

1979

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### Recommended Citation

Philip Slayton, *The Canadian Legal Response to Steel Dumping*, 2 Can.-U.S. L.J. 81 (1979)

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# The Canadian Legal Response to Steel Dumping

by Philip Slayton\*

## I. DUMPING AND THE CANADIAN ANTIDUMPING SYSTEM<sup>1</sup>

**D**UMPING IS SALE for export at prices lower than those charged to domestic buyers, taking into account the conditions and terms of sale. It is international price discrimination, made possible by the separation of markets and often accompanied by some measure of monopoly power possessed by the seller in his home market. There are many possible motives for dumping, for example, it may be done to secure foreign exchange, protect a home market, promote the goods in question, meet competition in a foreign market from domestic producers or third country exporters, or eliminate competition in that market (so-called "predatory" dumping). Dumping may be temporary or permanent. Jacob Viner thought that in the nature of things, dumping would very likely be a temporary phenomenon,<sup>2</sup> but more modern analysts—Kenneth Dam, for example—consider that dumping is typically permanent.<sup>3</sup>

The contemporary Canadian antidumping system was created by passage in 1968 of the Antidumping Act,<sup>4</sup> which was passed to fulfill Canada's obligations as a signatory of the 1967 Antidumping Code<sup>5</sup> of the General Agreement on Tariffs and Trade. Both the Code and the Act are lengthy and complex documents; analysis of them is quite beyond the scope of this paper. In very general terms, the Canadian Act provides that liability for antidumping duty depends upon a Tribunal finding that dumping "has caused, is causing or is likely to cause material injury to the production in Canada of like goods, or . . . has materially retarded or is materially retarding the establishment of the production in Canada of like goods." (s.3) In most circumstances, the duty will be equal to the margin of dumping, which is to say, the amount by which the normal value of the goods exceeds the export price. (s.8(a))

The procedures of the Canadian system are complicated. The Deputy Minister of National Revenue, Customs and Excise—in practice, Special Assessment Programs of National Revenue—initiates a dumping investigation, on his own initiative or on receipt of a complaint from Canadian producers

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<sup>1</sup> Portions of this paper are based on the author's study of the Canadian Antidumping Tribunal. See P. SLAYTON, *THE ANTI-DUMPING TRIBUNAL* (Ottawa: Law Reform Commission, 1979). See also Slayton, *The Canadian Anti-dumping System*, 2 CAN. BUS. L.J. 438 (1978).

<sup>2</sup> See J. VINER, *DUMPING: A PROBLEM IN INTERNATIONAL TRADE* 146 (1923).

<sup>3</sup> K. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 171 (1970).

<sup>4</sup> 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.

<sup>5</sup> 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).

of like goods, if he considers that there is some evidence both of dumping and of injury or retardation caused by dumping. (s.13(1)) If following the investigation, the Deputy Minister is satisfied that the goods have been or are being dumped, in a volume and with a margin of dumping that are not negligible, section 14(1) requires him to make a "preliminary determination" of dumping. Section 15 permits, where there has been a preliminary determination, either a provisional duty or the posting of security in an amount not greater than the margin of dumping.

The Antidumping Tribunal receives the preliminary determination. The Tribunal has the responsibility for inquiring into injury and retardation (under section 16(1)(a)), and has ninety days to make a finding. (s.16(3)) When the Deputy Minister receives the Tribunal finding, he must make a final determination and assess the duty payable (if there has been a finding of injury or retardation), or return any provisional duty or security (if the Tribunal finding has been negative). (s.17) There is a system of appeals, from the Deputy Minister's final determination or redetermination and reappraisal to the Tariff Board, and then on questions of law to the Federal Court. (ss. 19 and 20) Section 31 of the Act permits the Tribunal to rescind or alter findings, or rehear any matter. An appeal from the Tribunal to the Federal Court lies on points of fact or law, but not on the question of injury.

