European Union – Measures Related to Price Comparison Methodologies

(DS516)

Legal Interpretation –

Article VI:1 of the *General Agreement on Tariffs and Trade 1994*,

the Second Note *Ad* GATT 1994 Article VI:1,

the Practice of the GATT Contracting Parties in the Application of GATT 1994 Article VI:1,

the Accessions of Poland, Romania, and Hungary to the GATT,

Article 2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, and

Section 15 of the Protocol of Accession of China to the WTO

1. Executive Summary

1.1. Reading the text of Article VI:1 of GATT 1994, Section 15 of China's Accession Protocol, the Second Note *Ad* Article VI:1, GATT accession documents, and other texts leads to the conclusion that GATT Contracting Parties and WTO Members have always recognized that non-market prices or costs are not suitable for antidumping comparisons because they are not appropriate to use "in determining price comparability". In an anti-dumping determination, it is necessary to ensure comparability between the normal value and the export price; and comparability is only ensured when the comparison between the normal value and the export price is capable of producing a meaningful answer to the question of whether or not there is dumping as defined by Article VI of the GATT 1994 and the Anti-Dumping Agreement. In this respect, Members have always recognized that non-market prices or costs are distorted and unreliable, and thus are not suitable for antidumping comparisons. These non-market prices and costs do not constitute or give rise to "comparable prices, in the ordinary course of trade," and therefore they are not appropriate to use "in determining price comparability".

1.2. In Section 15(a) of China's Accession Protocol, WTO Members and China adopted this longstanding approach and clarified that, so long as prices and costs in China continued not to be determined under market economy conditions, its domestic prices and costs would be considered distorted in determining price comparability under GATT 1994 Article VI and the Anti-Dumping Agreement and may be rejected. The resulting text reflects the understanding of WTO Members that antidumping duties would remain an appropriate response and that domestic prices or costs would not be suitable where market economy conditions did not prevail.

1.3. The basic requirement of comparability, which predates Section 15, flows from Article VI of GATT 1994, and is further reflected in the Second Note *Ad* Article VI:1 and in Article 2 of the Anti-Dumping Agreement. Understood correctly, Article VI establishes that the dumping comparison requires comparable, market-determined prices. Without a "comparable price, in the ordinary course of trade", no dumping comparison can be made. This "comparable price, in the ordinary course of trade" is a market-determined price. Accordingly, Section 15(a)(i) clarifies the view of WTO Members that it is appropriate to use domestic prices or costs in determining price comparability if "market economy conditions prevail" in the industry under investigation. For purposes of a dumping comparison, both Section 15 and Article VI call for "comparable prices" that are market-determined to determine normal value.

1.4. This understanding is confirmed by the Second Note *Ad* GATT 1994 Article VI:1. The Second Note also reflects that it is the definition in Article VI:1, together with Article VI:2, that provides for the legal authority to reject non-market prices and costs in anti-dumping comparisons, not the Second Note itself. The Second Note confirms that, under GATT 1994 Articles VI:1 and VI:2, an importing Member must "determin[e] price comparability for the purposes of paragraph 1" of Article VI. That is, to make a dumping comparison, the importing Member must ensure comparability by finding "comparable prices" to establish normal value. The Second Note identifies *one* situation (a state-controlled economy) in which "special difficulties may exist in determining price comparability," but there is no text suggesting this is the *exclusive* situation in which "special difficulties may exist". The recognition by Members of a "case" creating special difficulties does not logically imply that there could be no other "case". The Second Note is not written as an *exception* to Article VI and the text does not provide legal

authority to do something that an importing Member may not already do or is prohibited from doing. Rather, the GATT CONTRACTING PARTIES,[1] through an "interpretative note", recognized that the authority to reject domestic prices when these are not "comparable prices, in the ordinary course of trade" lies in Article VI.

1.5. The GATT Secretariat's review of Contracting Parties' legislation applying Article VI provides further evidence confirming the understanding of Article VI as requiring market-determined prices for determining price comparability. This review of legislation and practice also evidences subsequent practice in the application of Article VI establishing the agreement of the parties regarding its interpretation. The Contracting Parties' legislation confirms their understanding that ensuring price comparability under Article VI requires a market-determined normal value – that is, a comparable price, in the ordinary course of trade. The report acknowledges the core view of Contracting Parties that "a lack of comparable figures" (prices and costs) in non-market economies means that normal value must be found on another basis – e.g., on the basis of prices in third countries. The report also observes that the Contracting Parties continued to apply Article VI in a manner that demonstrated they considered they had the legal authority to calculate normal value on the basis of market-determined prices (e.g., third-country prices) when non-market economic conditions rendered domestic prices or costs unsuitable for establishing a normal value and ensuring comparability.

1.6. The practice of GATT CONTRACTING PARTIES in accessions to the GATT, and the agreements reached in those accessions, confirms that non-market economy prices and costs may be rejected pursuant to Articles VI:1 and VI:2 of GATT 1994. In the accessions of Poland, Romania, and Hungary to the GATT, the CONTRACTING PARTIES did not create any exception to Article VI:1 of GATT 1994 in the accession protocol of the acceding non-market economy. Rather, in each case they re-affirmed their ability to reject and replace non-market prices or costs for antidumping comparisons. The subsequent practice of the CONTRACTING PARTIES supports the interpretation of Articles VI:1 and VI:2 as providing the legal authority to ensure comparability and to reject prices and costs not determined under market economy conditions for purposes of antidumping comparisons.

1.7. The Anti-Dumping Agreement, through Article 2, implements the principle of comparability set forth in Article VI of GATT 1994. In relation to determining comparability, the Anti-Dumping Agreement confirms that establishing normal value requires a comparable, market-determined price or costs that ensures comparability. Article 2.1 retains the key elements from Article VI for domestic prices to be used to calculate normal value – that is, there must be a "comparable price, in the ordinary course of trade." Thus, as under Article VI, the lack of comparable, market-determined prices – that is, determined under market economy conditions for the industry under investigation – requires the use of an alternative source for normal value. Similarly, non-market-determined costs (the prices of production factors) are distorted or unreliable and cannot ensure comparability (as through prices in the ordinary course of trade). Article 2.2 reinforces the proposition that normal value must be based on prices and costs that permit a "proper comparison". The prices or costs of an industry in which market economy conditions do not prevail cannot be considered comparable prices, or capable of ensuring

[1] Consistent with Article XXV:1 of the GATT 1994, this document uses "CONTRACTING PARTIES" to mean "the contracting parties acting jointly."

comparability, for purposes of "normal value." In sum, Article 2 of the Anti-Dumping Agreement confirms the principle of comparability expressed in Article VI:1 of GATT 1994.

1.8. Section 15, in turn, is a specific expression of the principle that comparability needs to be ensured. Section 15 is concerned with "determining price comparability *under* Article VI of the GATT 1994 and the Anti-Dumping Agreement". The primary "rules" for determining price comparability would be those in the two agreements. The provisions of Section 15 do not cover all situations and do not need to as Article VI of GATT 1994 and the Anti-Dumping Agreement also govern the determination of price comparability. Thus, the expiry of subparagraph (a)(ii) of Section 15 does not mean that an importing Member may not ensure comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement for purposes of making a dumping comparison. Rather, expiry of subparagraph (a)(ii) means that the "rule" set out in that provision does not apply beyond 15 years. Nothing in Section 15(d) suggests a lapse in the basic requirement to ensure comparability, which flows from Article VI:1 of the GATT 1994, as implemented particularly in Article 2 of the Anti-Dumping Agreement. If market economy conditions do not prevail in China or in the industry or sector under investigation, then "comparable" prices or costs do not exist for purposes of the dumping comparison. In that situation, an importing Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China.

1.9. In sum, the expiry of one provision of China's Accession Protocol, Section 15(a)(ii), does not mean that WTO Members no longer have the ability to reject and replace non-market domestic prices or costs for purposes of antidumping comparisons. Rather, the legal authority to reject prices or costs not determined under market economy conditions flows from GATT 1994 Articles VI:1 and VI:2. That this authority exists in Article VI is reflected in legal text and consistent practice spanning decades: the proposal to amend Article VI:1 and eventual adoption of the Second Note *Ad* Article VI:1 (1954-55), confirming the legal authority existed in Article VI; the Secretariat review of Contracting Parties' application of Article VI, demonstrating a subsequent, common practice rejecting non-market prices or costs in determining normal value (1957); the Accessions to the GATT of three non-market economies – Poland (1967), Romania (1971), and Hungary (1973) – in which the CONTRACTING PARTIES affirmed their existing ability to reject non-market prices or costs in situations other than "the case" described in the Second Note; Article 2 of the Anti-Dumping Agreement (1995), bringing forward the key concepts from Article VI:1 and reinforcing (through terms such as "proper comparison") that market-determined prices or costs are necessary for antidumping comparisons; and Section 15 (2001), which clarifies that domestic prices or costs will be used when "market economy conditions prevail" for the industry under investigation, but domestic prices or costs may be rejected when market economy conditions do not prevail.

1.10. The evidence is overwhelming that WTO Members have not surrendered their longstanding rights in the GATT and WTO to reject prices or costs that are not determined under market economy conditions in determining price comparability for purposes of antidumping comparisons.

2. Section 15 of China's Accession Protocol Reflects the Basic Requirement of Price Comparability

2.1. To understand the core concept of price comparability for purposes of antidumping comparisons, it is useful to start with Section 15 of China's Accession Protocol. Section 15 was agreed in the context of the accession to the WTO of a very large, economically significant party. The resulting text reflects the understanding of WTO Members that antidumping duties would remain an appropriate response and that domestic prices or costs would not be suitable where market economy conditions did not prevail.

2.2. The introductory text to Section 15 states that Article VI of GATT 1994 and the Anti-Dumping Agreement "shall apply" to antidumping proceedings involving Chinese imports.[2]

2.3. Section 15(a) states that a Member uses either of two alternatives "[i]n determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement". The title to Section 15 similarly is: "Price Comparability in Determining … Dumping".

2.3.1. Section 15 is therefore an elaboration of "determining price comparability" and a specific expression of the principle that comparability needs to be ensured. What does it mean for an importing Member to "determin[e] price comparability"?

2.3.2. The two alternatives set out in Section 15 are means to provide a basis for determining normal value (i.e., "shall use either Chinese prices or costs or a methodology not based on a strict comparison with domestic prices or costs in China"). Export price is not mentioned in these provisions or elsewhere in Section 15.

2.3.3. The text of Section 15 suggests "determining *price comparability*" is *determining* (finding) a *comparable price* (normal value) for purposes of the dumping comparison.[3] This language reflects other texts in GATT 1994 and the Anti-Dumping Agreement.

2.3.4. Section 15(a) refers to "determining price comparability under Article VI". Article VI:1(a) establishes that dumping occurs when the price of an exported product "is less than the *comparable* price, *in the ordinary course of trade*, for the like product" in the home market.[4]

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[2] China's Accession Protocol, Sec. 15 ("Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 . . . and the SCM Agreement shall apply in proceedings involving imports of Chinese origin into a WTO Member . . . .").

[3] The relevant dictionary definition of "determine" is "[a]scertain or establish exactly by research or calculation". *Oxford Dictionary of English*, A. Stevenson (Oxford University Press, 2010, 3rd ed.), p. 478. The relevant dictionary definition of "comparability" is "the quality or state of being comparable." *Webster's New Explorer Encyclopedic Dictionary* (Merriam-Webster, 2006, 1st ed.), p. 365.

[4] GATT 1994, Art. VI:1 ("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) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country . . . .").

2.3.4.1. This suggests that "determining price comparability" under Section 15(a) refers first to determining whether there *is* such a "comparable price, in the ordinary course of trade".

