CONSTRUCTING NORMAL VALUE IN WTO ANTI-DUMPING LAW. GIVING MEANING TO THE PHRASE OPEN, MARKET-ORIENTED POLICIES IN THE PREamble TO THE MARRAKESH DECLARATION

Bernard O’Connor

Abstract

This paper looks at the construction of normal value in WTO anti-dumping law in relation to market economies (as opposed to non-market economies). The object is to look at two distinct issues: a) when can an investigating authority reject as un-reasonable the costs in the accounts of an exporting producer and b) use costs from a country other than the country of origin of the dumped goods.

The paper is a textual examination of the applicable WTO law. It shows how the idea of open markets permeates the specific provisions on normal value and how ‘openness’ must be the overriding interpretive tool or objective where any uncertainty is to be found in the texts.

The fifth recital of the Marrakesh Declaration sets out the context for the interpretation of Article VI of the GATT and the Agreement on the Implementation of GATT Article VI. This shows that an open market-oriented approach is essential to the understanding of the concept of normal value in WTO law. The concepts of the ordinary course of trade and a particular market situation must be understood in that context.

The paper concludes that, despite the complexities of the texts themselves, as well as the presence of gaps or lacunae in the law, there is an overriding obligation on competent authorities to find a normal value that is open market orientated. And where the costs and prices in the country of origin are not the result of normal open-market forces, recourse to data from outside that country is permissible.

1 Bernard O’Connor practices law in Brussels and Milan and is a member of the faculty of the MILE programme in the WTI in Bern and the IELPO programme in Barcelona. I would like to thank my colleagues Sebastien Gubel, Elena Bertolotto, Andrea Gutierrez-Solana and Enrique Rodriguez for comments on earlier drafts.
The definition of dumping in WTO law

Dumping is a commercial pricing strategy aimed at gaining or increasing a share of an export market. While the commercial concept of dumping is fairly simple to frame, its reduction into legal principles is more difficult. Neither the GATT nor the Agreement on the Implementation of GATT 1994 (the Anti-Dumping Agreement or the ADA) set out the principles on which anti-dumping law is based. Rather, these provisions enter immediately into the definition of dumping and the details of the calculation of dumping margins.²

GATT Article VI provides:

\[\text{The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another}\]

\[(a)\text{ is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,}\]

\[(b)\text{ in the absence of such domestic price, is less than either}\]

\[\text{(i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or}\]

\[\text{(ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.}\]

Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.³

Dumping in legal terms is, therefore, the difference between the normal value in the country of origin and the export price to the importing country. Dumping is found where the normal value is higher than the export price. And dumping is to be condemned if it causes injury to, or materially retards, an industry in the importing country.

What is Normal Value?

² Unlike other agreements there is no preamble to the ADA setting out the drafter’s intent. The preamble to the GATT 1947 does not address dumping and rather looks to growth by the lowering of tariffs and other barriers to trade. There is no preamble to the GATT 1994.

³ A supplementary provision to Article VI in Annex I, in relevant part, provides: It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.
Why does the law refer to the *normal value* in the country of origin rather than a price or a market price? This is because there can be situations, for example, where there is no market in the country of origin,\(^4\) where there is no market for the particular product\(^5\) in that country, where there are no sales of the same product by the producing exporter in the country of origin, or, where there are sales in the country of origin but the costs or prices are materially distorted. As there may not be a price, or an appropriate price, or even a market, in the country of origin, the law requires that dumping be measured on the basis of the *normal value* in the *country* (rather then the *market*) of origin.\(^6\)

That *normal value* should normally be a *normal* market price is clear from Article VI. The article refers to *price* and a *comparable price* and the *ordinary course of trade*. The references to *prices* and the *ordinary course of trade* introduce the idea that normal value is normally based on *prices* in open markets functioning in the *ordinary course*. In short, while Article VI does not mention the word *market*, the reference to markets is inherent in the object and purpose of the provision. And it can be seen from the fifth recital to the Marrakesh Declaration of 15 April 1994 that the world trading system should be based on open market-oriented policies. The fifth recital provides:

> **Determined to build upon the success of the Uruguay Round through the participation of their economies in the world trading system, based upon open, market-oriented policies and the commitments set out in the Uruguay Round Agreements and Decisions**

The reference to open market-oriented *policies* in this recital does not mean that the WTO is only looking at policies and not at markets themselves. All markets are legally framed in some fashion by policies and law. The law sets down the basic obligations in relation to exchange.\(^7\) The law sets out the rules to reflect policies on what can be traded legally, the nature and status of the actors engaged in the trade and the responsibility of both the actors and the state in relation to proper functioning of the market. So the *policies* that are referred to in the fifth recital are those policies which make a market open and make an economy market-oriented.\(^8\)

