Michigan Journal of International Law

Volume 1 | Issue 1

1979

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Recommended Citation

Peter D. Ehrenhaft, *An Administrator's Look at Antidumping Duty Laws in United States Trade Policy*, 1 MICH. J. INT'L L. 97 (1979).
Available at: https://repository.law.umich.edu/mjil/vol1/iss1/5

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An Administrator's Look at Antidumping Duty Laws in United States Trade Policy

PETER D. EHRENHAFT

Trade policymakers, like military strategists, are often "fighting the last war." Our present antidumping law was passed in 1921.[1] It was a reaction to trade problems perceived in the years during and after World War I. The related countervailing duty law harks back to an even earlier era.[2] Since their enactment we have tinkered with each.

Administration of both statutes has been surrounded by extensive regulations and a body of unwritten practice. But solving the trade problems of today—if that is what we are doing—with this elaborate legal corpus will not necessarily provide us with a sensible guide to the laws we need to meet the challenges of the next decade.

Important new trends are discernible even now. Perhaps the old rules will continue to serve us in these new situations; more likely, they will give way to new thinking.

PAST TRENDS AND FUTURE PROJECTIONS

Global Economy

There are at least six important new developments that affect the administration of our antidumping and countervailing duty laws.

World Economic Growth

The volume of world trade has grown almost fivefold since 1970; in the next decade it is likely to expand at the same or even faster rate. The United States share of that trade has remained at between 13 to 17 percent of the world total, and is likely to maintain that level or increase slightly in the next ten years. These facts alone make our

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international trade institutions far more important than they have ever been. The percentage of United States GNP devoted to foreign trade has also almost doubled since 1970; it can be expected to increase substantially—perhaps even double again—by 1990. This makes domestic firms more susceptible than ever to foreign competition; concurrently, it means that new export markets have opened for our products. The international price of the dollar now directly affects about twice as much of the economy as it did in 1970.

The cast of characters with whom we are trading is changing rapidly. This is especially true with regard to developing countries who are making claims to special and differential treatment to accelerate their development, posing unique problems for our antidumping and countervailing duty laws.

Also, the European Community (hereinafter EC) and Japan have become much more significant competitors for the United States industrialized economy. Together they now greatly exceed the economic output of the United States, and each has in numerous sectors challenged the technological and marketing prominence once held by us alone.

Finally, growth has accelerated the depletion of numbers of raw materials and natural resources. It has created needs for national economies to rely upon each other now more than ever. Commodity cartels such as OPEC have emerged among the "haves" to squeeze the "have nots." Perhaps less threatening, cooperative commodity arrangements are evolving, as in sugar. The existence of such international arrangements cannot help but influence countervailing duty or antidumping outcomes concerning the affected commodities.

All of these factors considered together mean that we will need to increase greatly the resources that we devote to monitoring our trade and dealing with an expanding volume of cases in which claims of unfair practices are made.

Spread of Technology

Several nations have now closed, or almost closed, the technology gap with the United States. Both the EC and Japan compete on a par with the United States in many very high-technology items. More importantly for the future, the more "advanced developing countries" (hereinafter ADCs) such as Brazil and Korea have mastered new technologies and are now changing the kinds of goods they produce for export. They perceive particular trade advantages in exporting products such as electronic components and parts and special metals and alloys. As these countries achieve possible comparative advantages in producing goods—almost exclusively for export—our industry will invoke our antidumping and countervailing duty laws as a possible brake on accelerating access by foreign firms to our markets.

The End of Colonialism

With the end of political colonialism during the last two decades and in response to charges of earlier exploitation, the United States, Japan, and the EC have each set up generalized systems of tariff preferences for developing nations. The developing nations are asking that the developed countries give them preferential treatment under the antidumping and countervailing duty laws as well by disregarding the otherwise applicable standards for determining fair values or objectionable subsidies.

State Involvement in Economic Activity

In 1970, less than 0.7 percent of our trade was with the communist bloc countries. Since then our trade with them has increased sixfold in dollar terms, and has doubled in terms of market shares. Further growth in that sector must be anticipated. This increase in trade has highlighted the fundamental, but tenuous, assumption in our trade laws that prices provide the bellwether for action. Our trade regulations are largely price driven—that is to say, the measure for determining the existence of dumping is essentially a price yardstick. We remedy the unfair practice by taxing the import, thus raising its price by the amount of the added duties.