It is not possible in this paper to review the jurisprudence surrounding the Canadian antidumping system. But, in general, the Federal Court has regarded the antidumping activities of the Ministry of National Revenue as largely immune from judicial review and control. It has, however, subjected the Tribunal to close scrutiny. With respect to National Revenue, the key decision is the *Sabre* case,<sup>6</sup> in which the Federal Court of Appeal held that a preliminary determination of dumping is an administrative decision, and is therefore not subject to review under section 28 of the Federal Court Act. For the Tribunal, the watershed case was the *Magnasonic* decision.<sup>7</sup> Chief Justice Jockett, speaking for the Federal Court of Appeal stated:

Parliament chose . . . to set up a court of record to make the inquiries in question and provided for such an inquiry being carried out by hearings where those whose economic interests are most vitally affected on both sides of the question would be entitled to appear. It seems obvious that it was thought that the most effective way of assuring that the right conclusion would be reached was to open the door to such opposing parties. . . .<sup>8</sup>

Chief Justice Jockett's analysis has made possible a certain judicialization of the Tribunal's process, seen most clearly in the 1974 Rules of Procedure.<sup>9</sup> The analysis was reaffirmed by the Federal Court of Appeal in the recent *Sarco* decision.<sup>10</sup>

<sup>6</sup> *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.).

<sup>7</sup> *In re Magnasonic Canada Ltd. and Anti-dumping Tribunal* [1972] F.C. 1239.

<sup>8</sup> *Id.* at 1248.

<sup>9</sup> SOR/74-581.

<sup>10</sup> *Sarco Canada v. Anti-dumping Tribunal*, unreported at time of writing. Judgment rendered on June 9, 1978 (No. A-16-77).

This is not the place to offer an appraisal of the Canadian antidumping system, or the antidumping mechanism in general.<sup>11</sup> But to put particular problems in perspective, I would like to mention briefly two views I have been developing. First of all, the Canadian system, and indeed any program of antidumping, is arguably irrational and inefficient (if one assumes that the system's purpose is to protect domestic producers). It is arguably irrational because the protection afforded Canadian industry depends, not just on injury experienced by the industry or on prices in Canada, but on prices in a foreign market (normal value). Further, the protection given one Canadian industry will often be at the expense of another industry, such as one using the dumped good as an input, or one providing an input to the foreign dumping exporter and, always at the expense of Canadian importers. As Brian Hindley has put it, "the prevention of dumping merely increases the profits of one group at the cost of a reduction in another's . . ."<sup>12</sup> The system is arguably inefficient because there may well be alternative less costly ways of providing the protection thought necessary. Economists prescribe producer subsidies and temporary increases in conventional duty. I think that voluntary price undertakings may often be useful. It is worth noting that many traditional consumer arguments in favour of an antidumping regime are suspect. The strongest such argument has been that consumers have an interest in eliminating so-called "predatory" dumping, designed to eliminate domestic production and create a monopoly for the foreign producer permitting the raising of prices. But, to give just one reply, it seems that such predation could only be successful if the foreign producer has a world monopoly, and if domestic firms, once driven out of the industry, will not re-enter in response to higher prices. These must be highly unusual conditions.

Second, I believe that the division of antidumping functions between the Department of National Revenue and the Tribunal is undesirable. It is inefficient, and may easily create confusion in the antidumping process. The fragmentation of effort makes full grasp of the dumping problem more difficult, in particular by giving study of dumping to one group and consideration of injury to another, with little contact between the two. There may, of course, be a political inspiration for the division, but in this forum I will leave aside that possibility.

Having looked generally at dumping, and the Canadian antidumping system, I turn to consider what the Tribunal has done in steel cases, and to say something about the new National Revenue investigatory mechanism for steel dumping.

## II. THE TRIBUNAL AND STEEL DUMPING

### A. *Indicators of material injury*

The key concept in antidumping is, of course, "material injury." Article

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<sup>11</sup> For an evaluation of the Canadian antidumping system, see P. SLAYTON, note 1 *supra*.

<sup>12</sup> B. HINDLEY, *BRITAIN'S POSITION ON NON-TARIFF PROTECTION* 13 (London: Trade Policy Research Centre, 1972).

3(b) of the Antidumping Code requires that evaluation of injury be based on such factors as turnover, market share, profits, the price of dumped goods in comparison with the price of domestically produced goods, export performance, employment, volume of dumped and other imports, utilization of capacity, productivity and restrictive trade practices. Article 3(c) stipulates that in establishing injury, attention must be paid to such factors as volume and prices of undumped imports, competition between domestic producers, and contraction in demand due to substitution of other products or to changes in consumer taste.