---
\(^4\) For example, non-market economies.
\(^5\) For example, where there are different infrastructures in different markets requiring different products to achieve the same end objective. An exporting producer may make one product for the domestic market that is different from the product destined for the export market. This paper does not address the concept of when products are like products.
\(^6\) The difference with the use of the word ‘*price*’ in relation to the export price is obvious but often overlooked. This is because it is presumed that there is a market in the country of export in which the domestic industry competes with imports in a market that sets a price. However, there are situations where the export price must also be constructed.
\(^7\) The scope and nature of contracts and the mechanisms to ensure coherent and agreed interpretations as well as compliance.
\(^8\) Again, while it is clear that this recital does not preclude WTO membership for countries with non-markets, all members are committed to achieving open markets through open market-oriented policies. Anti-dumping law recognises that achieving open markets can be a process that takes time.
ADA Article 2.1 expands on the idea of *price* used in GATT Article VI, as well as factors that can affect prices, such as *differences in conditions and terms of sale, differences in taxation, and other differences affecting price comparability.* Article 2.1 provides:

> For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

Thus the guiding principle, in law, in determining how the normal value should be arrived at, appears to be a *comparable price* emerging from the functioning of the *ordinary course of trade.* Again, Article 2.1 does not mention the word *market.* But given the WTO context, the concept of the *ordinary course of trade* must be an open market-oriented concept. In this sense Article 2.1 begins to make explicit the link between *normal value* and ‘normal’ open markets. In a normal situation the fact of dumping, as well as the margin of the dumping, is measured by comparing the price on the market of origin with the export price to the market where the product is destined for consumption. This is in line with the commercial concept of dumping.

The use of the term *normal value* allows for a situation where there is no price, or no market, or where the market or the prices on that market are distorted. To determine how the normal value is arrived at in the absence of a normal open market, investigating authorities have to construct the normal value. Construction of the normal value is provided for in ADA Article 2.2.

*Constructing the normal value*

The first direct reference to the word *market* in the ADA appears in relation to the construction of normal value. Article 2.2 of the ADA provides:

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

The use of the words *market* and *sales* in Article 2.2 along with the words *ordinary course of trade* as well as *particular market situation* and *low volumes of sales* along with the first recital to the Marrakesh Agreement, completes the understanding that Article VI and ADA Article 2.1 are referring to *market* prices when referring to the use of prices to determine normal value in the normal situation.
Article 2.2 shows that i) the normal situation is a normal open market price based system and ii) when it is necessary to construct the normal value the market principles continue to apply: the constructed normal value must arrive as closely as possible to an open market value or price.\(^9\)

**The Normal Value and the Export Price\(^{10}\) must be fairly compared**

GATT Article VI and the ADA make reference to the fact that the normal value and the export price must be comparable and that the comparison must be *fair*. ADA Article 2.4 addresses the nature of a fair comparison. It provides in relevant part:

> A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.

In *US*-anti-dumping measures on hot rolled steel from Japan\(^{11}\), the AB interpreted Article 2.4 widely:

> Article 2.4 of the Anti-Dumping Agreement provides that, where there are "differences" between export price and normal value, which affect the "comparability" of these prices, "[d]ue allowance shall be made" for those differences. The text of that provision gives certain examples of factors which may affect the comparability of prices: "differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences". However, Article 2.4 expressly requires that "allowances" be made for "any other differences which are also demonstrated to affect price comparability."

---


\(^{10}\) For the purposes of completeness, there can also be problems with the export price. Where these occur there can also be a need to construct that price. Competent authorities have the responsibility to ensure that the export price is not distorted in some way. ADA Article 2.3 provides: *In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.*

\(^{11}\) United States — Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan WT/DS184/AB/R
There are, therefore, no differences "affect[ing] price comparability" which are precluded, as such, from being the object of an "allowance".\textsuperscript{12}

It is clear that competent authorities are allowed to make allowances for any factor that makes the comparison \textit{unfair}. The overriding objective is to ensure fairness in the comparison between the two dumping comparators.

If the \textit{normal value} has to be constructed then the construction must also be based on market-orientated criteria, as the objective is to arrive at a normal (open-market) value. This understanding of a fair comparison is seen in the text of Article 2.4 itself. The text specifically provides that competent authorities can make adjustments if that comparability is distorted by differences in \textit{conditions \ldots of sale} or any \textit{other differences}. Sales normally take place in markets. Thus \textit{conditions \ldots of sale} is a reference to a market in which the values or prices to be compared are determined. And it echoes the provision in Article 2.2 that \textit{normal value} must normally be based on sales in the ordinary course of trade.

In \textit{US-Stainless Steel (Korea)}\textsuperscript{13} the panel examined the words \textit{conditions and terms of sale} and considered they referred to the bundle of rights and obligations created by the sales agreement. In paragraph 6.75 the Panel found:

\textit{Thus to the extent that there are, for example, differences in payment terms in two markets, a difference in the conditions and terms of sale exists.}

And in paragraph 6.78 found:

\textit{[W]e agree with the United States that a difference in risk of non-payment between markets that was known at the time of sale might represent a difference for which due allowance could properly be made under Article 2.4.}

In \textit{EC-Bed Linen}, the AB when examining the provisions of ADA Article 2.4.2, argued:

\textit{Article 2.4 sets forth a general obligation to make a "fair comparison" between export price and normal value. This is a general obligation that, in our view, informs all of Article 2\ldots}\textsuperscript{14}

And further:

