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Dumping: Confronting the Paradox of Internal Weakness and External Challenge

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Large-scale, continuous dumping is essentially the transmission of an economic adjustment problem from one country to another. When dumping reaches acute proportions it may create foreign policy problems involving the maintenance of good relations among nation-states as well as economic adjustment problems for the importing country.

Unfortunately, dumping today poses serious foreign policy problems for the United States, particularly with respect to many other advanced industrial states. Dumping is but one of a series of major economic issues faced by the United States today in the international arena, however, and its importance should not be emotionalized or overstated.

The salience of dumping as an issue is, in fact, merely a reflection of the basic transformation which is currently taking place in the international system. We are moving out of an era dominated by military issues into an era in which war in the form of direct confrontations between major states may virtually disappear.[1] This is due to many reasons, not the least of which is the awesome increase in the ability to inflict irreparable harm on the human race.[2]

As the use of force declines as an instrument of developed country policies, the use of economic methods of competition as instruments of national policy can be expected to increase.[3] It is irrelevant whether power in this context is perceived as a zero-sum concept, flowing from the "security" to the "economic" realm. Perhaps, as Tucker has argued, all power is at a discount, with economic issues merely appearing to grow in salience.[4] The fact remains that we are entering a new international environment in which conflicts

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between nations will typically involve the allocation of economic resources, rather than the traditional type of conflicts over ideological or military objectives.

Dumping today involves considerable amounts of economic resources. Thus, the proper response to foreign dumping is a matter of "high" foreign policy for the United States.[5]

The principal paradox posed by the recent increase in dumping by many advanced industrial states is that it is simultaneously a reflection of internal weakness by the dumping country and external challenge to the importing country. As a general rule, countries attempt to confront other countries with challenges from a position of strength in important foreign policy matters.[6] Many countries have recently engaged in large-scale continuous dumping into the United States market, however, because they are weakened economically by recessionary forces, increased oil prices, and chronic overcapacity in key sectors. Equally important, they are enfeebled politically by fragile governments unable to cope with powerful domestic groups seeking a larger share of the national product. These governments may not only condone dumping, but support it through subsidies or other market-related schemes in order to achieve national objectives. Increasingly, the distinction between subsidies and dumping is becoming more blurred, and the solutions to both problems should be approached in a coordinated manner.

In yet another paradox, the weakness—indeed, the desperation—of certain trading partners has become a key element in their strength.[7] The chronic weakness of dumping states may become an insurance policy against vigorous enforcement of the United States antidumping laws, especially by those in the United States government who have become fearful of growing Eurocommunism. Continuous dumping may conceivably evolve into a permissible concealed form of devaluation used to subsidize excess employment, underwrite oil costs, and carry unneeded capacity.

While most large-scale dumping today appears to be the result of weakness, it presents an external challenge to the economic system of the importing country by creating dislocations in employment and capital investments and lessened profitability for business enterprises.[8] It also creates political tensions between the dumping country and the importing country. On the benefit side of the equation, dumping presents lower prices to consumers, results in more competition and improved industrial performance, and acts as an anti-inflationary mechanism of price control.

The United States must make a delicate calculus, taking into account the benefits of dumping, as well as its costs. The analysis is complicated, and does not lend itself to simplistic solutions that are either "free trade" or "protectionist" in nature. Like trade itself, dumping has become increasingly politicized. The solutions must therefore be balanced ones, taking into account political as well as economic and legal factors.

Before solutions can be proferred, three questions need to be answered:

1. what is dumping;
2. has dumping increased; and
3. assuming so, why is increased dumping taking place.

After considering these three questions *seriatim,* this article concludes that vigorous enforcement of the United States antidumping laws is in the best interests of the United States and an open world trading system. This policy is not antithetical to a free trade policy for the United States; rather, it is the essential precondition for a continuation of the liberal trade policy pursued by the United States since the commencement of the Reciprocal Trade Agreements Act of 1934.

THE ECONOMIC CONCEPT OF DUMPING

Apart from the legal definitions of dumping,[9] the practice by economists has traditionally been to subdivide dumping into three temporal categories: sporadic, intermittent, and continuous or persistent. Sporadic dumping typically involves the occasional sale of overstock at low prices in "fire sale" fashion. As such, it poses little concern to the importing country. Intermittent dumping, on the other hand, is of greater concern to the importing country, as the dumper in this case tries to establish a foothold by selling for brief periods at prices less than fair value. After the foreign competitor is eliminated, the dumper may then raise his prices to the detriment of consumers. There appears to be a consensus that this form of predatory dumping is an unfair foreign trade practice that should be moved against.[10]

Whether large-scale continuous dumping poses problems or benefits for the importing country is a subject of intense controversy.[11] Continuous dumping over an extended period of time may exist for a variety of economic reasons, including a desire to obtain economies of scale from fixed assets or to shore up a nation's balance of trade posture. It may also reflect a political decision to continue an essentially unprofitable enterprise and maintain a given level of employment. Recent cases of large-scale continuous dumping appear to have involved the steel (1976, 1977),[12] electronics (1971, 1972),[13] automobile (1974, 1975),[14] and sugar (1977, 1978)[15] industries. It is important to distinguish the major market incursions that have occurred in these areas from the sporadic or predatory dumping practice of a particular enterprise. The latter simply involves a particularized adversary proceeding between private parties; the former are national controversies involving either public enterprises or enterprises pursuing national objectives in a parallel manner.

The public policy question raised by large-scale continuous dumping is the focus of this article; the legal and economic issues raised by all three types of dumping have been addressed by the author in an earlier article.[16]

In general, a continuous dumping scheme cannot long endure without governmental assistance in the form of subsidies or barriers to reentry of the dumped or similar goods.[17] These forms of governmental assistance are generally the condition precedent to a successful continuous dumping scheme; they act as handmaidens to the secure position of the exporting firm in the home market country.