2.3.5. Section 15(a) refers to "determining price comparability under … the Anti-Dumping Agreement". Article 2.1 accords with Article VI:1. Dumping occurs when the price of an exported product "is less than the *comparable* price, *in the ordinary course of trade*, for the like product" in the home market.[5]

2.3.5.1. Again, this suggests that "determining price comparability" under Section 15(a) first refers to determining whether there *is* such a "comparable price, in the ordinary course of trade".

2.3.6. Anti-Dumping Agreement Article 2.2 establishes certain alternatives for determining normal value when there are no domestic sales *in the ordinary course of trade* or in enumerated circumstances "such sales do not permit a *proper comparison*". This provision is linked to the dumping definition in Article 2.1.[6]

2.3.6.1. The textual links suggest this determination of no sales or sales not permitting a "proper comparison" also is part of "determining price comparability" under 15(a).

2.3.6.2. This understanding also comports with Article VI:1(b), which recognizes certain alternative methods to determine normal value "in the absence of" a "comparable" home market price.

2.3.7. The Second Note *Ad* Article VI:1 also recognizes a situation in which "special difficulties may exist *in determining price comparability* for the purposes of paragraph 1 [of Article VI]". The result is that a "*strict comparison with domestic prices* in such a country may not always be *appropriate*".

2.3.7.1. That is, in determining price comparability, the Second Note also sets out a situation in which domestic prices and costs ("all domestic prices") may not ensure comparability.

2.3.8. Each of these texts will be explained in more detail, but from these textual links, one can conclude that "determining price comparability" involves a finding whether a "comparable price, in the ordinary course of trade," exists, whether domestic prices "permit a proper comparison", or whether a comparison with

[5] Anti-Dumping Agreement, Art. 2.1 ("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.").

[6] Anti-Dumping Agreement, Art. 2.2 ("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 . . . .").

domestic prices is "appropriate". Alternatively, in determining price comparability, an importing Member may find that normal value must be determined on another basis.

2.4. Section 15(a) establishes two alternatives for normal value "[i]n determining price comparability" – that is, two bases on which to find comparable prices. The importing WTO Member "shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China".

2.4.1. The *first alternative* is Chinese prices or costs. Use of domestic *prices* would mean that, in determining price comparability, the importing Member has found a "comparable price, in the ordinary course of trade" (Article VI:1; Article 2.1) or "sales [that] do … permit a proper comparison" (Article 2.2).

2.4.2. Use of third-country export prices would mean that, in determining price comparability, the importing Member has found a "comparable price, in the ordinary course of trade" (Article VI:1) or a "comparable price" that "is representative" (Article 2.2).

2.4.3. Use of domestic *costs* would mean that, in determining price comparability, the importing Member has found that those costs (which are also prices)[7] do permit a "proper" or "appropriate" comparison to be made (Article 2.2; Second Note *Ad* Article VI:1).

2.4.4. The *second alternative* is a methodology not based on a strict comparison with domestic prices or costs in China. In this scenario, normally the domestic prices or costs would not be comparable or would not permit a proper or appropriate comparison.

2.4.5. Section 15 of China's Accession Protocol clarified and confirmed that, in determining price comparability, an investigating authority will use Chinese prices and costs for the industry under investigation where "market economy conditions prevail" (first alternative) and may reject those prices or costs where market economy conditions do not prevail (second alternative).[8]

2.4.5.1. Under the second alternative, "determining price comparability" leads to rejection of Chinese "prices or costs" and not just rejection of "prices"; this is because using suitable "prices or costs" is necessary "in determining price comparability".[9]

[7] Costs of production are themselves prices of factors between suppliers and the producer under investigation. Prices and costs are two ways of referring to a particular transaction.

[8] Section 8, *infra*; *see* China's Accession Protocol, Section 15(a)(i) ("In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement . . .: (a)(i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability.").

[9] *See* China's Accession Protocol, Section 15(a)(i) ("[T]he importing Member shall use Chinese *prices or costs* for the industry under investigation *in determining price comparability*.") (italics added).

2.5. Section 15 thus reflects that comparability needs to be ensured irrespective of how normal value is determined (that is, whether it is determined on the basis of domestic prices, the price to a third country, or on the basis of costs). This is consistent with the basic requirement of price comparability that flows from Article VI of GATT 1994, as implemented in Articles 2.1 and 2.2 of the Anti-Dumping Agreement.

3. Under GATT 1994 Article VI, a Dumping Comparison Requires Identification of a "Comparable Price" That Is Market-Determined

3.1. The basic requirement of comparability predates and is reflected in Section 15. This requirement flows from Article VI of GATT 1994, and is further reflected in the Notes *Ad* Article VI:1 and in Article 2 of the Anti-Dumping Agreement.

3.2. Understood correctly, Article VI:1 establishes that the dumping comparison requires comparable, market-determined prices or costs.

3.3. Article VI:1 sets out that "dumping" occurs when "products of one country are introduced into the commerce of another country at less than the normal value of the products".

3.4. Article VI:1(a) and (b) specifies that the normal value is a "comparable price, in the ordinary course of trade".[10]

3.4.1. This "comparable price, in the ordinary course of trade" is a market-determined price. Section 15(a)(i) clarifies the view of WTO Members that it is appropriate to use domestic prices or costs in determining price comparability if "market economy conditions prevail" in the industry under investigation.

3.5. Without a "comparable price, in the ordinary course of trade", or suitable proxy, no dumping comparison can be made. This applies to domestic prices, third-country export prices, and costs of production (which are themselves prices between input suppliers and the producer under investigation).[11]

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[10] GATT 1994 Art. VI:1(a), (b): "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) 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) in the absence of such domestic price, is less than either (i) the highest *comparable price* for the like product for export to any third country *in the ordinary course of trade*, or (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit." (italics added)

[11] Normal value may be based on costs determined in accordance with Article VI and the Anti-Dumping Agreement. Where input prices are not market-determined, and thus are not themselves comparable prices in the ordinary course of trade, those prices (costs) would not be suitable to establish a normal value based on those costs. *See, e.g.*, *EU – Biodiesel (Argentina) (AB)*, para. 6.24 ("In addition, in our view, Article 2.2 of the Anti-Dumping Agreement concerns the establishment of the normal value through an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of domestic sales. The costs calculated pursuant to Article 2.2.1.1 of the Anti-Dumping Agreement must be capable of generating such a proxy.").

3.6. Prices of an industry in which market economy conditions do not prevail are not "comparable" – that is, similar, or of an equivalent quality[12] – to prices that are market-determined.[13]

3.7. Prices of an industry in which market economy conditions do not prevail are also not comparable prices "in the ordinary course of trade".[14]

3.8. "Comparable" prices "in the ordinary course of trade" are market-determined, reflecting arm's-length transactions between buyers and sellers. Numerous provisions confirm this commonsense understanding:

3.8.1. As noted, Section 15 clarifies that whether "market economy conditions prevail" in the industry under investigation is critical "in determining price comparability". Section 15 further clarifies that "market economy conditions" relate to whether functioning markets exist for the "*manufacture, production and sale*" of the product under investigation.[15]

3.8.2. Article 2.2 of the Anti-Dumping Agreement similarly reflects that domestic sales may "not permit a proper comparison" "because of the particular market situation".

3.8.3. The First Note *Ad* Article VI:1 recognizes that "[h]idden dumping by associated houses" may occur when the export price is affected by the relationship between exporter and importer. Such an export price is not market-determined and can be replaced to permit a proper dumping comparison.[16]

3.8.4. Similarly, Anti-Dumping Agreement Article 2.3 recognizes that export price may need to be "constructed on the basis of the price at which the imported products are first resold to an independent buyer" when "export price is unreliable because of association or compensatory arrangement between the exporter and the

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[12] The dictionary definition of "comparable" is "(of a person or thing) able to be likened to another; similar" or "of equivalent quality; worthy of comparison". *Oxford American College Dictionary*, (Oxford University Press, 2002), p. 282.

[13] For clarity, in this document prices "determined under market economy conditions" and that are "market-determined" are used to refer to prices of an industry or sector in which market economy conditions prevail.

[14] *Cf. US – Hot-Rolled Steel (AB)*, para. 142 (for example, a price for a sale may not reflect the criteria of the marketplace, such as profit-maximization).

[15] *See, e.g.*, China's Accession Protocol, Sec. 15(a)(i) ("If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability . . . .").

[16] First Note *Ad* Article VI:1 of GATT 1994 ("Hidden dumping by associated houses (that is, the sale by an importer at a price below that corresponding to the price invoiced by an exporter with whom the importer is associated, and also below the price in the exporting country) constitutes a form of price dumping with respect to which the margin of dumping may be calculated on the basis of the price at which the goods are resold by the importer.").

importer or a third party."[17] Article 2.3 confirms the importance of independence between buyer and seller.

3.8.5. GATT 1994 Article VII:2(b) reflects a similar concern in customs valuation for market-determined prices: "'Actual value' should be the price at which … such or like merchandise is sold or offered for sale *in the ordinary course of trade under fully competitive conditions*."

3.8.6. The Second Note *Ad* Article VII:2, elaborates: "It would be in conformity with Article VII, paragraph 2 *(b)*, for a contracting party to construe the phrase 'in the ordinary course of trade . . . under fully competitive conditions', as excluding any transaction wherein the buyer and seller are not independent of each other and price is not the sole consideration."[18]

3.8.7. The Second Note *Ad* Article VI:1 also reflects that a proper dumping comparison requires identification of domestic prices and costs that are market-determined, as explained in Section 4, below.

3.9. Article VI:1, in light of Section 15 and Articles 2.1 and 2.2, reflects that, where the economy or an industry or sector of an exporting Member does not generate comparable, market-determined prices and costs (for example, because market economy conditions do not prevail in the Member or an industry or sector), domestic prices or costs are not suitable for an antidumping comparison. Instead, an importing Member may find an alternative, market-determined normal value for purposes of making a valid dumping comparison.

4. The Second Note *Ad* Article VI:1 Confirms that Comparable, Market-Determined Prices Must Exist for Home Market Prices or Costs to Be Used for Purposes of a Dumping Comparison

4.1. As explained, for purposes of a dumping comparison, Section 15 and Article VI call for "comparable prices" that are market-determined to determine normal value. This understanding is confirmed by the Second Note *Ad* GATT 1994 Article VI:1.[19]

4.1.1. The Second Note is an example of a situation in which comparability is at issue (in the conditions described in that Second Note). As such, it is a specific expression of the main principle of comparability.

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[17] Anti-Dumping Agreement, Art. 2.3 ("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.").

[18] *See also* Customs Valuation Agreement, Art. 2.1 (transaction value between related buyer and seller shall be accepted provided the relationship did not influence the price).

[19] Second Note *Ad* GATT 1994 Article VI:1 ("*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.") (italics added).

4.2. The Second Note reflects that, in making a dumping comparison under paragraph 1 of Article VI, it may not be possible to find comparable prices or costs in the situation of a state-controlled economy, and the importing Member may determine to resort to another source for normal value. The text of the Second Note also reflects that it is Articles VI:1 and VI:2 that provide the legal authority to reject the non-market prices and costs, not the Second Note itself.

4.3. First, the text confirms that, under GATT 1994 Article VI, an importing Member must "determin[e] price comparability for the purposes of paragraph 1" of Article VI. That is, to make a dumping comparison, the importing Member must find *comparable prices* to establish normal value: "It is recognized that … [in the case of a state-controlled economy] special difficulties may exist *in determining price comparability for the purposes of paragraph 1 . . . .*"

4.4. Second, the text identifies *one* situation in which "special difficulties may exist in determining price comparability." The situation identified is "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."

4.4.1. There is no text suggesting this is the *exclusive* situation in which "special difficulties may exist". For example, the text does not read "it is recognized that *only* in the case of imports" from a state-trading country.

4.4.2. There is no language that circumscribes the importing Member's investigation "in determining price comparability for the purposes of paragraph 1". That is, the text does not limit the determination that there is no "comparable price, in the ordinary course of trade" to this one situation.

