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Robert B. Peabody

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Dumping and the United States Steel Industry

by Robert B. Peabody*

IN HIS PAPER, Mr. Steele has spoken about the propensity of advanced free world economies to import steel and has suggested that, all things considered, such propensity is not too bad.¹

The very name of the topic assigned to me—"Dumping and the United States Steel Industry"—suggests that in fact there is no such *propensity* insofar as the importing of steel into the United States is concerned. My dictionary defines propensity as "an intense and often urgent natural inclination." The dumping of steel into the United States has been far from a "natural" inclination. In fact, it has been precisely the opposite—a most unnatural and intensively cultivated policy—a policy deliberately employed which has materially injured the United States steel industry.

Having said this by way of apprising you of my premise, let me quickly outline my salient points. First, I will describe briefly the domestic United States steel industry and introduce a few statistics designed to characterize what has been happening to the domestic industry. Second, I want to make clear what dumping is under our statute and why it is a problem. Third, I will try to review briefly the nature of that dumping, what generates it and what its effects have been. Finally, I will attempt to divine the future.

As a preliminary matter, let me describe the American Iron and Steel Institute (AISI).

The American Iron and Steel Institute is a trade association of iron and steel producers (and their employees) in the Western hemisphere. There are about 2,100 individual members. As one would expect, most of our company members are based in the United States. United States member companies account for about ninety-two percent of the total United States production capability. The principal Canadian steel producers also are members. In fact, the chief executive officers of Stelco, Algoma and Dofasco are directors of AISI. There are member companies from Mexico and South America as well.

As a trade association, AISI does not itself produce or sell a pound of steel, nor does AISI have any commercial, production, financial or management role with respect to the iron and steel industry in the United States, in Canada or elsewhere. In brief, AISI is not a cartel, it is not a Eurofer, and it is not a "club." Those familiar with United States antitrust laws will appreciate how sincerely I make this point.

Consequently, my remarks are made only from an industry-wide or overview perspective, and not with respect to the views of specific companies, nor

* General Counsel, Executive Vice President and Treasurer, American Iron & Steel Institute. This paper was delivered at the Canada-United States Law Institute's Conference on Steel Dumping into Canada and the United States, held September 29 & 30, 1978, at the University of Western Ontario, London.

¹ See Steele, *The Propensity of Advanced Free World Economies to Import Steel*, 2 CAN.-U.S. L.J. 17 (1979).

with regard to the harm suffered by individual company employees or shareholders or those who supply goods and services to the domestic steel companies. Finally, my remarks are personal and do not represent the views of industry in general or AISI in particular.

Steel is by far the most versatile and inexpensive of all structural materials known to modern industrial civilization. Our world of today and tomorrow could not exist without it. Moreover, given the same physical, chemical and metallurgical specifications, steel is capable of being a fungible commodity; that is, the product produced to a specification by one company should be the same as the product produced by another company in another country.

There are about 200 companies which produce steel in the United States. They range in size from the largest, which ship many millions of tons of steel mill products each year, to so-called "mini-mills," with productive capabilities of about 100,000 tons per year.

Each company is privately owned and privately financed. There is no state steel company or industry. The companies obtain their funds in the public marketplace, and not from the national treasury, directly or indirectly. The companies are individual competitors; there is no "public utility" statute which guarantees any return on investment or assures a market.

The companies in the domestic steel industry are, however, severely regulated; the United States antitrust and securities laws are of particular significance. The basic aim of those statutes is to enhance and maintain competition—not competitors as such, but the philosophic or economic goal of competition. Because of those statutes, business and economic practices which prevail in Europe and Japan are not practiced in the United States steel industry. The EEC basing-point price system mentioned by Mr. Steele,² for example, could not apply in the United States. Price discriminations in domestic commerce are prohibited by the Robinson-Patman Act.³ Restrictive output, price restraint and other business practices which affect supply or price competition, as such, are forbidden by United States laws—laws which not only permit public enforcement against violators, but also create incentives for private, self-help enforcement through class actions and treble damage recovery. These legal rules which apply to each of the United States steel companies, and which are strictly enforced against them, have a material effect on how the industry views that form of international price discrimination which is dumping, and more particularly, how the industry views the enforcement, or lack of enforcement, of the United States anti-dumping laws.

The industry currently employs in its iron and steel operations about 452,000 persons. Of this total, 337,000 are wage employees and 115,000 are salaried employees. Total assets in 1977 were about \$35.4 billion and total revenues were about \$39.7 billion. It takes about one dollar of capital invest-

² *Id.* at 31.

