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# Steel: Unions, Industry, Governments, and Tribunals

Charles H. Blum

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## STEEL: UNIONS, INDUSTRY, GOVERNMENTS, AND TRIBUNALS

*Charles H. Blum*<sup>†</sup>  
U.S. Speaker

Well, thank you, Troy, and thank you, Henry.

I am a little like, you know, Daniel in the lion's den. I am the non-lawyer here, but Daniel was no lawyer, either. And I am getting used to it, just like Washington, I mean; this is about the ratio that I encounter wherever I go in Washington. I have been doing this as a non-lawyer for a long time.

I was involved in this proceeding in two different ways. I have been, since 1990, the U.S. Representative for EUROFER, which is the trade association representing the steel producers of Western Europe. They account for about one-sixth of the world's steel production, and have been collectively the largest supplier of foreign steel to the United States,<sup>1</sup> although, Canada individually is bigger than any of the fifteen-member states.

Since 1988, when I left the government, I have represented the Metal Service Center Institute<sup>2</sup>, formerly the Steel Service Center Institute. Metal Service Centers buy, warehouse, process, and deliver usually just in time steel to about 300,000 locations around the United States.

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<sup>†</sup> Charles H. Blum has served as President of the International Advisory Services Group, Ltd. since its founding in 1988. Previously, he had a seventeen-year career in the U.S. State Department and the Office of the U.S. Trade Representative. While in the State Department, Mr. Blum served as political, labor, and economics officer, earning the Department's superior honor award in 1978. He rose to the rank of Assistant USTR for Industry (1983-85) and for Multilateral Negotiations (1985-88). In these positions, he negotiated more than twenty bilateral steel agreements, Spain's accession to the GATT Subsidies Code, access for general aviation aircraft to the Indonesian market, and the launch of the Uruguay Round of multilateral trade negotiations. In his current position, Mr. Blum has monitored and influenced steel developments for a number of clients in the U.S. and abroad. Mr. Blum has delivered or prepared testimony to Congressional committees and Executive Branch agencies, and he is a frequent commentator on steel related issues in trade publications and the international press. Mr. Blum earned his B.A., magna cum laude, from Eastern College and his M.A. in international relations from the University of Pennsylvania. He also studied at the University of the Americas in Mexico City and graduated with distinction from the State Department's intensive economics training course.

<sup>1</sup> EUROFER, *EU Crude Steel Production*, available at: [http://www.eurofer.be/cgi-bin/year\\_crude\\_production.pl?YearCrude=2000](http://www.eurofer.be/cgi-bin/year_crude_production.pl?YearCrude=2000) (last visited Nov. 1, 2004).

<sup>2</sup> Metals Service Center Institute, *The History of MSCI*, available at: <http://www.ssci.org/history.adp> (last visited Nov. 1, 2004).

Most small buyers have to deal through Service Centers, so collectively Service Centers are the largest buyers of domestic steel,<sup>3</sup> and they are the second largest buying group of imported steel in the United States after the U.S. steel mills themselves, which is a part of this story that we might get into. This includes some mills in Cleveland. In fact, they would like to buy more right now.

Interestingly, EUROFER decided to participate actively in every phase of this process, except one, which was U.S. consumer oriented. So as a group, EUROFER did not participate, although, Steptoe & Johnson did. Perhaps more interesting, the Service Centers decided not to participate at all in this proceeding except for the period when the issue of what kind of relief to put in place in early 2002. They were active in that period.

Other than that, even in the review that came later and led to the termination of the measures, Service Centers chose not to participate even though they are the biggest buyers of steel.<sup>4</sup> We can talk about why it is a curiosity.

My point about this proceeding is from beginning to end, it was atypical. It was beyond atypical; it was down right curious, mysterious, brief and inglorious. It was begun, implemented and terminated in ways that really are not typical of anything else. Nevertheless, I have been asked to try to draw some lessons from this experience, and I will do my best.

First, it is imperative to examine what made this case peculiar. It was different from most safeguard cases and most trade cases in a number of different ways.

