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The United States Response: A Canadian Comment

by D.J.M. Brown*

AS THE CANADIAN commentator to the United States legal response to steel dumping, as described earlier by Mr. Anawaty,¹ my first reaction to the Department of Treasury's action in instituting its trigger price mechanism (TPM) was amazement at the speed with which it came into effect.

Conditioned as I was with the length of time it had taken the United States Treasury to clear Mr. Anawaty's paper for my comment, I was truly impressed with the few weeks which transpired between Under Secretary Solomon's Report to President Carter early in December 1977, and implementation of the TPM by the end of that month.

Apart from that, I would like to add the following four observations and comments:

(1) The United States response in the form of the TPM and related enforcement procedures was an ingenious solution to the many conflicting interests to be accommodated by the United States Government.

(2) It assisted the Antidumping Directorate of Revenue Canada in its enforcement of the Canadian antidumping legislation in relation to the dumping of steel.

(3) Under the circumstances, the Canadian steel industry benefitted from the American initiatives.

(4) However, I have some reservations as to whether the TPM ought to be regarded as enforcement of antidumping law and whether it has been and will be effective in affording the intended protection.

TPM—AN INGENIOUS SOLUTION

I sympathize very much with the various conflicting factors or restraints which bore upon the United States Government in 1977 and which led to its response in the form of the trigger price mechanism.

On the one hand, for several reasons the United States steel industry required additional protection. There was a pervasive condition of excess capacity and oversupply on a worldwide basis, and the United States market for steel, even in its depressed state, remained the single largest market available to steel makers in other countries.

Although the United States market always was attractive because of its size and openness, the defensive strategy adopted earlier by the European Community, known as the Davignon Plan, and the negotiated quotas of imports into Europe compounded the desirability of exporting to the United States market.

* Of Blake, Cassels & Graydon, Toronto. This paper was delivered at the Canada-United States Law Institute's Conference on Steel Dumping into Canada and the United States, held September 29 & 30, 1978, at the University of Western Ontario, London.

¹ See Anawaty, *The United States Legal Response to Steel Dumping*, 2 CAN.-U.S. L.J. 60 (1979).

On top of both the chronic oversupply of steel products worldwide and the defensive moves adopted in Europe, the steel industry in the United States faced a growing need to re-equip and modernize, both to make steel efficiently and to meet the burden of environmental requirements imposed by the Environmental Protection Agency² and the Occupational Safety and Health Administration.³

These conditions left the United States steel makers especially vulnerable to low-cost imports, particularly since the logic of the capital-intensive steel industry makes sales at any price which contributes to overhead more desirable than idle capacity. And, in light of the dependence of the United States economy on steel, with annual sales approaching forty billion dollars, and with 370,000 employees in the industry, the circumstances of the steel industry in 1977 could not be disregarded.

Theoretically, the United States antidumping laws,⁴ particularly after the introduction of the 1974 amendment prohibiting sales at less than "the cost of production"⁵ (whatever that means precisely) provided a legislative program which ought to have precluded competition from "dumped" low-cost imports. However, the machinery of enforcement, as explained earlier by Mr. Anawaty, was not designed for volume and speed. Consequently in 1977, with the filing of nineteen complaints covering a wide range of steel products from a variety of exporting countries, the enforcement system must have become effectively paralyzed and its protective effect, both as a threat and in action, largely nullified.

² The Environmental Protection Agency (EPA) was established in the Executive branch as an independent agency pursuant to Reorganization Plan No. 3 of 1970, effective December 2, 1970. The EPA was created to permit coordinated and effective governmental action on behalf of the environment.

³ The Occupational Safety and Health Administration of the U.S. Department of Labor was established by the Occupational Health and Safety Act of 1970 (84 Stat. 1590; 29 U.S.C. §§ 651 *et seq.* (1976)). The Act, enforced by the Secretary of Labor, is an effort to reduce the incidence of personal injuries, illnesses and deaths among working men and women in the United States which result from their employment.

⁴ The Antidumping Act of 1921, ch. 14, 42 Stat. 11 (codified *as amended* at 19 U.S.C. §§ 160-71 (1976)).