Continuous dumping, under any definition, must be distinguished from import-penetration situations involving fairly priced goods or goods competing on their merits without artificial assistance. For example, section 201 of the Trade Act of 1974 is designed to deal with imports of goods causing serious injury to domestic industry; the price of imported goods is relevant, but not dispositive in this form of proceeding. Since fair competition is generally involved, the injury standard[18] and administrative procedures[19] make it very difficult to obtain import-limiting actions from the Executive branch.[20] In contrast, once dumping has been established, antidumping duties may be obtained if anything more than *de minimis* injury is established.[21] Whether or not economists and lawyers agree, Congress and the International Trade Commission will require a lower standard of injury when dumping is involved in the import transaction.

HAS DUMPING INCREASED?

Like the definition of dumping, the magnitude of dumping into the United States marketplace is a perplexing question. The amount of dumping can be measured in terms of cases actually processed at the Treasury Department, affirmative dumping injury decisions rendered by the International Trade Commission (hereinafter ITC), or on a qualitative basis. Each barometer of dumping has major flaws.

Treasury Department Proceedings

If one were to gauge the amount of dumping (in terms of Treasury Department proceedings), table 1 shows that dumping has increased dramatically since 1969, when only six cases were processed. The

Table 1.
Cases Processed by the Treasury Department, 1969–78

Fiscal Year	Number Processed
1969	6
1970	17
1971	34
1972	32
1973	21
1974	11
1975	23
1976	13
1977	29
1978 (through August, 1978)	28

Source: U.S. Customs Service, Department of the Treasury.

absolute numbers do not indicate the volume of trade involved, the number of potentially valid petitions that were either never filed or never accepted due to lack of information, or the greater difficulty in obtaining acceptance of petitions after 1974. On the other hand, it seems safe to say that the increase in cases processed by Treasury reflects the increased dumping that has occurred since 1969.

International Trade Commission Proceedings

A finding of dumping follows a bifurcated proceeding. After Treasury establishes sales at less than fair value the petitioner must also prove to the ITC that injury to an American industry has occurred or is likely to occur as a result of the foreign dumping. The International Trade Commission record of affirmative injury decisions has varied greatly. These ITC findings (which follow in table 2) do not reflect cases of dumping where no injury has been found, or discontinued cases, such as the case of automobile dumping in 1975. Therefore, they do not adequately measure the magnitude of dumping over the last eight years.

A Qualitative Analysis

A qualitative analysis of steel and consumer electronics, two key sectors of the United States economy, demonstrates the increase in continuous dumping. Apart from the magnitude of dumping involved, these sectors have been selected to illustrate differing reactions to the phenomenon of price discrimination.

Table 2.
Affirmative ITC Findings

Year	Number
1970	4
1971	13
1972	15
1973	12
1974	4
1975	2
1976	4
1977	7
1978 (through August, 1978)	3

Source: International Trade Commission.

Steel

The most startling increase in dumping in recent years has occurred in the steel sector. "Big Steel" has been pilloried in the press and by academic commentators[22] since 1962, when President Kennedy forced a rollback in the announced price increases of the industry,[23] and the industry's grasp of public relations has been less than magnificent. Nevertheless, the claim of the industry that it has been victimized by foreign dumping since 1976 appears to be valid.

On a price basis, Japanese price discrimination between domestic shipments and exports to the United States appeared to be on the order of $25 per net ton in 1976.[24] On a cost basis, Japanese producers appeared to sell at an estimated average of $32 per ton below average cost in 1976 and an estimated $46 below average cost for the first nine months of 1977, behavior that would also qualify as dumping under the second legal definition of dumping discussed above.[25]

Given the bad press Japanese economic policy has received in recent years, the allegation of steel dumping from Japan might merit little more than a yawn. The truly astonishing aspect of the steel dumping story in 1977 was the performance in the United States marketplace of steel exporters from the European Economic Community (hereinafter EEC). In 1977, while the exports of steel from Japanese producers actually declined somewhat in volume, imports into the United States from European producers more than doubled from 3.2 million to 6.8 million tons (table 3). The EEC found it difficult in 1976 and 1977 to organize its steel market due to the problem of domestic discounting among the nine members of the Community. To remedy this tendency towards discounting and protect the domestic market, the EEC instituted two plans in 1976 and 1977, known as the Simonet[26] and Davignon plans. Viscount Etienne Davignon, who

Table 3.
Imports of Steel Mill Products

	Thousands of Net Tons				
Imports from	1973	1974	1975	1976	1977
Japan	5,637	6,159	5,844	7,984	7,820
EEC	6,510	6,424	4,123	3,188	6,828
All other	3,003	3,387	2,046	3,113	4,659
Total imports	15,150	15,970	12,012	14,284	19,307
Apparent consumption	122,528	119,609	89,016	101,078	108,451
Imports as percentage of apparent consumption	12.4%	13.4%	13.5%	14.1%	17.8%

Source: Statistics from the American Iron and Steel Institute.

established his early credentials with the establishment of the International Energy Agency (hereinafter IEA) in 1975, turned his attention to steel in 1977 with devastating results.[27] The Davignon Plan for steel consists of three separate but interrelated elements:

(a) guidance prices on intra-EEC transactions[28] (to be supplemented by required minimum prices);
(b) production quotas; and
(c) minimum base prices for imports.

The extent of dumping by the EEC in 1977 can be gleaned from a comparison of the internal base guidance price and the average price of exports to the United States for the major steel product categories. Significantly, in all categories except one (steel bars), substantial price differences are revealed (table 4).

Apart from disregarding the traditional price measurement of dumping,[29] the EEC has also engaged in significant below-cost pricing[30] to the United States. Its below-cost sales performance appears to be even more pervasive than Japan's, as it is a less efficient producer of steel than Japan, and is therefore required to sell at lower price levels relative to the actual cost of production than Japan.[31] Evidence indicates that realized revenues on European shipments to the United States averaged $50 per net ton below cost and profit during the first nine months of 1977 (table 5).

