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Trigger Price Mechanism: Protecting Competition or Competitors, The

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The U.S. steel industry, the third largest American industry, has eroded steadily since 1959. The industry attributes its problems to the presence of foreign steel on American markets. Its critics, however, point to poor management, outmoded technological processes and abnormal pricing policies as the causes of the industry's decline.

Whatever the actual causes of the industry's erosion, both the government and the business sector consider imports to be a sig-

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nificant factor in the industry's malaise. The government has repeatedly tried to curb imports through a variety of measures, including industry quotas, voluntary price agreements (VRA's) and, most recently, the Trigger Price Mechanism (TPM). The industry, in turn, has filed numerous antidumping complaints to

4. For a description of VRA's, see text accompanying notes 121-132 infra. See also FTC Study, supra note 1, at 73-81.


The Government has collaborated with several domestic industries in attempts to cure economic ills allegedly caused by imports. In 1934, for example, the United States established a sugar quota system to protect the domestic sugar industry from price movements in the world market. At the same time a tariff was imposed on most imported sugar. See Gerber, The United States Sugar Quota Program: A Study in the Direct Congressional Control of Imports, 19 J. L. & Econ. 103 (1976).

Voluntary export controls, an alternative to import quotas in the textile industry, began in 1956 with an agreement through which Japan limited its exports of cotton textiles. See Smith, Voluntary Export Quotas and U.S. Trade Policy—A New Non-Tariff Barrier, 5 Law & Pol'y Int'l Bus. 10, 13 (1973). See also text accompanying notes 124-30 infra.

6. Hot-Rolled Carbon Steel Wire Rods from Belgium, 28 Fed. Reg. 6,474 (1963); Hot-Rolled Carbon Steel Wire Rods from Luxembourg, 28 Fed. Reg. 6,476 (1963); Hot-Rolled Carbon Steel Wire Rods from West Germany, 28 Fed. Reg. 6,606 (1963); Hot-Rolled Carbon Steel Wire Rods from France, 28 Fed. Reg. 7,368 (1963). The industry was unsuccessful in these antidumping complaints since the court concluded that European sales at "less than fair value" had caused no injury to American products (see Antidumping Act of 1921, 19 U.S.C. § 160(a) (1976)). While the Japanese rods were the "significant factor" in harming the domestic industry, the Tariff Commission had previously found them not to have been sold at "less than fair value" (see 19 U.S.C. § 160(a) (1976)). 28 Fed. Reg. 7,368, 7,369 (1963).

On March 21, 1980, the U.S. Steel Corporation filed a dumping petition against 16 European steel producers; the petition involved basic steel mill products from seven European countries. 45 Fed. Reg. 20,150 (Mar. 27, 1980). In response, the U.S. Department of Commerce suspended the Trigger Price Mechanism on March 24, 1980, id., and stated that the underlying reasons for the TPM no longer existed once this petition was filed and that henceforth the Department would direct its resources to the expeditious investigation of the alleged dumpings. Id. Despite the filing of the dumping complaint, Viscount Etienne Davignon, Commissioner of the European Economic Community, stated that Community steel producers did not contemplate any change in their marketing
deter importation of foreign steel and has engaged in strong lobbying activities in support of protectionist legislation.\(^7\)

Whether foreign steel imports merely contribute to the steel industry's problems or actually cause its decline is perhaps not as important as the fact that the government acts as if imports were the sole destructive factor in the market and takes measures to protect the domestic market from competition by steel imports. Ostensibly, this protectionism conflicts with the Sherman Act, which is based on the premise that competition produces the best allocation of resources, the lowest prices, the highest quality and the greatest progress.\(^8\) Exceptions to the Sherman Act do exist,\(^9\) but the usefulness of competition depends upon limiting the number of these exceptions; although the interaction of competitive forces is not a panacea for all economic ills, it remains a necessary force in a mixed economy.

Two major goals of U.S. antitrust policy are the promotion of efficiency and progress and the maintenance of the competitive process to limit market power.\(^10\) This Article examines the Trigger Price Mechanism, considers its possible conflict with antitrust policies, and explores the ramifications of such a conflict. Because of the symbiosis between the Trigger Price Mechanism and the Antidumping Act of 1921,\(^11\) this Article discusses the TPM in conjunction with current U.S. antidumping procedures.

I. THE TRIGGER PRICE MECHANISM

Dumping is the selling by a foreign manufacturer of goods at below the foreign market price in the domestic market. It is essentially price discrimination among nations.\(^12\) Under the Antidumping Act of 1921, two separate bodies must make independent determinations before a conclusion that a product has been

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dumped can be reached. First, the Treasury Department must determine that a product is or is likely to be sold in the United States at less than fair value (LTFV). Fair value refers to the market price of merchandise in the country of manufacture. If no foreign market price exists, as for example, may occur when goods are manufactured exclusively for export, the Treasury uses a cost of production standard or the average price quoted to third countries to determine fair value. LTFV sales, without more, are insufficient to establish dumping. Second, the International Trade Commission (ITC) must conclude that the LTFV sales are injuring or are likely to injure a U.S. industry. Once both determinations have been made, the dumper is subject to a duty which represents the difference between the U.S. importer's purchase price and the foreign market price for the product.

The TPM functions as a monitoring system and as a device for the Secretary of Treasury to initiate antidumping complaints and to expedite the Department's antidumping investigations. The TPM has four components: (1) the establishment of prices for products that the American Iron and Steel Institute classifies as steel mill products; (2) the use of a Special Summary Steel Invoice (SSSI) for all imports of steel mill products; (3) the continuous collection and analysis of data on the cost of production and prices of steel mill products imported into the United States and on the condition of the domestic steel industry; and (4) the expedited initiation and disposition of proceedings under the Antidumping Act of 1921 with respect to imports below trigger prices.

