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The Trigger Price Mechanism: Does It Prevent Dumping by Foreign Steelmakers?

U.S. imports of low priced foreign steel products surged to record levels in 1977 as a result of a worldwide surplus of steel.[1] Domestic steel producers asserted that foreign manufacturers were selling their products in the United States at "less than fair value" in violation of the Antidumping Act of 1921.[2] In response to pressure from U.S. manufacturers, President Carter appointed an Interagency Task Force, chaired by Under Secretary of Treasury Anthony M. Solomon, to study the problems of the steel industry. On December 6, 1977, the Task Force released the Solomon Report,[3] which recommended that the Treasury Department adopt a system of "trigger prices" to facilitate monitoring of steel imports under the Antidumping Act. President Carter approved the recommendation of the Solomon Report, and in January 1978 the Treasury Department implemented a complex trigger price mechanism.

The scope of the trigger price mechanism (TPM) is limited to basic steel mill products.[4] Essentially, it is a system of prices assigned to basic steel mill products representing the lowest fair price a foreign manufacturer may charge for such products in the United States without dumping. The Treasury Department determines the base price by calculating the full cost of producing and shipping steel to the United States by the most efficient foreign manufacturer.[5] Any imported steel sold for less than this base price "triggers" an immediate, informal investigation by

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[1] Foreign producers of steel increased their share of the domestic market from 14% in 1976 to 18% in 1977, exceeding the previous peak level of imports reached in 1971. NEWSWEEK, Nov. 20, 1978, at 105.

[2] 19 U.S.C. §§ 160-77 (1976) (current version at 19 U.S.C.A. §§ 1673-77 (West Supp. 1979)).

[3] INTERAGENCY TASK FORCE, REPORT TO THE PRESIDENT: A COMPREHENSIVE PROGRAM FOR THE STEEL INDUSTRY (Dec. 6, 1977), *reprinted in* 17 INT'L LEGAL MATERIALS 955 (1978) [hereinafter cited as SOLOMON REPORT].

[4] Basic steel mill products are those products listed by the American Iron and Steel Institute (AISI) as basic steel mill products. The AISI has defined 32 product categories that include such items as flat-rolled steel, alloy steel plates and steel rod. The TPM covers about 26 of these 32 categories, but it does not cover all the different products within any given category. For example, the TPM might cover one type of wire product but not another. The Secretary decided to limit the TPM to certain major products within each product category in order to facilitate enforcement of the trigger price. However, the classification scheme adopted by the Secretary was arbitrary and resulted in a legal challenge to the entire TPM. *See* Part III, *infra*. For a complete list of the AISI's 32 basic steel mill products *see* 43 Fed. Reg. 6068 (1978).

[5] Part II contains a detailed description of how the Treasury Department calculates the TPM.

the Customs Service. If this inquiry reveals questionable sales by a foreign manufacturer, the Secretary initiates an accelerated dumping investigation.[6] If the Secretary's fast-track investigation[7] reveals that sales below fair value have occurred, and the International Trade Commission certifies that these sales resulted in material injury[8] to the domestic steel industry, the Treasury Department assesses a dumping duty in accordance with the Antidumping Act.

I. Shortcomings of the Antidumping Act

The Solomon Report recommended adoption of the TPM because of widespread dissatisfaction in the steel industry with the government's attempts to prevent sales of foreign steel products at less than fair value (LTFV).[9] Industry officials have long asserted that the Antidumping Act was too cumbersome to provide relief from sudden surges of imports that might cause injury to U.S. industry.[10] The Solomon Report substantiated these complaints; it estimated that the average dumping investigation, from the time a manufacturer files its complaint until the Secretary publishes a dumping finding, requires approximately thirteen months to complete.[11]

From these data the Solomon Report concluded that the special problems of the steel industry required faster results than could be obtained through traditional dumping investigations. Thus, it recommended the TPM not as a substitute for the Antidumping Act but as a means for expediting dumping investigations. The TPM requires the Secretary to immediately investigate any foreign sale below the predetermined base or "trigger" price. Since the trigger price represents the actual cost of producing and shipping steel to the United States by the most efficient foreign manufacturer, it is assumed that no foreign producer could fairly sell steel for less. Consequently, any sale occurring below the trigger price raises a rebuttable presumption that the sale was

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[6] *See* text accompanying notes 30-32, 91-92 *infra*.

[7] A fast-track investigation is a Treasury Department phrase used to describe the acceleration of a dumping investigation. SOLOMON REPORT, *supra* note 3, at 967-68. *See* text accompanying notes 30-32, 91-92 *infra*.

[8] Material injury to the domestic steel industry means harm which is not "inconsequential, immaterial, or unimportant." 19 U.S.C.A. § 1677(7)(A) (West Supp. 1979).

[9] Neither the term "fair value" nor "less than fair value" (LTFV) is defined in the Antidumping Act. However, fair value is analogous to "foreign market value," which is defined as the price at which the product is sold in the exporting country increased by the cost of packaging the product for shipment to the United States. *Id.* § 1677b(a)(1). Also, an important distinction exists between sales at "less than fair value" and "dumping." Sales at LTFV are not illegal if they cause no injury to a domestic industry. In contrast, dumping is defined as sales at LTFV that cause injury.

