

DIVISION LINGUISTIQUE

GENERAL AGREEMENT ON
TARIFFS AND TRADE

RESTRICTED

COM.AD/W/81/Add.2
26 July 1978

Special Distribution

Original: English

LIST OF PRIORITY ISSUES IN THE ANTI-DUMPING FIELD

Submissions by Governments

Addendum

The following communications relating to the four priority issues to be discussed at the next meeting of the Anti-Dumping Committee have been received from Canada and the United States.

CANADA

1. Sales at a loss

"Sales at a loss" in the home market are transactions where a product is sold at a price which does not cover the manufacturing costs, selling and marketing costs and general administrative costs relating to the production and sale of the goods in question.

While neither the G.A.T.T. Anti-dumping Code nor Canadian legislation refers specifically to "sales at a loss", both stipulate that the sales used to determine normal value shall be those made in "the ordinary course of trade". Accordingly, a decision is required as to what sales are in the ordinary course of trade with respect to a particular industry during the period under investigation. This may involve on occasion assurances that the home market sales used to determine normal value do not represent sales at a loss. Domestic sales made over a period of time which do not fully reflect the cost elements identified in the previous paragraph would normally be discarded for the purposes of normal value determination.

2. Allowances relating to price comparability

According to Article 2(f) of the Anti-dumping Code, the normal value and the export price "shall be compared at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for the differences in conditions and terms of sale, for the differences in taxation, and for the other differences affecting price comparability".

Under Canada's anti-dumping legislation, price comparability is achieved not only by the granting of certain allowances to reflect the various differences between the sale of the goods to Canada and the domestic sales used to establish normal value, but also in the selection of the domestic sales used for the comparison and the adjustments made to export price to ensure it is on a comparable basis. What follows, therefore, is an outline of the normal value and export price provisions of the Anti-dumping Act. For additional information, the relevant sections of the legislation have been attached as Appendix "A". Appendix "B" contains an explanation of each adjustment to normal value that is allowed under Canadian regulations.

A. Calculation of Normal Value

(i) Use of Domestic Sales

Canadian regulations state that, in order to use domestic selling prices as the basis for determining the normal value of any goods being shipped to Canada, the total quantity of like goods sold by the exporter in his domestic market during the investigation period must represent 25% of his total sales during that period, excluding the quantity exported to Canada. Where this condition is met, normal value is calculated on the basis of the price at which the exporter freely sells those like goods, that is, goods with identical or closely resembling characteristics, for domestic consumption in the ordinary course of trade during at least the sixty-day period preceding the date of sale to Canada. The price used is that at which a preponderance of sales was made during the specific period to customers at the same trade level as the Canadian importer and in quantities similar to those being shipped to Canada. In the absence of such a preponderance, the weighted average of the prices is used.

To take into consideration differences in terms and conditions of sale, in taxation and other differences relating to price comparability between the sale of the goods to the Canadian importer and the domestic sales by the exporter used to establish normal value, adjustments may be made to that normal value. These adjustments cover quantity differences, differences in physical characteristics (quality, structure, design, material, etc.) and in trade level, deferred and cash discounts, freight, internal taxes, credit terms and the applicable exchange rate. (see Appendix "B").

Where the exporter's domestic selling prices cannot be used because he sells solely or primarily for export, normal value is established on the basis of that of another vendor in the domestic market who does satisfy the 25% domestic sales requirement. The normal value of the goods of the other vendor is calculated on the basis of his domestic selling prices for like goods, adjusted by the appropriate allowances as noted above.

(ii) Alternative Methods

Where there are not a sufficient number of home market sales that comply with all the terms and conditions, both the Anti-dumping Code and Canadian legislation allow officials to base normal value on either sales of like goods by the exporter to importers in other countries or upon an aggregate of the cost of production of the goods being shipped to Canada plus an amount for administrative, selling and all other costs and for profits. Canadian practice is to use the cost-plus approach when information is available and adjustments relating to price comparability, as specified in the regulations, are made where applicable.

(iii) Ministerial Prescription

Should the government of the exporting country control its export trade, or if domestic prices are substantially determined by the government, the Minister of National Revenue prescribes the manner in which normal value is to be determined. In such cases, it has been the practice to prescribe that normal values be based upon the prices at which comparable goods produced in a market economy are freely sold for domestic consumption under competitive conditions in that country.

The Minister of National Revenue also prescribes the manner of determining normal value where sufficient information has not been furnished or is not available to establish normal value by using either domestic sales information or the cost-plus approach. The method used, however, varies from case to case, based upon the best available information.

B. Calculation of Export Price

Export price is equal to the lesser of the exporter's selling price for the goods or the importer's purchase price. In order that the export price be compared on the same basis with the normal value, the selling price or purchase price is adjusted by deducting (a) all costs, charges and expenses incurred by the exporter in preparing the goods for shipment to Canada that are over and above those generally incurred on sales for home consumption and (b) all costs, charges and expenses incurred by the exporter beyond the point of direct shipment to Canada.

Where there is no exporter's sale price or importer's purchase price, as in the case of goods shipped on consignment, or where the export price is considered to be unreliable because the sale was not at arm's length, or there existed a compensatory arrangement, the export price is based on the price at which the goods are sold by the importer in Canada to unrelated purchasers. In addition to the costs, charges and expenses incurred by the exporter which were previously mentioned, all costs incurred by the importer until the time the goods are resold in Canada, as well as an amount for any profit accruing on the sale, are deducted from the selling price.

As with normal value, the Minister of National Revenue may prescribe a manner of calculating the export price where sufficient information has not been furnished or is not available to enable export price to be determined by either of the methods described above.

3. Regional Protection

Canada's legislation instructs the Anti-dumping Tribunal to take into consideration the existence of regional markets, as defined by the Anti-dumping Code, in its assessment of material injury.

4. Price Undertakings

Although provision for price undertakings exists in the Anti-dumping Code, Canada has to date not adopted this procedure as a means of terminating anti-dumping investigations.

DETERMINATION OF NORMAL VALUE
ANTI-DUMPING ACT

9. (1) Subject to subsection (5), the normal value of any goods is the price of like goods when sold by the exporter

- (a) to purchasers with whom, at the time of the sale of the like goods, the exporter is not associated,
- (b) in the ordinary course of trade for home consumption under competitive conditions,
- (c) during such period, in relation to the time of the sale of the goods to the importer in Canada, as may be prescribed by the regulations, and
- (d) at the place from which the goods were shipped directly to Canada or, if the goods have not been shipped to Canada, at the place from which the goods would be shipped directly to Canada under normal conditions of trade,

as adjusted by allowances calculated in the manner prescribed by the regulations to reflect the differences in the terms and conditions of sale, in taxation and other differences relating to price comparability between the sale of the goods to the importer in Canada and the sales by the exporter of the like goods but with no other allowances affecting price comparability whatever.

DETERMINATION DE LA VALEUR NORMALE
LOI ANTIDUMPING

9. (1) Sous réserve du paragraphe (5), la valeur normale de toutes marchandises est le prix de marchandises semblables lorsqu'elles sont vendues par l'exportateur,

- (a) à des acheteurs avec lesquels, au moment de la vente de marchandises semblables, l'exportateur n'est pas associé,
- (b) dans le cours ordinaire du commerce pour la consommation intérieure dans des conditions concurrentielles,
- (c) durant la période que peuvent prescrire les règlements par rapport au moment de la vente des marchandises à l'importateur au Canada, et
- (d) au lieu en provenance duquel les marchandises ont été expédiées directement au Canada ou, si les marchandises n'ont pas été expédiées au Canada, au lieu en provenance duquel les marchandises auraient été expédiées directement au Canada dans des conditions commerciales normales,

corrigé par les dégrèvements calculés de la manière prescrite par les règlements pour refléter les différences dans les modalités de vente, dans l'imposition et les autres différences ayant trait à la comparabilité des prix entre la vente des marchandises à l'importateur au Canada et les ventes par l'exportateur de marchandises semblables mais sans aucun autre dégrèvement affectant la comparabilité des prix.

(2) In the application of subsection (1) in the case of any goods

(a) if there was not, in the opinion of the Deputy Minister, such a number of sales of like goods made by the exporter at the place described in paragraph (1)(d) as to permit a proper comparison with the sale of the goods to the importer in Canada, there shall be substituted for that place the place located nearest thereto at which like goods were sold by the exporter; and

(b) if there was not a sufficient number of sales of like goods made by the exporter by reason of the fact that the exporter sold goods solely or primarily for export, but there were sales of like goods for home consumption in the country of export by other vendors, there shall be substituted for the exporter such one of any such vendors as the Deputy Minister may specify.

(3) In determining the normal value of any goods under subsection (1), the price of like goods when sold by the exporter to purchasers during the period referred to in paragraph (1)(c) shall be

(a) the price at which the preponderance of sales of

(2) Dans l'application du paragraphe (1), dans le cas de toutes marchandises,

(a) s'il n'y avait pas, de l'avis du sous-ministre, un nombre suffisant de ventes de marchandises semblables effectuées par l'exportateur au lieu décrit à l'alinéa (1)d) permettant d'établir une comparaison exacte avec les ventes à l'exportation, on doit substituer à ce lieu celui qui se trouve le plus près de lui et où des marchandises semblables ont été vendues par l'exportateur; et

(b) s'il n'y avait pas un nombre suffisant de ventes de marchandises semblables effectuées par l'exportateur en raison du fait que l'exportateur vendait des marchandises seulement ou essentiellement pour l'exportation, mais qu'il y ait eu des ventes de marchandises semblables destinées à la consommation intérieure dans le pays d'exportation par d'autres vendeurs, on doit substituer à l'exportateur celui de cesdits vendeurs que le sous-ministre pourra spécifier.

