South Carolina Law Review

Volume 33 | Issue 3 Article 11

3-1982

The Steel Trigger Price Mechanism

Joseph Wettlin

THE STEEL TRIGGER PRICE MECHANISM

I. Introduction

In recent years the American steel industry has been confronted with slack demand during a period of expanding excess worldwide production capacity. The relative obsolescence of American plants and equipment has hampered efforts by the domestic industry to compete in this environment, and many foreign producers have been able to undersell American companies in the domestic market even after including reasonable profits and the cost of transportation. Domestic industry leaders contend, however, that much of the imported steel has been "dumped"—that is, sold at less than fair value—by less efficient foreign producers attempting to maintain high rates of plant utilization in order to minimize unemployment and help cover fixed operating costs.[1] Dumping is proscribed by statute in the United States[2] and internationally by the General Agreement on Tariffs and Trade,[3] to which all of the major trading partners of the United States subscribe.[4] As steel industry leaders attempted to counter the alleged dumping by foreign producers, they found existing antidumping procedures ineffective, cumbersome, time consuming, and easily circumvented. In response to criticism from the steel industry, the federal government established the trigger price mechanism (TPM) in January 1978. Steel imported into the United States at prices lower than specified trigger prices would result in a self-initiated government antidumping investigation that was predicted to reduce the time necessary to complete action from the usual thirteen-month pe-

1. *See Steel: Protection Now, Rundown Later,* The Economist, Dec. 31, 1977, at 78.
2. 19 U.S.C. §§ 160-171 (1976).
3. 61 Stat. A3, T.I.A.S. No. 1700 (1947).
4. The General Agreement on Tariffs and Trade (GATT) is "a multilateral international agreement which is today the principal instrument for the regulation of world trade. Over eighty nations, including the United States, participate in GATT and it has been estimated that about eighty percent of world trade is governed by this agreement." Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law,* 66 Mich. L. Rev. 249, 250 (1967).

riod to between two and three months.[5] Trigger prices were to be revised quarterly to reflect intervening changes in costs of production components and currency values.[6]

In March 1980, the Commerce Department announced that it would not increase steel trigger prices for the next quarter. The United States Steel Corporation retaliated by flooding the Department with antidumping petitions against European producers, alleging that these producers had dumped steel products in the United States. The Commerce Department immediately suspended the TPM,[7] purportedly in order to process the large number of complaints. After months of consultation between all of the interested parties, the Carter Administration announced that the TPM would be reinstated for five years[8] and that United States Steel would withdraw its complaints.[9] The announcement emphasized that the TPM was to be temporary and only one part of an overall program designed to facilitate the modernization of the American steel industry and make it a successful competitor of efficient foreign producers in a free trade environment.[10]

Because the reintroduced TPM is intended to be a temporary program, it is appropriate to examine the progress of the steel industry in the recent past to determine whether temporary assistance, limited to five years, is likely to be effective. This Note will examine the background of the steel industry and antidumping legislation in the United States; the establishment, theory, and legal basis of the TPM; the crisis precipitated by United States Steel; and the potential effects of the resulting settlement.

II. BACKGROUND

A. *The Steel Industry*

Historically, the American steel industry has enjoyed cer-

5. Interagency Task Force, *Report to the President: A Comprehensive Program for the Steel Industry,* 17 INT'L LEGAL MATS. 955, 967-68 (1978) [hereinafter cited as *Solomon Report*].

6. *Id.* at 966.

7. THE ECONOMIST, Mar. 29, 1980, at 105.

8. [1980] U.S. IMPORT WEEKLY (BNA) No. 46, at N-5 (Oct. 1, 1980).

9. *Id.* at A-14.

10. *Id.* at N-2.

tain advantages including ample supplies of raw materials in proximity to low-cost water transportation routes, inexpensive immigrant labor, and a continent-sized domestic market free from trade barriers and foreign competition.[11] Given this generally favorable environment, the industry prospered until the mid-1950s[12] and developed at least two characteristics that were unusual in American business. First, the steel industry was anticompetitive in terms of price; and second, the industry's major producers did not attempt to capture the entire market.[13]

Big steel's apparently conscious effort to avoid control of an excessive share of the market and its willingness to learn from the experience of other industries may explain why steel industry practices that seem to violate federal antitrust laws have not been successfully challenged. That United States Steel and other steel companies practiced serious anticompetitive price-fixing during United States Steel's early years is beyond dispute.[14] In 1911, similar practices by American Tobacco and Standard Oil were the basis for antitrust actions that resulted in divestiture orders against both companies. In the same year, an antitrust suit was also instituted against United States Steel, but a number of events—including World War I—delayed a decision on the case until 1920. During the delay, the steel industry's significant role in the war effort and its adjustment of the more obvious methods of price collusion favorably affected public opinion. *United States v. United States Steel Corporation,*[15] a four-three decision by the United States Supreme Court recognized the corporation's past sins but concluded that, because the company had recently mended its ways, it should not be convicted of

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11. A. LOWENFELD, PUBLIC CONTROLS ON INTERNATIONAL TRADE, § 4.2, at 145-46 (1979).

12. For an analysis of United States Steel's failure to capture a larger share of the market, see W. ADAMS, THE STRUCTURE OF AMERICAN INDUSTRY 150-52 (3d ed. 1961).

13. A. LOWENFELD, *supra* note 11, at 146-48. *See* W. ADAMS, *supra*, note 12, at 150-52. Judge Gary, United States Steel's chief executive, was apparently influenced by the claims of William Jennings Bryan that no business should be allowed to control more than fifty percent of an industry. "Gary felt that if U.S. Steel confined itself 'voluntarily to a size approved by the most popular and trusted of radicals, [it] surely cannot be attacked for monopoly.'" *Id.* at 150-51 (quoting I. TARBELL, THE LIFE OF ELBERT H. GARY 257-58 (1930)).

