

CHAPTER 06

NORMAL VALUES FOR A NON-MARKET ECONOMY

The determination of the normal value can become quite complicated, as explained in the previous chapter. When countries that were signatories to GATT traded with state-controlled or centrally-planned economies (CPEs) and anti-dumping actions were brought against exporters in CPEs, the determination of the normal value became an even bigger problem because prices in CPEs were not determined by market forces. A normal value was determined for a CPE exporter by using prices of the like product in a third market-economy country. This method to determine normal values, the analogue method, continued to be used when CPEs began to incorporate some market principles in their economies. This chapter provides some background to the analogue method and explains how the analogue method was applied in anti-dumping cases against CPEs, and later against these same countries, which were reclassified as non-market economies (NMEs). The analogue method has been criticised for a number of reasons and the problems associated with the use of this method will be discussed in this chapter.

6.1 AN HISTORICAL BACKGROUND TO THE ANALOGUE METHOD

The state regulated the economy in CPEs. The ideal was to become self-sufficient, so planned economies did not specialise in areas of manufacture where they had a comparative advantage. Instead, the goal was to manufacture everything the population needed and to import as little as possible. Trade between the previously planned communist/socialist countries and other countries was channelled through a Ministry and not handled by individual enterprises. State-owned and state-controlled monopolies were entrusted with production for international trade. Goods were exported in order to pay for necessary imports, but volumes of trade were limited where possible, to limit the influence of market forces (Gregory & Stuart 1995:291-292,378; Hirsch 1988:466; McKenzie 1990:136; Wang

1999:121). Certain areas of production were heavily subsidised or favoured. The energy, transport and communication sectors in particular, were highly concentrated and heavily subsidised in CPEs before and usually also during the subsequent transition to market economies, because these sectors were vital to economic development (Ordovery *et al* 1994:317). This type of subsidisation kept prices in the key infrastructure sectors artificially low and contributed to price and cost data in general being unreliable (Horlick 1990:142). The fact that the currencies of these planned economies were inconvertible made prices even more suspect, even though attempts were made to calculate “shadow” exchange rates (Gregory & Stuart 1995:378; Horlick & Schuman 1984:819; Wang 1999:121).

The prices of products under central planning did not reflect the true cost of production as understood in market economies, so selling prices of products in the home market of a CPE could not be used to determine the normal value for those products in anti-dumping investigations. The unreliable cost information also made it impossible to use the constructed-value method to determine normal values (Hirsch 1988:471). Likewise, the export price to a third country was as suspect as all the other prices and could also not be used to determine normal values.

The original General Agreement on Tariffs and Trade (GATT) of 1947 and subsequent Multilateral Trade Agreements provided guidelines and procedures for anti-dumping actions, but the guidelines were really applicable only to those countries that were signatories to the Agreements and which had market economies (Laird 1998:paragraph 2; McKenzie 1990:135). Trade with centrally-planned economies was not dealt with by the GATT, except in a note to Article VI of GATT 1947¹, which indicated that such economies could not be dealt with in the same way as market economies (GATT Secretariat 1994:545-546). The Notes and Supplementary Provisions to Article VI of GATT, Ad Article VI, paragraph 1, note 2 states:

It is recognised 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

1 Notes and supplementary provisions, Ad Article VI Paragraph 1, Note 2.

possibility that a strict comparison with domestic prices in such a country may not always be appropriate (Bierwagen 1990:220; GATT Secretariat 1994:545-546).²

This note allowed the investigative authorities in the importing country to use any method to determine a normal value under such circumstances.

A practical solution was to use prices for the like product in a third market-economy country³ as the normal value for a product under investigation. This method became known as the analogue or surrogate⁴ method. However, volumes of trade between CPEs and market economy countries were initially limited, where possible, by the governments of the CPEs, to prevent the influence of market force forces. The analogue method was therefore not used very often.

When the previously centrally-planned countries began to incorporate some market principles, these countries were reclassified as non-market economies (NMEs). Although these countries were no longer completely centrally planned, they were also not market economies. Prices in these countries were still largely state-controlled and so there was little doubt as to which countries were NMEs and which were not NMEs. NMEs were treated in the same way in which CPEs were treated in respect of anti-dumping actions.

Provision was made in the Australian Anti-dumping Act (1975), the Council Regulations in the EC, the Federal regulations in the USA and the Canadian Special Import Measures Act (SIMA) during the mid- to late 1970s and early 1980s⁵ to use the cost structure of an industry in an analogue or surrogate country which produced a “like product”, to determine a comparable “normal value” for goods

2 Paragraph 1 of Article VI of GATT stipulates that dumping is to be determined by the comparison between the normal value and the export price. For the exact wording of paragraph 1 see Article VI of GATT in the appendix to chapter 03.

3 Other terms used for such a third market-economy country are the reference country, the analogue country or surrogate country.

4 This method was known as the analogue method in the EC and the surrogate method in Australia, the USA and Canada. The term analogue, will be the preferred term in this thesis - although the term surrogate will sometimes be used if it is applicable in a certain context.

5 These were the four main users of anti-dumping actions until the Uruguay Round (Kempton & Stevenson 1999:2). Also see table 2.2 of this thesis.

exported by non-market economies (NMEs). The chosen analogue or surrogate economy would be a market economy where conditions would be similar to conditions in the exporting country (Chen 1987:724-727; Hirsch 1988:471; Horlick & Schuman 1984:816).