If the steel industry is to be believed—and the burden of disproving this rests with those contesting the allegation—the loss in revenue due to lost sales caused to the domestic steel industry by dumping in 1976 and 1977 amounted to over $1.05 billion (table 6).[32]

Table 4.
Price Discrimination by Steel Producers in the EEC, October through December 1977 (in dollars per net ton)

Product Category	(a) Internal Base Guidance Prices (excluding extras)	(b) Average Price of Exports to the U.S., F.O.B. Port of Exportation (including extras)	(c) Differences
Cold rolled sheets and strip	$318	$240	$78
Hot rolled sheets and strip	239	193	46
Plates	230	203	27
Bars	250	291	−41
Structurals	250	219	31
Wire rods	260	193	67

Source: Putnam, Hayes & Bartlett Study.

Table 5.
Below-Cost Pricing of Exports to the U.S. by the EEC Steel Industry: Standard Mix of Carbon Steel Products (in dollars per ton)

Year	(a) Average Cost Including Profit	(b) Average Realized Revenue	(c) Difference
			(b)−(a)
1976	$307	$257	−$50
1977	341	268*	− 73

*Only nine months available for 1977.

Table 6.
Injury to the Domestic Steel Industry Caused by Dumping in 1976 and 1977 ($ millions, before taxes)

Year	Quantity Impact	Price Impact	Total Injury
1976	$ 124	$ 547	$ 671
1977	933	2,411	3,344
Total	$1,057	$2,958	$4,015

Source: Putnam, Hayes & Bartlett Study.

Impact of Dumping

Steel is the classic case of a non–footloose industry.[33] Continuous dumping of steel may thus result in serious discontinuities, due to the immobility of its labor force and the idling of its capital stock, which cannot be easily moved to another sector or another country. There are also significant short term inelasticities of supply, as new steelmaking capacity requires from two to seven years to install. The steel industry has responded to foreign dumping by idling some of its domestic facilities. It has not transferred its capital stock overseas for shipment into the United States.[34]

Dumping may have more pernicious consequences for the owners of the means of production of non–footloose industries such as steel, with relatively high entry barriers. The adjustment costs for labor, however, should not differ significantly. If dumping results in retiring an excessive amount of United States steel capacity, United States producers may be unable to meet future supply scarcities due to the difficult market entry conditions of the industry. This, of course, is hard to assess, and opinions with respect to the steel situation differ dramatically.[35] The owners of the means of production of products manufactured under a stable technology, with low entry requirements, are better able to adjust to dumping, and indeed, take advantage of it, than are products produced by non–footloose industries.

WHY HAS DUMPING INCREASED?

Dumping has increased for structural reasons. These include slow growth and unemployment in the OECD area, increased oil prices, and overcapacity. Increased dumping is also a result of conscious decisions to expand market shares.

Slow Growth and Unemployment in the OECD Area

The dominant pattern of activity in the OECD area is that of slow growth in output and trade, and a continued rate of high unemployment. GNP growth for 1978 seems likely to stay around 3.5 percent, about the same as 1977. Unemployment will remain around the level of 5.3 percent for the OECD area, and the OECD predicts that recorded unemployment in OECD area countries could increase by more than half a million persons in early 1979.[36] The rise in unemployment seems likely to be widespread in continental Europe despite large-scale European efforts to support employment through subsidies and other measures.[37] Moreover, a general slowdown in productivity growth[38] has added to recessionary pressures.

The stagnation of the OECD economies has a direct bearing on the problem of dumping. Countries mired in a recession, with high unemployment rates, are very reluctant to add to their pool of unemployed. Instead, labor will be treated as a fixed cost, much like capital equipment, and workers will continue to produce items at artificially low subsidized prices, with real unemployment being disguised. Products may then be sold at price-discriminating levels at whatever price the markets will bear. This may become a continuous dumping policy under any definition, with goods being sold at even less than marginal costs.

A cursory analysis indicates the strength of organized labor in the OECD area, and its pervasive fixed-cost characteristic. In Italy the organized labor force serving large enterprises has contracts that make the dismissal of employees extremely difficult.[39] In France the Government backed off from a scheme to rationalize the steel industry by reducing employment, and ended up controlling two-thirds of the leading steel groups in France in September, 1978.[40] A similar reaction occurred recently in Belgium,[41] and in the United Kingdom the British Steel Corporation continues to operate at relatively full employment rates despite its fantastic financial losses in recent years.[42] Nevertheless, there are serious strains now on the social contract in the United Kingdom, and British workers may be expected to resist the proposals currently being made to reduce employment in the industry by 40,000 jobs.[43]

The growth in power of trade unions in Europe is a classic example of the politics of pluralistic stagnation.[44] In this type of development, interest groups come to play a progressively greater role in the processes of government and policymaking. This leads to *immobilisme* as governments become blocked from pursuing "national interest" policies by strong and broadly based interest groups. Unions in Britain, France, and Italy have been elevated—or have elevated themselves—into veto groups capable of frustrating what would otherwise be rational economic policy.[45]

In contrast, the growth of contract labor in Japan gives the Japanese added flexibility in laying off workers. Thus, the traditional view of labor as a fixed cost in Japan leading to dumping[46] may bear serious revision. Japan has closed down eighteen of her fifty-eight blast furnaces since 1974. In addition, Japan's multiproduct companies, such as Sumitomo, are shifting many workers out of steel into other lines of production, such as automobiles. On an overall basis, however, in Japan as in Europe, governments are loath to take the political heat for adding to the unemployment rolls. Continued production—and continued dumping—is a more politically palatable alternative.