(3) Pour la détermination de la valeur normale de toutes marchandises en vertu du paragraphe (1), le prix de marchandises semblables, lorsqu'elles sont vendues par l'exportateur à des acheteurs pendant la période mentionnée à l'alinéa (1)c) doit être

like goods that comply with all the terms and conditions that are referred to in subsection (1) or that are applicable by virtue of subsection (2) was made by the exporter to purchasers throughout the period; and (b) when there is no such preponderance of sales at a single price throughout the period, the weighted average of the prices at which like goods are so sold by the exporter to purchasers throughout the period.

(4) Where goods imported into Canada and goods sold for home consumption are like goods except only that the goods sold for home consumption have applied to them a trade mark, as defined in the Trade Marks Act, that is not applied to the goods imported into Canada, and goods like the goods imported are not sold for home consumption, the goods imported and the goods sold for home consumption shall be deemed to be like goods for the purposes of this section if, in the opinion of the Minister,

(a) the goods are being imported into Canada without that trade mark applied to them in order to avoid the operation of subsection (1), and

(b) it is probable that there will be applied to the

(a) le prix auquel dans la plupart des cas, des ventes de marchandises semblables ont été faites par l'exportateur à des acheteurs durant toute cette période et qui sont conformes à toutes les modalités mentionnées au paragraphe (1) ou applicables en vertu du paragraphe (2); et

(b) lorsque, dans la plupart des cas, ces ventes n'ont pas eu lieu à prix fixe durant toute cette période, fondé sur une moyenne pondérée des prix auxquels des marchandises semblables ont ainsi été vendues par l'exportateur à des acheteurs durant toute cette période.

(4) Lorsque des marchandises importées au Canada et des marchandises destinées à la consommation intérieure sont des marchandises semblables, sauf que les marchandises destinées à la consommation intérieure portent une marque de commerce, telle que définie dans la Loi sur les marques de commerce, que ne portent pas les marchandises importées au Canada, et lorsque des marchandises semblables aux marchandises importées ne sont pas destinées à la consommation intérieure, les marchandises importées et les marchandises destinées à la consommation intérieure seront censées être des marchandises semblables aux fins du présent article, si, de l'avis du Ministre,

(a) les marchandises sont importées au Canada sans cette marque de commerce de manière à

goods, subsequent to their importation into Canada, that trade mark or any other mark so closely resembling that trade mark that it is likely to be taken therefor.

(5) Where the normal value of any goods cannot be determined under subsection (1) by reason that there was not a sufficient number of sales of like goods that comply with all the terms and conditions that are referred to in that subsection or that are applicable by virtue of subsection (2), the normal value of the goods shall be determined, at the option of the Deputy Minister in any case or class of cases, as

(a) such price of like goods when sold by the exporter to importers in any country other than Canada during the period referred to in paragraph (1)(c) as, in the opinion of the Deputy Minister, fairly reflects the market value of the goods at the time of the sale of the goods to the importer in Canada, as adjusted by allowances calculated in the manner prescribed by the regulations to reflect the differences in the terms and conditions of sale, in taxation and other differences relating to

échapper à l'application du paragraphe (1), et

(b) il est probable que les marchandises porteront, après avoir été importées au Canada, cette marque de commerce ou une autre marque de commerce assez ressemblante pour être probablement confondue avec elle.

(5) Lorsque la valeur normale des marchandises ne peut être déterminée en vertu du paragraphe (1) en raison du fait qu'il n'y avait pas un nombre suffisant de ventes de marchandises semblables répondant à toutes les modalités qui sont visées dans ce paragraphe ou qui sont applicables en vertu du paragraphe (2), la valeur normale des marchandises doit être déterminée, au gré du sous-ministre, dans tout cas ou toute catégorie de cas,

(a) comme étant le prix de marchandises semblables lorsqu'elles sont vendues par l'exportateur à des importateurs dans tout pays autre que le Canada pendant la période visée à l'alinéa (1)c) qui, de l'avis du sous-ministre, reflète équitablement leur valeur marchande à l'époque de la vente des marchandises à l'importateur au Canada, corrigé par les règlements pour refléter les différences dans les modalités de vente, d'imposition et les autres différences relatives à la comparabilité des prix entre la vente des marchandises à l'importateur au Canada et les

price comparability between the sale of the goods to the importer in Canada and the sales of like goods by the exporter to importers in any country other than Canada but with no other allowances affecting price

comparability whatever; or

(b) the aggregate of

(i) the cost of production of the goods, and

(ii) an amount for administrative, selling and all other costs and for profits,

calculated in such manner as may be prescribed by the regulations.

(6) In subsections (2) and (5) the expression "sufficient number of sales" with reference to any goods has the meaning given to that expression by the regulations.

(7) Notwithstanding subsections (1) and (5), the normal value of any goods that are shipped directly to Canada from a country where, in the opinion of the Minister,

(a) the government of that country has a monopoly or substantial monopoly of its export trade, or

(b) domestic prices are substantially determined by the government of that country,

shall be determined in such manner as the Minister prescribes. 1968-69, c. 10, s. 9.

ventes de marchandises semblables par l'exportateur à des importateurs dans tout pays autre que le Canada mais sans aucun autre dégrèvement affectant la comparabilité des prix; ou

(b) comme étant l'ensemble

(i) du coût de production des marchandises, et

(ii) d'un montant pour les frais administratifs, les frais de vente et tous autres frais ainsi que

pour les bénéfices,

calculés de la manière que peuvent prescrire les règlements.

(6) Dans les paragraphes (2) et (5) l'expression "nombre suffisant de ventes", se rapportant à toutes marchandises, a la signification donnée à cette expression par les règlements.

(7) Nonobstant les paragraphes (1) et (5), la valeur normale de toutes marchandises qui sont expédiées directement au Canada en provenance d'un pays où, de l'avis du Ministre,

(a) le gouvernement de ce pays a un monopole ou un quasi-monopole sur son commerce d'exportation, ou

(b) les prix intérieurs sont en grande partie déterminés par le gouvernement de ce pays,

doit être déterminée de la manière que prescrit le Ministre. 1968-69, c. 10, art. 9.

ANTI-DUMPING REGULATIONS

3. Subject to sections 9 and 10, the sales of like goods, the prices of which are used to compute the normal value of any goods, shall be those sales of goods that

(a) are made to purchasers who are at the same or at substantially the same trade level as the importer, and
(b) are in the same or substantially the same quantities as the sale of goods to the importer, or in the event that the sale of goods are not in the same or substantially the same quantities in the country of export as the sale of goods to the importer, shall be those sales that,

(c) if the quantity sold to the importer is larger than the largest quantity sold for home consumption, are in the largest quantity sold for home consumption, or
(d) if the quantity sold to the importer is smaller than the smallest quantity sold for home consumption, are in the smallest quantity sold for home consumption.

13. For the purposes of paragraph 9(2)(b) and subsection 9(5) of the Act, a sufficient number of sales with reference to any goods in a prescribed period

REGLEMENTS ANTIDUMPING

3. Sous réserve des articles 9 et 10, les ventes de marchandises semblables dont les prix sont utilisés pour calculer la valeur normale de toutes marchandises, sont les ventes de marchandises

(a) faites à des acheteurs qui sont au même niveau commercial que l'importateur, ou sensiblement au même niveau, et
(b) dont les quantités sont les mêmes ou sensiblement les mêmes que celles de la vente de marchandises à l'importateur, ou

au cas où les marchandises n'ont pas été vendues dans les mêmes ou à peu près les mêmes quantités dans le pays d'exportation que la vente de marchandises à l'importateur, sont les ventes qui,

(c) si la quantité vendue à l'importateur dépasse la quantité la plus grande vendue à des fins de consommation intérieure, sont dans la quantité la plus grande vendue à des fins de consommation intérieure, ou

(d) si la quantité vendue à l'importateur est inférieure à la plus petite quantité vendue à des fins de consommation intérieure, sont dans la quantité la plus petite vendue à des fins de consommation intérieure.

13. Aux fins de l'alinéa b) du paragraphe (2) de l'article 9 et du paragraphe (5) de l'article 9 de la loi, l'expression "un nombre

means sales of those goods during that period in such quantities that, if the quantity of the goods sold to importers in Canada in the period were to be deducted from the total quantity of the goods and the like goods sold throughout that period, at least twenty-five per cent of the remainder would have been sold for home consumption.

14. For the purposes of determining the normal value of any goods imported into Canada the period referred to in paragraph 9(1)(c) of the Act in relation to the sale of the goods is the period ending on the day of the sale and commencing

- (a) sixty days immediately preceding that day; or
- (b) where the nature of the trade otherwise requires, on such day preceding the day of the sale of the goods as is required to form a proper comparison in determining the normal value.

16. For the purpose of determining the normal value of any goods under paragraph 9(5)(b) of the Act,

- (a) the cost of production of the goods shall include all costs that, in accordance with good business principles and

suffisant de ventes relativement à des marchandises pendant une période prescrite" désigne les ventes de ces marchandises pendant cette période en des quantités telles que, si la quantité des marchandises vendues à des importateurs au Canada durant cette période devait être déduite de la quantité totale des marchandises et des marchandises semblables vendues durant toute cette période, au moins 25 p. 100 du reste aurait été vendu pour consommation intérieure.

14. Aux fins de la détermination de la valeur normale de toutes marchandises importées au Canada, la période visée à l'alinéa c) du paragraphe (1) de l'article 9 de la loi relativement à la vente des marchandises est la période qui se termine le jour de ladite vente et qui commence

- (a) soixante jours immédiatement avant cette date, ou,
- (b) lorsque la nature du commerce ne le permet pas, le jour, antérieur au jour de la vente des marchandises, qui convient pour établir une comparaison judicieuse pour la détermination de la valeur normale.