\textit{We note that, while the word "comparable" in Article 2.4.2 relates to the comparability of export transactions, Article 2.4 deals more broadly with a "fair comparison" between export price and normal value and "price comparability". Nevertheless, and with this qualification in mind, we see Article 2.4 as useful context sustaining the conclusions we draw from our analysis of the word "comparable" in Article 2.4.2. In our view, the word "comparable" in}

\textsuperscript{12} WT/DS184/AB/R of 24 July 2001 at paragraph 177.
\textsuperscript{13} WT/DS179/R of 22 December 200
\textsuperscript{14} WT/DS141/AB/R at paragraph 59
Article 2.4.2 relates back to both the general and the specific obligations of the investigating authorities when comparing the export price with the normal value.\textsuperscript{15}

This implies that where markets are used to determine the normal value and the export price, the fair comparison requirement means that the quality of the markets becomes relevant.\textsuperscript{16} Where the normal value has to be constructed, all the costs and prices used to construct that value must be analysed to determine the extent to which they are the result of normal open market forces.\textsuperscript{17} Where they are not, the overall requirement is that the investigating authority constructs the normal value so as to arrive, as reasonably as possible, to a normal value or price which would likely be found in an open market.

\textit{The nature of the market of origin}

The very existence, and the quality or openness, of the market of origin is, therefore, an essential and underlying element in all aspects of the construction of the normal value. When determining the costs and prices in the country of origin, the investigating authority must evaluate firstly whether there is a market giving rise to prices and, secondly, if there is a market, the openness of that market and its capacity to provide prices that can be used for the construction of the normal value. Is the market for the product concerned\textsuperscript{18} an open market? And, where the costs or prices refer to input costs (or, in other words, the purchase price of inputs making up the like product) there is a need to examine the quality of the up-stream markets that determine the costs of those inputs and the consequent price to the exporting producer of the product under investigation.

This understanding, that a \textit{fair comparison} within the terms of ADA Article 2.4 requires an examination of how costs and prices are arrived at, is confirmed in a complete reading of GATT Article VI. Paragraph 1.2 of the supplementary provision\textsuperscript{19} to Article VI provides:

\begin{itemize}
  \item WT/DS141/AB/R at paragraph 60.
  \item For the sake of completeness it should be noted that the panel in \textit{European Union — Anti-Dumping Measures on Certain Footwear from China} WT/DS405/R considered ADA Article 2.4 did not set out criteria for the determination of normal value and did not create a general fairness obligation. However, as see in the text, the AB stated in \textit{EC-Bed Linen} that Article 2.4 ‘informs’ all of Article 2. See paragraph 7.265 addressing this issue in \textit{EU-Footwear}.
  \item In joined cases T-159/94 and T-160/94, \textit{Ajinomoto v. Council}, the EU General Court noted in paragraph 9 that "the criteria of the market structure or the level of competition are not in themselves decisive for the purpose of applying a constructed normal value rather than a normal value based on actual prices, where the latter are the result of market forces". In appeal, the Court of Justice reflected this approach in its judgment: "the Court of First Instance held \textit{in essence} that the \textit{decisive factor} for the purposes of establishing the normal value on the basis of actual prices rather than on a constructed value is the very existence of such \textit{prices}, which result from market forces (…)
  \item The competent authority does not necessarily have to evaluate the overall economy in this exercise but only the market for the particular product under investigation.
  \item Also known as the \textit{Ad Note} to Article VI as well as the second supplementary provision.
\end{itemize}
It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

This second supplementary provision is generally considered to address the calculation of the normal value in command economies such as those that existed in the USSR and Eastern Europe in the 45 or so years after 1945. It is also generally considered that this provision has lost much of its scope since the economic reforms in those countries in the late 1980s and early 1990s.

However, the second supplementary provision has significance not only in relation to the economies described therein, but also in that it confirms the need to compare the quality of markets for the purposes of the fair comparison. The provision is recognition that an examination of the quality or the openness of markets, or as the case may be, the absence of markets, is an essential element in carrying out the fair comparison exercise.

The wording of the second supplementary provision is exemplary. In other words, it is one example of a problem in calculating normal value when markets are non-existent or where prices on the market are distorted, in this case, by the state. There can be other situations, not specifically foreseen by the drafters of supplementary provision, which can also distort the quality or the openness of markets and the costs and prices on those markets.

Jorge Miranda has examined the origins of the second supplementary provision. He shows it is based on a proposal by Czechoslovakia to amend GATT Article VI itself. Czechoslovakia had argued that:

\[
\text{no comparison of export prices with prices in the domestic market of the exporting country is possible when such domestic prices are not established as a result of fair competition in that market but are fixed by the State.}
\]

Thus it can be seen that the root of the second supplementary provision is a desire to make reference to a market where the competition is ‘fair’ or undistorted. This reflects the ordinary course of trade concept. And, even if the objective of Czechoslovakia was to amend the text of GATT Article VI, the GATT Contracting Parties clearly accepted the need for markets with fair competition when determining normal value by introducing the second supplementary provision.