[10] SOLOMON REPORT, *supra* note 3, at 965.

[11] *Id.* at 964. In fact, the Solomon Report underestimates the delays that have occurred under the Antidumping Act; of 19 dumping complaints filed since January 1975, only one had reached even the tentative finding stage by January 1978. *See id.* at 963. *See also* 43 Fed. Reg. 22937 (1978).

at less than fair value and the Secretary initiates a fast-track dumping investigation.

In order to fully understand what is meant by a fast-track investigation, it is necessary to briefly examine the awesome complexity of the Antidumping Act of 1921. The Antidumping Act authorizes the Secretary[12] to initiate dumping investigations *sua sponte* if he receives information that sales at LTFV are occurring.[13] In practice, however, this power is rarely exercised.[14] Consequently, the onus of detecting and reporting foreign sales at LTFV falls on U.S. manufacturers. The Act requires any manufacturer who suspects a foreign producer is dumping steel in the United States to file a complicated petition with the Treasury Department.[15] This petition must establish a prima facie case of sales at LTFV by setting forth information such as the foreign producers' pricing scheme, cost of production statistics, and estimates regarding the injury causing potential of the imported product.[16] Needless to say, problems and expenses involved in collecting this information delay the filing of dumping petitions and probably discourage some U.S. manufacturers from pressing valid claims.

Once a satisfactory petition[17] is finally filed with the Treasury Department, no relief is immediately forthcoming.[18] Before June 1979,

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[12] As of January 2, 1980, responsibility for administering the Antidumping Act was transferred from the Treasury Department to the Commerce Department in an effort to improve enforcement of that Act. Exec. Order No. 12,188, 45 Fed. Reg. 989 (1980). *See also* note 18 *infra*.

[13] 19 U.S.C.A. § 1673a(a) (West Supp. 1979).

[14] COMM. OF THE WHOLE HOUSE, STATEMENTS OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 96-153, Part II, 96th Cong., 1st Sess. 412 (1979), *reprinted in* [1979] U.S. CODE CONG. & AD. NEWS 305 [hereinafter cited as STATEMENTS OF ADMINISTRATIVE ACTION].

[15] 19 U.S.C.A. § 1673a(b) (West Supp. 1979).

[16] 19 C.F.R. §§ 153.27(a)(2)-153.27(a)(3) (1979).

[17] The Secretary has sweeping authority to return to the petitioner any petition that he deems insufficient. 19 U.S.C.A. § 1673a(c) (West Supp. 1979).

[18] The Treasury Department has a history of less than vigorous enforcement of trade legislation. Until 1974 the Secretary was not required to complete a dumping investigation within any specified time period. *See* S. REP. NO. 1298, 93d Cong., 2d Sess. 183 (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7186, 7306. Hence if the Secretary was displeased with a petition filed by a U.S. manufacturer, he simply would not conduct an investigation of the foreign producer charged with violating the Antidumping Act. The Treasury Department's conduct was particulary eggregious with regard to the Countervailing Duty Act. *Id.* at 7318. The Secretary literally refused to investigate some claims despite the repeated filing of petitions by U.S. corporations. This conduct led the Congress to enact legislation in the Trade Act of 1974 requiring the Secretary to complete dumping investigations and publish a preliminary finding within six months of the time that a dumping petition was filed. *See* 19 U.S.C. § 160 (1976) (amended 1979).

The Treasury Department's refusal to enforce vigorously trade legislation was a major factor in Congress' decision to shift enforcement responsibility for trade matters to the Commerce Department. *See* 19 U.S.C.A. § 2111 (West Supp. 1979); *see also* Exec. Order No. 12,188, 45 Fed. Reg. 989 (1980). Unfortunately, Commerce Department enforcement of the new Antidumping Act is off to an inauspicious beginning. The Commerce Department negated one of the few improvements the Trade Agreements Act made in the Antidumping Act when it announced that it would not require foreign producers to deposit estimated dumping duties on goods sold at LTFV. *See* 48 U.S.L.W. 2466 (Jan. 15, 1980). Instead foreign producers can post bonds to cover their potential liability for dumping. Of course, it is much cheaper for a foreign

when the Antidumping Act was amended,[19] the Secretary could, at his discretion, wait for nine months before issuing even a tentative finding of whether sales at LTFV had occurred.[20] During this time, the foreign producer could continue to sell his products in the United States with impunity.[21] Further, even after he made a tentative finding of sales at LTFV, the Secretary could wait an additional three months before issuing a final determination of whether such sales had occurred.[22] Then, assuming that sales at LTFV had occurred, there was yet another delay while the case was referred to the International Trade Commission (ITC) for a determination of whether the sales at LTFV had resulted in material injury to the domestic steel industry.[23] Finally, after all these delays, a dumping duty would be assessed only if the ITC concluded that the sales had in fact resulted in material injury to the domestic steel industry.