16. Pour déterminer la valeur normale de toutes marchandises conformément à l'alinéa 9(5)(b) de la Loi,

- (a) le coût de production des marchandises doit comprendre tous les frais qui, conformément aux bons principes et aux bonnes pratiques des

practices, are attributable or in any manner related to the production or manufacture by the producer of those goods and of all like goods,

(b) the amount for profits on the sale of the goods shall be an amount equal to

(i) if in the opinion of the Deputy Minister there was such a number of sales of like goods made by the producer in the country of export for home consumption at a profit as to permit a proper comparison, the weighted average profit made on such sales,

(ii) where subparagraph (i) is not applicable but there was in the opinion of the Deputy Minister such a number of sales of like goods made by other vendors in the country of export for home consumption at a profit as to permit a proper comparison, the weighted average profit made on such sales, or

(iii) where subparagraphs (i) and (ii) are not applicable but there was in the opinion of the Deputy Minister such a number of sales of goods of the same general category as the said goods made by the producer in the country

affaires, sont attribuables ou, d'une manière ou d'une autre, se rapportent à la production ou à la fabrication pour le producteur de ces marchandises et de toutes marchandises semblables;

(b) le montant correspondant aux bénéfices réalisés sur la vente des marchandises doit être égal,

(i) si, de l'avis du Sous-ministre, le nombre des ventes de marchandises semblables effectuées avec profit par le producteur dans le pays d'exportation en vue de la consommation intérieure permet une comparaison convenable, à la moyenne pondérée du bénéfice réalisé sur ces ventes,

(ii) lorsque le sous-alinéa (i) ne peut pas s'appliquer mais que, de l'avis du Sous-ministre, le nombre des ventes de marchandises semblables effectuées avec profit par d'autres vendeurs dans le pays d'exportation en vue de la consommation intérieure permet une comparaison convenable, à la moyenne pondérée du bénéfice réalisé sur ces ventes, ou

(iii) lorsque les sous-alinéas (i) et (ii) ne peuvent pas s'appliquer mais que, de l'avis du Sous-ministre, le nombre des ventes de marchandises de la même catégorie

of export for home consumption at a profit as to permit a proper comparison, the weighted average profit made on such sales, or (iv) where subparagraphs (i), (ii) and (iii) are not applicable but there was in the opinion of the Deputy Minister such a number of sales of goods of the same general category as the said goods made by other producers in the country of export for home consumption at a profit as to permit a proper comparison, the weighted average profit made on such sales, and

(c) the amount for administrative, selling and all other costs shall be an amount equal to the weighted average of such costs incurred on the sales of the goods that were used for the purpose of calculating the amount for profits pursuant to paragraph (b),

and for the purposes of this section, sections 3 to 12 and section 14 apply mutatis mutandis.

générale que lesdites marchandises, effectuées avec profit par le producteur dans le pays d'exportation en vue de la consommation intérieure permet une comparaison convenable, à la moyenne pondérée du bénéfice réalisé sur ces ventes, ou (iv) lorsque les sous-alinéas (i), (ii) et (iii) ne s'appliquent pas mais que, de l'avis du Sous-ministre, le nombre des ventes de marchandises de la même catégorie générale que lesdites marchandises, effectuées avec profit par d'autres producteurs dans le pays d'exportation en vue de la consommation intérieure permet une comparaison convenable, à la moyenne pondérée du bénéfice réalisé sur ces ventes, et

(c) le montant correspondant aux frais d'administration et de vente, ainsi qu'à tous les autres frais, doit être égal à la moyenne pondérée de tels frais occasionnés par les ventes de marchandises d'après lesquelles a été calculé le montant des bénéfices conformément à l'alinéa b),

et, aux fins du présent article, les articles 3 à 12 ainsi que l'article 14, s'appliquent mutatis mutandis.

DETERMINATION OF EXPORT PRICE

ANTI-DUMPING ACT

10. (1) Subject to this section, the export price of any goods, notwithstanding any invoice or affidavit to the contrary, is an amount equal to the lesser of

- (a) the exporter's sale price for the goods, and
- (b) the importer's purchase price for the goods,

adjusted in the manner prescribed by the regulations to exclude all charges thereon resulting from or arising after their shipment from the place described in paragraph 9(1)(d) or, where applicable, the place substituted therefor in determining normal value by virtue of paragraph 9(2)(a).

(2) Where, in respect of any imported goods,

- (a) there is no exporter's sale price or importer's purchase price at the time of importation of the goods, or
- (b) the Deputy Minister is of the opinion that the export price, as determined under subsection (1), is unreliable

(i) by reason that the sale of the goods for export to Canada was a sale between associated persons, or

(ii) by reason of a compensatory

DETERMINATION DU PRIX A
L'EXPORTATION

LOI ANTIDUMPING

10. (1) Sous réserve du présent article, le prix à l'exportation de toutes marchandises, nonobstant toute facture ou affidavit énonçant le contraire, est un montant égal au moindre

- (a) du prix de vente de l'exportateur pour les marchandises, ou
- (b) du prix d'achat de l'importateur pour les marchandises,

corrigé de la manière prescrite par les règlements afin d'exclure toutes les charges sur celles-ci, résultant de leur expédition du lieu décrit à l'alinéa 9(1)d) ou survenant par la suite, ou lorsque cela est applicable, du lieu qui y est substitué afin de déterminer la valeur normale en vertu de l'alinéa 9(2)a).

(2) Lorsque, relativement à des marchandises importées

- (a) il n'y a pas de prix de vente de l'exportateur ou de prix d'achat de l'importateur au moment de l'importation des marchandises, ou
- (b) que le sous-ministre est d'avis que le prix à l'exportation, tel qu'il est déterminé en vertu du paragraphe (1), est sujet à caution

(i) en raison du fait que la vente des marchandises pour l'exportation au Canada était une vente entre personnes associées, ou

arrangement made between any two or more of the following, namely, the manufacturer or producer, the vendor, the exporter, the importer and any other party, that directly or indirectly affects or relates to

- (A) the price of the goods,
- (B) the sale of the goods,
- (C) the net return to the exporter, vendor, manufacturer or producer of the goods, or
- (D) the net cost to the importer of the goods,

the export price of the goods shall be deemed to be (c) if the goods were sold by the importer in the condition in which they were imported to a person with whom, at the time of the said sale, he was not associated, the price for which the goods were so sold less an allowance calculated in the manner prescribed by the regulations

- (i) for costs, including the duties imposed under the Customs Tariff and taxes, incurred on or after the importation of the goods and their sale by the importer,
- (ii) for profits on the sale of the goods to that person, and

(ii) en raison d'un arrangement compensatoire, passé entre deux ou plusieurs des personnes suivantes, à savoir: le fabricant ou producteur, le vendeur, l'exportateur, l'importateur et toute autre partie, qui affecte ou concerne, directement ou indirectement,

- (A) le prix des marchandises,
- (B) la vente des marchandises,
- (C) le profit net pour l'exportateur, le vendeur, le fabricant ou producteur des marchandises, ou
- (D) le coût net pour l'importateur des marchandises,

le prix à l'exportation des marchandises est réputé être (c) si les marchandises ont été vendues par l'importateur, dans l'état où elles ont été importées, à une personne avec laquelle, au moment de ladite vente, il n'était pas associé, le prix pour lequel les marchandises ont été ainsi vendues diminué d'un dégrèvement calculé de la manière prescrite par les règlements,

- (i) pour les frais, y compris les droits imposés selon le Tarif des douanes et les taxes, encourus au moment de l'importation des marchandises et de leur vente par l'importateur ou par la suite,
- (ii) pour les profits sur la vente de marchandises à cette personne, et

(iii) for all charges on the goods resulting from or arising after their shipment from the place described in paragraph 9(1)(d), or
 (d) in any case other than that described in paragraph (c), the price determined in the manner prescribed by the regulations.

(3) In the case of any goods referred to in paragraph (2)(a), notwithstanding any other provision of this Act, no entry of such goods shall be considered, for the purposes of this Act, to be perfected until

- (a) the importer, exporter or owner, or his agent or consignee, has delivered to the Deputy Minister such documents and information including statements showing the terms and conditions on which the goods have been sold or accounted for or disposed of in Canada as the Deputy Minister requests in order to determine the export price of the goods, and the export price is determined pursuant to paragraph (2)(c); or
 (b) the export price is determined pursuant to paragraph (2)(d) or pursuant to section 11.

(4) For greater certainty, any agreement pursuant to which the manufacturer or producer, the

(iii) pour toutes les charges sur les marchandises résultant de leur expédition du lieu décrit à l'alinéa 9(1)d), ou survenant par la suite, ou

(d) dans tout cas autre que celui mentionné à l'alinéa c), le prix déterminé de la manière prescrite par les règlements.

(3) Dans le cas de marchandises visées à l'alinéa (2)a), nonobstant toute autre disposition de la présente loi, aucune entrée de ces marchandises ne doit être considérée, aux fins de la présente loi, comme effectuée avant que

- (a) l'importateur, l'exportateur ou le propriétaire, ou leur mandataire ou consignataire, n'ait remis au sous-ministre les documents et les renseignements, y compris les déclarations énonçant les modalités selon lesquelles les marchandises ont été vendues ou comptabilisées au Canada ou qu'il en a été disposé au Canada, que le sous-ministre requiert afin de déterminer le prix à l'exportation des marchandises, et le prix à l'exportation est déterminé en conformité de l'alinéa (2)c); ou
 (b) le prix à l'exportation est déterminé en conformité de l'alinéa (2)d) ou en conformité de l'article 11.

