

University of Michigan Journal of Law Reform

Volume 11

1978

The Trigger Price Mechanism: Limitation on Administrative Discretion under the Antidumping Laws

Mark Alan Kantor
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mjlr>



Part of the [International Trade Law Commons](#)

Recommended Citation

Mark A. Kantor, *The Trigger Price Mechanism: Limitation on Administrative Discretion under the Antidumping Laws*, 11 U. MICH. J. L. REFORM 443 (1978).

Available at: <https://repository.law.umich.edu/mjlr/vol11/iss3/9>

This Note is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

The Trigger Price Mechanism: Limitation on Administrative Discretion under the Antidumping Laws

The world steel market, long subject to cyclical fluctuations, is presently faced with a severe problem of overproduction. United States producers of steel in particular have suffered difficulties in the current crisis.¹ While the industry's problems are not new, conditions of slack demand and overcapacity have recently resulted in the implementation of a new system to administer the antidumping laws of the United States to curb imports of foreign-produced steel. This article will describe and evaluate this new system, the trigger price mechanism (TPM), and consider its role as a constraint on the administrative discretion of the United States Department of the Treasury.

I. SUBSTANTIVE PROBLEMS OF THE U.S. STEEL INDUSTRY

World raw steel production has grown rapidly in the postwar years, rising from a total of approximately 207 million net tons in 1950 to 783 million net tons in 1974. At the same time, the share of production attributable to United States producers has steadily eroded from forty-seven percent to seventeen percent.² While steel making capacity is dispersed throughout the world, production remains concentrated in the more developed economies. The USSR, the United States, the European Communities (EC), and Japan produce about three-fourths of the world's raw steel.³

Domestic consumers are the dominant purchasers of United States-produced steel. Because of the size of the American market, however, this country has been a target of exports by foreign producers.⁴ Imports of

¹N.Y. Times, Oct. 17, 1977, at 51, col. 4.

²FEDERAL TRADE COMMISSION, STAFF REPORT ON THE UNITED STATES STEEL INDUSTRY AND ITS INTERNATIONAL RIVALS: TRENDS AND FACTORS DETERMINING INTERNATIONAL COMPETITIVENESS 5-6 (Dec. 1977) [hereinafter cited as FTC STAFF REPORT].

³The United States accounted for approximately one-half of the total world steel production in 1950, but only about one-sixth in 1976. In that year, the U.S.S.R. produced 147 million metric tons of raw steel, followed by the United States with production of 116 million tons, and Japan with 107 million metric tons. The countries of the European Communities (EC), together, produced 134 million metric tons of steel. *Id.* at 6-8. From 1955 to 1976, raw steel production increased by only 9% in the United States, compared to 84% in the EC and 1,038% in Japan. THE COUNCIL ON WAGE AND PRICE STABILITY, REPORT TO THE PRESIDENT ON PRICES AND COSTS IN THE UNITED STATES STEEL INDUSTRY 8 (Nov. 1977) [hereinafter cited as COWPS REPORT].

⁴FTC STAFF REPORT, *supra* note 2, at 9.

raw steel rose from 1.5 percent of apparent United States consumption of steel in 1957 to almost eighteen percent in 1977.⁵ Over the same time period, American industry employment fell from more than 500,000 hourly workers to fewer than 370,000.⁶ Moreover, domestic production has grown at a far smaller rate than the world average.⁷ Clearly, the United States steel industry is undergoing a relative contraction. This conclusion does not prove, however, that these economic dislocations have been caused by anything more than normal competitive processes.

There are several possible explanations of the difficulties faced by the United States steel industry. Critical observers of the industry, after examining the historical increase in steel imports, argue that the continuing loss of domestic market share is due to the relative efficiency of foreign steelmakers and the willingness of foreign steel exporters to price in a flexible manner.⁸ It is also claimed that poor management of United States steel producers has contributed to this erosion of market share.⁹ This line of reasoning suggests that increased imports are a reflection of worldwide price competition and will bring positive benefits to American consumers.

Management and labor union spokesmen contend, however, that the steel industry's problems are the result of both excessive federal regulation and unfair international trade practices, principally dumping.¹⁰ Dumping is the sale in the United States of foreign products below "fair value," normally measured by the home market prices of the exporting producer, which injures or is likely to injure a domestic industry.¹¹ Domestic steel firms have filed an unprecedented number of petitions¹² under the Antidumping Act of 1921, as amended,¹³ asking for relief from

⁵See FTC STAFF REPORT, *supra* note 2, at 70 (Table 2.24: Growth Trends in Production, Shipments, Imports and Exports of Steel Mill Products: 1950-1976), and INTERAGENCY TASK FORCE, REPORT TO THE PRESIDENT: A COMPREHENSIVE PROGRAM FOR THE STEEL INDUSTRY 9 (December 6, 1977) [hereinafter cited as Solomon Report], [reprinted in *Administration's Comprehensive Program For The Steel Industry: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 95th Cong., 2d Sess. 3-38 (1978) [hereinafter cited as *Hearings*]]. The negotiation of Voluntary Restraint Agreements (VRA) with the major Japanese and EC steel producers for tonnage limits on exports from 1969 through 1974, discussed in *Consumers Union of U.S., Inc. v. Kissinger*, 506 F.2d 136 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975), renders these numbers inadequate for determining the potential foreign penetration of the U.S. market.

