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## The Reinstated Steel Trigger Price Mechanism: Reinforced Barrier to Import Competition

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# The Reinstated Steel Trigger Price Mechanism: Reinforced Barrier to Import Competition

Garry P. McCormack

## **Abstract**

Early in 1978 the Carter Administration implemented a trigger price mechanism (TPM) to aid the distressed United States steel industry. Although the TPM by its terms is a monitoring system, the controversy it has aroused suggests that its actual function extends far beyond mere monitoring of steel imports. Part I of this Comment will examine the TPM in the context of world steel trade to show how the original system actually functioned, and how the new version is likely to operate. Part II will explore the ways in which this import relief program is inconsistent with traditional United States trade law and policy.

## COMMENT

### THE REINSTATED STEEL TRIGGER PRICE MECHANISM: REINFORCED BARRIER TO IMPORT COMPETITION\*

#### INTRODUCTION

Early in 1978 the Carter Administration implemented a trigger price mechanism (TPM)<sup>1</sup> to aid the distressed United States steel industry. Part of a comprehensive program for the industry,<sup>2</sup> the TPM was intended to “expedite relief from unfair import competition, but to do so in a manner which [would] not preclude healthy competition in the [United States] market.”<sup>3</sup>

The TPM regulations were proposed as a monitoring system<sup>4</sup> to be used by the Department of the Treasury to facilitate enforcement of the Antidumping Act of 1921.<sup>5</sup> The Antidumping Act was

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1. The TPM was recommended to President Carter by an Interagency Task Force headed by Under Secretary of the Treasury Anthony M. Solomon. Report to the President: A Comprehensive Program for the Steel Industry, released Dec. 6, 1977 [hereinafter cited as Solomon Report], reprinted in *Hearings on the Administration's Comprehensive Program for the Steel Industry Before the Subcomm. on Trade of the House Comm. on Ways and Means, 95th Cong., 2d Sess. 3-38 (1978)* [hereinafter cited as *Steel Industry Hearings*]. The President approved the plan on the date of its release. 13 WEEKLY COMP. OF PRES. DOC. 1835 (Dec. 6, 1977). The Treasury Department first publicized its intention to implement the TPM along with an announcement of proposed rulemaking governing collection of information through a Special Summary Steel Invoice (SSSI) to be filed at the time of importation of steel articles. 42 Fed. Reg. 65,214 (1977). Final regulations on the SSSI were published February 13, 1978, and became effective February 21, 1978 as an amendment to customs entry regulations under 19 C.F.R. 141.89 (1980). 43 Fed. Reg. 6065 (1978). The first trigger prices for seventeen steel mill products were announced by the Treasury Department on January 3, 1978. 43 Fed. Reg. 1464 (1978).

2. In addition to implementation of the TPM, the Interagency Task Force recommended tax incentives to modernize United States steel facilities, loan guarantees for domestic steel mills, “rationalization” of environmental policies and procedures, community and labor assistance, and other general measures. Solomon Report, *supra* note 1, at 21-35.

3. *Id.* at 8.

4. *Id.* at 13-14.

5. Ch. 14, 42 Stat. 11 (repealed 1979). The Antidumping Act was criticized as procedurally too cumbersome and too product-specific to provide effective relief from surges of imports of a broad range of steel products. Solomon Report, *supra*

subsequently repealed by the Trade Agreements Act of 1979,<sup>6</sup> but the TPM remained in effect under the antidumping provisions of the new act.<sup>7</sup> On January 2, 1980, authority to administer the TPM was transferred to the Commerce Department by Executive Order.<sup>8</sup>

In all, the system operated for 25 months before the Commerce Department suspended it on March 21, 1980, in reaction to the filing of large-scale antidumping complaints by U.S. Steel Corporation.<sup>9</sup> The mixed results of the TPM during that period subjected the system to widespread criticism.<sup>10</sup>

Prolonged negotiations between the government and U.S. Steel resulted in withdrawal of the antidumping complaints and reinstatement of the TPM, in a revised form approved by the in-

note 1, at 12-13. The TPM, designed to streamline enforcement procedures, consisted of four basic components: (1) establishment of trigger prices for steel industry, and the cost of production and prices of steel mill products imported into the United States; (2) adoption of the SSSI; (3) continuous collection and analysis of data concerning both conditions in the domestic steel industry, and the cost of production and prices of steel mill products in the countries that are the principal exporters of such products to the United States; and (4) where deemed appropriate, expedited initiation and disposition of proceedings under the Antidumping Act of 1921 with respect to imports priced below trigger prices. 42 Fed. Reg. 65,214, 65,125 (1977); *see notes 109-19 infra* and accompanying text.

6. Pub. L. No. 96-39, § 106, 93 Stat. 144 (effective Jan. 1, 1980).

7. *Id.* § 101, 19 U.S.C. §§ 1671-1677g (Supp. III 1979). These sections replace the Antidumping Act of 1921 by adding a new Title VII, Countervailing and Antidumping Duties, to the Tariff Act of 1930. *Id.*

8. Exec. Order No. 12,188, 45 Fed. Reg. 989 (1980). *See also* Reorg. Plan No. 3 of 1979, 44 Fed. Reg. 69,273 (1979).

9. U.S. Steel Corporation filed major antidumping petitions with Commerce against steel imports from Belgium, France, Italy, Luxembourg, the Netherlands, the United Kingdom, and West Germany. 45 Fed. Reg. 26,109 (1980); 45 Fed. Reg. 20,150 (1980). Commerce noted that the TPM was intended as a substitute for major antidumping complaints by private parties, and concluded that continuing the TPM while investigating industry complaints would undercut the basis upon which the TPM was established. 45 Fed. Reg. 20,150 (1980).

10. Criticism of the TPM came from steel importers, domestic steelmakers, protectionists, and free trade advocates alike. *See, e.g., Trigger Prices are Set, But Who's Under the Gun?*, *IRON AGE*, Jan. 16, 1978, at 28; *Plug Trigger-Price "Loopholes:" SSCI*, *Am. Metal Mkt.*, Aug. 12, 1980, at 4, col. 1; *The TPM: Inflation's Ally?*, *id.* Apr. 2, 1980, at 21, col. 1; *Steel Fence*, *Wall St. J.*, Feb. 11, 1980, at 20, col. 1; *National Steel Official Blames Shipping Lag on Trigger Flaws*, *Am. Metal Mkt.*, Apr. 3, 1979, at 4, col. 1; *Steel Trigger Price Hearings Delineate Two Opposing Camps*, *id.*, Feb. 1, 1978, at 18, col. 1; *Few Happy With Steel Price Plan*, *J. of Com.*, Jan. 26, 1978, at 1, col. 2. In its press release announcing the filing of its antidumping complaints against seven European steel-exporting countries, *see note 9 supra*, U.S. Steel Corp. cited "a host of inadequacies, distortions, and failures of the TPM." United States Steel Public Affairs Release (Mar. 20, 1980).

dustry, on October 9, 1980.<sup>11</sup> Nevertheless, controversy continues to surround the system.<sup>12</sup>

Although the TPM by its terms is a monitoring system,<sup>13</sup> the controversy it has aroused suggests that its actual function extends far beyond mere monitoring of steel imports. Part I of this Comment will examine the TPM in the context of world steel trade to show how the original system actually functioned, and how the new version is likely to operate. Part II will explore the ways in which this import relief program is inconsistent with traditional United States trade law and policy.

## I. THE EVOLUTION OF THE TPM

### A. *The United States and World Steel Trade*

The position of the United States in world steel production has steadily declined since the 1950's.<sup>14</sup> International steel trade has played a major role in that decline.<sup>15</sup> Exports have been a vital factor in the growth of production in Japan, the European Economic Community (EEC), and a number of advanced developing nations.<sup>16</sup> Yet from 1956 to 1976, while annual world steel exports grew more than three-fold, United States exports actually de-

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11. 45 Fed. Reg. 66,833 (1980).

12. See, e.g., *Orban Criticizes Anti-Surge Provision in New Triggers, Labels It a Form of Quota*, Am. Metal Mkt., Dec. 9, 1980, at 1, col. 3; *Nucor's Iverson Sees Triggers Doing More Damage Than Good*, *id.* Dec. 2, 1980, at 4, col. 2; *Protectionism Seen Limiting Exports, Job Growth*, *id.* Oct. 27, 1980, at 28, col. 1; *Overseas Lukewarm to Triggers: Anti-Surge, Preclearance Sections Draw Fire of Europe and Japan*, *id.* Oct. 3, 1980, at 1, col. 1; *Revived Trigger System Prompts Pleas for Changes*, *id.* Oct. 2, 1980, at 2, col. 1.

13. See note 4 *supra*; *Davis Walker Corp. v. Blumenthal*, 460 F. Supp. 283, 292 (D.D.C. 1978).

14. United States International Trade Commission, Pub. No. 951, *Conditions of Competition in the Western U.S. Steel Market Between Certain Domestic and Foreign Steel Products*, app. B-2 (1979), [hereinafter cited as USITC Pub. 951]. The United States was the world's largest steel producer in 1956, with a 36.8% share of total world production. *Id.* at app. B-3. In 1976, its 17.0% share ranked it second, behind the Soviet Union and barely ahead of Japan. *Id.* at app. B-2.

15. See generally H. Pifer, P. Marshall, & J. Merrill, *Economics of International Steel Trade: Policy Implications for the United States* (May 1977) (report prepared for the American Iron and Steel Institute by Putnam, Hayes, & Bartlett, Inc.) [hereinafter cited as Putnam, Hayes Report].

16. Exports accounted for more than 65% of total Japanese growth in production in the decade 1967-1976. *Id.* at 4. During the same period, EEC reliance on exports to sustain growth in production increased from 10% to 35%. *Id.*

clined.<sup>17</sup> Once the world's leading exporter of steel, the United States has become its largest importer;<sup>18</sup> as much as 18 percent of annual apparent consumption has been supplied by foreign producers.<sup>19</sup>

The declining United States position in international steel trade has been accompanied by a deterioration in the financial health of the domestic industry.<sup>20</sup> Profits have fallen over the last three decades.<sup>21</sup> A number of reasons have been offered to explain this trend.<sup>22</sup> The single factor which domestic steel producers have stressed most often in recent years has been the quantity of low-priced imports suppressing prices and limiting sales volume, and thus inhibiting the capital formation necessary to expand and modernize United States production facilities.<sup>23</sup> In particular, United States steel producers complain that foreign steel is being "dumped" in their market, injuring the domestic steel industry.<sup>24</sup>

17. H. Mueller & K. Kawahito, *Steel Industry Economics: A Comparative Analysis of Structure, Conduct and Performance* 3 (Jan. 1978) (report prepared for Japan Steel Information Center) [hereinafter cited as Mueller and Kawahito]. From 1956 to 1976, annual world steel exports increased by 334%, from 30.4 million tons to 131.6 million tons. All major steel producers other than the United States recorded at least a 47% increase. *Id.* at 3-4.

18. Draft Preliminary Report of the Steel Tripartite Advisory Committee Working Group on International Trade, July 21, 1980, *reprinted* in U.S. IMPORT WEEKLY (BNA), No. 37, July 23, 1980, at M-1 [hereinafter cited as Tripartite Committee Report].

19. *Id.* Since 1959, when the United States became a net importer of steel, imports have filled more than 35% of the growth in U.S. apparent steel consumption. Putnam, Hayes Report, *supra* note 15, at 4.

20. Tripartite Committee Report, *supra* note 18, at M-1.

21. *Id.*

22. Contributing factors include high labor costs, climbing construction costs and interest rates for new plants, pollution control requirements, rising raw material costs and fuel expenses, and government intervention restraining prices. *See, e.g.*, COUNCIL ON WAGE AND PRICE STABILITY, *A STUDY OF STEEL PRICES* xi (1975) [hereinafter cited as 1975 COWPS Report]; American Iron and Steel Institute, *Steel at the Crossroads: The American Steel Industry in the 1980's*, at 7-15 (Jan. 1980) [hereinafter cited as *Steel at the Crossroads*]; Mueller & Kawahito, *supra* note 17, at 2, 18, 24-26; Putnam, Hayes Report, *supra* note 15, at 28-33; *The Detroit News*, Dec. 1, 1977, at D7, col. 1.

23. *See* American Iron and Steel Institute, *The Steel Industry Today: A Report to the Cabinet Committee on Economic Policy* 10-11 (May 1971); *Steel at the Crossroads*, *supra* note 22, at 12-13; American Iron and Steel Institute, *The Steel Import Problem* 35-36 (3rd ed.) (July 1968).

24. Between January 1, 1934, and December 31, 1956, 198 antidumping investigations were undertaken, counting all industries together. REPORT OF THE SECRETARY OF THE TREASURY TO THE CONGRESS ON THE OPERATION AND EFFECTIVE-

### B. *Dumping*

The term "dumping" refers to the practice of selling goods for export at prices lower than prices charged for the same or similar goods at the same time, and under like circumstances, in the home market.<sup>25</sup> A manufacturer or government in an exporting country may enjoy a number of benefits by selling goods abroad at prices below home market prices. Where, as in the steel industry, fixed costs incurred irrespective of level of production, such as plant and equipment costs, are relatively high, and variable costs proportionate to output, such as raw material costs, are relatively low, dumping may permit a manufacturer to maintain a high production level and to minimize average cost of goods, thus maximizing overall profit.<sup>26</sup> Dumping may aid the development of an infant industry in a nation where demand in the home market is inelastic,<sup>27</sup> may protect a national industry from high unemployment levels in an economic down-cycle,<sup>28</sup> or may be used as a means of increasing foreign currency exchange.<sup>29</sup>

Dumping may be beneficial to the importing country as well. It may provide consumers with sporadic, short-lived bargains, without causing permanent harm to competing domestic manufacturers.<sup>30</sup> Even a permanent supply of bargain-priced goods may act as a stimulus to competition and improved efficiency, and as a counter-inflationary force.<sup>31</sup>

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NESS OF THE ANTIDUMPING ACT AND ON AMENDMENTS TO THE ACT CONSIDERED DESIRABLE OR NECESSARY 15-16 (1957) (mimeographed ed.). Between January 1, 1975, and December 6, 1977, 19 separate antidumping complaints were submitted by the steel industry alone, and indications were that more were on the way. Solomon Report, *supra* note 1, at 4.

25. Ehrenhaft, *Protection Against International Price Discrimination: United States Countervailing and Antidumping Duties*, 58 COLUM. L. REV. 44, 46 (1958). A broader definition is "price discrimination between national markets." *Id.*

26. See Barcelo, *Antidumping Laws as Barriers to Trade—The United States and the International Antidumping Code*, 57 CORNELL L. REV. 491, 503 (1958); Putnam, Hayes report, *supra* note 15, at 43-55.

27. Ehrenhaft, *supra* note 25, at 47.

28. *Id.*

29. Baier, *Substantive Interpretations Under the Antidumping Act and the Foreign Trade Policy of the United States*, 17 STAN. L. REV. 409, 448 (1965).

30. Ehrenhaft, *supra* note 25, at 47-48.

31. *Id.* See also Baier, *supra* note 29, at 449. This is the view taken by free trade advocates, based on the theory that dumping is consistent with the principle of long-run comparative economic advantage. See J. VINER, *DUMPING: A PROBLEM IN INTERNATIONAL TRADE* 28-31, 138 (1923).

Yet dumping is more often perceived as being harmful to the importing country.<sup>32</sup> At its worst, price discrimination in international trade may be a weapon of economic warfare.<sup>33</sup> An exporter may sell goods cheaply in a foreign market with the intent to drive out competition or to prevent the establishment of a rival industry.<sup>34</sup> After competition has been eliminated, the exporter may raise prices to the detriment of the same consumers who had temporarily benefited from bargain prices.<sup>35</sup> Because of its potential for harm, dumping has been the target of protective trade laws in the United States for most of this century.<sup>36</sup>

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32. "Dumping" is implicitly defined by the United States Antidumping Law to include an injury component. Although the statutory language, "sales at less than fair value," follows the economic definition of dumping, an antidumping duty order is not issued unless there is a determination of actual or potential material injury to a United States industry, or material retardation of the establishment of a domestic industry. See notes 43-67 *infra* and accompanying text.