(4) Pour plus de certitude, un accord en conformité duquel le fabricant ou le producteur, le

vendor or the exporter of any goods undertakes directly or indirectly, or in any manner whatever, to indemnify, pay on behalf of or reimburse the importer of the goods for all or any part of the dumping duty that may be levied upon the entry of the goods, shall be deemed to be a compensatory arrangement affecting the price of the goods within the meaning of paragraph (2)(b). 1968-69, c. 10, s. 10.

ANTI-DUMPING REGULATIONS

18. (1) In determining the export price of any goods pursuant to subsection 10(1) of the Act, the exporters' sale price for the goods, being the price at which the goods are sold or agreed to be sold to the Canadian importer, shall be adjusted by deducting therefrom the following amounts:

- (a) the costs, charges and expenses incurred by the exporter in preparing the goods for shipment to Canada that are additional to those costs, charges and expenses generally incurred on sales for home consumption; and
- (b) all other costs, charges and expenses, including Canadian customs duties and taxes if applicable, by or for the account of the exporter resulting from or arising from the exportation or after the shipment of the goods from the place described in paragraph 9(1)(d) of the Act, or,

vendeur ou l'exportateur de toutes marchandises s'engage, directement ou indirectement ou de quelque façon que ce soit à indemniser, à payer pour le compte de l'importateur ou à rembourser à ce dernier la totalité ou une partie des droits antidumping qui peuvent être imposés sur l'entrée des marchandises, est censé être un arrangement compensatoire affectant le prix des marchandises dans le sens où l'entend l'alinéa (2)b). 1968-69, c. 10, art. 10.

REGLEMENTS ANTIDUMPING

18. (1) Pour déterminer le prix à l'exportation de toutes marchandises, conformément au paragraphe (1) de l'article 10 de la loi, le prix de vente des exportateurs pour les marchandises, qui est le prix auquel les marchandises sont vendues ou auquel il est convenu de les vendre à l'importateur canadien, sera corrigé par la déduction des montants suivants:

- (a) les frais, charges et dépenses encourus par l'exportateur dans la préparation des marchandises en vue de l'expédition au Canada, qui s'ajoutent aux frais, charges et dépenses généralement encourus sur des ventes effectuées en vue de la consommation intérieure, et
- (b) tous autres frais, charges et dépenses, y compris les taxes et les droits de douane canadiens, le cas échéant, par l'exportateur ou pour le compte de ce dernier, et résultant ou provenant de leur exportation ou survenant après l'expédition des marchandises depuis le lieu

where applicable, the place substituted therefor in determining the normal value by virtue of paragraph 9(2)(a) of the Act.

(2) In determining the export price of any goods pursuant to subsection 10(1) of the Act the importers' purchase price for the goods, being the price at which the goods have been purchased or agreed to be purchased by the importer, shall be adjusted by deducting therefrom the following amounts:

(a) the costs, charges and expenses incurred by the exporter in preparing the goods for shipment to Canada that are additional to those costs, charges and expenses generally incurred on sales for home consumption; and

(b) all other costs, charges and expenses, including Canadian customs duties and taxes if applicable, by or for the account of the exporter resulting from or arising from the exportation or after the shipment of the goods from the place described in paragraph 9(1)(d) of the Act or, where applicable, the place substituted therefor in determining the normal value by virtue of paragraph 9(2)(a) of the Act.

décrit à l'alinéa d) du paragraphe (1) de l'article 9 de la loi ou, le cas échéant, depuis le lieu qui y est substitué dans la détermination de la valeur normale en vertu de l'alinéa a) du paragraphe (2) de l'article 9 de la loi.

(2) Pour déterminer le prix à l'exportation de toutes marchandises, conformément au paragraphe (1) de l'article 10 de la loi, le prix d'achat des importateurs pour les marchandises, qui est le prix auquel les marchandises ont été achetées ou le prix convenu, pour leur achat, par l'importateur, sera corrigé par la déduction des montants suivants:

(a) les frais, charges et dépenses encourus par l'exportateur dans la préparation des marchandises en vue de l'expédition au Canada, qui s'ajoutent aux frais, charges et dépenses

généralement encourus dans le cas de ventes en vue de la consommation intérieure, et
(b) tous autres frais, charges et dépenses, y compris les taxes et les droits de douane canadiens, le cas échéant, encourus par l'exportateur ou pour le compte de ce dernier et résultant ou provenant de l'exportation ou survenant après l'expédition de ces marchandises du lieu écrit à l'alinéa d) du paragraphe (1) de l'article 9 de la loi ou, le cas échéant, du lieu qui y est substitué afin de déterminer la valeur normale en vertu de l'alinéa a) du paragraphe (2) de l'article 9 de la loi.

19. (1) In determining, pursuant to paragraph 10(2)(c) of the Act, the export price of any goods that were sold by the importer thereof under the conditions described in that paragraph, the allowance referred to in that paragraph shall be an amount equal to the aggregate of the following:

- (a) the profit on the sale of the goods by the importer;
- (b) the charges on the goods resulting from or arising after their shipment from the place described in paragraph 9(1)(d) of the Act or, where applicable, the place substituted therefor in determining the normal value by virtue of paragraph 9(2)(a) of the Act; and
- (c) all costs incurred by the importer with respect to the goods from the time of their importation into Canada, including the costs relating thereto, until the time of the sale of the goods.

(2) For the purposes of paragraph 10(2)(d) of the Act, the export price of any goods imported to be assembled, packaged or further manufactured in Canada or to be entered into the course of manufacture or production in Canada shall be the price of the goods into which the imported goods are so assembled, packaged, produced or further manufactured when sold between

19. (1) Pour déterminer, conformément à l'alinéa c) du paragraphe (2) de l'article 10 de la loi, le prix à l'exportation de toutes marchandises qui ont été vendues par l'importateur desdites marchandises aux conditions décrites dans cet alinéa, le dégrèvement visé à cet alinéa sera un montant égal à l'ensemble:

- (a) du bénéfice réalisé sur la vente des marchandises par l'importateur,
- (b) des frais sur les marchandises résultant de leur expédition du lieu décrit à l'alinéa d) du paragraphe (1) de l'article 9 de la loi ou consécutives à cette expédition, ou, le cas échéant, du lieu qui y est substitué afin de déterminer la valeur normale en vertu de l'alinéa a) du paragraphe (2) de l'article 9 de la loi, et
- (c) de tous les frais encourus par l'importateur à l'égard des marchandises, à compter du moment de leur importation au Canada, y compris les frais y afférents, jusqu'au moment de la vente des marchandises.

(2) Aux fins de l'alinéa 10(2)d) de la loi, le prix à l'exportation de toutes marchandises importées et devant être assemblées, emballées ou subir un complément d'ouvrage au Canada, ou devant entrer dans la fabrication ou la production au Canada, doit être le prix des marchandises dans la fabrication ou la production desquelles entrent les marchandises importées ainsi assemblées,

persons who are not associated at the time of the sale, less an amount equal to the aggregate of

(a) the profit incurred on the sale of the said goods into which the imported goods were assembled, packaged, produced or further manufactured;

(b) the administrative, selling and all other costs incurred in selling the goods described in paragraph (a);

(c) the costs that are attributable or in any manner related to the assembly, packaging, production or further manufacture in Canada of the goods described in paragraph (a);

(d) the costs, charges and expenses incurred in preparing the imported goods for shipment to Canada that are additional to those costs, charges and expenses generally incurred on sales for home consumption; and

(e) all other costs, charges and expenses, including Canadian customs duties and taxes, if applicable, resulting from or arising from the exportation, or after the shipment of the goods from

(i) the place described in paragraph 9(1)(d) of the Act, or

(ii) the place substituted therefor in determining the normal value by virtue of

emballées, produites ou ayant subi un complément d'ouvroison, lorsqu'une personne les vend à une autre personne qui ne lui est pas associée à la date de la vente, moins un montant égal à la somme

(a) des bénéfices réalisés par la vente desdites marchandises dans la fabrication ou la production desquelles entrent les articles importés qui ont été assemblés, emballés, produits ou soumis à un complément d'ouvroison;

(b) des frais d'administration et de vente, ainsi que de tous les autres frais engagés dans la vente des marchandises désignées à l'alinéa a);

(c) des frais attribuables ou afférents de quelque façon à l'assemblage, à l'emballage, à la production ou au complément d'ouvroison, au Canada, des marchandises désignées à l'alinéa a);

(d) des coûts, frais et dépenses subis dans la préparation des marchandises importées pour expédition au Canada et qui s'ajoutent aux coûts, frais et dépenses généralement subis à l'occasion de ventes effectuées en vue de la consommation intérieure; et

(e) de tous les autres coûts, frais et dépenses, y compris les droits de douane et les taxes du Canada, s'il en est, occasionnés par l'exportation des marchandises ou à la suite de leur expédition

(i) du lieu décrit à l'alinéa 9(1)d) de la loi, ou

INSUFFICIENT INFORMATION
ANTI-DUMPING ACT

11. Where, in the opinion of the Deputy Minister, sufficient information has not been furnished or is not available to enable the determination of normal value or export price under section 9 or 10, the normal value or export price, as the case may be, shall be determined in such manner as the Minister prescribes. 1968-69, c. 10, s. 11.

RENSEIGNEMENTS INSUFFISANTS
LOI ANTIDUMPING

11. Lorsque, de l'avis du sous-ministre, des renseignements suffisants n'ont pas été fournis ou ne sont pas disponibles pour permettre de déterminer la valeur normale ou le prix à l'exportation en vertu de l'article 9 ou 10, la valeur normale ou le prix à l'exportation, selon le cas, sont déterminés de la manière que prescrit le Ministre. 1968-69, c. 10, art. 11.