What happens when much of our trade occurs with countries where prices are, to use the most neutral term, "centrally administered"? Even if our system examines costs rather than prices, can it be applied to goods from the USSR where capital, labor and raw materials costs are determined by public officials who can disregard economic scarcity or demand?

In the past, these problems have been most obvious in the context of trade with Eastern Europe, the Soviet Union and the Peoples' Republic of China. In those contexts, they have provided us with a few conceptual and practical problems, as in the case concerning golf carts from Poland. In the future, we can expect even more perplexing issues. The most important will arise from the involvements of governments in only portions of an otherwise free market economy. Key sectors, such as the oil or steel industries, may be under direct state control. In administering our antidumping and countervailing duty laws, we must draw some practical limits on the extent to which we will regard a government's intrusion into the affairs of its domestic economy as a distortion for the purposes of our "fair trade" laws.

Transnational Enterprises

Paradoxically, it is not only the growing influence of the state that complicates our lives. It is also the growth in the private sector of transnational enterprises (hereinafter TNEs). Their interests span

political frontiers and allegiances and their economic power often dwarfs that of many nations. TNEs have also changed our perceptions of how private economic activity is organized. In the past, intracorporate transactions had little international significance. Today, enormous companies may rapidly shift large fund balances and even inventories from one place to another, thus influencing a country's trade accounts and currency reserves. In sorting out these transactions for dumping or countervailing duty purposes, it is often impossible to tell where the foreign interest ends and the domestic one begins. For example, the injury standard in dumping cases refers to injury caused by foreigners to an industry in the United States. We are now being faced with the perplexing problem of TNEs appearing on both sides of the border. Even more difficult is the problem of determining the prices that should be used for finding home country or third country values for computing dumping margins when related parties deal in all of them. These problems are exacerbated when TNEs produce components in selected jurisdictions for assembly elsewhere or are otherwise integrated backward and forward from mine to retail outlet across national boundaries.

Financial Instabilities

Ironically, we face new problems not only when goods are *not* subject to market pricing, but also when money *is*. The breakdown in the early 1970s of the Bretton Woods international monetary system began a new age—one in which the value of money itself is the subject of daily change from market forces. The recent tribulations of the dollar, however transitory we hope they are, show that United States trade policy will have to account in the future for monetary shifts and changes. Long ago, when these statutes were first written, we were under a gold standard, and such shifts and changes were hardly conceivable.

United States Economy

In the United States economy, at least six important trends and influences deserve special mention.

Domestic Inflation

A few years ago, the United States enjoyed a rate of inflation considerably lower than that of the rest of the world. Now the outlook is not so promising. To be sure, inflation cannot be cured through the antidumping and countervailing duty laws, but these two statutes can have an impact on inflation; in the short run, that impact may be adverse, as their immediate tendency is to increase prices to

United States consumers; in the long run the impact would, we hope, be beneficial, as their real aim is to preserve free competition in the United States market for those suppliers able to demonstrate their comparative advantage in real terms.

We are acutely aware of this problem as the Administration attempts to make control of inflation a priority consideration in all of its programs. The antidumping and countervailing duty laws become harder to administer when the United States inflation rate is consistently higher than that of the relevant trading partner. The difference between the foreigner's nominal home market prices and his United States prices increases slowly, causing almost daily movement in dumping margins. This may or may not be corrected by changes in the exchange rate. But often exchange rates do not reflect inflation rates with respect to the specific commodity in question. Like exchange rates, interest rates may also take up some of the slack, but they too may or may not be fine-tuned to the product in question. If the shifts in relative purchasing power caused by inflation are reflected by these two normal adjustment mechanisms, then we may see a gradual growth of dumping margins in some products from countries with lower inflation rates and an increase in the number of cases filed by the domestic interests affected. Yet this increase in dumping complaints filed may have little to do with the underlying economic and business realities of the actual products under consideration, and may be counterproductive in our efforts to reduce inflationary pressures.

