UNITED STATES TARIFF COMMISSION

/AA1921-33/

TC Publication 122 March 23, 1964

STEEL REINFORCING BARS FROM CANADA

Determination of Likelihood of Injury

On December 23, 1963, the Tariff Commission was advised by the Assistant Secretary of the Treasury that steel reinforcing bars from Canada, manufactured by Western Canada Steel Limited through its subsidiary, the Vancouver Rolling Mills Limited of Vancouver, Canada, are being, or are likely to be, sold in the United States at less than fair value as that term is used in the Antidumping Act. Accordingly, the Commission on December 24, 1963, instituted an investigation under section 201(a) of the Antidumping Act, 1921, as amended, to determine whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States.

Public notices of the institution of the investigation and of a public hearing to be held in connection therewith were published in the Federal Register (28 F.R. 14534 and 29 F.R. 519). The hearing was held on February 11, 1964.

In arriving at a determination in this case, due consideration was given by the Commission to all written submissions from interested parties, all testimony adduced at the hearing, and all information obtained by the Commission's staff.

On the basis of the investigation, the Commission has determined (Commissioners Dorfman, Talbot, and Fenn dissenting) 1/ that an industry in the United States is likely to be injured by reason of the importation of steel reinforcing bars from Canada, manufactured by Western Canada Steel Limited through its subsidiary, the Vancouver Rolling Mills Limited of Vancouver, Canada, sold at less than fair value within the meaning of the Antidumping Act, 1921, as amended.

Statement of Reasons for Affirmative Determination

The steel reinforcing bars (re-bars) found by the Assistant Secretary of the Treasury to have been purchased from the subject Canadian plant at less than fair value have been entering the United States since mid 1960. They continue to be imported. At first the imports were sold in a wide area of the United States. However, in 1962 the importer concentrated most of his sales in the Northwest area of the United States (principally Oregon and Washington) which now constitutes the only major competitive market area in which the imported re-bars are sold. This area, except for imports, is served almost exclusively by three domestic mills located within that area. In recent years there have been only rare instances in which special circumstances have made it feasible for other domestic mills to ship re-bars into that competitive market area. This is principally because of the peculiar location

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1/ The views of Commissioners Dorfman and Talbot and the separate views of Commissioner Fenn follow the statement of reasons for the affirmative determination.
Section 201(a) of the Antidumping Act provides that the "Commission shall be deemed to have made an affirmative determination if the Commissioners of the said Commission voting are evenly divided as to whether its determination should be in the affirmative or in the negative."

of the market area and the higher shipping costs applicable to shipments of the other more distant mills. The price level of re-bars in the Northwest market area is affected only within broad ranges by the general price level of domestic re-bars sold throughout the remainder of the United States.

During the years 1962 and 1963, the importer sold his re-bars at prices materially lower than the price of any domestic re-bars sold in the area with three possible minor exceptions; out of an estimated 800 sales of domestic re-bars, three made in the last quarter of 1963 were sold at prices that may have been slightly lower than the price of the imported re-bars. Adequate data were not at hand to determine whether these three sales were actually made at lower prices.

No evidence obtained in this investigation clearly indicates that other imported re-bars are price leaders in the Northwest area of the United States. Offshore imports come in shorter lengths and frequently contain excessive rust. After taking into consideration the higher waste factors and other facts associated with offshore imports, it is clear that the price level of such imports in the Northwest market area is generally as high or higher than the price of domestic re-bars. Such imports have no appreciable influence on the market price levels for re-bars in the Northwest market area. Moreover, shipments from the Canadian plant have a peculiar advantage over offshore imports in that the importer can make prompt deliveries comparable to deliveries by the domestic mills selling in the Northwest market area.

It is evident that the market price for re-bars in the Northwest area began to soften in late 1959 or early 1960. However, a sharp decline in prices did not occur until the sales of the imported Canadian re-bars were concentrated in that area. The importer, an apparent novice in the steel business, has demonstrated a phenomenal success in establishing a re-bar business in the Northwest area having gross sales in excess of $500,000 per year during each of the years 1962 and 1963. This unusual and easy success can only be attributed to his significant underselling of the prices for all domestic re-bars sold in the market area by the three local mills. These facts are persuasive that his gross underselling of the domestic product helped depress prices in the last two years. The depressed prices cannot be accurately measured, especially within the time directed by statute for this investigation. Nevertheless, it is clear that the price levels have been depressed at least 9 percent and that they may have been depressed by as much as 24 percent in some sales.

