidumping duties will be imposed.

This is what some people think EIT status leads to. But that’s not really the case.

### 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.

Before China joined 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 their trade relations with China.

In the WTO, China is not treated as a non-market economy. The only place you can find reference to such a distinction is in an obscure rule allowing for discriminatory treatment of certain 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.

I think it is important to be clear that this provision does not apply to China. Because we would all agree already that China does not fit the old GATT definition of a non-market economy, we have already in effect made a determination that China, for WTO purposes, deserves non-discriminatory treatment under the antidumping laws.

But what about this Economy in Transition business and the use of surrogate information like price information from India?

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 certain forces in the economy appear to be distorting prices. Normal value is the term of art used to describe the "fair price" for the good when produced and sold on the home market.

But even if Customs wants to fall back on alternative methodologies, like the use of surrogate pricing information from third countries, it must first give Chinese exporters the opportunity to argue that market economy conditions prevail in their industry and that home price information is accurate. EIT status doesn't make use of surrogate information automatic.

From a practical standpoint, this all 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 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.

As I said earlier, 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 special EIT process involves an assessment by Australian Customs of whether a petitioner's asserted price control or raw material input situation exists for exporting firms under investigation. 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.

How 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.

However, 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.

Does this have anything to do with EIT status?

Significantly, in the example I've cited involving the dumping 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 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.

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.

Before I close today, I want to mention that over the next several weeks, the Institute and the Shanghai WTO Affairs Consultation Centre will be conducting a global survey of business into views on how well China is progressing in the implementation of its commitments made in the WTO. Participation in the survey is confidential and voluntary. Altogether we expect to receive input from more than 200 business representatives in Australia, China, the USA and Europe. If you would like to be included in the survey, please provide me with your business card or e-mail address, either today or over the next few days.

Thank you very much for your attention.