For this reason, when examining the cost of production in the country of origin for the purposes of constructing the normal value, as required under ADA Article 2.2, consideration must be given as to how those costs have been determined. If the costs are distorted by the absence of an open market or by a distortion of the market, this factor must be taken into consideration by the competent investigating authorities.

---

What is meant by the word 'market'?

Despite the centrality of the idea of market to GATT Article VI, there is no definition of market in the GATT itself or in the ADA. A partial examination of the definition only seems to be found in the second supplementary provision to GATT Article VI, and then, in the negative. This provision shows that the GATT contracting parties were concerned with the absence of fair competition. Thus it would seem that the standard by which a market must be judged to be open or not is whether it can give rise to fair competition. If there is fair competition it is an open market for the purposes of the normal value. If there is the absence of fair competition (or the absence of a market) the normal value can be constructed.

As the idea of markets is addressed in the negative, and not in absolute terms (the second supplementary provision is merely an example), a number of observations can be made. One, the drafters of the GATT chose not to define markets or open markets or non-markets in the positive. Two, and most importantly, national investigating authorities enjoy a wide margin of discretion in determining the quality of markets for the purposes of determining prices and costs in constructing the normal value. Three, what might be considered a market, or in particular an open market, may vary depending on the circumstances of any particular country or any particular market sector. The issue is not the regulation of a particular market, as all markets are regulated, but the extent to which the market remains open to fair competition.

Panels and the AB have begun to examine the nature of markets in the context of WTO law on subsidies. In *US-Softwood Lumber IV* (DS 257), the AB was called upon to review the Panel finding in relation to Article 14(d) of the SCM Agreement. Article 14(d) concerns the provisions of subsidies by providing goods or services for less than adequate remuneration. The AB found:

> [Here] we consider the submission of the United States that the term "market conditions" necessarily implies a market undistorted by the government's financial contribution. In our view, the United States' approach goes too far. We agree with the Panel that "[t]he text of Article 14 (d) [of the] SCM Agreement does not qualify in any way the 'market' conditions which are to be used as the benchmark ... [a]s such, the text does not explicitly refer to a 'pure' market, to a market 'undistorted by government intervention', or to a 'fair market value'."

Having found that there was no provision in the text in relation to the quality or nature or purity of the word ‘market’, the AB went on to analyse what can be done when there is a distortion in a

---

21 Graafsma and Kumashova go further and state that there is no definition of a market or non-market economy in International Law. They state that any definition is a creation of national law. See *In re China's protocol of Accession and the Anti-Dumping Agreement: Temporary Derogation or Permanent Modification?* (2014) 9 Global Trade and Customs Journal, issue 4 pp. 154-159

market. In *Softwood Lumber* the distortion was the predominant presence of the State as the principle supplier to a specific and very narrowly circumscribed sub-market in Canada. Essentially the Panel had concluded that, as there was no qualification to the use of the word market in Article 14(d), the investigating authority was obliged to use whatever price was found on that market, whatever the nature of that market. The AB reversed the Panel on this point. It found that the investigating authority did not act unreasonably in not using prices in Canada as the market was distorted by reason of the predominant presence of the State. The AB found:

*It appears to us that the language found in Article 14(d) ensures that the provision's purposes are not frustrated in such situations. Thus, while requiring investigating authorities to calculate benefit "in relation to" prevailing conditions in the market of the country of provision, Article 14(d) permits investigating authorities to use a benchmark other than private prices in that market. When private prices are distorted because the government's participation in the market as a provider of the same or similar goods is so predominant that private suppliers will align their prices with those of the government-provided goods, it will not be possible to calculate benefit having regard exclusively to such prices.*

The AB concluded:

*In conclusion, for the reasons stated above, we reverse the Panel's finding, in paragraph 7.64 of the Panel Report, with respect to the interpretation of Article 14(d) of the SCM Agreement and find, instead, that an investigating authority may use a benchmark other than private prices in the country of provision, when it has been established that private prices of the goods in question in that country are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods.*

In the later WTO dispute between China and the US in relation to the application by the US of the SCM, the Panel in *US-Definitive anti-dumping and countervailing duties on certain products from China* found:

*In this respect, we see the logic of the Appellate Body's reasoning in US – Softwood Lumber IV in regard to Article 14(d) of the SCM Agreement to be equally applicable to Article 14(b), and indeed to Article 14 in its entirety. Here we recall in particular the Appellate Body's analysis of the terms "in relation to prevailing market conditions [...] in the country of provision" in Article 14(d). The Appellate Body reversed the panel's interpretation that this required the use of in-country prices as the benchmark even if distorted by the government's predominance as a supplier of the good. The Appellate Body found that instead any benchmark, to be "in relation to" those market conditions, had to "relate or refer to, or be connected with" them. In this regard, the Appellate Body specifically indicated that where in-country benchmarks were not available, "proxies" could be used so*

---

23 *Ibid*, at 101
24 *Ibid*, at 119
long as these related or referred to, or were connected with, the "prevailing market conditions in the country of provision".