³ 49 Stat. 1526 (1936) (codified at 15 U.S.C. §§ 13 *et seq.* (1976)).

ment to produce one dollar of sales revenues. The industry in 1977 had approximately 816,000 shareholders and paid dividends totalling about \$578 million.

The individual companies can be categorized by referring to integrated or non-integrated companies, carbon or specialty companies, hot metal or cold charge facilities, flat rolled or full range. There are many different ways to look at the makeup of the 200 or so companies.

The industry is highly unionized. Substantially all steel plant production and maintenance wage employees are represented by the United Steelworkers of America. The United Mineworkers union represents almost all production and maintenance wage employees in coal operations. At least ten or twelve other unions represent wage employees in specific operations. The salaried workforce is basically non-unionized.

I would like to draw your attention to a few comparative and crucial statistics. In 1965, the industry shipped 92.66 million tons of steel. Of that amount, 2.49 million tons were exported. Imports were 10.38 million tons. The domestic apparent supply, therefore, was 100.55 million tons, of which imported steel comprised 10.32%. In 1977, a year which was the third largest on record for the consumption of steel in the United States (exceeded only by 1973 and 1974), the domestic industry shipped 91.14 million tons of steel, or about 1.5 million tons less than it shipped in 1965. Two million tons were exported. Imports were 19.3 million tons. The domestic apparent supply, therefore, was 108.44 million tons, of which imported steel comprised 17.79%.

A few other similar comparisons:

- (1) *Employees in steel operations*: In 1965, 624,764; in 1977, 452,388, or a reduction of 172,375 persons.
- (2) *Long-term debt*: In 1965, \$3.2 billion; in 1977, \$7.93 billion.
- (3) *Capital expenditures*: In the period 1965 through 1977, a total of \$28.4 billion.
- (4) *Return on revenue and shareholders' equity*: In 1965, 5.9% and 9.4%, respectively; in 1977, 0.96% and 0.1%.

What do all these statistics mean? What is the significance of a ninety percent increase in foreign steel in the United States since 1965? Isn't that good for the domestic consumer? Isn't that only what we expect from free trade?

These questions lead quickly to dumping and what it is in the United States.

The relevant statute is the Antidumping Act of 1921.⁴ The concept of the Act is quite simple. It is designed to prevent unfair competition of foreign goods with those produced domestically. Specifically, it is intended by the Act that a foreign exporter should not be permitted to practice price discrimination between his home market and the United States market; that is, he can't sell steel in his home country markets at higher prices than he charges for the

⁴ Ch. 14, 42 Stat. 11 (1921) (codified as amended at 19 U.S.C. §§ 160-71 (1976)).

same steel when it is ready for export to the United States, if doing so would cause injury to the United States industry.⁵

Another aspect of fair competition under the Act is that a producer ought not to be able to sell into the United States at prices below his cost of production. Specifically, where the Secretary of the Treasury determines that home market sales have been made at less than the cost of production over an extended period of time, in substantial quantities, and at prices which do not permit recovery of all costs within a reasonable period of time in the normal course of trade, the home market sales are required to be disregarded and a "constructed value" is required by the Act to be determined and applied in making the required price discrimination analysis.⁶ Where price discrimination exists and injury is found, a special dumping duty is levied equal to the difference between the purchase price of the goods when ready for export to the United States and the foreign market value as determined under the statute.⁷

The effect of the statute, therefore, is to take into account the physical isolation of the United States from the Japanese and European steel producers, as well as the attendant transportation, insurance, handling, tariff and other costs which such steel shipments must carry. One would reasonably conclude that foreign steel products, if they enter the United States at all, economically would have to be priced to the American market at about the same level as the domestic steel products. However, after considering the above-mentioned costs associated with foreign steel shipments into the United States, it would seem reasonable to conclude that much of the European steel, in particular, would have to enter the American market at even higher prices than the available domestic supply.

The reason for this is that the goods are substantially fungible. The domestic industry, whatever one thinks of it, is at the very least, competitive in production costs with European producers, and therefore the domestic companies start with a substantial advantage in servicing the United States market. With respect to the Japanese, the effect of freight, tariffs and insurance, in addition to export packaging costs and the profits for distributors within the United States, should substantially compensate for any production cost advantage that may have existed in that country in recent years.