Changes in the Labor Force

American laborers, no less than the providers of capital and raw materials, have a proper claim to the protective effect of laws on importation. Indeed, the adjustments imposed by the competition of imports are often more grievously felt, both socially and economically, by laborers than by the providers of other productive factors. Accordingly, changes in the labor force are bound to have an effect upon the administration of the antidumping and countervailing duty laws. The removal of mandatory retirement at age sixty-five and the increase in the number of families with two wage earners has created a domestic need for more jobs than ever before. These phenomena may make relocation adjustments harder and efforts to cling to existing jobs more vocal. On top of this, there have been notable changes in American attitudes toward the kind or quality of work that is satisfying and enriching. To reflect these popular attitudes, trade policy must take into account not only the labor intensity of imported products, but the quality of that labor and the kinds of United States jobs that such imports inevitably displace.

Decline in Productivity

Related to the nature of the work force is the observed decline in the value of output per worker in the United States over the past few years. We are now tenth among the leading industrial nations in output per man-hour. Whatever the causes of this phenomenon, and many have been postulated, the facts suggest that our growing competitive edge in the rest of the world must be in goods with relatively high research and development value, capital value or materials costs. But to what extent should our trade laws protect the less productive elements of our economy or become more directly connected to efforts to promote structural adaption and change?

Scarcity of Resources

Since the oil crisis, and perhaps even earlier, United States trade policy has had to take into account the need to trade for some items rather than produce them. Depletion of strategic reserves has always been recognized as a legitimate reason for encouraging trade in some items, even though they might be available domestically at a lower price. Will there be situations in which the government wants to encourage inexpensive imports to supplement a strategic stockpile despite domestic interests in preserving that market for themselves? In other industries we may want protection from imports to preserve a domestic manufacturing capacity in time of national emergency. The present antidumping and countervailing duty laws allow for no such calculus in their present administration.

Change in Economic Values

The depletion of scarce resources is one kind of externality of production that should influence our analysis of the effects of trade. Another prominent externality is pollution. Just as we might encourage imports of scarce commodities, so also might we with to import the products of polluting processes rather than make our own populace suffer the costs involved in domestic production. While this may seem to be a rational policy, it cannot be easily woven into the price model of the antidumping and countervailing duty laws, because such costs are not the stuff of conventional production accounting. On the other hand, we are already faced with claims that the failure of foreign governments to impose upon their own producers the type of real costs that our industry must bear in complying with environmental standards is an unfair "subsidy" that should be reached by a countervailing duty.

This is not an idle issue. We are exporting not only goods but economic values. We are concerned not only in the choice of what others will produce or how they produce it; we are concerned about the conduct of business itself. With the encouragement of several sectors

of our citizenry, we have attempted to raise the standards of conduct of private business everywhere. Whether the strict enforcement of the antitrust laws, the securities laws and other rules of business conduct hurt or help American competitiveness, I cannot say, but obviously they affect trade policy. Thus far, compliance or noncompliance with such concepts has generally been immaterial to our decisions. Whether we can remain in blissful or benign neglect is questionable.

Change in Social Values

Finally, there has been an undoubted shift in our social values. The entrepreneurial spirit that reigned in pre–World War I America has been dampened. In these more complicated times, security is as much to be sought as opportunity. And self-help is often displaced by the hope that some public agent will intervene to provide the solution to every problem. The pace of change itself has much to do with this phenomenon. As we enter the 1980s more and more private actors will rely upon public administrators for protection from the chill winds of competition—including, of course, foreign competition.

THE GENESIS OF THE EXISTING RULES

The list of trends is hardly exhaustive, but it covers enough ground to explain the high priority given to thinking about whether our laws in their present form will be able to meet these new challenges.

When originally passed in 1921, the Antidumping Act's fundamental objective was to prevent injury to United States competitors in domestic markets. The statute has retained this objective through the intervening years. But there is no requirement to show that the protected market is "free" in any sense. It can be very uncompetitive or heavily regulated. Similarly, little concern (other than in the case of state-controlled economies—the most extreme situation) is given to the condition of the home market, whose prices are the standard of "fairness." Is it controlled by cartels? Is it a developing economy in which goods of the type in question are to be exported for foreign exchange while prices at home are kept high to assure availability of the product for export? These questions are not usually asked under our current law. Finally, we are not trading in homogeneous products, identical in all markets; often we are dealing in highly differentiated wares tailor-made for separate sale in various markets.