33. Ehrenhaft, *supra* note 25, at 47.

34. *Id.*

35. *Id.*

36. Dumping is as old as the mercantile system. In 1791 Alexander Hamilton called attention to dumping of sail cloth and linens into the United States by British exporters. See S. DOC. NO. 112, 73d Cong., 2d Sess. 1 (1934). Dumping began to take on major significance toward the end of the 19th century, when giant industrial cartels in Germany and the United States producing steel and machinery engaged in extensive dumping. J. VINER, *supra* note 31, at 51, 80. The first United States statute directed against dumping was the Antidumping Act of 1916. 15 U.S.C. § 72 (1976). That act was intended to curtail intentional intermittent predatory dumping, making it a criminal offense for persons to import goods "at a price substantially less than the actual market value . . . Provided, That such act . . . be done with the intent of destroying or injuring an industry in the United States . . ." *Id.* The active enforcement of that act was prevented by the difficulty in proving the intent required by the statute. Ehrenhaft, *supra* note 25, at 45, 58. After World War I, to provide an enforceable statute and to protect United States "war baby" industries from dumped imports, Congress enacted the Antidumping Act of 1921, ch. 14, 42 Stat. 11 (repealed 1979). Ehrenhaft, *supra* note 25, at 45, 53.

More modern attempts at regulation have been international in scope. Article VI of the General Agreement on Tariffs and Trade (GATT) is a multilateral effort at international trade regulation which seeks to control the predatory aspects of dumping and government subsidization of exports while softening the harsh, trade-stifling approach to antidumping and countervailing duty legislation taken by some nations. See General Agreement on Tariffs and Trade, *concluded* Oct. 30, 1947, art. VI, 61 Stat. A3, A23, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter cited as GATT]. The United States Trade Agreements Act of 1979 enacted antidumping and countervailing provisions intended to comport with article VI of GATT and to implement two important agreements negotiated in the Multilateral Trade Negotiations under GATT: the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, T.I.A.S. No. 9619 (relating to subsidies and countervailing measures); and the Agreement on Im-

### C. *The United States Antidumping Law*

Despite the declared United States policy of expanding international trade by reducing artificial barriers to trade among nations,<sup>37</sup> protection from imports is available to United States industries under several trade law provisions.<sup>38</sup> The great majority of import relief petitions by domestic steel producers in recent years, however, have alleged injurious sales at less than fair value<sup>39</sup> under

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plementation of Article VI of the General Agreement on Tariffs and Trade, April 12, 1979, T.I.A.S. No. 9650 [hereinafter cited as International Antidumping Code]. S. REP. NO. 249, 96th Cong., 1st Sess. 37, reprinted in [1979] U.S. CODE CONG. & AD. NEWS 381, 423. For an excellent history of antidumping and countervailing duty laws, see generally Ehrenhaft, *supra* note 25, at 44-45, 50-54. For a more recent view of multilateral trade regulation, especially article VI of GATT and the International Antidumping Code, see generally Barcelo, *supra* note 26.

37. The United States is dedicated, at least in principle, to a liberal, expansive trade policy encouraging increased exchange of goods with other free nations. One of the declared purposes of the Trade Agreements Act of 1979 is "to foster the growth and maintenance of an open world trading system . . ." 19 U.S.C. § 2502 (Supp. III 1979). See also Trade Expansion Act of 1962, 19 U.S.C. §§ 1801-1991 (1976); Reciprocal Trade Agreements Act of 1934, 19 U.S.C. § 1351-1354 (1976).

38. *E.g.*, Tariff Act of 1930, § 301, 19 U.S.C. § 1671 (Supp. III 1979) (providing for countervailing duties); Tariff Act of 1930, § 337, 19 U.S.C. § 1337 (1976) (providing for United States International Trade Commission cease-and-desist or exclusionary orders to curtail unfair import competition); Trade Act of 1974, § 201, 19 U.S.C. § 2251 (1976) (providing various forms of import relief); Trade Act of 1974, § 301, 19 U.S.C. § 2411 (1976) (providing for presidential action where antidumping and countervailing duty statutes are inadequate to give relief from subsidized imports). In addition, government procurement of imports is prohibited in certain instances by the federal Buy American Act, 41 U.S.C. §§ 10a-10d (1976), as amended by 19 U.S.C. §§ 2511-2518 (Supp. III 1979), and by various state buy American statutes. See, *e.g.*, MASS. ANN. LAWS ch. 7, § 22(17) (Michie/Law. Co-op); N.J. STAT. ANN. § 40A:11-18 (West).

39. Fair value is not defined by the statute, but is determined by the Commerce Department by reference to "foreign market value." 19 C.F.R. 353.1 (1980). The foreign market value of goods is ordinarily the price, at the time such goods are exported to the United States, at which such or similar merchandise is sold, or, in the absence of sales, offered for sale in the principal markets of the exporting country in usual wholesale quantities and in the ordinary course of trade. 19 U.S.C. § 1677b(a)(1)(A) (Supp. III 1979). If such goods are not sold in significant quantities for home consumption, then the price at which such goods are sold or offered for sale for export to countries other than the United States will be used. *Id.* § 1677b(a)(1)(B). If Commerce determines that home market or third country standards cannot be applied, then foreign market value will be determined by the "constructed value" of the goods. *Id.* § 1677b(a)(2). Constructed value is the sum of: (1) the cost of materials and processing, (2) an amount for expenses calculated at not less than ten percent of such cost, (3) an amount for profit not less than eight percent of the sum of such general expenses and cost, and (4) the cost of packaging and other incidental expenses. *Id.* § 1677b(e). Special rules are provided for state-controlled economies, certain

the Antidumping Act of 1921 and its successor antidumping provisions (the Antidumping Law) in the Trade Agreements Act of 1979.<sup>40</sup>

Although the Antidumping Act of 1921 was amended several times<sup>41</sup> and finally repealed,<sup>42</sup> its fundamental provision survives substantially unchanged in the new law. The current statute provides that:

If—

- (1) the administering authority [Commerce Department] determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and
- (2) the [International Trade] Commission determines that—
  - (A) an industry in the United States—
    - (i) is materially injured,<sup>43</sup> or
    - (ii) is threatened with material injury, or
  - (B) the establishment of an industry in the United States is materially retarded,
 by reason of imports of that merchandise, then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an

multinational corporations, sampling techniques, and adjustments to prices for differences in conditions of sale. *See generally id.* § 1677b.

40. USITC Pub. 951, *supra* note 14, at 30; *see* note 24 *supra*.

41. Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 2043 (1975); Act of Aug. 14, 1958, Pub. L. No. 85-630, 72 Stat. 583; Customs Simplification Act of 1954, Pub. L. No. 768, 68 Stat. 1138.

42. Trade Agreements Act of 1979, Pub. L. No. 96-39, § 106, 93 Stat. 144 (effective Jan. 1, 1980).

43. Addition of the word "material" to modify "injury" is the principal change made by the Trade Agreements Act of 1979 in the original wording of the provision. This change brought the language into harmony with art. VI of GATT, *supra* note 36, and art. III of the International Antidumping Code, *supra* note 36. It is doubtful, however, whether this change will influence future determinations by the Commission. Remarks of Bill Alberger, Vice-Chairman (now Chairman) of the International Trade Commission, at the Practising Law Institute on Basics of Antidumping and Other Import Relief Laws: Multilateral Trade Negotiations Update, in Washington, D.C. (Nov. 9, 1979). *See also* H.R. REP. NO. 317, 96th Cong., 1st Sess. 46 (1979). "In the Committee's view, the ITC's decisions from January 3, 1975 to July 2, 1979 have, on the whole, been consistent with the material injury test of this legislation and the agreement. The Committee intends that standard to continue." *Id.* In the past, the Commission has found injury even where United States producers retained their relative share of the market. Electric Golf Carts from Poland, United States International Trade Commission Pub. No. 740, Investigation No. AA1921-147 (Sept. 16, 1975).

amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise.<sup>44</sup>

The new statute thus charges the Commerce Department with making dumping determinations, and the International Trade Commission with making determinations as to injury.<sup>45</sup> As under the 1921 Act, the procedures leading to the imposition of dumping duties are carefully prescribed.<sup>46</sup>

An investigation may be commenced on the Commerce Department's own initiative,<sup>47</sup> or as the result of a petition<sup>48</sup> filed by an "interested party"<sup>49</sup> on behalf of an industry.<sup>50</sup> The Commerce Department is given considerable latitude in determining whether to self-initiate an investigation.<sup>51</sup> In the case of a petition filed on behalf of an industry, the petitioner must allege the elements necessary for the imposition of dumping duties, and must support the allegations with information reasonably available to the peti-

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44. 19 U.S.C. § 1673 (Supp. III 1979).

45. The "administering authority" referred to in the statute is defined as "the Secretary of the Treasury, or any other officer of the United States to whom the responsibility for carrying out the duties of the administering authority under this subtitle are transferred by law." *Id.* § 1677. Authority to administer the statute was later transferred to the Commerce Department. *See* note 8 *supra*.

46. *Compare* Antidumping Act of 1921, 19 U.S.C. §§ 160-170a (1976) (repealed 1979) *with* Tariff Act of 1930, 19 U.S.C. §§ 1673-1673e (Supp. III 1979).

47. 19 U.S.C. § 1673a(a) (Supp. III 1979).

48. *Id.* § 1673a(b).

49. The term "interested party" is defined to include United States manufacturers, producers, or wholesalers of the product in question, trade or business associations of such parties, and certified or recognized unions or groups of workers representative of an industry engaged in the manufacture, production, or wholesale of such product in the United States. *Id.* § 1677(9).

50. "Industry" refers to the domestic producers as a whole of the product in question. *Id.* § 1677(4). For purposes of injury, however, the United States may in appropriate circumstances be divided into two or more markets comprising "regional industries," which are treated as though they were separate industries. *Id.* § 1677(4)(c).

51. The statute requires Commerce to self-initiate an investigation "whenever . . . [it] determines, from information available to it, that a formal investigation is warranted into the question of whether the elements necessary for the imposition of a duty under section 731 [of the Tariff Act of 1930] exist." *Id.* § 1673a(a). Similar broad discretion existed under the Antidumping Act of 1921. *See* Antidumping Act of 1921, 19 U.S.C. §§ 160(c)(1) (1976) (repealed 1979). Though such discretion seems arbitrary, it has consistently withstood constitutional challenges. *Kreutz v. Durning*, 69 F.2d 802 (2d Cir. 1934); *C.J. Tower & Sons v. United States*, 71 F.2d 438 (C.C.P.A. 1934).

tioner.<sup>52</sup> If the petition is in order, the Commerce Department must commence its investigation within 20 days after filing.<sup>53</sup>

Once the Commerce Department announces the commencement of an investigation, the Commission must make a preliminary injury determination<sup>54</sup> within 45 days after the date the petition was filed.<sup>55</sup> If that determination is affirmative,<sup>56</sup> the Commerce Department must make a preliminary determination as to sales at less than fair value<sup>57</sup> within 160 days after the date the petition was filed,<sup>58</sup> unless the time is extended.<sup>59</sup>

Upon an affirmative preliminary less-than-fair-value determination by the Commerce Department, an order will be issued suspending liquidation<sup>60</sup> of new customs entries of the product in question, thus postponing until the conclusion of the investigation the final determination of the total duties collectible on such imports.<sup>61</sup> From the date of this affirmative preliminary less-than-

52. 19 U.S.C. § 1673a(b) (Supp. III 1979).

53. *Id.* § 1673a(c).

54. The preliminary injury determination is whether "there is a reasonable indication that—(1) an industry in the United States (A) is materially injured, or (B) is threatened with material injury, or (2) the establishment of an industry in the United States is materially retarded" by reason of the imports of the merchandise in question. *Id.* § 1673b(a).

55. *Id.* In the case of investigations self-initiated by Commerce, this determination must be made within 45 days after the date on which the Commission receives notice of the investigation. *Id.*

56. A negative injury determination by the Commission terminates the investigation. *Id.*

57. The preliminary less-than-fair-value determination is whether "there is a reasonable basis to believe or suspect that the merchandise is being sold, or is likely to be sold at less than fair value." *Id.* § 1673b(b)(1). An affirmative determination must include the estimated dumping margin. *Id.*

58. *Id.* Where the investigations are self-initiated by Commerce, this determination must be made within 160 days after the investigation began, but not before an affirmative preliminary injury determination by the Commission. *Id.* Either period may be shortened where the petitioner and any interested parties waive verification of information received by Commerce, and Commerce finds that sufficient information is on the record to make its preliminary determination. *Id.* § 1673b(b)(2).

59. The period of investigation may be extended, in extraordinarily complicated cases, by up to 50 days. *Id.* § 1673b(c)(1).

60. *Id.* § 1673b(d)(1). The term "liquidation" refers to the closing of the customs file on an import entry. Upon liquidation, the amount of duty payable is conclusively fixed. 19 C.F.R. § 159.1 (1980).

61. A negative preliminary less-than-fair-value determination by Commerce does not close the investigation, but it does have the effect of postponing any suspension of liquidation of entries until an affirmative final determination is made. 19 U.S.C. § 1673d(c)(1)(B) (Supp. III 1979). The practical effects of this finding are discussed at notes 74-78 *infra* and accompanying text.

fair-value determination, estimated dumping duties or equivalent security must be deposited in an amount equal to the estimated average dumping margin.<sup>62</sup> In certain cases, the suspension of liquidation will apply retroactively to merchandise imported during the 90 days prior to the order suspending liquidation.<sup>63</sup>

Within 75 days after its preliminary fair value determination, the Commerce Department makes its final determination regarding sales at less than fair value.<sup>64</sup> If the final determination is affirmative,<sup>65</sup> the Commission must make its final injury determination, usually not later than 75 days after the date of the Commerce Department's final determination.<sup>66</sup> An affirmative final determination by the Commission requires the Commerce Department to issue an Antidumping Duty Order within seven days, directing the Customs Service to assess dumping duties on the imported merchandise.<sup>67</sup> Depending on the findings of the Commission, such duties

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62. 19 U.S.C. § 1673b(d)(2) (Supp. III 1979). The average dumping margin in statutory terms is the amount by which the foreign market value exceeds the United States price. *Id.*

63. *Id.* § 1673b(e)(2). Retroactive suspension will be granted where there is an allegation by petitioner and a determination by Commerce of "critical circumstances," such as a history of dumping of the class of merchandise in question, or actual or imputed knowledge by the importer that the goods were exported at less than fair value, or "massive exports" of such goods over a relatively short period of time. *Id.* § 1673b(e)(1).

64. *Id.* § 1673d(a)(1). Upon application by exporters or the petitioner, Commerce may in its discretion postpone the determination. *Id.* § 1673d(a)(2).

65. A negative less-than-fair-value determination by Commerce terminates the investigation. *Id.* § 1673d(c)(2).

66. *See id.* § 1673d(b)(3). Where the preliminary less-than-fair-value determination by Commerce was affirmative, the Commission deadline for assessing injury is the later of 120 days from the date of the preliminary Commerce determination, or 45 days from the date of the final Commerce determination. *Id.* § 1673d(b)(2). Where the preliminary determination by Commerce was negative, the final determination as to injury by the Commission must be made within 75 days of the final less-than-fair-value determination by Commerce. *Id.* § 1673d(b)(3).