14. *See* United States v. United States Steel Corp., 251 U.S. 417, 438-45 (1920).

15. 251 U.S. 417 (1920).

antitrust violations.[16]

After this decision, which exemplifies the special treatment given the American steel industry as a whole, the industry enjoyed a long period of protectionist tariffs and government tolerance of anticompetitive pricing policies. This period continued until after World War II. During the postwar period, however, the United States took the lead in negotiations to decrease trade barriers. The threat posed by free trade was probably not immediately apparent to American steel executives whose industry had survived the war unscathed while most foreign steel industries had been devastated. Moreover, the domestic steel industry, which was operating at full capacity in modern plants,[17] was called upon to supply steel to rebuild the rest of the industrialized world. By the 1950s, however, a coincidence of newly rebuilt and efficient foreign steel industries, continued reductions in tariff protection, and the obsolescence of American plants built during the war began to weaken the domestic industry's competitive position.[18]

The United States was a net exporter of steel until 1959,[19] when a 116-day strike forced domestic steel users to import large amounts of foreign steel, which they found satisfactory in quality and reliability and competitive in price. For the first time both industry leaders and domestic steel users recognized the growing potential of foreign producers to compete in the American market. Since then, the United States has been a net importer of steel with imports at times approaching twenty percent of domestic steel use.[20]

The steel industry has not yet adjusted fully to its new environment. Its progress toward modernization has not been im-

16. *Id.* at 457.

17. The United States Government acquired over one billion dollars worth of steel plants during the war. Most of these plants were managed for the government by the large steel companies and after the war were sold to their wartime managers at considerable discounts. For example, one plant that had cost the government $202 million to build was sold to United States Steel for $47 million. W. ADAMS, *supra* note 12, at 152-53.

18. *See generally* K. WARREN, WORK STEEL: AN ECONOMIC GEOGRAPHY 217-28 (1975); 5 W. HOGAN, ECONOMIC HISTORY OF THE IRON AND STEEL INDUSTRY IN THE UNITED STATES 2033-80 (1971).

19. A. LOWENFELD, *supra* note 11, at 148.

20. *Id.* at 212-13; THE ECONOMIST, Mar. 29, 1980, at 106.

pressive,[21] and it is still attempting to invoke protective measures to block imports.[22] This indictment is not intended to suggest that the industry has made no effort to meet the challenge of efficient foreign competition or that the industry has not been subjected to significant external problems.[23] It does,

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21. [A]ccording to the International Iron and Steel Institute, 81 percent of Japan's crude steel in 1976 was produced in efficient basic oxygen furnaces compared with only 63 percent of U.S. output. By contrast, higher-cost open hearth furnaces accounted for 18 percent of U.S. crude steel production, but for only 0.5 percent in Japan. Moreover, 35 percent of Japanese steel was produced by the labor-saving [and energy-saving] continuous casting method, more than triple the 11 percent in the United States. Also, the Japanese appear to benefit from economies of scale by using giant blast furnaces to an extent unparalleled in the American steel industry (Wall Street Journal, 3 August 1977).

Adams, *Unfair Competition in International Trade*, in TARIFFS, QUOTAS, AND TRADE: THE POLITICS OF PROTECTIONISM 107 (1979). It has been estimated that by 1988 the American industry could achieve fifty percent of its output by continuous casting. The Japanese industry predicts it will achieve ninety percent by 1984. THE ECONOMIST, Oct. 4, 1980, at 71.

22. Initial attempts by the industry to counter serious foreign competition were based on the Antidumping Act of 1921, 19 U.S.C. §§ 160, 162-64, 170a (1976), and the Trade Expansion Act of 1962, 19 U.S.C. §§ 1872, 1981 (1976). The standards of these acts were too stringent, however, to permit a finding of import-caused injury. When existing measures proved inadequate, the industry engaged in intensive lobbying for legislative imposition of quota protection, which resulted in a number of bills that began to surface as early as 1967. In order to avoid adverse international ramifications, which were to be expected if mandatory quotas were imposed, the State Department persuaded major foreign steelmakers to enter into voluntary restraint agreements (VRA). Japan and the European Community both agreed to three-year VRAs that became effective on January 1, 1969. Slightly modified agreements were negotiated for three years following the initial VRAs, so that some form of voluntary quota was in effect to protect the steel industry from European and Japanese imports from 1969-1975. The TPM was initially implemented in January 1978 after announcement by major steelmakers in the summer of 1977 that it would be forced to close major plants and lay off substantial numbers of employees. Adams, *Unfair Competition*, *supra* note 21, at 97-106.

23. The steel industry faced both international and domestic problems that may have prevented its complete modernization. International developments included a steadily increasing world production capacity coupled with a leveling of demand. THE ECONOMIST, Apr. 12, 1980 at 72. The Japanese industry progressed rapidly throughout the period to become the largest steel exporter in the world, THE ECONOMIST, Dec. 31, 1977 at 79-80, able to produce steel so efficiently that it could compete at American prices at a time when American industry would have preferred to finance new plants through increased prices. During the same period, the European Community experienced significant slumps in demand and was willing to sell at reduced prices in the American market in order to use excess capacity and maintain employment levels in its own industry—effectively exporting unemployment to the United States. Finally, in the 1970s, OPEC raised oil prices and for the first time energy costs became a significant part of production costs in what was once a very capital intensive industry. THE ECONOMIST,

however, raise questions about the industry's commitment to modernization and its ability to achieve significant results within the five-year life of the reinstated TPM.