Two issues are addressed in these passages from the Appellate Body. The second and most obvious issue is the finding that where local price benchmarks are not available, or in some way distorted, external benchmarks can be used. The first and less obvious issue is that if there is a distortion of the market in the country of origin, then the prices on that market may be disregarded. In other words, the quality or openness of the market is a relevant consideration in measuring the benefit of a subsidy. This statement of the law is clear even if the AB emphasised that there was no qualifying adjective to the word market in Article 14 of the SCM.

In relation to dumping the situation is different. While there is still no adjective such as ‘open’ or ‘pure’ or ‘undistorted’ directly related to the word market in either GATT Article VI or the ADA, there are ample provisions serving the same qualifying purpose. These are the adjectival phrases such as ‘ordinary course of trade’ or ‘particular market situation’, ‘conditions and terms of sale’ etc.

It can be concluded therefore that when reference is made to the idea of a market within the ambit of GATT Article VI and the ADA, there is an inherent need to examine the quality of the market to determine whether any costs and prices arising therein can be used for the construction of the normal value.

And given the origins of the second supplementary provision to GATT Article VI, the idea that competition in the market must be fair so as to give rise to prices determined in the ordinary course of trade begins to emerge as the key criteria in the fair comparison requirement.

Furthermore, as the drafters chose specifically not to define what a normal market is, the legal framework gives to competent authorities the discretion to determine what is a normal open market situation or when prices are in the ordinary course of trade. If an investigating authority has reasonable grounds to consider that costs or prices are not in the ordinary course of trade, or if there is a particular market situation that distorts costs and prices, then the investigating authority is entitled to make adjustments in order to ensure that there is a fair comparison between the normal value and the export price.

Must costs in the country of origin be used to construct the normal value?

In attempting to define what a market is, reference has already been made to the fact that, in anti-subsidy cases, investigating authorities are entitled to use prices from geographically adjacent markets. The AB found this even though the wording of Article 14(d) of the SCM Agreement provides that:

*The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase...*
What is the situation in relation to anti-dumping? At first sight, and like for the anti-subsidy rules, Article 2.2 seems to impose the obligation to determine the normal value on the basis of the costs of production in the country of origin.

However Article 2.2.1.1 of the ADA expands on the idea of the costs to be used when implementing Article 2.2. Article 2.2.1.1 provides:

For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations.

As a preliminary point, this provision of the ADA appears to introduce a distinction between prices and costs. As has been seen, prices are the basis of the normal value and the export price. Costs are considered in relation to the internal accounting of the exporting producer. However, this distinction arises because the ADA is looking at the same thing from different angles. Costs and prices can be, and often are, exactly the same thing. The cost of an input for a downstream product can be the price on the upstream market. In this situation, input costs for one product in one market are just the product price in another market.

Article 2.2.1.1 provides that costs shall normally be based on costs recorded in the books of the producer under investigation provided that (i) “records are in accordance with the generally accepted accounting principles of the exporting country” and (ii) they reasonably reflect the costs associated with the production and sale of the product under consideration. But what happens if those criteria are not met? If either of these two criteria is not met then the costs are unreliable and can, if necessary, be adjusted.

The first criterion is fairly straightforward. The costs recorded in a producer’s accounting books that do not comply with the accountancy standards may simply not be reliable and therefore can be disregarded. This provision will not be examined further.26

There is, however, debate as to the correct interpretation of the words reasonably reflect in the second criterion.27 Does this phrase only mean that the costs actually paid must be exactly

26 This is not to say that the provision does not raise problems particularly in relation to the adequacy of international accountancy standards.
transcribed into the books of the exporting producers or does it mean something more? To interpret the preconditions in this first accounting sense would be to conflate the two separate conditions of Article 2.2.1.1 into one. If *reasonably reflect* were to mean simply that the records kept by the producer must reflect the costs incurred by the producer as reported in purchase documents or contracts, this would be comparable to the requirement to comply with generally accepted accountancy principles in the county of export.

The interpretation of *reasonably reflect* must be one that provides that not only does the producer have to comply with the accepted accounting standards but also must reflect costs reasonable for a particular input. Both conditions, explicitly independent from each other, address different problems in determining the normal value.

Moreover, an analysis that restricts the interpretation of *reasonably reflect* to the idea of accurate transcription does not take into account the need to compare the normal value and the export price fairly and thus to examine the nature of the markets which give rise to those costs and prices.

It has been seen that the overall objective of ADA Article 2.2 is to ensure that the normal value is determined on the basis of costs and prices in the ordinary course of trade and that Article 2.4 requires that the markets are open and comparable. In this context the *reasonably reflect* obligation in the second criterion must mean something more than the mere correct transposition of the invoice price for an input from the invoice to the accounts of the exporting producer. If the legal interpretation of the term *reasonably reflect* were to be limited to correct or exact transposition between invoices and accounts, it would limit the scope of these words to the idea of *accurately* reflecting. But the law does not provide for mere *accuracy*. The ADA uses the word *reasonably* to echo the need to ensure that the price paid was determined in the ordinary course of trade in a normal open market subject to fair competition. In other words, consideration must be given to the *quality* of the market in which the producing exporter operates and the *quality* of the market determining the input costs.

