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Gilmore: An Antidumping Proceeding as Cost-Price Comparison

FRED A. RODRIGUEZ

In the usual dumping case, a producer sells his product abroad at prices lower than those at which the same product is sold in the domestic market (country of origin).¹ But dumping is also possible in other circumstances. The General Agreement on Tariffs and Trade (hereinafter GATT) and the Antidumping Code (hereinafter the Code)² recognize dumping where, in the absence of a domestic price, the price in the export market is lower than the price for a comparable product in a third country market.³ If neither a domestic nor a third country price is available, these international agreements provide that dumping occurs when the export market price is lower than the cost of production in the country of origin.⁴ United States law goes even further, providing that dumping may occur even though a domestic price is available and it is not higher than the export price.⁵

This article discusses the Treasury's application of this provision of United States law in the case concerning *Carbon Steel Plate from Japan*,⁶ instituted pursuant to a complaint filed on March 8, 1977, by the Oregon Steel Mills Division of Gilmore Steel Corporation (hereinafter *Gilmore*).⁷ Although this was not the first case⁸ to apply the cost of production (hereinafter COP) provision added by the Trade Act of 1974, it "represented the largest volume of trade [\$174 million in 1976] affected by the 1974 cost of production amendments. . . ."⁹

FACTUAL AND PROCEDURAL SUMMARY OF THE CASE

Before the Treasury Department

Gilmore Steel filed a complaint with the Customs Commissioner alleging that it had information that hot rolled carbon steel plate from

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Japan was being dumped in the United States market with dumping margins as high as \$80 per net ton.¹⁰ Those same producers, it was alleged, were selling similar steel in Japan at prices \$31 to \$72 per ton below COP. Because such sales did not permit recovery of all costs within a reasonable period of time in the normal course of trade, complainant asked that the Secretary of the Treasury (hereinafter the Secretary) disregard Japanese home market sales and use constructed value in calculating dumping margins in this case.¹¹ Gilmore further alleged that because of the dumping a domestic industry lost sales estimated at \$40 million during 1975 and 1976; that industry was defined as those facilities in the Pacific Northwest that produce the subject steel plate specifically, Gilmore Steel.¹²

Treasury decided to initiate a full investigation after a preliminary investigation indicated that “[t]he information received tends to indicate that the prices of the merchandise sold for exportation to the United States are *less than the constructed value* [emphasis added].”¹³ The decision to initiate the investigation was based solely on information furnished by Gilmore Steel in its complaint.¹⁴ Customs Regulations require that the complaint contain information as detailed as possible concerning the export price, injury to the domestic industry and the price in the home market.¹⁵ A complainant may also furnish information concerning constructed value though such information is required only when neither a home market price nor a third country price is available.¹⁶ Gilmore furnished cost of production data, and alleged dumping in violation of 19 U.S.C. § 164(b), which provides that the Secretary may use a constructed value as the comparison price when home market sales at a price greater than or equal to cost of production are so few as to be inadequate for determination of “foreign market value.”

Tentative Determination of Sales at LTFV and Withholding of Appraisalment

Treasury made an affirmative tentative determination of sales at LTFV,¹⁷ directing Customs to withhold appraisalment for the purpose of determining the proper duties on imports of the merchandise which was the subject of the complaint.¹⁸ Normally appraisalment is withheld for three months, but an importer and exporter concerned may request that the period be extended to six months.¹⁹ “The extension affords the exporters and importers an opportunity to present further information and argument to Treasury prior to the Secretary’s final determination, and if persuasive, may prevent a determination that the merchandise is being sold below fair value.”²⁰ Having received such a request (the Federal Register notice does not indicate from whom), Treasury announced that appraisalment would be withheld for six months, until April 6, 1978.²¹

The practical effect of withholding appraisalment may be to cut off imports of the subject merchandise. Without appraisalment an importer would not know exactly how much it was paying for the merchandise until imposition of dumping duties. Thus, the importer will be reluctant to purchase goods from the dumper. Nor may a foreign exporter, manufacturer, seller, or producer protect the importer against the eventual imposition of dumping duties by offering to reimburse the importer for any duties paid; dumping duties paid by the foreign exporter will be deducted from either the purchase price or the exporter's sales price.²² This is tantamount to paying the dumping duty twice. Of course, the foreign producer has the option of eliminating the dumping margins by raising its price, or by terminating United States sales until a final determination has been made.²³