B. Antidumping Legislation

1. Development in the United States.—Dumping occurs when a foreign manufacturer exports goods to be sold in the United States at a lower price than that charged in his own country.[24] As defined by the Trade Agreements Act of 1979,[25] dumping is the sale of foreign goods at less than their fair value.[26] Dumping is generally advantageous to foreign manufacturers who benefit from increased sales, greater market domination, higher profits, and higher employment. It might also be considered beneficial by American consumers because it results in lower prices. Consumers in the producing country, however, might view dumping as harmful on the theory that it results in higher than normal prices for products sold at home, since goods dumped in the United States do not carry a proportionate share

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Apr. 12, 1980, at 72.

Domestically, the industry was faced with slowing demand as lighter metals and other substitutes were used in finished products; labor costs increased faster than productivity and far exceeded those of foreign competitors ("Wages and benefits of American steelworkers average $18.90 an hour compared with $9.20 an hour for their Japanese counterparts. . . ." NEWSWEEK, Oct. 13, 1980, at 90); government regulations on environmental standards and safety required large expenditures (estimated at $6 billion for environmental standards from 1977 to 1983, *Solomon Report, supra* note 9, at 971); and social and administrative pressures were applied to keep inefficient eastern plants open and prevent relocating to higher demand areas in the west. Additionally, the industry was in poor financial condition to raise the capital needed to fund needed improvements, long-term debt was at its practical limit, and book value of equities significantly exceeded market price. Finally, funds that could be raised were effectively diminished by the effects of runaway inflation.

24. Alternatively, dumping may be defined using the price charged in a third country if insufficient market data is available on the producing country from which to figure fair value. 19 U.S.C. § 1673(1) (Supp. 1979). If sales to a third country were made, fair value may be computed using cost of production plus reasonable markup for cost of sales and profits. An even more difficult question arises when dealing with a state-controlled economy producing a product only for sale in the United States. Electric Golf Cars from Poland, 1 INT'L TRADE REP. DEC. (BNA) 5116 (1975). *See also* Electric Golf Cars from Poland, 1 INT'L TRADE REP. DEC. (BNA) 5117 (1975); Electric Golf Cars from Poland, 1 INT'L TRADE REP. DEC. (BNA) 5511 (1980).

25. Pub. L. No. 96-39, 93 Stat. 144 (1979)(codified in scattered sections of 19 U.S.C.).

26. *Id.*

of the cost of production.[27] Both American steel producers and American labor may be harmed by increased competition resulting from the sale of imported steel at less than fair value. It is this potential harm to American industry that antidumping laws are intended to prevent.

Present antidumping procedures were first enacted by Congress as part of the Antidumping Act of 1921,[28] which was intended "to protect American industries from the detrimental effects of importation of foreign goods at unfairly low prices."[29] The 1921 Act provided for imposition of a special dumping duty (equal to the excess of market value in the producing country over the exporter's sale price)[30] upon Treasury Department findings that imports were sold at less than fair value and that the domestic industry had been or was likely to be injured.[31]

One of the major deficiencies in the 1921 Act was its failure to place time constraints on government processing of complaints. As a result, when resolution of a complaint involved sensitive international political issues, the Treasury Department could simply postpone a decision for an indefinite period of time.[32] The Trade Act of 1974[33] solved this problem by establishing time limits for the completion of antidumping investiga-

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27. Dumping can result in lower costs to consumers in the producing country. To the extent that the goods are produced using excess capacity and the price received exceeds the variable costs of production, a contribution is made to cover fixed costs, and lower domestic prices become possible.

28. 19 U.S.C. §§ 160-171 (1976). The 1921 Act was repealed by the Trade Agreements Act of 1979, Pub. L. No. 96-39 (1979)(codified in scattered sections of 19 U.S.C.), but the basic antidumping theory was reenacted in the new act. Antidumping legislation had been enacted before the 1921 Act in the Revenue Act of 1916. 15 U.S.C. § 72 (1976). This act provided for criminal actions against importers but was essentially unenforceable because it required a showing of *intent* to destroy or injure a domestic industry. *See id.*

29. Davis Walker Corp. v. Blumenthal, 460 F. Supp. 283, 287 (D.C. Cir. 1978).

30. *See* 19 U.S.C. § 161(a) (1976).

31. Initially, Treasury made the determination on both dumping and injury. Responsibility for determination on injury was transferred to the United States Tariff Commission in 1954. The Tariff Commission was redesignated the International Trade Commission (ITC) in 1974. *See* Customs Simplification Act of 1954, Pub. L. No. 83-768 § 301(a), 68 Stat. 1138 (1954)(amending 19 U.S.C. § 160).

32. The pressure for time limits for investigations was even greater because of delays experienced in subsidy/countervailing duty cases. United States Steel filed six such cases in September 1968, none of which had been acted on six years later. A. LOWENFELD, *supra* note 11, at 188-90.

33. Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975)(codified in scattered sections of 19 U.S.C.).

tions and also permitted the Treasury to initiate antidumping investigations without waiting for a private company to petition for an investigation.[34]

The Trade Agreements Act of 1979[35] was enacted to implement trade agreements negotiated and signed by the United States in the Tokyo Round of Multilateral Trade Negotiations. Although the 1979 Act repealed the 1921 Act, it retained the basic antidumping procedures of the 1921 Act but reduced time limits for conducting investigations[36] and adopted a standard that requires a showing of material injury before antidumping duties can be assessed.[37]

2. *Antidumping Procedures.*—As enacted in the Trade Agreements Act of 1979, current antidumping procedures provide that once an antidumping petition has been filed by an American manufacturer or other interested and allegedly injured party, concurrent investigations are conducted by the Commerce Department[38] and the International Trade Commission.[39] Commerce is responsible for determining whether a foreign producer

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34. *Id.* at § 321, 19 U.S.C. § 160 (1976). The latter provision was not used by Treasury, but the authority of Treasury to initiate an investigation without any prior industry complaint was cited as authority under which the Executive Branch could implement trigger prices for steel products without Congressional approval. *Solomon Report, supra* note 5, at 965-66.