⁶Solomon Report, *supra* note 5, at 3.

⁷FTC STAFF REPORT, *supra* note 2, at 6.

⁸Solomon Report, *supra* note 5, at 10.

⁹*But see* FTC STAFF REPORT, *supra* note 2, at 472-512, and particularly the conclusions at 528-30.

¹⁰Solomon Report, *supra* note 5, at 10.

¹¹*See* text accompanying notes 21-39 *infra* for a fuller discussion of the statutory elements of an antidumping violation.

¹²*See, e.g.*, notices of Treasury Department investigations, prompted by petition, covering carbon steel plate from Japan, 42 Fed. Reg. 16,883 (Mar. 30, 1977), welded stainless steel pipe and tubing from Japan, 42 Fed. Reg. 16,883 (Mar. 30, 1977), steel wire strand for prestressed concrete from Japan, 42 Fed. Reg. 60,034 (Nov. 23, 1977), and cold rolled and galvanized carbon steel sheets from Belgium, France, the Federal Republic of Germany, Italy, The Netherlands, and the United Kingdom, 42 Fed. Reg. 61,348-54 (Dec. 2, 1977).

¹³19 U.S.C. §§ 160-172 (1970 & Supp. V 1975).

these practices. They contend that the dramatic surge in imports, from 14.3 percent in 1976 to almost eighteen percent in 1977¹⁴ cannot be explained as a competitive response to market conditions, since growth of United States demand for steel and United States prices have increased only gradually. Further, they argue that maintenance of full employment in Western Europe and Japan is considered a fundamental social policy.¹⁵ Consequently, unlike the United States where labor lay-offs and contractions are more common, labor in the EC and Japan is a fixed cost of production. When overcapacity and slack demand press upon foreign steel firms, their response allegedly is to find additional markets¹⁶ by selling below average production costs, thereby leading U.S. purchasers to switch to foreign producers of steel. The result of this dumping is to shift the unemployment burden from foreign firms to United States steel firms.¹⁷

The antidumping laws may be employed to protect consumers against a loss in economic welfare as well as to shield American industries by erecting protective barriers to imports. Dumping by a foreign producer can harm consumers in two circumstances. The first of these is monopolization of the import market by a foreign concern through predatory pricing,¹⁸ and the second is temporary exportation of products at below cost by the foreign firm to maintain production and employment at home.¹⁹ In either case, artificially low prices may force domestic producers out of business and may reduce the available supply of the product to consumers over the long run.²⁰

II. UNITED STATES ANTIDUMPING LAW

The Antidumping Act of 1921,²¹ administered by the Treasury Department, has provided the primary basis for the American response to the recent increase in steel imports.²² In proscribing dumping, the Act authorizes the imposition of customs duties equal to the margin of dumping found upon final determination that the law has been violated.²³ The

¹⁴FTC STAFF REPORT, *supra* note 2, at 70 and Solomon Report, *supra* note 5, at 9.

¹⁵*See, e.g.*, Putnam, Hayes & Bartlett, Inc., *Economics of International Steel Trade: Policy Implications for the United States* 16 (May 1977) (report to the American Iron and Steel Institute).

¹⁶*Id.* at 18.

¹⁷*See, e.g., Hearings, supra* note 5, at 226 (Statement of Hon. Ralph Regula).

¹⁸ *See* W. Wares, *An Evaluation of the Provisions and Recent Administrative History of the United States Antidumping Act of 1921*, at 190-95 (1976) (unpublished Ph.D. dissertation in the University of Michigan Economics Department).

¹⁹*Id.* at 183-90.

²⁰If supply is restricted while consumer demand remains unrestrained, it is evident that purchasers will be forced to pay higher prices for the product.

²¹19 U.S.C. §§ 160-172 (1970 & Supp. V 1975). The Act was extensively amended by § 321 of the 1974 Trade Act, Pub. L. No. 93-618, 88 Stat. 1978 (Jan. 3, 1975) [hereinafter cited as 1974 Trade Act].

²²Solomon Report, *supra* note 5, at 4. *See also* note 12 *supra*.

²³19 U.S.C. § 161 (1970).