As part of the section 160(b) phase of Treasury's LTFV determination,²⁴ standard questionnaires "designed to elicit information which will enable Customs officials in Washington, and ultimately the Treasury, to determine whether sales at less-than-fair value have taken place"²⁵ were sent to the Japanese steel producers under investigation requesting home market and export sales price information, as well as detailed cost data.²⁶ The investigation covered steel products manufactured by the five Japanese steel companies which together were responsible for 70 percent of the imports during the investigated period, October 1, 1976, to March 31, 1977.²⁷

While the Japanese companies furnished information regarding sales in the home market, they did not provide any data concerning sales to third countries²⁸ or actual cost of production. Based on the best information available²⁹ (information furnished by Gilmore Steel and from published financial reports of the investigated steel companies),³⁰ Treasury concluded that there were insufficient sales in the home market at or above the cost of production to form a basis for comparison. It therefore compared the United States price³¹ to the constructed value³² of the Japanese exports and tentatively determined that the Japanese firms were dumping the subject steel in the United States at weighted average margins of from 27 to 33 percent.³³

The respondents in *Gilmore* sought a hearing during the tentative determination in order to contest the substantiality of the claims and to raise conflicts between 19 U.S.C. § 164(b) and the GATT and its Antidumping Code.³⁴ No hearing was held because the Secretary determined that "the evidence of possible sales below cost of production was sufficiently reliable to warrant a further inquiry" and because "mere inquiry into whether sales in the home market fell within section 205(b) of the Act gave rise to no conflict with applicable provisions of the GATT or the International Dumping Code."³⁵

Final Determination

On November 16, 1977, after the Secretary's tentative determination of sales at LTFV, Treasury held an Antidumping Conference to permit discussion of its findings.³⁶ In addition to the complainant and the investigated steel companies, representatives for the American Iron and Steel Institute, Consumers Union and the United States Customs office were present. The ground rules for the conference eliminated any discussion of the issues of most interest to respondents: the alleged inadequacies in Treasury's preliminary investigation, the alleged inconsistency between the request for cost of production data and the Code, and the topic of injury. The Japanese steel producers therefore rested their presentation and stated that they would rely on their briefs.³⁷

Gilmore Steel, on the other hand, focused on two points. First, it took issue with respondents' claim that prices below average costs which occur during periods of slack demand in Japan should not be disregarded in determining foreign market value. It is exactly during such times of slack demand, Gilmore argued, that the Act should be invoked to prevent the use of dumping to export unemployment. Second, Gilmore argued that the late submittal by the Japanese producers of partial cost of production data should not be used as a pretense for delaying the proceedings. If Treasury could not verify the submitted data within the statutory time limits, it should rely on the information which was used to make the tentative determination.³⁸

Treasury then asked the parties to address three issues: (1) whether the Secretary had authority to extend the final determination period to six months as requested by the Japanese steel producers; (2) how to define certain statutory terms concerning the calculation of COP; and (3) which accounting principles should be applied in evaluating the fixed and variable costs of Japanese steel producers.³⁹

Both at and after the conference the parties submitted briefs to Treasury addressing the issues excluded and raised during the conference. Shortly before the conference, the Japanese steel producers also presented COP information to Treasury, requesting confidential treatment.⁴⁰ After the conference, nonconfidential versions of the earlier reports were also submitted and made available to Gilmore. The COP data submitted had been taken from financial statements filed by the Japanese companies with the Japanese Ministry of Finance Securities Bureau and prepared in accordance with cost accounting standards issued by the Ministry's Business Accounting Deliberation Council. (A sixty-page English translation of the standards, by Arthur Anderson and Company, accompanied the data.)

Before the Secretary's final determination, respondents requested that trading companies be excluded from the investigation because

the confidential reports demonstrated that they had not sold carbon steel plate below their cost of acquisition and because the trading companies were selling in the United States at a substantial profit.⁴¹

On January 6, 1978, the Secretary made a final determination of sales at LTFV. He found weighted margins of dumping of between 5.4 and 18.5 percent.⁴² However, the final determination did not merely confirm the tentative determination of sales at LTFV; the case had taken an interesting twist. For the final determination, imports were not compared to COP prices, because

[e]nough sales [10% of all sales during the investigated period] in the home market above the calculated cost of production occurred during the period of investigation to permit use of home market prices as the bases for determining "fair value."⁴³

Obviously, before the Secretary could make such a finding, it had been necessary to determine the cost of producing the investigated steel.