The interrelationships among the various influences in this industry are very complex: There are various size and grade combinations; there are at least three clearly different channels of distribution (warehouses, independent fabricators and integrated producer-fabricators plus combinations thereof and changing patterns therein); geographically there is a clearly distinguishable pattern of production and distribution almost exclusive to the states of Oregon and Washington but, at the

same time, there are inter-market influences; and the production of end products of the mills can be shifted easily from one product to another, e.g., from merchant bars to re-bars.

Given this multitude of interrelated forces in this particular case, it is difficult during the allotted time for this investigation to appraise accurately and finally all the cause and effect relationships. However, one thing clearly emerges from this complex of circumstances: the likelihood of material injury to the domestic industry if sales at less than fair value continue unabated. Having so concluded, there is no necessity to probe more deeply into the question as to whether material injury has occurred.

As to likelihood of injury, we note the following:

1. Imports at less than fair value continue.

2. Sales of such imports in the United States continue to be made at prices grossly lower than prices of domestic re-bars in the competitive market area as explained heretofore in this statement.

3. Although the importer states that his imports in 1964 will not exceed the level of his imports in the preceding two years because of the non-availability of such re-bars for export to the United States, he nevertheless has a confidential contractual relationship with the Canadian producer that is quite persuasive that such imports will increase.

4. The Canadian producer offers his marginal production of re-bars to the importer under an arrangement which is quite patently designed for the disposal of such marginal production in a market which will not interfere with his home market.

5. The Canadian producer can easily increase his production of re-bars by merely making less merchant bars, bar-size shapes, and small structurals as only a portion of its steel production now goes into re-bars.

Under these circumstances it is clear that such imports would continue to have a price-depressing effect in the Northwest market area and the anti-competitive effect of such imports could be expected to grow if condoned by a negative determination. In view of all the facts that may be properly considered under the Antidumping Act it is our opinion that an industry is likely to be injured by such imports.

We further observe that markets are valuable assets of an industry. In fact, the value of a plant, an organization, or industrial know-how can be destroyed by the loss of markets for the output. The national policy of the United States is to encourage international trade and this certainly has not expressed itself in protecting domestic industries from all lower prices and all market pressures generated by imports. Domestic industry has been expected to adjust. While no industry has unlimited, preemptive or continuing property rights to a market there are some types of competition which the Antidumping Act is intended to control. If one wants to get extremely technical one can argue that the existence or likelihood of injury is a fact relating solely to the party on the receiving end and has nothing to do with the perpetrator of the act. But in the Dominican cement case, a majority of the Commission found that the fact that the foreign producer had both "the

capacity and incentive" to continue selling below fair value was relevant to its determination of likelihood of injury. Similar conditions prevail here.

There is also a question of whether and to what extent the condition of the alleged victim should be taken into account in appraising injury. Is an extremely strong person less injured or his rights less violated by a given loss than is a weak person? Men are likely to become more incensed at an attack upon one who is weak than one who is strong and may even be tempted to forgive the first attack on the strong because the immediacy of injury is less apparent. On the other hand, condoning continued attacks on the strong is likely to lead to eventual material injury even to the strong.

The contention has been made during this investigation that the principle of de minimis should be applied in this case because the competitive market area consumes only about 5 percent of all re-bars sold in the United States and as a consequence thereof there could be no injury or likelihood of injury if virtually all the imports at less than fair value are sold in such a limited market area. Such a bare contention is as untenable as the parallel argument that the loss of a hand, which weighs less than one percent of the weight of a man's body, does not constitute material injury to that man. Every case must be decided on the basis of its own peculiar circumstances.