4.4.3. The recognition by Members of a "case" creating special difficulties ("It is recognized that, in the case …") does not logically imply that there could be no other "case".

4.5. Third, in the "case" described in the Note, the CONTRACTING PARTIES recognized the importing Member could reject prices or costs that are not market-determined. This is because a strict comparison "with domestic prices in such country" would not be appropriate, and in such country, "all domestic prices are fixed by the State", which would include costs (prices of factors of production).

4.6. Fourth, the text does not provide legal *authority* to do something that an importing Member may not already do or is prohibited from doing. That is, the Second Note is not written as an *exception* to Article VI.

4.6.1. As noted, the text describes a situation in which difficulties exist "in determining price comparability for the purposes of paragraph 1" of Article VI. That is, the authority to "determin[e] price comparability" exists in Articles VI:1 and VI:2.

4.6.2. The text uses no language expressing that it is an exception or derogation from Article VI (e.g., "notwithstanding", "provided that", "nothing shall prevent").

4.6.3. The text is expressed as a description, or recognition, by Members. The text reads: "It is *recognized* that, in [the situation described], special difficulties may exist in determining price comparability …."

4.6.4. The text provides no *authorization* for an action in response to that recognized situation: "[A]nd 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*." That is, the text recognizes that the importing Member exercises judgment whether use of domestic prices is "appropriate".

4.7. The legal authority to reject "domestic prices" is *not* provided in this text ("It is recognized that … importing contracting parties may find it necessary to take into account . . . ."). Rather, the text reflects that the legal authority for rejecting "domestic prices" exists in "paragraph 1" of Article VI when an importing Member is "determining price comparability" (and in Article VI:2 with respect to the imposition of an anti-dumping measure).

4.7.1. Thus, the Second Note is not an exception (in the nature of an affirmative defense) to Article VI of the GATT 1994. Rather, it elaborates the obligations by which all Members have agreed to be bound and the authority in antidumping comparisons they have retained.

4.8. The negotiating history of the Second Note supports the conclusion that the Note is not an exception to Article VI. Rather, the CONTRACTING PARTIES, through an "interpretative note", recognized that the authority to reject domestic prices when these are not "comparable prices, in the ordinary course of trade," lies in Article VI.

4.8.1. Czechoslovakia proposed to amend Article VI:1(b) to permit rejecting home market prices "when the price in the domestic market is fixed by the State".[20] Czechoslovakia explained that Article VI:1 should be amended "[i]n order to remove the difficulties caused by the application of certain standards relating to the definition of normal value in paragraph 1 of Article VI . . . due to the fact that *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 the market* but are fixed by the State."

4.8.1.1. That is, Czechoslovakia considered that non-market-determined prices made the price comparison called for in Article VI:1 *impossible*. Rather, Czechoslovakia considered prices resulting from "fair competition in the market" to be necessary.

4.8.2. Czechoslovakia also proposed a draft interpretive note to Article VI:1: "In considering the differences affecting price comparability due regard shall be had for the fact that in a country with a complete or substantially complete state monopoly of its trade and all domestic prices fixed by the state such prices have a

[20] Proposals by the Czechoslovak Delegation, W.9/86 (9 December 1954) (italics added).

different economic function than in countries in which domestic prices are established by private trade."[21]

4.8.2.1. This note recognizes that prices from a state-controlled economy are different in nature from "domestic prices … established by private trade" and that these "differences affect[] price comparability".

4.8.3. The Working Party Sub-Group, however, did *not* recommend *amending* Article VI:1. The report states: "The Sub-Group considered a proposal by Czechoslovakia (W.9/86/Rev.1) for amending subparagraph 1(b) to deal with ***the special problem of finding comparable prices*** for the application of that sub-paragraph to the case of a country all, or substantially all, of whose trade is operated by a state monopoly. The Sub-Group was *not prepared to recommend the amendment of the Article* in this respect, but agreed to *an interpretive note* to meet the case. This note is recorded in Annex A."[22]

4.8.3.1. The Sub-Group considered that the issue presented by Czechoslovakia was "the special problem of *finding comparable prices*" for purposes of a dumping comparison when the home market is state-controlled.

4.8.3.2. The Sub-Group did *not* consider an amendment to Article VI:1 would be necessary to find that home market prices were not useable for purposes of the dumping comparison. Instead, the Sub-Group recommended adoption of an "interpretative note" nearly identical to what is now the Second Note.

4.8.3.3. The report confirms that the GATT CONTRACTING PARTIES considered that Article VI *contained flexibility and authority* to reject non-market-determined prices for purposes of determining dumping.

4.8.4. The Working Party adopted the Sub-Group III-A report language and the text for what became the Second Note.[23]

4.8.5. The negotiating history reveals that GATT Contracting Parties decided that *no amendment* to Article VI was necessary to meet "the special problem of finding comparable prices" where home market prices were not market-determined (or, in Czechoslovakia's words, "not established as a result of fair competition in the market"). Rather, they agreed on the Second Note *Ad* Article VI:1 to

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[21] Article VI – Draft Interpretative Note to paragraph 1 Proposed by the Czechoslovak Delegation, Spec/93/55 (7 February 1955).

[22] Sub-Group III-A of Review Working Party III to Trade other than Restrictions or Tariffs, W.9/220 (22 February 1955) (emphasis added).

[23] Draft Report to the Contracting Parties, W.9/231 (26 February 1955); Report of Review Working Party III to Trade other than Restrictions or Tariffs, L/334 (3 March 1955). The Legal Drafting Committee made non-substantive edits to the text of the Second Note (called "Note 2" in the document). W.9/236/Add.1 (3 March 1955). The Second Note was adopted following the 1954-55 Review Session. L/334, adopted 3 March 1955, Annex I, Section I.B; BISD 3S/222, 223.

"recognize[]" that it would not be "appropriate" to use such non-market-determined prices for purposes of the dumping comparison. This history further confirms that the CONTRACTING PARTIES viewed the authority to reject non-market prices for antidumping comparisons as inherent in Article VI:1 (and Article VI:2 with respect to the imposition of anti-dumping measures) as that provision refers to the need to ensure comparability.

4.9. We are aware that the Appellate Body has described the Second Note *Ad* Article VI:1 as "provid[ing] the legal basis" for rejecting non-market domestic prices or costs and "authorizing" use of surrogate values in the particular case referred to in that provision.[24] However, the Appellate Body reports do not interpret the legal text of the Second Note *Ad* Article VI:1, as set out above, to support that statement. Nor do the reports explore the negotiating history confirming the reading of the Second Note *Ad* Article VI:1 as not providing any legal authority to do something Article VI:1 does not already authorize. In fairness, the interpretation of the Second Note was not at issue in the appeals before the Appellate Body.[25] Therefore, those statements do not reflect a considered interpretive effort on this point. And in any event, irrespective of the nature of the Second Note with respect to the particular case referred to in that provision, the fact remains that the Second Note is just one expression of the more general principle that an investigating authority is entitled to ensure comparability, which is rooted in and flows from Article VI of the GATT 1994.

4.10. The text and negotiating history of the Second Note *Ad* Article VI:1 confirm the reading of GATT 1994 Article VI:1 and Section 15 of China's Accession Protocol. An importing Member has the authority under Article VI to reject domestic prices and costs when they are not "comparable prices, in the ordinary course of trade" because they are not determined under market economy conditions.

5. Historical Practice in the Application of Article VI Demonstrates Agreement among the Contracting Parties that Normal Value Must Be Market-Determined

5.1. At approximately the same time as the proposed amendment to Article VI, which resulted in adoption of the Second Note *Ad* Article VI:1 confirming the existing authority of Contracting Parties to ensure comparability and hence to reject non-market domestic prices and costs for antidumping comparisons, the GATT Secretariat undertook a review of parties' legislation applying Article VI. This 1957 review[26] provides further evidence

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[24] *United States – Antidumping and Countervailing Measures (AB)*, WT/DS379/AB/R, para. 569 ("The second *Ad* Note to Article VI:1, which provides the legal basis for the use of surrogate values for NMEs in anti-dumping investigations, also authorizes recourse to exceptional methods for the calculation of normal value in investigations of imports from NMEs."); *EC – Fasteners (AB)*, WT/DS397/AB/R, para. 285 ("This provision allows investigating authorities to disregard domestic prices and costs of such an NME in the determination of normal value and to resort to prices and costs in a market economy third country.").

[25] *See, e.g., United States – Antidumping and Countervailing Measures (AB)*, para. 583 (reviewing claim of error under SCM Agreement Article 19.3); *EC – Fasteners (AB)*, para. 291 ("Finally, we note that China's claim before the Panel concerned the determination of individual and country-wide dumping margins and duties, not the possibility of resorting to alternative methodologies in the calculation of normal value in anti-dumping investigations involving China.").

[26] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712 (23 October 1957).

confirming the understanding of Article VI as requiring market-determined prices for determining price comparability. This review of legislation and practice also establishes subsequent practice within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties in the application of Article VI establishing the agreement of the parties regarding its interpretation.

5.2. The Secretariat analysis revealed that, in applying Article VI:1, Contracting Parties universally relied on market-determined prices or costs to determine normal value. The parties likewise rejected non-market prices and costs as a basis for normal value in light of GATT "requirements to base the calculations on a comparable situation."[27]

5.2.1. Among other things, the Contracting Parties applying antidumping regimes considered that "their legislation is fundamentally similar or the same" in terms of addressing anti-dumping. Further, "[i]nsofar as the relations of the existing provisions with Article VI are concerned, all governments consider their application of duties to be practically in conformity with the obligations laid down in this Article."[28]

5.2.2. This includes the fact that the Contracting Parties reported rejecting non-market domestic prices and costs for antidumping comparisons. Instead, "[i]n practice, countries levying anti-dumping or countervailing duties on imports from State-trading economies very often rely on *the price situation in comparable third markets* or on consultations with the exporting country."[29]

5.3. The Contracting Parties' legislation confirms their understanding that determining price comparability under Article VI requires a market-determined normal value – that is, a comparable price, in the ordinary course of trade.

5.3.1. The 1957 review, in summarizing the parties' replies to its survey questionnaire, emphasizes that price comparability is at the core of Article VI: "Article VI takes account of differences affecting price comparability, mainly those based on terms of sale and taxation . . . . There is, however, a clear tendency to arrive at a normal value *which is really a comparable value*. … It emerges from the replies that *normally* all contracting parties in question base the calculation of the normal value on the price of the 'same product from the same producer'". [30]

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[27] L/712, pp. 5-6.

[28] L/712, pp. 5-6. The report also notes that "[i]n practice most countries do not distinguish between anti-dumping and countervailing duties . . . . The practical reason for this approach seems to be that a comparison with the 'normal value' is possible in most instances while proof of a subsidization is often difficult". *Ibid.*, p. 7.

[29] L/712, p. 10 (italics added). For example "Canada in its relations with certain State-trading countries has had recourse to special bilateral agreements" and "Belgium does not consider imports from State-trading countries under the aspect of dumping but applies in given circumstances countervailing duties considering under-priced imports from such countries as being subsidized. But Belgium also measures the extent of the 'subsidy' by a price comparison as in the case of anti-dumping duties." L/712, p. 11.

[30] L/712, p. 11.

5.3.2. This comparison of a producer's domestic price and an export price is "normally" appropriate because the relevant prices are "comparable prices" – that is, they are valued on a market basis. However, because information on domestic market value is not always available, the report notes that "other possibilities" include the option "to base the normal value . . . on prices in third countries."[31] This ensures that a market value is always used as the basis for comparison to the export price.