Information obtained by Treasury while developing the Trigger Price Mechanism (hereinafter TPM)⁴⁴ to monitor prices of imported steel mill products, the Secretary concluded, was the "best available evidence" of the cost of producing the subject steel plate. Calculation of COP for the TPM had been based on data submitted by the same investigated Japanese companies, which data had been corroborated by the staff of the Council on Wage and Price Stability. Since the Secretary did not have enough time to verify the information submitted by Japanese producers during the final determination phase, he could not rely on those data alone; but, where separate corroboration was available, the Secretary did not feel compelled to disregard the figures altogether.

To determine the final margins of dumping, Treasury first computed a single COP figure for all carbon steel plate for all the companies and then calculated the weighted average of all home market sale prices above that figure for each company (the calculations did not include home market sales below COP). Finally, the individual import sales of each company were compared to these averages to obtain the dumping margins. Treasury found no evidence of sales below the cost of acquisition by trading companies, so pricing behavior beyond the primary level of trade was not examined while calculating the dumping margins.

On the question of whether the final determination period could be extended to six months as requested by the Japanese steel companies, the Secretary determined that the three-month period within which to reach a final determination⁴⁵ is mandatory; therefore, the request for an extension was denied.

Two-and-a-half months after Treasury's final determination, while the ITC was making its injury determination, Treasury revised the weighted average LTFV margins to between 4 and 13 percent. "The revised weighted average margins of the five Japanese producers was 7.9 percent,"⁴⁶ one-fourth of the weighted average margin of 32 percent calculated in the tentative determination.

Before the ITC

Following public hearings⁴⁷ the ITC unanimously determined that an industry in the United States was being injured by reason of importation of carbon steel plate from Japan that was being, or was likely to be, sold at LTFV.⁴⁸

The ITC defined the relevant industry as those facilities in the United States devoted to the production of carbon steel plate—eleven mills throughout the United States—because sales at LTFV were spread throughout the country. Factors which indicated injury to the United States industry by reason of sales at LTFV included: an increase in the market share by imports from Japan from 5 percent in 1974 to 11 percent during the investigated period, a time when the United States market was shrinking; a decline in United States producers' capacity utilization from 75 percent in 1974 to 45 percent in 1976; a decline in United States producers' shipments from 9 million short tons in 1974 to 5.6 million short tons in 1976; a drop in the employment of related workers from 21,500 in 1974 to 14,600 in 1977; net operating losses by eight of the United States firms producing carbon plate steel in 1976; Japanese prices almost 20 percent below United States producers' prices through March 1976; and lost sales to purchasers of the lower priced Japanese-made carbon plate steel.

After the ITC's affirmative determination of injury by reason of sales at LTFV, Treasury made a public notice (finding) of both Treasury and ITC determinations,⁴⁹ subjecting all imports, including those for which appraisement was withheld before the finding, to a dumping duty equal to the difference between the foreign market value (*i.e.*, average home market prices which are above the constructed value) and the purchase price or the exporter's sales price, whichever would be appropriate.⁵⁰

COST OF PRODUCTION

The above summary of *Gilmore* demonstrates that, even though in the final determination Treasury did not actually rely on a constructed value, the complainant had been able to use section 164(b) to initiate an investigation and to obtain a tentative determination of

sales at LTFV. *Gilmore* also shows how the option to disregard home market prices (or, where appropriate, third-country market prices), when the Secretary has reasonable grounds to believe that such prices are less than the cost of producing the merchandise, can become an effective device for smoking out information that foreign producers would otherwise withhold, even on a confidential basis.

In order to better understand the issues raised by the application of section 164(b), it would first be useful to place it in historical perspective and to discuss its operation.

History of Section 164(b)

In 1972 Treasury determined that sales of sulphur from Canada being imported at prices below the Canadian producers' cost of production did not violate the Antidumping Act.⁵¹ The Canadian sulphur was found to be a by-product of natural gas, and therefore the sulphur price did not have to cover fully distributed costs. Domestic sulphur interests had argued that sales below cost of production were *ipso facto* violations of the Act, but Treasury had rejected those contentions.

However, Treasury officials had reason to believe, following the *Elemental Sulphur from Canada* decision, that the domestic sulphur interests would press for a sales-below-cost provision in the 1974 Trade Act, and that such a move would be sympathetically received in Congress. Treasury decided that, under the circumstances, it would prefer to author its own provision.