Views of Commissioners Dorfman and Talbot

On the basis of the information that has come to the attention of the Commission in the conduct of this investigation, we--like all of the other Commissioners--do not find that an industry in the United States is being "injured" 1/ or is being prevented from being established by reason of the importation of steel reinforcing bars (re-bars) supplied at "less than fair value" (LTFV) by the Vancouver Rolling Mills of Vancouver, British Columbia (which re-bars are henceforth referred to as Canadian re-bars). However, we disagree with the Commissioners whose determination constitutes the Commission's finding that an industry in the United States is "likely to be injured" in consequence of such imports.

At the outset we wish to note that the U.S. Antidumping Act provides no basis for holding that LTFV sales are per se either illegal, reprehensible, or contrary to the public interest. The Commission has

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1/ The Commission has always interpreted the term "injury," as employed in the Antidumping Act, to mean "material injury," in accordance with the practice followed by the Treasury Department when it had the responsibility (prior to Oct. 1, 1954) for making injury determinations under the Antidumping Act. The antidumping provision in the General Agreement on Tariffs and Trade, art. VI, par. 1--which was designed to be in accord with U.S. practice under the Antidumping Act--employs the term "material injury" in the same context.

frequently addressed itself to this point with such explanation as the following: 1/

> The term "less than fair value" must be construed in the sense in which it is employed in antidumping procedures. Treasury makes its determination by comparing the purchase price . . . with the foreign market value . . .. If the "purchase price" is less than the "foreign market value," Treasury makes a determination of sales below fair value and so notifies the Tariff Commission. Such a determination carries no implication of "unfairness" in the sense of being illegal, let alone being presumptuous of causing injury. Otherwise, the injury-determination function of the Tariff Commission would be meaningless.

A determination by the Treasury that imports are being sold in the United States at LTFV is a prerequisite to an antidumping investigation by the Tariff Commission, but it is neither a criterion nor evidence of injury or the likelihood thereof (nor evidence that an industry is prevented from being established). Only after a determination of injury or the likelihood thereof, by reason of the importation of such merchandise, is a special dumping duty imposed. LTFV imports that neither cause, nor are likely to cause, injury to a domestic industry (nor prevent an industry from being established) constitute no offense under the Antidumping Act. Moreover, there is no presumption that any subsequent Treasury finding of sales at LTFV involving the same articles, and even the same foreign supplier and the same U.S. importer, would in itself establish that a domestic industry is being injured or is likely to be. Under the Antidumping Act, the Commission must analyze and evaluate each separate Treasury

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1/ T.C. Publication 109, Titanium Dioxide from France, 1963.

advice of LTFV sales in the complex of circumstances in which they occur.

We do not know the precise scope of the industry on which the instant finding by the Commission is based, inasmuch as the three Commissioners responsible for it have advised us in regard to that matter merely that they "consider the 'industry' likely to be injured in this case to be the domestic producers of re-bars." Interpreted literally, such an industry would embrace the totality of domestic production of all articles made by the producers of re-bars, or at least all articles made in the same establishments in which such re-bars are made. Re-bars are not the sole product of any domestic mill; rather they are one of various forms in which steel mills market their basic product. The mill equipment on which re-bars are rolled can be used for merchant bar and bar-sized shapes as well.

Disregarding what has just been observed and assuming that the industry under review comprises the nationwide facilities devoted to the production of re-bars alone, we would still find incredible the view that the LTFV imports of Canadian re-bars are likely to cause injury to such an industry. Indeed, we would be of the same opinion if the scope of the industry in question were the narrowest claimed by any party who testified at the Commission's hearing in

this case, namely the facilities devoted to the production of re-bars in the three plants located in the Pacific Northwest--two in the State of Washington and one in the State of Oregon.

In only a very few antidumping investigations 1/ has the Commission identified the industry concerned as embracing less than the national production of the article in question. In a series of Commission antidumping decisions pertaining to steel wire rods, rendered less than a year ago, the Commission unanimously rejected the propriety of segmentizing the domestic production of such wire rods into regional industries. 2/ In explanation of its position, the Commission observed as follows: 3/

> With regard to the "regional industry" claim, the Commission recognizes the propensity of users to buy from the lowest priced suppliers. It recognizes also that domestic producers of such articles as wire rods can generally supply nearby users at lower costs than can

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1/ In one of these, the Commission determined by a 3 to 2 decision on Oct. 26, 1955, that the producers of cast-iron soil pipe in the State of California constituted an industry within the meaning of the Antidumping Act. Commissioners Sutton and Jones did not find injury or the likelihood thereof on that basis, and Commissioner Sutton did not subscribe to the concept of industry on which the majority based its decision. The Commission's decision in that case was challenged in the courts, but in sustaining the action of the Commission the U.S. Court of Customs and Patent Appeals avoided laying down "a broad definition of 'industry' . . . that will be applicable to every situation." At several points, however, the appellate court clearly implied that in the discharge of its responsibilities the Commission must consider "the nationwide effect its determination would have."