Treasury Department, at its discretion, may initiate an antidumping investigation.²⁴ When complaints are initiated by private parties, however, it must determine within thirty days whether to begin an investigation.²⁵ Once an investigation is undertaken, the Treasury Department must determine if sales of the foreign-produced good in U.S. markets are at "less than fair value" (LTFV).²⁶ In making this evaluation, the Treasury compares the "purchase price" or "exporter's sales price" with one of three standards measuring foreign value. The difference constitutes the "margin of dumping."²⁷ When the U.S. importer and the foreign exporter are unrelated, the Antidumping Act requires the Treasury to rely for its calculations on the "purchase price," defined as the price at which the importer purchased the merchandise plus any other costs normally included in the factory price.²⁸ If the U.S. importer is commercially related to the foreign exporter, the Act substitutes a determination of the "exporter's sales price" as the appropriate standard. This is essentially the price at which the American importer resells the article in the domestic market, adjusted to arrive at a calculated net f.o.b. factory price.²⁹

Once the purchase or exporter's sales price has been calculated, it is compared against one of three standards of foreign value. In calculating the foreign market value of American imports, the Treasury is directed to use the home-market price of that good whenever possible.³⁰ If the home-market price cannot be ascertained, foreign market value is computed from the price of goods exported to third-party countries.³¹ Where home-market and third-party prices are less than the exporter's cost of production, the Treasury uses a "constructed value" in conducting antidumping inquiries.³² "Constructed value" is the sum of the costs of materials, fabrication and processing, packing, and general expenses and profits. The statute mandates minimum levels for general expenses and profits of 10 percent and 8 percent, respectively, of the cost of materials, fabrication and processing.³³ Upon determination of the foreign market value, the Treasury compares it with the purchase or exporter's sale price to arrive at the margin of dumping.

The Treasury is required to issue a Tentative Determination within nine months after a full-scale investigation has begun.³⁴ If the Tentative Determination indicates that sales LTFV are likely to be found, the Treasury must suspend customs value appraisal on the merchandise in question.³⁵

²⁴19 U.S.C. § 160(a) (Supp. V 1975).

²⁵19 U.S.C. § 160(c)(1) (Supp. V 1975).

²⁶19 U.S.C. § 160(a) (Supp. V 1975).

²⁷19 U.S.C. § 161 (1970).

²⁸19 U.S.C. § 162 (Supp. V 1975).

²⁹19 U.S.C. § 163 (Supp. V 1975).

³⁰19 U.S.C. § 164(a) (Supp. V 1975).

³¹*Id.*

³²19 U.S.C. § 164(b) (Supp. V 1975).

³³19 U.S.C. § 165(a) (1970).

³⁴19 U.S.C. § 160(b)(2) (Supp. V 1975).

³⁵19 U.S.C. § 160 (b)(1)(b) (Supp. V 1975). Customs appraisal is the practice of assessing

Such merchandise may thereafter be imported only if covered by a bond equal to the tentative margin of dumping.³⁶ Following publication of the Tentative Determination, all interested parties may make written and oral representations before a Final Determination is announced.³⁷ If the Final Determination, which must be made within 90 days of the Tentative Determination, is affirmative, the case is referred to the U.S. International Trade Commission (ITC) to determine whether the LTFV sales have caused or are likely to cause injury to a domestic industry.³⁸ If the ITC finds such injury, the Treasury publishes a dumping finding and assesses antidumping duties equal to the final margin of dumping on all imports as to which appraisal was withheld and on all further imports of the product sold at dumping margins.³⁹ The entire administrative process generally consumes thirteen months.⁴⁰ The prospect of judicial review, which may focus on only the LTFV determination, further extends this time period.

III. INADEQUACIES OF THE ANTIDUMPING ACT

The existing scheme for enforcing the Antidumping Act suffers from three primary deficiencies: the cumbersome nature of the procedure, the specific product orientation of investigations and remedies, and the Treasury's unbridled investigatory discretion. Commentary on the insufficiency of antidumping provisions has focused on the time consuming aspect of the procedure.⁴¹ Enforcement procedures, from drafting of the complaint through imposition of a dumping duty, require sixteen to seventeen months to complete.⁴² Judicial intervention after completion of administrative action may further delay final relief. Consequently, sudden surges of "dumped" imports can entirely evade action by the Treasury. Where dumping is predicated on short-term exporting designed to maintain production and employment, the practical inability to reach temporary conduct may render the Act ineffective.⁴³

the value of an article for the purpose of computing an ad valorem tariff on importing the article.

³⁶19 C.F.R. §§ 153.50-153.51 (1977). The effect of requiring that bond be posted has been described as potentially "devastating." Fisher, *The Antidumping Law of the United States: A Legal and Economic Analysis*, 5 LAW & POL. INT'L BUS. 85, 96 (1973).

³⁷19 U.S.C. § 160(d)(1) (Supp. V 1975). Prior to the 1974 Trade Act revision, § 321(a)(2)(d)(1), opportunity to make a presentation was at the discretion of the Secretary of the Treasury. See Fisher, *supra* note 36, at 96.

³⁸19 U.S.C. § 160(a) (Supp. V 1975).