Trigger prices are based on the Japanese costs of steel production, costs that the Japanese Ministry of International Trade and Industry (MITI) made available to the U.S. Treasury Department. MITI based its figures on data of the six major integrated steel companies in Japan and some small electric-furnace steel companies.

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TRIGGER PRICE MECHANISM

makers. The Treasury adjusted the data MITI supplied to reflect production levels and capacity utilization over the average business cycle of three years.

A trigger price represents the aggregate of a base price, shipping, insurance, interest, handling costs and appropriate extras. Extras relate to specifications for width, thickness, chemistry and service preparation of the base product. The Treasury Department revises these prices quarterly to reflect changes in Japanese costs, including adjustments for variations in labor and raw material costs and the dollar-yen exchange rate. Ocean freight and related costs are differentiated for each of the four major importing regions in the United States—Atlantic Coast, Gulf Coast, West Coast and Great Lakes; prices of specific products thus may vary depending upon the region into which they are imported.

When imports arrive in the United States, the U.S. Customs Service compares the prices on the SSSI's with applicable trigger prices. The Customs Service refers any invoices showing below-trigger prices to a Special Customs Steel Task Force, which investigates the possibility of sales at less than fair value and which may recommend that the Treasury initiate an antidumping investigation. The parameters of the Task Force's investigation are unclear. The Treasury has stated that shipments below trigger may result in informal inquiries with the importer to determine whether sales have been at less than fair value. However, Treasury does not object to conferring with the importer before instituting an investigation.

Under current antidumping procedures, thirteen to sixteen months generally elapse from the initiation of the investigation to the assessment of dumping duties. Enforcement and collection

of the duties may take years.\(^\text{27}\) Although the Treasury has the authority to initiate its own antidumping investigations,\(^\text{28}\) it undertakes such investigations only when it receives a complaint that establishes a \emph{prima facie} dumping case.\(^\text{29}\) Moreover, this complaint requires a document that reports home market prices, foreign production costs and transaction prices on shipments. Such a document is costly, time consuming and difficult to obtain. The TPM alleviates the need for this complaint. If Customs' analysis of SSSI's shows substantial or repeated shipments below trigger prices and these prices are not shown to represent fair value within the meaning of the Antidumping Act, the Treasury will begin an antidumping investigation.\(^\text{30}\)

The TPM was also intended to expedite one of the most complicated aspects of an antidumping proceeding—the determination of whether LTFV sales have occurred. This requires an initial analysis of whether the purchase price or exporter's sales price is less than foreign market value or, if that figure is impossible to ascertain, the constructed value.\(^\text{31}\) Announcement of the tentative determination is coupled with a determination of a margin of dumping which represents the percentage of the U.S. weighted average price by which those prices are less than the "fair value" of the merchandise.\(^\text{32}\) The Treasury Department is permitted six months to reach a tentative determination of LTFV sales but may obtain an extension.\(^\text{33}\) Under the TPM, the Treasury Department has taken less than six months to make tentative determinations of LTFV sales.\(^\text{34}\)

The TPM does not reduce the required time limits for final Treasury Department determinations of LTFV sales or for the International Trade Commission's determinations of injury. A final determination of sales at less than fair value must occur within the length of time as 13 months whereas the ITC Memorandum estimates the length of time to be 16 months.

27. Fordham Corporate Law Institute, International Antitrust Symposium 146 (1978) (remarks of Donald E. deKieffer). Mr. deKieffer notes that currently the time lag between the entry of a duty and its collection is 5 to 3 ½ years.
29. Solomon Report, \emph{supra} note 5, at 10, 14.
30. \emph{Id.} at 10-11, 16.
34. \textit{See} text accompanying notes 36-54 \textit{infra}.
three months from the publication of the tentative determination. During this period, interested parties may present briefs and oral arguments to the Treasury. Following the Treasury's final determination, the International Trade Commission has three months to decide whether the LTFV sales have injured a domestic industry. 35

A. TPM Antidumping Investigations

The TPM has produced four Treasury-initiated antidumping investigations. 36 Investigations of carbon steel plate imported from Taiwan and from Poland were announced on October 25, 1978. 37 Within three and one-half months a tentative determination of LTFV sales in regard to the Polish steel 38 and a final deter-

36. One investigation was terminated at an early stage. 43 Fed. Reg. 54,315 (1978). The investigation of sales by Empresa Nacional Siderurgica, S.A. of Spain, was terminated on the basis of a determination that, with the exception of two shipments, all exports of carbon steel plate to the United States between April 30 and October 31, 1978, were at or above applicable trigger prices. Customs identified two shipments that entered at below trigger prices. One shipment entered within hours of the expiration of the Treasury Department's grace period for contracts with fixed price terms. The other shipment was exported within hours of the change from second-quarter to third-quarter trigger prices.

The importer's inadequate documentation and delayed or incomplete responses to the Customs Service price inquiries made it impossible for the Customs Service to verify that all shipments were at or above applicable trigger prices. As a warning to importers, the Federal Register notice advised that in the future, information relevant to trigger price monitoring which could have been provided upon entry or upon initial inquiry by Customs will not be considered once an antidumping investigation is formally initiated. Id.