67. *Id.* § 1673e(a). Upon final determination of less-than-fair-value sales and publication of an Antidumping Duty Order, estimated antidumping duties must be deposited with Customs pending liquidation. *Id.* §§ 1673e(a)(3), 1673g(a). Unlike the deposit required after an affirmative preliminary less-than-fair-value determination, which can be made by posting a bond or other security, this deposit must be made in cash. *Id.*; *see note 62 supra* and accompanying text. This conditional cash deposit is held until Commerce calculates the antidumping duties payable on each entry and makes a final duty assessment. 19 U.S.C. §§ 1673g, 1675a(2) (Supp. III 1979). The United States Customs Service, a branch of the Treasury Department, is charged with assisting the Commerce Department in the administration of the Antidumping Law. 45 Fed. Reg. 35,803 (1980).

will be assessed either prospectively only,<sup>68</sup> or retroactively to include all entries for which liquidation has been suspended.<sup>69</sup>

The antidumping law provides several safeguards to assure due process and to avoid unjust results. These include termination or suspension of investigations in certain circumstances,<sup>70</sup> opportunities for interested parties to be heard during the course of an investigation,<sup>71</sup> various procedural safeguards<sup>72</sup> and appellate review of administrative determinations.<sup>73</sup>

Although the substantive provisions of the United States Antidumping Law provide ultimate relief from unfair import competition, the impact of the law is felt almost immediately upon the commencement of an antidumping investigation.<sup>74</sup> During the

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68. Where the Commission finds threat of material injury only, and not threat of material injury which would have led to a finding of material injury but for the suspension of liquidation under § 1673b(d)(1), duties will be assessed prospectively. 19 U.S.C. § 1673e(b) (Supp. III 1979).

69. Where the Commission finds either material injury, or threat of material injury which would have led to a finding of material injury but for the suspension of liquidation under § 1673b(d)(1), duties will be assessed retroactively. *Id.* § 1673e(b)(1).

70. Termination is permitted in the discretion either of the Commission or of Commerce upon withdrawal of the petition by the petitioner, except that the Commission may not terminate the investigation until after a preliminary determination by Commerce. *Id.* § 1673c(a). Commerce may suspend an investigation, subject to later review, where substantially all the exports of the goods in question will be ceased by agreement of the exporters, or where prices will be raised by their agreement to eliminate any dumping margin. *Id.* § 1673c(b). Where Commerce decides that suspension of an investigation will be more beneficial to the domestic industry than continuation of the investigation, and the investigation is complex, Commerce may suspend an investigation if the exporters agree that prices on substantially all exports of the goods in question will be raised to levels not suppressing or undercutting domestic prices, the dumping margin on each entry will not exceed 15% of the average dumping margin found during the course of the investigation, and export quantities will not increase. Commerce may not accept such an agreement unless it is satisfied that suspension is in the public interest and effective monitoring of the agreement is practical. *Id.* § 1673c(c), (d).

71. *Id.* § 1677c.

72. These include preventing disclosure of confidential information, *see, e.g.*, § 1673b(d)(3); notice requirements, *see, e.g.*, *id.* § 1673b(f); and administrative review of determinations, *id.* § 1675.

73. Judicial review of determinations is available under § 516A of the Tariff Act of 1930, 19 U.S.C. § 1516a. An interested party who is a party to the proceeding may file an action in the United States Customs Court (now the United States Court of International Trade) contesting administrative findings at various stages in the course of an investigation. *Id.*

74. Consider the position of an importer who is offered goods subject to a pending antidumping investigation. He accepts such an offer at the risk of paying

course of an investigation, the bottom-line price of the imported goods in question is rendered uncertain, thus discouraging their sale and importation while the authorities seek to measure any dumping margin which may exist.<sup>75</sup> From the date of a preliminary finding that there is a reasonable basis to believe or suspect that there are sales at less than fair value, any imports of the goods in question are released by customs officials only upon posting of a bond sufficient to cover potential antidumping duties.<sup>76</sup> It has been said that importers regard the restrictions imposed pursuant to the investigation as more onerous than the penalties to which they may become subject if dumping is eventually established.<sup>77</sup> The natural consequence of the restrictions is the curtailment of imports of such goods long before the final less-than-fair-value and material injury determinations are made.<sup>78</sup>

This "procedural protectionism," as it has been called,<sup>79</sup> is matched by a potential for "substantive protectionism."<sup>80</sup> Orientation of the Antidumping Law toward effect rather than intent has facilitated enforcement,<sup>81</sup> but it has also given the Antidumping Law the potential to curtail dumping of virtually any kind,<sup>82</sup> rather

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dumping duties in an amount equal to the dumping margin finally determined by Commerce. *See* note 67 *supra*. These duties in many cases threaten to be prohibitively high. For example, in the antidumping petition of United States Steel Corporation against seven European steel exporting countries, margins as high as 82.5% of the export price were alleged. *See* United States International Trade Commission, Pub. No. 1064, Preliminary Determination of the Commission in Investigations Nos. 731-TA-18 — 24, Certain Carbon Steel Products from Belgium, the Federal Republic of Germany, France, Italy, Luxembourg, the Netherlands, and the United Kingdom (1980), app. A-20, Table 2 [hereinafter cited as USITC Pub. 1064].

75. *See* Barcelo, *supra* note 26, at 523; Ehrenhaft, *supra* note 25, at 60.

76. *See* note 62 *supra*; *see also* note 67 *supra*.

77. Ehrenhaft, *supra* note 25, at 60-61.

78. For example, the 1978 Treasury Department affirmative preliminary less-than-fair-value determination regarding carbon steel plates from Japan "resulted in a virtual halt in orders for that product from the foreign suppliers." Solomon Report, *supra* note 1, at 12-13. Imports of carbon steel plate dropped to 201,844 tons in 1978, down from an average of over 700,000 tons during the three preceding years. *See* American Iron and Steel Institute, Annual Statistical Report (1978), at 47 [hereinafter cited as 1978 Statistical Report]; Annual Statistical Report (1977), at 47 [hereinafter cited as 1977 Statistical Report]; Annual Statistical Report (1976), at 47; Annual Statistical Report (1975), at 47.

79. Barcelo, *supra* note 26, at 522.

80. *Id.* at 520-22.

81. *See* Ehrenhaft, *supra* note 25, at 58-59.

82. For example, "persistent" dumping, the practice of systematic, extended sale for export at prices below those charged in the home market, though it may be of great economic advantage to both the exporting and the importing nation, and may

than focusing on the intermittent predatory dumping which economists agree is harmful to competition.<sup>83</sup> For example, the operative concepts "material injury"<sup>84</sup> and "industry"<sup>85</sup> can be so interpreted by the Commission that the loss of profits by one regional domestic producer might constitute "material injury" to an "industry," and subject a foreign manufacturer's goods to antidumping duties wherever they are imported in the United States even though predatory intent is lacking and the lower-priced imports may be beneficial in other regions.<sup>86</sup>

Despite the potential use of the Antidumping Law as a protectionist instrument, and despite several outstanding dumping findings with respect to foreign steel products,<sup>87</sup> the Commission stated in a recent study that the great bulk of imports of steel mill products remains unaffected by United States trade laws.<sup>88</sup> Pressures were increasingly brought to bear on the government by the United States steel industry to augment the protectionist thrust of those laws.<sup>89</sup> In December, 1977, under extraordinary pressure, the Carter Administration devised the TPM to protect the industry from low-priced import competition.<sup>90</sup>

#### D. *The Trigger Price Mechanism*

To understand the TPM it is necessary first to recognize that it was originally conceived as a compromise and as an emergency measure to deal with complex problems and competing policy considerations. The year 1977 marked a new low in the decline of the United States steel industry. Steel imports rose to an unprece-

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be motivated by non-predatory considerations, may conceivably cause harm to a competing domestic industry and be curtailed by the application of the Antidumping Law. Where antidumping duties halt persistent dumping, they become a protective tariff and reduce each nation's gains from trade, according to international trade theory. See Ehrenhaft, *supra* note 25, at 47-48.

83. *Id.* at 48.

84. 19 U.S.C. § 1677(7) (Supp. III 1979).

85. *Id.* § 1677(4).

86. See Baier, *supra* note 29, at 421; Ehrenhaft, *supra* note 25, at 67-70; United States International Trade Commission Pub. No. 970, Determination of the Commission in Investigation No. AA 1921-197, Carbon Steel Plate from Taiwan, *reprinted in* 44 Fed. Reg. 29,734 (1979).

87. See 19 C.F.R. 153.45 (1980).

88. See USITC Pub. 951, *supra* note 14, at 30.

89. See Solomon Report, *supra* note 1, at 12-13.

90. 42 Fed. Reg. 65,214 (1977); See generally Note, *Effective Enforcement of U.S. Antidumping Laws: The Development and Legal Implications of Trigger Pricing*, 10 LAW & POL'Y INT'L BUS. 969 (1978).

dented level,<sup>91</sup> while as many as 20,000 steel workers were left unemployed by plant closings and other cutbacks.<sup>92</sup> Five of the nation's fifteen largest steel companies recorded net losses for the year.<sup>93</sup> In their annual reports for 1977, most steel companies attributed lost earnings to steel imports.<sup>94</sup> By December, 1977, an unprecedented number of complaints filed by domestic steel companies under the Antidumping Act of 1921 were pending<sup>95</sup> and more were threatened,<sup>96</sup> jeopardizing trade relations with the principal trading partners of the United States.<sup>97</sup>

Allowing the pending and threatened antidumping investigations to be pursued to their conclusion might have closed the United States market to steel imports<sup>98</sup> at a time when Japan and the European Economic Community were lagging behind the United States in their recovery from recession,<sup>99</sup> and just before critical negotiations in the Tokyo Round of the General Agreement on Tariffs and Trade<sup>100</sup> were to take place.<sup>101</sup> Moreover, the domestic steel industry had criticized the traditional antidumping procedures as "too cumbersome to provide relief quickly from sud-

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91. 1977 Statistical Report, *supra* note 78, at 8, Table 1A.

92. N.Y. Times, Jan. 15, 1978, § 4, at 1, col. 1.

93. Price Waterhouse & Co., 1978 Survey of Financial Reporting and Accounting Developments in the Steel Industry of America 3 [hereinafter cited as Price Waterhouse 1978 Survey].

94. *See id.* at 7-9.

95. Between January 1, 1975, and December 6, 1977, when the Solomon Report was published, 19 separate antidumping complaints had been submitted to the Treasury Department, of which only one had reached the point of a preliminary determination of sales at less than fair value. Solomon Report, *supra* note 1, at 4-5. Between October 19, 1977, and January 23, 1978, 16 antidumping complaints were filed concerning nine basic steel products from France, Japan, Belgium, West Germany, Italy, the Netherlands, and the United Kingdom. U.S. Department of Treasury, Steel Trigger Price Mechanism: A One-Year Review for the Steel Tripartite Committee, Attachment A (1979) [hereinafter cited as TPM Review] (copy on file with the *Fordham International Law Journal*). These 16 complaints were withdrawn shortly after TPM protection was provided to the domestic industry. *See* note 147 *infra* and accompanying text.

96. Solomon Report, *supra* note 1, at 4.

97. *Id.* at 5.

98. *See id.*; notes 74-82 *supra* and accompanying text.

99. *See* Affidavit of Anthony M. Solomon, Under Secretary of the Treasury ¶¶ 3, 6, *Great Lakes Terminal Ass'n v. Blumenthal*, No. C79-165 (D. Ohio July 6, 1979) [hereinafter cited as Affidavit of Anthony M. Solomon].

100. GATT, *supra* note 36. While passed in 1947, GATT has been reexamined and updated by the signatories in two lengthy sets of multilateral negotiations: 1964-67 ("the Kennedy Round"), and 1973-79 ("the Tokyo Round").

101. *See* Affidavit of Anthony M. Solomon, *supra* note 99, ¶ 8.

den surges of imports that may cause injury,"<sup>102</sup> and too product-specific to prevent foreign suppliers from shifting export production to products outside the scope of a particular investigation.<sup>103</sup>

### 1. Purpose and Operation of the TPM

In October, 1977, President Carter appointed an Interagency Task Force, headed by Under Secretary of the Treasury for Monetary Affairs, Anthony M. Solomon, to consider the conditions affecting the United States steel industry and to recommend remedial measures.<sup>104</sup> The President approved the recommendations of the Task Force report<sup>105</sup> on the date of its release.<sup>106</sup> The solution proposed by the Task Force for the industry's import problem was intended to prevent future injury to the domestic steel industry while permitting foreign producers to continue to sell their products in the United States market.<sup>107</sup> Specifically, the Task Force recommended:

[T]hat the Department of 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.<sup>108</sup>

The basic operation of the TPM as implemented<sup>109</sup> closely tracks the procedures suggested by the Task Force.<sup>110</sup> Trigger prices are published for discrete steel mill product classifications based upon cost data made available by Japanese steel producers,<sup>111</sup> and are adjusted each quarter to reflect changes in production or other costs or in the dollar/yen exchange rate (within a five

102. Solomon Report, *supra* note 1, at 12.

103. *Id.* at 13.

104. Affidavit of Anthony M. Solomon, *supra* note 99, ¶ 2.

105. *See* note 1 *supra*.

106. 13 WEEKLY COMP. OF PRES. DOC. 1835 (Dec. 6, 1977).

107. Solomon Report, *supra* note 1, at 8, 18.

108. *Id.* at 13 (emphasis omitted).

109. *See* note 1 *supra*.

110. *See* Solomon Report, *supra* note 1, at 14-16.

111. 43 Fed. Reg. 1,464 (1978). Cost data are supplied by the Japanese Ministry of International Trade and Industry. *Id.*

percent flexibility band to smooth out sharp fluctuations).<sup>112</sup> These prices are identical for all importers regardless of source, and are constructed on a cost-insurance-freight basis using Japanese freight and insurance costs to each of the four coastal regions (including the Great Lakes) of the United States.<sup>113</sup> Importers are required to present at entry a "Special Steel Summary Invoice" (SSSI)<sup>114</sup> which simplifies comparison of import prices with the trigger prices, and to certify on that invoice that no rebate, drawbacks, or unrelated incentives have been or are to be paid or granted in connection with the import transaction.<sup>115</sup>

A Special Customs Steel Task Force (SCSTF) was established to administer the TPM.<sup>116</sup> If the total price shown on an SSSI is lower than the applicable trigger price, the SCSTF forwards information regarding that importation to the Commerce Department in Washington for further investigation.<sup>117</sup> If warranted, the Commerce Department will self-initiate a formal antidumping investigation within a few weeks.<sup>118</sup> The Interagency Task Force expected that information obtained in connection with the administration of the TPM would enable the administering authority to conclude its formal investigation within a much shorter time than that allowed for normal antidumping investigations.<sup>119</sup>

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112. 44 Fed. Reg. 24,180 (1979). *See also* 43 Fed. Reg. 1,464, 1,468 (1978).

113. 44 Fed. Reg. 24,180 (1979).

114. 19 C.F.R. § 141.89(b) (1980); *see note 1 supra*.

115. 42 Fed. Reg. 65,214, 65,216 (1977).

116. 42 Fed. Reg. 65,214, 65,215 (1977).

117. *See id.* The administrative functions originally assigned to the Treasury Department were transferred to the Commerce Department by Executive Order. *See note 8 supra*.