The Treasury draft was first introduced by representatives of the Treasury Department during hearings on the Trade Act before the House Ways and Means Committee. The Committee on Ways and Means approved the Treasury draft, as did the Senate Finance Committee. The provision that is now 19 U.S.C. § 164(b) was passed as section 321(d) of the Trade Act of 1974.⁵²

Operation of Section 164(b)

In order to invoke section 164(b), the Secretary must have reasonable grounds to believe that home market price, or if appropriate third-country market prices, are less than the cost of production. Neither the statute nor the Treasury regulations⁵³ define what constitute reasonable grounds.

In *Gilmore* the complainant substantiated its allegations of sales below the cost of production in the home market with information from five outside sources, including an exhaustive report commissioned by *Gilmore* on "Documented Japanese Steel Costs, Price and

Business Procedures.”⁵⁴ The report concluded that the cost of production of carbon steel plate in Japan, per net ton, was \$233 during Japanese Fiscal Year (hereinafter JFY) 1975 and \$244 for the first half of JFY 1976.⁵⁵ The other sources gave estimates ranging from \$237.50 to \$296 per net ton. Estimates of Japanese home market prices during the same period varied from \$146 to \$225 per net ton. Adding the statutory 8 percent profit,⁵⁶ the average dumping margins ranged from \$27 to \$108 per net ton.⁵⁷ The Secretary found in the above information reasonable grounds to make a tentative determination that home market sales were below the cost of production.⁵⁸

Even though sales in the home market below the COP are found, it does not automatically follow that such sales will be disregarded in determining the foreign market value. They will be disregarded only if they:

- (1) have been made over an extended period of time and in substantial quantities; and
- (2) are determined by the Secretary not to be at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade.⁵⁹

These conditions incorporate still other undefined terms: “an extended period of time,” a “reasonable period of time,” “substantial quantities,” and “normal course of trade,” which are considered later. For the moment, though, assume that these circumstances exist and that the Secretary determines, after disregarding all below-cost home market sales, that there are an insufficient number of sales at or above cost to form an adequate basis for comparison. If he also determines that no foreign market value exists, he must resort to the constructed value as determined under 19 U.S.C. § 165. Briefly stated, constructed value is equal to the cost of materials and fabrication, plus a minimum of 10 percent for general expenses, plus a minimum of 8 percent of the sum of cost and general expenses as profit, plus the cost of packing the merchandise ready for shipment to the United States.

ISSUES RAISED BY THE APPLICATION OF SECTION 164(b)

Assuming that the cost of production provision is properly invoked,⁶⁰ the application of section 164(b) raises two broad issues: specifically how the exporter’s cost of production should be determined, and whether application of the section is consistent with GATT and the Antidumping Code.

*Determination of an Exporter's Cost of Production**Definitions*

Nowhere in section 164(b), the regulations, or the provision's legislative history is there a definition of "extended period of time" or "reasonable period of time." The Senate Report provided some guidance, stating that it was not directed at infrequent sales at less than cost but at "the practice of systematically selling at prices which will not permit recovery of all costs. . . ." ⁶¹ The matter was discussed during the *Gilmore* final determination conference, where there is some indication that Treasury, in its informal guidelines, was interpreting or was intending to interpret the terms to mean "within a business cycle." ⁶² It has been alleged that Treasury has concluded that the first one or two months of a six month investigative period are an extended period of time. ⁶³

But, even assuming consensus on the length of a business cycle within a given industry, this does not resolve the problem of which costs prices must cover over that period of time. Should Treasury consider company projections for their future sales activities, and their future prices and their future costs? Should it extrapolate from the experience of some past period? ⁶⁴ Where the business cycle is longer than the minimum 120-day period required by 19 C.F.R. § 153.31, should Treasury be required to solicit COP information which corresponds with the business cycle? ⁶⁵

Similarly, "substantial quantities" is not defined. It has been alleged that Treasury has concluded that 1 or 2 percent of sales in the United States market is a substantial quantity. ⁶⁶ Certainly it is not likely that a complainant would bear the expense of developing the evidence necessary to give rise to the belief that home market, or third market prices were below the COP unless a substantial absolute volume of sales of the subject merchandise was involved. There was no question in *Gilmore* that the sales were substantial.