³⁹19 U.S.C. §§ 160(a), 161 (1970 & Supp. V 1975).

⁴⁰Solomon Report, *supra* note 5, at 12.

⁴¹See Solomon Report, *supra* note 5, at 12.

⁴²This estimate includes the time necessary for preparation of a complaint. Transcript of Department of the Treasury Press Conference by Robert W. Crandall and Peter D. Ehrenhaft at 25-26 (Jan. 3, 1978) [hereinafter cited as Treasury Press Conference]:

Question: How long is it likely to take American producers to follow a dumping case all the way through the ITC and to the end?

Mr. Ehrenhaft: The average time today is 13 months following the filing of the complaint, but if you add to that the time that it takes to prepare the complaints, probably it takes 16, 17 months. This is intended to compress that significantly.

⁴³Solomon Report, *supra* note 5, at 12.

Unfair product sales designed to monopolize the import market must occur on a continuing basis, however, and therefore would seem to be within the reach of enforcement efforts. The problem remains, nevertheless, because antidumping investigations and remedies concentrate on specific products. Complaints may be brought only with respect to specific types of merchandise, and only specific products are subject to the Act's remedies.⁴⁴ Foreign producers intent on continuing unlawful imports can easily shift to a related product which is outside the scope of the investigation and persist in unfair price discrimination between national markets.⁴⁵ Only recently have domestic steel producers attempted to combat this practice by filing a battery of antidumping petitions covering a broad range of steel products.

The Treasury also has been criticized for exercising its discretion in initiating investigations to avoid antagonizing foreign governments. Until the advent of the 1974 amendments, it is alleged, the Treasury consistently refused to press antidumping investigations that might affect sensitive trade relations with other countries.⁴⁶ While this exercise of discretion was circumscribed by the introduction of maximum time limits on procedural steps in 1974, including a requirement that the Treasury either begin an investigation or refuse to do so within thirty days of receiving a complaint,⁴⁷ the discretion of the Treasury to initiate and carry through to completion antidumping prosecutions remains relatively unhampered.⁴⁸

The strong response of domestic steel producers to the influx of imports into the American market, including the filing of numerous antidumping complaints, led to the formation of an Interagency Task Force on Steel by the Carter Administration in late 1977. In the report by the Task Force to the President,⁴⁹ popularly known as the Solomon Report, a policy program for relief of the United States steel industry was developed. While the Solomon Report recommends a series of measures to deal with long term problems of the industry, including modernization and environmental regulation,⁵⁰ the centerpiece of the program is a system of trigger

⁴⁴19 U.S.C. §§ 160(a) and 161(a) authorize imposition of dumping duties only on those products subject to a specific investigation. The Treasury Department may not, for example, impose dumping duties on steel wire based on an affirmative finding of dumping with respect to steel tubing. Consequently, the Department must investigate both products. See the notices of antidumping investigations in 42 Fed. Reg. 60,034 (Nov. 23, 1977) (steel wire strand for prestressed concrete) and 42 Fed. Reg. 16,883 (Mar. 30, 1977) (steel pipe and tubing), as an example of investigations into related products.

⁴⁵Solomon Report, *supra* note 5, at 13.

⁴⁶Samuelson, *The Anti-Dumping Laws—Rx for the Steel Industry*, 9 NAT'L J. 1636, 1637 (1977).

⁴⁷1974 Trade Act, § 321(a), 19 U.S.C. § 160 (Supp. V 1975).

⁴⁸The 1974 amendments set maximum time limits on the various procedural steps in a Treasury Department investigation, provide for notice through publication of all major Treasury actions, and provide an opportunity for manufacturers, importers and exporters to demand a hearing prior to a Final Determination. See 1974 Trade Act, § 321(a), 19 U.S.C. § 160 (Supp. V 1975).

⁴⁹Solomon Report, *supra* note 5.

⁵⁰The Solomon Report, *supra* note 5, at 21-35, proposed, *inter alia*, reducing the guidelines for useful life depreciation of new steel industry machinery and equipment under I.R.C. § 167(m) from 18 to 15 years, additional funds be made available for industrial loan guarantees, providing funds for assistance to individuals, business and public services in communities hit hard by steel-related unemployment, and support for conversion of aban-

prices for monitoring steel import prices and for initiating antidumping investigations.⁵¹ Acting under the authority of Section 201(a) of the Antidumping Act of 1921, as amended,⁵² the Treasury Department implemented the trigger price system recommended in the Solomon Report.⁵³

IV. THE TRIGGER PRICE SYSTEM

A. Operation of the TPM

The TPM consists of four parts:⁵⁴

- (1) the identification and publication of trigger prices for steel products imported in the United States;
- (2) the adoption of a special Summary Steel Invoice for use by the Customs Service in administering the trigger price system;
- (3) the continuous collection and analysis of information on the cost of production and the prices of steel products in the principal countries of export for use in calculating the trigger prices, and information on the condition of the United States steel industry; and
- (4) the expedited administration of antidumping proceedings for imports below the levels set by the trigger prices.