What business common sense would suggest and informed analyses confirm is that in the United States market, the domestic¹ industry is the low cost, efficient supplier. And, since no one disputes (and Citibank's reports invariably confirm) that the steel industry average profits are far less than the average of all manufacturing industry profits, then why and how has it come to pass that foreign steel has grown from about ten percent of the apparent domestic supply in 1965 to about eighteen percent in 1977 and, in the month of July 1978, to about twenty percent? Stated another way, how has it come

⁵ 19 U.S.C. § 160(a) (1976).

⁶ *Id.* §§ 160(b)(1)(A), 161(a).

⁷ *Id.* § 161(a).

to pass that the growth of the United States steel market has been taken by foreign steel producers?

The answer is, of course, that the foreign steel has been knowingly, consciously and intentionally dumped by foreign producers with full regard and understanding of the Antidumping Act—more precisely stated, in full understanding of, and disregard for, the statute.

That there is no doubt that steel is being dumped in the United States from both Japan and the EEC is shown by the 1977 and 1978 studies of Putnam, Hayes & Bartlett, Inc. (PHB). In their latest paper entitled, "The Economic Implications of Foreign Steel Pricing Practices in the U.S. Market," PHB describes not only the dumping but also the cost of that dumping to the United States steel industry and to our economy generally. In the last two years, bankruptcy, failing companies, the shutdown of production facilities for millions of tons of product, reduced dividends and the layoff of tens of thousands of employees have characterized the United States steel community. Congressional investigations, Executive branch investigations, the Solomon Report and the trigger price mechanism have followed in response. However, there is an even deeper problem, that is to say, the human problems caused by the dumping, and this is the cumulative effect of the many years of dumping, with its depressing effect on both prices (and therefore, profits) and volume—an effect which has created grave problems with respect to the ability of these private companies to provide the capital and support for the cost of new production facilities.

To return to the point: How has this come to pass? What has happened to the 1921 Act?

If you assume that there has been, and continues to be, massive and widespread dumping within the meaning of the Act, all in the face of the price discrimination provisions of the Act, two conditions had to exist. The first is directly related to the statute and its administration, the second, to the conditions which exist in the principal steel exporting countries. As the saying goes, "it takes two to tango."

With respect to the statute and its administration: For many years in the United States, and irrespective of any particular political party, the political and social reality was that the Antidumping Act simply was not permitted to be enforced with respect of steel. The reasons were based upon domestic policy considerations, foreign policy considerations and practical politics. Perhaps the most significant reason was that stated recently by John J. Nevin, Chairman of Zenith Radio Corporation:

U. S. policy in foreign trade matters continues to be based on what has been aptly described as a 'Marshall Plan' mentality. That mentality sees Europe and Japan as so weak that they require very substantial U. S. concessions in trade and other economic matters and the United States as so strong that it is immune from economic injury, no matter what concessions are made by its government.⁸

⁸ Nevin, *Can U.S. Business Survive Our Japanese Trade Policy?*, 56 HARV. BUS. REV. 165, 177 (Sept.-Oct. 1978).

In any event, over the years, that has been the effect of the United States Government policy with respect to foreign trade in steel. It was not that the domestic steel industry did not point out to responsible government officials what was happening or that knowledgeable and informed officials were unaware of what they were doing. This is neither the time nor the place to describe the actions taken from 1965 onward by companies in the domestic industry to alert the government to what unquestionably would be the result of their steel trade actions, nor to discuss the repeated attempts to obtain action under the Antidumping Act. Suffice it to say that until the catastrophic events of the Summer and Fall of 1977, the United States Government's position can be charitably described as benign neglect of the Antidumping Act insofar as steel was concerned.

What was taking place offshore in those years from 1965 onward? In Europe, social legislation had mandated full employment. For various political and social reasons there was an inability to rationalize steel production facilities throughout the ECSC. The lack of availability of private funds for investment in steel facilities resulted in funding through national treasuries in one way or another, with the usual consequence of government participation in business policies. National, social and economic goals produced the nationalization or quasi-nationalization of much of the European industry. The Japanese began to compete vigorously in traditional offshore markets. Internal EEC price and stabilization systems were put into place. All these and more, including in years past the need for dollars, resulted in many of the European steel producers exporting to the United States at almost any price and without regard to the price discrimination provisions of our Act.

In Japan, a completely different set of considerations existed. Steel was made a target industry after World War II. Funds were made available through the national treasury. The economic system of the nation was structured to facilitate the guidance of the industry so as to achieve pre-determined national economic goals. Steel, shipbuilding, automobiles—all steel-related or based products—were heavily emphasized by the Ministry of International Trade and Industry (MITI) in the post-war period, and the economic system was refined to produce the world's most successful modern day application of merchantilism, that is, importing raw materials, protecting the home market from competition, adding value and exporting finished goods.