The last undefined condition, "in the normal course of trade," is not as troublesome as the others. It was intended to exclude only those sales below the COP where such sales would not permit recovery of the product's cost. In certain situations, sales below the COP were not to be disregarded because they were in the normal course of trade. These sales include the sale of obsolete or end-of-model year merchandise at less than cost, sales below cost during the first year(s), when costs are inflated because of large research and development expenditures which could not reasonably be recovered within those first years; and infrequent sales at less than cost, such as for promotional purposes. ⁶⁷

Applicable Accounting Principles

Which accounting principles should Treasury apply in deciding

whether home market or third country sales are below the cost of production—those of the United States, or those of the exporting country?⁶⁸ The draft of section 164(b) originally submitted by Treasury to the House Ways and Means Committee was accompanied by the following statement regarding applicable accounting principles:

[I]n determining whether merchandise has been sold at less than cost, the Secretary will employ accounting principles generally accepted in the home market of the country of exportation if he is satisfied that such principles reasonably reflect the variable and fixed costs of producing the merchandise.

This statement is now part of the provision's legislative history, and it shows a clear intent to use the generally accepted accounting principles (hereinafter GAAP) of the country of exportation.⁶⁹

As might be expected, this issue was disputed in *Gilmore*. Treasury said that it would be willing to apply Japanese GAAP if they allowed a producer to change inventory valuations from a FIFO to a LIFO system; or if they permit depreciation at other than straight line, but not to the extent that they exclude interest expenses that directly relate to the manufacturing of the goods in question.⁷⁰

The Japanese companies argued that Japanese GAAP should be applied throughout because they were developed and are applied in one of the world's recognized capital markets—noted for a securities regulation system of great severity, and for the great thoroughness of its Accounting Standards.⁷¹ Specifically, they argued that since the Japanese GAAP prohibit the inclusion of any nonoperating income or expense when calculating production cost, interest expenses should not be included as part of cost.⁷²

Gilmore, on the other hand, argued that

[c]hanges of accounting methods which can postpone costs from a bad year to a subsequent year—or bring forward, from a profitable year, reserves to unprofitable years so as to make a bad year look good—are not accounting principles that “reasonably reflect costs!”

Their application would subvert the purpose of Congress in enacting section 164(b).⁷³ The notice of final determination of sales at LTFV in the Federal Register did not state how or whether Treasury resolved these questions.

One further problem in handling cost accounting information bears mentioning. Where data submitted to calculate COP are derived from a company's published financial statements, and where appropriate costs are allocated among the producers' product lines to

determine the cost of production of the subject merchandise, the procedure lends itself to manipulation and abuse. This is particularly true where the company sells various products and services, some of which are profitable and some which are not. Overall the company may be profitable and yet, with regard to the subject merchandise, it may be experiencing a loss. Absent the disclosure of actual cost accounting data by the investigated company (which may be unobtainable even by the company itself), how does Treasury determine whether the data is reliable?

Section 164(b) versus GATT and the Antidumping Code

Problems arising from differences between the Antidumping Act on the one hand, and GATT and the Antidumping Code, on the other, have been analyzed elsewhere.⁷⁴ The focus here is on whether section 164(b) is consistent with these two international obligations which deal with national responses to dumping.⁷⁵

If Article VI (1) of the GATT (condemning imports at less than the normal value if those imports cause injury) had stopped there, section 164(b) would not present a potential conflict. But it goes further:

For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

- (a) is less than the comparable price, ordinary course of trade, for the like product when destined for consumption in the exporting country, or,
- (b) in the absence of such domestic price, is less than either
 - (i) The highest comparable price for the like product for export to any third country in the ordinary course of trade, or
 - (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Article 2(d) of the Antidumping Code is similar; it permits determination of the dumping margin by comparison to a third country price or cost of production

[w]hen there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation, such sales do not permit a proper comparison.

Arguably, when a product is sold below cost in the home market and in the export market, it is introduced in the export market at less

than normal value. The problem is that both the GATT and the Code permit COP valuation only in the absence of a domestic price. This is the position taken by the Japanese producers in *Gilmore*.⁷⁶ Treasury disagreed. It took the position that section 164(b)

is consistent with the Code, because [the Code] permits the use of cost-of-production investigations when sales are not in the *ordinary course* and provide a usable reference price. And it is the view of Congress, and we, in administering the statute, that persistent sales at below cost cannot be regarded in a free market economy as sales in the ordinary course.⁷⁷

Although Treasury's position is appealing, it is also possible, if not more likely, that "in the ordinary course of trade" contemplated those situations in which, although there were prices available in the home market, they were so few that they did not constitute a proper basis for comparison. For example, a foreign producer that makes a few token sales in order to come within the price comparison priority would be prohibited from so doing. In *Gilmore* the complainant never alleged token home market sales; therefore, if the latter interpretation is the correct one, since home market prices were available, the COP investigation would be contrary to the international agreements.