38. On February 5, 1979, a tentative determination of LTFV sales regarding the carbon steel plate from Poland was published. 44 Fed. Reg. 7,005 (1979). Since Poland is considered a state-controlled economy, its home market prices or prices of export to third countries could not be used in determining fair value. Id. (applying 19 U.S.C. § 164(c) (1976)). Therefore, in determining whether the steel in question was being or was likely to be sold at less than fair value, the basis of comparison was the difference between the U.S. sales prices and the home market price of similar merchandise manufactured in Spain. Spain was chosen because it was considered to be at a stage of economic development comparable to that of Poland. The company involved would have preferred to have used
mination of LTFV sales of the Taiwanese steel\textsuperscript{39} were announced. Final determination of LTFV sales of the Polish steel was announced on April 20, 1979.\textsuperscript{40} The International Trade Commission's injury decisions were published on May 22, 1979 regarding Taiwan\textsuperscript{41} and June 27, 1979 regarding Poland.\textsuperscript{42} The ITC unanimously concluded that the imports of carbon steel plate from Poland were unlikely to injure a U.S. industry or to prevent a United States industry from being established. Indeed, the ITC found that the affected U.S. industry was actually recovering from a 1975-1976 downturn and from the injury caused by LTFV sales from Japan in 1977.\textsuperscript{43}

The carbon steel plate from Taiwan did not fare so well. An evenly divided\textsuperscript{44} ITC determined that the Taiwanese LTFV sales were injuring or were likely to injure an industry in the United States.\textsuperscript{45} One of the factors influencing the Commission's determination was the conduct of the representatives of the China Steel Corporation, the producer of the carbon steel plate from Taiwan, at the Commission's public hearing. The ITC found the representatives' responses to the Commission's questions about future pricing practices to be "evasive or noncommittal."\textsuperscript{46} The representatives' failure to assure the ITC that future prices would be at fair value was taken as an indication that, without an affirmative determination of injury, prices would remain at less than fair value.\textsuperscript{47} Therefore, on June 13, 1979, the Treasury Department issued a finding of dumping. As a result, all unappraised entries of the steel became liable for possible assessment of special dumping duties.\textsuperscript{48}

Finland's prices as a basis for its home market prices. This choice was rejected. \textit{Id.}

\textsuperscript{39} On February 14, 1979, the Treasury published a determination of LTFV sales of the carbon steel plate from Taiwan. 44 Fed. Reg. 9,639 (1979).
\textsuperscript{40} 44 Fed. Reg. 23,619 (1979).
\textsuperscript{41} 44 Fed. Reg. 29,734 (1979).
\textsuperscript{42} 44 Fed. Reg. 37,564 (1979).
\textsuperscript{43} \textit{Id.}
\textsuperscript{44} The Antidumping Act provides that "the [ITC] shall be deemed to have made an affirmative determination if the Commissioners . . . voting are evenly divided." 19 U.S.C. § 160(a) (1976).
\textsuperscript{46} \textit{Id.} at 29,735.
\textsuperscript{47} \textit{Id.}
The Treasury announced an investigation of steel wire nails from Korea on April 20, 1979. Of the thirty-three companies shipping steel wire nails into the United States, twenty-two companies were found to have shipped below applicable trigger prices. The ITC, however, had found on February 7, 1979, that LTFV sales of nails from Canada caused no injury to the U.S. steel wire nail industry. Since the Treasury Department doubted that LTFV sales of Korean nails would injure the U.S. industry, it referred the case to the ITC for a determination of whether there was a reasonable indication that the U.S. steel wire nail industry was likely to be injured by reason of the importation from Korea.

On May 23, 1979, the ITC responded affirmatively. It had found evidence of domestic price depression, increased market penetration and declining profits and shipments. It also found that Korea had obtained a larger market share in the Western States than domestic producers. This investigation was discontinued on October 26, 1979, however, since with one exception there was found no reasonable grounds to believe that steel wire nails from Korea were being sold at less than fair value. The exception involved merchandise produced by Murakami Kogyo Company. The margin of sales was considered minimal in relation to the volume of exports from this manufacturer, however, and formal assurances that future sales to the United States would not be at less than fair value were given.

50. Id.
51. Id. This action was taken pursuant to 19 U.S.C. § 160(c)(2) (1976) which provides:
   If, in the course of making a determination . . . the Secretary concludes, from the information . . . that there is substantial doubt whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason by [sic] the importation of such merchandise into the United States, he shall forward to the Commission the reasons for such substantial doubt and a preliminary indication, based upon whatever price information is available, concerning possible sales at less than fair value, including possible margins of dumping and the volume of trade . . . .
53. Id. at 29,990.
55. Id.
B. TPM: Effect Upon Domestic Market Conditions

Initially, the TPM appeared to have no deterrent effect on steel imports from the European community, while it did seem to have a strong influence on steel products from Japan. During 1978, steel imports reached a record level of 21.1 million tons, primarily due to European imports. By February 1979, the imports had dropped 40% from the February 1978 level. It is unclear whether this decline is attributable to successful implementation of the TPM or is related to an antidumping complaint that the Lukens Steel Company filed against six major European countries on December 26, 1978.

Although import statistics alone do not adequately portray the market, several observations serve to assess the impact of the TPM and particularly its effect on the steel market in the Western States. From January through September, 1978, the United States experienced an 18% increase in carbon steel plate imports. During the same period the Western steel market experienced a 40% increase, and the source of its steel imports shifted from Japan to the European Economic Community (EEC) and other foreign suppliers. For example, France, Belgium, Italy, Germany and the United Kingdom increased their share of total carbon steel plate imports from 17% in 1976 to 45% during the first seven months of 1978. During the same time, the share of imports of carbon steel plates from Japan declined from 52% to 7%.