118. *Id.*

119. Solomon Report, *supra* note 1, at 16. The Interagency Task Force contemplated that under this "fast track" investigation, action could be taken within 60 or 90 days, as opposed to the potential 13-month period required for normal Treasury and Commission procedures under the Antidumping Act of 1921. *Id.*; *see note 102 supra* and accompanying text. The TPM has produced four such fast track investigations to date. The first of these, involving carbon steel plate from Spain, was begun on October 20, 1978, 43 Fed. Reg. 49,875 (1978), and was terminated on November 16, 1978, after a determination by Treasury that the bulk of the sales in question were at or above the applicable trigger price. 43 Fed. Reg. 54,315 (1978). Another investigation, involving carbon steel plate from Poland, was begun on the same date, 43 Fed. Reg. 49,875 (1978), and ended with a negative final injury determination by the Commission on June 18, 1979, following an affirmative final determination by Treasury of sales at less than fair value. 44 Fed. Reg. 37,564 (1979). A third investigation, involving carbon steel plate from Taiwan, was commenced with the Spanish and Polish plate investigation, 43 Fed. Reg. 49,875 (1978), and resulted in final af-

The TPM was intended to be consistent with the overall objectives of the Interagency Task Force's program, including "maintaining an open world trading environment based upon normal trading practices," while enforcing domestic trade laws in a manner "effective and responsive to the requirements of suppliers and consumers alike."<sup>120</sup> It was the declared aim of the Solomon Report's program, moreover, to "help create an environment within which a free industry can operate efficiently," but to avoid the danger of "any direct government involvement in the industry's decisions."<sup>121</sup> The program also sought to "avoid measures which stimulate inflation. . . . [Its implementation] should not contribute to unnecessary and disruptive price increases at the expense of domestic consumers and the economy as a whole."<sup>122</sup> The Interagency Task Force recommendations emphasized that the TPM would not be a "minimum price" system, and that none of its terms were keyed to the statutory definitions of "foreign market value" or "constructed value."<sup>123</sup> The TPM was, the report said, fully consistent with existing statutory law.<sup>124</sup>

It can be seen, from statements made by Treasury officials in conjunction with the implementation of the TPM and afterwards, that the success of the system depends upon the reliability of two

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firmative determinations of sales at less than fair value on February 7, 1979, 44 Fed. Reg. 9,639 (1979), and material injury on May 16, 1979, 44 Fed. Reg. 29,734 (1979). The last investigation, involving steel wire nails from South Korea, was commenced April 13, 1979, 44 Fed. Reg. 23,621 (1979). On October 19, 1979, the Treasury Department published its preliminary determination that, with the exception of one of the 12 Korean manufacturers involved, there was no reason to believe or suspect that the nails were sold at less than fair value. 44 Fed. Reg. 61,722 (1979). As to the one exception, the investigation was tentatively discontinued because of minimal dumping margins and assurances that future sales would not be at less than fair value. *Id.* On May 23, 1980, after authority to administer the Antidumping Law shifted from Treasury to Commerce, *see* note 8 *supra*, Commerce made the final determination that six of the manufacturers involved made less-than-fair-value sales. 45 Fed. Reg. 34,941 (1980). The investigation ended on August 1, 1980, with a negative injury determination. 45 Fed. Reg. 53,924 (1980). For further discussion of these investigations, *see generally* Comptroller General, Report to the Congress on the Administration of the Steel Trigger Price Mechanism (July 23, 1980) [hereinafter cited as GAO Report]; Note, *The Initial Antidumping Investigations under the Trigger Price Mechanism*, 13 J. INT'L L. & ECON. 433 (1979).

120. Solomon Report, *supra* note 1, at 8.

121. *Id.*

122. *Id.*

123. *Id.* at 17; *see* note 39 *supra*.

124. Solomon Report, *supra* note 1, at 17. The Interagency Task Force was referring to the Antidumping Act of 1921, ch. 14, 42 Stat. 11 (repealed 1979).

basic assumptions upon which the TPM was based.<sup>125</sup> An analysis of these assumptions will permit a sharper focus than has heretofore been obtained on the relationship of the TPM to existing United States trade law.

## 2. Assumptions Underlying the TPM

The first of the two assumptions upon which the TPM rests is that no injury will be caused by imported steel products entering the United States market at prices reflecting the full production, transportation, and capital costs, plus a reasonable profit, of the most efficient foreign producers; or, at least, that domestic producers may not be able to prove injury due to imports at such prices.<sup>126</sup>

Domestic steel producers have argued that the United States steel industry, despite its inefficiencies and need for modernization, is fully able to compete with fair-priced imports from any foreign source.<sup>127</sup> If that is so, the Task Force reasoned, then maintaining import prices at the level of the full costs of Japanese imports will prevent injury.<sup>128</sup> It was anticipated that the TPM would markedly increase imported steel prices.<sup>129</sup> Domestic producers, if they did not too sharply increase their own prices, would thus be able to recapture a substantial portion of the importers' market share.<sup>130</sup> Yet the TPM would also permit domestic producers to raise their prices to some degree, improving profit margins.<sup>131</sup> Increased market share would augment the rate of capacity

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125. See generally, e.g., *Steel Industry Hearings*, *supra* note 1; 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 (1978) [hereinafter cited as TPM Introductory Note]; Solomon Report, *supra* note 1; Briefing by Anthony M. Solomon, Under Secretary of the Treasury for Monetary Affairs, Office of the White House Press Secretary (Dec. 6, 1977) [hereinafter cited as White House Briefing]; Dep't of the Treasury News, Feb. 10, 1978; *id.*, Jan. 27, 1978; Affidavit of Anthony M. Solomon, *supra* note 99; Am. Metal Mkt., Dec. 9, 1977, at 1, col. 1.

126. See Solomon Report, *supra* note 1, at 18.

127. See *Steel Industry Hearings*, *supra* note 1, at 83; TPM Introductory Note, *supra* note 125, at 953.

128. See Solomon Report, *supra* note 1, at 18.

129. See *id.* at 19. Prices did, in fact, increase markedly. See notes 156-57 *infra* and accompanying text.

130. Solomon Report, *supra* note 1, at 19. See also Dep't of the Treasury News, Feb. 10, 1978.

131. Solomon Report, *supra* note 1, at 19; see Wall St. J., Dec. 19, 1977, at 3, col. 2.

utilization and restore jobs to American steelworkers.<sup>132</sup> By most injury criteria, therefore, injury to the domestic industry would be eliminated by the TPM.<sup>133</sup>

The second basic assumption underlying the TPM is that foreign producers would voluntarily maintain their prices at or above trigger price levels.<sup>134</sup> In part, this assumption relies on the "procedural protectionism" inherent to antidumping investigations: foreign producers would prefer losing some of their market share in the United States to running the risk of a fast-track antidumping investigation whose preliminary dumping determination would in short order close the market to them.<sup>135</sup> Indeed, for many foreign producers, the TPM offered the means by which they would avoid running the full course of investigations already pending against them.<sup>136</sup> Finally, the prospect of higher prices providing a greater return on sales to the United States would provide importers some compensation for their loss in United States market share.<sup>137</sup>

132. Solomon Report, *supra* note 1, at 19; *see* note 92 *supra* and accompanying text.

133. The most important standards for injury applied by the International Trade Commission under the Antidumping Act of 1921 included price suppression and invasion of the market with adverse effect on domestic production. Comment, *Comparison of Standards for Injury Under Escape Clause Procedure and the Antidumping Act*, 29 U. PITT. L. REV. 435, 440-41 (1968). The antidumping provisions of the Trade Agreements Act of 1979 prescribe factors which the Commission must take into account, including the volume of imports, effects of those imports on prices, and impact on domestic producers, among others. Evaluation of the factors is likewise described in some detail. 19 U.S.C. § 1677(7) (Supp. III 1979).

134. The Solomon Report emphasized that the TPM was not intended to be a "minimum price" system. *See* Solomon Report, *supra* note 1, at 17. It is clear, however, that the success of the system depended on its ability to set a floor price for imports. *See* notes 239-41 *infra* and accompanying text. There is also persuasive evidence that it actually operated as a price-setting system. *See* notes 243-53 *infra* and accompanying text.

135. *See* notes 74-79 *supra* and accompanying text; Ehrenhaft, *supra* note 25, at 61. "Withholding of appraisement necessarily creates uncertainty. It is a major deterrent, often more feared than the imposition of the duty." *Bills to Amend Certain Provisions of the Antidumping Act, Hearings on H.R. 6006, 6007, and 5120 Before the House Committee on Ways and Means*, 85th Cong., 1st Sess. 32 (1957) (statement by Ass't Secretary of Treasury Kendall).

136. Treasury Department officials made it clear that the TPM would continue to operate only if pending antidumping suits were dropped. *See, e.g.*, White House Briefing, *supra* note 125; Am. Metal Mkt., Dec. 9, 1977, at 1, col. 1; notes 144-47 *infra* and accompanying text.

137. *See* text accompanying notes 156-57 *infra*. In fact, the market share of imports actually increased by a small margin in 1978. American Iron and Steel Institute, Annual Statistical Report (1979), at 8, Table IA [hereinafter cited as 1979 Statis-

### 3. Compromises Incorporated in the TPM

While the accuracy of these assumptions made by the Task Force may be questioned, it is clear that they are the warp and woof of the compromise woven in the TPM. This compromise has three basic aspects.

First, while the TPM was designed to prevent injury, it was equally designed to permit technical dumping.<sup>138</sup> By definition the trigger price is below the fair value of the products of any but the most efficient foreign producer.<sup>139</sup> Thus, a European steel producer, for example, whose production costs may be substantially higher than those of the most efficient producer, and whose transportation costs are the same or similar, is permitted to sell below his costs because it may be impossible for domestic producers to prove injury due to sales at the trigger price.<sup>140</sup> In this sense, the trigger price is a compromise price.<sup>141</sup> An inefficient foreign pro-

tical Report]. This increase may be accounted for by the unusually high capacity utilization rate of domestic mills, *i.e.*, 86.8%. *Id.* The market share of imports did drop markedly in 1979, down to 15.2% from 18.1% the year before. *Id.*

138. "Technical dumping" is a term of art applied in injury determinations by the International Trade Commission. *See, e.g.*, International Trade Commission, Pub. No. 744, Vinyl Clad Fence Fabric from Canada, Inv. No. AA 1921-148 (1975). It is used here in the broad sense in which it is used in the legislative history of the Antidumping Act, *i.e.*, selling an imported product at a price not lower than is needed to make the product competitive in the United States market, but below its fair value. *See* S. REP. NO. 1298, 93d Cong., 2d Sess. 179, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7186, 7316; *see* note 39 *supra*.

139. The definition is not altogether pragmatic, however. Since transportation costs are an important component of import steel costs, relative proximity to a particular coastal region of the United States may enable a producer less efficient than the Japanese to sell here at prices above fair value but below trigger prices. Thus, certain Canadian steel producers were able to gain "preclearance" to sell below trigger prices without risk. *See* TPM Review, *supra* note 95, at 7 n.13; GAO Report, *supra* note 119, at 12-14.

140. *See* Solomon Report, *supra* note 1, at 18. The reasoning of the Task Force may have been as follows: sales by less efficient European producers at the trigger price merely replace imports by the Japanese, who, at that price, would in all likelihood be selling at or above fair value. Thus, European sales cannot be said to cause injury to the domestic industry, since, in their absence, they would be replaced by non-dumping Japanese sales. Similar reasoning was employed by the United States Tariff Commission in making negative injury determinations in the wire rod antidumping cases of the 1960's. *See* 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).

141. *See* General Counsel, United States International Trade Commission,

ducer who complies with the TPM does not thereby raise the prices on his products to their full "fair value," but compliance with the TPM assures that the price at which he sells will not be less than a price with which the domestic industry can compete.<sup>142</sup>

Second, although foreign producers voluntarily selling at trigger prices may as a result lose some of their market share in the United States, they are nonetheless assured that the market will not be closed to them by the procedural barrier of an antidumping investigation. This assurance is provided by the third and most important aspect of the TPM compromise: the agreement on the part of United States steel producers to drop their pending antidumping complaints, and to refrain from filing new petitions, in exchange for the protection of the TPM.<sup>143</sup>

There can be no doubt that the government, from the start, intended to provide TPM protection only as a substitute for broad industry-filed antidumping complaints. The Task Force report itself stated:

Implementation of the trigger price mechanism should result in a substantial elimination of the injury the steel industry claims it is presently suffering due to sales of imported steel below its "fair value." This should, in turn, eliminate the need for the domestic steel companies to file new antidumping complaints and encourage them to consider the prompt withdrawal of the petitions now under investigation . . . .<sup>144</sup>

The Administration made it apparent in its public statements regarding the TPM that the "encouragement" it offered the domestic industry to withdraw its antidumping petitions amounted to an ultimatum: the United States steel producers would not enjoy the

Memorandum to Commissioner Catherine Bedell on the Proposed "Reference Price" Antidumping, Plan 2 (Nov. 28, 1977) [hereinafter cited as ITC Memorandum].

142. See notes 127-30 *supra* and accompanying text.

143. See *Korf Indus., Inc. v. Klutznick*, No. 80-0898 (D.D.C. May 16, 1980). Korf Industries, a domestic steel producer, sued for reinstatement of the TPM following its suspension in March, 1980, claiming that its prior decision to drop a pending antidumping complaint was consideration given for TPM protection in a "contract" with the government. Complaint for Declaratory and Injunctive Relief at 18; Points and Authorities in Support of Opposition to Defendants' Motion to Dismiss, or, in the Alternative, for Summary Judgment, at 7-9. Other domestic steelmakers noted the implementation of the TPM in their letters withdrawing antidumping complaints. See, e.g., 43 Fed. Reg. 47,041 (1978); 43 Fed. Reg. 37,052 (1978); 43 Fed. Reg. 30,956 (1978); 43 Fed. Reg. 9212 (1978).

144. Solomon Report, *supra* note 1, at 18.

benefits of the TPM unless the petitions were dropped.<sup>145</sup> The reason given was that the Treasury Department lacked the resources both to administer the TPM and to investigate the petitions filed by the industry.<sup>146</sup>

Within months after the implementation of the TPM, sixteen antidumping complaints pending when the TPM was introduced were withdrawn.<sup>147</sup> In accepting the reprieve from aggressive foreign steel pricing afforded by the TPM, the domestic steel industry petitioners settled for less than the full statutory relief offered by the Antidumping Law.

#### 4. Effects of the TPM

It is hazardous to attribute the trends in an industry to any single trade or economic factor. Indeed, reviews of the early performance of the TPM differ widely in their estimates of its effectiveness.<sup>148</sup> Nevertheless, given the gloomy outlook for the United States steel industry prior to 1978,<sup>149</sup> its remarkable recovery during the period of rising trigger prices in the first year the system was in operation,<sup>150</sup> and the industry's flat performance in 1979 when trigger prices remained fairly static,<sup>151</sup> it is fair to say that the administration of the TPM has been an important factor in determining the condition of the United States steel market.

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145. *Solomon Puts Choice: 'Dumping Suits or Reference Prices'*, Am. Metal Mkt., Dec. 9, 1977, at 1, col. 1. Indeed, when the first major antidumping petitions subsequent to the implementation of the TPM were filed, the TPM was suspended. See note 9 *supra*. In a press release explaining the suspension, the Commerce Department noted that: "[the TPM] was designed as a substitute for individual antidumping petitions by the domestic steel industry." Dep't of Commerce News, Mar. 21, 1980.

146. See Suspension of the Steel Trigger Price Mechanism, 45 Fed. Reg. 20,150 (1980); Dep't of the Treasury News, Jan. 27, 1978.

147. TPM Review, *supra* note 95, at Attachment A; 43 Fed. Reg. 47,041 (1978); 43 Fed. Reg. 37,052 (1978); 43 Fed. Reg. 30,956 (1978); 43 Fed. Reg. 9212 (1978).

148. Compare TPM Review, *supra* note 95, with GAO Report, *supra* note 119.

149. See notes 91-93 *supra* and accompanying text. List prices of domestic steel products rose by 9.6% in 1977. See IRON AGE, Jan. 1, 1979, at 76 (measured by Iron Age Finished Steel Composite Price). Nonetheless, industry profits fell. Price Waterhouse 1978 Survey, *supra* note 93, at 3.

150. Trigger prices rose from an average of \$297.80 per ton in February, 1978, to \$352.48 for the first quarter 1979. TPM Review, *supra* note 95, Attachment C.

151. Trigger prices actually declined in 1979, from an average of \$352.48 per ton for the first quarter to \$347.54 for the fourth quarter. GAO Report, *supra* note 119, at 3. In the first quarter of 1980, trigger prices rose to \$358.31. Dep't of the Treasury News, Nov. 20, 1979.