Neither the Canadian Antidumping Act nor the regulations made under the Act specify any indicators of material injury, and what the Code by itself says is not, of course, binding on the Tribunal. But the Tribunal has from the beginning developed material injury indicators that compare closely to those mentioned in the Code. A survey of the Tribunal's cases shows that typically the Tribunal has considered a claim of material injury in light of loss of market share, loss of profit, under-utilization of capacity, loss of employment, price erosion, cancelled or postponed expansion of production facilities, unusually high inventories, higher unit distribution costs and curtailment of research and development. And, Rule II of the 1974 Rules of Procedure formalized most of these indicators. The rule requires briefs, written submissions and evidence to contain information relating to:

- (a) the retardation in the implementation of definite plans for production;
- (b) the loss of orders, markets and profits;
- (c) the reduced employment of persons;
- (d) the reduced utilization of capacity, by producers in Canada of like goods;
- (e) the volume of imported goods that are dumped, where known; and
- (f) the price erosion resulting from the dumping of goods.

Rule II does not mention inventories, distribution costs, or the curtailment of research and development, but these indicators continue to be considered by the Tribunal.

How has the Tribunal employed these indicators in the case of steel dumping? In the 1973 *Stainless flat rolled steels/alloy tool steel bars* case,<sup>15</sup> the Atlas Steel Company claimed, among other things, that the dumping of plate by Swedish exporters had caused injury, or at least was materially retarding the establishment of wide plate production in Canada. Atlas first pleaded loss of market share; the Tribunal was not impressed, and appeared to think that the changing volume of imports was largely attributable to cyclical features of the international plate market rather than to dumped prices. Atlas argued unused capacity; here the Tribunal noted, among other things, that a

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<sup>15</sup> *Stainless flat rolled steels originating in or exported from Sweden and alloy steel bars, not including high speed, AISI P-20 mould steel and die blocks, originating in or exported from Sweden and Austria (ADT-5-73)*, September 18, 1973.

characteristic of international stainless steel production is the use of rolling capacity to produce less profitable products, such as carbon steel, and that "it is normally not expected that rolling capacity could be fully utilized for the rolling of stainless steel products." The Tribunal rejected a loss of employment argument on the basis that at least some part of the market share of dumped Swedish imports would have gone to non-dumping foreign suppliers. It rejected a price degradation argument for 1973 because Atlas was able to sell at increased prices in that year and did not agree that profits had been lost, since apparently the profitability of Atlas was improving in 1973. The Tribunal concluded that the dumping of stainless steel plate, sheet and strip from Sweden was not causing or likely to cause material injury, but it did undertake to monitor imports of these products and review its finding in sixteen months.

With respect to alloy tool steel bars, the Tribunal undertook a similar review of the material injury indicators. It considered that any loss of market share by Atlas was attributable to non-dumped imports from the United States. It found no evidence of under-utilization of capacity, price degradation, loss of employment or decreased profitability. The Tribunal concluded that there was no material injury, or likelihood of material injury. The finding in this case was confirmed in 1975,<sup>14</sup> in a section 31 review following a monitoring process.

In the 1977 *Wide flange steel shapes* case,<sup>15</sup> the Tribunal observed that although in 1976 the market of WF shapes increased slightly (1.5%), Algoma Steel Corporation's domestic sales decreased by fifteen percent, and imports from the subject countries doubled. In the first eight months of 1977, the market grew by fourteen percent, imports from the subject countries increased by fifty-two percent, but Algoma's domestic sales decreased by three percent. The Tribunal characterized Algoma's situation as being "squeezed between rapidly escalating production costs, and the falling prices of an increasing volume of imports from the subject countries . . . it bore the brunt of this price competition in loss of volume and market share." In turn, reduced volume affected profitability, employment and utilization of production capacity, especially by preventing the amortization of cost elements over a larger volume. The Tribunal found that the dumping "has caused, is causing and is likely to cause material injury."

In *Bar size angles* (1977),<sup>16</sup> the key finding by the Tribunal was that in 1976 the market share of the domestic industry dropped from eighty-six percent to sixty-seven percent, and the share taken by Japanese imports increased from two percent to sixteen percent. The situation improved in the first eight

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<sup>14</sup> Stainless flat rolled steels originating in or exported from Sweden and alloy steel bars, not including high speed, AISI P-20 mould steel and die blocks, originating in or exported from Sweden and Austria (ADT-5A-73), February 21, 1975.