It is difficult to identify a causal relationship between the

57. Id.
58. 43 Fed. Reg. 49,875 (1978). The International Trade Commission suggested that the speed with which Treasury initiated this investigation indicates that it “is in the nature of a triggered self-initiated investigation under the Antidumping Act.” USITC Study, supra note 1, at 39.
59. 44 Fed. Reg. 2,053 (1979). The complaint was withdrawn on June 18, 1979, subject to the following conditions: 1) that the withdrawal be without prejudice; 2) that the Treasury files pertaining to the petition be retained for at least five years; and 3) that any subsequent filing with respect to the withdrawn petition be processed expeditiously. 44 Fed. Reg. 37,105, 37,106 (1979).
61. USITC Study, supra note 1, at 22, app. C at C-27).
62. Id.; USITC Final Report, supra note 60, at 84.
64. Id.
TPM and these changes in the Western steel market. The shift in source could be related to Japan's decision (prompted by the U.S. furor over steel imports) to limit exports to its 1977 levels. However, the surge of European imports could also be traced to the fact that trigger prices are based on Japanese costs of production. The American Iron and Steel Institute in August, 1978, released a study that claimed that because European costs are at least fifty dollars per net ton above Japanese costs, permitting entry of European steel at trigger prices is "a license to dump."

Members of the Western steel market have attributed increased imports to the TPM's freight structure. They claim the structure has encouraged foreign suppliers to divert to the western United States exports that otherwise would have been delivered to the East Coast. This diversion has apparently prompted West Coast importers to stockpile steel products and to maintain a discount program. However, the ITC has found that the TPM caused no "significant diversion of imports to the Western States from other regions."

II. THE TPM AND ANTITRUST LAW AND POLICY

A. Legality of the TPM

Notwithstanding the Solomon Report's protestations that the TPM does not constitute a minimum price system, the mechanism clearly operates as if it were such a system. Imports priced at or above trigger prices enter the United States freely, subject only to the small risk of a private antidumping action. The importa-

65. USITC Final Report, supra note 60, at 84.
67. Brief on behalf of China Steel Corporation at 47, 51, Carbon Steel Plate from Taiwan [AA 1921-197], Investigation under Section 201(a) of the Antidumping Act of 1921, as amended, before the United States International Trade Commission.
68. Id. at 47.
69. USITC Final Report, supra note 60, at 85.
70. Solomon Report, supra note 5, at 17.
71. The Treasury Department actively encourages the withdrawal of private antidumping complaints. See id. at 18.
tion of steel at below trigger prices is a target for a Treasury antidumping investigation unless the Treasury determines that the steel is priced at fair value. The extent to which the Treasury permits entry of steel below trigger prices but above fair value is unclear.\textsuperscript{72} The fact that the Treasury Department has instituted only four antidumping investigations pursuant to the TPM\textsuperscript{73} indicates that most imports are priced above trigger level. Additionally, a large domestic manufacturer of steel, wire and wire products that purchases between 1 million and 1.5 million tons of wire rod per year from foreign suppliers has claimed that the minimum price scheme of the TPM deters imports at below trigger prices, whether or not the imports are priced above fair value.\textsuperscript{74} Moreover, the Treasury's power to revise prices, including freight rates, gives it ultimate control over the level of imports and ability to divert imports to selected areas of the country.

To the extent that it attempts to control competition from imported steel mill products, the TPM thus is "in restraint of trade or commerce among the several States, or with foreign nations" within the meaning of Section 1 of the Sherman Act.\textsuperscript{75} To the extent that it determines or controls prices at which imported steel mill products enter the domestic market, the TPM also is a species of price fixing, manipulation or stabilization.\textsuperscript{76}

The Sherman Act's proscription against restraints of trade is limited to contracts, combinations or conspiracies. Unilateral con-

\textsuperscript{72}. See USITC Study, supra note 1, at 39.

\textsuperscript{73}. See text accompanying notes 36-55 supra.

\textsuperscript{74}. Davis Walker Corp. v. Blumenthal, 460 F. Supp. 283 (D.D.C. 1978). In this case the plaintiff sought declaratory and injunctive relief with respect to the TPM; the plaintiff claimed that insofar as the TPM pertained to steel wire rod, it contravened the Antidumping Act. \textit{Id.} at 289. The plaintiff also claimed that the TPM was arbitrary and capricious, in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A), and that the TPM was invalid for failure to comply with the rule-making requirements of the APA. \textit{Id.} The court granted summary judgment in favor of the defendants on the issue of whether the TPM contravened the Antidumping Act. \textit{Id.} at 293. With respect to the claim that the TPM failed to comply with the APA rule-making requirements, the court held that the TPM was a policy statement and that its conclusion was supported by policy considerations. \textit{Id.} at 294-95. Finally, the court held that adoption of the TPM was not arbitrary and capricious within the meaning of the APA. \textit{Id.} at 295-97.


\textsuperscript{76}. See United States v. Socony Vacuum Oil Co., 310 U.S. 150 (1940); Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933); United States v. Trenton Potteries Co., 273 U.S. 392 (1927).
duct is beyond its scope. Therefore, the illegality vel non of the TPM depends upon (a) whether it results from an agreement denominated a contract, combination or conspiracy and (b) whether that agreement, if found, is in any way immunized from Section 1 liability.

Focusing upon the first inquiry, that is, the existence of an agreement, the attempt to select who may have agreed with whom involves an impressive cast of characters, including the President of the United States, the Secretary of the Treasury, the Japanese Ministry of International Trade and Industry, the domestic steel industry and foreign steel producers. One combination that comes to mind immediately is MITI's action in supplying information on the Japanese costs of production to the Treasury Department to assist the Department in its calculation of trigger prices. This information, it should be recalled, was made available through the cooperation of the major Japanese steel producers.