The bedrock principle of antidumping policy ought to be comparative advantage. If a foreign supplier is capable of selling his wares in the United States at low prices, United States consumers certainly benefit. If the foreigner's ability to sell at low prices is an accurate

reflection of the comparative costs of producing goods in his home country, then we in the United States should buy more and produce less of that product. We should shift our resources to what we can do better and more cheaply, unless we decide that for national defense or security purposes or for reasons of tradition or patriotism we should produce a good for a cost higher than is available through trade. But in such cases, the extra cost must be justifiable in terms of the extra defense or tradition or national feeling we thus purchase. To the extent prices provide a fair guide to costs, they are far more easily used to determine comparative advantage. If we are speaking about an idealized principle, cost comparisons are probably the most reliable guide before action.

A policy to buy more and produce less often implies a need to make dramatic shifts in the economy. In human and economic terms, that adjustment is never without cost. But in the long run, it will always be wasteful to refuse to adjust to changes in comparative costs. In the short run, it will often be less wasteful to adjust slowly and deliberately, protecting our flanks with, among other devices, antidumping and countervailing duties. They have their role, but it is a temporary role. They cannot stand as King Canute and his retinue before the tides of the new world.

To achieve this aim, we must rethink our notion of "fair value." Interestingly, "fair value" has never been defined in our law. And in terms of its administration, it has not been applied in terms of "fairness," but rather in terms of prices charged elsewhere. Dumping margins can be based on monopoly prices in the home market—hardly "fair" prices in anyone's lexicon. Since 1974, a cost-of-production standard may also be used, into which certain ingredients, such as appropriate allocations of fixed and measured allowances for overhead and profit, must be calculated. But these new constructs are also not based on some external standard, as the term "fair value" might imply. Rather, the principle has to do with the seller's short-run pricing policy. According to the 1974 Act, a foreigner should not be permitted to price his goods below average cost over some relatively short period. Yet it is not entirely clear that our law should not permit him to lose money in this economy, if that is his choice, absent threats that he is an economic predator or that the below-cost sales make him so unreliable a supplier that we should not adjust our economy to accommodate to his supply.

Antidumping administration in the 1980s must define the proper basis for establishing the standard of comparison. The most plausible basis is the notion of comparative advantage, tested through cost of production analyses. Based on present experience with cost of production analysis, it is not clear that this is necessarily a way to simplify the law or make it more certain and appropriate in light of the

various factors outlined. And it should be made absolutely clear that what is suggested here is simply the idea of one person involved in the administration of these laws—not the official views of "The Administration." But if we reveiw the various factors outlined—from recognizing the possible comparative advantages of the advanced developing countries to the involvement of states in the production of goods, to the spread of multinational corporations, to our pervasive worry about the effects of inflation—then we are probably driven to a recognition that the only way to accommodate these various trends with a rational statute is to use cost of production analyses to test comparative advantage.

At the same time, I see a need not only for finding a way to use cost procedures to determine what we have called fair values for antidumping purposes. I see no less the need for expediting our calculations. This law would have a macro-economic impact on our economy and that of other countries. Surely individual companies may be affected and may benefit or be denied benefits. But the Act speaks of "an industry." Our concern as a government must be for a United States "industry" or a significant segment of it. The law must be tailored to those realities.

Countervailing Duties

Our current countervailing duty is different from the Antidumping Act in that there is no injury test for most imports. Dumping was treated as a problem only when industry was threatened, but subsidies were "per se" harmful. Unlike dumping cases, countervailing duty cases inevitably involve foreign governments.

The antidumping law does not tell us what "fair value" means; it tells us how to compute the essential equivalents of foreign market or constructed values. The countervailing duty law does not oblige us with either a definition or a procedure for determining what a "bounty or grant" is. And the privacy of the process (until the adoption of the Trade Act of 1974) has prevented the creation of any significant jurisprudence.

The Multilateral Trade Negotiations in Geneva have had the benefit of exposing how complex the problem really is. None among us now believe that governments have no role in developing the resources of their countries, promoting their development, or aiding their unemployed. The number of devices used by governments at every stage of economic development to further such laudable aims is infinite. A simple rule that says that all government aids are unfair is not acceptable in world terms today. But no less is it an acceptable principle that each nation may look out only for its own interests and export to others the difficulties of finding suitable employment for its

workers or making changes in its economic or social structures. Yet that is what the game is all about. Government investment in redundant steel mills or in price supports paid to farmers of plots too small to yield commercial harvests avoid the solutions of economic problems our laws should correct.