5.4. The review acknowledges the core view of Contracting Parties that a lack of domestic prices or costs that ensure comparability in non-market economies means that normal value must be found on another basis. In particular, "in the case of State-trading countries the normal value – ***due to the lack of comparable figures*** – is sometimes calculated on the basis of prices in third countries having a comparable economic structure."[32]

5.5. A comparable, market economy structure is a prerequisite for price comparability. The Contracting Parties, in describing how their domestic legislation defined the Article VI term "normal value," demonstrated their understanding that normal value could only be established through what were referred to as prices from a "free economy", prices for goods "freely offered for sale", prices "in the ordinary course of trade", and other similar formulations.

5.5.1. Canada described "fair market values obtaining in the domestic market of a third country *having a free economy*."[33] In terms of comparable prices, Canada referred to the price "*in the ordinary course of trade under fully competitive conditions*."[34] In terms of third-country prices, Canada referred to "values . . . from third countries *having a free economy*."[35]

5.5.2. South Africa described normal value in terms of "the *market price* at which . . . such or similar goods are *freely offered for sale*."[36] South Africa's response alternatively referred to a "price quoted by an efficient producer"[37] or "a price sufficient to cover the cost . . . calculated at not less than world market prices . . . in any country."[38]

5.5.3. Rhodesia and Nyasaland described normal value in terms of "the *market price* at which . . . goods are *freely offered for sale*."[39]

[31] L/712, p. 11.

[32] L/712, p. 11 (emphasis added).

[33] L/712, p. 49 (Canada) (emphasis added).

[34] L/712, p. 55 (Canada) (emphasis added).

[35] L/712, p. 48 (Canada) (emphasis added).

[36] L/712, p. 101 (South Africa) (emphasis added).

[37] L/712, pp. 90-100 (South Africa).

[38] L/712, pp. 90-100 (South Africa).

[39] L/712, pp. 71, 84 (Rhodesia and Nyasaland) (emphasis added).

5.5.4. The United States referred to "the price . . . at which such or similar merchandise is sold or freely offered for sale . . . *in the ordinary course of trade*."[40]

5.5.5. Belgium referred to normal value as "the value *in the open market under fully competitive conditions*."[41] Belgium's response referred, alternatively, to "prices . . . sold or offered . . . by manufacturers or exporters belonging to *countries where trade is a matter of private enterprise*."[42]

5.5.6. Sweden referred (following in principle the inability to use other methods) to "prices for like products *in a third country*" "which could then be interpreted to some degree as an indication on the 'cost of production.'"[43]

5.5.7. Australia referred to normal value in terms of "*fair market value* or . . . a reasonable price."[44] In that sense, Australia referred to "'Fair Market Value' mean[ing] . . . fair market value of the goods . . . for home consumption *in the usual and ordinary course of trade*."[45] Australia referred to a "'reasonable price' mean[ing] such a price as represents the cost of production."[46]

5.5.8. Norway referred to prices in a "*private enterprise economy*."[47]

5.5.9. The United Kingdom referred to prices for "a sale *in the open market* between buyer and seller *independent of each other*."[48]

5.6. Each of these terms reflects the understanding of the Contracting Parties that normal value must be based on prices or costs established under market economy conditions.

5.7. The review observes that the Contracting Parties continued to apply Article VI in a manner that demonstrated they considered they had the legal authority to calculate normal value on the basis of market-determined prices or costs (e.g., third-country prices) when non-market economic conditions rendered domestic prices or costs not comparable.[49]

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[40] L/712, pp. 133-134 (United States) (emphasis added).

[41] L/712, p. 41 (Belgium) (emphasis added).

[42] L/712, p. 41 (Belgium) (emphasis added).

[43] L/712, p. 109 (Sweden) (emphasis added). Sweden noted that, in the case of centrally planned economies, "home market prices do not offer satisfactory guidance" in determining normal value. L/712, p. 107.

[44] L/712, p. 23 (Australia).

[45] L/712, p. 23 (Australia) (emphasis added).

[46] L/712, p. 23 (Australia).

[47] L/712, p. 146 (Norway) (emphasis added).

[48] L/712, p. 152 (United Kingdom) (emphasis added).

[49] *See, e.g.*, SR.12/15 (Nov. 23, 1957), pp. 113-16 (comments of Rhodesia and Nyasaland). As Rhodesia and Nyasaland noted, its "legislation was designed to deal with trade emanating from countries having a free economy;" adding that "ways and means had been found, however, to adapt this legislation to imports from State-trading

5.7.1. In particular, the review notes that "Canada, Rhodesia and Nyasaland[,] and South Africa have imposed anti-dumping duties also on (dumped) imports from State-trading countries."[50]

5.7.2. The review likewise observes that, with respect to "Australia, New Zealand, Sweden and the United States . . . it seems that these States could apply their provisions to imports from State-trading countries: a fact which is stated by some of them."[51]

5.8. Reflecting the Contracting Parties' understanding of antidumping comparisons under Article VI (as demonstrated in their consideration and agreement to the Second Note and in their domestic legislation), the Secretariat review explains, as a general matter, that the "State Trading Problem" was one of a lack of comparable, market-determined prices and costs:

> The State Trading Problem
> A special problem in the application of anti-dumping and countervailing duties is created by the fact that two types of economy exist. One is the economy based on the cost of production (in the following called free-trade economy) and the other is the State-trading economy in which the prices within the national economy are determined on other bases than the cost of production. This makes the application of the GATT anti-dumping provisions, which are by definition based on the price of the product, difficult in the case of State-trading countries . . . .
>
> Prices on the home market of State-trading countries may in one instance be higher than the price of the same product would be in a free-trade country a situation which could lead to the levy of anti-dumping duties even in circumstances which economically are not dumping. On the other hand, extremely low prices in a State-trading country could exclude the levy or anti-dumping duties. A note to the revised Article VI refers to that problem and states that a strict comparison in such cases may not always be appropriate. In practice, countries levying anti-dumping or countervailing duties on imports from State-trading economies very often rely *on the price situation in comparable third markets* or on consultations with the exporting country.[52]

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countries." Australia "shared the views expressed by other delegates on the matter of anti-dumping and countervailing duties in relation to State-trading." *Ibid.*

[50] L/712, p. 9.

[51] L/712, p. 9.

[52] L/712, p. 10 (emphasis added). As reflected in the Contracting Party submissions cited, these "third markets" were *not* other State-trading countries. Rather, they were "comparable" because prices were market-determined and other conditions (such as level of development) were comparable to those of the State-trading country.

5.8.1. Sweden noted "the difficulties in determining the 'normal value' of products exported from countries with centrally planned and controlled economies and *concerning which home market prices do not offer satisfactory guidance*."[53]

5.8.2. Norway expressed a similar view in its response to the survey, stating that: "As the fixing of prices in these countries takes place according to totally different principles than in countries with a private enterprise economy, and frequently without direct connexion with the actual cost of production, the "normal value" defined according to the usual criteria *cannot give the correct basis for comparison*."[54]

5.9. In sum, the Secretariat review provides extensive evidence of the practices Contracting Parties employed in applying Article VI. The review reflects the uniform view of the Contracting Parties that they had the authority to reject non-market prices and costs.[55] The Contracting Parties stated that they would reject those prices and costs because they were not comparable – that is, not market-determined. Instead, they would look to comparable third countries with market economy conditions to establish a normal value.

5.10. Given the consistent practice of Contracting Parties in applying Article VI in the case of domestic prices or costs that were not market-determined, as reflected in the Secretariat review,[56] it would also be appropriate to consider the Contracting Parties establishing a "subsequent practice in the application of [Article VI] which establishes the agreement of the parties regarding its interpretation", within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties.

5.10.1. With respect to subsequent practice,[57] the Secretariat review sets out "as clearly as possible the situation which now exists after provisions relating to the application of anti-dumping and countervailing duties had been incorporated, as Article VI, in the GATT."[58] Each Contracting Party provided information on its legislation and imposition of antidumping duties as in application of and consistent with Article VI.[59] As noted, the Contracting Parties, in their practice and their explanations, were in agreement that normal value must be a market-determined price or cost. They further agreed they had the authority to reject

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[53] L/712, p. 107 (emphasis added).

[54] L/712, p. 146 (emphasis added).

[55] At the request of parties, the Secretariat undertook further analysis of country practices. None of the Secretariat's additional findings brought into question the conclusions reached in its first review of this subject. *See* L/978 (Apr. 24, 1959) ("Report of the Group of Experts on Anti-Dumping and Countervailing Duties"); L/1141 (Jan. 29, 1960) ("Second Report of the Group of Experts on Anti-Dumping and Countervailing Duties").

[56] As noted in the Secretariat report: "The descriptions in the Country Section have had the full approval of the governments concerned." L/712, p. 4.

[57] Vienna Convention on the Law of Treaties, Art. 31(3)(b) ("There shall be taken into account, together with the context: . . . (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation . . . .").

[58] L/712, p. 5.

[59] L/712, p. 6.

non-market prices or costs from State trading countries because these were not comparable, market-determined values.

5.10.2. Thus, in accordance with Article 31(3)(b) of the Vienna Convention, it would be appropriate to take the practice described "into account, together with the context," in interpreting Article VI:1. That subsequent practice supports and confirms an understanding of Article VI:1 that domestic prices or costs not determined under market economy conditions may be rejected because these are not "comparable prices, in the ordinary course of trade".

6. The Practice of CONTRACTING PARTIES in Accessions to the GATT Confirms That Non-Market Economy Prices and Costs Could be Rejected Pursuant to GATT 1947 Article VI:1

6.1. The practice of CONTRACTING PARTIES in accessions to the GATT, including the agreements reached in those accessions, confirms that non-market economy prices and costs may be rejected pursuant to Article VI:1 of GATT 1947.

6.1.1. As explained, the text of Article VI:1 of GATT 1994, the Second Note *Ad* Article VI:1,[60] and the practice of Contracting Parties up to and at the time of consideration of Czechoslovakia's proposed amendment to Article VI:1 *all* support the conclusion that the authority to reject non-market economy prices and costs for antidumping comparisons resides in Articles VI:1 and VI:2, particularly, in the need for "comparable prices, in the ordinary course of trade" to establish normal value.

6.1.2. This understanding is further supported and confirmed by examining the accessions of various non-market economies to the GATT. In each of these three accessions, the CONTRACTING PARTIES did not create any exception to Article VI:1 of GATT 1947 in the accession protocol of the acceding party. Rather, they simply recognized and recorded in the Working Party Report their understanding that they could reject non-market economy prices and costs for antidumping comparisons.

6.1.3. This consistent approach in accessions establishes a "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."[61] This practice is evidenced in each GATT accession protocol, as a part of the agreement establishing the terms of accession and agreement between the contracting parties and the acceding party, together with the Working Party Report evincing agreement of Contracting Parties as to their existing rights under the GATT 1947. As subsequent practice, this shall be taken into account together with the context of an agreement. This practice supports the interpretation of Articles VI:1 and VI:2 as providing the legal authority to

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[60] The accessions refer variously to this provision as "the Second Note *Ad* Article VI:1" and the "Second Supplementary Provision."

[61] Vienna Convention on the Law of Treaties, Art. 31(3)(b) ("There shall be taken into account, together with the context: . . . (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation . . . .").

ensure comparability and hence to reject non-market economy prices and costs for antidumping comparisons.

6.2. The accession of Poland to the GATT demonstrates that no amendment or exception to the GATT 1947 was necessary to authorize Contracting Parties to reject non-market prices or costs for purposes of antidumping comparisons.

6.2.1. Poland completed its accession to the GATT in 1967. The Contracting Parties recognized that Poland was not a market economy.

6.2.2. The issue of how antidumping comparisons would be made in relation to Poland's exports was an issue of concern. The issue was addressed in the GATT Working Party Report, which recognizes that the Contracting Parties had the authority under Article VI to reject Polish prices or costs, but did not arise in Poland's Protocol of Accession.

6.2.3. Poland's Protocol of Accession contains no provision addressing antidumping comparisons or permitting a Contracting Party to reject non-market economy prices and costs for antidumping comparisons.[62] Poland's Protocol of Accession also does not incorporate any Working Party Report commitments into the Protocol.