In other words, the cost structure in a third country which was a market economy, and which was as similar as possible to the exporting country, was to be used to determine the normal value against which the export price could be compared. If a suitable analogue country could not be found, the investigative authorities were allowed to determine normal value “on any other reasonable basis” (Corr 1997:81; Ehrenhaft 1990:305; Farr 1998:11; Horlick & Oliver 1989:14-18; Horlick & Shuman 1984:808,819; Messerlin 1991:47; Olechowski 1993:173; Ryan 1996:113-114; Wang 1999:122). The prices of the like product in the analogue country were taken to be the normal value, or in some cases were used to construct a normal value. The export price was then compared to this normal value based on the analogue country’s cost structure, to decide whether or not the exporter (a NME) was dumping. This method was known as the analogue method in the EC and the surrogate method in Australia, the US and Canada (Bellis 1990:76; Horlick 1990:140; Magnus 1990:200; Steele 1990:257).

The applicant would usually suggest which third country could be used as the analogue or surrogate country. The defendant could object, if they could provide a suitable alternative (Wang 1999:124-125). In practice, especially in the early days of anti-dumping actions against CPEs, the defendants often did not respond to the actions and in many cases even if they did, their legal arguments were poor and unprepared, and they often did not have the necessary information to supply the authorities with an alternative analogue country (Olechowski 1993:173-174). What happened in many cases was that the CPEs, and later the NMEs, agreed to a price undertaking, rather than enter into a legal battle with competing industries in the importing country (Horlick & Schuman 1984:815). Finger (1993:46) and Olechowski (1993:174) suggest that managers in the NMEs (and the former centrally-planned economies) chose the route of a price undertaking because a legal battle with trading partners would reflect badly on their management abilities. It has also been alleged that the trading partners of NMEs soon realised that their competitors in NMEs preferred a settlement to a legal action, and used this knowledge to their own advantage (Olechowski 1993:174).

The problems experienced with the analogue method encouraged the search for alternative and fairer

methods to determine normal values for NMEs. A combination of the surrogate and the constructed-value method has been used by the US. Input quantities of the product under investigation (ie the exporter's input quantities) can be used, and these quantities can then be valued at prices prevailing in a reasonably comparable market-economy country, the surrogate (Horlick & Oliver 1989:14-17; Horlick & Shuman 1984:811-812, 825; Kaplan *et al* 1988:410-414; Messerlin 1991:47; Meuser 1979:784; Vermulst 1987:490; Verrill 1988:432; Wang 1999:120). This combination of the constructed-value and surrogate methods became known as the "factors of production" method and according to the US 1988 Omnibus Trade Act, it was the preferred method in the US (Kaplan *et al* 1988:411-413). An advantage of using the input quantities from the country of export is that certain technical advantages, like economies of scale, could be reflected in the resultant normal value. In other words, there is some chance of reflecting any possible comparative advantage (Vermulst 1987:786).

During the 1970s and 1980s, the inefficiencies of the socialist system resulted in the economic decline of the various socialist economies.⁶ Socialism collapsed in Eastern Europe during the late 1980s and in the Soviet Union (USSR) at the end of 1991. The transition to a market economy began in earnest for these countries and it was important for them to attract foreign direct investment and to increase exports and imports. Trade between the former planned economies and other countries grew as the countries in transition⁷ incorporated more and more market principles into their economies. Allegations of dumping against the economies in transition increased along with the increase in trade. Prices in the countries "in transition" could still be distorted by subsidies, controls or import restrictions, and because prices in these countries were still regarded as being unreliable, an analogue or surrogate country's prices were usually used as the normal value or to calculate the normal value in anti-dumping actions against countries classified as NMEs (Ehrenhaft 1990:302; Meuser 1979:797-798; Vermulst 1987:488-489).

6 The Socialist countries were the Union of Soviet Socialist Republics (USSR), Bulgaria, Czechoslovakia, the German Democratic Republic (the previous East Germany), Hungary, Poland, Romania, the People's Republic of China (PRC), North Korea, Vietnam, Mongolia and Cuba (Bellis 1990:76).

7 When these countries were fundamentally changing their economies from a plan to a market system, this was called transition. The term reform was more applicable to the situation when the governments made changes to the economies but they still remained planned economies (Gregory & Stuart 1995:358).

The definition of a NME changed as the previously state-controlled countries became more and more market oriented. According to US anti-dumping legislation, NMEs are those countries that do “not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise” (Verrill 1988:432; Wang 1999:120). In some countries’ legislation, for example Colombia, Ecuador, Mexico, Peru and Uruguay, brief mention is made of centrally-planned economies or “countries where there are distortions in the economy that do not permit them to be considered market economy countries” or countries in which “domestic prices are mainly set by the State” (Compendium of antidumping and countervailing duty laws 1999:section III.E). In South Africa the analogue method would be used if “in an investigation of dumping ... the Board is of the opinion that the normal value of the goods concerned is, as a result of government intervention, not determined in the exporting country or country of origin according to free market principles” (Board on Tariffs and Trade RSA 1986, section 2).