### THE FIRST ODDITY

First, it is rare, but it is not unprecedented that the President asks for an investigation to be conducted.<sup>5</sup> We call this self-initiation, but the President does not initiate, he requests the initiation.

In this case, the President was boxed in by a political fluke. Senator Jeffords of Vermont disaffiliated from the Republican Party in March of 2001, and that gave the Democrats control of the Senate.<sup>6</sup>

One of the first things the new Chairman of the Finance Committee, Senator Baucus, and one of his allies on the committee, Senator Rockefeller did was to start publicly and privately threatening that if the President did not

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<sup>3</sup> Corinna C. Petry, *Steel Success Strategies: Consolidation Won't Level Competition*, (August 2003), available at: <http://www.metalcenternews.com/2003/August/mcn0803Consolidation.htm> (last visited Nov. 1, 2004).

<sup>4</sup> Petry, *supra* n.3.

<sup>5</sup> Trade Act of 1974, 19 C.F.R. § 201.7 (1974).

<sup>6</sup> Lizette Alvarez, *Man in the News – James Merrill Jeffords; A Longtime Maverick*, N.Y. TIMES, May 25, 2001, at A19.

initiate this kind of a case by June the 14th, 2001, they would do so.<sup>7</sup> Under the law, they could, and they did.

Now, what was the significance of June 14? Well, the President had his kind of coming out party as a world leader at the European Summit in Sweden on June 14. And that was the whole idea; we are going to embarrass this guy while he is out there. We are going to steal his thunder. Lo and behold, on June 5, with no warning, and at a photo op at the White House, the President said I am going to ask for this investigation.<sup>8</sup>

That set off a frantic period of a couple of weeks where people tried to define the issue at hand in this case. This is not the way you usually do a case. The industry was involved only as a kind of afterthought. There was no petition. There were no basic data. The definition of products was not done. All of these variations made this fundamentally different from other cases.

### THE SECOND ODDITY

A second oddity of this case is the WTO Rules talk about rising imports. In this case, the rising imports had occurred in 1998 to a record level.<sup>9</sup> We had record imports that year. And then there was a secondary surge to a lower level in 2000.<sup>10</sup> However, overall, the trend from 1998 was down. In fact, steeply down, for almost all products.

In 1998, there were some members of the industry, particularly Weirton Steel in West Virginia, the United Steel Workers, the Weirton Union, and Geneva Steel, which is no longer in business, which is a separate union, independent steel workers union, that were very interested in using the safeguard. However, they were trumped by Bethlehem Steel, U.S. Steel, and some members of the Clinton Administration who really did not want to do that for reasons we can get into later.

That chance came and it went. The moment when the law could have been used most appropriately left, three years later, the Bush Administration in quite a different set of circumstances initiated the case.

One of the practical problems in this case was that this meant the non-petitioners had to invent a causal link between those distant imports and the injury because you have to show that imports are the most substantial cause

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<sup>7</sup> Paul Blustein, *Steel Firms Said to Sway White House*, WASH POST, May 26, 2001, at E01.

<sup>8</sup> Edward Alden, *Bush Acts to Protect US Steel Producers*, FIN. TIMES (London), June 6, 2001, at 1.

<sup>9</sup> Dewey Ballantine LLP, International Trade Law Group, *Steel Trade Issues 2000: Zero Tolerance for Unfair Trade*, available at: [http://216.239.41.104/search?q=cache:awknGf1fHwMJ:www.dbtrade.com/carbon\\_steel/sti2000.htm+%22steel+trade%22&hl=en](http://216.239.41.104/search?q=cache:awknGf1fHwMJ:www.dbtrade.com/carbon_steel/sti2000.htm+%22steel+trade%22&hl=en) (last visited Nov. 1, 2004).

<sup>10</sup> *Id.*

of injury. To do that, they invented this lag effects theory, so they could accumulate all of the loss of business and lower prices that happened subsequently, and blame them all on the import surge. Not entirely satisfying.