ALLOWANCES TO NORMAL VALUE ALLOWED UNDER THE
ANTI-DUMPING ACT

1. Quantity Adjustments -

(a) A quantity discount granted to the importer is deducted from the normal value provided it is neither greater in percentage nor more favourable in terms than that granted by the exporter in the home market or provided the Deputy Minister is satisfied it is warranted based upon savings directly attributable to the quantities involved.

(b) At the discretion of the Deputy Minister, the department may make an upward adjustment to reflect the price for which the smaller quantity purchased by the importer would be sold for home consumption.

2. Differences in Characteristics of the Goods - Since Canada's definition of "like goods" includes goods with closely resembling characteristics, differences in quality, structure, design, material, etc. may exist between the goods sold to the Canadian importer and the like goods sold domestically. In such instances, the normal value of the goods is adjusted, usually on the basis of the cost difference between the domestic and exported goods plus the gross markup related to this cost difference.

3. Deferred Discounts - A discount is deemed to be deferred when the terms of sale between the parties concerned stipulate that the discount is contingent upon some future happening and is, therefore, granted to the purchaser only after the sale has occurred. Under Canadian regulations, a deduction is made from normal value for any deferred discount granted to the importer provided it is neither greater in percentage nor more favourable in terms than that generally granted in the domestic market and provided the Deputy Minister is assured that the exporter will comply with the terms and conditions of the discount.

4. Cash Discounts - Cash discounts are deductions which are allowed to customers to induce them to pay their bills within a certain time. A cash discount is allowed from normal value equal to that given to the importer provided it is neither greater in percentage nor more favourable in terms than that generally granted by the exporter in his domestic market and provided the Deputy Minister is satisfied that the importer has or will earn it.

5. Freight Allowance - Since normal value is to be established at point of direct shipment to Canada, a deduction is allowed for freight when the goods are sold domestically on a common-delivered basis. The allowance is the lesser of the average cost of freight in the home market or the actual cost of freight incurred on shipments to the Canadian importers. Although the goods must be sold on a common-delivered basis to comply with the regulations, other types of freight such as delivered or f.o.b. are allowed because this affects price comparability under Article 2(f) of the Code.

6. Trade Level Difference - Under both the Anti-dumping Code and Canadian legislation, officials are required to use domestic sales to the same trade level as the Canadian importer. When, however, the trade level of the importer does not exist in the domestic market, officials refer to sales of like goods to the nearest and subsequent level. A deduction is then granted from normal value which represents the cost for sales functions that would not have been incurred had the sale been made to the trade level of the importer. The calculation of this allowance involves identifying those direct selling functions (e.g. salesmen's salaries, expenses, advertising, promotions) which the exporter performs in the home market and the importer assumes on sales in Canada, comparing the relative cost in each market and allowing the lower of the two. The main provision is that the exporter must not perform the function on sales to Canada or on behalf of the importer in Canada.

7. Rebates of Internal Taxes - A deduction is made from normal value for any taxes and duties levied on the sale of like goods (including the components incorporated therein) when destined for home consumption that are not borne by the goods sold to the Canadian importer. These rebates are allowed to the extent that they do not exceed the actual duties and taxes paid.

8. Credit Terms - When computing normal value, the value of interest payments is to be added to the purchase price. The interest rate used is determined on a case-by-case basis but the average rate of interest prevailing in the domestic market on the date of sale appears to be the most logical approach. This is intended to counteract the practice of certain foreign governments granting loans to customers in other countries, including Canada, at lower interest rates than are normally applied in the lending country.

9. Exchange Rate - Although the selection of the exchange rate to be used with respect to a particular shipment is not an allowance per se, it is one factor affecting price comparability. The exchange rate used is the official rate on the date of sale in order that any exchange fluctuations between that date and the date of entry into Canada do not affect price comparability.

UNITED STATES

Acceptance of Price Undertakings

The acceptance of price assurances (undertakings) as a basis for terminating or suspending antidumping actions is not explicitly provided for in the U.S. Antidumping Act. Sections 201(b)(1)(C) and 201(b)(3) of the Act merely indicate that the Secretary of the Treasury can "discontinue" an investigation without specifying the basis therefor. Under authority of section 407 of the Act, which directs the Secretary to adopt regulations necessary for the enforcement of the Act, Section 153.33 of the Customs Regulations has been enacted. This regulation details the role of price assurances in determining whether an investigation may be discontinued with regard to one or more manufacturers, producers or exporters.

The term "discontinuance" refers to the procedure under which antidumping investigations are suspended as to individual foreign manufacturers, producers or exporters. If after "an appropriate period of time" (which Section 153.33(h) of the Customs Regulations states is generally two years) it is determined that the foreign firm has abided by the terms on which the discontinuance was granted, the investigation will be "terminated" (formally closed) as to that firm.

Section 153.33(a) of the Customs Regulations specifies the three grounds on which a discontinuance can be granted: (1) minimal dumping margins coupled with price revisions eliminating present sales at less than fair value and price assurances that there will be no such sales in the future,*/ (2) termination of sales to the U.S. and assurances that such sales will not be resumed, and (3) "other circumstances on the basis of which it may no longer be appropriate to continue an antidumping investigation. . . ."

*/ Where all examined exports of a particular foreign firm disclose no sales at less than fair value, the Secretary can "exclude" such firm from determinations under the Act. (Section 153.38 of the Customs Regulations).

Price assurances are involved in one of the three grounds on which a discontinuance can be granted. Section 153.33(a)(1) of the Customs Regulations permits discontinuance where:

"The margins of dumping involved are minimal in relation to the volume of exports of the merchandise in question, price revisions have been made which eliminate any likelihood of present sales at less than fair value, and assurances have been received which eliminate any likelihood of sales at less than fair value in the future. . ."
(Section 153.33(a)(1) of the Customs Regulations). (Emphasis added).

The prerequisite of "minimal" dumping margins in relation to volume of exports generally has been interpreted to mean margins of 1% or less on a weighted-average basis of all sales by a manufacturer, producer or exporter of the product under investigation.*

Prior to 1970, the Treasury Department's policy with regard to the acceptance of price assurances was much more broad, and assurances generally were accepted when offered regardless of the size of the dumping margins. This policy was changed in May, 1970, to the present practice restricting acceptable price assurances to situations in which only minimal dumping margins were found. The change was based on the view that the old policy allowed exporters and importers to be unmindful of the Act and its possible consequences until after they had achieved meaningful import penetration and had a significant adverse impact upon a domestic industry. The belated offer of price assurances permitting escape from the consequences of an affirmative determination and possible dumping finding encouraged "one free bite" at the market. The present policy is designed to encourage exporters to take the law into account at the time they make initial pricing decisions. If they fail to do so, even if they revise prices so as to avoid actual liability for dumping duties, they run the risk of becoming subject to the discipline of a dumping finding for several years.

*This should be distinguished from a situation in which the dumping margins were so small as to be de minimis legally (e.g., .01% ad valorem), in which case a negative determination would be issued, equivalent to a finding that there were no sales at less than fair value.

Under the present policy, for example, in the Determination of Sales at Less than Fair Value in Polyvinyl Chloride Sheet and Film from the Republic of China, 43 Fed. Reg. 2254 (1978), there was a Final Discontinuance as to China Gulf Plastics based on weighted-average margins of 0.22%; and in the Determination of Sales at Less than Fair Value in Pressure Sensitive Plastic Tape from West Germany, 42 Fed. Reg. 29586 (1977), there was a discontinuance as to Nopi GmbH and Beiersdorf A.G., based on weighted-average margins of 0.81% and 0.36%, respectively. However, this policy is presently being examined with the thought of increasing the one percent criterion for "minimal" in certain circumstances, specifically in complex cases requiring substantial adjustments for varied circumstances of sale, levels of trade, quantity discounts, and differences in merchandise. The standard was so relaxed, for example, in the Tentative Discontinuance as to Shirasaki Tape Co., Ltd., in Impression Fabric of Manmade Fiber from Japan, 42 Fed. Reg. 47908 (1977), where a 1.15% weighted-average margin was deemed "minimal," and assurances were then accepted.

Section 153.33(c) of the Customs Regulations specifies that price assurances shall be in "substantially the following form:"

"I hereby certify that I am (an officer/attorney in-fact) of (name of foreign manufacturer, producer or exporter) and am authorized, on behalf of (name of foreign manufacturer, producer or exporter) to give assurances that...:

"1. All future sales of (commodity) by (name of foreign manufacturer, producer or exporter) for exportation to the United States shall be made at prices which are not less than fair value within the meaning of the Antidumping Act, 1921, as amended (19 U.S.C. 160, et seq.) and that (name of foreign manufacturer, producer or exporter) shall make a report to the Commissioner of Customs which shall contain or be accompanied by the information required by section 153.33(f) of the Customs Regulations (19CFR 153.33(f)) for such period of time and at such intervals as the Secretary may deem appropriate and shall cooperate

in allowing whatever verification of such information is deemed necessary by the Secretary;. . .

(Officer or Attorney-in-fact)"

Such assurances must be received from each manufacturer, producer or exporter that wishes to be considered for discontinuance. Although section 153.33(a) of the Customs Regulations permits the Secretary to discontinue "[w]henver... during the course of an investigation" he is satisfied that discontinuance is warranted, Treasury, as a matter of policy, has not accepted price assurances and discontinued an investigation as to any particular manufacturer, producer or exporter until after a full fair value investigation has been conducted and weighted-average margins of sales at less than fair value are calculated for any manufacturer involved in the investigation and seeking a discontinuance. If a full investigation were not conducted, there could be no assurance that the calculated margins were indeed "minimal" and that the price revision had eliminated them.