INCREASED OIL PRICES

The second reason why dumping has increased recently relates to the serious balance of trade deficits run by several key OECD countries since the OPEC oil price increases of 1973. In 1974 alone, the additional cost of oil imports was $50 billion for the OECD countries.[47] The additional balance of trade deficit of the oil-importing countries has translated into trade surpluses for the OPEC countries. Based on the 1972 OECD and OPEC trade balances, it is at least arguable that a $250 billion dollar resource transfer has been made to OPEC exporters by the OECD above "normal" 1972 prices.[48]

To reduce these mind-boggling figures to the level of individual countries in the OECD area might be useful. For Italy, two-thirds of its trade deficit in the first half of 1974 was due solely to the purchase of petroleum products.[49] The oil crisis has also been a severe blow to Japan. Japan relies on oil for 70 percent of its energy needs, and at the time the "oil shock" came, Japan imported 99 percent of its petroleum.[50]

Increased oil costs intensify recessionary pressure, which has already been cited as one key reason for dumping. Higher oil costs also increase dumping in another respect: they augment neomercantilist pressures on non–oil sectors of the exporting economy. Simply put, as imports dramatically increase in cost, strong incentives are created to promote exports in order to reduce the balance of trade deficit.

To put the argument succinctly, it would seem that several key OECD nations have been dumping steel and other products into the United States in order to permit them to afford more expensive energy imports.[51]

Overcapacity

The third major reason for increased dumping is overcapacity.[52] Overcapacity leads to dumping, as firms will reason that they should sell at whatever price the market will bear in order to attempt to cover their fixed costs. There appears to be substantial overcapacity at present in the steel[53] and automotive[54] industries. Significant additional capacity is coming onstream in the petrochemical sector,[55] a problem that will increase as the OPEC oil-producing countries develop their own processing facilities in the next decade.[56] This may indicate that the next major wave of dumping cases will be in the area of petrochemicals.[57]

CONSCIOUS MARKET ENTRY STRATEGIES

Finally, dumping has increased as a result of conscious market entry strategies. The classic case of taking over a market involved the dumping of TV sets. Promotion of a new product must be carefully distinguished from the predatory dumping situation.[58] The latter clearly requires swift, affirmative corrective actions under the antidumping law or another statute.

THE IMPLEMENTATION OF FOREIGN DUMPING: THE ENIGMATIC ROLE OF THE STATE

With the exception of market entry, the goals discussed above—lower unemployment, reduced balance of trade deficits, and use of overcapacity—are *national* objectives superimposed on the objectives of individual enterprises. While an individual firm may be willing to lay off workers and idle capacity, the government may not be willing to do so for political reasons. Conversely, the government may desire to rationalize an inefficient sector of the economy but be unable to stand up to powerful trade unions wishing to avoid economic dislocations. In each case the result is the same: labor becomes a fixed cost that needs to be covered by the domestic enterprise. It is the thesis of this article that dumping policies are increasingly state-led or state-supported efforts to improve national economic postures.

In 1900 Brooks Adams said that nation-states were behaving more and more like huge corporations in competition.[59] Today nation-states frequently are huge corporations in competition. This is especially true in such dumping-prone sectors as steel. For example, governments owned raw steel products enterprises in twenty-one major countries in 1975.[60] Government-owned exports to the United States from these twenty-one countries accounted for 11.1 percent of total United States steel imports in 1974.[61]

In Japan, the state has played a crucial role in the generation and implementation of foreign economic policy.[62] As early as 1950 the government in Japan emphasized the development of the steel industry. Furthermore, the government facilitates the steel industry development by acting, in effect, as a well-controlled revolving door providing entrance to and exit from Japan.[63]

In Italy, state-controlled enterprises have become as significant in domestic and international economic affairs as the large private corporations.[64] The Institute for the Reconstruction of Italy (hereinafter IRI), the Ente Nazionale Idrocarburi, and other state-owned enterprises are responsible to the Ministry for State Holdings, and the Foreign Ministry.[65] Finsider, the steel state-participation enterprise run by IRI, has, like its British counterpart, British Steel Corporation, lost enormous sums in recent years.[66]

The list could continue, but, hopefully, the point has been made. United States industries which are particularly vulnerable to dumping, such as the steel industry, are private firms in which shareholders hold management responsible for making a profit, and these private firms are increasingly competing in a world of profitless enterprises with markets insulated by governmental tariff and nontariff barriers to trade. Dumping has thus become transmogrified from the classical profit-maximizing action of a private firm to a concealed partial devaluation of the currency of the exporting country carried out by the national government for national objectives.[67] Instead of its traditional role as a micro-economic industry problem, dumping is increasingly a reflection of the macroeconomic problems of central government authorities.

Without the ability to implement the decision to dump for the reasons enumerated earlier, the objectives of national policy would remain objectives, and not national policies implemented by the government.

WHAT IS THE APPROPRIATE UNITED STATES RESPONSE TO DUMPING?

The United States should vigorously enforce the current antidumping law. Dumping misallocates world resources,[68] and enforcement of the antidumping law sends a message to the dumping country that the United States will not let that country profit from trade barriers imposed to maintain its dumping scheme.[69] In addition, enforcement of antidumping law rallies support for the cause of free trade.[70] Thus, both the objectives of an open world economy and a liberal trade policy for the United States are preserved by vigorously enforcing the dumping law.

How vigorously the United States enforces the antidumping laws is ultimately a political question. Other nations have dumped their economic adjustment problems at the American doorstep and said, "You adjust," treating the United States as if it were the world's residual buyer of the imported product.

The American response to continuous dumping in the steel area has been the reference price plan, or Trigger Price Mechanism (hereinafter TPM). Essentially, this is a procedure that permits the Treasury Department to institute a dumping investigation on its own initiative when import prices are below listed prices for certain steel mill products.[71] The trigger prices are based on Japanese production costs, which are the world's lowest.