<sup>15</sup> 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.

<sup>16</sup> 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.

months of 1977, but the Tribunal attributed that to the withdrawal from the market by the Japanese as a result of the Deputy Minister's investigation. It found that dumping "had caused, is causing and is likely to cause material injury."

In *Stainless steel plate and sheet* (1978),<sup>17</sup> the Tribunal found, with respect to plate, that Atlas had lost over ten points of market share from 1974 to September 30, 1977, while dumped imports from Japan and South Africa had gained at least fifteen points. The Tribunal said that the "[i]ntense price competition from these dumped imports in 1976 and 1977 prevented Atlas Steels from increasing its prices to offset rising material costs. This, together with the volume loss sustained by Atlas Steels, caused financial losses on a progressively deteriorating scale and caused material injury." As for sheet, the Tribunal considered that loss of market share in 1976 was largely attributable to operational problems at Atlas' Tracy plant, and that any 1977 injury was not material, but found that material injury was likely in view of surplus sheet capacity offshore.

Looking at how the Tribunal has used material injury indicators in these cases, two things in general occur to me. First of all, with the possible exception of the *Stainless flat rolled steels/alloy tool steel bars* case, loss of market share has raised a presumption of material injury. Once loss of market share is established, the burden of proof seems to shift to the exporter-importer, who must show reasons for injury other than dumping. This demonstration is hard to make, and I am not convinced that the quasi-judicial adversarial nature of the Tribunal proceedings (compared to an administrative or inquisitorial system), notwithstanding the emphasis on natural justice, allows the object of a dumping complaint adequate access to the information necessary to discharge the burden. Second, loss of market share contemporaneously with increase of market share by dumped imports has apparently satisfied the Tribunal that there is a causal relationship between the two.

### B. *The Causal Relationship*

It is commonly said that dumping and material injury are necessary conditions for the levying of an antidumping duty. It should be remembered that they are not sufficient conditions. Dumping must clearly be the principal *cause* of injury. Article 3(b) of the Code makes this very plain, and requires full consideration of "all factors having a bearing on the state of the industry in question . . . ."

I have elsewhere criticised the Tribunal for not developing an approach to causality that satisfies this requirement,<sup>18</sup> and have referred to a tendency to assume causality when there is a contemporaneous increase in dumped imports and loss of market share by Canadian producers. The question of

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<sup>17</sup> *Stainless steel plate* originating in the Federal Republic of Germany, Japan and the Republic of South Africa and stainless steel sheet, not including cold rolled sheet in grades AISI 409, AISI 410S and AISI 434, originating in the Federal Republic of Germany and Japan (ADT-14-77), January 13, 1978.

<sup>18</sup> See P. SLAYTON, note 1 *supra*.

causality is a very difficult question indeed, but this does not mean that the Tribunal is justified in refusing to grasp the nettle.

What are some of the "other factors" that may be relevant in a consideration of steel dumping?

#### 1. International Conditions<sup>19</sup>

The Tribunal has to some extent acknowledged the effect that international conditions may have had on the domestic market.

In *Stainless flat rolled steels/alloy tool steel bars*, the Tribunal, as noted, appeared to attribute changing market share of imports to international cycles of demand.

In *Wide flange steel shapes*, part of the complaint depended upon an appraisal of international conditions. Algoma claimed that a worldwide overcapacity for the product threatened future injury. But in that case only the Tribunal's Vice-Chairman, in separate reasons, paid attention to international factors. Ms. Ritchie stressed the worldwide cyclical nature of the steel industry, and suggested that this characteristic "has had profound effects upon the attitudes of producers and customers alike." In particular, noted Ms. Ritchie, in times of shortage, steel producers use a system of allocation to customers based on past purchase history and this leads steel fabricators and service centres to ensure the possibility of purchases from alternative sources. As the Vice-Chairman put it, "in expectation of periods of shortages, they will continue to build up the necessary history of purchases from the foreign sources, instead of shifting to Algoma." In other words, responsiveness to price is limited because of international market conditions; accordingly, it is less likely that dumping will cause injury.

The reasons in *Bar size angles* make no mention of these international considerations.