Some progress seems to have been made in Geneva from which our law can and should benefit. We have come to recognize that, at least among the industrialized countries of the world, government aids to exports can have deleterious effects not only on the competing industries of importing countries but also on such industries' abilities to compete in third-country markets and in the country granting the export aid. Our countervailing duty law has only reached imports to the United States. In a sense it must reach further. On the other hand, particularly in the area of domestic subsidies—regional aids, research and development grants—we also recognize that unless the industry of an importing country is injured as a result of the foreign aid, we should not invoke the law. But we are properly saying that we will apply countervailing duties if our domestic industry is injured even by such "domestic" aids.

THOUGHTS FOR FUTURE CHANGES

One of our primary aims must be to act more quickly. Redress may be useless if not given in time. We must identify the problems, obtain the needed data, and make the calculations the law mandates in less time. Foreign sellers cannot be allowed to take advantage of dumping or subsidies by fiddling with their facts while our industries burn. The second principle is that antidumping and countervailing duties are complementary parts of the trade law arsenal rather than matters apart. Their place is one of protection—but protection of the market as the forum for the clash of competition. No practical freetrader can seriously advocate repealing the antidumping and countervailing duty laws on the ground that they inhibit trade any more than one can seriously call for an immediate abolition of all instruments of war in the name of peace. The question is not one of free versus regulated trade. Rather it is a question of how the United States should assure the freedom of the market from the unfair intrusions these laws identify.

Integration of Remedies

One long-standing problem is the overlap and duplication among remedies in foreign trade regulation. An aggrieved domestic producer has a confusing number of statutory paths and administrative

forums from which to select a remedy. He can file petitions for import relief and complaints of unfair trade practices with the ITC under section 201 of the Trade Act of 1974[3] and section 337 of the Tariff Act of 1930.[4] He could request the Office of the Special Trade Representative to consider an unfair trade practice petition under section 301 of the Trade Act,[5] or, in some cases, the market disruption provisions of section 406.[6] He could initiate an antidumping complaint or petition to have a countervailing duty investigation initiated. Adjustment assistance may be available from the Commerce or Labor Departments. The Agriculture Department, FDA, and the FTC might all be asked to address specified import-related problems. Even the antitrust laws can be invoked, as in the most recent decision of the District Court in Delaware in the case of golf carts from Poland.[7] Should private action and recoveries be encouraged? Should a domestic industry apparently affected by imports be able to file a single petition with the government requesting investigation and possible relief, leaving it to the government to select the source of the problem and the most appropriate one or more remedies? The idea has much to commend it.

Clarification of Policies

The trade laws are not always consistent. A priority of concerns needs to be established, so that administrators have principles to rely on when the policies conflict. In the era of inflation, why should we resist taking advantage of bargains if foreign governments and manufacturers wish to give them to us? When should we prevent the foreign export of unemployment at the expense of raising prices to our consumers?

There are no easy answers to these questions, nor is there a consensus among scholars, administrators, or congressmen. The point is that we need to ask the questions and order our priorities in any new law. As suggested earlier, placing the notion of comparative advantage at the head of the list might be one such approach.

Consideration of Injury First

Under our antidumping law, we consider whether less-than-fair-value (hereinafter LTFV) imports have caused or threaten injury to our industry. This occurs *after* the LTFV determination and appraisement is withheld. However, the GATT Antidumping Code requires that there be evidence of injury *before* an antidumping procedure progresses to the imposition of provisional remedies such as the withholding of appraisement.[8] Until 1974, the United States approach had been to accept the allegation of the complainant as the

requisite "evidence of injury." Since 1974, if these allegations leave a "substantial doubt" of injury in the mind of the Secretary, he may refer the case to the ITC to determine on a preliminary basis whether there is "no reasonable indication" of injury by reason of the alleged LTFV sales. The allotted period for this determination is thirty days.