2/ TC Publication 93, Hot-Rolled Carbon Steel Wire Rods from Belgium, 1963; TC Publication 94, Hot-Rolled Carbon Steel Wire Rods from Luxembourg, 1963; TC Publication 95, Hot-Rolled Carbon Steel Wire Rods from West Germany, 1963; and TC Publication 99, Hot-Rolled Carbon Steel Wire Rods from France, 1963.

3/ TC Publication 93, Hot-Rolled Carbon Steel Wire Rods from Belgium, 1963.

> the more distant domestic producers. Nevertheless, virtually all such domestic producers, in greater or lesser degree, regularly penetrate one another's "natural" markets. Moreover, both the buyers and sellers in each of such markets take vigilant note of the happenings in each of the other of such markets. Accordingly, in the case of wire rods, the Commission finds no merit in the "regional industry" concept.

We are aware that nearly all of the re-bars produced by the three mills located in Oregon and Washington are usually sold in those two States, and that few re-bars produced elsewhere in the United States are ordinarily sold in Oregon and Washington. However, the absence of a substantial movement of re-bars from Oregon and Washington to other States, or vice versa, would not establish that the Pacific Northwest constitutes a completely isolated "re-bar market," or that the producers located there constitute a separate industry. Like steel mills elsewhere in the country, the Oregon and Washington producers cannot with impunity ignore marked price changes for re-bars in other States. Although the volumes have not been large, California re-bars, for example, have moved recently into Oregon, and Oregon re-bars have been sold as far distant as Salt Lake City.

The total quantity of LTFV imports of Canadian re-bars, which first entered in mid-1960, was never equal--even at its highest--to more than a very small part of the U.S. production of articles made in the domestic mills producing re-bars, either nationally or in the Northwest. The LTFV imports in 1963 accounted for about one-fifth of

1 percent of the national consumption of re-bars, and about 4 percent of the consumption of re-bars in the "competitive marketing area" in which the mills in Oregon and Washington sold their re-bars.

A substantial part of the Canadian re-bars that entered the Northwest area were sold to dealers and warehouses. These channels constitute an exceedingly small outlet for the three domestic producers of re-bars in the Northwest area. Moreover, one of those producers strongly argued that this outlet should be excluded from consideration by the Commission in formulating its decision. In the circumstances, it is doubtful that even a complete loss of the dealer market would injure them.

LTFV sales of Canadian re-bars could scarcely have had a significant nationwide effect on the sales volume or the prices of domestic re-bars. Re-bar prices in the Northwest area, as evidenced by the prices there for fabricated re-bars, began to decline long before Canadian re-bars were sold in either Oregon or Washington. The major cause of depressed prices there was undoubtedly the substantial reduction in the tonnage of re-bars consumed in that area following completion of steel work on several large projects. Indeed the decline in annual consumption was many times larger than the annual amount of Canadian re-bars handled by Northwest area fabricators (in contrast to dealers). The sharp decline in consumption no doubt intensified competition among the domestic producers and fabricators for the

remaining business. In consequence, prices deteriorated to the level where domestically produced re-bars frequently undersold the LTFV imports of Canadian re-bars.

From testimony developed at the Commission's hearing, it is clear that the "loss" by domestic firms of a contract to supply re-bars for the first stage of the Astoria-Megler bridge sharply focused attention on imports of Canadian re-bars. Up to that time, virtually no Canadian re-bars had ever been sold in Oregon or Washington. The question whether, as testified, the bids of the domestic firms were not technically "responsive" to the request for bids is now probably immaterial, inasmuch as the circumstances surrounding the Astoria-Megler contract were unique.