Another controversy about the consistency between the Act and GATT (and the Code) has been brought to the forefront by section 164(b). This concerns the 8 percent minimum profit provision in section 165.⁷⁸ When COP is used, GATT Article VI provides for a reasonable amount for profit, and the Antidumping Code provides "the addition for profit shall not exceed the profit normally realized on sales of products of the same general category in the domestic market of the country of origin."⁷⁹

No steel industry enjoyed an 8 percent profit in 1976; profit margins for the United States steel industry were 3.6 percent.⁸⁰

Unlike the attempts to rationalize section 164(b) with GATT, no attempt is made to reconcile the 8 percent profit provision of section 165 because it predated GATT and therefore the United States enjoys "grandfather" rights.⁸¹

CONCLUSION

Notwithstanding the methods ultimately used by Treasury, to the extent that section 164(b) was applied to determine which home market prices were above the COP, *Gilmore* may indicate a shift from antidumping actions as price comparisons to antidumping actions as cost-price comparisons. This is so even though, from its history, it is not

clear that section 164(b) was intended to be applied in a non-by-product case. Nonetheless, it is likely that complainants will continue to invoke it, and that Treasury will continue to apply it, where, as in *Gilmore*, home market prices are not lower than United States prices and where the merchandise is not a by-product.

It may well be, as counsel for *Gilmore* argues, that the purpose of the Act is to prevent a foreign manufacturer from weathering a downturn in a business cycle at the expense of the United States industry through sales below cost. From the perspective of the American worker there is much to recommend this rationale, particularly where the exporting country has an economic system which treats employment as a fixed cost. However, if the goal of United States antidumping law is to counter a foreign manufacturer's predation, interpretive problems are presented. It is unlikely that, absent predatory intent, the foreign manufacturer would continue to sell below cost over an extended period of time; it may do so during the short run for a legitimate business reason, like minimizing losses and paying for fixed costs. Nonetheless, it is difficult to distinguish a business decision to weather a downturn in the economy from predatory intent.

Undoubtedly, nations that are parties to GATT and the Code, whose producers are subjected to cost comparisons, will object to the application of section 164(b). *Gilmore*, like *Canadian Sulphur* before it, points out holes in present national antidumping measures. These problems should be addressed in multilateral negotiations with an eye toward reducing the degree to which antidumping laws are non-tariff barriers to trade.

NOTES

1. J. VINER, *DUMPING: A PROBLEM IN INTERNATIONAL TRADE* 4 (reprint ed. 1966).
2. General Agreement on Tariffs and Trade, October 30, 1947, 61 Stat. (5), (6), T.I.A.S. No. 1700, 55 U.N.T.S. 194 (effective January 1, 1948), as amended, T.I.A.S. No. 1890; Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade (Code), June 30, 1967, 19 U.S.T. 4348, T.I.A.S. No. 6431 (effective July 1, 1968).
3. See GATT, *supra* note 2, at art. VI(1); Code, *supra* note 2, at art. 2.
4. See GATT, *supra* note 2, at art. VI(1)(b)(ii); Code, *supra* note 2, at art. 2(d).
5. 19 U.S.C. § 164(b) (1976), enacted as § 321(d), Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975), amending Antidumping Act of 1921, ch. 14, tit. II, 42 Stat. 11 (1921).
6. See 43 Fed. Reg. 22,937 (1978) (Notice of Finding of Dumping). Notices of the various