The reference plan is exceedingly complex and controversial, and the jury is still out on its effectiveness. Nevertheless, some preliminary generalizations may be useful.

1. As a political device to buy time until the domestic steel industry began to recover from its depressed condition in 1977, the TPM was a master stroke. With unemployment reaching politically unacceptable levels in the steel industry in 1977, something had to be done. A price solution, rather than a quantitative restraint solution, was not overly disruptive of political relationships with United States trading partners. Indeed, spokesmen from the Japanese steel industry have commended the TPM for introducing a measure of discipline into the pricing of steel in the United States marketplace.[72]
2. As an economic device to prop up a depressed steel industry the TPM has worked well. Steel company profits have been fairly strong since the introduction of the TPM, which has permitted the industry to raise its prices by 12 percent in 1978.[73]
3. As an import-limiting device, if that was its intent, the TPM has failed miserably. Steel imports actually jumped 18.6 percent for the first nine months of 1978, and should exceed the 1977 record of 19.3 million tons.[74] Imports have dropped substantially from Japan, but have increased sharply from the EEC, and other countries as shown in table 7. For the first time imports from other countries will exceed the totals from the EEC and from Japan, as the two traditional big suppliers are left contending for second place.
4. The TPM continues the evolution of United States dumping enforcement away from price and toward the cost of production as the referent for fair value. Enforcing the TPM has been difficult, since production costs are obviously different for each country. The single-tier pricing mechanism of the TPM keyed to Japanese costs has given the EEC a "license to dump," a license to sell in the United States at a price above the trigger price, yet below the domestic price or cost of production.[75] The single-tier pricing mechanism apparently reflected the political decision to move against dumping from Japan but to risk large-scale dumping from "our European friends."[76] The Japanese trade surplus had become embarrassingly large in 1977, and politically unpopular in the United States, so it was deemed politic to move against Japan.

Whether a multi-tier TPM is to be adopted to reflect European costs will also be a political decision. Inflationary concerns place the Administration on the horns of a dilemma in this respect: a multi-tier

Table 7.
Steel Imports

Supplier	9 months, 1978	9 months, 1977	Percent Change
EEC	5,529,666	4,373,828	+26
Japan	5,065,195	5,954,167	−15
Canada	—	1,430,828	—
All Other	—	1,761,674	—
Total	16,030,958	13,520,497	+19

Source: Steel Week, October 30, 1978.

TPM would clearly be more inflationary than a single-tier TPM, while continuation of the single-tier TPM risks additional unemployment in the steel industry, and deepening a possible recession in 1979.

The American reaction to steel dumping in 1977 and 1978 and the decision of Treasury to discontinue the automobile dumping case in 1975 constitute admission that the current dumping laws may be inadequate to handle large-scale continuous dumping. As the science of economics becomes more exact it may be possible to develop more accurate cost of production models for industry sectors. Such models would permit the United States government to set up an "early warning" system for foreign suppliers and thus ease enforcement problems under the Antidumping Act of 1921. At the present, however, a cost-oriented antidumping enforcement approach would have all the disadvantages of posted prices, could tend to be inflationary if not properly calculated, and would be inordinately complex. Notwithstanding these negative effects, a cost-oriented antidumping enforcement approach seems preferable to the alternative technique of individual antidumping petitions in large-scale continuous dumping cases based on price discrimination theory.

In any case, the antidumping law should not be repealed, as some in this volume suggest. It must be improved and enforced. Inaccurate antitrust analogies for determining injury from dumping[77] should not be relied on. Instead, trade should be treated as a special Federal responsibility, as the Constitution suggests.[78] It *does* matter to United States workers who puts them out of work, and whose economic adjustment problem they are bearing. It *does* matter why prices of goods are cheaper. To ignore these facts is to be excessively theoretical and ideological, and therefore of limited utility to the practical policymaker.

NOTES

1. Hunter, *Power and Peace*, 9 FOREIGN POL'Y 37, 38 (1972).
2. *Id.*
3. On this point, *see* Bergsten, Keohane, & Nye, *International Economics and International Politics: A Framework for Analysis*, in WORLD POLITICS AND INTERNATIONAL ECONOMICS (C. Bergsten and L. Krause, eds. 1975).
4. R. TUCKER, THE INEQUALITY OF NATIONS (1977).
5. "High" foreign policy has traditionally been linked with national security affairs. "Low" foreign policy has been used to describe functional, economically-related issues that may actually consume more manhours in the bureaucratic operation of a government but receive less attention from the highest government officials. On the evolution of trade policy matters from "low" to "high" foreign policy, *see* Cooper, *Trade Policy is Foreign Policy*, 9 FOREIGN POL'Y 18, 18–21 (1972). On the rise of economic issues to the top of international agendas *see also* C. BERGSTEN, TOWARD A NEW INTERNATIONAL ECONOMIC ORDER (1975), and S. BROWN, NEW FORCES IN WORLD POLITICS (1974).
6. My thesis is that as a rule it is irrational to confront other nations with challenges from a position of weakness, and that the makers of foreign policy will in general behave in a rational manner that is calculated to increase the power of their nation-state. *See* H. MORGENTHAU, POLITICS AMONG NATIONS (3d ed. 1960). For an analysis critical of Morgenthau's emphasis on power as the objective of national policies, *see* J. STOESSINGER, THE MIGHT OF NATIONS: WORLD POLITICS IN OUR TIME (rev. ed. 1965).
7. For an application of this theory to the case of Italy, *see* Posner, *Italy: Dependence and Political Fragmentation*, in BETWEEN POWER AND PLENTY: FOREIGN ECONOMIC POLICIES OF ADVANCED INDUSTRIAL STATES 254 (P. Katzenstein ed. 1978).
8. For an analysis of the impact of dumping on the importing country, *see* Fisher, *The Antidumping Law of the United States: A Legal and Economic Analysis*, 5 L. & POL'Y INT'L BUS. 85, 90–92 (1973); W. WARES, THE THEORY OF DUMPING AND AMERICAN COMMERCIAL POLICY 57–91 (1977).
9. *See* Antidumping Act of 1921, ch. 14, tit. II, 42 Stat. 11 (1921), *as amended*, 19 U.S.C. §§ 160–73 (1976). There are four aspects: (1) price discrimination between national markets, 19 U.S.C. § 160 (1976); (2) sales below cost of production, 19 U.S.C. § 164(b) (1976); (3) dumping from a state-controlled economy, 19 U.S.C. § 164(c) (1976); and (4) dumping by a multinational enterprise, 19 U.S.C. § 164(d) (1976).
10. *See, e.g.*, Barceló, *Antidumping Laws as Barriers to Trade—the United States and the International Antidumping Code*, 57