6.2.4. Therefore, there is no legally operative language in Poland's accession agreement itself that provides authority to any Contracting Party to reject and replace non-market prices or costs for purposes of antidumping comparisons involving Poland. That is, there is no exception to the GATT 1947 in Poland's Accession Protocol.

6.2.5. Neither does the GATT Working Party Report itself use legally operative language purporting to give any legal authority to reject non-market economy prices and costs for antidumping comparisons.

6.2.5.1. "With regard to the implementation, where appropriate, of Article VI of the General Agreement with respect to imports from Poland, *it was the understanding* of the Working Party that the second Supplementary Provision in Annex I to paragraph 1 of Article VI of the General Agreement, relating to 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, *would apply*. In this connexion *it was recognized that a contracting party may use* as the normal value for a product imported from Poland the prices which prevail generally in its markets for the same or like products or a value for that product constructed on the basis of the price for a like product originating in another country, so long as the method used for determining normal value in any particular case is appropriate and not unreasonable."[63]

[62] Protocol for the Accession of Poland to the GATT, BISD 15S/46 (June 30, 1967).

[63] GATT Working Party Report on the Accession of Poland, L/2806, para. 13 (June 23, 1967) (italics added).

6.2.6. The Working Party Report simply records "the understanding of the Working Party" that the Second Note to Article VI:1 "would apply". And as noted above, the Second Note does not contain legally operative language, providing a legal authority to do something, or creating an exception from another obligation.

6.2.7. Further, the Working Party noted that "it was recognized that" a Contracting Party "may use" a value that was not a Polish home market price, a third-country export price, or Polish costs of production "for determining normal value".

6.2.8. In sum, the Accession of Poland confirms that the view of the CONTRACTING PARTIES was no amendment or exception to the GATT 1947 was necessary to authorize Contracting Parties to reject non-market prices or costs for purposes of antidumping comparisons. Rather, as they had confirmed in the Second Note *Ad* Article VI:1 and in considering Czechoslovakia's proposed amendment to Article VI, the authority to reject those prices already existed in GATT 1994 Article VI:1.[64]

6.3. The accession of Romania to the GATT in 1971 similarly demonstrates that no amendment or exception to Article VI:1 was necessary to authorize Contracting Parties to reject non-market prices or costs for purposes of antidumping comparisons.

6.3.1. In many respects, the documents related to Romania's accession are similar to those described above in relation to Poland. However, certain differences further confirm the interpretation of GATT 1994 Article VI:1.

6.3.2. First, as with Poland, there is no provision in Romania's Protocol of Accession addressing antidumping comparisons or providing a legal authority to a Contracting Party to reject non-market economy prices and costs for antidumping comparisons.[65] Neither are there any Working Party Report commitments that are incorporated into Romania's Accession Protocol.

6.3.3. Therefore, as with Poland, there is no legally operative language in Romania's accession agreement itself that provides authority to any Contracting Party to reject and replace non-market prices or costs for purposes of antidumping comparisons involving Romania.

6.3.4. Again, as with Poland, the GATT Working Party Report does not itself use legally operative language purporting to give any legal authority to reject non-market economy prices and costs for antidumping comparisons.

6.3.4.1. "With regard to the implementation, where appropriate, of Article VI of the General Agreement with respect to imports from Romania, *it was the understanding* of the Working Party that the second Supplementary Provision in Annex I to paragraph 1 of Article VI of the General Agreement, relating to imports from a country in which

[64] The Poland Working Party Report was considered and approved by the GATT Council. GATT Council, Minutes of the Meeting Held on 26 June 1967, C/M/41, at 3 (17 July 1967) ("The reports of the four Working Parties on accession were presented to the Council … and the reports were adopted.").

[65] Protocol for the Accession of Romania to the GATT, BISD 18S/7.

> *foreign trade operations were carried out by State and cooperative trading enterprises* and where *some domestic prices* were fixed by the law, *would apply*. In this connexion it was recognized that a contracting party may use as the normal value for a product imported from Romania the prices which prevail generally in its markets for the same or like products or a value for that product constructed on the basis of the price for a like product originating in another country, so long as the method used for determining normal value in any particular case is appropriate and not unreasonable."[66]

6.3.5. Again, as with Poland, the Working Party Report simply records "the understanding of the Working Party" that the non-legally operative Second Note *Ad* Article VI:1 "would apply". And the Working Party also noted that "it was recognized that" a Contracting Party "may use" a value that was not a Romanian home market price, a third-country export price, or Romanian costs of production "for determining normal value".

6.3.6. The Romania Working Party Report does contain two important changes from the language used in the Poland Working Party Report, both of which further support the understanding of Article VI:1 and the Second Note *Ad* Article VI:1.

6.3.7. First, the Romania Working Party Report changed the language on "imports from a country which has a complete or substantially complete monopoly of its trade" to "imports from a country *in which foreign trade operations were carried out by State and cooperative trading enterprises*".

6.3.7.1. As the Poland Working Party Report language tracks the language in the Second Note, this different language in Romania's accession confirms that the situation described in the Second Note was *not* viewed as the exclusive situation in which it could be appropriate to reject domestic prices and costs. Rather, the Working Party recognized that difficulties in determining price comparability could extend to a situation like Romania's in which "cooperative trading enterprises" operated.

6.3.8. Second, the Romania Working Party Report changed the language on "imports from a country . . . where all domestic prices are fixed by the State" to "imports from a country . . . where *some* domestic prices *were fixed by the law*."

6.3.8.1. Again, this change confirms that the situation described in the Second Note was *not* viewed as providing the legal authority for rejecting domestic prices or costs. Nor was the Second Note viewed as the exclusive situation in which it could be appropriate to reject domestic prices or costs.

6.3.8.2. Rather, the Working Party recognized that difficulties in determining price comparability could extend to a situation like Romania's in which "some" domestic prices were "fixed by the law". This

[66] Working Party Report on the Accession of Romania, L/3557, para. 13 (Aug. 5, 1971) (italics added).

different language reflects the CONTRACTING PARTIES' recognition that the Second Note, which refers to "*all* domestic prices . . . fixed by the State," is not the *only* situation in which it is appropriate to reject non-market domestic prices or costs.

6.3.9. The accession of Romania confirms that the view of the CONTRACTING PARTIES was no amendment or exception to the GATT 1947 was necessary to authorize Contracting Parties to reject non-market prices or costs for purposes of antidumping comparisons. Rather, as they had confirmed in the context of Poland's Accession, the CONTRACTING PARTIES considered that the authority to reject those prices already existed in Article VI:1.[67]

6.4. The accession of Hungary to the GATT in 1973 provides a third example demonstrating that no amendment or exception to Article VI:1 was necessary to authorize Contracting Parties to reject non-market prices or costs for purposes of antidumping comparisons.

6.4.1. The documents related to Hungary's accession are similar to those described above in relation to Poland and Romania. However, the differences even more markedly provide confirmation for the interpretation of GATT 1994 Article VI:1.

6.4.2. First, as with Poland and Romania, there is *no* legally operative language in Hungary's accession agreement itself that provides authority to any Contracting Party reject and replace non-market prices or costs in Hungary.[68]

6.4.3. And again, the GATT Working Party Report does not itself use legally operative language purporting to give any legal authority to reject non-market economy prices and costs for antidumping comparisons.

> "*For the purpose of implementing Article VI* of the General Agreement, a contracting party *may use as the normal value* for a product imported from Hungary the prices which prevail generally in its market for the same or like product, or a value for that product constructed on the basis of the price for a like product originating in another country, so long as the method used for determining normal value in any particular case is appropriate and not unreasonable."[69]

6.4.4. In Hungary's case, then, the Working Party eliminated *any* reference to a "complete or substantial monopoly on trade"[70] or "foreign trade operations were

[67] The Romania Working Party Report was considered and approved by the GATT Council. GATT Council, Minutes of the Meeting Held on 6-7 October 1971, C/M/73, at 1-2 (19 October 1971) ("The Council adopted the Report as a whole.").

[68] There is no provision in Hungary's Protocol of Accession addressing antidumping comparisons or providing legal authority to a Contracting Party to reject non-market economy prices and costs for antidumping comparisons. BISD 20S/3. Neither are there any Working Party Report commitments that are incorporated into Hungary's Accession Protocol.

[69] GATT Working Party Report on the Accession of Hungary, L/3889, para. 18 (July 20, 1973) (italics added).

[70] Second Note; Poland's Working Party Report, para. 13.

carried out by State and cooperative trading enterprises".[71] The Working Party also eliminated any reference to "all domestic prices are fixed by the State" [72] or "some domestic prices were fixed by the law". [73]

6.4.5. The elimination of any language evoking, even in part, the Second Note provides yet further confirmation that this provision was not understood by the CONTRACTING PARTIES as providing the legal authority for rejecting domestic prices or costs or as constituting the only "case" in which Contracting Parties could do so.

6.4.6. Rather, it appears the CONTRACTING PARTIES and Hungary understood the conditions in Hungary were such that "[f]o*r the purpose of implementing Article VI* of the General Agreement, a contracting party *may use as the normal value* for a product imported from Hungary" a surrogate value. That is, *it was "implementing Article VI*" in the context of an economy like Hungary's that would permit domestic prices or costs to be rejected and surrogate values to be used.[74]

6.5. Each of these accessions to the GATT demonstrates the understanding of the CONTRACTING PARTIES and the acceding party that no new legal authority needed to be provided to permit an importing Contracting Party to reject domestic prices or costs not determined under market economy conditions. Rather, it was Article VI that provided the necessary legal authority.

6.6. Given this consistent understanding, manifested through the Accession Protocols and Working Party Reports in each accession, it would be appropriate to consider this "subsequent practice" in the application that establishes agreement on the interpretation, within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties.

6.6.1. With respect to subsequent practice,[75] in each accession, the Accession Protocol, together with the Working Party Report, demonstrated the Contracting Parties' application of Article VI to an economy, like the acceding party, in which prices are not comparable and market-determined. Each accession established the agreement of the CONTRACTING PARTIES that, in applying Article VI, a Contracting Party had the authority to reject non-market domestic prices or costs and instead use market-determined prices in determining normal value. This practice in the application of Article VI establishes the agreement of the parties regarding its interpretation.

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[71] Romania's Working Party Report, para. 13.

[72] Second Note; Poland's Working Party Report, para. 13.

[73] Romania's Working Party Report, para. 13.

[74] The Hungary Working Party Report was considered and approved by the GATT Council. GATT Council, Minutes of the Meeting Held on 30 July 1973, C/M/89, at 1-2 (17 August 1973) ("The Council … adopted the Report of the Working Party.").

[75] Vienna Convention on the Law of Treaties, Art. 31(3)(b) ("There shall be taken into account, together with the context: . . . (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation . . . .").

6.6.2. Thus, in accordance with Article 31(3)(b) of the Vienna Convention, the practice described "shall be taken into account, together with the context," in interpreting Article VI:1. That subsequent agreement or practice supports and confirms an understanding of Article VI:1 that domestic prices or costs from a non-market economy may be rejected because these are not "comparable prices, in the ordinary course of trade".

6.7. The text of GATT 1994 Article VI:1, the Second Note *Ad* Article VI:1 (and its negotiating history), the practice of GATT Contracting Parties in applying Article VI, and the practice and agreement of the CONTRACTING PARTIES in the context of accessions to the GATT of non-market economies *all* confirm the same understanding. The legal authority for Contracting Parties, and now WTO Members, to reject non-market domestic prices or costs and instead to use comparable, market-determined prices to establish normal value, was inherent and resided in Article VI.