The changes made in the antidumping statute by its amendment in June 1979 by the Trade Agreements Act[24] promise to reduce delays only slightly. The structure of the new Act substantially parallels the old; the most significant change is a slight reduction in the period allowed for a dumping investigation. The new Act requires the Secretary to publish a preliminary determination of whether sales are occurring at LTFV within 210 days, 60 days less than under the old statute.[25] However, this gain is partially nullified because the Secretary can, under certain circumstances, wait an additional 135 days before issuing a final determination.[26] This is an increase of 45 days over the time period the old statute granted the Secretary to make a final determination.[27] Thus, in complex cases, the new Act will reduce investigatory delays by only 15 days.

The TPM is still an important feature of the U.S. trade program

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producer to post a small bond than to deposit the entire amount of estimated dumping duties while waiting for a final determination of whether dumping has occurred.

Current enforcement of trade legislation by the executive branch has generated fierce criticism of U.S. policy. *See* Part IV *infra*.

[19] The statute was amended by the Trade Agreements Act of 1979, 19 U.S.C.A. §§ 1673-77 (West Supp. 1979).

[20] The Secretary had six months to publish a preliminary determination, but he could, at his discretion, extend the investigatory period for an additional three months. 19 C.F.R. §§ 153.31-153.32 (1979).

[21] The Secretary was authorized to require a foreign producer to post a bond before imported goods could be distributed, but this was not the usual practice of the Customs Service. *Id.* § 153.50-153.51(a)(2).

[22] *Id.* § 153.40.

[23] *Id.* § 153.41.

[24] 19 U.S.C.A. 1673-77 (West Supp. 1979).

[25] The Administering Authority, which is now the Commerce Department, *see* note 18 *supra*, must make a preliminary determination within 160 days. *Id.* § 1673b(b)(1). However, the Authority may extend this period for an additional 75 days in "extraordinarily complicated" cases. *Id.* § 1673b(c). Since extraordinarily complicated cases are defined as those cases involving complex transactions, novel issues or a number of firms, the Authority should have no difficulty extending the investigatory period to 210 days. *Id.*

[26] The Authority must publish a final determination 75 days after he announces his preliminary determination. *Id.* § 1673d(a)(1). However, he can extend the period for an additional 60 days if the foreign producer so requests. *Id.* § 1673d(a)(2).

[27] 19 U.S.C. § 160(b)(3) (1976) (amended 1979).

despite the amendments made to the Antidumping Act by the Trade Agreements Act. The TPM continues to function as a vehicle for initiating fast-track dumping investigations because the new statute failed to correct two major shortcomings of the old Act with regard to the steel industry. First, both the old Act and the new Act require U.S. manufacturers who file dumping petitions to develop detailed information concerning the marketing strategies and production costs of foreign manufacturers.[28] Obviously, foreign producers are unwilling to disclose this type of information freely to their U.S. competitors. Thus, steel industry officials assert that the Treasury Department should bear the burden of developing the information necessary to prove sales at LTFV inasmuch as it can use diplomatic pressure to obtain the information from foreign governments.

Second, although the Secretary has the authority to initiate dumping investigations *sua sponte*, in fact all investigations are initiated by private individuals and corporations.[29] The reason for this practice lies in the Treasury Department's lack of a substantial incentive to report foreign exporters whom it suspects of dumping. Unlike domestic manufacturers, who lose substantial sales, customs agents do not have an economic interest in preventing foreign producers from dumping their products in the United States. Moreover, since it takes a considerable amount of time to draft a dumping petition with all the required information, U.S. manufacturers are unable to file petitions fast enough to counter sudden surges in imported products.[30] Thus foreign producers can, to a large extent, successfully evade the antidumping law.

The TPM is designed to overcome both of these problems with regard to the basic steel industry. First, it shifts onto the Treasury Department the burden of collecting the economic information required in a dumping petition.[31] The TPM accomplishes this shift by requiring the Secretary to develop a data bank of statistical information on the most efficient foreign producer of steel.[32] These data are used to calculate the foreign producer's cost of production for steel products classified as basic steel mill products by the American Iron and Steel Institute (AISI). Using this information, the Secretary assigns AISI products a trigger price. Second, the TPM shifts the burden of monitoring foreign exporters and initiating dumping complaints from private enterprise to the Treasury Department. Under the TPM the Secretary automatically commences a dumping investigation, regardless of whether he receives an industry

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[28] 19 C.F.R. §§ 153.27(a)(2)-153.27(a)(3) (1979). *See also* STATEMENT OF ADMINISTRATIVE ACTION, *supra* note 14, at 412.

[29] STATEMENT OF ADMINISTRATIVE ACTION, *supra* note 14, at 412. *See also* H.R. REP. NO. 96-317, 96th Cong., 1st Sess. 59 (1979).

[30] SOLOMON REPORT, *supra* note 3, at 965.

[31] For a detailed list of the information required *see* 19 C.F.R. §§ 153.27(a)(2)-153.27(a)(3) (1979).