There is no definition of a NME in the Basic Regulation of the EC. The regulation only refers to a list of countries that are considered to be NMEs. Countries currently listed as NMEs are Albania, Armenia, Azerbaijan, Belarus, Georgia, North Korea, Krygyzstan, Moldova, Mongolia, Tajikistan, Turkmenistan and Uzbekistan. The People’s Republic of China (PRC), the Ukraine, Vietnam and Kazakhstan are listed as NME countries which are members of the WTO (CONSLEG system 2003:8). The list also used to include Estonia, Kazakhstan, Lithuania and Russia - the latter was officially recognised as a market economy country in November 2002 (Council Regulation (EC) No 2238/2000) and was therefore taken off the list.⁸ However, the list is not exhaustive, and a country like Cuba, which is not on the list, probably would be classified as a non-market economy in an anti-dumping case (Farr 1998:11, 63-65; Stanbrook & Bentley 1996:46). Other countries that were treated as NME countries in the past included Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Latvia, Romania and the (previous) USSR (Vermulst 1987:354; Vermulst & Graafsma 1992:15).

8 “Article 2(7) of Regulation (EC) No 384/96 provides that non-market economy countries *include* those to which Regulation (EC) No 519/94 applies ...” (Stanbrook & Bentley 1996:46).

6.2 CRITICISMS OF THE ANALOGUE METHOD

6.2.1 *The choice of the analogue country*

One of the main objections to the use of the analogue method is that the country chosen as the analogue could be inappropriate - developed countries like Sweden, the US, West Germany and the UK were often chosen as the analogue country for countries like Poland, Romania, the USSR, Czechoslovakia and China. And it was alledged that, as a result, it would be more likely to find that dumping occurred. However, the cost of production in developed countries is not always higher than in developing countries even though wages may be higher in the former. Nevertheless, normal values based on the cost structure of such developed counties could be unreasonably high and then any anti-dumping duties imposed would be inflated (Chen 1987:729; Fu 1997:79; Hirsch 1988:472-473; Krishna 1997:21; Messerlin 1991:53; Vermulst & Graafsma 1992:41; Wang 1999:131).

For example, in a 1992 case in which a specific range of textiles manufactured in China were being imported into South Africa, the textile industry of South Africa brought a successful application against the Chinese exporter. While the facts of the application were quite complex, the relevant point is that the country chosen as the analogue country was the United States of America. Many countries manufacture and export textiles. Although the choice of the US as analogue was within the existing South African regulation, the cost of a square metre of the same type of woven fabric manufactured in the US was not only substantially higher than the cost of a square metre of the same textile in China, it was also higher than the cost of a square metre of the same type of woven fabric manufactured in South Africa (Board of Tariffs and Trade RSA 1992:6-7). The choice of the US as the third country seems unfair in this specific case. One could, of course, argue that the Chinese exporter had the opportunity to object to the US being used as the analogue country, which did not happen in this particular case. Had the exporter objected, the authorities might have decided to use another analogue, which might have been more favourable to the Chinese case. The exporter could even have had the anti-dumping duty annulled after it was imposed, if it could prove that the choice of the third country

was inappropriate (Fu 1997:79).

It has been alleged that in some cases a market economy which has the highest possible cost structure is chosen as analogue or surrogate country (Olechowski 1993:173). If this allegation is true, then countries with a comparative advantage in certain goods might be classified as dumpers. Such abuse goes against the grain of the free and fair trade principles of the World Trade Organisation (WTO) and the intent of the URAA (and earlier GATT agreements) and could “penalise low-cost, efficient developing country exporters” (Kufuor 1998:188).

Certain criteria are usually considered when deciding on an analogue. For example, administrative convenience, availability of information, whether or not the like product is produced in the analogue, whether or not prices are reliable, whether or not producers in the analogue country were subject to effective competition, and whether or not the level of economic development in the analogue is similar to that in the country of export. Because the choice of analogue could be a critical factor in anti-dumping cases against NMEs, other criteria, like similarity of manufacturing processes, economies of scale or the geographic proximity of the analogue to the country of export, could also be considered (Chen 1987:729-730; Feaver & Wilson 1995:228; Hirsch 1988:471; Horlick & Schuman 1984:816; Stanbrook & Bentley 1996:48-49; Vermulst & Graafsma 1992:17-18).

The choice of an analogue is not always easy. The government of the third country first has to give permission to the investigative authorities in the country bringing the anti-dumping application before this third country can be used as the analogue. The industry or enterprises then have to be approached to find out if they are willing to provide the necessary information (Horlick & Shuman 1984:821; Vermulst 1987:490). Many enterprises are unwilling to be involved in such anti-dumping cases as involvement not only entails work, but also could mean providing information that competitors may use to their own advantage. So the choice of analogue is often dependent on which country and which industry or enterprise is willing to co-operate with the investigative authorities. In some instances the authorities may have to resort to using information provided in previous anti-dumping cases, as new information may just not be available. In other words, the choice of a particular analogue may not be because of bias against the exporter but rather because the relevant data are the easiest or only information available

(Chen 1987:729-731; Horlick & Shuman 1984:819-22). The problems involved in choosing an analogue and then obtaining the necessary information from the analogue, contribute considerably to the time-consuming and expensive nature of the analogue method (Chen 1987:737; Ryan 1996:113).

6.2.2 *Uncertainty*

The use of the analogue method also creates uncertainty for NME exporters and for importers of products from NME countries. Exporters (and importers) have no way of predicting which country could be used as analogue if an anti-dumping action were brought against the exporter, which means there is no way of knowing what value will be used to determine the normal value in a possible anti-dumping case (Chen 1987:736; Horlick & Shuman 1984:824-825; Vermulst 1987:491; Wang 1999:132). Many NMEs are trying to increase their exports to improve economic development and growth. The use of the analogue method in anti-dumping actions against NME exporters could make it difficult for such exporters to plan their production and to decide which markets to enter.