For different reasons in Japan than in Europe—for different reasons within different countries of the EEC—the social, political and economic systems forced steel products into the United States market which were priced on the discriminatory basis that the Antidumping Act was intended to foreclose. Further, prior to the establishment of the trigger price mechanism in the Spring of 1978, the policy of the United States Government was, on balance, one of manifest reluctance to enforce the Antidumping Act against unfair price discrimination from foreign steel producers.

In all candor I would have to confess that the Antidumping Act as it now exists is far from an efficient working tool, even if the government

desired to enforce it to accomplish the purpose for which it was adopted. It is slow-moving by its very terms. Elaborate procedures are built into it which require extremely heavy burdens of proof to be borne by the domestic industry. Due process concepts contemplate hearings and findings. Withholding of appraisal and the posting of bonds occur only after detailed investigations, and only then after the passage of extended periods of time. In brief, the entire complex of administrative processes and ritual serves to make it extraordinarily difficult to obtain relief.

What then is the current situation?

After unsuccessful attempts were made to cause the American government, under other provisions of our trade laws, to take action against the unfair trade practices of both the Japanese and European steel producers (including a widely-publicized petition filed by AISI asking for relief for the industry from the diversionary effects of the secretly negotiated discriminatory quota agreements of 1975 and 1976 between EEC and Japan), the combination of congressional pressure, resulting from the economic disaster in the steel industry in the Summer and Fall of 1977, and the filing of numerous dumping petitions by individual steel companies resulted in the now well-known Solomon Report and ultimately the trigger price mechanism (TPM).

The trigger price mechanism is best characterized as a device which the Treasury Department now is using to determine whether it will initiate formal dumping investigations—an authority which the Treasury has long had but never employed with respect to steel. The TPM has been founded on a Treasury analysis of Japanese steel industry costs, it being assumed that the Japanese are the low cost exporter to the United States market.

Thirty-two different categories of steel mill products have been identified and trigger prices established for substantially all of them. Each trigger price has three elements: a base price, an extras charge and a transportation charge.

Product coming in below the trigger price is to be investigated to see if it is being dumped. Product arriving at or above the trigger price is not subject to the Treasury-initiated investigation procedure. When TPM was installed, it was the expressed hope of Treasury officials that it would serve to reduce imports by twelve to fourteen million tons.

Numerous problems exist with the system and its reliance upon Japanese costs. The operating rate utilized in the calculation is highly unrealistic. The yields assumed are doubtful. The system for converting yen to dollars is debatable, to say the least. Even with these flaws, it is a major, constructive step.

All problems with the Japanese cost analysis, however, pale by comparison to the fact that EEC dumping simply is not affected by the trigger price mechanism. That is, even though an EEC steel producer is price discriminating within the meaning of the Act, so long as the steel is brought in at the trigger price, Treasury has publicly said it will take no action. And, of course, Treasury has said if the steel companies file their own dumping actions, it will be forced to terminate the system entirely. This open license to

dump has been readily accepted by the EEC and Third World steel producers. Imports during the first seven months of 1978 were 12,576,000 net tons, an increase of more than thirty percent over the first seven months of 1977. In July 1978, imports were 1,785,000 tons, an increase of more than 400,000 tons over June 1978. At that rate, steel imports will exceed twenty million tons by the end of 1978, setting a new record.

Steel imports from the EEC in the first seven months of 1978 were 4,383,000 tons, about ten percent more than from Japan in the same period, and roughly equal to the tonnage imported from the rest of the world.

What, then, for the future? It is obvious that the United States Government is only going to succeed in its efforts to stop foreign steel dumping by promptly commencing formal dumping investigations which, of course, it is authorized to do. If the government does so—and of course it controls the investigation and can turn it off as easily as turn it on—it is reasonable to anticipate that the flow of dumped product will stop. Fair competition will then exist. The domestic companies will then be fairly tested to see if they can adequately serve the domestic market.

If the government does not take action, and if the flow of dumped steel from Europe and Third World countries continues at the rate it has, I have no doubt that dumping petitions will be filed, the litigation process aggressively pushed, and congressional pressures steadily increased, all with serious and long-lasting effects both domestically and overseas.

In conclusion, we are not dealing with a reluctance of the domestic industry to face competition. We are not dealing with an abstract concept of free trade. There is unfair competition. It needs to be stopped. Fair international rules of trade in steel need to be established and followed, all to the benefit of consumers, producers and workers, that is, to the benefit of us all.