[32] 43 Fed. Reg. 1464 (1978).

complaint, if a foreign manufacturer sells a steel product in the United States for less than its trigger price.[33]

As a result of these two reforms, the TPM has drastically reduced the time period typically required for a dumping investigation. The combination of a government maintained data bank on foreign cost of production statistics and automatic investigations by the Secretary whenever a foreign producer sells a product at less than its fair value has cut delays under the Antidumping Act by more than two-thirds.[34] This accelerated investigatory period is what the TPM refers to as a fast-track investigation. Thus, as previously noted, the TPM does not replace the Antidumping Act; it merely provides a mechanism for more quickly initiating and completing investigations.[35]

II. Calculation of the Trigger Price

The TPM directs the Secretary of the Treasury to determine cost of production statistics for the most efficient foreign producer, and since it is widely conceded that the Japanese are the most efficient steelmakers in the world, the Secretary has collected information on the six largest Japanese steel manufacturers.[36] To help gather this information, the Secretary appointed a Steel Price Task Force in March 1978.[37] Working with information supplied by the Japanese Ministry of International Trade and Industry (MITI), the Task Force calculates the trigger price in the following manner for any given Japanese steel product imported into the United States. Initially, a raw material component is calculated by determining the cost of basic raw materials such as iron ore, alloys and lubricants, plus the fees paid to the producers' subsidiaries for processing coke.[38] Labor costs per raw ton of steel are then added to the raw material component.[39] Next to be added are overhead expenses, which include rental and lease charges, machine repairs and plant maintenance.[40] Then an allowance is made for depreciation.[41] After the depreciation allowance is calculated, certain capital charges must be computed, which include interest payments on corporate notes and a profit estimate of eight percent per annum.[42]

At this point, all of these cost of production statistics are added together to yield a subtotal. This subtotal is then recalculated to reflect the percentage of plant capacity being utilized by the Japanese producers.[43]

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33 SOLOMON REPORT, *supra* note 3, at 967.
34 *Id.* at 967-68. *See also* text accompanying notes 91-92 *infra*.
35 *See* Davis Walker Corp. v. Blumenthal, 460 F. Supp. 283, 292 (D.D.C. 1978).
36 43 Fed. Reg. 1464 (1978).
37 *Id.* at 1464, 32710.
38 *Id.* at 32711-12.
39 *Id.* at 32712.
40 *Id.*
41 *Id.*
42 *Id.*
43 *Id.* at 32710-11.

This recalculation reflects the Task Force's belief that some costs (labor) increase as production increases, while others either decrease (overhead) or remain unchanged (raw materials). The recalculated subtotal is now reduced by a yield credit.[44] The yield credit reflects the amount of finished steel products that can be extracted from crude steel. Any scrap resulting from the production process is melted down and reused as a raw material, hence it is deducted from the total cost of the product.

In short, as shown in Table 1 below, the Treasury Department calculates the cost of production per net finished ton of steel by adding the cost of raw materials, labor, overhead and capital charges, adjusted by a variable for capacity utilization, less a yield credit.

TABLE 1

COST OF PRODUCTION PER NET FINISHED TON OF STEEL*

Raw Material Component (basic raw materials plus other material costs)
Labor
Other Expenses (including overhead)
Depreciation
Capital Charges (interest due plus profit estimate)
Subtotal
Less Yield Credit
Total Cost Per Net Ton

**Assume prior recalculation to reflect capacity utilization.*

Source: Adopted from 44 Fed. Reg. 11633 (1979).

The Steel Price Task Force makes two further adjustments to the cost of production figure shown in the table above to arrive at the trigger price. First, an allowance is made for the depreciation of the dollar against the yen.[45] Second, the cost of shipping the steel from Japan to the United States is calculated according to the particular port of entry.[46] Shipping costs to the West Coast and Gulf ports are lowest, while costs to East Coast and Great Lake ports are highest. The resulting base price is designated as the trigger price. It represents the minimum fair value cost of the product in the United States.

[44] *Id.* at 32711.

[45] *Id.* at 32711-12. It should be noted that recently the dollar has been sharply appreciating against the yen and this has been a major force in stabilizing the TPM.

[46] *Id.* at 47809.

In order to ensure compliance with the TPM, the Treasury Department has adopted a new form, the Special Summary Steel Invoice (SSSI).[47] Foreign producers are required to fill out an SSSI in duplicate for each shipment of products subject to the TPM that have an aggregate purchase price over $10,000.[48] The SSSI must specify both the applicable trigger price and the manufacturer's unit invoice price for the imported product.[49] The foreign manufacturer must mail one copy of the SSSI to the Customs Service immediately upon export of the products so that it will arrive prior to the shipment.[50] The other copy of the SSSI remains with the shipment for identification purposes. Upon receipt of the SSSI, the Customs Service forwards it to the Special Customs Steel Task Force in Washington for analysis. If the forms reflect substantial or repeated shipments below trigger prices, the Secretary will initiate a dumping investigation *sua sponte*.

In practice, foreign manufacturers, and European producers in particular, have not fully complied with the TPM requirements regarding SSSI forms.[51] As a result, the Treasury Department has adopted a get-tough policy, requiring complete information on the SSSI as a condition of entry into the United States.[52] Thus, all shipments that arrive before the Special Customs Steel Task Force receives an SSSI, or any shipments that contain otherwise inadequate documentation, are subject to denial of entry. Furthermore, in at least one case the Treasury Department has initiated a dumping investigation against a manufacturer for failing to provide information required by the SSSI.[53]

The constant monitoring of steel imports made possible by SSSI forms prevents foreign manufacturers from shifting their product mix to avoid assessment of dumping duties.[54] Before the TPM was implemented, whenever a U.S. corporation filed a complaint with the Secretary alleging that a foreign manufacturer was dumping a certain

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[47] The SSSI is designated Customs Form 5520 and should not be confused with Customs Form 5515 (the Special Customs Invoice) after which it is modeled. A sample of the form with instructions for filling it out is printed in 44 Fed. Reg. 12414-16 (1979). Copies of the SSSI may be obtained from any district director of Customs or from the U.S. Government Printing Office, Washington, D.C. 20402.