The system, as discussed below, is a self-imposed restraint on the Treasury Department's discretion to initiate enforcement activities under the Antidumping Act. This restraint on investigatory and prosecutorial discretion is accompanied by public guidelines, the trigger prices themselves, which place foreign producers on notice as to how the Treasury will exercise its discretion in targeting steel imports for investigation.

The trigger prices are calculated from the estimated cost of steel production in the most efficient exporting country, currently Japan, based on the best evidence available.⁵⁵ Profit and general expense factors, as well as appropriate capital charges, are incorporated in the cost of production.

done steel facilities into alternative uses. In the area of environmental regulation, the Report urged better coordination between the Environmental Protection Agency and the Occupational Safety and Health Administration, and a continuing dialogue with the steel industry.

⁵¹Solomon Report, *supra* note 5, at 13-20.

⁵²19 U.S.C. § 160 (Supp. V 1975).

⁵³43 Fed. Reg. 1464 (Jan. 9, 1978).

⁵⁴42 Fed. Reg. 65,214, 65,215 (Dec. 30, 1977) (to be codified in 19 C.F.R. Part 141) (Proposed Amendments to the Customs Regulations Relating to the Documents and Information Required to be Filed at the Time of Importation of Certain Articles of Steel).

⁵⁵In the course of publishing the base prices for certain imports of steel mill products, 43 Fed. Reg. 1464 (Jan. 9, 1978), the Treasury Department discussed at length the methodology it used for constructing the trigger prices. The methodology is similar to that used in the COWPS Report, *supra* note 3, but the product coverage is different. In addition, the estimated costs of production constructed for use in the TPM are based primarily on information from the large, integrated Japanese steelmakers. This data was supplied to the Treasury by the Japanese Ministry of International Trade and Industry. The COWPS REPORT conclusions are based on average cost data for the Japanese steel industry as a whole. 43 Fed. Reg. at 1464.

Importation costs, excluding tariffs, are then added to the calculated cost of production to arrive at the Treasury trigger price. Trigger prices have been established for a number of specified categories of raw steel products, but fabricated steel articles are not covered by the system.⁵⁶

Imports below the level of the trigger price are subject to an antidumping investigation conducted by the Treasury.⁵⁷ Because the information used in constructing the trigger prices will be used in steel antidumping investigations, the Solomon Report contemplates an expedited investigation. Whereas de novo examinations take thirteen months or more, the Report suggests that the Treasury will complete most steel cases identified by the TPM within ninety days.⁵⁸ Once a Tentative Determination of dumping has been reached, withholding of appraisal may be imposed retroactively under existing authority.⁵⁹ Upon a Final Determination, the case is referred to the ITC for what the Task Force clearly hoped will be a similarly expedited injury determination.⁶⁰

The TPM is in form exclusively a procedure allowing the Treasury Department to initiate and expedite an investigation, without the impetus of a private industry petition, into sales of foreign steel products which may have been made at an LTFV price. The trigger price system merely identifies those cases in which the Treasury will initiate an investigation, and since such self-initiation is presently a matter of de facto administrative discretion,⁶¹ the implementation of the system does not affect the legal rights of private parties under the Antidumping Act.⁶² Foreign firms, of course, may still contest an LTFV determination by the Treasury.⁶³ Where the Treasury does not initiate an investigation because the merchandise in question entered the United States at a price above the relevant trigger, domestic firms may file a complaint with the Treasury requesting an investigation.⁶⁴ In such cases, where sales at LTFV have occurred but are above the trigger price, the domestic firm is likely to encounter difficulty in proving the requisite "injury" before the ITC.⁶⁵ In proposing the trigger system, the Solomon Report accepted the United States industry position that domestic firms are fully competitive with foreign producers where sales are not made below the actual cost of pro-

⁵⁶See U.S. Department of the Treasury, U.S. Customs Service, *Trigger Price Mechanism: Questions and Answers*, Attachment 3 (Feb. 10, 1978). Domestic steel fabricators are expected to seek trigger pricing protection. *The Opposition Grows to Reference Pricing*, BUS. WEEK, April 10, 1978 at 30. The program included 17 steel mill products when it was first set up, but has since swollen to 84 products. *Tarnished Shield: 'Trigger-Price' System to Help Steel Industry Triggers Much Dismay*, Wall St. J., Sept. 26, 1978, at 1, 19 col. 1.

⁵⁷See Solomon Report, *supra* note 5, at 16.

⁵⁸*Id.*

⁵⁹Authority for retroactive withholding of appraisal currently exists under 19 C.F.R. § 153.34(a) (1977).

⁶⁰Solomon Report, *supra* note 5, at 16.

⁶¹See note 24 and accompanying text, *supra*.