35. Pub. L. No. 96-39, 93 Stat. 144 (1979)(codified in scattered sections of 19 U.S.C.).

36. 19 U.S.C. § 1673(b) (Supp. 1979).

37. *Id.* The 1921 Act required only injury or likelihood of injury. 19 U.S.C. § 160 (1976)(repealed 1979). For a general discussion of the material injury standard, see Note, *The Trade Agreements Act of 1979: Material Injury Standard,* 14 J. INT'L L. & ECON. 87 (1979). Much of the impetus for adoption of a material injury standard came from foreign trading partners who considered the standard applied by the United States to be defined in Article VI of the GATT. 61 Stat. A3, A23, T.I.A.S. No. 1700, at 28 (1947); and in the International Dumping Code, Agreement on Implementation of Art. VI of the GATT (1967)(*entered into force* for the United States, July 1, 1968). *See generally* Didier, *EEC Antidumping Rules and Practices,* 17 COMMON MKT. L. REV. 349, 359-60 (1980); Marks & Malmgren, *Negotiating Nontariff Distortions to Trade,* 7 L. & POL'Y INT'L BUS. 327, 378-79 (1975). For a suggestion that, even with the new material injury language, the ITC will continue to apply a de minimis standard, see Alberger, *Implementation of the New Antidumping and Countervailing Duty Laws by the U.S.I.T.C.,* in BASICS OF ANTIDUMPING AND OTHER IMPORT RELIEF LAWS MULTILATERAL TRADE NEGOTIATIONS UPDATE 151 (1979)(Alberger is now Chairman of the ITC).

38. Pursuant to the President's Reorganization Plan No. 3 of 1979, 44 Fed. Reg. 69,273 (1979), authority to administer antidumping law was transferred to the Secretary of Commerce on Jan. 2, 1980.

39. See note 30 *supra.*

has engaged in dumping, and the Trade Commission is charged with determining whether a domestic party or industry has been or is likely to be injured as a result. The maximum time permitted between the filing of a petition and a final determination is 420 days. Upon an affirmative final determination, Commerce publishes an antidumping order which describes the merchandise covered and directs the customs service to assess antidumping duties equal to the amount by which the market value of the foreign merchandise exceeds its price in the United States.[40]

The effectiveness of antidumping actions cannot be measured in terms of the duties that are collected but instead must be gauged in terms of their potential for discouraging dumping and for making duties unnecessary. Once Commerce makes an affirmative preliminary determination and orders a suspension of liquidation,[41] the most reasonable course of action for the exporter in most cases is either to voluntarily raise his export price or to stop exporting to the United States. A decision to increase the export price results in both increased revenue to the exporter on individual sales and increased cost to importers. A decision not to raise the export price, however, also increases cost to importers because they must either post a bond or pay an estimated antidumping duty pending assessment.[42] Increased cost to importers and uncertainty created by suspension of liquidation adversely affect an exporter's level of sales at least as much as a price increase would because domestic purchasers of steel frequently suspend their importation of the product from the challenged source once a suspension of liquidation becomes

40. 19 U.S.C. § 1673e(a) (Supp. 1979). Adjustments are usually necessary to identify comparable prices with which the size of the antidumping duty may be determined. Added to the exporter's sales price, for purposes of comparison, are the cost of containers and covers and other expenses of preparing the product for shipment, import duties rebated or not collected by the exporting country by reason of the exportation to the United States, taxes abated or rebated by the exporting country that would have been paid but for the exportation to the United States, and the amount of any countervailing duty imposed by the United States to offset export subsidies. Deducted from the exporter's sales price are costs (including import duties other than countervailing duties) incident to bringing the merchandise to the place of delivery in the United States and any export taxes paid to the exporting country (except those to offset subsidies received). Adjustments are also allowed to reduce the exporter's sales price by the amount, if any, of sales commissions, some selling expenses, and some processing or assembly costs. [1980] U.S. IMPORT WEEKLY (BNA) No. 37, Reference File 37:0103-04.

41. 19 C.F.R. § 353.39(e)(1) (1980).

42. *Id.* §§ 353.48(a)(3), 353.49(a).

likely. When importers are faced with the uncertainty not only of whether an antidumping duty will be assessed but also of the size of any such duty, they generally find it prudent to buy from an American producer—or from a foreign producer not charged with dumping—until the uncertainty is eliminated.

The exporter's best option, assuming a decision to remain in the United States market, may be a price increase, which eliminates uncertainty and increases his profit margin on whatever level of sales can be maintained.[43] From the viewpoint of the domestic industry and the United States Government, this result not only accomplishes the objectives of the Antidumping Act but also allows early settlement without the expense and difficulty of a full antidumping investigation.

III. The Trigger Price Mechanism

A. *The Interagency Task Force*

Before enactment of the Trade Agreements Act of 1979, several critical conditions had developed in the American steel industry. The industry claimed that antidumping action—the primary source of protection against unfair foreign competition—was cumbersome, burdensome to the domestic producers it was designed to protect, and easily circumvented by foreign competitors. In addition, producers had complained that unprecedented surges of low-priced imports had occurred, a number of plants had closed, one medium-sized company had entered bankruptcy, unemployment had increased significantly, and a number of communities were suffering adverse economic consequences.[44] In 1977, President Carter appointed an Interagency Task Force chaired by Treasury Under Secretary Anthony B. Solomon to study the state of the industry.

The Task Force reviewed reasons for giving special consid-

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43. Significantly, the foreign producer is barred from indemnifying the importer against any antidumping duty that might be imposed. The amount of any promised reimbursement is deducted from the purchase price used to determine the antidumping duty with the result that, instead of reimbursing the importer, the exporter would be increasing the potential amount of any antidumping duty to be assessed. 19 C.F.R. § 353.55 (1980).