In *Stainless steel plate and sheet*, Atlas again expressed concern about the effects of world oversupply. So far as plate went, the Tribunal did not explore this problem, although in an off-hand fashion it contributed another such consideration by referring to "the potential impact on Canada of the recently imposed quotas on stainless steel flat rolled products entering the United States." Its discussion of sheet did include reference to worldwide surplus capacity. The Tribunal said that "with the threatening presence of important surplus capacity offshore, to allow dumping to continue would permit the ongoing underselling of domestic product by dumped imports and would invite more serious erosion of the market share now held by Atlas Steels."

It seems entirely reasonable to take international conditions into account when considering the question of material injury. To me, the following questions seem important:

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<sup>19</sup> See Steele, *The Propensity of Advanced Free World Economies to Import Steel*, 2 CAN.-U.S. L.J. 17 (1979).

- (1) In what circumstances may the suffering of the Canadian industry be attributable simply to an international steel recession?
- (2) May an increase in market share of dumped imports at the expense of the Canadian industry sometimes be attributable to reasons other than price (*i.e.*, reasons other than dumping), for example, on account of buying patterns caused by market cycles?
- (3) Do offshore surplus capacity and protectionist measures by other countries (such as quotas or trigger price systems) always increase the likelihood of material injury? Is it in accord with national and international antidumping policy to levy anti-dumping duties semi-automatically when these conditions exist?

## 2. Self-inflicted Injury: Marketing Techniques

Particular marketing techniques used by Canadian producers have created some difficulties in assessing causal relationships between dumping and injury. I have mentioned already allocation systems used in times of shortage. Another factor, for example, is liquidation of inventories in times of surplus, particularly by steel service centres, that obviously may depress sales by producers.

The impact of marketing policy was vigorously argued in the *Wide flange steel shapes* case. The Tribunal majority reasoned as follows:

Allegations were made to the effect that Algoma's selective marketing policy was partly responsible for its loss of sales to the dumped imports. Evidence was adduced that Algoma would not sell to all fabricators and distributors who wanted to buy its product. The evidence of Algoma is that it has had a consistent marketing policy over the years, whereby it selects distributors on the basis of criteria designed to give it what it considers to be the most adequate and extensive market coverage throughout the country . . . Algoma's distributorship system consists essentially of approximately 125 customers who fall mostly into the categories of steel fabricators and service centres . . . . These customers are serviced by Algoma's sales personnel located throughout Canada and by a staff of engineers who carry out design consultation with construction designers across Canada.

But the Tribunal noted that those excluded from the Algoma network were minor concerns that collectively accounted only for a very small part of the market. It added that, "Algoma's marketing policy does not appear to have affected its competitiveness vis-a-vis undumped imports which have also lost ground to the dumped imports."

In *Stainless steel plate and sheet*, the importers-distributors argued that the injury suffered by Atlas was in part self-inflicted as a result of its policy of selling to four distributors only, forcing other distributors to import. The Tribunal rejected this argument, noting that the four distributors between them operated twenty-seven warehousing and service centres across the country, thereby, in the Tribunal's opinion, providing effective national coverage.

It seems clear that the Tribunal is not sympathetic to the marketing policy argument, although there is a paucity of analysis to support its position.

### 3. Self-inflicted Injury: Production, Management and other Problems

A standard part of every exporter or importer's argument before the Anti-dumping Tribunal is that the Canadian industry's real problems are internal and self-inflicted. For example, it was argued in *Wide flange steel shapes* that Algoma was responsible for its own injury, partly through its relationship with Dominion Bridge. Algoma owns forty-three percent of Dominion Bridge, and that company not only imported dumped WF shapes, but used these dumped goods to underquote Algoma on some contracts. And, in *Stainless steel plate and sheet*, the Tribunal found Atlas' 1976 drop in sheet production to be largely a result of a nine week strike and operation problems at the Tracy plant. There are many variations on these self-inflicted injury arguments, and where there is strong evidence their relevance is unquestionable.

In my view, one serious deficiency in the Tribunal's treatment of these arguments is that it has failed to develop what might be called a "thin skull" theory. How does the Tribunal decide whether "other factors" are solely responsible for injury, or whether they have only increased susceptibility to injury from dumping? Must the exporter take his "victim" as he finds him, no matter how great the self-inflicted susceptibility to injury by dumping?