### THE THIRD ODDITY

Third, the U.S. industry itself was divided on this. In 1998, they were divided. Those divisions continued into this process partly over the issue of, "is this case winnable?" Some of the U.S. industry actually opted stainless flat roll producers asked not to be included in the President's request, and they were not.

In another case, the specialty steel producers, called hollow asked out of the investigation. They were removed from one category, yet the union surreptitiously got them included in another category. Thus, the producers had no knowledge of this until actually the list was produced. They were taken by surprise. Again, it was a very strange case.

The bigger division among the industry actors was, "What do we want out of this case?" The union, some of the weaker producers, and some of the larger integrated companies wanted relief from legacy costs; this massive accumulation of healthcare and pension costs for retirees who were growing in numbers, and their dependants growing in number.<sup>11</sup> The burdens here were unsustainable for most of those companies, in fact, probably all of them at some point in time. They wanted the government to give them financial relief. Their staunch allies in this process, mini mills like Nucor and Steel Dynamics were dead set against such a bailout.<sup>12</sup> They actually had this disagreement in front of the International Trade Commission at the hearing where they are both asking for import relief.<sup>13</sup> What one group wanted, the other group opposed.

### THE FOURTH ODDITY

A fourth oddity is the extent to which foreign producers came to be excluded. Thanks to NAFTA, Canada and Mexico were excused after investigation.<sup>14</sup> That it was not clear if they would be in or not, but it was ruled in the end that they were not.

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<sup>11</sup> James Cox, *Bush Slaps Tariffs on Steel Imports*, USA TODAY, March 6, 2002, at 1B.

<sup>12</sup> Dan Ikenson, Center for Trade Policy Studies, Cato Institute, *Steel Trap: How Subsidies and Protectionism Weaken the U.S. Steel Industry*, available at: <http://www.free-trade.org/pubs/briefs/tbp-014.pdf> (last visited Nov. 1, 2004).

<sup>13</sup> *Bush Sets Tariffs on Steel Imports; President Opt's for Compromise on Free Trade*, WASH POST, March 6, 2002, at E01.

<sup>14</sup> *Dispute Settlement: Panel Rules Against US Steel Tariffs; Panel Established on US Upland Cotton*, BRIDGES WEEKLY TRADE NEWS DIGEST, April 2, 2003.

A hundred or so developing countries, not all steel producers, to be sure, were excluded by virtue of Article 9.1 of the WTO Agreement on safeguards.<sup>15</sup> That provision prohibits the application of a safeguard measure to any developing country that supplies three percent or less of the particular product, unless all such developing countries with that lower share account for more than 9 percent of that product. This was because of the definition of products; this was such a generous exclusion that many viable producers, including Brazil, a major and a modern producer, were virtually totally excluded from the process from the beginning.<sup>16</sup>

Importantly, this relief fell principally on the European Union. In the first year of relief, the EU exporters that I represent lost 1.6 million tons. The rest of the world, whether they were covered or not covered, gained 800,000 tons. Therefore, the EU accounted for the entire loss times two that this program generated.

Now, the problem here is with the WTO. Article 2.2 of the WTO says that safeguard measures should be applied to a product irrespective of its origins.<sup>17</sup> It is supposed to be a most favored nation (here after "MFN") remedy. This corrected some gray area measures of the 1980s, including voluntary restraint measures. They were prohibited by this agreement.<sup>18</sup> Article 2.2 was the vehicle.

Unfortunately, Article 9.1 actually undermines Article 2.2 by letting the developing countries out.<sup>19</sup> Therefore, there was a kind of reversed steel activity where these measures really fall on the backs of just a few producers when the trade is structured the way this one happened to be.

### THE FIFTH ODDITY

A fifth oddity, the Bush Administration went further in dismantling the relief from day one by eliminating products. There are a whole series of very messy and unsatisfying processes, but 3.5 million tons of covered products were eventually eliminated this way from the relief. Half of that tonnage went to the benefit of the domestic steel producers, and half of it went to

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<sup>15</sup> WTO Agreement on Safeguards, (April 15, 1994), *reprinted in* H.R. Doc. No. 316, 103d Cong., 2d Sess. 1577 (1994), *available at* [http://www.wto.org/english/docs\\_e/legal\\_e/25-safeg.pdf](http://www.wto.org/english/docs_e/legal_e/25-safeg.pdf) (last visited Nov. 1, 2004).