In 1978 United States steelmakers logged their best results since the boom of 1973-1974, marked by favorable developments in raw steel production, capacity utilization, and profits.<sup>152</sup> The most dramatic change in 1978, however, was in the prices charged by United States mills. Finished steel average list prices increased by an enormous 15.3% by comparison with 1977.<sup>153</sup> The increase from December 1977 to December 1978 was even higher, at nearly 16.7%.<sup>154</sup> Even these figures do not reveal the true magnitude at price increases, because domestic mills discounted prices throughout most of 1977. If discounts were as large as 5% (a conservative estimate), the true increase in the prices of domestic mills would have exceeded 20% in the year.<sup>155</sup> Meanwhile, trigger prices greatly increased the cost of steel imports: in 1977, the average price of imported steel was approximately \$286 per ton;<sup>156</sup> in 1978, the average price rose 25% to \$327 per ton.<sup>157</sup>

The sharp rise in steel prices caused some alarm as the inflationary effect of the TPM became apparent.<sup>158</sup> Although the system was intended not to be inflationary,<sup>159</sup> it defies reason that an industry whose annual sales exceed \$40 billion,<sup>160</sup> whose size is surpassed only by the automobile and petroleum industries,<sup>161</sup> and upon which so many industries depend for their raw material,<sup>162</sup> can increase its prices 15% or more without producing a serious impact on inflation.

152. Raw steel production climbed 9% over 1977, making 1978 the third most productive year in the history of the steel industry. See 1978 Statistical Report, *supra* note 78, at 55. The average rate of capacity utilization in 1978 was 86.8%, compared with 78.4% in the preceding year. *Id.* at 8, Table IA. Earnings of the six largest producers totalled more than \$1 billion, compared with an overall loss in 1977. IRON AGE, Feb. 19, 1979, at 21.

153. IRON AGE, Jan. 1, 1979, at 76.

154. *Id.*

155. IRON AGE, May 22, 1978, at 43; Wall St. J., Dec. 19, 1977, at 3, col. 2.

156. AMERICAN METAL MARKET, METAL STATISTICS 211 (1979).

157. *Id.*

158. Alfred E. Kahn, Chairman of the Council on Wage and Price Stability under President Carter, noted that the system "tends to be inflationary." Am. Metal Mkt., Mar. 9, 1979, at 30, col. 1. When the TPM was first announced, Barry Bosworth, Director of the Council, said it was "obvious that the steel industry [would] continue to be a very serious problem" with regard to inflation. Remarks by Barry Bosworth, White House Conference on Steel (Oct. 13, 1977) [hereinafter cited as White House Conference].

159. Solomon Report, *supra* note 1, at 8.

160. *Id.* at 3.

161. *Id.*

162. *Id.*

Other effects of the TPM brought protests from the parties adversely affected. Among these effects was a geographical dislocation of steel imports, shifting import tonnages from traditional trade patterns.<sup>163</sup> Since trigger prices were established on a cost-insurance-freight basis according to Japanese shipping costs, trigger prices were higher where Japanese shipping distances were longer and Japanese freight rates more costly.<sup>164</sup> Trigger prices were thus lowest on the West Coast and highest in the Great Lakes region,<sup>165</sup> making foreign steel prices more attractive on the West Coast and drawing business away from Great Lakes stevedores.<sup>166</sup>

The potential for trade dislocation was obvious from the start. West Coast steelmakers feared that the TPM would intensify import competition in their market,<sup>167</sup> and they were right. West Coast imports increased by more than 30% between 1977 and 1978.<sup>168</sup> During 1978, imports captured 44% of the market there.<sup>169</sup> California producer Kaiser Steel, especially hard hit, "spurred red ink in 1978."<sup>170</sup>

Another change in steel trading patterns brought about by the TPM was a shift by foreign steel sources to products not included in the trigger price list.<sup>171</sup> American steel fabricators, in particular,

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163. See *Great Lakes Terminal Ass'n v. Blumenthal*, No. C79-165 (N.D. Ohio July 6, 1979) (order denying preliminary injunction). In that action, plaintiffs Great Lakes Terminal Association, a membership corporation consisting of 14 commercial marine terminal companies which provide stevedoring and related services at all principal Great Lakes and St. Lawrence Seaway ports, Toledo Overseas Terminal, Inc., a marine terminal operator in Toledo, Ohio, and Local 1982 of the International Longshoremen's Association alleged that the TPM had "a profoundly distorting impact on the importation of steel mill products through the four seacoasts" of the United States, causing a decline in plaintiffs' share of the import trade. Complaint for Declaratory Judgment and Injunctive Relief at 2-3, 6-7.

164. Solomon Report, *supra* note 1, at 15.

165. U.S. Dep't of Treasury News 2 (May 25, 1978).

166. See *Great Lakes Terminal Ass'n v. Blumenthal*, No. C79-165 (N.D. Ohio July 6, 1979). Imports of steel on the Great Lakes/Canadian border decreased 14.9% in 1978 despite a 24.9% increase in overland steel imports from Canada. When Canadian tonnages are removed from both 1977 and 1978 totals, the Great Lakes' loss comes to 29.4%. See 1978 Statistical Report, *supra* note 78, at 47, 51; 1977 Statistical Report, *supra* note 78, at 47, 49.

167. IRON AGE, Jan. 16, 1978, at 36.

168. See 1978 Statistical Report, *supra* note 78, at 51; 1977 Statistical Report, *supra* note 78, at 49.

169. FORBES, Jan. 8, 1979, at 108.

170. *Id.*

171. The trigger price list originally included products in 22 of 32 categories of steel mill products established by the American Iron and Steel Institute. 42 Fed. Reg. 65,214 (1977).

protested that foreign steel suppliers became increasingly aggressive in the sale of steel products pre-fabricated abroad, since these were exempt from TPM coverage.<sup>172</sup> By December, 1978, for example, imports of fabricated structural shapes increased 71% from December of the year before.<sup>173</sup> Significantly, despite larger increases in the price of basic steel products, the average value-per-ton of these fabricated shapes increased only 3.5% from the previous year.<sup>174</sup>

By making minor adjustments in the TPM, the government was able to pacify some of the parties adversely affected by the program. The TPM freight rate to the Great Lakes was adjusted slightly downward,<sup>175</sup> and TPM protection was accorded to producers of "downstream" fabricated steel products.<sup>176</sup> But when the nation's largest steel producer declared itself dissatisfied with TPM protection, no small compromise would suffice.

On March 21, 1980, U.S. Steel Corporation filed antidumping complaints against seven European countries,<sup>177</sup> alleging material injury due to less-than-fair-value imports of a broad variety of steel products.<sup>178</sup> In its press release announcing the filing of its petitions, U.S. Steel attacked the "structural inadequacy" of the TPM, and noted that imports in the last quarter of 1979 rose to exceed 18% of United States apparent consumption.<sup>179</sup> Perhaps more significantly, the press release decried the Commerce Department decision, one day earlier, not to increase second quarter 1980 trigger prices from first quarter levels.<sup>180</sup> Largely due to a decline of the yen against the dollar, the level of trigger prices had not increased by more than token amounts since the first quarter of 1979.<sup>181</sup>

172. *IRON AGE*, July 17, 1978, at 24.

173. See 1978 Statistical Report, *supra* note 78, at 45; 1977 Statistical Report, *supra* note 78, at 45. This trend continued in 1979. See 1979 Statistical Report, *supra* note 137, at 44.

174. See American Iron and Steel Institute, Imports of Iron and Steel Products, Dec. 1978 (AIS Imports 1) (mimeographed ed.).

175. Dep't of Treasury News, May 25, 1978.

176. See, e.g., 43 Fed. Reg. 18,383 (1978) (announcing trigger prices for fabricated wire products).

177. 45 Fed. Reg. 20,150 (1980).

178. See USITC Pub. 1064, *supra* note 74, at 1.

179. United States Steel Public Affairs Release (Mar. 20, 1980).

180. *Id.* at 2.

181. Following a 7% increase in average trigger prices for the first quarter of 1979, the trigger price remained stable through the second quarter and declined dur-

True to its earlier threats to suspend the TPM if large-scale antidumping complaints were filed by domestic producers, the government promptly responded to the U.S. Steel announcement by discontinuing the TPM.<sup>182</sup> When, months later, U.S. Steel dropped the complaints<sup>183</sup> and reinstatement of the TPM could be announced,<sup>184</sup> other and more tangible adjustments were embodied in the TPM.

### E. *The New "Improved" TPM*

Three basic changes were made in the TPM upon its reinstatement: the duration of the system was extended, administrative procedures were strengthened, and a new "anti-surge provision" was added. All of these changes were important in overcoming the domestic steel industry's dissatisfaction with the TPM.

#### 1. Extension of the TPM

When the TPM was originally introduced, it was viewed by its drafters as an emergency measure to tide the United States steel industry over a brief period of crisis.<sup>185</sup> The new TPM, by contrast, will last a minimum of three years, and a maximum of five.<sup>186</sup> The system is now designed to cover a "transition period" during which the United States industry is expected to modernize, and the European Community will "press ahead with restructuring."<sup>187</sup>

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ing the third and fourth quarters. GAO Report, *supra* note 119, at 3. For the first quarter of 1980, a 5% increase was announced. Dep't of Treasury News, Nov. 20, 1979. Immediately prior to the filing of complaints by U.S. Steel, Commerce announced that trigger prices would remain unchanged for the second quarter of 1980. U.S. Dep't of Commerce News, Mar. 19, 1980.

182. 45 Fed. Reg. 20,150 (1980).

183. *Id.* at 66,833.

184. *Id.*

185. Solomon Report, *supra* note 1, at 20.

186. The reinstatement is for a five-year period. Before the end of the third year, however, the Secretary of Commerce will review the industry's efforts to modernize. If progress is deemed inadequate in relation to the capability of the industry, the Secretary may terminate the system. 45 Fed. Reg. 66,833, 66,835 (1980).

187. The reinstatement of the TPM was premised in part on the domestic industry's recognition of its "critical need . . . to accelerate modernization . . ." and the European Community's recognition of the need for "adjustment" by the European steel industry. 45 Fed. Reg. 66,833, 834 (1980). Apparently, the government anticipates that after five years the domestic industry will be more competitive, and European production capacity will be closer to the level of demand for steel in its home market. *See id.*

## 2. Strengthening of Administrative Procedures

The administrative changes made in reinstating the TPM place a greater emphasis on enforcement of the system and give the United States industry a better opportunity to influence the setting of the trigger prices. Enforcement is emphasized by the adoption of suggestions made by the General Accounting Office (GAO) in its critique of the prior administration of the TPM by the Treasury Department.<sup>188</sup> The suggestions adopted include: (1) attempting to reduce errors made by Customs Service steel import specialists in comparing import prices and trigger prices; (2) establishing criteria for follow-up of significant cumulative below-trigger-price shipments; (3) establishing procedures for obtaining replies to requests for information made to importers; (4) making systematic antidumping reviews of TPM information; (5) preparing written procedures for antidumping reviews; (6) limiting "preclearance" treatment for below-trigger but above-fair-value imports to specific mill products and companies which have in fact been precleared; (7) periodically reviewing preclearance data; (8) responding fully to all recommendations (by Customs) to initiate antidumping investigations; (9) exercising care in dealing with such recommendations; and (10) maintaining complete files on the disposition of TPM cases.<sup>189</sup> In addition, enforcement of the TPM is assured under the reinstated system by the Commerce Department's promise to make regular audits of import transactions, particularly of transactions between related parties, in order to assure that compliance is not being avoided.<sup>190</sup>

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188. GAO Report, *supra* note 119, at 37-38.

189. 45 Fed. Reg. 66,833, 66,834-35 (1980).

190. *Id.* at 66,834. Related party transactions are those transactions where the exporting and importing companies are related, for example, as principal/agent or parent/subsidiary. The criteria are set forth in 19 U.S.C. § 1677(13) (Supp. III 1979). The governments' concern, of course, is that an import transaction at the trigger price may be followed by resale below the trigger price. *See generally* GAO Report, *supra* note 119, at 21-22. The Department has recently proposed procedures for monitoring import transactions between related parties. In such transactions where (1) the foreign exporter is not the producer of the steel, resale is made prior to entry in the United States, and the importer performs processing, distribution or warehousing, or (2) the foreign exporter is not the producer of the steel and the resale is made after entry in the United States, Commerce will look beyond the actual import transaction and will request that the importer report, or arrange for the exporter to report, the ex-mill price paid to the foreign producer. 46 Fed. Reg. 22,738 (1981). The proposed procedure, which would examine wholly foreign transactions between foreign exporters and their suppliers, clearly exceeds the authority of the Antidumping Law,

No longer will trigger prices be determined solely upon data supplied by Japanese steel producers. Under the new TPM, the United States industry will be given an opportunity to influence the level of trigger prices. Commerce will consult, on an individual basis, with steel producers, steelworkers, and others concerning the administration of the system.<sup>191</sup> Before establishing quarterly trigger prices, Commerce will discuss developments in production costs with steel industry cost experts,<sup>192</sup> review public data to determine whether discrepancies exist between such data and information supplied by the Japanese,<sup>193</sup> and make “[a]ppropriate adjustments to TPM levels” on the basis of this review.<sup>194</sup>

### 3. The Anti-Surge Provision

The most important modification of the TPM is a substantive one. The new TPM includes an “anti-surge” provision designed “to assure that [the] TPM is being administered effectively and to help identify instances in which dumped or subsidized imports may be causing injury.”<sup>195</sup> The new measure provides that:

Commerce, on request at any time, will consult with the United States industry concerning surges in apparently dumped or subsidized imports. Whenever steel mill product imports rise over 13.7% of apparent domestic consumption, the United States industry is operating below 87% capability utilization, and there appears to be a surge in imports of one or more specific products from one or more specific countries, Commerce will review the situation. If, as a result of this review, it appears that TPM is being evaded, appropriate action will be taken. Whenever aggregate imports exceed 15.2% of apparent domestic consumption, the U.S. industry is operating below 87% capability utilization, and there appears to be a surge in imports of one or more specific products from one or more specific countries, Commerce

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which is concerned only with sales in the United States at less than fair value. 19 U.S.C. § 1673(1) (Supp. III 1979).

191. 45 Fed. Reg. 66,833, 66,834 (1980).

192. *Id.*

193. *Id.*

194. *Id.* Additional changes in the administration of the system include: (1) opportunities for interested parties to request additional product coverage; (2) the establishment of new preclearance procedures designed to avoid preclearance of imports which are below fair value by examining home market prices as well as costs; and (3) the adoption of a three-year rolling average exchange rate system to avoid exchange rate fluctuations in the trigger prices. *Id.*

195. *Id.*

will examine the situation to ascertain whether the imports are apparently (1) being dumped on a cost or price basis, (2) the result of government subsidization, or (3) the result of fair competition. . . . If Commerce determines the imports appear to be a result of unfair competition (dumping or subsidization) and if the unfair practice does not abate promptly, Commerce will either initiate dumping/countervailing duty cases . . . or will immediately make nonconfidential materials and the result of its examination available and any interested party may then file an antidumping or countervailing duty petition and Commerce will not suspend the TPM. In all cases, Commerce will consult with the domestic industry regarding its review.<sup>196</sup>

With the addition of the anti-surge provision, far more is accomplished than mere assurance of effective TPM administration and identification of unfair import competition. First, the anti-surge provision introduces quantitative injury criteria to the TPM.<sup>197</sup> Second, it provides implicit quantitative controls on steel imports, allowing a minimum of discretion to Commerce in the enforcement of such controls.<sup>198</sup> Third, it enlarges the scope of the TPM to include the Countervailing Duty Law<sup>199</sup> as well as the Antidumping Law.<sup>200</sup> Once again, a compromise with several aspects and serious implications has been struck. In agreeing to drop its antidumping complaints against the nation's principal European trading partners, and foregoing the relief it might have obtained through legal action, U.S. Steel has obtained major concessions.

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196. *Id.* at 66,834-35.