[48] *Id.* at 12411-12. Originally, all sales over $2500 required an SSSI form. 42 Fed. Reg. 65214-15 (1977). Because the Treasury Department found that it was inundated with paper work as a result of this requirement, the threshold was raised in March 1979 to $10,000 for all imports except those coming from Canada and Mexico. The threshold for imports from these countries is $5000. 44 Fed. Reg. 12411-12 (1979).

[49] 42 Fed. Reg. 65215 (1977). The TPM also requires manufacturers to specify the currency and the rate of exchange used to arrive at the unit sales price stated on the SSSI. 43 Fed. Reg. 6068 (1978).

[50] 42 Fed. Reg. 65215 (1977).

[51] Wall St. J., Nov. 12, 1978, at 12, col. 3.

[52] *Id.*

[53] *Id.* The Treasury initiated an investigation of a Spanish company, Empresa Nacional Siderurgica, S.A., for providing inadequate documentation on its SSSI form. The Treasury later discontinued the investigation when it appeared that the company had made only two shipments below applicable trigger prices. *Id.*

[54] *See* SOLOMON REPORT, *supra* note 3, at 966.

product, that manufacturer would merely cease dumping the product under investigation and shift its sales at LTFV to another item in its product line.[55] In other words, if a dumping complaint were filed against a foreign manufacturer for sales of alloy steel plates at LTFV, that manufacturer would stop dumping alloy steel plates and begin to sell carbon steel plates at LTFV. In order to prevent sales of the carbon steel plates at LTFV, the U.S. corporation would have to collect all the economic data required by the Antidumping Act and the Trade Act of 1974 and file a new dumping complaint. This would involve a delay of several months, and when the new complaint was filed, the foreign manufacturer would shift his LTFV sales to yet another product outside the scope of the investigation. The TPM corrects this problem by allowing the Treasury Department to monitor steel imports on an industry-wide basis instead of focusing on specific products. Foreign producers cannot shift their LTFV sales from one product to another because the sale of any item below the applicable trigger price may result in an immediate investigation by the Secretary.

III. Legal Challenges to the TPM

Less than three months after the implementation of the TPM in January 1978, the validity of the program was challenged in *Davis Walker Corp. v. Blumenthal*.[56] Davis Walker manufactured wire and wire products that were excluded from protection under the TPM.[57] Davis Walker contended that it was damaged because the TPM increased prices for imported steel used as its raw materials but did not similarly affect competing imports of the wire products that it produced. In other words, Davis Walker was caught in a price squeeze. The TPM made it more expensive for Davis Walker to manufacture steel-fabricated products, but it did not prevent foreign producers from selling finished fabricated products in the United States at LTFV.[58]

Davis Walker sought an injunction and challenged the TPM on three grounds. First, Davis Walker asserted that the TPM circumvented the elaborate statutory procedures established by the Antidumping Act to determine sales at LTFV.[59] The corporation reasoned that the TPM would inhibit foreign producers from selling steel in the United States for less than its trigger price. Therefore, the TPM in effect imposed a dumping duty on all goods for which trigger prices had been set without following the procedures required in the Antidumping Act. Second, Davis Walker claimed that the TPM was a substantive rule subject to the rulemaking requirements of the Administrative Procedure Act (APA) and

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[55] *Id.* at 965.
[56] 460 F. Supp. 283 (D.D.C. 1978).
[57] *Id.* at 286.
[58] *Id.*
[59] *Id.* at 289.

was therefore invalid for failure to comply with the standards of the APA.[60] Finally, Davis Walker asserted that the Treasury Department's classification scheme, which excluded steel wire and wire products from control under the TPM, was arbitrary and capricious in violation of section 706 of the APA.[61]

After a hearing on the motion for preliminary injunction, the United States District Court for the District of Columbia concluded that Davis Walker had "demonstrated a substantial likelihood of succeeding on the merits of its claim that the inclusion of steel wire rod in the 'trigger price system' without the simultaneous inclusion of steel wire and wire products is arbitrary and capricious in violation of section 706(2)(A) of the Administrative Procedure Act."[62] Accordingly, on March 24, 1978, the court ordered the Secretary of the Treasury to show cause why wire products should not be included within the trigger price system and granted a preliminary injunction against his enforcement of the TPM as it pertained to steel wire rods.[63]

On April 10, the Secretary submitted a report to the court stating his reasons for not including fabricated steel wire products in the trigger price system.[64] The Secretary asserted that there was an almost infinite variety of "extras" that could alter the price of any fabricated product. Extras include the grade of the steel, the chemistry of the particular alloys, and the size and cut of the finished product. Since the calculation of trigger prices for all extras on fabricated products would be impossible, the Treasury Department was unwilling to expand the TPM beyond the few wire products listed by the AISI as basic steel mill products.[65] As a result, many of the fabricated steel wire products produced by Davis Walker were excluded from the TPM.