CORNELL L. REV. 491 (1972); Barceló, *The Antidumping Law: Repeal It or Revise It, post.*

11. Opposing the application of the antidumping laws to continuous dumping are Barceló, in the articles cited *supra* note 10, and Wares, *supra* note 8. For an argument in favor of applying the dumping statute to continuous as well as predatory dumping, *see* Fisher, *supra* note 8, at 144–48.
12. Continuous dumping in the steel sector is analyzed *infra*, text accompanying notes 22–32.
13. The dumping of tuners from Japan in 1970 is discussed in Fisher, *supra* note 8, at 122 (*see* Tuners from Japan, AA1921-64, USTC Publ. 341 (1970)), as is the dumping of ferrite cores from Japan. *See* Fisher, *supra* note 8, at 125, 126 (*see* Ferrite Cores from Japan, AA1921-65, USTC Publ. 360 (1971).
14. *See* New, On-the Highway, Four-Wheeled, Passenger Automobiles from Belgium, Canada, France, Italy, Sweden, the United Kingdom, and West Germany, AA1921–Inq.–2, USITC Publ. 739 (1975), and Department of the Treasury Press Release of May 4, 1976, announcing the conditional discontinuance of the automobile dumping investigation. The automobile antidumping investigation was the largest, in terms of dollar volume ($7.4 billion), ever conducted under the Antidumping Act of 1921. It is generally believed that the primary reason Treasury discontinued the case was its concern about the financial impact of an extended investigation on several foreign car manufacturers, including Volkswagenwerk. *See* Treasury Dropped Auto Dumping Study to Avoid Damage to Volkswagenwerk, Wall St. J., May 6, 1976, at 4.
15. *See* Sugar from Belgium, France, and West Germany, AA1921–Inq.–20, –21, –22, USITC Publ. 916 (1978).
16. Fisher, *supra* note 8.
17. There are, however, occasionally *de facto* protective barriers in the form of transportation costs or the production of a unique product which may play the same role as governmental barriers against re-entry of the dumped goods, permitting sectorization of markets.
18. The test under section 201 is whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or threat thereof, to the competing domestic firm.
19. The President reviews findings by the International Trade Commission, and is not obligated to provide the recommended import relief. If the President does not provide the relief in the form recommended by the Commission, Congress can, by a concurrent resolution, override the President's action, requiring the President to implement the Commission's recommended relief.
20. To date, in only one case in which the ITC has recommended section 201 relief other than adjustment assistance has

the President granted relief in the form recommended—Stainless Steel and Alby Tool Steel, TA-201-5 USITC Publ. 756 (1976).

21. *See* the leading case of Cast Iron Soil Pipe from Poland, AA1921-50, USTC Publ. 214 (1967) at 6, which states: *The word "injury" in the Antidumping Act has been construed by the Commission as meaning "material injury." Any injury which is more than* de minimis *is material injury. When the Congress used the word "injury" in the Act without qualification of degree, the only exception that one might reasonably apply to the word is the old legal maxim that "the law does not concern itself with trifles."* *And see* SEN. FINANCE COMM., REPORT ON THE TRADE ACT OF 1974, S. REP. No. 1298, 93d Cong., 2d Sess. 180 (1974): *Under the Antidumping Act, the Commission determines whether a domestic industry "is being or is likely to be injured, or is prevented from being established, by reason of the importation of" the less-than-fair-value imports. The term "injury," which is unqualified by adjectives such as "material" or "serious," has been consistently interpreted by the Commission as being that degree of injury which the law will recognize and take into account. Obviously, the law will not recognize trifling, immaterial, insignificant or inconsequential injury. Immaterial injury connotes spiritual injury, which may exist inside of persons not industries. Injury must be a harm which is more than frivolous, inconsequential, insignificant, or immaterial.*
22. *See* Adams, *Import Restraints and Industrial Performance: The Dilemma of Protectionism, post.*
23. *See* A. SCHLESINGER, A THOUSAND DAYS: JOHN F. KENNEDY IN THE WHITE HOUSE 583-88 (Fawcett Crest ed. 1967).
24. "The Economic Implications of Foreign Steel Pricing Practices in the U.S. Markets", a study prepared for the American Iron and Steel Institute, by Putnam, Hayes & Bartlett, Inc. (1978) (hereinafter cited as Putnam, Hayes & Bartlett Study). While this study was prepared for the American Iron and Steel Institute, it appears to be reasonably accurate, and the author has been unable to find other seriously researched cost and price estimates that differ significantly. In particular, the author disagrees with the conclusions of a study prepared by Merrill, Lynch, Pierce, Fenner & Smith, Inc., *infra* note 31.
25. Putnam, Hayes & Bartlett Study, *supra* note 24; 19 U.S.C. § 164(b) (1976).
26. The Simonet plan refers to the first series of recent meetings taken by the EEC Commission to meet the problems affecting the steel industry. Beginning in December, 1976, steel producers were required to inform the Commission each month of all steel deliveries within the Common Market as well as of any exports outside the Common Market. (*See* Commission

decision of December 8, 1976 (19 O.J. EUR. COMM. (No. L 344) 24 (1976)). This measure was designed to enable the Commission to closely monitor and analyze the steel market and to establish production objectives.