197. The original TPM was based in part on the assumption that sales at trigger prices would not injure the domestic industry. *See* notes 130-37 *supra* and accompanying text. The new TPM establishes a presumption of injury whenever aggregate imports (as a percentage of domestic consumption) and domestic capacity utilization reach predetermined levels and there appears to be a surge of specific imports. If the Commerce Department then finds the "appearance" of "unfair" pricing or subsidization of these imports, it will conclude that a formal investigation is warranted regardless of the fact that the imports are being sold at or above the trigger price.

198. In this respect the anti-surge provision is a response to the GAO's criticism of TPM administration by the Treasury Department. Specifically, the GAO faulted Treasury's lack of explicit injury or market impact criteria for identifying any significant sales below trigger prices, and blamed Treasury's "ad hoc" tonnage criteria for causing it to ignore potential dumping. GAO Report, *supra* note 119, at i, 21.

199. 19 U.S.C. §§ 1671-1671f (Supp. III 1979).

200. *Id.* §§ 1673-1677g. The reason for the government's willingness to expand the TPM to encompass the Countervailing Duty Law is unclear. There has been no widespread criticism of the Countervailing Duty Law as an ineffective remedy against subsidized imports. It is possible, however, that the government prefers to prevent the filing of major countervailing duty complaints while the domestic industry enjoys TPM protection. *See* notes 225-29 *infra* and accompanying text.

First, it has obtained from the government an agreement to set a low threshold for a presumption of injury under the TPM, and to set the threshold in strict quantitative terms.<sup>201</sup> Early in the administration of the original TPM, even while steel prices and profits were rising dramatically,<sup>202</sup> the United States industry continued to complain of large quantities of imports.<sup>203</sup> With the anti-surge provision, relief, if only in the form of "procedural protectionism,"<sup>204</sup> will be available to the domestic steelmakers whenever aggregate imports, apparent domestic consumption, and domestic capacity utilization reach predetermined levels, *regardless of the profitability of the industry* and other relevant injury indicia, as long as subsidized sales, or sales below fair value, or sales evading trigger price regulation are being made.<sup>205</sup> When the prescribed conditions obtain, therefore, a foreign country exporting to the United States tonnages of a given steel product amounting to a "surge" may promptly be excluded from the United States market by the protectionist effect of a countervailing duty or antidumping investigation, without regard to the likelihood that material injury can eventually be demonstrated.

Thus, it may well be that the anti-surge provision establishes, as the second aspect of the new TPM compromise, an implicit "quota" system with regard to steel imports.<sup>206</sup> In determining

201. See note 197 *supra*.

202. See text accompanying notes 152-57 *supra*.

203. See, e.g., FORBES, Jan. 8, 1979, at 108; Am. Metal Mkt., April 3, 1979, at 4, col. 1; N.Y. Times, Jan. 17, 1979, at D1, col. 1.

204. See notes 78-83 *supra* and accompanying text.

205. Such a limited focus on levels of import penetration and domestic capability utilization is not contemplated in the Antidumping Law or its legislative history. The statute requires the International Trade Commission to consider the following additional factors in making injury determinations: (1) price undercutting by the importer, measured by comparison with the price of like domestic products; (2) suppression of domestic prices or prevention of domestic price increases; (3) actual and potential decline in profits, productivity, and return on investments in the domestic industry; and (4) other relevant factors having a bearing on the state of the industry. 19 U.S.C. § 1677(7) (Supp. III 1979); see S. REP. NO. 249, 96th Cong., 1st Sess. 18 (1979), reprinted in [1979] U.S. CODE CONG. & AD. NEWS 381, 404. See also 19 C.F.R. §§ 207.26-207.27 (1980).

206. Article XI of GATT prohibits the use of such quantitative restrictions by its signatories. GATT, *supra* note 36, art. XI. Specific exceptions permit the use of quotas to correct a balance of payments problem or to protect a nation's internal financial position, *id.* art. XII, to promote health and safety, *id.* art. XX, to protect national security, *id.* art. XXI, and, in suspension of GATT obligations, to limit imports of individual products on an emergency basis for a limited period of time, *id.* art. XIX.

whether there has been a surge in the volume of imports of a given product, the Commerce Department "will consider the amount of increase in those imports, the period in which this increase occurred, and the significance of the amount in light of prevailing market conditions and seasonal and recent representative patterns in trade."<sup>207</sup> The message is clear: since it is unlikely that imports will frequently be below 13.7% of apparent domestic consumption<sup>208</sup> or that capability utilization in the United States will often rise above 87%<sup>209</sup> foreign producers are well-advised not to increase greatly the volume of their shipments of any product to the United States over that of representative or recent past levels. Such an increase, unexplained by unusual conditions, will likely constitute a "surge" and elicit a dumping or countervailing duty investigation. Although "surge" is not defined in TPM regulations, there can be little doubt that the anti-surge clause establishes a ceiling on carbon steel import tonnage based upon past import volume. In an announcement of a separate program for monitoring specialty steel imports for surges,<sup>210</sup> Commerce defined a "surge" as "imports . . . ris[ing] above the average levels for the past ten years . . . ." <sup>211</sup>

The third important aspect of the compromise embodied in the new TPM is perhaps the most significant. Where formerly the TPM was a system intended to improve upon the United States antidumping law, the TPM now appears equally to encompass, as regards steel imports, the Countervailing Duty Law.<sup>212</sup> This law

207. 45 Fed. Reg. 66,833, 66,834 n.3 (1980).

208. Imports represented an average of 15.28% of annual apparent United States steel supply from 1969-1979. In only three years during that decade did this percentage fall below 13.7%. 1979 Statistical Report, *supra* note 137, at 8, Table IA.

209. Only once during the past decade did annual domestic steel capacity utilization rise above 87%. *Id.*

210. The Commerce Department, declining to add specialty steels to the list of products afforded TPM protection, has decided nonetheless to monitor specialty steel imports for "surges" of potentially unfair imports. Dep't of Commerce News, Jan. 8, 1981.

211. *Id.* The second component of a "surge" in specialty steel imports as defined by Commerce is a clear trend in import levels toward the levels determined by the Commission in the 1976 Escape Clause Case under § 201 of the Trade Act of 1974, 19 U.S.C. § 2251 (1976). See *Stainless Steel and Alloy Tool Steel*, United States International Trade Commission Pub. No. 756, Investigation No. TA-201-5. The TPM surge provision similarly sets import level criteria. See text accompanying note 196 *supra*.

212. See note 199 *supra*.

imposes a countervailing duty on imported merchandise which has been subsidized by foreign governments if the importation of the merchandise results in actual or threatened material injury to a United States industry.<sup>213</sup> Under the anti-surge provision of the TPM, the Commerce Department promises, whenever imports exceed 15.2% of apparent domestic consumption, domestic industry is operating below 87% of capacity, and there appears to be a surge of a given product, to ascertain whether the imports of that product are apparently the result of government subsidization.<sup>214</sup> If Commerce concludes that such imports are apparently the result of subsidization, it will either launch a formal investigation, or will turn its nonconfidential files over to an interested party, *e.g.*, a domestic producer, so that a countervailing duty complaint may be privately filed without the loss of TPM protection to the industry.

The new TPM has thus awarded the domestic steel industry an enhanced countervailing duty protection. First, the government will initiate a countervailing duty investigation, with a consequent "procedural protectionist" effect,<sup>215</sup> based in part on criteria easily met and mechanically applied. Second, when all the anti-surge requirements are met, the government will use its ability, far greater than that of a private petitioner, to obtain information regarding possible subsidization by a foreign government, while at the same time saving that petitioner the great expense necessary to build a *prima facie* case.<sup>216</sup>

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213. 19 U.S.C. § 1671(a) (Supp. III 1979).

214. This process will be completed within 90 days, during which the United States Trade Representative will discuss the issue with the government concerned. 45 Fed. Reg. 66,833, 66,835 (1980).

215. See notes 74-78 *supra* and accompanying text. The protectionist effect of a countervailing duty investigation will closely resemble that of an antidumping investigation because both statutes provide for similar procedures and provisional remedies. Compare 19 U.S.C. §§ 1671b-1671e (Supp. III 1979) with *id.* §§ 1673b-1673g.

216. Under the Countervailing Duty Law, a petitioner must allege the elements necessary for the imposition of a countervailing duty and must submit along with the petition "information reasonably available to the petitioner" to support the allegations. 19 U.S.C. § 1671a(b)(1) (Supp. III 1979). A petition failing to fulfill these requirements must be dismissed. *Id.* § 1671a(c)(3). While the statute restricts administrative discretion to reject inadequate petitions, it is uncertain to what lengths a petitioner of substantial means, such as U.S. Steel Corporation, must go to build a *prima facie* case. When in 1979 U.S. Steel was contemplating filing a countervailing duty petition against European steel producers, the company sent a team of five attorneys and other U.S. Steel employees to conduct a "comprehensive study of the European steel industry," examining "reams of financial data." *Am. Metal Mkt.*, Apr. 2, 1979, at 5, col. 1. To be sure, information regarding foreign government subsidies

In return, however, the domestic industry, as in the case of the TPM as it relates to the Antidumping Law, has sacrificed its ability to file private countervailing duty complaints except under the conditions prescribed in the anti-surge provision. Although the Commerce Department has not announced that it will be unable to administer both the new TPM and large-scale countervailing duty complaints,<sup>217</sup> the inference of this further compromise can be made from the language of the anti-surge provision. If Commerce specifically prescribes the conditions under which an interested party may file a countervailing duty petition without causing the suspension of the TPM,<sup>218</sup> then the threat is implicit that the filing of such a petition under other conditions will result in its suspension.

## II. LEGALITY OF THE TPM

### A. *The Davis Walker Case*

The validity of the original TPM was challenged in two cases, *Davis Walker Corp. v. Blumenthal*<sup>219</sup> and *Great Lakes Terminal Ass'n v. Blumenthal*,<sup>220</sup> in which domestic companies affected by the TPM sought to enjoin its operation. In both cases the courts declared that the TPM was within the authority delegated to the Secretary of the Treasury to administer the Antidumping Act.<sup>221</sup> In only one of the cases, *Davis Walker*, did the court address that precise issue.<sup>222</sup> It is submitted that the *Davis Walker* court, in upholding the TPM, failed to base its decision on an analysis of the mechanism as it has actually operated, and thus incorrectly answered the question whether the TPM accords with the United States Antidumping Law.

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is far more readily available to the United States government than to private parties, and the inability of private parties to collect information is a potential roadblock to petitioners' complaints.

217. See text accompanying note 146 *supra*.

218. See text accompanying note 196 *supra*.

219. 460 F. Supp. 283 (D.D.C. 1978).

220. No. C79-165 (N.D. Ohio July 6, 1979) (order denying preliminary injunction).

221. 460 F. Supp. at 291; No. C79-165, slip. op. at 14.

222. 460 F. Supp. at 290-91. The *Great Lakes* court did not reach the issue of the authority to implement the TPM because the plaintiffs in that case did not question that authority in their motion for a preliminary injunction. No. C79-165, slip. op. at 14, n.8. The action was not pursued to a decision on the merits.

In *Davis Walker*, an independent steel wire producer<sup>223</sup> and its purchasing subsidiary sought injunctive and declaratory relief with respect to the TPM, alleging, *inter alia*, that the TPM circumvents the Antidumping Act by establishing a system of minimum prices which would deter imports at prices below trigger prices without regard to the fair value of such imports or to the likelihood of injury to a domestic industry.<sup>224</sup> The plaintiffs argued that foreign manufacturers would raise their prices to trigger levels, amounting, in effect, to an across-the-board imposition of a dumping duty without following the statutory procedures.<sup>225</sup> Because no steel would be imported below trigger prices, anti-dumping investigations would never be initiated, and less than fair value and injury determinations would never be made.<sup>226</sup>

On motion from the defendants, the *Davis Walker* court dissolved its preliminary injunction, granted summary judgment in favor of the defendants, and dismissed the action.<sup>227</sup> In its decision, the court rejected the argument that the TPM sets minimum import prices:

The evidence submitted by plaintiffs, particularly the Treasury materials that describe the trigger price system, reveals that the TPM is merely a device to monitor imports and to provide the Secretary with sufficient information to enable him to determine whether to self-initiate an investigation. The TPM itself does not establish any restrictions upon the affected industry; rather it serves to aid the Treasury in its administration of the Antidumping Act. The implementation of the TPM does not *by its terms* set trigger prices as minimum import prices or preclude the importation of goods at less than trigger price.<sup>228</sup>

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223. *Davis Walker Corporation* is an independent wire drawer and fabricator of wire products in the sense that it is not related to a steel mill. As such, it must buy steel wire rod, which is the raw material for its products, on the open market. 460 F. Supp. at 286 n.1. Most of *Davis Walker's* competitors are steel mills and mill-related companies. See USITC Pub. 951, *supra* note 14, at 13-14. Thus its ability to compete and to be profitable depends in large part on the margin between the market price of wire rod, on the one hand, and wire products, on the other. When the first list of trigger prices was released, independent wire drawers were "squeezed" by the coincidence of a very high trigger price for wire rod and the lack of trigger price coverage for wire products. 460 F. Supp. at 296. See also TPM Introductory Note, *supra* note 125, at 954.

224. 460 F. Supp. at 289.

225. *Id.* at 290-91.

226. *Id.* at 291.

227. *Id.* at 289.

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

The court also rejected the plaintiffs' interpretation of the uniform increase of foreign manufacturers' prices to trigger price level as tantamount to an across-the-board imposition of a dumping duty: "The decision by foreign manufacturers to increase prices to the trigger price level is not the legal equivalent of the imposition of dumping duties . . . . Moreover, the decision of foreign steel . . . manufacturers to increase prices does not allow the Secretary to avoid the statutory procedures."<sup>229</sup>

The only direct effect of the TPM, the court stated, is "a greater probability that antidumping investigations will be initiated for imports below trigger prices," since the Secretary would not necessarily self-initiate an investigation if "the Secretary is satisfied within the time to be allotted [for informal inquiries of the importers of shipments at prices below applicable trigger prices] that no reasonable possibility of sales at less than fair value may be found . . . ." <sup>230</sup> Conversely, the court said, importers' compliance with the trigger price "will not necessarily foreclose the possibility of investigation," because private industry complaints might still trigger an investigation.<sup>231</sup>

Finally, the court noted that since all the statutory procedures must be followed once an investigation is commenced, the TPM, as described by the government, does not deny affected parties any rights they might have under the Antidumping Act.<sup>232</sup> Having determined that the TPM is merely a guide to aid the Secretary of the Treasury in determining whether to self-initiate an investigation,<sup>233</sup> it only remained for the court to note that authority to administer such a system is within the Secretary's authority to make rules and regulations necessary for the enforcement of that act.<sup>234</sup>

In its analysis of the TPM, the *Davis Walker* court did not give adequate consideration to three factors. First, the court failed to place proper emphasis on the fact that, in the administration of the TPM, trigger prices were publicized and were not merely used internally by the administering authority in determining whether

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229. *Id.*

230. *Id.* The court here virtually quoted the Treasury Department's announcement of TPM regulations. *See* 43 Fed. Reg. 1468 (1978).

231. 460 F. Supp. at 292.

232. *Id.*

233. *Id.* at 293.

234. *Id.*

to self-initiate an investigation.<sup>235</sup> Second, the court ignored the effect of statements by Treasury Department officials that the TPM would operate only in the absence of broad industry-triggered investigations thus making it clear that investigations would not be initiated regarding sales at or above the trigger prices.<sup>236</sup> Third, the court overlooked the importance of the “procedural protectionism” inherent in antidumping investigations.<sup>237</sup>

#### B. A Price-Setting System

If the TPM were “merely a device to monitor imports and to provide [the administering authority] with sufficient information . . . to determine whether to self-initiate an investigation,”<sup>238</sup> it would be unnecessary to announce quarterly the trigger prices to apply to the subsequent calendar quarter.<sup>239</sup> On the contrary, the periodic publication of trigger prices is essential to the TPM’s more basic purpose of assuring that prices of steel imports will rise to, or above, the trigger price level, thus relieving the domestic industry from aggressive price competition.<sup>240</sup> The TPM could hardly have been counted as successful if, rather than diminishing or eliminating injury to the United States industry, it had merely given rise to a multitude of self-initiated antidumping investigations to replace the industry antidumping petitions whose withdrawal the Administration had hoped to secure.<sup>241</sup> Instead, the widest possible compliance with the system was desired.