#### C. *The Problem of "Like Goods"*

Section 2(1) of the Antidumping Act says that "like goods" are "(a) goods that are identical in all respects to the said goods, or (b) in the absence of any goods described in paragraph (a), goods the characteristics of which closely resemble those of the said goods." The language of this section closely follows that of article 2(b) of the Code. The test is not one of competition, with reference to cross-elasticity of demand and functional interchangeability, but the more mechanical test of characteristic comparison.

The Act makes clear that goods which "closely resemble" may only be considered in the absence of identical goods; in other words, production of identical goods in Canada precludes consideration by the Tribunal of injury to producers of competitive goods. The position in the absence of identical goods is more complex. In general, the Tribunal has asked whether the dumped goods are competing directly with the non-identical Canadian produced goods. In the recent *Sarco* case,<sup>20</sup> the Federal Court of Appeal took a very cautious view of this practice. Mr. Justice Herald, speaking for the Court, stated:

[I]n defining "like goods" the respondent was required to consider *all* of the characteristics or qualities of the goods, and not restrict itself to a consideration of something less than the totality of those characteristics. Accordingly, if the record disclosed that the Tribunal

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<sup>20</sup> See note 10 *supra*.

had restricted itself to "market considerations" in defining "like goods," I would agree with counsel for the applicant that the Tribunal had erred in law.

It is now clear that substitutability, functional similarity or competitiveness by themselves do not meet the "closely resemble" requirement; *a fortiori*, the requirement for "identical" goods.<sup>21</sup>

In *Stainless flat rolled steel/alloy tool steel bars*, the Tribunal made these comments:

- (1) [The Tribunal] recognized that in the case of sheet the matter of width did not affect the status of strip as a like product.
- (2) The Tribunal has recognized that plate, regardless of width, are like products and can compete with one another on the basis of grade and chemical specifications, that sheets over 72 inches can be cut to required sizes, and that therefore all imports of plate, regardless of size, are in competition with the production of stainless steel plate in Canada.

The interpretation of "like goods" revealed by these statements must now, following *Sarco*, be regarded as doubtful. In this case, the Canadian produced goods were not identical to the dumped goods. Whether or not there was a close resemblance seems to have been determined essentially on the basis of competitiveness, and that is contrary to the spirit, and perhaps the letter, of *Sarco*.

In *Wide flange steel shapes*, this statement appears in the reasons of the majority:

It was . . . suggested that those sizes not produced in Canada should not be considered like goods to the goods made in Canada, but the majority of the Tribunal cannot accept this as a valid argument. There is undisputed testimony by Algoma that it can compete in over 80% of the WF shapes' market.

This view must now, similarly, be regarded as highly doubtful.

In *Stainless steel plate and sheet*, the Tribunal noted the argument that, "to the extent imports satisfied requirements for wide plate, Atlas Steels had no ground for complaint as it did not produce wide plate." The Tribunal then compared wide and narrow plate, and said that "on the basis of the evidence, the Tribunal considers them directly competitive and 'like goods' for its purposes." Again, this analysis is suspect.

The cases I have mentioned all antedate the *Sarco* decision. Now that the Federal Court of Appeal has clarified the concept of like goods, the Tribunal will have to change its approach to this question. It may now be a good deal more difficult for an antidumping action to succeed in the absence of identical goods.

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<sup>21</sup> It should be remembered that the key to the question of like goods is the class of goods identified in the Deputy Minister's preliminary determination, and it has been held that the Deputy Minister can formulate that class however he likes. *Mitsui v. Anti-dumping Tribunal* [1972] F.C. 944.

#### D. *The Regional Market Problem*

Paragraph 4(a)(ii) of the Code, applicable to Canada by virtue of section 16(4) of the Act, sets forth a concept of "separate industry." It permits a country to be divided into two or more competitive markets and the producers within each market to be regarded as a separate industry where, because of transport costs or special regional marketing conditions, there exists regional isolation.

Paragraph 8(e) of the Code states that where injury has been found in a regional market, as permitted by article 4(a)(ii), "antidumping duties shall only be definitively collected on the products in question consigned for final consumption to that area . . . ." One consequence of the separation in the Code of this provision from paragraph 4 is that, since section 16(4) of the Canadian Act refers only to paragraph 4, apparently it is not possible in Canada to levy the "regional" duties contemplated in paragraph 8. Accordingly, Canada-wide duties may be put into place just to protect regional industries.