- procedural steps leading to the above finding are published at 42 Fed. Reg. 16,883 (1977) (Notice of Initiation of Dumping Investigation); 42 Fed. Reg. 54,489 (1977) (Notice of Withholding of Appraisement); 43 Fed. Reg. 2,032 (1978) (Determination of Sales at Less than Fair Value); *see also* Carbon Steel Plate from Japan, AA1921-179, USITC Publ. 882 (1978) (International Trade Commission determination of injury, reproduces the last three notices).
7. Notice of Initiation of Dumping Investigation, *supra* note 6.
 8. *See* Birch Three-Ply Door Skins From Japan, 40 Fed. Reg. 48,383 (1975) (Determination of Sales at Less than Fair Value); 41 Fed. Reg. 2,690 (1976) (Determination of Injury).
 9. Dept. Treas. News, Oct. 3, 1977.
 10. Complaint by Gilmore Steel, February 25, 1977. The complaint was filed pursuant to 19 U.S.C. § 160(c)(1) (1976); the regulations governing the submission of such complaints are set forth in 19 C.F.R. §§ 153.25-28 (1978).
 11. Complaint by Gilmore Steel at 16, 27.
 12. Complaint by Gilmore Steel at 27.
 13. Notice of Initiation of Dumping Investigation, *supra* note 6.
 14. *Id.*
 15. 19 C.F.R. § 153.27 (1977).
 16. 19 C.F.R. § 153.27(a)(3)(iii) (1977).
 17. Notice of Withholding of Appraisement, *supra* note 6.
 18. *See* 19 C.F.R. § 153.35 (1977).
 19. *See* 19 C.F.R. § 153.35(b) (1977). A domestic manufacturer or producer does not have the same option to request an extension.
 20. *Results of the U.S. General Accounting Office Review of Selected Aspects of the Anti-dumping Act of 1921*, reprinted in SUBCOMM. ON TRADE OF THE HOUSE COMM. ON WAYS AND MEANS, UNFAIR TRADE PRACTICES, H.R. DOC. NO. WMCP:95-99, 95th Cong., 2d Sess. 22 (1978) (hereinafter *Unfair Trade Practices*).
 21. Notice of Withholding of Appraisement, *supra* note 6, at 54,490.
 22. 19 C.F.R. § 153.49 (1977).
 23. DEPT. OF TREASURY, *Antidumping Duties*, in UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD, COMPENDIUM OF PAPERS: VOLUME II 396 (Commission on International Trade and Investment Policy ed. 1971).
 24. Notice of Withholding of Appraisement, *supra* note 6.
 25. DEPT. OF TREASURY, *supra* note 23, at 399.
 26. Brief of Respondent Nippon Steel Corporation in Connection with Antidumping Proceeding: Hot Rolled Carbon Steel Plate from Japan 21 (Nov. 30, 1977) ("Nippon Brief").
 27. Nippon Steel Corporation (Nippon Steel), Nippon Kohan KK (NKK), Sumitomo Metal Industries, Ltd. (Sumitomo), Kawasaki Steel Corporation (Kawasaki), and Kobe Steel Ltd. (Kobe). *See* Notice of Withholding of Appraisement, *supra* note 6.

28. Treasury assumed that sales in third countries were above the cost of production and therefore would provide an inadequate basis for comparison. *Id.*
29. 19 C.F.R. § 153.31(a) (1978).
30. See Notice of Withholding of Appraisement, *supra* note 6. The financial statements used were those submitted by United States Steel in another antidumping proceeding. Petition of United States Steel Corporation for Relief Under the United States Antidumping Statute from Certain Steel Products Imported from Japan (Sept. 19, 1977).
31. Purchase price is defined at 19 U.S.C. § 162 (1976); exporter's sales price is defined at 19 U.S.C. § 163 (1976).
32. Constructed value is defined at 19 U.S.C. § 165(a) (1976). It is the sum of (1) the cost of materials and of fabrication before exportation, (2) an amount for general expenses (not less than 10 percent of the cost of materials and of fabrication) and for profit (not less than 8 percent of cost plus general expenses), and (3) the cost of placing the merchandise in condition, packed ready for shipment to the United States.
33. Notice of Withholding of Appraisement, *supra* note 6, at 54,490.
34. See Hudec, *United States Antidumping Law and the GATT Antidumping Code*, *post*.
35. Determination of Sales at Less than Fair Value, *supra* note 6, at 2,033.
36. Antidumping Conference before Peter D. Ehrenhaft, Deputy Assistant Secretary of the Treasury, Nov. 16, 1977.
37. *Id.* at 7.
38. *Id.* at 9.
39. *Id.* at 8, 16-25.
40. 19 C.F.R. § 153.22 (1977).
41. Letter from William H. Baringer to Peter D. Ehrenhaft (Dec. 22, 1977).
42. 43 Fed. Reg. 2,033 (1978); 43 Fed. Reg. 2,035 (1978).
43. Dept. Treas. News, Jan. 9, 1978, announcing the final LTFV determination at 43 Fed. Reg. 2,033 (1978). The techniques of dumping margin calculation were explained, to varying degrees, in both the Federal Register and the Department of Treasury announcements.
44. 42 Fed. Reg. 65,214 (1977); 43 Fed. Reg. 1,964 (1978).
45. 19 U.S.C. § 160(b)(3) (1976).
46. Carbon Steel Plate from Japan, AA1921-179, USITC Publ. 882, A-8 (1978).
47. Two hearings were held—in Seattle (announced at 43 Fed. Reg. 4,125 (1978)), and in Washington, D.C. (announced at 43 Fed. Reg. 6,342 (1978)).
48. Carbon Steel Plate from Japan, AA1921-179, USITC Publ. 882 (1978).
49. 43 Fed. Reg. 22, 937 (1978); see 19 U.S.C. § 160(a) (1976), 19 C.F.R. § 153.43 (1977).
50. 19 U.S.C. § 161 (1976); 19 C.F.R. § 153.57 (1977).
51. Elemental Sulphur from Canada, 37 Fed. Reg. 3,922 (1972).
52. For further criticism of section 164(b), see Hemmendinger, *The Antidumping Act: Proposals for Change*, *ante*, text accompanying notes 19-26.
53. 19 C.F.R. § 153.5 (1977).
54. International Ventures Management, Inc., Report (Feb. 18, 1977). Note: Unlike the United

