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Comments on Professor Slayton's Paper On Steel Dumping

by Stanley D. Metzger*

PROFESSOR SLAYTON'S PAPER on Canada's legal response to steel dumping¹ is most enlightening. I agree with his conclusions concerning (1) the concept of antidumping presently employed in both Canada and the United States; (2) the work of the Canadian Antidumping Tribunal; and (3) the recently instituted "fast track" system of benchmark prices and accelerated "investigations" for steel dumping—a system also adopted by the United States.

I would like to add some observations to each of these points and make some proposals somewhat more far-reaching than those offered by Professor Slayton.

I. I agree with Professor Slayton's reasons for believing that the notion of antidumping, extant in both the United States and Canada is both irrational and inefficient. I would add that in my experience a very high percentage of dumping complaints are filed by domestic industries attempting to protect artificially high domestic prices set through oligopolistic or cartel behavior against lower priced imports. These lower priced imports themselves often represent off loading by foreign oligopolies or cartels shipping abroad excess production which could foul their own cozy "price leadership" operations at home! In all those very numerous cases, wise economic and social policy should resemble the prescription of the Kentuckian when told by a distraught neighbor that his wife was locked in combat with a bear. Asked anxiously what he was going to do about it, the Kentuckian, continuing to rock on his porch, finally said, "I'm going to holler: Go to it Wife, Go to it Bear!"

If this description, and this suggested remedy, does not fit the steel industries of the major countries, their chemical industries, and the rest, I don't know what does.

II. Two and a half years ago during some time as a Visiting Professor at Carleton University's Normal Paterson School of International Affairs at Ottawa, I did a study entitled *Compliance with International Obligations: Some Recent United States and Canada Injury Determinations Under the International Antidumping Code*.² In that paper, I attempted to analyze all of the decisions of the United States and Canada during the January 1, 1974 to December 31, 1975 period, in which their respective tribunals had made positive injury determinations in antidumping cases, for the purpose of deter-

* Professor of Law Emeritus, Georgetown University Law Center. Former Chairman, United States Tariff Commission, 1967-69. This paper was presented 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 Slayton, *The Canadian Legal Response to Steel Dumping*, 2 CAN.-U.S. L.J. 81 (1979).

² Published as an Occasional Paper (No. 31), Carleton University, May 1976.

mining whether those findings complied with Canada's and the United States obligations under the provisions of the International Antidumping Code.³ The Code was entered into on June 30, 1967 and effectively went into force July 1, 1968, binding the United States, Canada and other industrialized countries that were parties to the GATT. This antidumping code is still in effect and binds these countries, though one would never notice it from their behavior.

There had been five positive injury determinations by the United States Tariff Commission⁴ (renamed the International Trade Commission in 1975) and six by the Canadian Antidumping Tribunal⁵ during this two year period. In all these cases, without exception, both the United States and Canadian tribunals had failed to conform with their countries' Code obligations.

The Code laid down understandable principles designed to curb the use of antidumping procedures as a mask for outright protectionist measures. Article 3(a) of the Code states flatly "that a determination of injury shall be made only when the authorities are satisfied that the dumped imports are demonstrably the principal cause of material injury or threat of material injury" to a domestic industry. It further enjoins these authorities to "weigh, on the one hand, the effect of the dumping, and, on the other hand, all other factors taken together which may be adversely affecting the industry," in making such a determination of causation.

So far as the "valuation of injury—that is the evaluation of the effects of the dumped imports on the industry in question" is concerned, the Code required that such a determination "shall be based on examination of all factors having a bearing on the state of the industry in question, such as: development and prospects with regard to turnover, market share, profits, prices (including the extent to which the delivered, duty-paid price is lower or higher than the comparable price for the like product prevailing in the course of normal commercial transactions in the importing country), export performance, employment, volume of dumped and other imports, utilization of

³ 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).

⁴ Primary Lead Metals from Australia and Canada, T.C. Publ. 639, January 1974; Racing Plates (Aluminum Horseshoes from Canada), T.C. Publ. 645, January 1974; Picker Sticks from Mexico, T.C. Publ. 671, May 1974; Tapered Roller Bearings and Certain Components Thereof from Japan, I.T.C. Publ. 714, January 1975; Electric Golf Cars from Poland, U.S.I.T.C. Publ. 740, September 1975.