A supplementary measure implemented on January 1, 1977, was the request of the EEC Commission to steel producers to voluntarily limit their production for a trial period of originally four months. (*See* Commission decision of December 20, 1976 (19 O.J. EUR. COMM. (No. C 304) 5 (1976)). Optional delivery quotas by product were established by the Commission for each individual steel producer with the objective that supply match demand for the steel market as a whole. (The Commission's use of production quotas was said to be authorized by Article 58 of the ECSC Treaty.) Voluntary commitments by steel producers to respect these optional delivery quotas were received by the Commission with respect to 90 percent of the steel production, apart from concrete reinforcement bar production, for which the Commission obtained commitments covering only 50 percent of the production.

The Simonet plan also provided for consultations with trading partners outside the Common Market (these consultations resulted in restraints on imports from Japan, and negotiations with other major exporters to the Common Market), as well as for long-term measures relating to the coordination of investments in new capacity, reconversion of existing production facilities and the general reorganization of the European steel industry.

27. *See European Steel Faces Worst Crisis in Memory*, N.Y. Times, May 23, 1977, at 41–42.
28. As the suggested prices are only guidance prices, enterprises are free to fix their prices as they wish. However, the Commission has, by separate letter, requested steel producers to agree to raise their list prices to the level of these guidance prices and to respect these guidance prices in transactions outside or inside the Common Market. Commission officials have indicated that their records show that 60 percent of the Common Market steel companies, representing 95 percent of its steel production, have agreed to these guidance prices.

    The Commission has stated that "the great majority of steel undertakings have agreed to its proposal" and that "this has led to an increased stabilization of the market." (20 O.J. EUR. COMM. (No C 174) 2 (1977)).
29. *See* 19 U.S.C. § 160 (1976).
30. *See* 19 U.S.C. § 164(b) (1976).
31. On the relative competitiveness of Japan and Europe in the steel market, *see* BUREAU OF ECONOMICS, FED. TRADE COMM'N STAFF REPORT, THE UNITED STATES STEEL INDUSTRY AND ITS COMPETITIVENESS (1977); COUNCIL ON WAGE AND PRICE STABILITY REPORT, PRICES AND COSTS IN THE UNITED STATES

STEEL INDUSTRY (1977); Securities Research Division, Merrill, Lynch, Pierce, Fenner & Smith, Inc., Japanese Steel Industry: A Comparison with Its United States Counterpart (1977); Putnam, Hayes & Bartlett, Economics of International Steel Trade: Policy Implications for the United States (1977) (an Analysis and Forecast for the American Iron and Steel Institute [hereinafter cited as Putnam, Hayes & Bartlett Forecast]); Putnam, Hayes & Bartlett Study, *supra* note 24; D. Barnett, International Competitiveness in Steel: Comparative Static and Dynamic Advantages (Working Paper, Department of Economics, University of Windsor, Canada [Oct. 15, 1977]).

32. This analysis does not suggest that the primary problem faced by the domestic steel industry has been dumping from foreign countries. In the author's opinion, raw materials prices for iron ore and coal, the lag in technological development by the United States steel industry compared to its technological counterparts, and increased United States labor costs, have been more profound causes of the distress of the domestic steel industry than foreign dumping. On this, *see* Crandall, *Competition and "Dumping" in the U.S. Steel Market*, CHALLENGE, July-Aug. 1978, at 13.
33. *See generally* COUNCIL ON WAGE AND PRICE STABILITY REPORT, *supra* note 31.
34. The impact of dumping upon the steel industry contrasts with the impact of dumping upon the television industry, which has responded to dumping by relocating overseas.
35. For an analysis indicating a possible steel short-fall in 1985, *see* Putnam, Hayes & Bartlett Forecast, *supra* note 31, at 45–55. For a more sanguine view of the possibility of a steel shortfall in the 1980's, *see* PRICES AND COSTS IN THE UNITED STATES STEEL INDUSTRY, *supra* note 31.
36. See OECD ECON. OUTLOOK, July, 1978, at 1–15.
37. *Id.* at 19.
38. *Id.* at 14.
39. The growth in the power of organized labor in Italy has been reflected by the increase in the percentage of national income constituted by wages. That percentage increased from 50.8 percent in 1950, to 55.1 percent in 1960, to 63.8 percent in 1964. Interestingly, the Ministry of Labor in Italy has frequently sided with the wage demands of the unions, in order to contain labor unrest and solicit their political support. The influence of the Italian Communist Party (PCI) has further strengthened union demands on the Christian Democratic Center-Left government coalitions. *See* Posner, *supra* note 7, at 249, 250.
40. *See French Steel Rescue: Control Without Nationalization*, Financial Times, September 22, 1978, at 18.
41. For additional information on the plight of the Belgian steel industry, *see* FED. TRADE COMM'N STAFF REPORT, *supra* note 31, at 363–67.
42. *See id.* at 360–62. The $825

million loss by British Steel Corporation for the year ending April 1, 1978, may have been the largest loss ever reported by an industrial corporation. American Metal Market, July 6, 1978, at 1. The company expects a net loss of around $325 million in the first six months of the fiscal year beginning April 1, 1978.