What is less clear than the existence of a combination to compute a trigger price is whether an "agreement" between the domestic steel industry and the government gave rise to the Trigger Price Mechanism. The industry's constant clamors for protection and its persistent criticism of prevailing antidumping measures were among the factors The Interagency Steel Task Force considered in its recommendation of the establishment of the TPM. Implementation of the TPM required the cooperation of the domestic industry in voluntarily withdrawing its pending antidumping complaints and in refraining from filing further complaints. The Solomon Report "encourage[d]" the industry to consider the prompt withdrawal of its antidumping petitions because the Treasury Department's resources were insufficient to administer both the TPM and antidumping investigations. Furthermore, the steel spokesman for the EEC suggested that if the United States did adopt the TPM, the domestic industry should in return drop the dumping charges it had filed against European

77. Unilateral conduct may be subject to Section 2 of the Sherman Act, which proscribes monopolies and attempts to monopolize. See 15 U.S.C. § 2 (1976).
79. See text accompanying note 19 supra.
81. Id. at 18.

Does this cooperation constitute an "agreement"? Proof of parallel business behavior is insufficient to establish a Sherman Act offense. Nonetheless, if parallelism is coupled with some kind of interdependent decisions, an antitrust violation may exist. Evidence which is insufficient to establish an express agreement may suffice to establish a conspiracy.

In Interstate Circuit, Inc. v. United States a group of competitors responded to a demand by parties standing in a vertical relationship to them, and a conspiracy was found to exist. The Court concluded that

[i]t was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. . . . It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. . . . Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.

If an agreement exists, insofar as it tampers with price structure, it is condemned unequivocally because it interferes with "the free play of market forces." Notwithstanding this stigma of per se illegality, price fixing is exempt from antitrust liability under the Noerr-Pennington doctrine if it results from private parties' solicitation of administrative or legislative action. While the precise

88. Id. at 226-27.
contours of this doctrine are unclear, it is a relevant consideration in any analysis of the possible illegality of the TPM.

The fact that the Executive Branch was involved in a TPM agreement, if such an agreement exists, does not necessarily shield the agreement from antitrust exposure. In Consumer Union of U.S. Inc., v. Rogers, 91 a consumer organization challenged the President's authority to reduce steel imports through voluntary agreements with the Japanese and European steel industries. The group initially claimed that the steel agreements violated the Sherman Act but then stipulated dismissal of that contention. Despite the dismissal, the district court concluded that the President had no authority to exempt the voluntary agreements from the antitrust laws. The breadth of the court's language is significant:

The President clearly has no authority to give binding assurances that a particular course of conduct, even if encouraged by his representatives, does not violate the Sherman Act or other related congressional enactments any more than he can grant immunity under such laws. . . . [W]hen representatives of the Executive Branch venture into areas where the antitrust laws have apparent application, they must proceed with strict regard for legislation outlawing restraints of trade so that no action taken will be inconsistent with the clear requirements of settled national policy. . . . The Court declares that the Executive has no authority under the Constitution or acts of Congress to exempt the Voluntary Restraint Arrangements on Steel from the antitrust laws and that such arrangements are not exempt. 92

On appeal, the U.S. Court of Appeals for the District of Columbia vacated the declarations regarding exemptions. 93 The declarations caused such concern among foreign steel producers, however, that Congress enacted special legislation immunizing the participants in the arrangement from antitrust liability. 94 It is

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94. Section 2485 of title 19 provides:
doubtful, nonetheless, that similar legislation would follow for the TPM. The legislative history of the special voluntary agreement legislation makes clear that it was not intended to serve as a precedent.\footnote{95}

B. Efficiency and Progress

The steel industry is now enjoying a period of relative prosperity—in sharp contrast to the bleakness of 1977. As of January, 1979, the industry was operating at 85% capacity, employment was rising, profits had risen and demand was high, with little sign of retreat.\footnote{96} While Treasury officials credited the industry's "renaissance" to the TPM,\footnote{97} an industry spokesman attributed the industry's revival to a strong demand factor.\footnote{98} Another spokesman credited the TPM only with eliminating "suicidal price discounts."\footnote{99} Demand has apparently been so strong that shortages in some products have been predicted.\footnote{100}

At the same time, there has been little movement toward increased efficiency or modernization in the industry. Steel plants are still outmoded, equipment remains a "disgrace," and domestic steel-making technology continues to be inferior to that of the Japanese.\footnote{101} The gap in our technology may well cause further declines in the industry's efficiency and viability.

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\textit{Voluntary limitations on exports of steel to United States}

No person shall be liable for damages, penalties, or other sanctions under the Federal Trade Commission Act or the Antitrust Acts . . . or under any similar State law, on account of his negotiating, entering into, participating in, or implementing an arrangement providing for the voluntary limitation on exports of steel and steel products to the United States, or any modification or renewal of such an arrangement, if such arrangement or such modification or renewal—(1) was undertaken prior to January 3, 1975, at the request of the Secretary of State or his delegate, and (2) ceases to be effective not later than January 1, 1975.


\footnote{96. Farnsworth, \textit{Few Like Steel Trigger Prices}, N.Y. Times, Jan. 17, 1979, § D, at 1, col. 3.}
\footnote{97. \textit{Id}.}
\footnote{98. \textit{Id}.}
\footnote{100. Bus. Week, Nov. 13, 1978, at 34, 35.}
\footnote{101. Am. Metal Mkt., Nov. 8, 1979, at 1, col. 1.}
When the *per se* ban against price discrimination is withheld from conduct, the purpose and effect of which is to reduce or eliminate foreign competition, the result is inconsistent with the antitrust policy of enhancing competition. The insulation of a domestic industry from imports leads to increases in prices of products not subject to foreign competition.