To determine whether that cost is a cost in the ordinary course of trade it is necessary to determine if the cost is a result of fair competition in an open market and that the cost is, itself, a market price or the equivalent of a market price. This would seem to require a determination that the specific market in which the producing exporter operates is not distorted. And, in turn, it can require a determination that the upstream market, if that is the market that determines the downstream market input cost, is a normal market and the costs have been incurred in the ordinary course of trade.

Graafms and Andamanopoulos argue that this conclusion distorts the object of anti-dumping procedures by creating a situation whereby dumping is no longer the result of the pricing behaviour of individual exporters, but instead is the result of alleged government intervention in a market. The

---

27 See in particular: De Baere, _Article 2(5) of the Basic Regulation and the adjustment of production costs in the light of the Anti-Dumping Agreement_, ERA Forum, 2014;
28 It is for this reason that distinctions are made between market economies, non market economies and economies in transition.
29 Graafsma and Andamanopoulos, _WTO challenges to cost adjustments in EU anti-dumping proceedings_, WWL Trade & Customs 2014
authors argue that to analyse whether government intervention results in lower export prices and injury to the industry should be the aim of countervailing investigations and not of anti-dumping ones.

This approach mixes two different issues. The fact that anti-dumping procedures focus on individual behaviour carried out by different exporters does not preclude the possibility that individual behaviour may reflect common circumstances. In other words, not all findings of dumping are the result of finding that there is reasonably reflect problem or a particularly market situation, and, there can be findings of no dumping even where there is a reasonably reflect issue or a particular market situation. The focus of the normal value determination is not to determine whether or not there is a free market and or the role of government in that market but to determine what is a normal value comparable to the export price.

The authors also point out30 that under GATT 1947 and the Anti-Dumping Code, the Antidumping Committee pronounced itself against anti-dumping actions on the basis of dumped imports or below costs inputs (input dumping).

It should be noted, as De Baere recognises,31 that the issue of input dumping is not one on which there was agreement in the Uruguay Round. The Ad-Hoc Group in charge of the Draft Recommendation concerning input dumping did not reach consensus and so the Draft was not adopted. The reason for the lack of agreement was the lack of agreement as to what exactly was at stake.

Again in relation to this issue care needs to be taken not to confuse two different issues. Input dumping is a term of art and not of law. It cannot be a term of law because there is no investigation as to whether a particular input is dumped or not. An anti-dumping procedure does not investigate whether an input is being dumped. It determines whether the cost of an input is unreasonable. These are two very different determinations.

It can be concluded that the reasonably reflect provision of ADA Article 2.2.1.1 means something more than merely accurately transcribing costs on input invoices into the accounts of the producing exporter. It can also be concluded that the interpretation of reasonably reflect requires an evaluation of the quality of the costs and prices. The quality at issue is whether or not that cost is the result of fair competition in a normal open market allowing the construction of a normal value that can be fairly compared with the export price.

Article 2.2.1.1 allows the competent authority to adjust costs and prices when faced with the absence of a normal situation. The idea of an adjustment would seem to indicate that the competent authority must start on the basis of the costs and prices on the books. This would be to read too much into the dictionary sense of the word ‘adjustment’, particularly within the overall context of the obligations of the competent authority. The competent authority must find an open market-orientated normal value. If the cost or price in the country of origin is so distorted that no amount of

30 Ibid
31 De Baere, Article 2(5) of the Basic Regulation and the adjustment of production costs in the light of the Anti-Dumping Agreement, ERA Forum, 2014
adjustment could cure its fundamental inadequacy, then the idea of adjustment must be understood as meaning replacement. This understanding is confirmed by the need of a competent authority to find a cost or price where there are no such costs or prices in the country of origin.

The limited references to reasonableness in WTO cases

In Egypt-Steel Rebar, Turkey claimed that by failing to deduct short-term interest earnings from interest expense in computing the net interest expense which it included in the cost of production and constructed normal value, the competent authority violated Article 2.1.1.1. In this regard the Panel noted that:

"we believe that the provision itself (ADA Article 2.2.1.1) makes clear that the calculation of costs in any given investigation must be determined based on the merits, in the light of the particular facts of that investigation. This determination in turn hinges on whether a particular cost element does or does not pertain, in that investigation, to the production and sale of the product in question in that case. Thus, in particular, we must consider the details of the evidence of record in order to reach a conclusion as to whether, in the rebar investigation, there was evidence in the record that the short-term interest income was "reasonably" related to the cost of producing and selling rebar, and that the IA thus should have included it in the cost of production calculation."

In Certain Broilers from China, the Panel dealt, to some extent, with the application and interpretation of ADA Article 2.2.1.1. In this case, the Chinese investigating authority disregarded the costs presented in the books and records of the companies investigated for the normal value calculation as it considered that “they did not reasonably reflect the costs associated with production and sales of the product concerned.” The consistency with generally accepted accountancy principles (the first criteria in Article 2.2.1.1) was not argued in this case. Rather, the attention was focused on the reasons argued by the parties as to the reasonableness of the costs recorded.