- States fiscal year, the Japanese fiscal year is identified by the year in which the fiscal year begins. The IVM report was critiqued by Robert R. Nathan Associates, Inc. in a report submitted to Treasury on August 9, 1977. It concluded, for various reasons (*e.g.*, selection of data, inconsistent methodology) that “[t]he IVM report is a thoroughly defective and misleading analysis.”
55. *IVM Report*, *supra* note 54, at 40.
 56. 19 U.S.C. § 165(a)(2) (1976).
 57. According to 19 C.F.R. § 153.5 (1977), cost of production does not include profit. Profit is included for constructed value (19 U.S.C. § 165 (1976)).
 58. 42 Fed. Reg. 16,883 (1977).
 59. 19 U.S.C. § 164(b) (1976).
 60. For further discussion on the meaning of “reasonable grounds to believe or suspect,” *see* Hemmendinger, *The Antidumping Act: Proposals for Change*, *ante*.
 61. TRADE REFORM ACT OF 1974, SEN. REP. No. 1298, 93d Cong. 2d Sess. 173 (1974).
 62. Counsel for Gilmore took the position that a business cycle would not be a reasonable period. A period less than a complete business cycle (*i.e.*, six months) would be a reasonable period because foreign producers faced with the temptation to dump during a downturn should not be allowed to recover their costs during profitable times at the expense of American industries. *See* Antidumping Conference, *supra* note 36, at 21–23.
 63. *Unfair Trade Practices*, *supra* note 20, at 254.
 64. *Id.* at 17.
 65. Letter to W. Michael Blumenthal (on behalf of Consumers Union) from the Center for Law and Social Policy, Nov. 21, 1977.
 66. *See Unfair Trade Practices*, *supra* note 20, at 254.
 67. *See* SEN. REP. No. 1298, *supra* note 61, at 71.
 68. Although there are no generally accepted accounting principles in the United States regarding cost accounting, Cost Accounting Standards (guidelines) do exist.
 69. TRADE REFORM ACT OF 1973, H. REP. No. 571, 93d Cong., 1st Sess. 71 (1973).
 70. *See* Antidumping Conference, *supra* note 36, at 30.
 71. *Id.* at 32.
 72. Letter in behalf of Kawasaki to U.S. Customs Service at 2 (Nov. 14, 1977).
 73. *See* Antidumping Conference, *supra* note 36, at 21, 34.
 74. *U.S. Analysis of GATT Antidumping Agreement in Relations to U.S. Antidumping Act of 1921*, 7 INT’L LEGAL MATERIALS 905 (1968); Shannon & Marx, *The International Antidumping Code and the United States Antidumping Law—An Appraisal*, 7 COLUM. J. TRANSNAT’L L. 171 (1968); J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 423 (1969).
 75. For a pre-1975 discussion of GATT Article VI and the Code, *see* Barceló, *Antidumping Laws and Barriers to Trade—The United States and the International Antidumping Code*, 57 CORNELL L. REV. 491, 524 (1972).
 76. Respondent’s Brief, *supra* note 26, Appendix at 1.

77. See Antidumping Conference, *supra* note 36, at 29.
78. 19 U.S.C. § 165(a)(2) (1976).
79. Code, *supra* note 2, at art. 2(d).
80. THE COUNCIL ON WAGE AND PRICE STABILITY, REP. TO THE PRESIDENT, *reprinted in PRICES AND COSTS IN THE UNITED STATES STEEL INDUSTRY 38* (1977).
81. Protocol of Provisional Application to the General Agreement on Tariffs and Trade, Oct. 30, 1947, para. 1(b), 61 Stat. (5), (6) T.I.A.S. No. 1700, 55 U.N.T.S. 308, *as amended*, T.I.A.S. No. 1890.