After submitting his report, the Secretary filed a motion for summary judgment. On May 25, the court dissolved the preliminary injunction and granted the Secretary's motion for summary judgment on all three issues in Davis Walker's complaint.[66] The court rejected Davis Walker's contention that the TPM imposed dumping duties and thus circumvented the procedures set forth in the Antidumping Act. It held that "[t]he decision by foreign manufacturers to increase prices to the trigger price level is not the legal equivalent of the imposition of dumping duties with respect to all such goods imported at the trigger price level."[67] The court found that the Antidumping Act authorized the Sec-

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60 *Id.*
61 *Id.*
62 *Id.*
63 *Id.*
64 *Id.*
65 *Id.* at 296.
66 *Id.* at 289.
67 *Id.* at 292.

retary to make rules and regulations necessary for the enforcement of the Act and that the Act did not restrict the means by which the Secretary obtained information sufficient to initiate an investigation.[68] Consequently, the court held that the TPM was a legitimate device to monitor imports and to provide the Secretary with sufficient information to enable him to initiate an investigation on his own motion.

The court also rejected Davis Walker's assertion that the TPM was invalid for failure to comply with the rule-making requirements of the APA. The APA requires notice and comment procedures for substantive rules but specifically exempts "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" from these requirements.[69] The court concluded that the TPM was a policy statement rather than a substantive rule and not subject to the rule-making requirements of the APA.[70]

Finally, the court declined to accept Davis Walker's argument that the TPM was arbitrary and capricious as it pertained to steel wire rods. It held that the Secretary's decision to limit the TPM to AISI steel mill products was rational because it allowed the Treasury to focus its enforcement energies on the area most urgently needing attention, namely, the basic steel mill industry.[71] The court stated that it was not necessary to find that the Treasury's classification scheme was the only reasonable one, or even that the court would have reached the same result. Rather, if the Secretary's decision had a rational basis, then it was not arbitrary or capricious within the meaning of section 706 of the APA.[72]

Subsequently, and perhaps as a result of the *Davis Walker* suit, the Secretary expanded the scope of the TPM to cover some wire products manufactured by Davis Walker.[73] According to the Treasury Department, the Secretary's goal is to cover the vast majority of steel products

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[68] *Id.* at 293.

[69] *Id.* at 293-94.

[70] *Id.* at 294. At present the majority view holds that the Secretary's decision to impose dumping duties under the Antidumping Act is rule-making and not adjudication. *See, e.g.*, Elof Hanson, Inc. v. United States, 178 F. Supp. 922, 928 (Cust. Ct. 1959), *rev'd on other grounds*, 296 F.2d 799 (C.C.P.A. 1960), *cert. denied*, 368 U.S. 899 (1961); Fisher, *The Antidumping Law of the United States: A Legal and Economic Analysis*, 5 LAW & POL'Y INT'L BUS. 85, 149 (1973); Myerson, *A Review of Current Antidumping Procedures: United States Law and the Case of Japan*, 15 COLUM. J. TRANSNAT'L L. 167, 196 (1976). Fisher and Myerson argue, however, that the Secretary's determinations are often adjudicatory in nature and that importers should be given the benefit of the greater procedural safeguards required by the APA for adjudicatory hearings.

[71] 460 F. Supp. at 296.

[72] *Id.* at 296-97.

[73] The Secretary informed the court that it would consider expanding the TPM to include "additional products should circumstances warrant it." *Id.* at 291. In fact, the TPM has been expanded well beyond the products to which it was originally limited. *See* 44 Fed. Reg. 4767 (1979). The expansion of the TPM may well have been the price the Secretary felt he had to pay in order to prevent further challenges to the TPM. A full list of the products covered by the TPM as of the third quarter of 1979 is published in 44 Fed. Reg. 29790-804 (1979).

imported into the United States without so broadening the scope of the TPM as to make it impossible to administer.[74]

IV. Steel Industry Criticism of the TPM

Although the Secretary continues to expand the scope of the TPM to include more fabricated steel products, criticism of the program by U.S. steelmakers has not subsided.[75] In fact, it is ironic that major U.S. producers of basic steel mill products are the most forceful critics of the TPM. These manufacturers, who led the fight for strong protective measures and whose representatives helped draft the program, now charge that the TPM is a failure because it does not prevent dumping.[76] U.S. producers of basic steel mill products began to complain about the TPM shortly after the first trigger prices were announced in January 1978. They asserted that MITI, in figures it supplied to the Treasury Department, had grossly underestimated Japanese manufacturing costs. Yielding to this pressure from domestic producers, the Secretary sent the Steel Price Task Force to Japan to investigate the MITI figures. The Task Force concluded, however, that the Japanese figures were essentially correct and it made only slight revisions in the trigger price.[77]

Despite the findings of the Task Force, U.S. manufacturers have continued to complain that TPM prices are set too low. From March 1978 to March 1979, trigger prices were raised by 10.6%.[78] The sharpest rise, 7%, occurred during the first quarter of 1979.[79] Nevertheless, even this 7% increase did not reflect the actual cost increase of 10% to Japanese manufacturers. This is because the TPM contains a built-in "flexibility band" that allows the Secretary, at his discretion, to reduce by up to 5% any increase in trigger prices.[80]