Both parties and the respondents in the investigation agree that in the case of joint products, which arise at a split-off point, pre-split-off costs cannot be directly assigned on a product-specific basis and must be allocated. Of the two types of methodologies for doing so that were discussed in this case – one based on relative sales value ("value-based allocation") and one based on the weight of the products ("weight-based allocation"), the Panel is of the view that neither method is in principle inherently unreasonable.

The panel first observed whether, when departing from the general rule of ADA Article 2.2.1.1, the competent authority had provided sufficient evidence during the investigation to show why the costs on the records of the producers were not reliable. In this regard, the panel was of the view that

32 WT/DS211/PR. Egypt – Steel Rebar from Turkey
33 Ibid at para. 7.393.
35 Ibid at 7.167
an “investigating authority is bound to explain why it departed from the general norm”. The panel ultimately found that China had acted inconsistently with ADA Article 2.2.1.1 first sentence, as it had not provided, on the case record, sufficient support reasoning for regarding the costs presented by the companies’ as not reasonably reflected in their records.

The panel upheld the US arguments that a competent authority bears the obligation to substantiate this decision in the record of the investigation. The panel took no view on the reasonableness of the cost allocation method used by the investigated companies. Nonetheless, the Panel observed that the arguments brought before it by China “could serve as a basis to determine that Tyson’s and Keystone’s books and records do not reasonably reflect their costs of producing paws (…).”

Lastly, as regards the burden of proof, the Panel in US-DRAMS confirmed that it is for the complaining party to establish a prima facie case on an inconsistency with ADA Article 2.2.1.1.

Costs from markets other than the country of origin

The next question to be addressed is what costs can a reasonable investigating authority use when it is not appropriate to use the costs in the books of the exporting producer because they are in breach of either of the two criteria in Article 2.2.1.1 and do not allow construction of costs and prices based on Article 2.2. Must a cost be found in the country of origin so as to comply with the requirement that costs must be based on the cost of production in the country of origin?

Neither the GATT nor the ADA set out detailed rules on what to do when costs are not reasonably reflected in the books of the exporting producer. This is the same situation as in relation to the calculation of the benefit of a subsidy. In the absence of clear rules, considerable discretion is given to the competent authority.

Article 2.2.1.1 comes within the terms of Article 2.2. Article 2.2 allows the possibility of using information other than the producer’s records when constructing normal value. Article 2.2.1.1, therefore, provides the investigating authorities with an alternative in constructing normal value.

Moreover, if the reason for disregarding the records kept by the producer is that the price is unreasonable because of a problem or distortion in the market itself, it seems clear that the benchmark for such costs should not be the distorted market in the country of origin.

The issue has not been addressed directly by WTO dispute settlement panels or the AB. That being said, some guidance as to what limits are placed on national authorities can be found in the WTO texts themselves and in case law.

---

36 Ibid at 7.161
37 Ibid at 7.171
38 Ibid at 7.172
39 Ibid at 7.171
40 United States – Countervailing duty investigation on dynamic random access memory semiconductors (DRAMS) from Korea, Report of the Panel WT/DS296/R of 21 February 2005
The Panel in *Egypt-Steel Rebar*,\(^{42}\) found that any cost or price used must be reasonable. The Panel noted:

> we believe that the provision itself (ADA Article 2.2.1.1) makes clear that the calculation of costs in any given investigation must be determined based on the merits, in the light of the particular facts of that investigation.

In *US-Softwood Lumber V*\(^{43}\) the panel had to examine the scope of the meaning of ADA Article 2.2.1.1. In paragraph 7.318 the panel found that Article 2.2.1.1

> [Does] not require that any particular methodology be used by an investigating authority to assess whether records reasonably reflect the costs associated with the production and sale of the product under consideration.

While this finding was not specifically re-examined by the AB\(^{44}\), overall, the AB confirmed that the United States had not acted inconsistently with Article 2.2.1.1. The facts of *Softwood Lumber* show that the US competent authority disregarded the costs and prices on the books of the exporters for a variety of reasons.

The second supplementary provision to GATT Article VI indicates that in certain situations *a strict comparison with domestic prices in such a country may not always be appropriate*. While there is room to discuss the extent to which there are still countries which fall within its scope,\(^{45}\) it can be seen from this provision that competent authorities are given discretion in determining the costs to be used. The provisions of the second supplementary provision to GATT Article VI do not limit the use of costs from other markets to situations where the State has a complete or substantially complete monopoly on trade. The provision is recognition that in determining the cost of production difficulties can arise and other methodologies can be used. Other situations can arise where the same considerations apply.

Many WTO members, in different ways, adopt rules and practices to deal with this issue when faced with a non-market economy. The competent authorities take prices from outside the country of origin in constructing the normal value. The key point is that the idea of taking prices from markets other than the market of origin or production is a recognised method of addressing what costs to use when the costs are not reasonably reflected in the books of the exporting producer.

---

\(^{41}\) The EU has addressed this situation by adopting specific measures in the basic Anti-Dumping Regulation.