⁵ Section 164(b) provides:

Whenever the Secretary has reasonable grounds to believe or suspect that sales in the home market of the country of exportation, or, as appropriate, to countries other than the United States, have been made at prices which represent less than the cost of producing the merchandise in question, he shall determine whether in fact, such sales were made at less than the cost of producing the merchandise. If the Secretary determines that sales made at less than cost of production (1) have been made over an extended period of time and in substantial quantities, and (2) are not at prices which permit recovery of all costs within a reasonable period in the normal course of trade, such sales shall be disregarded in the determination of foreign market value. Whenever such sales are disregarded by virtue of having been made at less than the cost of production and the remaining sales, made at not less than cost of production, are determined to be inadequate as a basis for the determination of foreign market value, the Secretary shall determine that no foreign market exists and employ the constructed value of the merchandise in question.

Id. § 164(b).

For all these reasons, some additional protective response was a virtual necessity in late 1977. However, the United States, with its policy of freer international trade and as a prime mover and signatory to the GATT Code, could not without serious repercussions directly impose minimum prices, significantly raise the tariff barriers, or fix quotas for imported steel. Also, given the importance of steel in the United States economy and the tremendous inflationary effect of steel price increases, the avoidance of a response which would significantly add fuel to inflation had to be of high priority. Thus, given all these countervailing factors, the ingenuity of the concept of the TPM is to be applauded. It managed to accommodate all of the following desiderata:

- (1) the assumption of the investigatory initiative by Treasury was well within the GATT framework;
- (2) by tying the TPM theoretically to the cost of production of the most efficient producer (Japan), the ball was thrown back to the industry to meet competition at price levels at which it claimed it could compete with imports and which in the circumstances were the least inflationary in effect;
- (3) it lessened the burden on the enforcement agencies—both Treasury and the International Trade Commission—by creating a more real administrative threat in the form of continued monitoring;
- (4) to many it must have in fact set a minimum price for imports without being one; and
- (5) it did so without the need for legislative change. Although I examined the reasons in *Davis Walker Corp. v. Blumenthal*⁶ with some care and with some advantage of having studied administrative law at an American law school, the result is namely, that the TPM and its spread over primary steel products was neither “arbitrary or discriminatory” nor contrary to the APA⁷ rule-making requirements and could not have been seen as seriously in doubt. Certainly, under Canadian law, the TPM system, or the somewhat similar Canadian response, would quickly and without serious dispute be affirmed as a legitimate administrative decision.⁸

In sum, in its concept, both alone and as a part of the Administration's several initiatives to assist the United States steel industry, the TPM and associated procedures appear to me to have skirted many potential difficulties and in design, at least, to have accommodated most of the existing conflicting interests. As I have said, TPM was an ingenious solution. Let me express some Canadian views as to its significance in Canada.

ANTIDUMPING ENFORCEMENT IN CANADA

The domestic steel industry in Canada is as vital to the Canadian economy as is the United States steel industry to the United States economy.

⁶ No. 78-0421 (D.D.C. May 25, 1978), reprinted in 17 INTL LEGAL MATERIALS 992 (1978), appeal dismissed, No. 78-1467 (D.D. Cir. July 14, 1978).

⁷ Administrative Procedure Act, 5 U.S.C. §§ 551-59, 701-06 (1976).

⁸ *In re Anti-dumping Act* and *In re Sabre International Ltd.* [1974] 2 F.C. 704, 52 D.L.R. 3d 156, sub nom *In re Sabre International et al. v. M.N.R.*, 6 N.R. 339 (C.A.).

Accordingly, quite foreseeably, given the European Community's defensive response to the worldwide surplus and given the introduction of TPM in the United States, Canada had no alternative but to respond in some way to protect its steel industry from the likelihood of increased imports.

TPM obviously increased the risk of diversion of imports into Canada, and although the efficacy of the Revenue Canada administration of the Anti-dumping Act⁹ was relatively good—as was demonstrated in *Bar size angles*,¹⁰ *Wide flange steel shapes*,¹¹ and *Stainless steel plate*¹²—the need for a special application or approach to enforcement in Canada became necessary with the introduction of TPM in the United States.

Perhaps ironically, the response of the United States in the form of the TPM permitted Canada to establish a procedure that seems to me to be more in accord with the GATT Code than the TPM and at the same time probably is more effective than the TPM as a deterrent to exporting to Canada at prices which are lower than normal value prices.