⁵ Slide Fasteners, or Zippers, and Parts Thereof, manufactured by Yoshida Kogyo, K.K., Tokyo, Japan, No. ADT-1-74, June 7, 1974; Tetanns Immune Globulin (Human) Originating in the United States of America, No. ADT-3-74, December 2, 1974; Photo Albums With Self-Adhesive Leaves and Component Parts Thereof Originating in Japan and the Republic of Korea, No. ADT-4-74, January 24, 1955; Frozen Prepared, Precooked Dinners Containing Meat, Poultry and/or Other Ingredients, Produced by the Banquet Foods Corporation, St. Louis, Missouri, United States of America, No. ADT-5-74, February 21, 1975; Artificial Brick for Use as Decorative Wall Covering, Produced by the UMC Corporation, Woodinville, Washington, United States of America, No. ADT-3-75, September 12, 1975; Colour Television Receiving Sets Originating In or Exported from the United States of America, Japan, Taiwan and Singapore, Having An Overall Diagonal Measurement Across the Picture Tube of Sixteen Inches and Over, No. ADT-4-75, October 29, 1975.

capacity of domestic industry, and productivity, and restrictive trade practices. No one or several of these factors can necessarily give decisive guidance."

Professor Slayton's examination of the Canadian Tribunal's steel dumping injury determinations discloses clearly that these codal prescriptions have been ignored, as my examination of all types of cases during a recent two year period had also made plain. The Canadian Tribunal's performance in this respect is no accident. Nor can it be isolated from the United States identical behavior, with which it is closely connected.

Two of the principal reasons for the Code's negotiation as part of the Kennedy Round of Tariff Negotiations in the 1963 to 1967 period were: (1) the performance of the United States Tariff Commission during the 1950's in finding material injury to be caused by dumped imports on flimsy grounds, both as to injury and causation; and (2) the fact that Canadian law going back to 1919 did not require any injury determination at all. The United States would not respond to European (primarily British and French) complaints by agreeing to tighten causation and injury determinations unless doing so was part of a general code of behavior, which also involved Canadian adoption of an injury requirement. The ink was scarcely dry on the Code, however, when the steel and cement industries of the United States mounted an offensive designed to frustrate its objectives so far as United States behavior was concerned. As a consequence of their successful efforts, the United States Congress enacted a statute (P.L. 90, 1968) declaring that:

Nothing contained in the . . . Code . . . shall be construed to restrict the discretion of the United States Tariff Commission in performing its duties and functions under the Anti-dumping Act, 1921, and . . . the Tariff Commission shall—

- (1) resolve any conflict between the International Anti-dumping Code and the Anti-dumping Act, 1921, in favor of the Act as applied by the agency administering the Act, and
- (2) take into account the provisions of the International Anti-dumping Code only insofar as they are consistent with the Anti-dumping Act, 1921, applied by the agency administering the Act.

This meant that individual Tariff Commissioners would be free to continue, if they so chose, to interpret and apply the United States Antidumping Act in a much looser manner than the Code permitted with respect to both the necessary quantum of injury and the degree of causation required between dumped imports and such injury. A number of commissioners had indicated their desire to do just that, with the enthusiastic support of certain members of the Senate Finance Committee, including its then, and present, chairman.

How loose an application of the Act has ensued in the United States is seen by events since 1968. As noted earlier, my analysis of two years of positive injury determinations disclosed that every one of the five injury determinations by the United States Tariff Commission in 1974 to 1975 failed to

meet Code requirements. Indeed, the Senate Committee's Report on the 1974 Trade Act, which contained no substantive changes in the 1921 Act, went out of its way to give marching orders to the International Trade Commission to ignore the Code. The report stated that "the (antidumping) law does not contemplate that injury from less-than-fair-value imports be weighed against other factors which may be contributing to injury to an industry," and that while the Act's causation requirement—"by reason of"—expresses a causation link, "this does not mean that dumped imports must be a (or the) substantial cause of injury caused by all factors contributing to overall injury to an industry."

In the years since 1974, the United States International Trade Commission has expressed reliance on the Senate Report in continuing to interpret and apply the 1921 United States law in the same loose fashion that had led to the complaints which caused the negotiation of the Code in the first place.

None of the actions in 1968 in the United States Congress and among certain Tariff Commissioners designed to gut the Code's injury requirements went unnoticed in Canada. Hence, when Canada enacted its Antidumping Act,⁶ which, with subsequent amendments is Canadian law today, it did not adopt the injury requirements of the Code, deliberately avoiding using the term "demonstrably the principal cause" of material injury, in favor of the wide-open "has caused, is causing or is likely to cause" material injury to the production in Canada of like goods. Canada, having witnessed the United States Congress' treatment of the Code, and having just recently decided to adopt an injury standard, was concerned that the Code's standards were too stiff, that they would make positive injury determinations more difficult than Canada thought was wise.