Whatever the impact of the LTFV imports of Canadian re-bars may have been on the steel mills in Oregon and Washington, no Commissioner has found that such imports caused them injury in the context of the Antidumping Act. It now remains to consider what basis exists for finding that an industry in the United States is likely to be injured by the LTFV imports of Canadian re-bars.

The prospective circumstances requisite to support a finding that imports of an article are likely to cause injury may not be more tenuous than those necessary to support a finding that the imports under present circumstances are causing injury. A finding of likely injury must therefore be based on changes in circumstances that are

clearly foreseen, substantive, and imminent; the finding may not be based merely on allegation, conjecture, or possibility. Such a finding, moreover, cannot in any sense be construed merely as a "warning" that a subsequent "offense" will almost certainly result in a finding of injury, inasmuch as the encompassing punitive action by the Federal Government that follows a finding of likelihood of injury is no different from that which ensues from a finding of injury.

Some improvement in production facilities is now underway in the steel mill in Vancouver, British Columbia, that has shipped re-bars to the United States. There is no evidence, however, that substantial productive capacity is being added, that the added capacity will be employed to make re-bars, that the mill expects to export more re-bars to the United States, or that more of such re-bars will be sold in the Pacific Northwest. At the Commission's hearing, the importer testified that he had been forewarned that the amount of re-bars that the Canadian mill could make available to him would be no larger this year than it was in the past year and that it would probably be smaller. British Columbia is one of the most prosperous of the Canadian provinces and construction in which re-bars are used is expanding there. The Canadian producer might therefore find the Canadian market both for re-bars and other steel products increasingly more lucrative. In any circumstance, there is no basis for forecasting the volume of Canadian re-bars that would be marketed in the Pacific Northwest; the importer who sold

Canadian re-bars in that area has also marketed them in Arizona, Nevada, Texas, Louisiana, and California, as well as in Montana, Utah, Wyoming, and Idaho.

The future impact of imports of Canadian re-bars on "the domestic producers of re-bars" will depend also--and in even greater degree--on other imponderables, such as the trend of U.S. construction projects that call for re-bars, the overall supply-demand situation with respect to steel mill products, and the trend of U.S. prices for re-bars. In the circumstances, a forecast would have to rest on speculative conjecture.

In concluding, we wish to observe that the Commission's finding will result in nationwide application of special dumping duties on all imports of Canadian re-bars entered at LTFV, irrespective of whether consumed in the Pacific Northwest or elsewhere in the United States.

Views of Commissioner Fenn

While I agree with Chairman Dorfman and Commissioner Talbot in their finding of no injury nor any likelihood in this case, I do not entirely subscribe to their statement of reasons. Consequently, it is appropriate for me to submit a separate opinion.

In my view, a finding of likelihood of injury cannot conceivably be applied to this situation. To find likelihood, one must be able to point to an impending change in circumstances which is about to transform a noninjurious action into an injurious one. That change must be specific, imminent, and predictable; the mere continuation of sales at less than fair value at the same level as in the past is not enough. To interpret the statute in any other way is to make it meaningless and to make of likelihood a kind of halfway house between injury and no injury which would be usable in almost any instance of sales at less than fair value. Furthermore, it would enable the United States to bypass the restriction now imposed by precedent and common sense that a dumping duty shall not be levied unless the injury done is material. 1/

To return to the instant case, if a sizable shipment of re-bars was in the process of moving from Canada to the United States, or a major order had just been placed, or the quantity of sales at less than fair

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1/ Through the years, injury in dumping cases has been interpreted to mean material injury, both by the Treasury Department when it had the responsibility of making such determinations and by the Tariff Commission when it succeeded to that task.

value was about to increase sharply, likelihood of injury could be a supportable finding. The only fact which could possibly meet these criteria is a planned improvement of production facilities in the Vancouver plant. It is true, of course, that the results of this increased efficiency may inflict injury on the domestic producers where none now exists, but a possibility is not likelihood.

Since likelihood is not a supportable finding here, the determination must be made between injury and no injury. As I have pointed out, to find injury the Commission must be satisfied that the harm done to a domestic producer is material. Furthermore, it must be convinced by the evidence that the injury was caused by the importation of the merchandise cited in the Treasury determination.