6.2.3 *Increasing the likelihood of affirmative anti-dumping decisions*

Not all initiated anti-dumping actions result in a definitive measure or duty being imposed on the product. However, the use of the analogue method to determine the normal value in an anti-dumping action tends to increase the likelihood of a positive dumping determination and the imposition of an anti-dumping duty. In a study by Miranda *et al* (1998:50-51), the results of which are replicated in table 6.1, “the proportion of investigations resulting in the imposition of definitive measures relative to all completed investigations, are often highest for countries in transition”, in other words for NMEs. According to the study, a significant number of countries with the highest proportion of affirmative outcomes imposed against them during the period under study, were economies “in transition”, for example Russia (86%), China (75%), Ukraine (74%) and Romania (63%). It would seem that once

these countries have an anti-dumping action brought against them, the chances of a definitive measure being imposed is very high, or the chance of them escaping a definitive measure is very small. Market economy countries with a reasonably high proportion of affirmative outcomes were Venezuela (81%), Japan (63%), Brazil (62%) and Mexico (60%) (Miranda *et al* 1998:50-52). Most of these market-economy countries with a high proportion of affirmative outcomes were developing countries, another group of countries which seem to be frequently the target of anti-dumping actions.

Table 6.1 Proportion of affirmative outcomes by affected country*, 1987-1997

| Affected country | Number of completed investigations imposing definitive measures (A) | Number of completed investigations (B) | Proportion of affirmative outcomes (C) = (A/B) x 100 % |
|------------------|---|--|--|
| Russia | 31 | 36 | 86 |
| Venezuela | 17 | 21 | 81 |
| China | 158 | 212 | 75 |
| Ukraine | 17 | 23 | 74 |
| Romania | 19 | 30 | 63 |
| Japan | 83 | 132 | 63 |
| Brazil | 65 | 105 | 62 |
| Mexico | 21 | 35 | 60 |
| Thailand | 31 | 54 | 57 |
| Malaysia | 18 | 33 | 55 |
| Poland | 18 | 33 | 55 |
| Kazakstan | 6 | 11 | 55 |
| India | 26 | 48 | 54 |
| United States | 93 | 175 | 53 |
| Yugoslavia | 10 | 19 | 53 |
| Korea | 63 | 123 | 51 |
| Hungary | 8 | 16 | 50 |

| | | | |
|-----------------|----|----|----|
| Italy | 20 | 43 | 47 |
| Chinese Taipei | 41 | 89 | 46 |
| Czech Republic | 8 | 18 | 44 |
| South Africa | 11 | 25 | 44 |
| Sweden | 8 | 19 | 42 |
| Czechoslovakia | 5 | 12 | 42 |
| Singapore | 12 | 29 | 41 |
| Canada | 14 | 34 | 41 |
| Indonesia | 14 | 34 | 41 |
| Germany | 35 | 86 | 41 |
| United Kingdom | 21 | 53 | 40 |
| France | 19 | 49 | 39 |
| Hong Kong | 12 | 31 | 39 |
| Spain | 12 | 31 | 39 |
| Belgium | 12 | 32 | 38 |
| Netherlands | 11 | 30 | 37 |
| Turkey | 8 | 23 | 35 |
| Israel | 4 | 12 | 33 |
| Argentina | 7 | 22 | 32 |
| Austria | 2 | 14 | 14 |
| Slovak Republic | 1 | 11 | 9 |

Note: * Some countries had very few investigations against them which skewed the proportion of affirmative outcomes. Countries with fewer than 10 completed investigation against them during the period 1987-1997 have been left out of this adapted table.

Source: Adapted from Miranda *et al* 1998:51, table 25.

6.2.4 The dumping margin

The use of the analogue method also has a direct bearing on the value of the dumping margin. The dumping margin is the normal value minus the export price and, according to the URAA, the comparison between these two price is supposed to be fair. The dumping margin itself in turn affects the size of any anti-dumping duty that could be imposed on the exported product, because the dumping margin limits the size of the anti-dumping duty⁹ (GATT Secretariat 1994:184). Here the vagueness surrounding the term “fair” can again lead to a bias in favour of the domestic industries in importing countries, especially in cases where the normal value of the exporter is represented by a price obtained from a third country (Krishna 1997:21).

Some domestic industries are very well prepared for anti-dumping cases and can provide a very good case for the choice of an analogue that would be to their own advantage in the anti-dumping action. Lawyers in a country like the US have had years of experience with anti-dumping legislation and cases and tend to have an advantage over exporters and their legal representatives in countries that have recently introduced anti-dumping legislation.

Chen (1987:728-733) describes two anti-dumping cases against China by Canada during the 1980s. In both cases the original analogue was a developed country, Japan in the one case and the UK in the other. After objections were raised against the use of the developed countries, two developing countries, India and Sri Lanka, were chosen as analogues in place of the developed countries. The revised normal values were lower than those based on the developed analogues, thus affecting the anti-dumping duty ultimately imposed on the products concerned. In the one case, Hydraulic turbines from Japan and the PRC¹⁰, the preliminary anti-dumping duty for China based on Japanese data was calculated as 61 per cent, and the final anti-dumping duty based on data from India was 34 per cent (Canada v Japan & PRC 1984). However, as mentioned in section 6.2.1, the choice of analogue is not always easy and is often made according to which information is available.