⁶²Solomon Report, *supra* note 5, at 14. The point is reemphasized in 43 Fed. Reg. 1464, 1468 (Jan. 9, 1978).

⁶³19 U.S.C. § 1514 (1970).

⁶⁴19 U.S.C. § 1516 (Supp. V 1975).

⁶⁵See Solomon Report, *supra* note 5, at 18.

duction for the most efficient Japanese steel makers. So long as steel prices remain at or above this level, the United States industry position is that domestic products are capable of meeting international competition. Following that argument to its conclusion, it is clear that sales by a foreign producer, which are below that firm's cost of production but above the cost of production for the most efficient Japanese firms presently employed as a base for the trigger prices, will not be found by the ITC to have injured the domestic industry.⁶⁶ In drafting the TPM, the Task Force contemplated that steel antidumping cases not initiated by the Treasury under the new system would be a waste of both public and private resources. Consequently, steel producers who are less efficient than the Japanese, such as the Western European concerns, will be effectively insulated from prosecution under the Antidumping Act.⁶⁷

*B. TPM as Administrative Rulemaking:
Procedural Requirements and Judicial
Review*

In administering the Antidumping Act, the Treasury was faced with a choice between establishing a pattern of enforcement emerging out of a succession of investigations and determinations, and creating a bright-line standard of behavior embodied in specific trigger prices. By adopting the TPM, the Treasury effectively promulgated a "rule" governing its discretion, primarily to ensure a solution to the three problems of the statutory enforcement scheme noted above. The procedure should become less cumbersome, since use of data collected as part of the procedure for maintaining the trigger prices will replace the prior time-consuming, case-by-case collection of data.⁶⁸ By establishing a series of prices cover-

⁶⁶See Treasury Press Conference, *supra* note 42, at 20-21; Transcript of White House Briefing by Anthony M. Solomon, Under-Secretary of the Treasury for Monetary Affairs 4 (Dec. 6, 1977).

⁶⁷On December 2, 1977, the Treasury published notices of initiation of antidumping investigations into cold rolled and galvanized carbon steel sheets produced in the major EC countries. 42 Fed. Reg. 61,348-54 (Dec. 2, 1977). On June 8 of the following year, the Treasury announced that an LTFV determination as to these imports "cannot reasonably be made in six months" and extended its investigatory period for an additional three months pursuant to § 201(b)(2) of the 1974 Trade Act, 19 U.S.C. § 160(b)(2). 43 Fed. Reg. 24,933 (June 8, 1978). By way of comparison, the Solomon Report, *supra* note 5, at 16, contemplated a 90-day investigatory period. Finally, on August 15 the petitioner withdrew its request for an investigation and the investigation was terminated without prejudice. 43 Fed. Reg. 37,052 (August 21, 1978).

⁶⁸*Cf.* National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974), where the District of Columbia Circuit Court of Appeals upheld the authority of the FTC to promulgate Trade Regulation Rules giving greater specificity to the statutory standard of conduct proscribing "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce." As Judge J. Skelly Wright, speaking for the majority, noted:

Without the rule, the Commission might well be obliged to prove and argue [that the same activity] in each particular case was likely to have injurious and unfair

ing a broad spectrum of products, the Treasury also expects to prevent evasion of antidumping enforcement by foreign enterprises which previously switched to unscrutinized products when appraised of an antidumping investigation.⁶⁹ Finally, by promulgating and publishing the trigger prices, the Treasury circumscribes its own investigatory and prosecutorial discretion.⁷⁰

The analogy between the TPM and regulatory rules, however, is incomplete in two respects.⁷¹ In the first place, promulgation of the mechanism by the Treasury did not include the usual procedural requirements for rulemaking⁷² because the TPM was considered exempt from the requirements of the Administrative Procedure Act (APA). In addition to falling within the express foreign affairs exemption to the APA,⁷³ the trigger price system was exempted from the APA because it was promulgated under a finding of "good cause . . . that notice and public procedure . . . are impracticable, unnecessary, or contrary to the public interest."⁷⁴ The basis for this finding by the Treasury is, however, questionable. While expediting implementation of the TPM may be a laudable goal, it cannot successfully be distinguished from similar goals in a wide variety of government programs clearly subject to APA procedures. Indeed, the only

effects on consumers or competition. Since this laborious process might well have to be repeated every time the Commission chose to proceed subsequently against another defendant on the same ground, the difference in administrative efficiency between the two kinds of proceedings is obvious. Furthermore, rules, as contrasted with the holdings reached by case-by-case adjudication, are more specific as to their scope, and industry compliance is more likely simply because each company is on clearer notice whether or not specific rules apply to it.

482 F.2d at 690-91. On the basis of determining that the use of rules, as opposed to case-by-case adjudication, reduced delay significantly, Judge Wright further concluded that the use of rules minimizes the "opportunity to turn litigation into a profitable and lengthy game." *Id.* at 691. As noted previously, one of the major criticisms of enforcement of the Antidumping Act has been the long delay between violation and remedy. *See* text accompanying notes 41-43 *supra*.