44. Ehrenhaft, *Introductory Note on the United States Department of the Treasury "Trigger Price Mechanism" for Imported Steel Mill Products*, 17 Int'l Legal Mats. 952, 952 (1978).

eration to the steel industry and the purpose and effectiveness of the Antidumping Act. It then formulated a number of objectives for a steel recovery program: to assist the steel industry in a manner that would stimulate efficiency and enable the industry to compete fairly; to help ease the burden of adjustment to market trends for both industry and labor; to provide meaningful incentives for plant and equipment modernization through appropriate tax, investment, and financial assistance; and to expedite relief from unfair import competition in a manner that would not preclude healthy competition in the United States market.[45] The Task Force report (Solomon Report) emphasized that inflationary measures and government involvement in industry decisions should be avoided.[46]

The Task Force found that a global slump in demand combined with substantial excess world capacity had resulted in aggressive exporting by foreign steel producers. As a result, imports were expected to increase from 14.1% of total American steel consumption in 1976 to 17.9% in 1977.[47] The domestic steel industry contended that this increase was largely attributable to dumping.[48] The pendency before the Treasury Department of nineteen antidumping petitions concerning steel products underscored the contention that existing procedures were inadequate to deal with the alleged surge in dumping. Although the petitions had been filed over a twenty-three month period, only one had been processed through a preliminary determination on dumping. The Task Force noted that the average time required to process a petition was thirteen months—exclusive of the time required by the manufacturer to prepare the petition[49]—and seemed impressed by a sharp reduction of orders in one case in which a tentative finding of dumping had been made.[50]

The most significant recommendation made by the Task

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45. The objectives listed are drawn from a discussion of objectives in the *Solomon Report, supra* note 5, at 960-61.

46. *Id.* at 961.

47. *Id.* at 962.

48. *Id.* at 963.

49. *Id.* at 964. It has been suggested that the *Solomon Report* underestimated the delays in processing petitions. Note, *The Trigger Price Mechanism: Does it Prevent Dumping by Foreign Steelmakers?*, 5 N.C.J. INT'L L. & COM. REG. 219, 280 n.11 (1980).

50. *Solomon Report, supra* note 5, at 959.

Force was the implementation of the trigger price mechanism:

> We recommend that the Department of the Treasury, in administering the Antidumping Act, set up a system of trigger prices, based on the full costs of production including appropriate capital charges of steel mill products by the most efficient foreign steel producers (currently the Japanese steel industry), which would be used as a basis for monitoring imports of steel into the United States and for initiating accelerated antidumping investigations with respect to imports priced below the trigger prices.[51]

The TPM, however, was only one element in a comprehensive program of recommended action designed to achieve the objectives the Task Force had outlined[52] and was intended to operate only until international pricing practices resumed more normal patterns. Implementation of the full package of recommendations, however, was necessary to allow the steel industry to take advantage of the temporary protection afforded by the TPM and emerge as an efficient and competitive producer in the international market. The Treasury Department announced its intention to implement the TPM on December 28, 1977[53] and published a notice containing the initial trigger prices on January 9, 1978.[54]

B. The Theory of the TPM

In simple terms, the TPM was intended to provide for continuous monitoring of the costs of production, capital, and reasonable profits of the most efficient steel producer, Japan.[55] This cost would be established as the trigger price, and, if any foreign producer attempted to sell steel in the United States at a price lower than the trigger price, customs officials would promptly forward the pertinent information to Treasury for further investigation. Thus, any producer, regardless of the domestic price of its product or its costs of production, could sell steel in the United States at any price greater than or equal to the trigger

51. *Id.* at 965 (emphasis in original).
52. *Id.* at 962.
53. *See* 42 Fed. Reg. 65,214 (1977).
54. *See* 43 Fed. Reg. 1463 (1978).
55. *Solomon Report, supra* note 4, at 965-66.

price without risking an investigation.[56] Dumping per se would not result in an investigation, but sales by a more efficient producer whose fair price was below the trigger would result in an investigation.[57] The Task Force predicted that a formal antidumping investigation could be initiated within a matter of weeks[58] and could be completed within sixty to ninety days.[59]

C. *Challenge to Legality*

Shortly after the TPM was established, its legality was challenged in *Davis Walker Corp. v. Blumenthal.*[60] The plaintiff, an independent manufacturer of wire and wire products, claimed that the TPM "contravenes the Antidumping Act . . ., is arbitrary and capricious . . ., and is invalid for failure to comply with rulemaking requirements."[61] The plaintiff's primary argument was that the TPM, by deterring the import of goods below the trigger price, established a minimum price for the affected goods and circumvented the procedures of the Antidumping Act.[62] The District Court for the District of Columbia disagreed, however, and held that the TPM was merely a guide for the Secretary of the Treasury in determining whether to exercise his

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56. This is true even though individual producers may in some cases be able to show that their fair price was below the trigger price. *See, e.g.,* [1981] U.S. IMPORT WEEKLY A-14 (BNA) No. 73 (Apr. 15, 1981).

57. This result was justified in terms of injury determination. The Task Force reasoned that if the more efficient producers such as Japan had unused efficient capacity, no injury could be shown by the United States industry from any sales at less than fair value but above the trigger price. Even if an inefficient producer were prevented from selling at less than fair value, the efficient producer could expand production and make the sale in question.

While this feature of the TPM may be subject to criticism as a license to dump for inefficient producers, it does not appear to be inconsistent with the *intent* of the Antidumping Act.

58. *Solomon Report, supra* note 5, at 967.

59. *Id.* at 967-68.

60. 460 F. Supp. 283 (D.D.C. 1978).