43. As the trend toward worker participation in the ownership and management of private enterprise increases in the OECD countries, labor costs may be expected to become more of a fixed cost in the production process.
44. *See* Blank, *Britain: The Politics of Foreign Economic Policy, the Domestic Economy, and the Problem of Pluralistic Stagnation,* in Katzenstein, *supra* note 7, at 99.
45. *Id.* at 99, 100.
46. *See* Putnam, Hayes & Bartlett Forecast, *supra* note 31, at 11–23.
47. *See* P. CONNELLY & R. PEARLMAN, THE POLITICS OF SCARCITY: RESOURCE CONFLICTS IN INTERNATIONAL RELATIONS 47 (1975).
48. *See* OECD ECON. OUTLOOK, *supra* note 36, at 42.
49. *See* Posner, *supra* note 7, at 250–51.
50. *See* Pempel, *Japanese Foreign Economic Policy: The Domestic Basis for International Behavior,* in Katzenstein, *supra* note 7, at 188.
51. This assertion admittedly differs from the standard argument that OECD states have promoted exports in order to reduce their oil-induced balance of trade deficit. *See, e.g.,* Zysman, *The French State in the International Economy,* in Katzenstein, *supra* note 7, at 270.
52. *See, e.g.,* the following ITC injury determinations citing the presence of overcapacity as a factor in foreign dumping: Carbon Steel Plate from Japan, AA1921–179, USITC Publ. 882 (1978); Sugar from Belgium, France, and West Germany, AA1921–Inq.–21, USITC Publ. 916 (1978); Perchloroethylene from Belgium, France, and Italy, AA1921–Inq.–14, –15, –16, USITC Publ. 904 (1978); Saccharin from Japan and the Republic of Korea, AA1921–174, –175, USITC Publ. 846 (1977); and Welded Stainless Steel Pipe and Tube from Japan, AA1921–180, USITC Publ. 899 (1978).
53. *See generally* Putnam, Hayes & Bartlett Forecast, *supra* note 31.
54. For a complete statistical description of the U.S. automobile industry, *see* U.S. INT'L TRADE COMM'N, AUTOMOTIVE TRADE STATISTICS 1964–1977, USITC Publ. 887 (1978).
55. Capacity in the chemical and derivative products industry has increased at an average annual rate of 6 percent over the last ten years, while production has increased at an average annual rate of only 3 percent.
56. Several OPEC nations have already made substantial investments to develop a domestic petrochemical industry. Several studies have been made of the comparative economies of producing petrochemicals in

the Middle East or North Sea areas, as compared to United States Gulf Coast production. One study prepared by Chem Systems, Inc., has concluded that there is little threat to the United States petrochemical industry from fairly-priced imports of ethylene derivatives. It is possible that the relatively uneconomical conditions of transport from the Middle East or the North Sea might encourage dumping in the future to compensate for such adverse conditions of competition in the United States marketplace. *See* S. Rothman & D. Crouse, Competitive Ethylene Economics: U.S. Gulf Coast Versus North Sea and Persian Gulf (private study by Chem Systems, Inc. [November 23, 1976]).

57. Recent cases of dumping of petrochemicals include Polyvinyl Chloride Sheet and Film from the Republic of China, AA1921–178, USITC Publ. 879 (1978); Perchloroethylene from Belgium, France, and Italy, AA1921–Inq.–14, –15, –16, USITC Publ. 904 (1978); Certain Nylon Yarn and Grouped Nylon Filaments from France, AA1921–185, USITC Publ. 922 (1978); and Methyl Alcohol from Brazil, AA1921–Inq.–7, USITC Publ. 837 (1977).
58. *See* Barceló, *The Antidumping Law: Repeal It or Revise It, post.*
59. B. ADAMS, AMERICA'S ECONOMIC SUPREMACY 85 (1900).
60. U.S. INT'L TRADE COMM'N, A SURVEY AND ANALYSIS OF GOVERNMENT OWNERSHIP IN MARKET ECONOMY COUNTRIES: A STUDY OF STEEL, AUTOMOBILES AND IRON ORE (1978).
61. *Id.*
62. *See* Pempel, *supra* note 50, at 139.
63. *Id.* at 161.
64. *See* Posner, *supra* note 7, at 226.
65. *Id.* at 238.
66. *See* Petition of Armco Steel Corp., U.S. Treasury Dep't Countervailing Duty Investigation of Terni Steel (Italy), 1976.
67. Barceló makes a serious error of analysis in assuming that continuous dumping should be considered only in the context of private firms. He notes that "[t]he pricing policies of private firms cannot be likened to a government decision to devalue its currency, wholly or partially." Barceló, *The Antidumping Law: Repeal It or Revise It, post,* at n. 110. The increasing role of governments in economic decision making processes permits the analogy to be made between continuous dumping and a governmental decision to devalue its national currency.
68. *See* Fisher, *supra* note 8, at 147.
69. *Id.* at 146.
70. *Id.* at 148.
71. For an explanation of the TPM, *see* Putnam, Hayes & Bartlett Study, *supra* note 24, at 38–41.
72. *See Nippon's Saito Praises, Criticizes Trigger Pricing,* American Metal Market, Aug. 25, 1978, at 1.
73. *See 'Trigger Prices': Misfire?,* NEWSWEEK, Nov. 20, 1978, at 105.

74. *Id.*
75. *See* Putnam, Hayes & Bartlett Study, *supra* note 24, at 40, 41.
76. On September 25, 1978, Peter D. Ehrenhaft, Assistant Secretary of the Treasury and Special Counsel for Tariff Affairs, rejected the creation of a multi-tier TPM as "unworkable," and said that a world trade agreement on steel would "solve the problem of too much steel coming from our European friends." *Full Antidumping Act Overhaul Called Vital,* American Metal Market, Sept. 26, 1978, at 1, col. 4.
77. *See* Adams & Dirlam, *Dumping, Antitrust Policy, and Economic Power,* 14 Bus. Topics 20 (1966); Barceló, *supra* note 10, in both of his articles.
78. Under the United States Constitution the power to impose tariffs rests with the Congress, which is also granted plenary authority over the regulation of international commerce. U.S. Const. art. I, § 8.