⁶⁹The system chosen by the Treasury does not preclude a switch from raw steel products to fabricated steel products. *See Hearings, supra* note 5, at 186, 187 (Testimony of John H. Lyons, General President, International Association of Bridge, Structural and Ornamental Iron Workers) and text accompanying note 130 *infra*.

⁷⁰*See* K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 111-16 (1969) [hereinafter cited as DISCRETIONARY JUSTICE] and text accompanying notes 149-157 *infra*.

⁷¹Both elements, the opportunity to be heard and the right to judicial review, discussed at text accompanying notes 72-76 *infra*, were taken by Judge Wright to be important protections against the arbitrary exercise of rulemaking in *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 692-93 (D.C. Cir. 1973).

⁷²Administrative Procedure Act, § 4, 5 U.S.C. § 553 (1970).

⁷³Section 4 of the APA, 5 U.S.C. § 553 (1970), provides in pertinent part: "(a) This section applies according to the provisions thereof, except to the extent that there is involved—(1) a military or foreign affairs function of the United States." For a critical discussion of this exemption, see Bonfield, *Military and Foreign Affairs Function Rulemaking under the APA*, 71 MICH. L. REV. 221 (1972).

⁷⁴APA § 4(a) 5 U.S.C. § 553(b)(3)(B). Invocation of the "good cause exemption, however, requires that the finding of good cause and a brief statement of reasons be incorporated in the rules issue. *See* K. DAVIS, ADMINISTRATIVE LAW TEXT 139 (3d ed. 1972). The Treasury Department finding, 43 Fed. Reg. 6065 (Feb. 13, 1978), is a seven-line conclusory statement which may not meet the intent behind the requirement of a finding.

rationale for swift initiation of the TPM is the exigencies of international trade disputes, and it is on this ground that the foreign affairs exemption is based.⁷⁵

Because the effectiveness of the TPM depends on the prices at which the triggers are set, public participation in agency decisionmaking on this issue is of signal importance. Although the Treasury provided notice and an opportunity for comment by interested parties in advance of the TPM's implementation,⁷⁶ it did not provide for public participation prior to announcing the methodology for calculating the trigger prices and the prices themselves.⁷⁷ The effectiveness of the TPM in regulating steel imports will, of course, depend on the accuracy with which the prices are calculated. While the concept of the TPM may have received formal public scrutiny, its implementation has not, suggesting that the APA's goal of effective public participation in agency decisionmaking may not have been realized by Treasury procedures.⁷⁸

There is a second, and more significant difference between the TPM and regulatory rules. Final agency actions, including rules, are subject to judicial review in the absence of an expression of contrary congressional purpose.⁷⁹ The promulgation of the TPM, by contrast, may be insulated from review prior to enforcement. The TPM is designed not to affect the legal rights of any party under the Antidumping Act but rather to constrain the Treasury's decisions to initiate investigations. The exercise of discretionary authority to decline to investigate is traditionally protected against judicial review,⁸⁰ and has in fact not yet been subjected to review in antidumping cases.⁸¹ If a discretionary refusal to investigate is unre-

⁷⁵See note 73 *supra*.

⁷⁶See 42 Fed. Reg. 65,214 (Dec. 30, 1977) (Proposed Amendments to the Customs Regulations Relating to the Documents and Information to be Filed at the Time of Importation of Certain Articles of Steel).

⁷⁷See 43 Fed. Reg. 1464, 1469 (Jan. 9, 1978) and 43 Fed. Reg. 4703 (Feb. 3, 1978), in which methodology and particular prices were announced without prior comment by interested parties.

⁷⁸In discussing whether reviewing courts should require notice and comment procedure for rulemaking exempt from the APA, Davis argues that the courts should undertake this function where the impact of administrative action is "substantial." K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* 193-202 (1976). Because the TPM reallocates economic opportunity among interested parties, the use of a notice and comment procedure by the Treasury would meet this policy interest in ensuring fairness of administrative actions. See text accompanying notes 124-131 *supra*.

⁷⁹*Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967).

⁸⁰K. DAVIS, *ADMINISTRATIVE LAW TEXT* 518 (3d ed. 1972). The principle of unreviewability is strongest in the area of criminal law, see, e.g., *Newman v. U.S.*, 382 F.2d 479 (D.C. Cir. 1967) (Burger, J.), but is slowly being replaced by judicial protection against abuse of prosecutorial discretion in civil cases. See *DeVito v. Shultz*, 300 F. Supp. 381 (D.D.C. 1969) (requiring the Secretary of Labor to furnish a written statement of reasons for refusing to initiate a proceeding to set aside the results of a contested union election.) Davis argues strongly that the judiciary should review the exercise of executive discretion to check abuses. DAVIS, *supra* note 78, at 518-23. See also, Wright, *Review: Beyond Discretionary Justice*, 81 *YALE L. J.* 575 (1972).