The TPM thus supports the domestic industry's raising of its prices.\(^{102}\) Since the implementation of the TPM in early 1978, the domestic industry has obtained a series of price increases beginning with a 5.5% increase shortly after the release of the Solomon Report.\(^{103}\) If the steel industry follows the most recent increase by Bethlehem Steel Corporation, the industry will have raised prices more than 6% since the beginning of the voluntary price restraint program.\(^{104}\)

The Federal Trade Commission estimates that the immediate cost of minimum reference prices to consumers is $1 billion annually.\(^{105}\) Price increases in steel are felt throughout the economy, beginning with the automobile and construction industries, the largest consumers of steel products in the United States.\(^{106}\) Moreover, a pyramid effect on price occurs because steel is a basic material in the production of other products; successive purchases in the production chain add markups above the increased costs of the steel itself.\(^{107}\) To the extent that the TPM inhibits imports below trigger prices, the consumer must contend with the oligo-

\(^{102}\) Salpukas, *February Steel Imports Off 40%*, N.Y. Times, Mar. 29, 1979, § D, at 4, col. 1; Brief on behalf of China Steel Corporation at 51-52, Carbon Plate from Taiwan [AA 1921-197], Investigation under Section 201(a) of the Anti-dumping Act of 1921, as amended, before the United States International Trade Commission.


\(^{104}\) Williams, *Bethlehem Lifts Steel Prices 3.5%*, N.Y. Times, Mar. 28, 1979, § D, at 1, col. 6.

\(^{105}\) FTC Study, *supra* note 1, at 559.

\(^{106}\) *Id.* at 63. According to the FTC Study, consumption percentages are as follows: automotive industry—17%; construction industry—16.9%; container industry—7.5%; the balance is spread among other consumers.

\(^{107}\) Memorandum from F.T.C. Commissioner Mayo J. Thompson to James T. Halverson, Director of the Bureau of Competition (May 31, 1974), reprinted in Scanlon, *We can enforce the law or help consumers: which do you want us to do?*, 7 Antitrust L. & Econ. Rev. 47, 86 (1975). The author points out that due to pyramiding, a $5.00 per ton rise in steel prices is equivalent to a $50.00 increase in the cost of an automobile. *Id.*
polistic pricing practices of the domestic industry.\textsuperscript{108}

The Trigger Price Mechanism trades off the negative impact of higher prices for the benefits of increased capacity, profits and employment in the domestic industry.\textsuperscript{109} Assuming that these gains are directly attributable to the TPM rather than to the strong steel demand factor, they nevertheless must be balanced against the anti-competitive effects of retaining the TPM. These effects include the potential effect of dumping orders in TPM antidumping cases.

The Solomon Report noted that the high margin of dumping found in the Gilmore case (involving carbon steel plate from Japan)\textsuperscript{110} caused a "virtual halt in orders for that product from the foreign suppliers."\textsuperscript{111} Dumping orders in trigger cases alter competitive pressures even more than orders under the Antidumping Act of 1921. TPM dumping orders raise the price for the affected products high enough above trigger to price the imported products out of the U.S. market. For example, the China Steel Corporation of Taiwan, the subject of an ITC dumping finding in June, 1979,\textsuperscript{112} has stopped exporting carbon steel plate to the United States.\textsuperscript{113} This kind of cessation permits domestic producers to capture that share of the market formerly supplied by imports, precisely as the Solomon Report envisaged.\textsuperscript{114} Unless other foreign suppliers with sufficient capacity enter the market, regional monopolies or oligopolies are permitted to exist. This result is antithetical to the political and social goals underlying the Sherman Act.\textsuperscript{115}

Although the TPM is on a collision course with the Sherman Act, abolishing the TPM now may be neither desirable nor appropriate to consider. The Solomon Report noted the Administration's concern that the number of antidumping complaints pending at the time of the Report threatened trade relations with our

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\textsuperscript{109} See text accompanying notes 96-97 \textit{supra}.
\textsuperscript{111} Solomon Report, \textit{supra} note 5, at 12-13.
\textsuperscript{112} See notes 36-48 and accompanying text \textit{supra}.
\textsuperscript{113} Furst, \textit{Chao: China Steel No Threat to U.S.}, Am. Metal Mkt., Nov. 7, 1979, at 1, col. 1.
\textsuperscript{114} Solomon Report, \textit{supra} note 5, at 18-19.
\textsuperscript{115} Cf. United States v. Topco Assocs., 405 U.S. 596, 608 (1972) (horizontal territorial restraints declared illegal \textit{per se} under the Sherman Act).
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principal trading partners. Foreign producers charged that strict enforcement of the Antidumping Act would have a chilling effect on international trade relations. One of the political risks of abolishing the TPM is the probability that domestic producers who refrained from filing dumping complaints in exchange for the TPM will file new charges against European producers, considered the most inefficient, and thereby exacerbate the problems of the European, particularly the French, industry.