7. Article 2 of the Anti-Dumping Agreement Implements the Principle of Price Comparability Set Forth in Article VI:1 of GATT 1994

7.1. The Anti-Dumping Agreement is, as its title suggests, an agreement on the application of GATT 1994 Article VI. In relation to determining price comparability, the Anti-Dumping Agreement confirms that establishing normal value requires a comparable, market-determined price. The further elaboration of alternative methods to use for finding normal value are consistent with, and lend further support to, the interpretation of Article VI as providing authority to reject non-market domestic prices or costs.

7.2. Article 2.1 establishes that "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 being 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." This text is nearly identical to Article VI:1 – in particular, the second sentence and subparagraph (a).

7.3. Article 2.1 thus retains the key elements from Article VI:1 for domestic prices to be used to calculate normal value: there must be a "comparable price, in the ordinary course of trade".

7.3.1. As under Article VI:1, the lack of comparable, market-determined prices – that is, prices determined under market economy conditions for the industry under investigation – requires the use of an alternative source for normal value.

7.3.2. Prices not determined under market economy conditions would also not be in the ordinary course of trade. A variety of circumstances could generally lead to the conclusion that a price is not in the ordinary course of trade.

7.3.2.1. For example, a price for a sale may not reflect the criteria of the marketplace.[76]

7.3.2.2. A price for a sale might not reflect normal commercial practices, such as in relation to other terms and conditions of sale.[77]

7.3.2.3. A price for a sale might be one established between related parties, rather than a transaction between economically independent entities at market prices, and thus not reflect market principles.[78]

7.3.2.4. A sale for an input into the product under investigation may similarly reflect non-arms-length transactions and thus not be in the ordinary course of trade.[79]

7.4. These examples suggest that a price for a sale may be considered not "in the ordinary course of trade" because of the lack of market orientation of the transaction or the entities engaged in the transaction. This reinforces that where market economy conditions do not prevail for an industry, it will not generate comparable prices, in the ordinary course of trade, and those prices need not be used to find normal value.

7.5. As previously discussed, "determining price comparability" involves a finding whether a comparison with a domestic price is "appropriate," whether a domestic sale "permit[s] a proper comparison," or whether a "comparable price, in the ordinary course of trade," exists.

7.6. Article 2.2 of the Anti-Dumping Agreement specifies that alternatives to domestic market prices may be used to find normal value when, because of a "particular market situation" or a "low volume of . . . sales in the domestic market of the exporting country," the domestic prices "do not permit a proper comparison".[80] This text reinforces that normal value must be based on prices that *permit a "proper comparison"*. Each of these situations further supports the conclusion that normal value must be based on prices determined under market economy conditions.

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[76] *See US – Hot-Rolled Steel (AB)*, para. 142.

[77] *See US – Hot-Rolled Steel (AB)*, paras. 141, 143 n. 106 (noting a liquidation sale is one example of a sale between independent parties that might be considered not in the ordinary course of trade, because it "may not reflect 'normal' commercial principles.").

[78] *US – Hot-Rolled Steel (AB)*, para. 141, 143 (noting that "[i]t suffices to recognize that, *as between affiliates*, a sales transaction *might* not be 'in the ordinary course of trade', either because the sales price is higher than the 'ordinary course' price, or because it is lower than that price" (emphasis original)).

[79] *See EU – Biodiesel (AB)*, para. 6.41 (finding that in applying the second condition of the first sentence of Article 2.2.1.1., "an investigating authority is 'certainly free to examine the reliability and accuracy of the costs recorded in the records of the producers/exporters' to determine . . . whether non-arms-length transactions or other practices affect the reliability of the reported costs").

[80] Anti-Dumping Agreement, Art. 2.2 (footnote omitted).

7.6.1. "Particular market situation" is not defined in the Agreement, but by its terms may suggest a structure of a market that interferes with the interaction of supply and demand that characterizes a market.

7.6.1.1. After the term "particular market situation" was included in the Kennedy Round Antidumping Code,[81] representatives from developed and developing countries discussed a number of conditions that might result in a "particular market situation" so as not to permit a proper comparison, including structural issues affecting the operation of market principles.[82]

7.6.1.2. Certain WTO Members have similarly identified a number of conditions in which a "particular market situation" might exist with respect to sales in the domestic market so as to not permit a proper comparison. These situations included government control over pricing, interference with competitively set prices, [83] artificially low prices, barter trade, or non-commercial processing arrangements. [84]

7.6.1.3. Therefore, as one GATT Antidumping Code panel concluded, a "particular market situation" may create a situation in which the sales themselves are rendered unfit to make a proper comparison.[85] Non-market economy conditions would be one such situation in which the prices of the sales themselves do not permit a proper comparison.

7.6.2. A low volume of sales in the ordinary course of trade of the like product for consumption in the exporting country also may not "permit a proper comparison." Footnote 2 to Article 2.2 elaborates that such a low volume may

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[81] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*, Art. 2(d) (1968).

[82] Anti-Dumping Duties (Circulated at the request of certain developing countries), MTN/INF/30, distributed on 30 June 1978, paras. 3.2, 3.3 (noting discussion of "structural imbalance arising from the development process," "inadequacies of technology," "insufficient transport facilities," "weak marketing and distribution services," "measures taken for balance-of-payments reasons or developmental purposes," and "prices of domestically produced and imported essential raw materials as well as intermediate products . . . at artificially high levels").

[83] For example, the United States in its 1994 Statement of Administrative Action accompanying the Uruguay Round Trade Agreements Act submitted to the U.S. Congress, specified that a "such a situation might exist where a single sale in the home market constitutes five percent of sales to the United States or where there is government control over pricing to such an extent that home market prices cannot be considered to be competitively set." H.R. Doc. No. 103-316, Vol. 1, p. 822.

[84] For the European Union, a 2002 amendment to its antidumping regulations specified that "[a] particular market situation for the product concerned . . . may be deemed to exist, inter alia, when prices are artificially low, when there is significant barter trade, or when there are non-commercial processing arrangements." Regulation (EC) No 1972/2002, Art.1.3 (amending Regulation (EC) No 384/96, Article 2(3)).

[85] *See EEC – Cotton Yarn*, ADP/137, para. 478 (finding that sales in the ordinary course of trade of the like product for consumption in the exporting country may not permit a proper comparison whenever the particular market situation in which such sales are made has "the effect of rendering the sales themselves unfit to permit a proper comparison. . . . {T}here must be something intrinsic to the nature of the sales themselves that dictates they cannot permit a proper comparison" (emphasis original)).

arise when sales constitute less than five percent of the sales of the product under consideration to the importing Member.[86]

7.6.2.1. Again, this situation reinforces that the structure of a market may render prices unsuitable for an antidumping comparison. The low volume of sales can call into question whether the price is reflective of ordinary market conditions.

7.7. Article 2.2 prescribes two alternative data sources that may provide for a "proper comparison" whenever domestic market sales price data cannot be used to calculate normal value: (1) "a comparable price" for the like product when exported to an "appropriate" third country, provided the price is representative; or (2) the cost of production in the country of origin plus a reasonable amount for administrative, selling, and general costs and for profits.[87] Again, each of these situations further supports the conclusion that normal value must be based on market-determined prices or costs.

7.8. Under the first alternative, Article 2.2 provides that "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."

7.8.1. A "comparable" third-country export price must be "representative". In the light of Article 2.2.1[88] and GATT 1994 Article VI:1(b), this will be a comparable price "in the ordinary course of trade".

7.8.1.1. The term "appropriate" within the context of Article 2.2 and the inquiry for a normal value to provide a "proper comparison" confers on an authority the ability to consider and determine what constitutes a "suitable" third country for the determination of normal value in a particular proceeding.[89]

7.8.2. As it is used in Article 2.2, the definition of "appropriate" thus suggests that the appropriateness of a third country may be assessed by reference to market principles with the aim of identifying a "comparable price" found in a "suitable" comparison market.

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[86] Anti-Dumping Agreement, Art. 2.2 n.2. The footnote goes on to indicate that sales below the five percent ratio "should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison."

[87] The text of Article 2.2 permits an investigating authority to determine which of the two alternatives is appropriate in a particular proceeding. The provision's use of the term "or" makes clear that an investigating authority may choose to use either of the two available data sources. *New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 2012 (defining "or," in part, as "Introducing the second of two, or all but the first or only the last of several, alternatives").

[88] *See* Anti-Dumping Agreement, Art. 2.2.1 (indicating that certain sales to a third country at prices below costs of production plus administrative, selling, and general costs "may be treated as not being in the ordinary course of trade by reason of price").

[89] The relevant dictionary definition of "appropriate" is "specially suitable (for, to); proper, fitting." *New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, p. 103.

7.8.3. Therefore, for the same reasons domestic market prices may not be used to calculate normal value, a third-country export price may not be considered "comparable" or "representative" if the prices are not market-determined.

7.9. Under the second alternative, Article 2.2 provides that "the margin of dumping shall be determined by comparison . . . with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits." As noted, the costs under Article 2.2 must be determined under market economy conditions to provide a proper comparison. The text of Articles 2.2, 2.2.1.1, and 2.2.2 reinforce this understanding.

7.9.1. The first sentence of Article 2.2.1.1 establishes that an investigating authority, "[f]or the purpose of paragraph 2," "shall normally" calculate costs on the basis of records kept by the exporter or producer "provided that" certain conditions are present, in particular that such records are consistent with GAAP of the exporting country and "reasonably reflect the costs associated with the production and sale of the product under consideration."

7.9.1.1. The introductory phrase "[f]or the purpose of paragraph 2" signifies that this provision applies to all references to costs in Article 2.2, including the use of costs for the purposes of establishing normal value.

7.9.1.2. The term "normally" indicates that an investigating authority should under ordinary conditions[90] calculate costs on the basis of the records kept by the export or producer (provided that the two conditions outlined in the first sentence are met), but it also indicates that there may be situations in which costs should not be calculated based on such records (even when the two conditions outlined in the first sentence are met).

7.9.2. The second condition in the first sentence (i.e., "reasonably reflect") also indicates that there may be situations in which costs should not be calculated based on such records.

7.9.2.1. The second condition references costs "*associated with* the production and sale of the product under consideration.[91]

7.9.2.1.1. "Associate" or "associated" is defined, in part, as something being "placed or found in conjunction with another."[92]

[90] The term "normally" is defined as "in a regular manner," "under . . . ordinary conditions," or "as a rule, ordinarily." *New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 1940; *see US – Clove Cigarettes (AB)*, para. 273 ("We observe that the ordinary meaning of the term 'normally' is defined as 'under normal or ordinary conditions; as a rule'").

[91] Anti-Dumping Agreement, Art. 2.2.1.1 (emphasis added).

[92] *New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, p. 132 (defining "associate" to mean "Joined in companionship, function, or dignity; allied; concomitant," "Sharing in

7.9.2.1.2. The term "associated with" thus conveys a more general connection between the relevant costs and the production or sale of the product under consideration and supports an economic conception of costs.[93]

7.9.2.2. The use of the general term "costs," as opposed to the term "amounts actually incurred," likewise must be interpreted as meaning real economic costs involved in producing the product in the exporting country and not simply the amount reflected, for example, in an invoice price. Otherwise, investigating authorities would be obliged to accept artificial, affiliated-party transfer prices – amounts which have no economic meaning.

7.9.2.3. Where the Anti-Dumping Agreement refers to costs "actually incurred by producers," it does so explicitly.

7.9.2.3.1. For administrative, selling, and general costs, Article 2.2.2(i) references "the actual amounts incurred and realized by the exporter or producer in question."

7.9.2.3.2. Similarly, Article 2.2.2(ii) uses an express limitation to "the actual amounts incurred and realized by other exporters or producers."

7.9.2.4. The Anti-Dumping Agreement in other circumstances indicates that an investigating authority should be concerned with real, economically meaningful data.

7.9.2.4.1. Export prices may be disregarded where the authority is concerned the price is "unreliable."[94]

7.9.2.4.2. The domestic industry may refer to "the rest of the producers" where certain producers are related to exporters or importers.[95]

7.9.2.5. An investigating authority also is not bound to accept artificial prices or costs.

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responsibility, function, membership, etc., but with a secondary or subordinate status," "A thing placed or found in conjunction with another").