Since most of the 10% actual cost increase to Japanese manufacturers in the first quarter of 1979 was due to the sharp depreciation of the dollar against the yen, the Secretary elected to reduce the TPM hike by 3%.[81] The Secretary's decision to raise trigger prices by only 7% in order to smooth out sharp fluctuations in currency values incensed U.S. manufacturers.[82] The president of U.S. Steel, David M. Roderick, criticized the Secretary's action and stated that the move in effect allowed the Japanese to dump their steel at 3% below cost.[83]

Mr. Roderick also asserted that the TPM has failed to halt the flood of imported steel into the United States.[84] Steel imports from January

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74 The Secretary asserts that the TPM covers 90% of all steel products imported into the United States. 44 Fed. Reg. 29789 (1979).

75 NEWSWEEK, *supra* note 1, at 105.

76 *Id.*

77 43 Fed. Reg. 32710 (1978).

78 *Id.* at 54711.

79 44 Fed. Reg. 29789 (1979).

80 *Id.* The Secretary may use the flexibility band to increase the TPM as well as decrease it. *Id.*

81 *Id.*

82 Wall St. J., *supra* note 51, at col. 2.

83 *Id.*

84 NEWSWEEK, *supra* note 1, at 105.

through September 1978, after the implementation of the TPM, were 19% higher than in the same period in 1977. U.S. Steel and other manufacturers attributed this increase to basic flaws in the structure of the TPM. Trigger prices are calculated according to Japanese production costs; less efficient European producers can sell their products in the United States for the same price as the Japanese without triggering a dumping investigation by the Secretary. For example, Romanian steelmakers[85] can sell their products on the West Coast for the same price as Japanese producers without violating the TPM. However, because Romanians are relatively inefficient steelmakers, it costs them more to produce one ton of steel than it costs the Japanese to produce one ton of steel. Similarly, it costs more to ship steel to the West Coast from Romania than it does from Japan. Thus, when Romanian steel is sold on the West Coast for the same price as Japanese steel, it must of necessity be selling at less than its actual cost of production. Nevertheless, such sales do not violate the TPM and do not trigger an investigation by the Secretary for possible violation of the Antidumping Act. This practice outrages U.S. steelmakers.

The Secretary admits that many European producers are importing steel at LTFV, but argues that these sales do not constitute dumping.[86] The Antidumping Act specifies that sales at LTFV do not constitute dumping unless they result in material injury to domestic producers. The Secretary asserts that it is impossible to prove injury as a consequence of sales at LTFV so long as Japanese plants are operating at less than full capacity and could increase exports to the United States.[87]

The soundness of the Secretary's reasoning in this regard is questionable. It is true that Japanese steel mills are operating at less than full capacity. However, since there is already a surplus of steel, the Japanese have no intention of increasing production and further depressing prices. Moreover, the fact that the Japanese could increase sales without violating the Antidumping Act does not justify permitting European producers to sell their products at LTFV. The Secretary is essentially usurping the power of the ITC by refusing to investigate claims that sales have been made at LTFV. The ITC, not the Secretary, is authorized to deter-

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[85] A Romanian steelmaker may incur an actual production cost of as much as $425 a ton; if the trigger price is $350 a ton, the company will sell at $350 in the United States with the Romanian Government subsidizing the $75 loss. As a result, Romanian steel sells for less in the United States than domestic steel. Mark Anthony, president of Kaiser Steel, argues "[w]e've got imports from Belgium, Japan, Italy, Taiwan, West Germany, France, South Africa, Korea and Romania—all of them selling lower than Kaiser. Now you tell me how the West Coast is a natural market for Romania, and I'll eat everything they sell." *Id.*

[86] SOLOMON REPORT, *supra* note 3, at 969.

[87] *Id.*

mine whether such sales have caused or are likely to result in material injury to domestic producers.

V. Conclusion

When the TPM was conceived, it was widely believed that dumping by Japanese manufacturers was the primary nemesis of U.S. steelmakers.[88] Domestic manufacturers argued that they could successfully compete against Japanese products if Japanese prices reflected the true cost of manufacturing their steel. Thus, the TPM was structured so as to detect possible violations of the Antidumping Act by Japanese manufacturers.[89] To this end, the TPM has been successful. Japanese steel imports declined by 14.9% in 1978.[90] This success in controlling Japanese imports is attributable to three improvements the TPM has made in the administration of the Antidumping Act. First, the TPM requires the government to assume the burden of collecting the economic data on Japanese steelmakers required in a dumping petition by the Trade Act of 1974 and the Antidumping Act. Second, the Secretary now initiates investigations on his own accord whenever it appears that a foreign manufacturer has made sales at LTFV. This prevents foreign manufacturers from constantly shifting prices on different products to avoid detection of sales at LTFV. Even a brief period of sales at less than the trigger price will result in an investigation. Third, the automatic initiation of a dumping investigation whenever an SSSI form reveals possible sales at LTFV has greatly reduced the bureaucratic delays inherent in the Antidumping Act. The investigatory period is reduced sharply because the Secretary already has the necessary data on Japanese costs of production to determine whether sales at LTFV have occurred. As a result, dumping investigations that used to take a year or more are now completed in approximately four months.[91] This accelerated, fast-track form of investigation was a key goal set forth in the Solomon Report.[92]