61. *Id.* at 286. Davis Walker found itself paying higher prices for imported wire rods it used in producing the wire it sold because wire rods were included in the TPM. Its foreign competitors, on the other hand, could still get wire rods at a discount and could undersell Davis Walker in the American market. Because finished wire products were not included in the TPM, Davis Walker could not even obtain the degree of protection that a trigger price would have afforded.

62. The provisions in question were those of the original Antidumping Act, 19 U.S.C. 160-171 (1976), which has since been repealed by the Trade Agreements Acts of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979)(codified in scattered sections of 19 U.S.C.).

statutory authority to initiate an investigation.[63] The court further held that "the decision by foreign manufacturers to increase prices to the trigger price level is not the legal equivalent of the imposition of dumping duties with respect to all such goods imported at the trigger price level"[64] and granted summary judgment in favor of the government on all claims.

Although the issue was not raised in *Davis Walker*, the TPM arguably violates Article XI of the General Agreement on Tariffs and Trade[65] to the extent that it establishes a de facto minimum price system or other nontariff deterrent to free trade. Article XI, which has the effect of domestic law insofar as it does not conflict with other federal legislation,[66] provides that "[n]o prohibitions or restrictions other than duties, taxes or other charges . . . shall be instituted or maintained by the contracting party . . . ."[67] The plaintiff in *Davis Walker* argued that the TPM circumvented the Antidumping Act by establishing a minimum price system,[68] and the district court found that the TPM did not *"by its terms"* preclude importation of goods at less than trigger prices.[69] The court thus concluded that the TPM did not create a de jure minimum price and that it furthered the intent of the Antidumping Act by protecting domestic industries from unfair foreign competition. Not closely con-

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63. *Id.* at 292-93.

64. *Id.* at 292.

65. 61 Stat. A3, A32, T.I.A.S. No. 1700, at 28 (1947).

66. [C]ourt cases, insofar as they deal explicitly with the subject, have heretofore treated the GATT as direct domestic law of the United States. All the general clauses, except Part IV . . ., have been *proclaimed* by the President. . . . Consequently, those parts proclaimed should be considered domestic law in the same manner as a regulation issued pursuant to authority delegated in a statute.

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> Since the Presidential proclamation of GATT also proclaimed the Protocol of Provisional Application and applied GATT to the extent of that Protocol, it is clear that Part II of GATT [including Art XI] is applied on "to the fullest extent not inconsistent with existing legislation." As domestic law, GATT provisions can be overruled by subsequent legislation.

Jackson, *The General Agreement on Tariffs and Trade*, in A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS 45 (2d ed. part I, 1977). For a detailed analysis of GATT and United States law, see Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 249 (1967).

67. GATT, Art. XI, 61 Stat. A3, A32, T.I.A.S. No. 1700, at 28 (1947).

68. 460 F. Supp. at 289.

69. *Id.* at 292 (emphasis in original).

sidered, however, was the question of whether the TPM created a de facto minimum price. Article XI is designed to prevent nontariff trade barriers, whether de jure or de facto, and a strong argument can be made that the TPM creates a barrier of the latter type. This analysis might well have supported an injunction against Treasury in *Davis Walker*.

The TPM also raises a procedural question. Current antidumping provisions charge the International Trade Commission, an agency separate from the Commerce Department,[70] with responsibility for determining injury but allocate to Commerce the responsibility for determining whether dumping has occurred. The TPM, however, permits the Commerce Department not only to determine whether a finding that dumping has occurred is probable but also to presuppose, in making that determination, the result of an ITC investigation on injury. Although this appears to be the effect of the TPM, a challenge to the legality of TPM on these grounds would probably be unsuccessful. In theory, the full range of procedures established by antidumping legislation protects manufacturers from injury, and they retain the right to file an antidumping petition in their own behalf. In fact, however, as suggested by the Solomon Report, the TPM may make it difficult for domestic producers to prove injury from sales above the trigger price.[71] Also, as noted earlier, the traditional remedies can only be used at the risk of suspension of the TPM.[72]

D. *The TPM Before March 1980*

The initial reaction to the TPM by all parties directly concerned was one of guarded enthusiasm. The measure was expected to provide stability for foreign steelmakers seeking to sell in the United States, to curb at least the more flagrant unfair competition confronting the domestic steel industry, and to reduce the staggering load of antidumping cases that Treasury was processing for the steel industry. Opinions on the TPM's effectiveness differed widely, however, during the two-year period preceding its suspension in March 1980.[73]

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70. See note 27 *supra*.
71. *Solomon Report, supra* note 5, at 969.
72. See text accompanying note 6 *supra*.
73. THE ECONOMIST, Mar. 29, 1980, at 105.

The Treasury Department and, after January 1980, the Commerce Department[74] contended that the TPM was successful in deterring dumping and cited the improved health of the domestic steel industry as the most significant indicator of the TPM's effectiveness. Government officials dismissed the significance of an increase in total imports and a probable increase in technical dumping (sales of foreign steel at less than fair value) and denied the existence of any material amount of dumping that would qualify for action under the Antidumping Act because the vast majority of steel imports entered at prices above the trigger price.[75] These officials emphasized that by the end of 1978, the industry was operating at nearly ninety percent capacity, employment in the industry had increased by approximately 15,000 workers, and profits were up sharply.[76] Moreover, the share of the domestic market captured by American producers grew from eighty percent before TPM to eighty-seven percent by early 1979.[77] The government viewed any unfavorable market conditions as reflections of international economic problems rather than as indications of the TPM's failure.[78]

The steel industry, however, whose representatives had helped draft the TPM and which was initially enthusiastic about the program, came to view it as a failure because it did not prevent dumping. The industry believed that the trigger price was set too low because the Japanese Ministry of International Trade and Industry, which had agreed to supply Treasury with industry data from which the trigger price was to be computed, had grossly underestimated Japanese costs of production.[79] Furthermore, the achievements of the TPM fell far short of the results the industry had anticipated and those Treasury had

74. See note 38 *supra.*

75. *See* Note, *supra* note 74, at 368.