The decision whether to accept price assurances and discontinue an investigation as to one or more manufacturers, producers or exporters is discretionary. Section 153.33(a) of the Customs Regulations states that the Secretary "may publish" a notice of discontinuance whenever the previously discussed conditions are met. Although price assurances uniformly have been accepted in situations where dumping margins are minimal, there could be situations, such as when price assurances given in a previous investigation were violated, when they might not be.

When a discontinuance is granted based on "minimal" margins and assurances of no future sales at less than fair value, the foreign manufacturer, producer or exporter is required by section 153.33(f) of the Customs Regulations to file periodic reports with the Commissioner of Customs. These reports generally are required annually. The following information is required in such reports:

"(1) Prices at, and the terms and conditions on which, the merchandise is being sold for export to the United States and in the applicable foreign market (or information regarding constructed value as set forth in section 206 of the Act" (19 U.S.C. 165));

"(2) Published price lists, if any;

"(3) Information regarding discounts, quantities involved on a per sale basis, shipping charges, packing costs, and other circumstances of sales in the two markets under consideration;

"(4) Information regarding differences in cost of manufacture where similar merchandise is compared pursuant to \$53.11; and

"(5) Such other information which the Secretary deems appropriate."

The undertaking to file such reports is also spelled out in the model price assurance contained in section 153.33(c) of the Customs Regulations and the model includes an agreement to "cooperate in allowing whatever verification of such information is deemed necessary by the Secretary."

Under section 153.33(g) of the Customs Regulations, a discontinued investigation may be reopened whenever "there are reasonable grounds to believe or suspect that there are or are likely to be sales to the United States at less than fair value..." In Railway Track Maintenance Equipment from Austria, for example, an investigation discontinued in 1972 was reopened in 1976 based on information supplied by the U.S. industry that sales at less than fair value were nevertheless occurring. 41 Fed. Reg. 47970 (1976). In such cases, the regulation states that a Withholding of Appraisement Notice should be published (for six months if properly requested prior to the discontinuance and otherwise for three months), and the normal procedures and time limits otherwise applicable to any antidumping proceeding are applied from that stage forward. However, because the information of LTFV sales in the Austrian case was externally obtained, the Department treated the investigation as though it was a new proceeding and issued its Tentative and Final Determinations (42 Fed. Reg. 23672 and 41339 (1977)) in the time periods applicable to new proceedings.

The Secretary may consider terminating a discontinued investigation either upon his own initiative or upon request by a foreign manufacturer, producer or exporter, or a U.S. importer, whenever an appropriate period of time (usually two years) has elapsed since the issuance of a final notice of discontinuance of an antidumping investigation, and no violations of price assurances have been found. (Section 153.33(h) of the Customs Regulations). A notice of tentative

termination will be published in the Federal Register, and interested parties will have an opportunity to present views prior to a final determination on whether to terminate. An example is found in Photo Albums from Canada, where a tentative termination notice was published in 1977 because there had been no sales at less than fair value subsequent to the final discontinuance in 1974. 42 Fed. Reg. 20357 (1977).

Adjustments for Allowances Relating to Price Comparability

The United States Antidumping Act recognizes that differences may exist in the circumstances under which identical products are sold in the home markets and in the United States, as well as in the products themselves. It provides that the "foreign market value" should be adjusted to reflect these differences. However, sections 202(b)(2) and 202(c)(2) of the Act do not provide any definition of the term "circumstance of sale." Section 202(b) of the Act provides:

"In determining the foreign market value for the purpose of subsection (a), if it is established to the satisfaction of the Secretary or his delegate that the amount of any difference between the purchase price [i.e. price for sale to the U.S.] and the foreign market value (or that the fact that the purchase price is the same as the foreign market value) is wholly or partly due to --

"(1) the fact that the wholesale quantities, in which such or similar merchandise is sold or, in the absence of sales, offered for sale for exportation to the United States in the ordinary course of trade, are less or are greater than the wholesale quantities in which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation in the ordinary course of trade for home consumption (or, if not so sold or offered for sale for home consumption, then for exportation to countries other than the United States),

"(2) other differences in circumstances of sale, or

"(3) the fact that merchandise described in subdivision (B) or (C) of section 212(3) [merchandise not identical to the merchandise sold to the U.S.] is used in determining foreign market value,

"then due allowance shall be made therefor."

A. Circumstances of Sale

The criteria used in making adjustments for circumstances of sale are contained in section 153.10 of the Customs Regulations. Generally, only those circumstances which bear a direct relationship to the sales which are under consideration will be considered for adjustment. This has been taken to mean only those expenses which are incurred because a particular sale was made. Those expenses incurred prior to the sale, or which would have been incurred whether or not any particular sale was made, will not be allowed. This approach roughly follows a characterization of allowable expenses as those which are variable, and of non-allowable expenses as those which are fixed. For example, in the investigation of Ski Bindings from Switzerland, 41 F.R. 22609 (1976), adjustments were allowed for certain advertising and promotional expenses incurred for the benefit of retail purchasers and directly related to the sales under consideration. Adjustments were not allowed for certain financing expenses in connection with bad debts for late payments because the debts were not directly related to the sales under consideration.

There is frequently a divergence of opinion concerning the types of expenses that are variable and those which are fixed. Our approach has been to look first at the functional nature of the circumstance of sale which is claimed. If the function or service would not have been performed unless the particular sale was made, it is potentially adjustable. We then look to the quantification of the adjustment. Those elements of the adjustment which represent continuing expenses are not allowed. In this category would be such items as rent, utilities, office supplies, salaries and wages paid to company employees, and fringe benefits. In the investigation of Polymethyl Methacrylate from Japan, 41 F.R. 12233 (1976), the disallowance of several claimed adjustments illustrates the application of this principle. Warehousing costs for inventory purposes were not an allowable adjustment, since these expenses were borne regardless of whether particular sales were made. Salesmen's salaries, unlike commissions, were also not an allowable adjustment to home market price, since they also were paid by the company irrespective of whether any particular sales were made. On the other hand, warehousing costs may have been allowable in the case of Ice Hockey Sticks from Finland, 41 F.R. 65345 (1978), because it was claimed the warehouse was needed solely for sticks sold to home market buyers, while exported sticks were shipped immediately to the U.S. However, no reasonable verification of

the claimed expenses incurred for these home market warehousing expenses could be established, and therefore the adjustment was disallowed.

Expenses which have been incurred only because a particular sale or group of sales was made will be allowed. These would include paid transportation costs, cost of work contracted to outside parties, lodging expenses for employees away from their place of business, and direct materials used in the activity for which adjustment has been claimed. In the investigation of Acrylic Sheet from Japan, 41 F.R. 32294 (1976), these expenses were allowed as adjustments, since they were incurred in connection with and because of specific sales. Types of adjustments which are potentially allowable, by virtue of having been incurred in connection with particular sales, are differences in credit terms and interest on accounts receivable (Stainless Steel Pipe and Tubing from Japan, 43 F.R. 17439 (1978)). On the other hand, expenses which do not relate to particular sales are not eligible for adjustment -- e.g., general bad debts expenses (Canned Bartlett Pears from Australia, 38 F.R. 6239 (1973)) and interest on inventory (Wool and Polyester Wool/Worsted Fabric from Japan, 37 F.R. 16431 (1972)).

Other allowable adjustments include guarantees and provision for technical assistance and servicing. In the investigation of Color Television Picture Tubes from Japan, 37 F.R. 20188 (1972), warranties against defects were provided in the home market but not in the U.S. Adjustments were accordingly made. Differences in commissions are also considered and allowed. In the investigation of Stainless Steel Sheet from Japan, 37 F.R. 10750 (1972), commissions paid to unrelated purchasers were allowed, but commissions to related trading companies were not allowed, on the theory that the payment did not reflect an arms-length transaction, and was not a legitimate cost; the manufacturer merely transferred a certain sum from one portion of its business to another. Interest on work in process (Stainless Steel Pipe and Tubing from Japan, 43 F.R. 17439 (1978)), and on raw materials (Stainless Steel Sheet from Japan, 37 F.R. 17050 (1972)) are not allowable as adjustments because they are not related to the sale of the merchandise as the statute prescribes.

An exception to the general rule that no adjustment is made for expenses incurred prior to sales concerns advertising. Advertising which is incurred for the benefit of the purchaser, rather than the seller, is allowable. An example of this situation would be a manufacturer directing advertising to

retail purchasers, although all sales are made to wholesalers or distributors. This advertising must be directly product-related and clearly directed at purchasers who do not buy directly from the manufacturer. In the investigation of Wool and Polyester Wool/Worsted Fabric from Japan, 37 F.R. 16413 (1972), most advertising costs claimed were for media displays and trade journals aimed at the wholesalers, i.e., the manufacturers' immediate customers, and were therefore not allowable. But costs for advertising directed at the ultimate consumer, such as labels, were allowed as an adjustment.

A further exception to the rule denying adjustments for expenses incurred prior to the sale relates to overhead expenses such as general selling expenses in certain limited situations. The first situation in which general selling expenses would be allowed is where a commission is paid on sales in one of the markets under consideration but not in the other. In that case selling expenses incurred in the market where no commission is paid may be adjusted for, up to the amount of the commission paid in the other market under consideration. (See Stainless Steel Sheet from Japan, 37 F.R. 10750 (1972) and Northern Bleached Hardwood Kraft Pulp from Canada, 38 F.R. 88 (1973)).