It was fairly predictable from this history that Canadian determinations would fail to conform with the Code. And indeed none of the six positive injury determinations in the 1974 to 1975 period used Code standards, nor did they live up to them without referring to them. Had Code standards applied, so far as the Canadian Tribunal's decisions reveal, none would have resulted in injury determinations, anymore than would have the United States International Trade Commission's findings in the American cases. Thus, in the *Zippers manufactured by Yoshida case*,⁷ the Canadian Tribunal did not attempt to inquire into material injury beyond its finding that there were "deteriorating profits" and "loss of sales." No findings were made concerning levels of employment or productivity, and specific information on the volume of dumped and other imports, on profits or on prices was omitted. Nor did the Tribunal indicate in any way what standards it was employing in evaluating injury or causation. The other cases were similar. It is therefore not surprising that the steel dumping cases reviewed by Professor Slayton reveal more in the same pattern.

What is that pattern? The plain fact of the matter is that the effective in-

⁶ 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.

⁷ ADT-1-74, June 7, 1974.

dicators of causation of injury, once it is determined that imports are sold for less than in the home or third country markets or than their "cost of production," are, in the words of the Senate Committee Report, "suppression or depression of prices, loss of customers, and penetration of the domestic market." In short, if dumped imports undercut domestic prices, and sell somewhat more in value at the expense of domestic competitors in consequence, you've got your injury case, absent unusual circumstances not capable of being generalized. This is what we've come to in the United States and Canada, the Code to the contrary notwithstanding, in steel as well as in other commodities.

III. In steel, however, we've now come one major step further toward using antidumping legislation as a protectionist device. Instead of pursuing the normal investigative course, the benchmark price system for determining dumping has been instituted to provide a shortcut to an injury determination which is all but fore-ordained. In consequence, foreign suppliers, taking due note of the actual state of affairs, will curtail their exports to levels unilaterally believed to be tolerable, or so agreed with the domestic industry *sotto voce* (assuming that there is a practical difference), with the result of avoiding activating antidumping proceedings.

If this sounds like a backdoor approach to an organized international steel cartel limiting exports to designated recipient countries, I believe that you are hearing right.

RECOMMENDATIONS

What should and can we do about this easy antidumping route to protectionism in general, and toward steel in particular?

As to what should be done, I would urge the following as general propositions:

1. Cause a special investigation to be undertaken, by an appropriate body in the United States and in Canada, into the merits of having anti-dumping legislation of any sort in an age where predatory dumping (dumping whose purpose and effect is to destroy competition) is rare, and where the incidence of such legislation falls upon industries and upon the consumer in all importing countries, with highly dubious countervailing advantages, if any, to the body politic.

2. If this course is unpalatable for whatever reason, let the parties to the Code at least resolve to abide by their current international obligations by revising their domestic legislation so that it is made to conform quite specifically to the terms of the Code. For the Code is itself a halfway house—it does permit levying antidumping duties to offset injury to competitors, not insisting that competition itself be destroyed, but it demands a real showing of injury, not a thin substitute therefor.

3. With respect to steel, if either of these two courses appears to be unfeasible, come to grips with steel's alleged special position, whether it be termed a "natural security" exception, or one of the "commanding heights" industries requiring special treatment, or whatever. State flat out that there

has to be what our French friends call "organized free trade" in steel, or what in plain English we used to call an old-fashioned world steel cartel. Let governments negotiate production, prices and quotas; let legislatures vote them; and allow whatever sunshine exists to shine on the whole proceedings.

But I think that very little *can* be done in the near future. With economic conditions in the United States, Canada and the rest of the Western world as we can see them—relatively high unemployment, together with relatively high inflation and quite moderate economic growth rates—the protectionist trend of the past ten years is accelerating, not reversing. The anti-dumping protectionist tool, whose use has been increasing during this period, will therefore continue to come into play, very likely more and more rather than less and less. While an upbeat conclusion would be more pleasant, I doubt that you would believe any "Westward ho, the land is bright" message even if I tried to express it.

We are poised between free trade principles that we find increasingly difficult to attempt to live by (yet continue to profess) and organized production and trade whose past is unsavory (and whose future we suspect may be similar). We appear to be doomed in the immediate future to seamy arrangements between the two. In the years between World Wars I and II, the Great Depression became a great awakening to the follies of galloping protectionism. Since we have not yet galloped so furiously, I would hope that our awakening will not need to be so rude. There ought to be an easier way to toll the bells, but so far I don't think we have found it.