76. Address by Lynn Holec, Office of Special Programs, Dep't of Treasury, Iron & Steel Seminar of the Financial Analysts Federation, in Cleveland, Ohio (Mar. 26, 1979), *cited in* Note, *The Trigger Price Mechanism: An Efficacious Enforcement of the Antidumping Laws?*, 5 J. CORP. L. 351, 369 (1980).

77. THE ECONOMIST, Mar. 29, 1980, at 106. It should also be noted, however, that the market share captured by imports had returned to 18% by the end of 1979.

78. Foreign steel producers concurred with the position of the federal government: the TPM had been successful in providing stability in the United States market. Note, *supra* note 76, at 369-70.

79. When the Task Force went to Japan to investigate this allegation, they found the Ministry's figures to be "essentially correct." Note, *supra* note 47, at 290.

predicted.[80]

Finally, many industry officials argued that Treasury was not using good judgment in computing and setting the trigger price. For example, Treasury had used an eighty-five percent operating rate for the Japanese industry to compute cost of production even though the actual rate was close to seventy percent.[81] Use of an inflated capacity rate resulted in an underestimation of the unit cost of production and therefore depressed the trigger price. In addition, although the trigger price was to be adjusted each quarter based on the best current information, Treasury limited increases on several occasions to less than the computed value by using a "flexibility band" provision in the TPM, which permits the Department to set the trigger price within five percent of the actual computed increase or decrease.[82]

IV. MARCH 1980—THE CRISIS

The American steel industry's disappointment with the TPM grew through the latter part of 1979 and the beginning of 1980 as imports of foreign steel, much of which was priced at less than fair value,[83] captured eighteen percent of the total American market in a period of slumping demand. The domestic industry operated at less than its eighty percent break-even capacity,[84] employment figures fell,[85] and, instead of providing help to stem the flow of imports, Commerce announced no increase in the trigger price for the second quarter of 1980. In re-

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80. Treasury had predicted that 1978 steel imports would fall to fourteen million tons when, in fact, twenty-one million tons were imported. Note, *supra* note 76, at 366. Although imports fell slightly in early 1979, they began increasing again by the end of the year. *Id.* at 369.

81. *Id.* at 366. Treasury justified this by use of a study suggesting that the Japanese industry could be expected to operate over a ten-year period at eighty-five percent capacity and argued that use of the average over the longer period was appropriate to allow for recovery of production costs by the foreign producer within a reasonable period.

82. The flexibility band was intended to "moderate price fluctuations, particularly those due to exchange rate changes." *Id.* at 363 (quoting Dep't of Treasury News, Feb. 15, 1979, at 1).

83. Note, *supra* note 49, at 291.

84. THE ECONOMIST, Oct. 4, 1980, at 71. In fact, by August 1980 the United States steel industry was operating at only 54% of capacity. THE ECONOMIST, Jan. 24, 1981, at 88.

85. A 1979 peak of some 354,000 employees fell to about 276,000 by late 1980. THE ECONOMIST, Oct. 4, 1980, at 71.

sponse, the chairman of United States Steel, who had argued for months that the administration should better protect the steel industry against imports,[86] elected to try self-help by filing seventy boxes of antidumping petitions against seven European steel producers.[87] It is doubtful that the chairman expected the petitions to result in affirmative final determinations of dumping and injury or that antidumping duties would ever be assessed. Filing of the complaints was, however, expected to stem the dramatic increase in the flow of imports.[88] Even if Commerce had not suspended the TPM, the uncertainty created by the petitions would probably have had significant impact on imports. Of perhaps equal immediate significance, and even greater long-term importance, United States Steel stood to gain substantial bargaining power as a result of the petitions because the Government wanted to avoid a possible trade war between the world's steel producers.[89] Furthermore, the petitions embarrassed the Government, which had assured major trading partners that the TPM would maintain stability in the American market. All that United States Steel stood to lose was the TPM, a system which it believed was ineffectual.

On the same day that United States Steel filed its complaints, Commerce suspended the TPM.[90] The Department justified its action by stating that imports from the seven European countries against which the petitions were filed accounted for nearly one-third of United States imports of basic steel in 1979, that the basis for maintaining the TPM no longer existed, and that the Department intended to devote its resources to an expeditious investigation of the alleged dumping.[91] Although the Government seemed to have little alternative to suspension of the TPM in the face of the flood of petitions, it also stood to improve its bargaining position by the suspension. The steel industry had little to gain by a permanent return to pre-TPM antidumping procedures: the burdens of initiating petitions were

86. THE ECONOMIST, Mar. 29, 1980, at 106.

87. *Id.* at 105.

88. Imports did drop after the petitions were filed. Total imports for 1980 fell to 15,491,000 tons compared with 17,518,000 tons in 1979. [1981] U.S. IMPORT WEEKLY (BNA) No. 63, at A-18 (Feb. 4, 1981).

89. THE ECONOMIST, Mar. 29, 1980, at 106.

90. *Id.* at 105.

91. 45 Fed. Reg. 20,150, Mar. 27, 1980.

substantial, and the result too often was a negative injury determination or a foreign producer's evasive shifting of exports away from those identified in the petition. Moreover, foreign producers were willing to bargain to get the TPM reinstated in order to secure a stable market in the United States.