A second risk associated with ending the TPM is the possibility that it would be replaced by even more anti-competitive programs, such as quotas or voluntary restraint agreements. If this were to occur, one economist predicts, "the departure from competitive MC [marginal cost] pricing would become even worse." Quotas isolate the domestic market from the world market. They create artificial shortages in the domestic market and result in domestic prices that are higher than world market prices. Article XI of the General Agreement on Tariffs and Trade (GATT) prohibits the use of such quantitative restrictions as a protectionist measure. Therefore, an appealing substitute for

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119. Quotas are administered by the U.S. Customs Service and come in two varieties: tariff rate and absolute. Tariff rate quotas permit a specified quantity of a quota product to enter at a reduced rate of duty for a given period of time. There is no restriction upon the amount of the product which may enter. However, any quantities that enter in excess of the quota for a given period are subject to higher duty rates. As of January 1, 1977, tariff rate quotas existed on certain cattle, whole milk, certain fish, potatoes and brooms.

Absolute quotas are quantitative—during a given quota period no more than the amount specified is permitted entry. Examples of commodities subject to absolute quota are ice cream and animal feeds.

The Federal Energy Office administers import quotas on fuel oil and the Department of Agriculture administers import quotas on certain dairy products.

120. For discussion of the varieties of VRA's see Smith, Voluntary Export Quotas and U.S. Trade Policy—A New Nontariff Barrier, 5 Law & Pol'y Int'l Bus. 10 (1973).
122. See Gerber, The United States Sugar Quota Program: A Study in the Direct Congressional Control of Imports, 19 J.L & Econ. 103, 103-04 (1976).
import quotas in recent years has been voluntary restraint agreements; they are not considered violative of the GATT Charter.

The VRA concept was first developed during bilateral negotiations between the United States and Japan in the mid-1950's concerning cotton textile imports. Like the steel industry today, the textile industry was confronted with a barrage of imports in the 1950's and, because of the industry's importance in the economy as a major employer, clamors for protection began reaching the Executive Branch and Congress. The 1956 agreement with Japan was successful in reducing cotton textile imports until 1958, when Hong Kong became the major source of import competition. This led to the Long Term Cotton Textile Arrangement of 1962, which offered strong protection to the cotton sector. However, the Agreement failed to achieve its intended purpose of providing a stable textile environment. Cotton textile imports decreased and man-made textile imports increased in alarming proportions.

In 1971, under pressure from the U.S. Government—including the threat of quota legislation—Japan, Hong Kong, China and Korea agreed to limit on a quantitative basis the volume of non-cotton textiles they exported to the United States. As a result of this agreement textiles were exempt from the 1971 10% import surcharge. The resulting loss of revenue to the U.S. Government has been estimated to be 58.8 million dollars. The cost to consumers from these agreements has been estimated to be between $1 billion and $2.5 billion for 1972 alone. Additionally,
the U.S. Government agreed to give Korea $375 million to compensate for the expected loss it would incur in limiting textile exports to the United States.¹³⁰

The economic effects of the textile VRA's are similar in at least one major respect to the TPM's, that is, increased consumer costs. The restriction of textile imports on a quantitative rather than value basis allowed foreign suppliers to shift their export program to more expensive products. The resulting economic loss fell predominately upon low income consumers.¹³¹ Increased prices in steel, however, do not necessarily fall upon only low income consumers; they are felt downstream in all sectors of the economy.¹³²

III. TPM: Fair Trade Policy Choice?

Tension clearly exists between the U.S. antitrust policy of enhancing competition and the Antidumping Act's preference for protecting domestic industries from unfair foreign competition. This situation translates into the familiar conflict between the values of free trade, fair trade and protectionism that surfaces whenever tariff and nontariff trade barriers shield domestic industries from import competition.

Free trade is thought to enhance productivity, increase competition, restrain prices in concentrated domestic industries, encourage innovation and provide consumers with greater consumption possibilities. It is based on the law of comparative advantage.¹³³ The factors militating against free trade, particularly within the steel industry, are full employment, supply shortages during recession, balance of payments and the national defense.¹³⁴

Protectionism has come into vogue of late as a cure for chronic economic stagnation.¹³⁵ Protectionism is trade regulation

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¹³⁰ Id.
¹³¹ Id. at 11.
¹³² See text accompanying notes 102-08 supra.
¹³³ P. Samuelson, Economics 662-65 (5th ed. 1964); FTC Study, supra note 1, at 532, 533.
¹³⁴ FTC Study, supra note 1, at 534-54. The FTC Study rejects the arguments against free trade except for the argument based on national defense needs.
¹³⁵ N.Y. Times, Apr. 5, 1979, § D, at 1, col. 3.
among countries for the benefit of home market industries.\textsuperscript{136} Tariffs are the traditional modes of protection, but import quotas and voluntary restraint agreements often function as nontariff protectionist trade barriers.

Somewhere on the continuum between the concepts of free trade and protectionism is the concept of fair trade. In his first State of the Union Message, President Carter stated that free trade must be fair trade but he did not define the parameters of that concept.\textsuperscript{137} What constitutes trade "fairness" or "unfairness" is unclear. One interpretation is that foreign competitors must be subject to our rules of competition.\textsuperscript{138}

The resolution of these competing policies vis-à-vis the steel situation is complicated by the differences in industry and marketing techniques between the U.S. steel industry and its Japanese and European competitors. The U.S. steel industry is an oligopoly of large, vertically integrated firms.\textsuperscript{139} Most steel makers own or control domestic ore mines and have substantial iron mine investments in Canada.\textsuperscript{140} The Japanese steel industry is less vertically integrated. At least 80% of the Japanese products are sold to trading companies in Japan that in turn sell to domestic and export consumers and service centers.\textsuperscript{141} The European community, which produces approximately one-third of the free world's raw steel, tends to be concentrated, and this tendency is encouraged by its respective governments.\textsuperscript{142}