[93] *See EU – Biodiesel (AB)*, para. 6.22 (finding that the "costs associated with the production and sale of the product under consideration" under Article 2.2.1.1 must be considered as referring to "those costs that have a genuine relationship with the production and sale of the product under consideration. This is because these are the costs that, together with other elements, would otherwise form the basis for the [comparable] price of the like product if it were sold in the ordinary course of trade in the domestic market").

[94] Anti-Dumping Agreement, Art. 2.3.

[95] Anti-Dumping Agreement, Art. 4.1(i).

7.9.2.5.1. Where the parties to a sales transaction are affiliated, "there is reason to suppose that the sales price might be fixed according to criteria which are not those of the marketplace."[96]

7.9.2.5.2. Even where the parties to a sales transaction are unaffiliated, there may be reason to suppose that the sales price might also be fixed according to criteria that are not those of the marketplace.[97]

7.9.2.6. Therefore, an investigating authority may disregard costs where those input prices are not market-determined. That is, where the prices of inputs are themselves not comparable prices, in the ordinary course of trade, they do not serve as suitable costs for the purpose of establishing the costs of production of the like product. Non-market based input prices are not a basis to make a proper comparison for antidumping purposes.[98]

7.9.3. The Appellate Body in *EU – Biodiesel* confirmed this understanding, finding that Article 2.2.1.1 does not limit an investigating authority to examining just the costs reflected in the records of the exporter or producer under investigation. The Appellate Body has understood that the costs calculated pursuant to Article 2.2.1.1 must generate "an appropriate proxy" for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined based on domestic sales.[99]

7.9.3.1. Given Article 2.2.1.1 (together with Article 2.2) pertains to an "appropriate proxy" for the price of the product under investigation "if it were sold in the ordinary course of trade in the domestic market," "the costs associated with the production and sale of the product" derived under Article 2.2.1.1 must be of a kind that is capable of serving as an appropriate basis for estimating the normal value of the final product.[100]

7.9.3.2. Similarly, the Appellate Body stated the general proposition that the second condition of the first sentence of Article 2.2.1.1 (starting with

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[96] *US – Hot-Rolled Steel (AB)*, para. 141 (emphasis omitted).

[97] *US – Hot-Rolled Steel (AB)*, para. 141 and n.106; *see* Report of the Working Party on the Accession of the Russian Federation to the World Trade Organization, WT/ACC/RUS/70, WT/MIN(11)/2, para. 90 (17 Nov. 2011) (Members expressed concerns that direct government control of a major input "could not be regarded as being based on commercial considerations . . . [and that] [a]rtificially low . . . prices could . . . lead to . . . exports of value-added intermediate and finished goods at prices below their normal value").

[98] *See EU – Biodiesel (AB)*, para. 6.22 (finding that appropriate costs for purposes of 2.2.1.1 are those that "would otherwise form the basis for the [comparable] price of the like product if it were sold in the ordinary course of trade in the domestic market").

[99] *EU – Biodiesel (AB)*, para. 6.24.

[100] *EU – Biodiesel (AB)*, para. 6.24.

"reasonably reflect") means that the records of the exporter or producer must "suitably and sufficiently correspond to or reproduce the costs that have a genuine relationship with the production and sale of the specific product under consideration."[101]

7.9.3.3. For these reasons, the panel and Appellate Body in *EU – Biodiesel (AB)* confirmed that an investigating authority, in ascertaining whether the records kept by the exporter or producer under investigation reasonably reflect the costs of production, could "'examine the reliability and accuracy of the costs recorded in the records of the producers/exporters' to determine, in particular, whether all costs incurred are captured, whether the costs incurred have been over- or understated and whether non-arms-length transactions or other practices affect the reliability of the reported costs."[102]

7.9.4. If the costs reported in the records of a producer or exporter are not market-determined, those costs cannot "reasonably reflect" the real economic costs associated with the production and sales of the product under consideration. That is, where the prices of inputs are themselves not comparable prices, in the ordinary course of trade, they cannot serve as suitable, market-determined costs for the purpose of establishing the costs of production of the like product.

7.10. In sum, Article 2 of the Anti-Dumping Agreement confirms the principle of price comparability expressed in Article VI:1 of GATT 1994. A comparable price is one which will permit a "proper comparison". Such a comparable price must be market-determined, reflecting commercial practices, independence of buyer and seller, and the interaction of supply and demand. The prices or costs of an industry in which market economy conditions do not prevail cannot be considered comparable prices for purposes of "normal value."

8. Section 15 of China's Accession Protocol Clarifies that a Member May Reject Chinese Prices and Costs in Determining Price Comparability Where Market Economy Conditions Do Not Prevail for the Industry Under Investigation

8.1. As explained, Section 15 is concerned in relevant part with "determining price comparability" for purposes of antidumping comparisons. Section 15 is a specific expression of the principle that comparability needs to be ensured. Recognizing this fact, Section 15(a) establishes two alternatives for normal value – that is, two bases on which to find comparable prices or costs: either "Chinese prices or costs" or "a methodology that is not based on a strict comparison with domestic prices or costs".

8.2. Section 15(a) indicates that the choice between the first and second alternatives is governed in part by the concluding phrase "based on the following rules".

[101] *EU – Biodiesel (AB)*, para. 6.22.

[102] *EU – Biodiesel (AB)*, para. 6.41 (quoting *EU – Biodiesel (Panel)*, para. 7.242 n.400).

8.2.1. Relevant dictionary definitions of "base" or "based on" indicate that the term means "foundation" or "starting point" but not exclusivity.[103]

8.2.1.1. When the term "based on" is meant to be exclusive in treaty text, it is usually modified by the term "only," "solely," or "exclusively."[104]

8.2.2. Section 15 is concerned with "determining price comparability *under* Article VI of the GATT 1994 and the Anti-Dumping Agreement".[105] Thus, the primary "rules" for determining price comparability would be those in the two agreements.

8.2.2.1. As noted, those agreements direct the importing Member to seek "comparable prices" first in the domestic market or prices or costs that permit a "proper comparison".

8.2.3. Sections 15(a)(i) and 15(a)(ii) set out two specific circumstances (or "rules") in determining price comparability. These two circumstances do not cover all possible situations in which an importing Member makes a dumping comparison.

8.2.4. Section 15(a)(i) requires an importing Member to "use Chinese prices or costs for the industry under investigation in determining price comparability" when the producers under investigation "can clearly show that market economy conditions prevail in the industry producing the like product".

8.2.5. This "rule" states the expected: comparable prices or costs will normally exist when "market economy conditions prevail" in the industry under investigation, and therefore the industry's prices or costs must be used.

8.2.5.1. This "rule" confirms that, where market economy conditions do *not* prevail, the industry's prices or costs will not be "comparable" and therefore need not be used.

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[103] *Shorter Oxford English Dictionary* (5th ed. 2002), pp. 190-91; *see EC – Hormones (AB)*, paras. 163-166 (finding that the term "base on" had a less stringent meaning than the term "conform to"; specifically, the requirement that a measure must "conform to" an international standard (i.e., one that fully embodies the international standard) differs from a requirement that a measure must be "based on" an international standard (i.e., one that may adopt some, but not necessarily all, of the elements of the international standard).

[104] *See e.g.* Customs Valuation Agreement, Art. 8 note, para. 3 ("However, if the amount of this royalty is based *only* on the imported goods and can be readily quantified, an additional to the price actually paid or payable can be made" (emphasis added)); SCM Agreement, Art. 41.3 ("Any decision of the investigating authorities can *only* be based on such information and arguments as were on the written record" (emphasis added)); TRIPS Agreement, Art. 41.3 ("Decisions on the merits of a case shall be based *only* on evidence in respect of which parties were offered the opportunity to be heard" (emphasis added)); GPA Agreement, Art. XV:5 ("Unless a procuring entity determines that it is not in the public interest to award a contract, the entity shall award the contract to the supplier that the entity has determined to be capable of fulfilling the terms of the contract and that, based *solely* on the evaluation criteria specified in the notices and tender documentation, has submitted" (emphasis added)); GATT 1994, Art. III:4 ("The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based *exclusively* on the economic operation of the means of transport and not on the nationality of the product" (emphasis added)).

[105] Emphasis added.

8.2.6. Section 15(a)(ii) states that an importing Member may use a methodology not based on a strict comparison with domestic prices or costs *if the producers cannot clearly show* that market economy conditions prevail in that industry.

8.2.7. This "rule" established that an importing Member *need not make any findings* on market economy conditions in an industry to reject domestic market prices or costs, other than the finding that the producers had failed to clearly show that market economy conditions prevail in that industry.

8.2.7.1. This is contrary to the normal situation in which an investigating authority must base its findings on positive evidence.

8.2.8. Section 15(a)(i) and 15(a)(ii) therefore attach a consequence to any evidence brought forward by the industry under investigation.

8.2.9. These provisions do not cover all situations and do not need to as Article VI:1 of GATT 1994 and the Anti-Dumping Agreement also govern the determination of price comparability.

8.2.9.1. For example, they do not address a situation in which there are no home market sales. Such a situation is dealt with in Article VI:1 and Article 2.2.

8.2.9.2. As another example, they do not address a situation in which all prices or costs are from transactions between related parties. In this case, the importing Member might find those prices or costs not to be comparable or to permit a proper comparison.[106]

8.2.9.3. This also illustrates that determining price comparability is a matter that can be examined at different levels (transaction, firm, industry, sector, economy, etc.).

8.3. Section 15(d) sets out three provisions that affect the operation of the "rules" set out in Section 15(a)(i) and 15(a)(ii) and confirm that "market economy conditions" are highly relevant in determining price comparability.

8.3.1. In the **first sentence**, if China establishes under a Member's national law that it is a market economy "the provisions of subparagraph (a) shall be terminated".

8.3.2. This means the "rules" of Section 15(a)(i) *and* 15(a)(ii), within the framework of Section 15(a), no longer apply. It does not mean that, once China is a market economy under a Member's national law, that importing Member need not determine price comparability under Article VI:1 of the GATT 1994 and the Anti-Dumping Agreement for purposes of making a dumping comparison.

8.3.3. In the **second sentence**, "in any event, the provisions of *subparagraph (a)(ii)* shall expire 15 years after the date of accession." "In any event" signifies that as

[106] *See EU Biodiesel (AB)*, para. 6.41.

of that 15-year mark, China may not have become a "market economy", the situation contemplated in the first sentence.

8.3.3.1. The second sentence of Section 15(d) provides for the expiry of Section 15(a)(ii) and *not* Section 15(a) as a whole, in contrast to language in the first or third sentences. This should be considered significant.

8.3.4. It is only "the provisions of subparagraph (a)(ii)" that expire. This is different than the first sentence ("provisions of subparagraph (a)"). This difference means that subparagraph (a) and (a)(i) do not expire.

8.3.4.1. The time-limited nature of this Protocol antidumping text appears unique as compared to prior GATT and WTO protocols pertaining to other state-controlled and non-market economies.

8.3.4.2. The expiry of subparagraph (a)(ii) is notable compared to Section 16, para. 9: "Application *of this Section* shall be terminated 12 years after the date of accession."

8.3.5. Expiry of subparagraph (a)(ii) means that the "rule" set out in that provision does not apply beyond 15 years.

8.3.6. In the **third sentence**, if China establishes that market economy conditions prevail in an industry or sector, "the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector". The sentence begins with "[i]n addition" – so this is yet another situation affecting the application of the "rules".

8.3.6.1. The introductory phrase establishes that the subject matter of this sentence is "in addition" to the subject matter of the first and second sentence. This suggests the third sentence remains applicable after the expiry of subparagraph (a)(ii).