The second situation in which general selling expenses may be adjusted for is when the foreign market value is to be compared to the "exporter's sales price" in the United States (when exporter and importer are related parties). In such a situation, general selling expenses incurred in the United States will be deducted from home market prices. However, when such a deduction is made for selling costs in the export (i.e., U.S.) market, selling expenses are deducted from the home market price only up to the amount actually incurred in the United States. In Electronic Ceramic Packages and Parts thereof from Japan, 38 F.R. 1991 (1973) and Aluminum Ingot from Canada, 38 F.R. 13036 (1973), among others, deductions were made in the home market for selling expenses as an offset to those allowed in the ESP computation.

As a practical matter, these adjustments for circumstances of sale are quantified based on the cost to the seller. Although the Customs Regulations provide that, where appropriate, the effect of these differences upon the market value of the merchandise will be considered, this is rarely practical. As all the merchandise in any particular market is uniformly affected by the various circumstances of sale, it is not usually possible to isolate the effect on market value of these items. For example, the fact that product warranties may be available in

one market but not the other may have a decided impact upon the market value of the merchandise, but it would be virtually impossible to distinguish or separate this impact from any element of genuine price discrimination between the two markets. Accordingly, any adjustment to price is based upon the cost of warranties to the manufacturer.

In all cases, it is incumbent upon any manufacturer seeking such adjustments to claim them. Further, all claimed adjustments must be adequately documented and verified by U.S. Customs Service personnel before they will be allowed. Very frequently, claimed adjustments for differences in circumstances of sale, which fall into the category of being allowable, cannot be allowed because of a failure of adequate proof.

Finally, in establishing standards for circumstances of sale adjustments, the Department considers it important that any standards be sufficiently clear and concise as to be readily administrable and to enable exporters and importers consciously to make pricing decisions in such a manner as to avoid possible dumping margins.

B. Adjustments for Differences in the Merchandise

As is the case with the circumstance of sale provision of the Act, no guidance is given relative to the method of adjustment. Section 153.11 of the Customs Regulations outlines current policy in this area.

The Act does provide that comparisons with the product exported to the U.S. be with "such or similar merchandise" sold (in the usual case) in the home market of the exporting country (Sec. 205(a) of the Act). The Act (Sec. 212(3)) defines "such or similar merchandise" in the following manner:

"The term "such or similar merchandise" means merchandise in the first of the following categories in respect of which a determination for the purposes of this title can be satisfactorily made:

"(A) The merchandise under consideration and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person, as the merchandise under consideration.

"(B) Merchandise (i) produced in the same country and by the same person as the merchandise under consideration, (ii) like the merchandise under consideration in component material or materials and the purposes for which used, and (iii) approximately equal in commercial value to the merchandise under consideration.

"(C) Merchandise (i) produced in the same country and by the same person and of the same general class or kind as the merchandise under consideration, (ii) like the merchandise under consideration in the purposes for which used, and (iii) which the Secretary or his delegate determines may reasonably be compared for the purposes of this title with the merchandise under consideration."

Accordingly, Treasury must first ascertain whether identical merchandise is sold in the foreign home market and, if not, determine, in accordance with the statutory standards which merchandise in the foreign home market is most similar to the exported merchandise. Where the products being investigated are complex, produced in numerous different versions, and differ significantly in different markets, the process of selecting the most comparable merchandise for comparison purposes is extremely difficult (as has been the case in administering the dumping finding on Television Receiving Sets from Japan (36 F.R. 4597 (1971))).

If the products sold in the foreign home market are so dissimilar as to make meaningful comparisons impossible (or if there are no or an insufficient number of home market sales), then the comparison is with the price of "such or similar merchandise" sold to third countries (sec. 205(a) of the Act). In the absence of third country sales of "such or similar merchandise," the comparison must be made with the "constructed value" of the merchandise sold to the U.S., as that term is defined in section 206 of the Act.

In making adjustment for differences between merchandise that is only "similar", present policy requires that such adjustments will, whenever possible, be based on differences in the cost of manufacture, if it is established to the satisfaction of the Secretary that the amount of any price differential is wholly or partly due to such differences. When this course of action is not possible, then the effect of any differences in the merchandise upon the market value of the merchandise may be considered.

As a normal rule, it is difficult to predicate an adjustment for differences in the merchandise upon differences in value, rather than cost, since it typically is difficult to find a reliable measure of value for the differences which could not, at the same time, be a disguise for dumping margins. For example, in the 1976 investigation of automobiles from West Germany, it was claimed that no addition to home market price should be made for the cost of various items of pollution control and safety equipment mandated for exports to the U.S., but not required for the European market. This argument was premised on the assertion that such items had no market value in Europe. However, since such equipment was a meaningful cost for manufacturers selling to the U.S. market, it was considered unrealistic to ignore such costs simply because of market value considerations in the home market. There are exceptions, however, and in the same automobile investigation (and companion investigations) adjustments for different optional equipment common in one market and not the other (but available in both) were made on the basis of list price for such options (market value), rather than cost of manufacture.

In determining differences in the cost of manufacture, policy has, over the years, required that only direct material costs and direct labor costs be considered as proper factors for adjustment. Recently, this policy has been amended to include directly related factory overhead expenses in the consideration of differences in the cost of manufacture. In the pending investigation of Motorcycles from Japan, 43 F.R. 17900 (1978), factory overhead expenses applicable to differences in the cost of manufacturing "similar" motorcycles sold, respectively, to the U.S. and in the home market are being considered.

Annex A

Summary of Cost Definitions

Direct Material - The cost of those materials which become an intergral part of the specific product and those materials which are consumed in the ordinary course of manufacturing and can be identified or associated with particular units or groups of units of that product.

Direct Labor - Direct labor costs include the cost of labor which can be identified or associated with particular units or groups of units of a specific product.

Factory Overhead - Production overhead or manufacturing expense - all costs which are incident to and necessary for production or manufacturing operations or processes other than direct production costs. The production expense is classified in two basic types:

- a) Variable overhead expense - generally those costs which do vary significantly with changes in the amount of goods produced at any given level of production capacity.
- b) fixed overhead expense - costs related to the period of operation and do not vary with the amount of goods produced at any given level of operation.

Regional Injury

Since 1954, what is now called the "United States International Trade Commission" makes the injury determinations in antidumping investigations in which the Secretary of the Treasury has determined that there are, or are likely to be, sales at less than fair value. (Section 201(a) of the Act.) Regional injury considerations have arisen in two contexts--(1) defining the scope of a domestic industry injured or likely to be injured by articles imported at less-than-fair value (LTFV) and (2) analyzing the competition between domestic products and those imported at LTFV.

In the first investigation conducted by the Commission in which it reached an affirmative "injury" determination, it held that an industry in the United States injured by the LTFV imports consisted of the domestic producers in the State of California. 1/ The determination was reached on the basis of the impact on the producers in an isolated market area of the imports of a product heavy in weight and expensive to ship. This rationale for finding a regional industry, from the existence of the traditional marketing patterns of producers supplying limited geographic areas, was followed in a series of investigations concerning cement imported at LTFV. 2/ The in-land transportation costs resulting from the weight and low value of the cement similarly isolated marketing areas of the domestic cement producers.

1/ Cast-Iron Soil Pipe from the United Kingdom, 20 Fed. Reg. 8269 (1955). This determination was challenged in the Customs Court and the court held that the Commission had the discretion to make determinations on the basis of separate regional industries. Ellis K. Orlovitz Co. v. U.S., 200 F. Supp. 302 (1961). On further appeal to the Court of Customs and Patent Appeals, however, the C.C.P.A. equated the determination of injury to a regional industry with a determination of the likelihood of injury to a national industry. Ellis K. Orlovitz Co. v. U.S., 50 C.C.P.A. 36, 42 (1963).

2/ Portland Cement from the Dominican Republic, 27 Fed. Reg. 9227 (1962); Portland Grey Cement from Portugal, 26 Fed. Reg. 10476 (1961); Portland Cement from Belgium, 26 Fed. Reg. 6511 (1961); and Portland Cement from Sweden, 26 Fed. Reg. 3427 (1961). Although the affirmative

Beginning in 1964, the Commission adopted a practice of analyzing the competitive impact of LTFV imports in defined regional markets, whenever appropriate, in addition to determining the statistical impact of the LTFV imports on the aggregate production, shipments, etc. of all domestic producers. In other words, the Commission ceased defining industry in terms of regional producers but, as a part of its inquiring into injury or its likelihood, has studied, if possible, the competition afforded by LTFV imports in all of the major markets for the products under investigation. Thus, in those investigations in which the Commission has reached an affirmative determination, the Commissioners in their statements of reasons for affirmative determinations will indicate how the domestic industry was injured or why it is likely to be injured in terms of where in the marketplace such injury or the likelihood thereof is occurring.

The first investigation in which the principal regional markets were studied and the effect of LTFV imports in one market weighed in the determination of injury to an industry consisting of all domestic facilities producing the subject product was in the matter of Chromic Acid from Australia. ^{3/} Similar determinations were reached in investigations concerning steel products in the same year. ^{4/} There were also

determination in the Dominican Republic investigation was challenged, there was only an indirect challenge to the regional industry finding of the Commission. In Imbert Imports, Inc. v. United States, plaintiff unsuccessfully argued that an affirmative Commission determination on the basis of injury or likelihood thereof to one competitive market area could not legally result in the assessment of dumping duties on LTFV imports at ports in different market areas which were not found to have been injured. 314 F. Supp. 784 (Cust. Ct. 1970), aff'd, 331 F. Supp. 1400 (Cust. Ct. 1971), aff'd, 475 F. 2d 1189 (C.C.P.A. 1973).