The Japanese and European steel industries enjoy certain competitive advantages over the U.S. steel industry before their products even reach the import market. The Japanese industry makes economic decisions in conjunction with its government. Its financial relationships with banks and trading companies have permitted the development of a practice known as "rationaliza-

\textsuperscript{137} President's Address to Congress on the State of the Union, 1 Pub. Papers 90, 94 (Jan. 19, 1978).
\textsuperscript{138} Fordham Corporate Law Institute, International Antitrust Symposium 137-38 (1978) (remarks of Donald E. deKieffer).
\textsuperscript{139} Adams & Dirlam, Steel Imports and Vertical Oligopoly Power, 54 Am. Econ. Rev. 626, 638 (1964).
\textsuperscript{140} FTC Study, supra note 1, at 83. See also USITC Study, supra note 1, app. B.
\textsuperscript{141} FTC Study, supra note 1, at 19. See also USITC Study, supra note 1, app. B.
\textsuperscript{142} FTC Study, supra note 1, at 20, 21.
tion.” This practice enables individual mills to specialize in the production of a few product lines and thereby eliminates duplication in the industry at large. This reduces costs, increases efficiency and provides a competitive advantage over nonrationalyzed steel industries.143

Members of the European community operate similarly but are rationalized to a lesser degree than Japan because several countries are involved. By coordinating their efforts, however, these countries have protected their industry from entry by non-EEC members. These efforts include allocating production and raw materials among member nations and setting minimum prices.144

Low cost labor is another major competitive advantage of the foreign steel industry. For example, the China Steel Corporation of Taiwan has estimated that it required $25 in labor costs to produce one metric ton of raw steel. The cost in the United States is $140 per ton.145 China Steel reported $94,160 in sales per employee for the fiscal year ending June 1979, with profits accounting for 16.4% of its sales.146 The only U.S. company with higher sales per employee was the National Steel Corporation.147

The foreign steel industry employs two marketing techniques that have a significant impact on competitive conditions in the Western steel market. These are price-indexing and channeling. Price-indexing is a method of maintaining prices at fixed percentages below the price of another producer. Price-index clauses in a contract guarantee that importers’ prices are generally a certain percentage below U.S. producers’ list prices. This makes it difficult for domestic producers to compete on the basis of price. Many domestic producers have claimed a loss of customers to importers because of price-indexing and contend that few customers were acquired by the domestic industry’s underselling competition.148 However, the ITC’s investigation of this practice con-

143. USITC Study, supra note 1, at 57. The Ministry of International Trade and Industry provides the Japanese steel industry with market advice and the steel firms generate the bulk of their financing through long-term debt. FTC Study, supra note 1, at 20.
144. USITC Study, supra note 1, at 58.
146. Id.
147. Id.
148. USITC Study, supra note 1, at 59-61.
cluded that price-indexing can be instrumental in penetrating the market, despite the fact that importers are able to offer lower prices than domestic competitors.149 There is nothing to prevent domestic competitors from offering additional discounts. Kaiser Steel initiated a price discount program to meet import competition and was successful in regaining some market power.150

The second practice, channeling, involves an informal allocation of customers and products by and among trading companies. Unlike price-indexing, which is practiced by both European and Japanese, channeling is peculiarly Japanese. If one trading company establishes an account, the other trading companies respect that relationship without any written agreements. Even though this practice reduces competition among trading companies, it is thought to promote efficiency and thus permit greater cost savings to the trading firms.151

Theoretically, the U.S. steel companies are bound by the discipline of a market economy while their competitors are not.152 The laws governing competition in the United States, particularly the Antidumping Act of 1921, are based upon a model of world trade as a market economy with nations competing on the basis of technology and resources. The trade decisions of U.S. trading partners, however, are often based upon social and political considerations such as full employment, production capacity or, as in the case of Taiwan, the desire to shift economic bases. Thus, the allocation of goods and resources is not controlled by the economics of the market place alone but by what one observer has labeled "selective socialism."153

A free trade approach would require that U.S. steel companies meet competition in the market place, not in antidumping proceedings or behind the trigger mechanism. An opposing argument holds that free trade is not possible where some of the players receive unfair advantages and that real competition exists only when all competing players operate under the same rules. The problem with the TPM is that it eliminates half the players from the game.

149. Id. at 160.
150. USITC Final Report, supra note 59, at 20.
151. USITC Study, supra note 1, at 60-61.
153. Id.
IV. Conclusion

The International Trade Commission asserted that for most of 1978 and probably for the indefinite future, the TPM was "the greatest single factor influencing the conditions of competition" in the U.S. steel industry. The precise contours of this influence are uncertain. While it is premature to assess adequately the economic impact of the TPM, it is possible to make some observations vis-a-vis our national antitrust policy goals. The TPM, like the steel VRA's of 1972, has had no discernable impact on increasing efficiency through expansion, modernization or development of domestic steel-making technology.

The TPM, however, does have an impact on domestic pricing policies. By preventing foreign sellers from engaging in price competition, the TPM functions as a constraint on the number of foreign entrants into the U.S. market. This tends to produce anti-competitive results, since the number of sellers in an industry usually operates as a limit on the oligopolistic control of competition.

Elimination of the TPM would probably not restore competition to the steel industry. Moreover, even if steel imports were to enter the U.S. market subject only to tariff restraints, they would not necessarily affect the domestic industry's policies and practices, which have historically proven oblivious to confrontation from imports.

The industry's behavior in the face of substantial imports seemed to belie the Mancunian assumption among policy makers that "free international trade is the best anti-monopoly policy and the best guarantee for the maintenance of a healthy degree of free competition."

154. USITC Study, supra note 1, at 35.