9 Anti-dumping Agreement, PART I, Article 9, paragraph 9.1.

10 Hydraulic turbines from Japan and the PRC, 120 Can. Gaz. Pt.1, at 5065 (1984) (preliminary determination). The final determination was made in 1986.

6.2.5 *Comparative advantage impossible for NMEs*

Another objection to the use of the analogue method is that it does not capture any possible comparative advantage of an exporter situated in a NME (Wang 1999:133-134). In fact, the analogue method effectively precludes a NME producer from ever being more efficient than its market-economy competitors because “It is structurally impossible for the NME to have a comparative advantage greater than that of the surrogate” (Vermulst 1987:491). The combination of the analogue and constructed-value method is an attempt to include technical differences in the normal value, but the only way in which a country’s comparative advantage can be fully reflected in the normal value is by using that country’s prices and cost structure to determine normal values.

6.2.6 *The investigative authorities could be biased*

Of course, as explained in chapter 4, the domestic industry in the importing country will not necessarily be granted the protection of an anti-dumping duty simply because the export price of a good is found to be lower than the relevant normal value. The applicant must also prove that the importation of the specific products causes material injury or a threat of material injury to the domestic industry, or materially retards the establishment of a domestic industry (Krishna 1997:22-23). In addition, according to the URAA, there must be a causal relationship between the material injury suffered or to be suffered and the products that are being dumped (GATT Secretariat 1994:173; Vermulst 1997:15). There may be factors external to the alleged dumping that could have the same impact on the local industry as would dumping, but which may have nothing to do with the products that are allegedly being dumped (Corr 1997:85; Krishna 1997:24). These external factors are not supposed to contribute to the determination of material injury by dumped products, but it is of course not always easy to prove or to disprove causality.

The investigative authorities are supposed (under any circumstances) to investigate all possible

influences on an anti-dumping case. Even if there is no opposition to the anti-dumping application, which often happened in cases against CPEs or NMEs, the relevant authorities are still supposed to acquire all relevant information to ensure that a fair decision is made. Of course, sometimes it is not easy to get information, and so provision is made in such cases for the investigative authorities to use the “best information available”¹¹ (GATT Secretariat 1994:195-196; Krishna 1997:31-33).

In some instances it has been alleged that the investigative authorities did not seem to try very hard to acquire the “best information available” that could have impacted on certain anti-dumping cases. Such allegations need to be investigated further. It has also been alleged in the literature that the investigative authorities in the importing countries that decide on whether or not exporters are dumping, tend to favour the applicant, that is, the domestic producer in the importing country (Messerlin 1991:51-53; Michalopoulos 1999:20-21). In other words, anti-dumping actions against NMEs seem to have a strong protectionist bias.

In cases where enterprises or industries in the importing country oppose the anti-dumping application, the chances of bias against the exporter would be reduced. But in some cases, there is no formal opposition to the application, not even from the exporter. The investigative authorities are then relied on to make decisions based on the best information available, which could give the incorrect impression that the investigative authorities are biased in favour of the applicant. It is also important to note that the investigative authorities are bound by the anti-dumping legislation of their respective countries, not by the URAA. So it is not always fair to accuse the investigative authorities of bias or protectionism, because they may merely be applying the law.

6.2.7 *The harassment effect*

11 ANNEX II to the URAA.

Once initiated, anti-dumping actions may be terminated. Termination could mean that the exporter is not dumping or that there is no material injury, but whatever the reason for termination, it means that an anti-dumping duty is not imposed nor is there any price undertaking. Nevertheless, the mere initiation of an anti-dumping action could be enough to impact on future export decisions - this is known as the harassment effect. The mere lodging of an application may discourage the importation of the products, because the possibility of a duty being imposed creates uncertainty for the importer and the exporter (Anderson 1993:101; Feaver & Wilson 1995:209). Such a credible threat could be especially useful to discourage competing imports during times of recession.

6.2.8 *Protectionist bias of anti-dumping*

Cunnane and Stanbrook (1983:3), Finger (1993:25) and Krishna (1997:10) are among those who are severely critical of the protectionist nature of anti-dumping policies. The use of a third country's cost structure to determine normal value in an anti-dumping investigation is likely to be even more protectionist, especially in times of recession. According to a study by Gallaway *et al* (1999:218-220), anti-dumping (and countervailing) actions often resulted in the exporters increasing their export prices to avoid future anti-dumping actions being taken against them. Eastern attitude to business is based more on negotiation and long-term relationships. If an anti-dumping duty is imposed on exports from an Asian country, the manager has failed. This was also the attitude towards anti-dumping in socialist countries. This different way of doing business, in contrast to the Western way, means that the exporter would rather increase export prices than enter into a legal battle (Finger 1993:46; Olechowski 1993:174). The protectionist tendency of anti-dumping policies sometimes means that NMEs and other developing countries can no longer just follow an export-oriented trade strategy based on comparative advantage. In some cases it might be strategically better to concentrate on sectors that have weak political influence in developed countries (Eymann & Schuknecht 1993:238).