*Wide flange steel shapes* is a striking example of this problem. In that case the following point was made:

Counsel for the Japanese importers and for fabricators in B.C. and Alberta alleged that imports from Japan were largely destined for the B.C. and Alberta markets, both of which could not be adequately covered by Algoma, principally because of transportation costs. These same basic arguments were made by a number of Newfoundland fabricators who claim to depend heavily on imports for their supply of WF shapes.

It was argued that the levying of antidumping duties on WF shapes would destroy the steel fabricating industry in the regions in question, by encouraging the construction industry to buy imported fabricated steel or fabricated steel made in other regions, and by encouraging use of concrete as a substitute. The majority of the Tribunal in its reasoning simply repudiated the argument on the evidence deciding that Algoma could compete in British Columbia at least in the absence of dumping. The Vice-Chairman, in her separate opinion, dissented, saying that, "the evidence does in fact justify special consideration for British Columbia and Newfoundland." Ms. Ritchie continued:

[I]t appears that in these two provinces, Algoma competition was marginal at best, and that Algoma has not regarded itself as having any special relationship to these areas or as having suffered any noticeable injury from the dumped imports intended for use in these two parts of Canada . . . There appears to be little advantage, if any, to the production in Canada of WF shapes . . . to include these areas within the scope of the finding.

The Vice-Chairman noted that section 16(3) of the Act empowers the Tribunal to make "such order or finding as the nature of the matter may require," but

concluded that she could not distinguish between the situation of British Columbia and Newfoundland and some other parts of Canada (I find this point unclear), and that therefore the granting of an exemption would have to be left to the Governor-in-Council.

On February 16, 1978, the Cabinet suspended antidumping duties on wide flange steel shapes for nine months retroactive to September 29, 1978 (the date of the preliminary determination), for shapes destined for use in British Columbia, Alberta, the Yukon Territory and Newfoundland.<sup>22</sup> This exemption has, of course, since expired. Much hard feeling has been created, particularly in British Columbia.

I am in favour of an amendment to the Antidumping Act, which will incorporate the provisions of article 8(e) of the Code. I am not satisfied that section 16(3) of the Act gives the necessary power to the Tribunal, and I consider that, if "regional duties" are thought to be a good idea, statutory amendment is the preferable course. It is likely best to depoliticize the regional question somewhat, by having the main responsibility rest with the Tribunal, rather than the Cabinet. And, it seems indisputable that the possibility of a regional injury finding is helpful in the Canadian context.

#### *E. Summary*

I would summarize my main points concerning the Tribunal's work in the steel dumping area in this way: First, in finding there to be material injury, loss of market share has been regarded as close to conclusive; second, when it comes to the causal relationship between dumping and injury, there are several issues that need much fuller analysis—in particular, the effect on the Canadian industry of world conditions in the steel industry; and third, there are particular problems associated with the concept of "like goods" and especially in connection with regional markets. These latter problems may best be dealt with by statutory amendment.

### III. NATIONAL REVENUE AND STEEL DUMPING

On February 20, 1978, the Minister of National Revenue announced a system of "fast track" antidumping investigations of imported steel mill products. Under this new system, the Steel Task Force within the Special Assessment Programs collects data on entries of imported steel, and on Canadian and foreign manufacturing costs and prices, and establishes "benchmark" prices. Export prices below these benchmark prices attract the particular attention of the Task Force (such prices are apparently considered evidence of dumping),<sup>23</sup> and the Task Force then initiates a formal investigation if there is in addition *prima facie* evidence of injury. If there is such evidence, reaction of Canadian steel mills to the impending investigation will be solicited. Benchmark prices are not disclosed (in order, so it is said, not to interfere

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<sup>22</sup> P.C. 1978/472, SI/78-29, dated March 8, 1978, made under section 17 of the Financial Administration Act, R.S.C. 1970, c.F-10.