More time should be allowed for this determination, and consideration must be given to raising the threshold. If a future Trade Act will create new and even more onerous investigatory tasks for Treasury in making LTFV determinations based on comparative costs, it may make more sense to have the entire injury determination concurrent with, if not ahead of, the LTFV phase. If the finding were negative, then we might avert the often enormous and abrasive task of thoroughly going into the costs of foreign manufacturers. If, on the other hand, the finding were affirmative, the LTFV investigation can have moved forward at least partially, as under current procedures. There are some problems with such an approach, since the margin of dumping is often a clue to the critical issue of whether dumping is a cause of injury. Margins of 5 percent are a different matter from margins of 50 percent, and dumping by 20 percent of the producers may yield a different conclusion than universal margins. Nevertheless, simultaneous investigations—as foreseen by the Code and followed by the EC and Australia, for example—seem to be a sensible approach. They might be complemented with a second stage injury, inquiry into the causal link between the dumping or subsidy found after Treasury's final determination. Such an inquiry ought to be feasible within thirty days. This would reduce the overall antidumping timetable by two months and also place the investigations in a more logical sequence when seen as trade policy laws.

Remedies More Likely to Bring a Halt to Dumping

Because the imposition of even provisional measures generally comes more than a year after alleged dumping is first observed, and actual duties are rarely assessed until a year after that, antidumping duties are almost never levied on the shipments that caused the actual injury complained of. If the procedure could be streamlined and the periods of reaching determinations shortened, then the weight of the remedy would fall closer to the occurrence of the damaging sales.

To bring the remedy closer to the offense and offender, the procedure for bringing in goods after a final determination has been made should be changed. Instead of permitting the importer simply to post a bond to cover possible duties, actual estimated dumping duties should be deposited in cash. If the final assessment of duties is less, a refund could be made. This is the practice in the EC and Canada and there is every reason for the United States to do the same.

Use of the Historic Dumping Margin as a Basis for Depositing Estimated Duties

If, after a foreign supplier is accused of having made LTFV sales that injure a domestic industry and the shipments from abroad start coming in at a higher price, these shipments will pay smaller, if any, antidumping duties. The current Act is remedial and not punitive in this regard. Yet, this practice creates no incentive to the foreign supplier to avoid the dumping that caused injury; those imports would be beyond the reach of the duties, since those entries will have been liquidated even before appraisement is withheld at the tentative determination stage.

We might go so far as to consider whether there is sense in applying an added duty, based on the historic margin of dumping on all shipments after withholding begins. Thus, the exporter could not avoid being answerable to some degree for violation of the Act. He would have an incentive to avoid future LTFV sales, as the prices in any quarter would be relevant for computing the dumping margins for later periods. But such a change would not be consistent with the current version of the Code. It would render more penal what is intended to be a remedial law. Nevertheless, the deposit of estimated duties at historic margins would appear to be a reasonable procedure to create greater incentives to avoid dumping, supply timely information and protect the revenue.

Improved Settlement Procedures

Concern that foreign exporters may take a "free bite" at our market led Treasury in the early 1970s to abandon its prior policy of suspending—if not terminating—any antidumping proceedings upon the receipt of assurances from the exporters concerned that further sales at less than fair value would cease. The policy of discontinuing proceedings upon the receipt of such assurances has generally been limited to exporters whose margins of dumping were deemed minimal—roughly 1 to 1.5 percent. The Canadian authorities have never discontinued cases upon the receipt of assurances. They were the first to have an antidumping law and are, in a sense, the true believers. On the other hand, the EC and Australia, the other two jurisdictions actively applying antidumping measures, are far more flexible, emulating both earlier United States practice and the apparent contemplation of the Code.

After some experience with this problem it may be desirable for us to consider a middle ground: a more liberal policy of settlements would allow for quick remedies without the friction that results from contested cases, yet would not require administrative winking at

instances of flagrant disregard of the Act. We must be particularly careful that any policy of liberalized discontinuance based on assurances does not provide a convenient cover for agreements between domestic and foreign industries concerned to increase prices in the United States market with the blessing of a government agency. Therefore, an expanded settlement policy would also appear to demand some earlier and more complete injury determination than now exists, together with the receipt of some significant evidence that LTFV sales did in fact occur.