<sup>16</sup> World Trade Organization, *Trade Policy Reviews: Second Press Release and Chairperson's Conclusions, Brazil: November 1996*, (1996), *available at*: [http://www.wto.org/english/tratop\\_e/tpr\\_e/tp47\\_e.htm](http://www.wto.org/english/tratop_e/tpr_e/tp47_e.htm) (last visited Nov. 1, 2004).

<sup>17</sup> *Supra*, n16.

<sup>18</sup> Paul Blustein, *US Tells Japan to Curb Steel Exports*, WASH. POST, January 8, 1999, at F01.

<sup>19</sup> *Supra* n16.

their consumers. Again, this is uncanny. Certainly, in terms of product exclusions, it is the biggest case ever.

### THE SIXTH ODDITY

Lastly, this case was peculiar because from the very beginning of the action, many people, including some who signed off on the decision, understood that it would never pass WTO muster. Essentially, it was illegal from day one. The reason it was illegal is that up and down is not synonyms, they are polar opposites. Rising imports and falling imports cannot be the same thing. The one factual requirement of the WTO is imports must be rising.<sup>20</sup> The rest of it is a question of judgment, but you can measure an increase relative or absolute.

Thus from the beginning, everyone said that this would not last. Therefore, the question becomes, "how do you get rid of it?" We had numerous arguments with numerous perspectives generating various opinions. The basic idea here is if relief lasts more than three years, there must be a mid term review by the International Trade Commission.<sup>21</sup>

The President, as has been customary in recent cases, made the relief affective for three years and one day.<sup>22</sup> As a result, the review triggered automatically. Thus, at three years and one day, the President can modify, reduce or terminate the relief.<sup>23</sup> He cannot increase it in any way.<sup>24</sup>

There are three ways that the President can modify, reduce or terminate the relief. Even without a review, the industry requested the measures be terminated.<sup>25</sup> There was one case in history where that occurred, thus it is very rare.<sup>26</sup> In this case, it was outside the realm of possibility

The other two choices, basically, are for the President to say the industry has not made a positive adjustment to import competition. In this case, it is restructuring. Alternatively, the President can say that the effectiveness of

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<sup>20</sup> *Steel Probe Draws Large Trade Crowd*, TORONTO STAR, May 25, 2002, at D12.

<sup>21</sup> *Statement of U.S. Senator Max Baucus, as Prepared; U.S. International Trade Commission Steel Safeguard Mid-Term Review*, (September 20, 2004), available at: <http://www.steel201.org/204/baucus.PDF> (last visited Nov. 1, 2004).

<sup>22</sup> Press Release, Office of the Press Secretary, The White House Steel Products Proclamation: To Facilitate Positive Adjustment to Competition From Imports of Certain Steel Products By the President of the United States of America; A Proclamation, March 5, 2002, available at: <http://www.whitehouse.gov/news/releases/2002/03/20020305-7.html> (last visited Nov. 1, 2004).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Harry Stoffer, *Supplier Executives Press for Steel Tariff Relief*, AUTOMOTIVE NEWS, Oct. 13, 2003, at 39.

the measure has been undermined by changed circumstances. That is the strange construction of this statute.

The respondents disagreed fundamentally on how to argue the case. The consumer group, which is called Consuming Industries Trade Action Coalition, (hereafter "CITAC") wanted to argue that the relief was not of an international interest because it had raised prices and it had reduced access to imports.<sup>27</sup> That was exactly what the President wanted. President Bush had ruled in the beginning that that was the national interest.<sup>28</sup> Thus, CITAC effectively generated attention, as they got a separate hearing and they were able to mobilize Congressional support.<sup>29</sup> The problem was their perspective was fundamentally unacceptable to the White House.<sup>30</sup> Their argument could not be the realistic basis to justify the termination of the program.