Indeed, general compliance with the TPM was to be expected because the likely penalty for non-compliance was the initiation of a fast-track antidumping investigation which, within weeks, would close the United States market to a foreign producer’s exports. Here “procedural protectionism” would play its role. The rewards for compliance with the system, moreover, were considerable. An importer who sold at or above the trigger price not only avoided the danger of an antidumping investigation initiated by the Treasury Department, or later by the Commerce Department, but also received protection against industry petitions whether or not the

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235. See 43 Fed. Reg. 1464 (1978).

236. See notes 143-47 *supra* and accompanying text.

237. See notes 74-79 *supra* and accompanying text.

238. 460 F. Supp. at 292.

239. See 43 Fed. Reg. 1464 (1978).

240. See notes 134-37 *supra* and accompanying text.

241. See notes 95-101, 143-47 *supra* and accompanying text.

trigger price corresponded to the fair value of his product. This protection was virtually assured because the administering authority held the threat that the benefits of the TPM would be denied the domestic industry if industry petitions were too numerous or too broad. Furthermore, an importer who raised his prices to the trigger price level would receive a better return on his sales, although his overall United States market share may have declined.

In short, the intent and the expectation of the TPM was that, in general, foreign steel producers would ensure that their products were imported into the United States at prices no lower than the trigger price. If "by its terms" the TPM was not a minimum price system, then by its intended operation it was.

The actual degree of compliance during the operation of the original TPM is disputed.<sup>242</sup> Yet, even a report most critical of the Treasury Department's administration of the TPM provides the basis for an estimate that for a six month sample period, less than six percent of imports from all sources represented "unexplained" sales "significantly" below trigger prices.<sup>243</sup> Perhaps a better measure of

242. Compare TPM Review, *supra* note 95, at 6-8 with GAO Report, *supra* note 119, at i, 16-21.

243. GAO made an initial estimate, based on raw and unconfirmed data from customs, that from first quarter 1978 to second quarter 1979, below-trigger tonnage per quarter ranged from 19.04% to 42.88% of imports subject to TPM coverage. GAO noted, however, that further processing of the data would likely reduce the volume of below-trigger shipments, as well as the margins (7.22% to 18.04%) by which the shipments' prices were estimated to undercut trigger prices. For example, unconfirmed below-trigger shipments for a sample period from October 1, 1978 to March 1, 1979, totalled 2.4 million tons, or 40% of TPM-covered imports. This unconfirmed volume was vastly reduced upon further analysis. GAO explained that 224,300 tons were found to be at, above, or insignificantly below trigger prices. Another 793,000 tons represented shipments small enough or priced close enough to trigger prices to fall below minimum tonnage-price criteria used by Customs in making antidumping recommendations to the Customs Trade Analysis Branch (now the Agreements Compliance Division of the Commerce Department). Canadian steel shipments precleared as sales above fair value even though below trigger prices, *see* note 251 *infra*, accounted for 408,300 tons. GAO Report, *supra* note 119, at 17-18a. Of the remaining 957,400 tons, only 133,500 tons could be confirmed as significantly below-trigger shipments. *Id.* at 19. GAO estimated that out of the tonnage remaining unanalysed, the amount which would remain significantly below-trigger was approximately 222,200 tons. This amount, added to the 133,500 tons confirmed as below-trigger, brings the total estimate of significantly below-trigger tonnage to 355,700 tons, or 5.9% of the total imports subject to TPM coverage during the sample period. *See id.* at 20.

Even this percentage should be put into perspective. On two dates during the sample period, October 1, 1978, and January 1, 1979, trigger price increases of 4.9% and 7.0% respectively became effective. Unforeseen delays in shipment of trigger-

general compliance with the TPM is the effect of the system on the domestic industry. In the first twelve months of full operation of the TPM, when trigger prices were rising sharply,<sup>244</sup> steel imports decreased by 21.2% from the preceeding twelve-month period, falling to 15.6% of apparent United States consumption,<sup>245</sup> and domestic steel capacity utilization increased to 88.9%, from 79.7% a year earlier.<sup>246</sup> Furthermore, the United States steel industry employment increased by 19,000 workers,<sup>247</sup> and profit-levels of domestic mills showed dramatic improvement.<sup>248</sup> From such results it may be inferred that the TPM operated as was intended by the Administration. The Treasury Department made quarterly announcements of trigger prices, and each quarter the vast majority of steel imports were sold at prices at, above, or insignificantly below those prices.<sup>249</sup>

It may be argued further that the TPM is a price-setting system in more than the "minimum price" sense: the publication of trigger prices may well have the effect of setting market prices generally by virtually establishing maximum import prices.<sup>250</sup> Con-

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priced tonnage from the preceding quarter may therefore have categorized such shipments as significantly below-trigger. Such delays in shipments against firm-priced contracts accounted for much below-trigger tonnage early in the administration of the TPM, and led to the initiation of three formal antidumping investigations. See *Certain Carbon Steel Plates from Various Countries*, 43 Fed. Reg. 49,875 (1978); GAO Report, *supra* note 119, at 31-35. Although it was practical from the administrative point of view to set arbitrary quarterly TPM deadlines, it is not easy to explain why a below-trigger shipment exported on October 1, 1978, should trigger a formal antidumping investigation, while the same shipment exported a day earlier should not.

244. See note 150 *supra*.

245. TPM Review, *supra* note 95, at 6. The Treasury Department considered the first full year of operation of the TPM to have begun on May 1, 1978, following "grace periods" allowing importers and foreign producers to adjust to the system. *Id.* at 1, n.2.

246. *Id.* at 8.

247. *Id.*

248. *Id.*

249. Apparently the trigger prices determined the market price with sufficient certainty to permit one Area Director of Customs to use the trigger price as the standard for appraisalment of steel imports for purposes of *ad valorem* duty calculation. Reviewing a protest from an importer of Korean steel who objected to the high appraisalment figure for his entries, the Area Director for the New York Seaport ruled that "[e]xport value at the trigger price figure is the correct appraisalment." Cust. B. & Dec. 81-11, June 24, 1980.

250. Several of the exporters who were targets of U.S. Steel's antidumping complaints urged this very point in their reply to the domestic steelmaker's allegations of price suppression by reason of their imports. *Certain Carbon Steel Products*

sider the deliberations of a steel purchaser fully informed of the minimum price at which a steel importer may sell his product without risk of becoming subject to an antidumping investigation. That buyer will not, in the absence of a shortage of steel supply, be willing to pay a price significantly higher than the trigger price. A foreign steel producer whose costs or marketing policies call for higher pricing will therefore not be able to charge significantly more than the trigger price while steel is available at that price. Moreover, a foreign steel producer who is able to sell his products at "fair value" prices lower than the trigger price because of his lower transport costs, advantageous currency exchange, etc., will not be willing to sell at prices significantly below the trigger price, because it will not be necessary to price his products so aggressively in order to compete with other producers selling at the trigger price level.<sup>251</sup>

Perhaps the clearest indication of the function of the TPM as a price-setting system is the reaction of the United States steel industry to the evolution of trigger price levels. While trigger prices rose sharply in the first year of the TPM, domestic prices increased almost in lock-step.<sup>252</sup> When trigger prices remained steady during the second year of the TPM, the strongest domestic industry criticism of the TPM was heard.<sup>253</sup>

The advent of the new "improved" TPM has not altered the price-setting character of the system. If it makes any changes in this area, the new TPM, with its emphasis on enforcement, probably ensures that trigger prices will be adhered to more scrupulously as floor prices for imported steel. In this regard it is significant to note that the GAO, whose suggestions for better ad-

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from Belgium, the Federal Republic of Germany, France, Italy, Luxembourg, The Netherlands, and the United Kingdom, United States International Trade Commission Preliminary Investigation Numbers 731-TA-18, 731-TA-19, 173-TA-20, 731-TA-21, 731-TA-22, 731-TA-23, 731-TA-24, at 31-32 (April 17, 1980) (statement by Alfred R. McCauley).

251. Preclearance of below-trigger imports is available to foreign steel producers who comply with Commerce Department procedures and who can show that their exports to the United States have a fair value below trigger prices. Such producers are allowed to sell below the trigger price without risking the initiation of a fast-track antidumping investigation. 45 Fed. Reg. 77,500 (1980). Prior to publication of the new procedures on November, 1980, 45 Fed. Reg. (1980), only Canadian exporters had obtained informal preclearance for their products. GAO Report, *supra* note 119, at 12-13.

252. See notes 153-57 *supra* and accompanying text.

253. See notes 179-81 *supra* and accompanying text.

ministration of the system are adopted in the new TPM, apparently regards the TPM as a rigid system which should permit no imports below trigger prices without action by the administering authority.<sup>254</sup>

### C. *Incompatibility With Existing Trade Law*

There is a great difference between monitoring steel imports to determine whether to self-initiate an antidumping investigation, and actually setting prices for steel imports. While the former is undoubtedly within the authority granted by the Antidumping Law, the latter is not.

The task assigned to the Commerce Department under the Antidumping Law is a remedial one. First, the Commerce Department must determine whether a class or kind of foreign merchandise is being or is likely to be sold in the United States at less than its fair value. Then, after a determination by the International Trade Commission that an industry in the U.S. is being materially injured, or is threatened with material injury, or that its establishment is being materially retarded because of imports of certain merchandise, the Commerce Department must publish an antidumping duty order with regard to that merchandise so that antidumping duties may be assessed. The Commerce Department is not authorized to deter the imports of such merchandise without following the carefully prescribed procedures of the Antidumping Law.

The successful operation of the TPM avoids the application of statutory procedures by deterring imports below prescribed prices unrelated to fair value, a prospective measure not contemplated in the law.<sup>255</sup> The TPM, at least insofar as it has actually obliged domestic producers to withdraw their petitions or refrain from filing petitions, is thus a substitute for Antidumping Law procedures rather than a regulation authorized for the enforcement of the statute. If setting the price of imported steel at trigger price levels is

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254. In its report, the GAO found fault with the Treasury Department's failure to initiate formal investigations based on recommendations from Customs, apparently disagreeing with the Treasury Department's view of the degree of discretion which should be involved in the decision to initiate an investigation. See GAO Report, *supra* note 119, at 23-24.

255. The statute itself provides a prospective remedy, of course, but only after proof of an existing wrong, such as sales at less than fair value plus actual or threatened material injury. See notes 45-69 *supra* and accompanying text.

not, as *Davis Walker* suggests, the “legal equivalent” of imposing antidumping duties, the TPM is extralegal<sup>256</sup> in the sense that there is not the slightest suggestion in the Antidumping Law that the administering authority may issue suggested prices to the international steel community, which, if followed, will avoid an antidumping investigation unless a complaint is filed on behalf of the domestic industry.

It is axiomatic that the discretion of an administering body does not extend beyond the authority granted by the empowering statute:

The power of an administrative officer . . . to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.<sup>257</sup>

It is submitted that the TPM, a system which actually operates to avoid the application of statutory procedures and thus works as a substitute for the Antidumping Law, operates to create a rule out of harmony with the statute.

If the implementation of the TPM by the Commerce Department is *ultra vires* under the Antidumping Law as a price-setting system, it is all the more so to the degree that Commerce, through the new anti-surge provision, will exercise control over the quantities of steel products imported to the United States. Although the Commerce Department is given broad discretion by the Antidumping Law in determining whether to self-initiate an antidumping investigation on the basis of “information available to

256. “Extra legal” is the label given to the TPM in a report from the General Counsel of the International Trade Commission in its report to Commissioner Bedell on the proposed “Reference Price” antidumping plan, now the TPM. One of the primary concerns expressed in the report was that the TPM, if successful would be extralegal in the sense that it would “borrow informally concepts [such as ‘constructed value’] from the [Antidumping] Act, but, in fact, would operate outside, and in avoidance, of [statutory] provisions.” ITC Memorandum, *supra* note 141, at 3.

257. *Manhattan Gen. Equip. Co. v. Comm’r of Internal Revenue*, 297 U.S. 129, 134 (1936). *See also* *Campbell v. Galeno Chem. Co.*, 281 U.S. 599 (1930). In *Galeno*, the Court stated that “[t]he limits of the power to issue regulations are well settled . . . . They may not extend a statute or modify its provisions.” *Id.* at 610 (citations omitted).

it,"<sup>258</sup> and is expressly permitted to determine that "a formal investigation is warranted into the question of whether the elements necessary for the imposition of [an antidumping] duty . . . exist,"<sup>259</sup> the Commerce Department is not given discretion to determine whether the material injury element is present.<sup>260</sup> A fortiori the Commerce Department is not empowered to set criteria for a presumption of injury, such as those established in the anti-surge provision, any more than it is authorized to prevent injury by setting import quotas. The possibility that the anti-surge provision of the new TPM may actually establish de facto quotas on steel imports, of course, may carry the TPM into a new realm of protection clearly unrelated to its authority under the Antidumping Law.

#### D. *Incompatibility With United States Trade Policy*

The impact of the TPM as an actual price-setting system and a potential limitation on quantities of steel imports must, in a broader sense, be examined in the context of United States trade policy. The United States is a nation committed to a policy of free trade.<sup>261</sup> The preservation of unfettered competition is the fundamental goal and policy of United States laws regulating domestic and international trade.<sup>262</sup> Indeed, the United States Antidumping Law, like the Robinson-Patman Act,<sup>263</sup> has as its purpose the preservation of fair and dynamic competition between sellers.<sup>264</sup> Like

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258. 19 U.S.C. § 1673a(a) (Supp. III 1979).

259. *Id.*

260. Injury determinations are the responsibility of the International Trade Commission. See notes 44-45 *supra* and accompanying text.

261. See note 37 *supra* and accompanying text.

262. See *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.

*Id.*

263. 15 U.S.C. §§ 13, 13a-13b, 21a (1976).

264. Baier, *supra* note 29, at 428-30. The most striking difference between the two laws is in the standards set for unlawful price discrimination. Under the Robinson-Patman Act price variations are unlawful only "where the effect of such discrimination may be substantially to lessen competition or tend to create a monop-

the Robinson-Patman Act, the Antidumping Law, in restraining price discrimination, has the potential for serious anticompetitive effects.<sup>265</sup> The legislative history of the Antidumping Law and of its predecessor, the Antidumping Act of 1921, reflect the concern of Congress that protection against unfair import pricing should not result in static price competition.<sup>266</sup> It is essential, therefore, that the administration of the Antidumping Law be carried out in a manner which will preserve a healthy free trade environment.

The Task Force received early assurances from the Antitrust Division of the Justice Department that the concept of the TPM did not violate the antitrust laws.<sup>267</sup> Nevertheless, the Antitrust Division orally advised the Task Force that certain steps should be taken in formulating the plan to minimize the risk of antitrust violation:

We advised that it was necessary to avoid any actual or implied agreement between steel producers, domestic or foreign, by assuring that the Task Force was acting unilaterally and independently of the producers. . . . We advised that under those circumstances the Department . . . would not challenge the plan as such. We cautioned, of course, that the plan could be the subject of an antitrust suit by a private party, and that the outcome of such an attack was not entirely certain.<sup>268</sup>

The potential of the TPM to restrain competition was the subject of stronger reservations within the International Trade Commission:

It is apparent that the . . . plan would take statutory concepts such as . . . "cost of production" and apply them to a non-statutory procedure, which essentially fixes minimum prices on imports. . . . [I]t is possible that importers of merchandise subject to a "reference price" plan [TPM] may be sued by a customer for price fixing, a per se violation of section 1 of the Sherman Act . . . .<sup>269</sup>

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oly in any line of commerce . . . ." 15 U.S.C. § 13(a) (1976); see text accompanying note 44 *supra*.