6.2.9 *Country-wide duty*

A further problem that affected CPEs and NMEs was that if an industry succeeded in obtaining an anti-dumping action against an exporter, the action was not only against the enterprise or industry that exported the offending goods, but against *all* current and future exports of that product from the relevant country, regardless of which enterprise or industry was the exporter. In other words, an exporter that was not dumping and which may even have been a fully privatised enterprise, was also subject to the anti-dumping duty if other exporters in that country were found to be dumping (Fu 1997:80, 101-102; Vermulst & Graafsma 1992:41).

According to paragraph 6.10 of the URAA, the investigative authorities “shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned” (GATT Secretariat 1994:180). Under the previous Anti-dumping Agreement the right to individual treatment was not so clearly stipulated and in most cases where there was more than one exporter from a country, a country-wide duty was imposed. However, an exporter could apply for individual treatment if it supplied the necessary information substantiating its claim, and if an exporter could show that it was not dumping, then any anti-dumping duties imposed on its products had to be refunded¹² (Bierwagen 1990:230; Vermulst 1987:324-325). Exporters from a CPE or NME were initially not granted this right to claim individual treatment (Fu 1997:73).

While this method of imposing a country-wide duty may seem very unfair, there was a good reason for such a duty. Under central planning, or even in non-market economies, it was not too difficult to circumvent an anti-dumping duty imposed on an enterprise controlled by the state by redirecting exports through another state-owned or state-controlled enterprise. It therefore became necessary to impose an anti-dumping duty on the product from the whole country rather than on the product from an enterprise (EC v Czech Rep *et al* 2002:9; Farr 1998:66; Fu 1997:95; Wang 1999:123). It is still possible, however, for an enterprise to apply for individual or market economy treatment, although there is no assurance that such special treatment will be granted.

12 See paragraph 4 of Article 8 of the Tokyo Anti-dumping Code (1979) in Bierwagen (1990:230).

6.3 THE PARTICULAR MARKET SITUATION

The Interpretative Note¹³ to Article VI of GATT allows the investigative authorities in the importing country to use any method to determine a normal value. On the other hand, the reference to State monopolies in this Interpretative Note, merely provides investigative authorities with the option to use some other method because it is conceded that “a strict comparison with domestic prices” in a non-market economy may not be appropriate (GATT Secretariat 1994:545-546). Nowhere does it state that the authorities are forbidden to use the actual prices in the domestic market of a non-market economy, or the exports to third country method or the constructed-value method. Nor is it stipulated how a normal value must be determined if actual selling prices are not used (Stanbrook & Bentley 1996:38-39, 46).

In article 2 paragraph 2.2 of the URAA, it is stated that “when, because of the particular market situation ... such sales do not permit a proper comparison” exports to third country or the constructed-value method should be used (GATT Secretariat 1994:168; Das 1999:209). It could thus be argued that, according to the URAA, the actual selling prices, exports to a third country and the constructed-value method could be used to determine the normal value in an anti-dumping case against a NME, while the Note to Article VI of GATT provides the option of using some other method. The analogue/surrogate method became the method of choice and many countries have indicated in their anti-dumping legislation that prices from a third market-economy country have to be used to determine the normal value for a NME.

According to EC anti-dumping legislation:

Where imports come from or originate in countries where there are distortions in the economy that do not permit them to be considered market economy countries, the normal value shall be determined on the basis of the comparable price in the ordinary course of trade at which the like product is actually sold in a third country with a market economy for domestic

13 Notes and Supplementary Provisions to Article VI of GATT, Ad Article VI, paragraph 1, note 2 (GATT Secretariat 1994: 545).

consumption, or, failing that, for export, or on the basis of any other method deemed appropriate by the Commission. For the purpose of determining the normal value, the Commission shall take into account the following criteria *inter alia*:

I. The production process in the country with a free market economy and the country whose economy has distortions.

II. Scale of production

III. Quality of the products.

Bearing in mind the foregoing factors, the choice of country must not entail disadvantages for the producer or exporter in the country of origin (Compendium of antidumping and countervailing duty laws 1999:9-10).

According to the anti-dumping legislation of Trinidad and Tobago, the selling price of the goods is not an appropriate normal value “if the government of the exporting country

I. Has a monopoly, or substantial monopoly, of the trade of the country and

II. Determines or substantially influences the domestic price of goods in that country”

(Compendium of antidumping and countervailing duty laws 1999:11).

The Uruguay anti-dumping legislation reflects what is stated in the URAA with respect to NMEs. According to Uruguay legislation, “... the third market-economy country shall be selected by taking into consideration the characteristics of the market for the product in question, the productive structures and the level of development” (Compendium of antidumping and countervailing duty laws 1999:14-15).

A factor which should play an increasing role in anti-dumping decisions against NMEs, is whether or not a NME that is faced with anti-dumping investigations is a member of the WTO. As a member of the WTO, a NME would have access to the dispute settlement body (DSB). Access to the DSB should play a significant part in future anti-dumping actions against Chinese exporters, as China became a member of the WTO in December 2001. In recent years, China, as a NME, has become the country most targeted with anti-dumping actions (see table 7.3) and the analogue method has been used in most anti-dumping actions against Chinese exporters (Fu 1997:73,82,87; Kempton & Stevenson 2000; Miranda *et al* 1998:11; Vermulst & Driessen 1997:142-143). China objects vehemently to its

classification as a NME and claims that many of the anti-dumping (AD) measures taken against her exports are ‘discriminatory, as the normal value for these AD cases were determined on the basis of the so-called “non-market economy” criteria of using “surrogate country” values’ (UNCTAD 2001:9). The use of the analogue method does seem to make it quite easy to bring successful anti-dumping actions against a NME (Finger 1993:46; Olechowski 1993:172-173).