Unfortunately, despite its success in controlling dumping by Japanese manufacturers, the structure of the TPM is totally inadequate to prevent dumping by other foreign steelmakers. In fact, the TPM has added a degree of legitimacy to steel sales at LTFV by non-Japanese steelmakers. So long as they do not go below the trigger price, these manufacturers may sell their products at LTFV without fear that the

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[88] Ironically, no Japanese steelmakers violated the TPM during 1978, the TPM's first year of operation. However, the Treasury has initiated investigations against the Stahlexport Przesiebioratwoa of Poland, the China Steel Corporation of Taiwan, and Empresa Nacional Siderurgica, S.A. of Spain. Wall St. J., *supra* note 51, at col. 3. The case against the Spanish company has already been dropped, *see* note 53 *supra*.

[89] 43 Fed. Reg. 1464 (1978).

[90] NEWSWEEK, *supra* note 1, at 105.

[91] Telephone interview with John P. Nolan, Industrial Analyst, Office of Special Programs, Treasury Department (Mar. 29, 1979). The author wishes to thank Mr. Nolan for reading this paper and making many helpful suggestions.

[92] SOLOMON REPORT, *supra* note 3, at 967-68.

Secretary will initiate a dumping investigation. Consequently, since the adoption of the TPM, steel imports to the United States from Common Market countries have risen dramatically, increasing 26.4%.[93]

In order to protect themselves from low priced European steel imports, U.S. manufacturers must go through the entire complex procedure established by the Antidumping Act without the benefit of shortcuts made possible by the TPM. They must collect the economic data on the foreign steelmaker required by the Antidumping Act. They must file a dumping petition with the Secretary that covers only one steel product, thus permitting the foreign steelmaker to alternate dumping products within its product line without fear of detection. And finally, U.S. steelmakers do not benefit from the TPM's fast-track investigatory period.

At best, then, the TPM has met with limited success. The reduction in Japanese steel imports has been offset to a degree by the increase in European imports. However, U.S. steelmakers have benefitted from the TPM despite increased European imports because the TPM allows them to raise their profit margin.[94] A by-product of the dollar's sharp decline against the yen is that a significantly higher trigger price has resulted.[95] Previously, Japanese manufacturers absorbed some of the impact of currency fluctuations in order to keep their products competitive, even if it meant selling at LTFV. Such behavior is no longer possible because it would trigger an automatic fast-track dumping investigation. U.S. steelmakers have taken advantage of this situation by raising their prices to a level just below the trigger price. Thus, to the extent that their costs have not risen as rapidly as the trigger price, U.S. steelmakers have realized greater profits.[96]

The problem is that even at these higher profit levels U.S. manufacturers are struggling to compete with the Japanese. Despite all the complaints about European steel, the real competition in the long run will continue to come from Japan. What the TPM has proven is that old, inefficient U.S. plants are at least as much the cause of lagging U.S. steel sales as unfair competition from foreign producers.[97] Unfortunately, antiquated production facilities are a problem that the trigger price mecha-

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93 NEWSWEEK, *supra* note 1, at 105.

94 Consumer groups allege that sharp increases in the TPM have contributed to U.S. inflation. *Id.*

95 *See* 43 Fed. Reg. 54712 (1978).

96 NEWSWEEK, *supra* note 1, at 105.

97 Even the Solomon Report, in its recommendation to the President to adopt trigger prices, noted that the TPM alone, without modernization of U.S. steel plants, would not succeed in the long run in stemming the tide of imports. SOLOMON REPORT, *supra* note 3, at 973-81.

nism cannot solve, and, in the long run, greater U.S. efficiency is the only solution to foreign competition.[98]

—JOHN JAY RANGE

Editorial Postscript

On March 21, 1980, as this article went to the printer, U.S. Steel Corporation filed massive dumping petitions against seven European steelmakers. As the author predicted, the Commerce Department retaliated by temporarily suspending further enforcement of the TPM until such time as U.S. Steel withdraws its dumping petitions. Whether U.S. Steel will yield to this pressure, and whether the TPM will be reinstituted, cannot be determined at this time. The editors feel, however, that this article continues to be relevant because it examines many of the issues raised by the present dispute, namely: does the TPM accurately reflect Japanese steel production costs; does it adequately protect U.S. steelmakers from European imports; and can the Commerce Department enforce the cumbersome Antidumping Act without the TPM?

[98] Whether the TPM will survive 1980 is presently an open question. When the TPM was implemented, there was a tacit understanding between the government and the steel industry that the steelmakers would forego filing dumping petitions in exchange for automatic dumping investigations whenever the trigger price was violated. But world demand for steel is declining after a relatively strong sales year in 1979 and U.S. steelmakers are increasingly concerned about dumping by foreign manufacturers. Because of its disenchantment with the TPM, U.S. Steel has threatened to file multiple dumping petitions. Such action could cause the Commerce Department to retaliate by terminating the TPM. TIME, Mar. 17, 1980, at 66-67.