265. See Baier, *supra* note 29, at 428-29; Ehrenhaft, *supra* note 25, at 44-45.

266. See S. REP. NO. 1298, 93d Cong., 2d Sess. 179, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7186, 7316; H.R. REP. NO. 79, 67th Cong., 1st Sess. 11 (1921).

267. Letter from John H. Shenefield, Assistant Attorney General, Antitrust Division of the Justice Department, to Senator Edward M. Kennedy (Jan. 9, 1978) (copy on file with the *Fordham International Law Journal*).

268. *Id.*

269. ITC Memorandum, *supra* note 141, at 19-20.

The Task Force was careful, therefore, in establishing the TPM to avoid any appearance that the Treasury Department would influence the industry's price decisions directly or would encourage collusive pricing on the part of foreign producers.<sup>270</sup> There is no hard evidence that actual concerted pricing resulted from the implementation of the TPM. In view of its actual effects in establishing market price levels,<sup>271</sup> however, it is clear that the TPM is inconsistent with Sherman Act principles.

One commentator, in a recent and perceptive article exploring the possible conflicts of the original TPM with the Sherman Act and antitrust policies,<sup>272</sup> has argued that, to the extent the TPM attempts to control competition from imported steel mill products, it is "in restraint of trade or commerce among the several States, or with foreign nations" within the meaning of section I of the Sherman Act.<sup>273</sup> The author, noting that the Sherman Act's section I proscription is limited to contracts, combinations, or conspiracies,<sup>274</sup> raised the question whether an agreement between the domestic steel industry and the government giving rise to the TPM constitutes a contract under section I.<sup>275</sup> She argued that, insofar as such a contract tampers with price structure, it may be a per se Sherman Act violation despite the *Noerr-Pennington* doctrine<sup>276</sup> and despite the fact that the Executive Branch was involved.<sup>277</sup>

270. See, e.g., Solomon Report, *supra* note 1, at 8, 17-18.

271. See notes 237-54 *supra* and accompanying text.

272. Nolan-Haley, *The Trigger Price Mechanism: Protecting Competition or Competitors?* 13 N.Y.U. J. INT'L L. & POL. 1 (1980).

273. *Id.* at 12.

274. *Id.*

275. *Id.* at 12-13. The commentator considers many other possible combinations, such as between the Japanese Ministry of International Trade and Industry, acting on behalf of Japanese steel producers, and the Treasury Department. *Id.*

276. *Id.* at 14. Price fixing resulting from solicitation of administrative or legislative action by private parties is exempt from antitrust liability. *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). Nevertheless, abuses of administrative or judicial processes which effectively bar respondents from access to government agencies and the courts "cannot acquire immunity by seeking refuge under the umbrella of 'political expression.'" *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972).

277. Nolan-Haley, *supra* note 272, at 15. There is some authority for the proposition that the Executive Branch cannot, by its participation in an agreement otherwise in violation of the Sherman Act, give binding assurances that such agreement does not violate the Sherman Act. *Consumers Union of U.S., Inc. v. Rogers*, 352 F. Supp. 1319, 1323 (D.D.C. 1973), *aff'd as modified sub nom.* *Consumers Union of U.S., Inc. v. Kissinger*, 506 F.2d 136 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975). In *Consumers Union*, a consumers organization challenged the authority of

The nature of the compromises and cooperation necessary among the government, the United States steel industry, and foreign steel producers and their representatives may well constitute a contract or conspiracy under the Sherman Act. Indeed, the basic assumption underlying the TPM, that the domestic industry would not be injured by trigger-priced imports and so would not have to resort to antidumping complaints, and that foreign producers would voluntarily maintain their prices at trigger levels, suggest the encouragement of such indirect cooperation between foreign and domestic steel producers. Under the new TPM, the cooperation will be extended for five years. Furthermore, by giving the domestic industry a greater opportunity to influence the setting of trigger prices, and by prescribing consultations between the Commerce Department and industry representatives in addition to those between Commerce and Japanese industry officials, the new TPM provides an atmosphere which fosters greater bilateral activity.

The new anti-surge provision under the reinstated TPM compounds the anti-competitive thrust of TPM price controls. Con-

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the President to reduce steel imports through the negotiation of Voluntary Restraint Agreements signed in 1969 and 1971 by representatives of the Japanese and European steel industries. Despite the consumer group's stipulation of dismissal of its claim that the voluntary restraint agreement violated the Sherman Act, the district court declared:

[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 Agreements on Steel from the antitrust laws and that such arrangements are not exempt.

*Id.* On appeal, the declaration of the district court was held to be "without judicial force or effect and . . . not appropriate for pursuit upon appeal." 506 F.2d at 141. Nonetheless, the General Counsel of the International Trade Commission relied on the district court's language to support his conclusion that the authority to implement the TPM is uncertain. ITC Memorandum, *supra* note 141, at 20-21. Participants in the Voluntary Restraint Agreements on Steel were given retroactive, but not prospective, immunity under the antitrust laws by Congress in § 607 of the Trade Act of 1974, 19 U.S.C. § 2485 (1976), at the request of the United States Department of State. S. REP. NO. 1298, 93d Cong., 2d Sess. 232, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7186, 7360-61. For a discussion of the *Consumers Union* case, see Comment, *Executive Authority and Antitrust Considerations in "Voluntary" Limits on Steel Imports*, 118 U. PA. L. REV. 105 (1969). For a discussion of the events leading to the execution of the Voluntary Restraint Agreements and their aftermath, see W. HOCAN, *THE 1970'S: CRITICAL YEARS FOR STEEL* 54-71 (1972).

certed pricing is not the only restraint of trade forbidden by section I of the Sherman Act; agreements restricting quantities of goods to be sold may also constitute *per se* violations.<sup>278</sup> Competition in the marketplace is as much affected by restricting the quantity of goods available as by dictating the prices at which they may be sold.<sup>279</sup> Thus the ceiling placed on carbon steel import tonnage by the anti-surge provision may also be, or may encourage, an anti-trust violation. At the very least, the provision protects the domestic industry in a way neither consistent with antitrust policy nor contemplated in the Antidumping Law.

The protectionist and anti-competitive thrust of the new TPM clearly exceeds that of the Antidumping Law. The Antidumping Law, of course, necessarily limits price competition by ultimately imposing a special duty on dumped imports. It does so, however, only after separate determinations are made by independent quasi-judicial bodies, and only after strictly prescribed procedures are followed.<sup>280</sup> Its tendencies toward procedural protectionism and substantive protectionism are tempered by its procedural and appellate safeguards, and are balanced by the difficulty involved in the preparation of a *prima facie* antidumping case by a private party.<sup>281</sup> In contrast, the TPM uses the inherent protectionist tendencies of the Antidumping Law and the imminent threat of a fast-track investigation to enforce minimum prices, and, it appears, maximum tonnages, set without regard to the actual fair value of the imports involved or their potential for injury.

The TPM thus prevents injury to the domestic industry while permitting foreign producers access to the United States market, but at prices and in quantities controlled by an administrative body not authorized by law to do so. In short, the preservation of limited import competition is negated by the destruction of the free market in steel trade.

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278. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940). Such agreements constitute *per se* violations because they interfere with the "free play of market forces." *Id.* Moreover, express agreement on the part of competitors is not required. Mere acceptance by competitors of an invitation to participate in a plan the necessary consequence of which is restraint of trade is sufficient to establish a conspiracy in violation of the Sherman Act. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226-27 (1939).

279. 310 U.S. at 221.

280. See notes 46-73 *supra* and accompanying text.

281. See notes 70-73 *supra* and accompanying text.

E. *Impact of the Reinstated TPM*

Finally, it should be noted that the TPM, as it has actually operated and as it will likely operate in its new form, is not even consistent with the overall objectives announced by its drafters.<sup>282</sup> Far from "maintaining an open world trading environment based upon normal trading practices," the system has substituted price controls and eliminated normal market competition from foreign sources. The TPM is not "responsive to the requirements of suppliers and consumers alike," but obliges the consumer to bear the brunt of its inflationary effects. Rather than avoiding any "direct government involvement in the industry's decisions" and helping "create an environment in which a free industry can operate efficiently," the level of the quarterly trigger price dictates the price increase a domestic producer may announce, and may well increase the industry's dependency on government programs.<sup>283</sup>

As a temporary measure viewed in the context of emergency conditions, the TPM may be a successful means of preventing injury to an endangered industry while keeping the United States market open to imports. Such a system can only create more problems than it solves, however, if it remains in effect for long.

The manufacture of steel products plays a major role in the United States economy.<sup>284</sup> The steel industry itself is a large employer, but the metalworking sector in the United States, comprised of the steel-consuming industries directly linked to steel supply, accounts for twenty times more employment.<sup>285</sup> Although a strong domestic steel industry is important to the nation, steel users will pay the price of protectionism by losing their ability to

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282. See Solomon Report, *supra* note 1, at 7-8.

283. Some domestic industry officials fear that dependence will result from control of the steel market by the government. "[T]he trigger price mechanism can seriously distort the steel marketplace by having pricing decisions made by civil servants . . . . [T]he mechanism has numerous inconsistencies and inequities that can provide potential opportunity to dole out penalties or favors to certain products, manufacturers, importers, or geographical areas." Am. Metal Mkt., Dec. 2, 1980, at 4, col. 3 (statement attributed to F. Kenneth Iverson, president of Nucor Corporation, a domestic steel producer).

284. See 1975 COWPS Report, *supra* note 22, at 5; Solomon Report, *supra* note 1, at 3.

285. Mueller, *The Competitiveness of the U.S. Steel Industry After the New Trigger Price Mechanism*, 10 (December, 1980) (Monograph Series: No. 25, Business and Economic Research Center, Middle Tennessee State University) [hereinafter cited as Mueller Monograph].

compete, both at home and abroad, with foreign metalworking companies.<sup>286</sup>

There is reason to doubt, moreover, that the latest round of protection for the steel industry will result in significant modernization efforts on the part of steelmakers. Results of recent protectionist efforts suggest that the opposite will be true. The Voluntary Restraint Agreements of 1969 and 1971<sup>287</sup> were intended to give a respite to the industry by temporarily restricting imports.<sup>288</sup> Instead of using this time to modernize their plants, several integrated steel producers cut back their steel investments and intensified their diversification efforts.<sup>289</sup> In fact, U.S. Steel Corporation, now promised three to five years of protection from import competition under the reinstated TPM, has declared its intention to invest half of its capital in the 1980's in such non-steel areas as chemicals, transportation, and utilities,<sup>290</sup> as well as strictly financial interests in coal reserves.<sup>291</sup>

Government officials argue that the new TPM is compatible with free trade,<sup>292</sup> or, at least, preferable to the alternatives to the program.<sup>293</sup> The fact is, however, that free import price competition is essential to preserve the interests of domestic steel consumers and to protect the economy as a whole from the inflationary effects of unrestrained domestic steel pricing.<sup>294</sup> The conduct of

286. *Id.* at 10-11. See United States International Trade Commission, Preliminary Investigation Nos. 731-TA-18 — 24. Certain Carbon Steel Products from Belgium, the Federal Republic of Germany, France, Italy, Luxembourg, The Netherlands and the United Kingdom, at 6 (April 23, 1980) (statement of the United States Department of Justice) [hereinafter cited as Justice Department Statement].

287. See note 277 *supra*.

288. See Office of the White House Press Secretary, Statement of the President, May 6, 1972, reprinted in W. HOGAN, *supra* note 277, at 70-71 (1972); Mueller Monograph *supra* note 285, at 13.

289. Mueller Monograph, *supra* note 285, at 13. The Commerce Department's Deputy Assistant Administrator for Import Administration, John Greenwald, has noted that industries which have been given protection in the past have not used the protection as an opportunity to modernize, but rather have used the protection as an excuse not to modernize. Am. Metal Mkt., Apr. 10, 1980.

290. IRON AGE, Jan. 5, 1981, at MP-19.

291. *Id.* "Our purpose in being in the coal business is to make money, not to hold on to reserves." *Id.* (statement attributed to David Roderick, Chairman of U.S. Steel Corporation).

292. See, e.g., TPM Review, *supra* note 95, at 8; Am. Metal Mkt., Feb. 24, 1981, at 5, col. 1.

293. Am. Metal Mkt., Oct. 14, 1980, at 22, col. 1.

294. See 1975 COWPS Report, *supra* note 22, at i; Justice Department Statement, *supra* note 286, at 8-11.

United States steel companies has been characterized by oligopoly and administered prices that have been inflexible downward, even in recessionary periods.<sup>295</sup> By insulating those companies from import price competition, the TPM can only temporarily support an inefficient industry at the expense of the economy as a whole.

The stability of the nation's economy, the competitiveness in international markets of United States steel-consuming industries, and even the efficiency of the domestic steel industry it seeks to protect, have been endangered by the reinstatement of the TPM. No emergency price-setting measure can be as salutary for the economy in the long term, nor as sure a guardian of progress and efficiency, as an open market in which competition is given free rein. In a message to Congress encouraging adoption of the Trade Expansion Act, President Kennedy urged:

Once given a fair and equal opportunity to compete in oversea markets, and once subject to healthy competition from oversea manufacturers for our own markets, American management and labor will have additional reason to maintain competitive costs and prices, modernize their plants, and increase their productivity. The discipline of the world marketplace is an excellent measure of efficiency and a force to stability. To try to shield American industry from the discipline of foreign competition would isolate our domestic price level from world prices, encourage domestic inflation, reduce our exports still further, and invite less desirable governmental solutions.<sup>296</sup>

It will be ironic if the new Reagan Administration, dedicated to *laissez-faire* economics and opposed to industrial subsidies and

295. Justice Department Statement, *supra* note 286, at 6; COUNCIL ON WAGE AND PRICE STABILITY, PRICES AND COSTS IN THE UNITED STATES STEEL INDUSTRY 20 (1977).

In addition to their secular rise over the past decade, steel prices have also been the least flexible of industrial prices. The rate of increase in steel prices often slows during recessionary periods, but rarely falls below zero . . . . [T]he average price of steel has not declined when demand has fallen—a pattern different from that of other metals . . . . As world prices fell in [1969-70 and 1974-75], the U.S. domestic prices remained comparatively stable. This opened a large gap between U.S. and imported steel prices which inevitably caused imports to increase. It is no coincidence that imports rose sharply in 1971 and 1976-77 . . . .

*Id.* Throughout the 1970's price indices for steel mill products, expressed as a percentage of 1970 price indices, were higher than the average for all industrial commodities. White House Conference, *supra* note 158, Figure A.

296. 108 CONG. REC. 952-53 (1962) (message to Congress, Jan. 25, 1962).

government intervention, masks government intervention and a non-budget subsidy for the steel industry behind restrictive pricing and import restraints by perpetuating the TPM.

### CONCLUSION

The steel Trigger Price Mechanism was proposed in 1977 as an emergency import price monitoring system to assist the government in the enforcement of the Antidumping Act of 1921 while preserving free trade. Its actual operation under that act and its function as reinstated under the new antidumping provisions of the Trade Agreements Act of 1979, however, is inconsistent with United States trade law, with traditional United States trade policy, and with the declared objectives of the TPM. The reinstated TPM is not an emergency measure, but a fixture on the trade landscape for as many as five more years; not a mere monitoring system, but a price-setting mechanism; not a means of preserving free trade, but a protectionist barrier to vital import competition; not a mechanism for enforcing the Antidumping Law, but a compromise measure avoiding and obviating the application of the law, and reaching to encompass the Countervailing Duty Law as well.

The reinstated TPM threatens steel consumers and the economy as a whole by limiting steel import volume and by underwriting inflationary price increases. It distorts traditional trade patterns and disrupts normal trade relations with other nations. It insulates an inefficient domestic industry from the stimulus of healthy competition, and encourages bilateral activity which may violate the antitrust laws of the United States. This system is not the answer to the problems of the steel industry. An early end to the Trigger Price Mechanism should be declared, in the interests of free trade, the economy, and the rule of law.

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