6.4 INDIVIDUAL TREATMENT FOR NON-MARKET ECONOMIES

Certain enterprises in some of the NMEs have been given “market” status¹⁴ by the relevant authorities in importing countries. This status means that these enterprises have been treated individually during an anti-dumping investigation. This usually means that an individual dumping margin will be calculated for the products from that enterprise, which in turn means that a unique anti-dumping duty would be imposed on those products and not a country-general duty. In other words, the anti-dumping duty would be an enterprise-specific and not a country-wide duty (Farr 1998:62-65; Wang 1999:123,134). However, these cases were still the exception to the rule, as the granting of individual treatment depended on certain criteria being met, for example whether there was private investment in an enterprise, whether profits could be freely transferred abroad and whether the exporter was free to set its export prices and quantities. Other factors were the degree to which a company was free from the influence of the government authorities in the NME, whether or not a country’s currency was convertible and whether or not government had any control over prices (Vermulst & Driessen 1997:143; Wang 1999:120).

The use of a country-wide duty may have been applicable when countries like China were still state-controlled, but country-wide duties were not appropriate in every anti-dumping case once these countries began their transition to market economies (Fu 1997:81-102). In some cases enterprises were granted individual treatment, although the analogue method was still used to determine the normal value.

14 Not to be confused with “market economy treatment” which is discussed in section 7.6.

During the early 1990s, the US anti-dumping authorities granted individual treatment to a few Chinese state-owned companies. It was argued that these enterprises “enjoyed sufficient independence from the central government and therefore were free to set their own export prices” (Fu 1997:74, 82). In a case against the Ukraine, the US granted individual treatment to one Ukrainian enterprise, Stirol. In order to be granted such treatment, the individual respondent had to “demonstrate the absence of both de jure and de facto governmental control over its export activities” (US v PRC 2001:8; US v Ukraine 2000:4-5).

Factors that would support a finding of de jure absence of governmental control by the US investigative authorities are

- “1) An absence of restrictive stipulations associated with an individual exporter’s business and export licences;
- 2) any legislative enactments decentralizing control of companies; or
- 3) any other formal measures by the government decentralizing control of companies” (US v PRC 2001:8; US v Ukraine 2000:4.

Factors that would be considered in respect of de facto governmental control of export functions would be

- “1) whether the export prices are set by, or subject to the approval of, a government authority;
- 2) whether the respondent has authority to negotiate and sign contracts and other agreements;
- 3) whether the respondent has autonomy from the government in making decisions regarding the selection of its management; and
- 4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses” (US v PRC 2001:9; US v Ukraine 2000:5).

The EC Commission also granted individual treatment to a few Sino-Foreign joint venture enterprises during the early 1990s, however, this concession only applied for a few years (until 1993) (Fu 1997:81-

84; Holmes & Kempton 1998:57). However, the European Commission's policy in respect of individual treatment of exporters from non-market economies became more lenient from 1996 onwards. EC anti-dumping regulations were amended to allow for individual treatment where circumstances warranted such treatment, which meant an anti-dumping duty could be an enterprise-specific rather than a country-wide duty (Farr 1998:62-65; Holmes & Kempton 1998:57; Vermulst & Driessen 1997:135; Wang 1999:123,134). Individual treatment can be granted to an enterprise if there is no chance of circumvention by other enterprises through this enterprise that is granted individual treatment (*EC v Czech Rep et al* 2002:9).

6.5 COMBINATION OF THE ANALOGUE AND CONSTRUCTED-VALUE METHODS

Understandably CPEs and then NMEs complained about the use of the analogue method. One of the complaints was that any comparative advantage an exporter may have would not be reflected in this method. It was decided to use a combination of the analogue method and the constructed-value method in a landmark anti-dumping case brought against Poland by the US in 1975 (Ehrenhaft 1990:305; Meuser 1979). The Polish Golf Car¹⁵ case presented the US investigative authorities with a unique problem. The only two countries producing golf cars in adequate quantities to make a valid price determination at that stage were the US and Poland. Polish prices were unreliable and the Poles complained that using the US as surrogate would be unreasonable. The only other countries that produced golf cars were Canada and Japan, but both produced only small quantities. If either of these countries were used as surrogate, the cost advantage that the Polish producers enjoyed because of economies of scale would be lost (Vermulst 1987:786). So Polish input quantities were used at Canadian prices, adjusted to allow for differences in production techniques (Meuser 1979:784-789).

15 A vehicle in which golfers drive around a golf course.

This approach, known as the factors approach or factors of production method is included in the US Tariff Act¹⁶ (Ehrenhaft 1990:305). The US Act, Section 773 (c)1, directs the USDOC (also referred to as the Department) to base normal values, “in most circumstances, on the NME producer’s factors of production, valued in a **surrogate** market economy country or countries considered to be appropriate by the Department” (US v PRC 2001:11, emphasis in original). The input quantities of the factors of production, for example material, energy, labour and capital costs, as reported by the respondents, are used to construct normal values. These input factors are then valued by using prices from an appropriate surrogate (US v PRC 2001:13-14).