Clearly, the producers of re-bars in the Oregon-Washington area are in a difficult position: tonnage has been lost, prices have been and continue to be depressed and unstable, established distribution patterns have been upset, and producers have had to assume the heavier burdens of fabricating a larger proportion of their re-bars. But sufficient evidence to demonstrate a causal relation between the importation of goods from Canada which are being sold at less than fair value and the predicament of the producers in the area is missing. The facts of this relationship are murky and inconclusive, at best. It may be surmised that the re-bars sold at less than fair value have contributed to the difficult situation in which the Oregon and Washington producers find themselves, but this conclusion is drawn more from deduction than from hard evidence. If a

man is plagued by heart trouble, hepatitis, leukemia, and pneumonia, one can assume that an abscessed tooth would make his condition worse; it does not necessarily follow, however, that his wretched health is a result of his infected cuspid.

There were a number of factors involved in the distress of the re-bar producers in Oregon and Washington during the months under consideration:

1. Japanese imports continued to come into the area at prices under those of the Canadian. As a matter of fact, there was a substantial increase in imports from Japan in 1962 over 1961. It is true that they constituted only a small percentage of consumption in the Northwest area, even in 1962, and that they moved primarily into the warehouse channel of distribution. Nevertheless, they did serve to disturb prices and reduce the market for the domestic product.

2. The demand for re-bars in the Northwest area has shrunk seriously in the last few years. Between 1960 and 1963, consumption dropped 26 percent and shipments of the three producers involved in this action fell off 30 percent. From 1962 -- when meaningful quantities of Canadian imports began to enter the area -- to 1963, the market slumped significantly (consumption and shipments were both down 16 percent). This loss of market in and of itself inevitably exerted a powerful downward push on prices over the entire period.

3. Prices, both nationally and in the Northwest area, had been soft for some time. They began to weaken, at least as far back as 1960 when the producers nationally were ignoring their published prices of re-bars. By mid 1961, most U.S. steel producers had withdrawn these published prices. Except for one of the three producers, prices in the Northwest held up fairly well, comparatively, during this period; presumably they were buttressed by the major dam and other construction projects then in process. But even there, prices were declining before the Canadian re-bars were imported.

4. The producer who was hurt the most was faced with forces far more damaging than Canadian re-bar imports. He suffered a very marked deterioration of sales between 1960 and 1963, and his prices began to weaken long before those of the other two producers and they fell more sharply. One can easily postulate that his position was adversely affected in great measure by the fact that he does not fabricate re-bars and consequently has to compete against producers enjoying more cost-price flexibility and the added sales advantages of service.

Two additional facts cast doubt on any causal connection between the Canadian imports and the poor situation of the Northwest producers:

1. The quantity of re-bars imported from Canada was very small. Until 1962, imports were virtually nonexistent; for 1962 and 1963 they were running at only 4 percent of consumption in the Northwest area.

2. The timing of price deteriorations do not mesh well with the importation of Canadian re-bars:

a. The major price break for re-bars in Seattle came a full 3 months before Canadian re-bars entered that area.

b. The prices in Seattle showed no reaction to the Canadian product for almost a year after they first appeared there.

c. The third producer did not suffer his sharpest slump in prices until 18 months after the imports began to arrive in the Northwest area. Further, the price break came 6 months before any Canadian re-bars were sold in his local market, which absorbed nearly 90 percent of his production in 1963. Even then, they came in at prices substantially above his.

It is possible, of course, that the threat of imports into Seattle in (a) could have been a factor in the first break, especially considering that they were moving into other parts of the Northwest area; that the delayed reaction in (b) might be accounted for by market lag and the price cut which had occurred 12 months before; and that the third producer's drop in (c) could be explained by the general depression in the area. But at the very least, the fuzziness of the chronology makes its use as evidence highly questionable.

In summary, the data available in this case do not, in my view, provide sufficient basis for a finding of injury, nor are the requisite conditions present which support a finding of likelihood of injury.

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This determination and statement of reasons are published pursuant to 201(c) of the Antidumping Act, 1921, as amended.

By the Commission:

Donn N. Bent
Secretary