\(^{42}\) WT/DS/211/R. *Egypt – Steel Rebar from Turkey*


\(^{44}\) WT/DS264/AB/R

\(^{45}\) The application of the provisions of the second supplementary provision to any specific market is not in itself straightforward and beyond the scope of this paper.
In discussing double remedies in *United States-definitive AD and CVD duties on certain products from China*, the AB states:

*Double remedies may also arise in the context of domestic subsidies granted within market economies when anti-dumping and countervailing duties are concurrently imposed on the same products and an unsubsidized, constructed, or third country normal value is used in the anti-dumping investigation.*

Of interest in this analysis is the fact that the AB recognises that normal value for dumping purposes can be constructed on the basis of third country prices even where the producing exporter is located in what is considered to be a market economy. The footnote to this particular passage makes clear that the AB understands the distinction between the situation when the normal value is based on the costs in the country of origin and in another market. The original footnote provides:

*However, double remedies are unlikely to result in the context of domestic subsidies granted within market economies if normal value is based on domestic sales. In such cases, both the normal value and the export price will be lowered as a result of the domestic subsidy, so that the dumping margin should not be affected.*

The AB’s understanding of normal value in GATT Article VI and the ADA thus comes full circle. If the normal value is to be constructed and the construction is to approach as closely as possible the market price in the country of origin, it can be sometimes necessary to use costs and prices other than those from the country of origin. The competent authority has the discretion to construct the normal value as it sees fit so long as the construction is reasonable and allows a fair comparison.

As has been seen in relation to subsidies, the AB has developed the need to examine the *quality* of markets more concretely. Article 14(d) of the Agreement on Subsidies and Countervailing Measures (SCM) provides that the less than adequate remuneration test be based on the market conditions prevailing in the market where the subsidy is provided. The US considered that there was no market for stumpage rights in Canada and used the market-based costs in adjacent States in the US. The panel had found this to be in breach of Article 14(d). The AB disagreed:

*This approach reflects the fact that private prices in the market of provision will generally represent an appropriate measure of the "adequacy of remuneration" for the provision of goods. However, this may not always be the case. As will be explained below, investigating authorities may use a benchmark other than private prices in the country of provision under Article 14(d), if it is first established that private prices in that country are distorted because of the government’s predominant role in providing those goods.*

---

46 WT/DS379/AB/R, at paragraph 543  
47 See Panel Report, footnote 972 to paragraph 14.72  
48 See *US-Softwood Lumber IV*, WT/DS257/AB/R  
49 On the facts there was a small private market for stumpage licences but it was considered by the US to be both small and distorted by the dominant presence of the government of Canada on the market.  
50 Ibid at 90.
The AB concluded in paragraph 103 that:

*We find, instead, that an investigating authority may use a benchmark other than private prices of the goods in question in the country of provision, when it has been established that those private prices are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods. When an investigating authority resorts, in such a situation, to a benchmark other than private prices in the country of provision, the benchmark chosen must, nevertheless, relate or refer to, or be connected with, the prevailing market conditions in that country, and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale, as required by Article 14(d).*

While it is clear that the reasoning of the AB in *US-Softwood Lumber IV* is very much based on a detailed analysis of SCM Article 14(d), the reasoning is not dissimilar to its approach in the double remedies analysis seen above in WT/DS379/AB/R. The absence of a functioning open market can distort costs. And where there is no appropriate functioning open market to determine costs then an adjacent market price can be used.

Reference should also be made to Article 17.6(ii) of the ADA which provides that in interpreting compatibility between domestic provisions and the ADA,

*Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities’ measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.*

Thus it can be considered that if a competent authority uses costs and prices from an adjacent market other than the costs and prices in the country of origin, it is doing so within the margin of discretion that is granted to it by WTO law as it currently stands.

Finally, the argument that by substituting actual costs by external costs, an investigating authority is treating a particular industry as a non-market economy by applying the methodology often used for non-market economies as a whole, cannot be correct. The methodology for the determination of normal value in a non-market economy and in a situation where prices are artificially low due to a particular market situation or costs are not reasonable is not the same. Both scenarios are distinct.

The distinction is seen most clearly in EU law. Even if the country of origin of a product is considered a non-market economy, an individual exporter from that country can be treated as though it operates in a market economy. Despite the fact that an exporter is given market economy treatment, the normal value of that exporter can be constructed.

---

51 Gaufsma and Adamantopoulos, *WTO challenges to cost adjustments in EU anti-dumping proceedings*, WWL Trade & Customs 2014
Conclusions

It can be concluded that for the purposes of constructing the normal value in anti-dumping law a number of fundamental issues emerge. The ultimate objective is to ensure that i) the constructed normal value reflects an open market-oriented price based on fair competition; and ii) there is a fair comparison between the normal value and export price. The construction of the normal value must be undertaken within this context. To the extent to which WTO law does not set out clear rules on what an investigating authority is to do when costs are not reasonably reflected in the books of the exporting producer, those competent authorities are granted a discretion, within limits, to construct the normal value. The limits are to ensure that the costs are normal open market costs (in other words, based on fair competition) and prices and that the comparison between the normal value and the export price is fair. Once those criteria are met, a competent authority has the discretion to determine the appropriate costs to be used to construct the normal value. And, where necessary, the competent authority can use costs and prices other than those of the country of origin.