<sup>23</sup> Importation above the benchmark price does not, of course, exempt a product from anti-dumping action. There may be other evidence that goods are dumped.

with the normal market system), although steel importers can advise Revenue Canada of proposed prices and learn whether they are above or below the benchmark price. Steel importers have particularly criticised this aspect of the system, claiming that it promotes uncertainty which generally curbs imports. Under "fast track," the period from initiation of investigation to preliminary determination or termination of proceedings will be three months, rather than the usual six, and it is anticipated that ministerial prescriptions under section 11 will be used frequently. The "fast track" system is supposed to be a product of the world steel recession, and of fear that similar systems introduced earlier by the European Economic Community and the United States might cause the diversion of large quantities of dumped steel into Canada.

At the time of this writing, there has been no initiation of investigation into steel products under "fast track" procedures.<sup>24</sup> The reason given by Special Assessment Programs is that at present there is no *prima facie* evidence of injury to Canadian steel manufacturers as a result of dumping. Special Assessment Programs points to a current strong market for Canadian steel, partly as a result of (1) steel warehouses building up inventories in anticipation of price increases and labor disputes disrupting supply; (2) export expansion, with new markets being found in the United States in particular; and (3) devaluation of the Canadian dollar, which has made the price of imported steel less attractive (and has made Canadian steel exports more competitive). Apparently the absence of evidence of material injury is so overwhelming that, whether goods are dumped or not, there is no case to send to the Tribunal.

So it seems that institution of "fast track" coincided with a dramatic improvement in the fortunes of the Canadian steel industry. These fortunes may well, of course, change, once the effect of high warehouse inventories is felt, or further protection of the United States steel industry is put in place, or finally (and perhaps least likely) the Canadian dollar experiences a recovery.

Elsewhere I have suggested that the basic procedures of Special Assessment Programs are not particularly favourable to Canadian industry.<sup>25</sup> Domestic producers generally have the burden of initiating the process and supplying much of the necessary information, and must normally wait about seven months before a preliminary determination (if there is to be one) is made. That approach can be best justified by an adherence to the theory of comparative advantage. If antidumping measures are regarded as exceptional, and only to be used in unusual circumstances, then it makes sense to demand much from those who seek to rely on such measures. The protection offered by antidumping duties must not be automatic, or even put in place too easily.

The general point to note about "fast track" is that it is, in theory at least, much more favourable to the Canadian industry than the normal pro-

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<sup>24</sup> I am grateful for this information supplied by K.H. McCammon, Director General, Special Assessment Programs, Customs and Excise, Revenue Canada.

<sup>25</sup> See P. SLAYTON, note 1 *supra*.

cedure. In particular, the main responsibility for initiating an investigation lies with National Revenue, with attention being attracted in the first place, not by a complaint from the Canadian industry, but by imports below a benchmark price. I have mentioned already the charge by importers that the secrecy surrounding benchmark prices acts as an administrative curb on imports. And, finally, extensive use of ministerial prescriptions—justified by the three month period for investigation—make it that much easier to bypass tedious and very difficult calculations of normal value.

What would be really interesting, but is far beyond the scope of this paper, is an analysis of exactly how benchmark prices are fixed, and the way in which ministerial prescriptions are formulated and used. Only following such an analysis could one easily establish who are the “fast track” winners and losers.

#### IV. CONCLUSION

I have indicated that my overall position regarding the antidumping mechanism in general, and the Canadian system in particular, is one of considerable skepticism. So far as the mechanism is concerned, I am doubtful about its utility in achieving stated purposes, and cynical about the honesty of its application by many governments. As for Canada, I perceive a certain incoherence in the structure and operation of the antidumping system.

With respect to steel, and putting general considerations aside, I consider that the Canadian industry is receiving special treatment by the “anti-dumpers.” “Fast track” is more-favourable than normal Revenue Canada procedures, for the reasons I have given. The Tribunal, on the whole, gives short shrift to alternative explanations of material injury experienced by Canadian steel manufacturers, in particular the effect of international conditions. The normal approach of the Tribunal—permitting loss of market share to raise a presumption of material injury—is conceptually unsound, and arguably unfair to exporters and importers. Finally, the failure of the Act to reflect fully the Code’s treatment of the regional market problem permits protection in some parts of Canada when it is clearly not necessary.

But, to give the full picture, there are two developments that might cause the Canadian steel industry some uneasiness. First, Revenue Canada does not appear overly anxious to use “fast track,” taking a conservative approach to what constitutes *prima facie* evidence of material injury. Secondly, the *Sarco* decision may dramatically reduce the availability of antidumping protection for domestic producers manufacturing competitive but not identical goods.