The Steel Task Force and "fast track" investigations are not inconsistent with the GATT Antidumping Code¹³ nor our Antidumping Act, and I expect that their efficacy will be shown if sufficient measurable harm to the Canadian industry does develop as a threat, by referring to benchmark pricing and not publicizing its source or method of calculation. I am sure exporters must assume that the TPM is at least a floor for the Canadian benchmark prices but cannot with any assurance conclude that the Canadian officials have departed from the traditional normal value export price basis for assessing dumping. To that extent, exporters whose normal prices exceed the United States TPM must, or ought at least, be somewhat uncertain that sales into Canada will avoid an investigation, even if their prices are at the TPM level. Furthermore, by this technique of not disclosing the benchmark price, criticism by Canada's trading partners of it having established a minimum price is not invited. Nor is the approach in any way contrary to the Anti-dumping Act, as far as I can see. Thus, although I have not in any way monitored the condition of the steel industry in Canada, I would expect that the combination of the introduction of a trigger price mechanism by the United States and the Canadian response in the form of a "fast track" benchmark system for investigation has effectively countered the threat of low-cost imports materially cutting into the traditional markets enjoyed by the Canadian steel industry.

⁹ R.S.C. 1970, c.A-15, as amended by R.S.C. 1970 (2nd Supp.) c.1 & c.10, S.C. 1970-71-72, c.43 & c.63.

¹⁰ Hot rolled carbon steel bar size angles, having each leg less than 3 inches in length, originating in or exported from Japan (ADT-13-77), December 30, 1977.

¹¹ Wide flange steel shapes, etc., originating in the United Kingdom, France, Japan, the Republic of South Africa, Belgium and Luxembourg (ADT-12-77), December 29, 1977.

¹² Stainless steel plate originating in the Federal Republic of Germany, Japan and the Republic of South Africa and stainless steel sheet, not including gold rolled sheet in grades A1S1 409, A1S1 401S and A1S1 434, originating in the Federal Republic of Germany and Japan (ADT-14-77), January 13, 1978.

¹³ The Code's formal title is *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*, found in *Basic Instruments* 15th Supp. (Geneva, 1967).

THE CANADIAN INDUSTRY AND TPM

The Canadian steel industry has probably been a beneficiary of the trigger price mechanism, particularly in light of the devaluation of the Canadian dollar. With its relatively efficient, integrated industry, it has been able to sell into the United States market at undumped prices, which are below the trigger prices fixed by the Treasury Department, and, I understand, that the Canadian steel industry has been able to increase its exports to the United States. In short, TPM has probably been more effective in sheltering exports from Canada to the United States than in protecting the United States industry against competition from dumped steel.

TWO CLOSING COMMENTS

I noted earlier that I believe that the assumption of the initiative by Treasury to enforce the antidumping legislation is in accord with the GATT Code requirements. I see nothing contrary about the establishment of a trigger price as an administrative aid to carrying out enforcement responsibilities. Indeed, if there has been a digression from the GATT Antidumping Code, to my mind it took place in 1974 when the United States dumping legislation was amended to permit a construction of fair values or normal values based on cost of production including a return on investment,¹⁴ in circumstances where fair value or normal value prices could be accurately established.

It seems to me, however, that if one stands back and ignores the form and looks at the substance of the United States response, its effect has been to establish minimum prices for steel imports; certainly many foreign exporters must regard it as such. In addition, the price level adopted was one which the United States industry openly said it could compete with and still overcome its own internal difficulties, and that fact was clearly at the basis of the establishment of the TPM. For these reasons, I do not think it can be said truly to be an antidumping measure—that is, one that focusses exclusively on fair prices—notwithstanding that it was developed within the framework of the antidumping legislation.

One last comment. Although TPM has not been in operation long enough to permit a reliable assessment to be made, I suspect that it has not been as successful in practice in affording the intended protection as one would expect from its design. While it has probably raised the price of some steel imports, the TPM at the same time probably has permitted other exporters, particularly European concerns, to lower their prices, knowing that the threat of an enquiry is vastly diminished if their prices are at TPM, notwithstanding that they are priced at less than fair value. While I expect that the majority of the imports from abroad are priced at the TPM level, I also expect that some enter below TPM with fair certainty that, as long as they are exceptional and do not become too significant or dominant, it is unlikely that an investigation will be instituted. Even if an investigation is initiated, because of the quantity of steel being imported at the trigger price, which

¹⁴ See note 5 *supra*.

would likely be excluded in the scope of the investigation, the risk of an injury finding being attributed to the "dumped" goods would be minimal. In short, if TPM is administered as it is claimed to be and as outlined by Mr. Anawaty, and if imports at or above that level are excluded from any enquiry, horrible causal problems would result at the International Trade Commission stage, and the likely result would be a no injury finding.

Thus, I suspect that as a protection against dumping, the TPM is enjoying only moderate or partial success, but it probably has raised the price level of imported steel and correspondingly the price levels for steel produced in the United States.