V. The Settlement

After six months of intense and complex consultation and negotiation, a settlement was reached.[92] The Carter Administration's announcement contained, in addition to the temporary reintroduction of the TPM, broad proposals concerning the steel industry, labor, and affected communities. Included were liberalized depreciation rules intended to increase investment and tax credits in the form of direct cash payments to steel companies; initiatives to foster adoption of advanced technology; a promise of case-by-case consideration for relief from the Clean Air and Clean Water Acts; programs to help workers, their families, and communities that included extended unemployment benefits and funds for training assistance and economic development; and a renewed government commitment to addressing economic problems of the steel industry.[93] To encourage modernization of the steel industry, the TPM was reinstated with the caveat that it would be cancelled within five years if the industry did not show significant progress in that direction.[94]

The total package actually contained few binding commitments. Many of the Government's proposals, such as those per-

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92. [1980] U.S. Import Weekly (BNA) No. 46, at N-5 (Oct. 1, 1980).

93. [1980] U.S. Import Weekly (BNA) No. 46, at N-2 (Oct. 1, 1980).

94. [1980] U.S. Import Weekly (BNA) No. 46, at N-2 (Oct. 1, 1980). Foreign participation in the negotiation and the solution primarily involved the European Community (EC) because the petitions all affected EC members. The Carter Administration's announcement stated that assurances had been received that the EC would press forward with an effort to restructure its steel industry. *Id.* at N-5. On the same day as the announcement, the office of the United States Trade Representatives (USTR) released copies of letters exchanged between USTR Reuben Askew and Viscount Etienne Davignon, the EC's Commissioner for Industrial Affairs, in which these officials agreed that both the American and European steel industries needed to modernize and restructure. [1980] U.S. Import Weekly (BNA) No. 46, at A-17 (Oct. 1, 1980). In October 1980, the EC authorized the European Commission to place compulsory limits upon steel production within the community. The plan provided for quotas backdated to October 1, 1980 that were aimed at reducing steel production by fourteen percent during the last quarter of 1980. The Economist, Nov. 8, 1980, at 56.

taining to tax and environmental matters, require congressional approval. The settlement not only permitted United States Steel to withdraw its petitions without prejudice but also allowed the company to reserve the option to continue to monitor imports, to act as it considers appropriate, and to seek an even better package through congressional action.

VI. Conclusion

The reintroduced TPM immediately increased stability in the American steel market, and steel imports predictably began to rise.[95] When the Commerce Department responded with only a nominal increase in the TPM for the first quarter of 1981, steel executives became concerned that the mechanism would once again fail to provide adequate protection for American products. A 4.4% increase in the TPM during the second quarter, however, prompted the Chairman of the American Iron and Steel Institute to comment, "We are encouraged by the evident effort which has been made by the Commerce Department to bring trigger prices closer to the Japanese costs as we believe them to be."[96] This response illustrates that steel industry evaluations of the TPM may depend on the mechanism's immediate results. A meaningful, long-range evaluation of the TPM, however, must assess its contribution to the overall health of the steel industry. This assessment must consider the TPM as only one part of a comprehensive program that also provides for new sources of capital and commits the steel industry to use that capital for modernization.[97] Unfortunately, inflation, high interest rates, increasing energy costs, and continuing government regulation have deterred major capital investment programs.

Nevertheless, the Reagan Administration's tax program, its commitment to a general deregulation of industry, and its intention to redirect the emphasis of antitrust enforcement to encourage acquisition and merger capital may improve the for-

95. The figures for the last four months of 1980 indicate a steady increase in imports: 1,063,755 tons in September; 1,141,939 tons in October; 1,179,000 tons in November; 1,534,000 tons in December. [1980] U.S. Import Weekly (BNA) No. 56, at A-19 (Dec. 10, 1980); [1981] U.S. Import Weekly (BNA) No. 59, at A-13 (Jan. 7, 1981); [1981] U.S. Import Weekly (BNA) No. 63, at A-18 (Feb. 4, 1981).

96. [1981] U.S. Import Weekly (BNA) No. 65, at A-2 (Feb. 18, 1981).

97. *Solomon Report*, *supra* note 5, at 970-71; [1980] U.S. Import Weekly (BNA) No. 46, at N-2 (Oct. 1, 1980).

tunes of the steel industry.[98] If inflation moderates and interest rates begin to fall,[99] capital should become available and affordable not only to steel companies but throughout the economy. The result would be a sharp rise in orders for basic steel and an increase in the significance of the TPM in determining the extent to which the domestic industry can capture increasing orders. If the trigger price is set at a sufficiently high level to deter massive dumping by foreign producers, the domestic industry could generate sufficient profits to support increased capital investment.

Even if this optimistic scenario is realized, the question remains whether industry leaders will recognize and seize the opportunity presented to them. The history of the steel industry suggests that they will not. Given a climate of government cooperation and available capital, however, some industry leaders have indicated that they are ready to break with history.[100] If a significant number of companies elect to take the risk, others will be forced to follow in order to remain competitive in the domestic market. Thus, under the proper conditions, the TPM may become a valuable temporary device for achieving the overall goal of an efficient, competitive American steel industry.

Joseph Wettlin

Editor's Note: On January 11, 1982, the Department of Commerce again suspended the operation of the TPM in response to antidumping complaints filed by the steel industry against eleven foreign countries. Whether this suspension will become permanent or will result in a negotiated settlement as in 1980 cannot be determined at this time.

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98. NEWSWEEK, July 6, 1981, at 57-58.

99. *See, e.g.*, FORBES, May 25, 1981, at 25; TIME, May 18, 1981, at 65. Interest rate reductions are probably the most uncertain and critical of the projected improvements in the economic climate. Reagan Administration policies seem to recognize the need for lower interest rates but favor maintaining higher rates until other economic problems have been solved. *See High Interest, Low Spirits*, NEWSWEEK, Aug. 3, 1981, at 61-62.

100. *See, e.g.*, FORBES, Feb. 16, 1981, at 36; INLAND STEEL, ANNUAL REPORT 1980, at 2-3.