There were other foreign respondents, who always viewed this program as illegitimate, and wanted to argue that it is a failure. Their position was that the industry has not restructured; if they had restructured, these measures are not the cause of that restructuring.

Nevertheless, the industry was restructuring. Here in Cleveland, ISG rescued parts of LTV, Bethlehem, and a few other companies, turning them into the lowest cost integrated producer in North America.<sup>31</sup> Another is example is the acquisition of National Steel by U.S. Steel.<sup>32</sup>

Among the mini-mills, no one had anticipated a terrific reorganization. The industry raised 5 billion dollars while relief, that first year relief was in effect to do this. There was no way you could argue that they had not done anything, or that the program had really hindered this. Therefore, by default the argument became that changed circumstances undermined the effective-

<sup>27</sup> The Impact of the Section 201 Safeguard Action on Certain Steel Products Before the House Comm. On Ways and Means, 108<sup>th</sup> Cong. (statement of *Andrew Sharkey, President and Chief Executive Officer, American Iron and Steel Institute*), available at: <http://waysandmeans.house.gov/hearings.asp?formmode=printfriendly&id=212> (last visited Nov. 1, 2004), "*CITAC and the other 201 critics would like you to believe that the President's steel tariffs are causing significant financial and job losses in U.S. steel-using industries, increased imports and decreased exports of steel-containing products and, worst of all, decisions to relocate facilities to China and other countries where steel is supposedly cheaper.*"

<sup>28</sup> *Steel Industry and Union Express Disappointment, But Not Surprise, with WTO Appellate Decision*, PR NEWSWIRE, Nov. 10, 2003.

<sup>29</sup> CITAC, *CITAC Members tell House Committee Steel Shortages, Sky-High Price Increases Devastating to U.S. Manufacturers*, (July 23, 2002), available at: [http://www.citac.info/release/2002/23\\_07.html](http://www.citac.info/release/2002/23_07.html) (last visited Nov. 1, 2004).

<sup>30</sup> James P. Miller, *Bush on Verge of Dropping Divisive Steel Tariffs*, CHICAGO TRIBUNE, Nov. 29, 2003, at C06.

<sup>31</sup> Christopher Bowe, *Breathing New Fire into Old, Failed Furnaces*, FIN. TIMES (London), April 21, 2004, at 4.

<sup>32</sup> Gregory Cancelada, *U.S. Steel Completes National Deal*, ST. LOUIS POST-DISPATCH, May 21, 2003, at 82.



ness of the program. This ties back to the President's decision, the President said at the beginning that it was in the overall national interest to do this.

The argument became that the mills had done the right thing, yet to continue these measures would actually be counterproductive. A continuation would draw marginal facilities back into operation, harming the stronger members of the industry.

At its inception, many thought this was an ill-conceived scheme, but after four hearings, numerous briefs, and other discussions, this began to sound feasible. The problem is by itself, it would never work. What made it all work was that trading partners, especially the European Union, immediately took this case to the WTO, and they backed it up immediately with a specific threat of retaliation.<sup>33</sup> The EU had a list of U.S. products that were going to be subject to tariffs if the U.S. lost this case and failed within five days to terminate the measures.<sup>34</sup> Many think that those threats were why the White House was willing, and politically able in the end, to terminate.<sup>35</sup>

Another factor to take into consideration is the winner of the 2000 U.S. Presidential election. Had Al Gore become President, the unions would have had a much stronger voice. The whole issue might have evolved differently. However, that point is moot.

A few lessons can be learned for the future. First, I think self-initiation is bad trade policy. If the President requests that the ITC conduct an investigation, it suggests the issue of injury has been pre-judged. Further, self-initiation puts the ITC Commissioners, who were sworn to uphold the law and are supposed to have a fact-driven objective, puts them in an impossible situation, because they are always political actors. They are appointed by the President, balanced between the two parties and funded by the U.S. Congress.<sup>36</sup> That is a contradiction we should avoid. I think this should be removed from policy options, and then eventually taken out of the law.