Reduced Adjustments

One of the greatest obstacles to rapid antidumping action is the need, under present practice, to calculate and verify the adjustments claimed by all sides to the prices we compare. The premise of the law is that the prices of like merchandise, sold at the same level of trade, and at about the same moment of time, in the two relevant markets, will be placed side by side and a simple difference or similarity identified. But the world is not so simple. Merchandise—particularly consumer products—may differ widely. TV sets sold in Japan are wired differently than those made for United States sale; their cabinetry and accessories may differ greatly. Moreover, distribution methods vary widely making the comparison of trade levels difficult. In Austria, so-called wholesalers buy fifty ski bindings for resale to sports shops; a United States retailer may buy 5,000 at a time. Can a level of trade adjustment be recognized? We spend enormous resources considering claims for warranty expenses, credit costs, after sale servicing and technical advice, advertising expenses as well as for the physical differences in the products being compared. And each of the latter may involve their own small cost of production analysis. The system has become so encumbered with detail—much of it of minimal impact on the final result—that we have begun to consider limiting the adjustments to those that, within recognized categories, are equal to at least some minimally important threshold—perhaps one percent. The result will favor some exporters, and will disfavor others. But it should expedite all cases and thus help both the domestic industry for whom the law exists and foreign interests with proper rights of access to our market.

Self-Initiation of Complaints Based on Prior Investigation

One means of solving the delays and complications we have encountered in making elaborate cost investigations in important industries may be to do more of the work ahead of time. In essence, the

steel Trigger Price Mechanism (hereinafter TPM) program[9] was designed to do just that. It is a creative response to a number of problems the steel industry had been experiencing. Steel is a key industry that had become troubled by low profitability, excess capacity and unemployment. It appeared that part of its problem was caused by competition from exceedingly cheap foreign steel. But applying the antidumping law as is was not an adequate response for two reasons.

First, the process is lengthy. By the time a set of complaints were filed, investigated and taken to a conclusion, the threatened harm may have already been done. Second, the process is oriented to specific products and to specific producers. Thus, an unfair practice could easily be shifted to a slightly different product or a different country, causing the whole procedure to be taken up from the beginning. In fact, the steel industry tried to overcome this problem by filing antidumping complaints against more than a dozen steel products from ten different countries. But steel comes in many forms, from more than two dozen sources.

The TPM was designed to meet these objections. It is a means of determining the need for, and if necessary, implementing, conventional antidumping remedies in an expedited manner. A set of trigger prices was established at the level of our best estimates of the costs of the world's most efficient steel industry—the Japanese—plus the cost of bringing that steel into the four major importing regions of the country. Using special invoices, importers must report the actual prices of their imports as well as of comparable foreign steel products, and the import prices are compared with our trigger prices. If steel is being imported below the trigger prices, it is a signal for Treasury to consider the matter—to trigger an investigation. If, on reflection, it appears that an antidumping proceeding should be initiated, Treasury can do so *sua sponte*, and many of the demands of the investigation can be satisfied from the special records and research already performed under the TPM.

This procedure has created two new pieces of antidumping jargon. The word used to describe Treasury's response to a case of probable dumping is "self-initiation." What it self-initiates is called a "fast-track" antidumping investigation, because it can hopefully be completed in a shorter period than the year taken in conventional cases. How well this will work is now being tested. Three fast-tracks were initiated in October, 1978 with respect to steel plate sold by companies in Spain, Poland and the Republic of China.[10]

A few points about the TPM must be made clear. First, sales below the trigger prices do not prove that dumping has occurred. The only consequence is that the invoice reflecting the sale will come to the attention of Customs personnel, who will put the information together with a large number of other facts.

Second, the trigger prices are not minimum prices. A foreign exporter is perfectly entitled to sell at below trigger prices if it is above his costs and at least equal to his home market price. A few Canadian producers have proven they can do so with some items.

Third, selling over the trigger price does not shield a company from an antidumping complaint. Many foreign producers may well have home market prices and costs in excess of our triggers. In such cases, a sale at the reference price may be an LTFV sale. However, the United States industry has contended that it could compete with foreign steel if it were priced at least at the full cost of production by the most efficient foreign producers plus their importation costs. Therefore, sales at or above trigger—even if at LTFV—are, in most cases, not likely to be injurious.[11] Moreover, to the extent a more efficient producer in country X has unused capacity, presumably it would fill the gap left by any producer in Y, whose LTFV sales at trigger prices were halted by a dumping case. The TPM has faced, and survived, one legal challenge. In *Davis-Walker Corp. v. Blumenthal,*[12] a producer of wire products sued the Secretary of the Treasury on the grounds that he had no authority to institute the TPM, and even if he had, he violated the requirements of the Administrative Procedure Act. The plaintiff was an importer of steel products who produced wire rod. The plaintiff's inputs were included in the TPM, but some of its output was not. While the prices of this company's inputs rose, it received no measure of extra protection for its output. The court held that the Secretary had the power under the Antidumping Act to self-initiate dumping cases, and that the TPM was lawfully implemented.