^{3/} 29 Fed. Reg. 2919 (1964)

^{4/} Steel Reinforcing Bars from Canada, 29 Fed. Reg. 3405 (1964); and Carbon Steel Bars and Shapes from Canada, 29 Fed. Reg. 5341 (1964). The determinations in the investigations cited above were challenged and are awaiting disposition in the Customs Court. See Border

several investigations from 1967 through 1973 in which the Commission held that an industry in the United States was being or was likely to be injured in reliance on findings of injury in the major regional market areas supplied by major domestic producers. 5/

In summary, for the Commission adequately to consider the impact of LTFV imported articles on domestic industries, it must study the market place(s) in which the articles compete. Where a great deal of the output of domestic producers is sold in traditionally identifiable geographic regions and those marketing patterns are disrupted by LTFV imports, this effect is highly relevant to a determination as to whether an industry is or is likely to be injured. 6/ However, article I, section 8 of the U.S. Constitution states that ". . . all Duties, Imposts and Excises shall be uniform throughout the United States. . .," and accordingly the Customs Court and Court of Customs and Patent Appeals have held that dumping duties must be assessed on a uniform, country-wide basis. 7/ This constitutional

Brokerage v. United States, Customs Court No. R 65/10806-12169, and Atkins Kroll v. United States, Customs Court No. R 65/10840-12206, respectively.

5/ Expanded Metal of Base Metal from Japan, 38 Fed. Reg. 33819 (1973) (Western states); Elemental Sulfur from Canada, 38 Fed. Reg. 29655 (1973) (North Central region); Steel Wire Rope from Japan, 38 Fed. Reg. 25724 (1973) (Pacific Northwest, Pacific Southwest and South Central regions); Canned Bartlett Pears from Australia, 38 Fed. Reg. 6239 (1973) (Northeast and Mid-Atlantic regions); Elemental Sulfur from Mexico, 37 Fed. Reg. 9417 (1972) (Tampa, Florida, and East Coast markets); Asbestos Cement Pipe from Japan, 37 Fed. Reg. 9267 (1972) (West Coast market); Clear Sheet Glass and Clear Plate and Float Glass from Japan, 36 Fed. Reg. 7330 (1971) (West Coast and Southeast markets); Cast-Iron Soil Pipe from Poland, 32 Fed. Reg. 12925 (1967) (Los Angeles and Northeast markets).

6/ See Statement of Reasons of Chairman Minchew and Commissioner Alberger in Carbon Steel Plate from Japan, 43 Fed. Reg. 17410 (1978).

7/ Imbert Imports, Inc. v. United States, 331 F. Supp. 1400, 1405 (Cust. Ct. 1971), 475 F.2d 1189, 1192

requirement places a responsibility on the Commission to be confident that regional impacts have the proscribed injurious effect on an industry as a whole when considering the magnitude of regional injury attributable to LTFV imports. In other words, the requirements of U.S. law mandate that, in order to support an affirmative determination of injury, any regional injury must be so great as to clearly impact negatively on the overall national industry. Moreover, imports into a particular area of the country could not be excluded from the possible assessment of dumping duties merely because that area had not previously been adversely affected by imports at LTFV.

(C.C.P.A. 1973). See also Ellis K. Oriowitz Co. v. United States, 50 C.C.P.A. 36, 40-41 (1963).

Sales Below Cost of Producing

Section 205(b) of the U.S. Antidumping Act provides when there are "reasonable grounds to believe or suspect" that sales in the home market, or to third countries, have been made at prices that represent less than the cost of production, a determination shall be made with regard to possible sales below cost. If it is determined that sales at less than the cost of production have been made over "an extended period of time" and in "substantial quantities" and are not at prices which would permit "recovery of all costs within a reasonable period of time" in the normal course of trade, such sales will be disregarded in the determination of foreign market value. Whenever the remaining home market or third country sales, made at not less than the cost of production, are determined to be "an inadequate basis" for the determination of foreign market value, the Secretary shall determine that no foreign market value exists and constructed value (as detailed in section 206 of the Act) shall be used instead.

This provision was added to the Antidumping Act by the Trade Act of 1974. The reason was expressed in the Report of the Senate Committee on Finance (S. Rep. No. 93-1298, 93d Cong., 2d Sess., 173(1974)) as follows:

"The Committee is concerned that in the absence of such a provision, sales uniformly made at less than the cost of production could escape the purview of the Act, and thereby cause injury to United States industry with impunity."

An investigation regarding cost of production is undertaken whenever data regarding a foreign manufacturer's or producer's production costs submitted by a petitioner provides "reasonable grounds to believe or suspect" below cost sales as defined in the Act.

Customs currently requires that such data include at least one item from each of the four categories shown below:

1. Home Market Materials Cost
 - a. Compiled from actual invoices or price lists; or
 - b. Compiled from U.S. import statistics; or
 - c. Compiled from trade sources (magazines, association reports, commodity exchanges, government sources, etc.); or
 - d. Documented U.S. or third country costs, adjusted by wage-price indices.
2. Home Market Labor Cost
 - a. Statistical data on wage rates in the home market; or
 - b. Documented U.S. or third country cost, adjusted by wage-price indices; ^{±/} or
 - c. Documented man-hours from sources involved in similar production.^{*/}
3. Home Market Capital Costs
 - a. Based on similar experience; or
 - b. Based on public reports (annual reports, articles, etc.).
4. Home Market General Expenses
 - a. Based on similar experience; or
 - b. Based on reasonable estimates.

After the Secretary has determined that a cost of production investigation is warranted, a special questionnaire is sent by Customs to the affected foreign manufacturers or producers for the purpose of developing the cost data. In most cases the data requested includes the following:

1. Materials
 - a. all costs (including transportation, insurance, etc);
 - b. method of computation (e.g., actual cost, FIFO, LIFO, etc);
 - c. explanation of allocations;
 - d. full details on waste and scrap allowances;
 - e. full market value for materials supplied by a related party.
2. Cost of Fabrication
 - a. labor costs (including all fringe benefits);
 - b. costs of dies, molds, tooling, etc.;
 - c. costs of inspection and testing;
 - d. subcontracting costs.

^{*/} Where appropriate, documentation regarding U.S. or third country cost or man-hours from similar sources should also include adjustments for differing degrees of automation.

3. General Expenses

- a. depreciation;
- b. taxes;
- c. interest costs related to the manufacture or sale of the merchandise;
- d. research, development, design, engineering, and blueprint costs;
- e. other selling and overhead costs.

The scope of the questionnaire is in accordance with section 153.5 of the Customs Regulations, which states that

"The cost of production ordinarily will be computed on the basis of the actual cost of materials, labor and general expenses, excluding profit, or, if necessary, on the basis of the best evidence available."

In the absence of verified data from foreign manufacturers, the best information available will be used to determine the cost of production, in accordance with sections 153.5 and 153.31(a) of the Customs Regulations. In the past this has consisted of information contained in petitions and information available to Customs on average costs of other manufacturers in the same country. An example of use of the best information available occurred in the tentative determination on Carbon Steel Plate from Japan (the Gilmore case), contained in the Withholding of Appraisement Notice, 42 Fed. Reg. 54899 (1977). Since the foreign producers had not submitted cost data, Treasury used published financial reports of the Japanese producers and information submitted by petitioner to derive the cost of production.

Packing and shipping costs are not included in cost of production calculations. Other exclusions include costs of extraordinary events, interest not related to production or sale of the merchandise, dividends, and direct taxes.

All cost calculations must be in accordance with generally accepted accounting principles (GAAP), and where formulas are used to derive costs, they must be verified as well as in accordance with GAAP. The GAAP of the home market will apply unless it is found to distort the results unreasonably.

When the cost of production has been established, the Secretary must determine whether sales below cost have been made over an extended period of time and in substantial quantities, and whether such sales have been at prices which would not permit recovery of all costs within a reasonable period of time in the normal course of trade. The Report of the Senate Committee on Finance on the Trade Act of 1974 explains the rationale for these standards:

"These standards would not require the disregarding of below-cost sales in every instance, for under normal business practice in both foreign countries and the United States, it is frequently necessary to sell obsolete or end-of-model year merchandise at less than cost. Similarly, certain products, such as commercial aircraft, typically require large research and development costs which could not reasonably be recovered in the first year or two of sales. Thus, infrequent sales at less than cost, or sales at prices which will permit recovery of all costs based upon anticipated sales volume over a reasonable period of time would not be disregarded. However, the practice of systematically selling at prices which will not permit recovery of all costs would be covered by this amendment and such sales would accordingly be disregarded." (S. Rep. No. 93-1298, 93d Cong., 2d Sess. 173 (1974)).

To date no firm rules have been established to delimit the scope of "an extended period of time" and "in substantial quantities." As stated in the Senate Report, though, the important consideration is whether the below cost sales have been "infrequent" or "systematic."

For example, in calculating cost of production in the Gilmore case it was determined that fixed costs should be allocated to units of production in accordance with the industry's average capacity utilization over the approximate length of the business cycle in the Japanese steel industry (three years), rather than on the basis of the capacity utilization in the more limited one-year period being investigated. In doing this, a more reasonable judgment would be made as to whether the then-current prices would permit recovery of all costs in the near future. Only those

home market sales made at prices below the cost calculated on the above basis were disregarded in making fair value comparison. Obviously, the length of business cycles will vary from industry to industry, and even the use of the business cycle approach to the question of "recovery of all costs" may not be feasible in all cases, since a clearly established pattern of cycles, which permits reasonable inferences about future capacity utilization, may not exist as it did in Gilmore.

Finally, there is the question concerning the point at which remaining home market or third country sales (those remaining after below cost sales have been disregarded) provide "an inadequate basis" for a fair value determination, thus requiring use of constructed value. In Gilmore, the Determination of Sales at Less Than Fair Value, 43 Fed. Reg. 2033 (1978) stated that since at least 10% of all home market sales were not disregarded (i.e., were made above the cost of production), there was an adequate basis for establishing a foreign market value.