Second, this case exposed some of the inadequacies of the current safeguard process, the U.S. statute and practices, and the WTO agreement itself. Part of the problem is the agreement is designed by law to do two different things. It is designed to deal with just injurious import surges. That is a problem that requires immediate response. Unfortunately, this process is extremely long, extremely cumbersome, very costly, and highly uncertain,

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<sup>33</sup> Reuters, *US Faces Trade Backlash*, SUNDAY TASMANIAN, (Australia), December 14, 2003, at 22.

<sup>34</sup> *EU Lists Targets for US Sanctions*, FIN. TIMES, May 15, 2002, at P2.

<sup>35</sup> Kamau High, *US Lifts Tariffs on Imported Steel*, FIN. TIMES, Dec. 4, 2003.

<sup>36</sup> *About the Commissioners and the USITC Staff*, available at: [http://www.usitc.gov/geninfo.htm#ITC\\_staff](http://www.usitc.gov/geninfo.htm#ITC_staff) (last visited Sept. 19, 2004).

because in the end, there is a Presidential judgment.<sup>37</sup> Therefore, it is the most political of all the trade remedies.

Conversely, it is supposed to promote restructuring, which is a longer-term idea. Occasionally, you get the two issues arising together, as they did in this case to some degree. Although, the restructuring was not necessitated by the rising imports. We have had a restructuring issue in the United States for over 27 years, so there is that basic contradiction.

There is also the issue of the preferred remedy. The economic agencies always prefer a tariff. They perceive tariffs to be most transparent.<sup>38</sup> They think that it is the least protectionist, and they always argue for it.

The difficulty is that the goal is to promote stability, yet a tariff is absolutely the worst remedy. A quota or a tariff rate quota that allocated shares would have allowed a lot of the traditional trade to have continued without any big disruption, without this unbelievably complex exclusion process. Therefore, remedies should be reexamined.

Furthermore, U.S. law embraces the idea of a restructuring plan.<sup>39</sup> Each company has to submit a plan. Some of them did, some of them did not. This creates a problem. If each company fulfilled their proposals, even disregarding the companies that proposed to do nothing; we would still end up with a bigger problem.<sup>40</sup> We would have had an industry that was more over-supplied than at any other time. The issue, which is not addressed to the law, is what is the success here? What is a good restructuring?

Success cannot mean that every interest gets to do what they want to do. The adjustment is competitive, and we have to recognize that. Part of competition is somebody fails; somebody does not get to do what they want to do. This is not yet accepted in the U.S. law, yet this case helps to show the way. We need to rethink this whole idea of restructuring, and the plans, and the connection between that and the rising imports.

Finally, this case shows the utility of the WTO dispute settlement system, which is much maligned in this country. When it is used intelligently and aggressively, it can overcome strong domestic pressures, even the prejudice created by self-initiation.

More than any party, the EU Commission, fully backed by the member states, and that is a rare thing, was able to box the Bush Administration in more effectively at the end of this game than even the Senate Finance Committee Democrats had done at the beginning of this game.

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<sup>37</sup> *Global Safeguard Investigations*, available at: <http://www.usitc.gov/7ops/safeguard.htm> (last visited Sept. 19, 2004).

<sup>38</sup> Arvind Panagariya, *The Tide of Free Trade Will Not Float All Boats*, FIN. TIMES, Aug. 2, 2004.

<sup>39</sup> Editorial, *Bad Trades*, WALL ST. J., Mar. 28, 2001, at A22.

<sup>40</sup> *Id.*

Thus, in law, hard cases make bad law. I think in trade policy hard problems make bad policy. Certainly, the 201 case shows how difficult it is to make a workable policy for a heterogeneous highly competitive industry even when imports are not actively destabilizing the situation.

So perhaps my most important conclusion would be there might be other approaches that could be more fruitful. I hope that we will have a chance to discuss those as this discussion continues.

Thank you very much.