A system like the TPM could be employed in other lines of commerce should the occasion arise. But the costs are large, and we do not regard it as more than a temporary solution to a major industry's critical problem. It has caused some increases in import prices and has caused the government to use substantial resources to monitor trade and to investigate imports, with perhaps modest results if measured by the volume of imports. However, it was and is superior to the alternatives. The earlier approach to the problem—Voluntary Restraint Agreements (VRA)—raised serious antitrust questions and was awkward from a diplomatic standpoint as private foreign manufacturers concluded international trade agreements with the United States government. "Orderly marketing agreements" negotiated between governments are essentially quotas, which create worse distortions and have even greater inflationary effects in markets where domestic demand increases. We think the TPM achieves the objectives of the antidumping laws without disrupting the price mechanism altogether. But it is clearly a high-cost program to be reserved only for the most unusual situation that faced the steel industry in 1977.

Publication of Decisions

Currently the only available means of keeping abreast of decisions is to research the unindexed Treasury Decisions and the Federal Register. Publication and indexing of the decisions of Treasury and the ITC should provide us and the rest of the interested world with a much greater ability to do the right thing. It will surely give an incentive to the opinion writers to document the basis of their decisions. At least one publisher has committed itself to setting up an information and reporting service on antidumping and countervailing duty cases by mid-1979. This goal may now be within sight.

NOTES

1. Ch. 14, tit. II, 42 Stat. 11 (1921), *as amended*, 19 U.S.C. §§ 160–73 (1976).
2. Ch. 11, § 5, 30 Stat. 205 (1897), *as amended*, 19 U.S.C. § 1303 (1976).
3. 19 U.S.C. § 160 (1976).
4. 19 U.S.C. § 1337 (1976).
5. 19 U.S.C. § 2411(d) (1976).
6. 19 U.S.C. § 2436 (1976).
7. Outboard Marine Corp. v. Pezetel, No. 77–51 (D.Del. Sept. 27, 1978), 1978–2 Trade Cas. ¶ 62,334. After the ITC decision in Electric Golf Carts from Poland, AA1921–147, USITC Publ. 740 (1975), plaintiffs filed suit against the Polish manufacturer of golf carts, alleging violations of the Sherman Act, 15 U.S.C. §§ 1, 2 (1976); the Wilson Tariff Act, 15 U.S.C. § 8 (1976); and the Antidumping Act of 1916, 15 U.S.C. § 72 (1976). All of the counts of the complaint were dismissed except the Sherman Act section 2 charge.
8. *See* Hudec, *United States Compliance with the 1967 GATT Antidumping Code, post.*
9. *See* Hemmendinger, *The Antidumping Act: Proposals for Change, post.*
10. *See* 43 Fed. Reg. 49,875 (1978).
11. In January, 1979, the Treasury Department published an Antidumping Proceeding Notice concerning Carbon Steel Plate from Belgium, France, the Federal Republic of Germany, the Netherlands and the United Kingdom, 44 Fed. Reg. 2,053 (1979), based on a petition filed by Lukens Steel Company that expressly claimed injury from sales above trigger prices but below the exporters' fair value. As the same product from Japan was under a finding of dumping published in the *Gilmore* case, 43 Fed. Reg. 22,937 (1978), and Treasury had self-initiated proceedings against exporters of this product that were selling it *below* trigger prices from Poland, Spain, and Taiwan, 43 Fed. Reg. 49,875 (1978), prosecution of this limited complaint was not regarded by Treasury as inconsistent with its trigger price mechanism. The self-initiated proceeding concerning Spain was terminated, as was the investigation based on Lukens' petition concerning the United

Kingdom 43 Fed. Reg. 54,315 (1978); 44 Fed. Reg. 11,285 (1979). At the writing of this article (March 1, 1979), a Final Determination of Sales at Less Than Fair Value had been published concerning the product from Taiwan 44 Fed. Reg. 9,639 (1979) and a Tentative Determination had been published concerning Polish steel plate. 44 Fed. Reg. 7,005 (1979).

12. Davis-Walker Corp. v. Blumenthal, 460 F. Supp. 283 (D.D.C. 1978); INT'L LEGAL MATERIALS 992 (1978).