6.6 MARKET-ECONOMY TREATMENT

Countries on the EC list are usually subject to a general rate of anti-dumping duty, although in some cases individual rates may be applied (Farr 1998:63-64). If a country is not on the list, the Commission decides whether or not a country is a NME on a case-by-case basis (Farr 1998:11). An amendment made to the Basic Regulation during 1998¹⁷, Council Regulation (EC) No 905/98, allowed exporters from China and Russia to apply for market-economy treatment and these applications were treated on a case-by-case basis.¹⁸ If a NME enterprise meets all the criteria as per the Council Regulation (EC) No 905/98, the way in which the normal value will be determined will be on a case-by-case approach and not based on the prices and costs in an analogue country (Commission of the European Communities 2000a:23). Such status will be granted if it can be shown “that

- (a) decisions of applicant firms related to prices, costs, inputs, sales, investments are made in response to market signals and without significant State interference;
- (b) firms have one clear set of basic accounting records independently audited in line with

16 Section 773(c) of The Tariff Act of 1930 (US) (Ehrenhaft 1990:305).

17 Council Regulation (EC) No 905/98 related to individual Market Economy Status for companies in China and Russia (Commission of the European Communities 2000a:23).

18 Russia was reclassified as a market economy country in Council Regulation (EC) No 1972/2002:1.

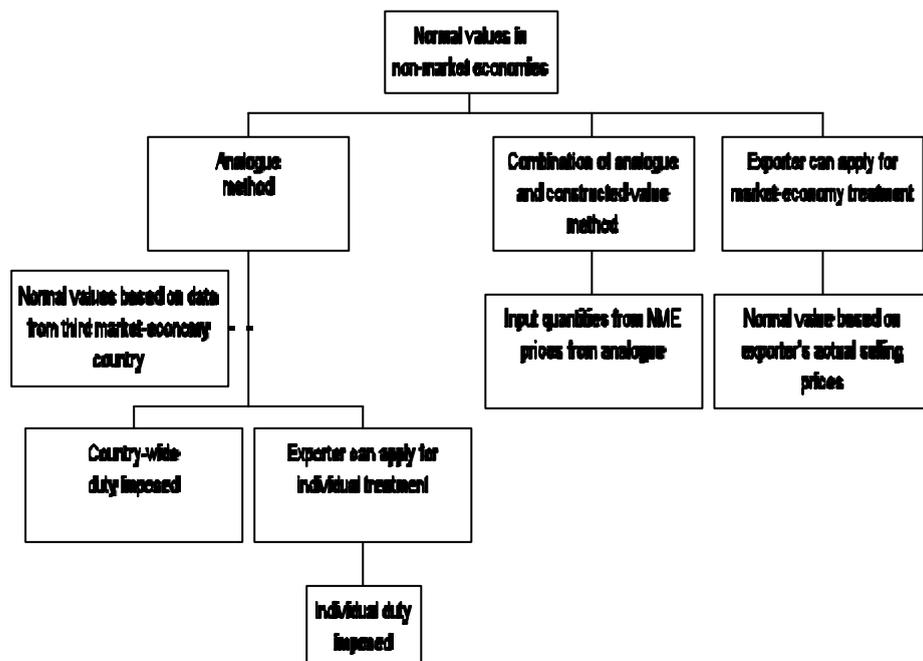
- international accounting standards;
- (c) the production costs and financial situation of firms are not subject to any significant distortions carried over from the former non-market economy system;
 - (d) firms are subject to bankruptcy and property laws which guarantee legal certainty and stability; and
 - (e) exchange rate conversions are carried out at the market rate.”

According to the same Report, the main reason why companies in these two countries were not granted individual market status was because they usually did not have a clear set of accounting records (Commission of the European Communities 2000a:23). The analogue method was then still used if market economy status was not granted to the relevant exporters (Commission of the European Communities 2000a:23; 2000b:9). Russia was officially recognised as a market-economy country in November 2002, so this ruling no longer applies to Russian exporters.

The various approaches to calculating normal values for NMEs as discussed in this chapter are summarised in the following flowchart.

Figure 6.1 Different ways to calculate normal values for NMEs

Source: Own compilation.



6.7 CONCLUSION

Exporters situated in non-market economy countries operate at a disadvantage with respect to anti-dumping actions. If a country has been classified as a NME, then the normal value is usually determined using the analogue method. The result of the anti-dumping action will therefore depend on which country is chosen as the analogue and using the analogue method makes it relatively easy to manipulate the determination of dumping finding. However, the fact that a large number of NME countries, including China, are now members of the WTO has contributed to the reassessment of the determination of normal value methods for NMEs. These members of the WTO are now able to dispute unfair anti-dumping decisions. Exporters from NMEs can apply for individual treatment and in some cases may even apply and receive market-economy treatment. As more NME countries are reclassified as market economy countries, the analogue method should be used less and less and the particular problems faced by NMEs in anti-dumping investigations should be reduced. However, the phasing out of the analogue method will not necessarily mean that anti-dumping investigations and the determination of dumping will be problem-free. The various circumstances that allow for the construction of a normal value (see figure 5.1) still provide the possibility of capturing the dumping margin.

This chapter and the previous one provided a detailed discussion of the possible ways in which the normal value can be manipulated in order to capture the dumping margin. Some interesting data and facts in the following chapter show that some other factors may also be at play in anti-dumping investigations.