8.3.7. Under this sentence, it is the non-market economy provisions of subparagraph (a) that no longer apply. This suggests that subparagraph (a)(ii) is not the only non-market economy provision of subparagraph (a). Another such provision is subparagraph (a) with its reference to "a methodology that is not based on a strict comparison with domestic prices or costs".

8.3.8. This third sentence gives *to China* the right to seek to demonstrate to an importing Member pursuant to its national law that market economy conditions prevail in an industry or sector.

8.3.8.1. This right of China is significant because it could relieve a producer under investigation of the need to demonstrate that market economy conditions prevail in the industry.

8.3.9. If China were successful, the industry or sector would not be subject to the non-market economy provisions of subparagraph (a). This too is expected: because

market economy conditions prevail in that industry or sector, comparable prices normally should exist for purposes of making the dumping comparison.

8.4. Nothing in Section 15(d) implies that at any point in time the basic requirement to ensure comparability, which flows from Articles VI:1 and VI:2 of the GATT 1994, as implemented particularly in Article 2 of the Anti-Dumping Agreement, no longer applies.

8.4.1. Following 15 years from accession, an importing Member must take account of whether market conditions prevail in China or an industry or sector in order to determine price comparability under one of the two alternatives in subparagraph (a).

8.4.2. Section 15(d), second sentence, only causes the "rule" in Section 15(a)(ii) – a Member may reject domestic prices or costs in China if the producers cannot clearly show market economy conditions prevail – to expire.

8.4.3. Under the GATT 1994 and the Anti-Dumping Agreement, an importing Member must determine whether comparable prices exist in order to use one of the two alternatives in subparagraph (a) – Chinese prices or costs or a methodology not based on a strict comparison with domestic prices or costs in China.

8.4.4. As Section 15(a)(i) and the first and third sentences of Section 15(d) make clear, if market economy conditions prevail in China *or* in an industry or sector, then comparable prices or costs could exist because those prices or costs are market-determined.

8.4.5. If market economy conditions do not prevail in China or in the industry or sector under investigation, then "comparable" prices or costs may not exist for purposes of the dumping comparison. This applies to domestic market prices, third-country export prices, and costs of production (which are themselves prices between input suppliers and the producer under investigation).

8.4.5.1. In that situation, an importing Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China.

8.5. Nothing in Section 15(d) suggests a lapse in the basic requirement to ensure comparability, which flows from Article VI:1 of the GATT 1994, as implemented particularly in Article 2 of the Anti-Dumping Agreement.

8.5.1. What changed on 11 December 2016, was that the China-specific rule on standard of evidence expired.

8.5.2. Under the Anti-Dumping Agreement, an investigating authority makes determinations that are grounded in a sufficient evidentiary basis.

8.5.2.1. The Anti-Dumping Agreement makes one express reference to the term "burden of proof", which is contained in the final sentence of Article 2.4 of the Anti-Dumping Agreement.

8.5.2.2. That provides that the authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

8.5.2.3. This refers to any interested party that has an interest in demonstrating the need for, or the lack of justification for, an allowance or adjustment to ensure comparability.

8.5.3. Ultimately, the Anti-Dumping Agreement does not contain an express rule regarding the burden of proof.

8.5.3.1. Without more, Members must ensure that any burden of proof rules they provide for or use, insofar as these are not otherwise provided for in Article VI of the GATT 1994 or in the Anti-Dumping Agreement, are not unreasonable in the context of Article 2.4.

8.5.4. On 11 December 2016, the China-specific rule on standard of evidence expired.

8.5.4.1. This means that an investigating authority will have to consider evidence on comparability, including the existence of market economy conditions, in accordance with the standard of evidence rules in the Anti-Dumping Agreement.

8.5.4.2. The analysis can still result in the rejection of costs and prices; and it can still be done at the level of the industry, sector, or economy as a whole.

8.5.5. The 'old' Section 15 was significant because it introduced a particular standard of evidence such that if China or the Chinese producers under investigation did not clearly show that market economy conditions prevailed in the industry or sector producing the like product, the importing WTO Member could use a methodology that was not based on a strict comparison with domestic prices or costs in China. In all the circumstances of China's WTO Accession and economic transition, this was a reasonable proposition that China agreed to.

8.5.5.1. Old Section 15 clarified that, where data is unreliable, the investigating authority can reject not only prices, but also costs.

8.5.5.2. Old Section 15 also clarified that the determination can be made at the level of the industry, sector, or economy as a whole (as opposed to a firm-by-firm or cost-by-cost basis).

8.5.6. The 'new' Section 15 continues to contain the same basic elements (apply consistent with, in determining price comparability, domestic prices or costs in China, for the industry under investigation, market economy conditions, a methodology not based on a strict comparison).

8.5.6.1. These rules do not expressly place the burden of proof on one subset of interested parties or another.

8.5.6.2. Following 11 December 2016, the investigating authority must have an adequate evidentiary basis for its determinations, including any determination to reject Chinese prices and costs, or to accept them, and must not impose an unreasonable burden of proof on any sub-set of interested parties.

8.6. Section 15 is not an exception to the GATT 1994 or the Anti-Dumping Agreement but confirms that in determining price comparability under those agreements, an importing Member may in certain circumstances reject an industry's prices or costs. It likewise would be incorrect to characterize Section 15 as in the nature of an affirmative defense, which the responding Party must bring forward. Rather, Section 15 clarifies the obligations by which all Members have agreed to be bound. That is, Section 15 provides that Article VI:1 of the GATT 1994 and the Anti-Dumping Agreement continue to apply consistent with the terms of Section 15.

8.6.1. The introductory paragraph to Section 15 states that the GATT 1994 and the Anti-Dumping Agreement "shall apply . . . consistent with the following", referring to the remainder of Section 15. As noted, this text confirms first that these other agreements do "apply" in determining price comparability for a Chinese industry under investigation.

8.6.2. The text reads "consistent with", which is defined as "compatible or in agreement with something."[107] For the named agreements to apply "consistent with" Section 15, they should be read as compatible or in agreement with each other.

8.6.3. Use of the phrase "consistent with" suggests Section 15 is not to be viewed as an exception or in contradiction to the named agreements. The text is not "subject to", "provided that", "in the event of conflict", or other similar wording.

8.6.3.1. For example, numerous WTO Agreement provisions use the phrase "subject to" to express a limiting condition or exception.[108]

8.6.3.2. Other provisions use the term "provided that".[109]

8.6.3.3. The WTO Agreement establishes that, in the event of conflict with a provision of an annexed Multilateral Trade Agreement, the provision

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[107] *Oxford Dictionary of English*, A. Stevenson (Oxford University Press, 2010, 3rd ed.), p. 372.

[108] *See, e.g.*, Article IV:5 (procedures subject to approval); Article IV:6 (procedures subject to approval); Article VII:1 (budget subject to approval); GATT 1994 Article II:1(b), (c) (commitments subject to terms, conditions or qualifications); Article XII:1 (BOP restrictions subject to Article); Article XVIII (BOP restrictions subject to Article); Article XX (general exceptions subject to chapeau); Article XXVIII:4 (authorization to negotiate subject to procedures and conditions); Agriculture Agreement Article 21.1 (GATT 1994 and Multilateral Trade Agreements subject to Agriculture Agreement).

[109] *See, e.g.*, Article IX:3 (waiver authority provided that three fourths of Members agree); GATT 1994 Article II:6(a) (adjustment of tariff concessions provided Members concur); Article III:6 (grandfathering internal quantitative regulations provided that no modifications made to detriment of imports); Article IV(c) (minimum proportion of film screen time provided that proportion does not increase); Article VI:6(c) (permitting special countervailing duty provided that Members immediately informed and may disapprove).

of the WTO Agreement "shall prevail to the extent of the conflict."[110]

8.6.4. Section 15(a) deals with "determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement" using either of two alternative bases for determining normal value, and the agreements apply consistent with Section 15. Therefore, the approach for selecting a basis for determining normal value under Section 15 is compatible or in agreement with the GATT 1994 and Anti-Dumping Agreement.

8.6.5. The provisions of Section 15(a)(i) and Section 15(a)(ii) explain the approach for selecting a basis for determining normal value in two specific circumstances. Both circumstances relate to whether market economy conditions prevail in the industry under investigation – that is, whether Chinese industry conditions could yield comparable prices or costs.

8.6.5.1. One of those circumstances – rejecting Chinese prices and costs without any additional affirmative finding when the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product – is time-limited. The other is not.

8.7. We are aware that the Appellate Body has stated that "the provisions of paragraph 15(a) expire 15 years after the date of China's accession (that is, 11 December 2016)."[111] However, the Appellate Body report does not interpret the legal text of Section 15(d), as explained above – in particular, the reference to expiry of "the provisions of subparagraph (a)(ii)" in the second sentence – to support that statement. Nor does the report consider the different text referring to "the provisions of subparagraph (a)" in the first sentence nor the text referring to the "non-market economy provisions of subparagraph (a)" in the third sentence.[112] In fairness, the interpretation of Section 15, and subparagraph (d) in particular, was not at issue in the appeal before the Appellate Body.[113] Therefore, those statements do not reflect a considered interpretive effort on this point.

8.8. Section 15(a) – which is compatible and in agreement with the GATT 1994 and Anti-Dumping Agreement – can be understood as a confirmation that the determination under those agreements of price comparability relates to whether there are comparable, market-determined prices.

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[110] GATT 1994, Article XVI:3.

[111] *EC – Fasteners (AB)*, para. 289 ("Paragraph 15(d) of China's Accession Protocol establishes that the provisions of paragraph 15(a) expire 15 years after the date of China's accession (that is, 11 December 2016). . . . . . Paragraph 15(d) in turn establishes that these special rules will expire in 2016 and sets out certain conditions that may lead to the early termination of these special rules before 2016.").

[112] *EC – Fasteners (AB)*, para. 289 (second and third sentences).

[113] *See EC – Fasteners (AB)*, para. 291 ("Finally, we note that China's claim before the Panel concerned the determination of individual and country-wide dumping margins and duties, not the possibility of resorting to alternative methodologies in the calculation of normal value in anti-dumping investigations involving China.").

9. Conclusion

9.1. In sum, the expiry of one provision of China's Accession Protocol, Section 15(a)(ii), does not mean that WTO Members no longer have the ability to reject and replace non-market prices or costs for purposes of antidumping comparisons. Rather, the legal authority to reject prices or costs not determined under market economy conditions flows from GATT 1994 Articles VI:1 and VI:2 and the need to ensure comparability of prices and costs when establishing normal value.

9.2. That this authority exists in Articles VI:1 and VI:2 is reflected in legal text and consistent practice spanning decades:

9.2.1. the proposal to amend Article VI:1 and eventual adoption of the Second Note *Ad* Article VI:1 (1954-55), confirming the legal authority existed in Articles VI:1 and VI:2;

9.2.2. the Secretariat review of Contracting Parties' application of Articles VI:1 and VI:2, demonstrating a subsequent, common practice rejecting non-market prices or costs in determining normal value (1957);

9.2.3. the Accessions to the GATT of three non-market economies – Poland (1967), Romania (1971), and Hungary (1973) – in which the CONTRACTING PARTIES affirmed their existing ability to reject non-market prices or costs in situations other than "the case" described in the Second Note;

9.2.4. Article 2 of the Anti-Dumping Agreement (1995), bringing forward the key concepts from Article VI:1 and reinforcing (through terms such as "proper comparison") that market-determined prices or costs are necessary for antidumping comparisons; and

9.2.5. Section 15 (2001), which clarifies that domestic prices or costs will be used when "market economy conditions prevail" for the industry under investigation, but domestic prices or costs may be rejected when market economy conditions do not prevail.

9.3. The evidence is overwhelming that WTO Members have not surrendered their longstanding rights in the GATT and WTO to reject prices or costs that are not determined under market economy conditions in determining price comparability for purposes of antidumping comparisons.