⁸¹*But cf.* *National Milk Producers Federation v. Shultz*, 372 F. Supp. 745 (D.D.C. 1974) (authorizing district court jurisdiction of a mandamus action against the Secretary of the Treasury for failing to initiate a countervailing duty investigation, and noting that mandamus will lie only where a duty to act is shown). Countervailing duty actions and antidumping

viewable, then it necessarily follows that internal criteria for exercising that discretion are equally insulated without regard to whether they have been published or subject to public scrutiny. In *Abbott Laboratories v. Gardner*,⁸² however, the Supreme Court noted that judicial review is presumed available under the APA to one "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," so long as review is not precluded by statute or the action is not committed by law to agency discretion.⁸³

A strong argument may be made that judicial review of antidumping actions is limited by statute solely to scrutiny of LTFV determinations and does not extend to the bases for investigations. In authorizing domestic producers to challenge Negative Final Determinations in court in the 1974 Trade Act,⁸⁴ Congress stated that it was extending domestic producers rights equal to those already held by foreign producers.⁸⁵ The subject of such judicial review is explicitly limited to "a determination by the Secretary . . . that a class or kind of foreign merchandise is not being, nor likely to be, sold in the United States at less than its fair value,"⁸⁶ and therefore does not seem to include administrative actions short of such an LTFV determination.

The 1974 congressional enactments on judicial review in antidumping cases were in response to the 1971 Court of Customs and Patent Appeals (CCPA) decision in *United States v. Hammond Lead Products, Inc.*⁸⁷ In *Hammond Lead*, the CCPA reversed a decision of the Customs Court sustaining a protest under the countervailing duty laws by an American manufacturer of litharge, a lead oxide used in storage batteries. The manufacturer had filed a complaint asserting that the government of Mexico was subsidizing the export of litharge to the United States⁸⁸ in contravention of the proscription against "any bounty or grant upon the manufacture or production or export of any article."⁸⁹ The Commissioner of Customs, acting for the Treasury, declined to impose a countervailing duty on Mexican litharge, whereupon the manufacturer brought suit in the United States Customs Court under section 516(b) of the Tariff Act of 1930.⁹⁰ The Customs Court found that jurisdiction existed to hear the protest⁹¹ and sustained the manufacturer's protest on the merits.⁹²

The CCPA reversed, holding that the Customs Court lacked the right to review an American manufacturer's protest of a *negative* countervailing

actions are both reviewable under the same statutory provision, 19 U.S.C. § 1516 (1970 & Supp. V 1975).

⁸²387 U.S. 136 (1967).

⁸³*Id.* at 140.

⁸⁴1974 Trade Act, § 321(f)(1), 19 U.S.C. § 1516(d) (Supp. V 1975).

⁸⁵S. REP. No. 1298, 93d Cong., 2d Sess. 178, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7186, 7314-15.

⁸⁶1974 Trade Act, § 321(f)(1)(d)(1), 19 U.S.C. § 1516(d)(1) (Supp. V 1975).

⁸⁷440 F.2d 1024 (C.C.P.A. 1971), cert. denied, 404 U.S. 1005 (1971).

⁸⁸*Id.* at 1025.

⁸⁹Tariff Act of 1930, § 303, 19 U.S.C. § 1303 (1970).

⁹⁰440 F.2d at 1025.

⁹¹61 Cust. Ct. 137, C.D. 3552 (1968).

⁹²63 Cust. Ct. 316, C.D. 3915 (1969).

duty determination under section 516.⁹³ Because antidumping and countervailing duty determinations were and are reviewable under the same statutory sections, the decision implied the denial of review of negative antidumping determinations as well. Despite an opinion prepared by the General Counsel of the Treasury Department contending that review of negative antidumping determinations was still available in spite of *Hammond Lead*, the Congress approved legislation confirming this right on the ground that "the law ought to be specific on this point."⁹⁴ The congressional purpose in enacting the 1974 provisions on judicial review was therefore to overrule *Hammond Lead* in the area of countervailing duties and to confirm its inapplicability to negative antidumping determinations. The history of the 1974 Trade Act thus appears to evidence a congressional intent to confirm judicial review of LTFV determinations, both positive and negative, but does not indicate a desire to subject administrative actions short of an LTFV determination to judicial scrutiny.

The language of the Antidumping Act, while placing limits on administrative enforcement, does not explicitly state that enforcement is committed by law to agency discretion. As the Supreme Court has explained in *Dunlop v. Bachowski*,⁹⁵ in the absence of an express prohibition of judicial review, a federal agency will bear "the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of [its] decision."⁹⁶

In the face of this strong presumption of reviewability, it is unlikely that the courts will find the Treasury's decision to refrain from investigation to be discretionary and free from review. Moreover, reviewability of pre-enforcement administrative action is not limited to a choice between a mandatory duty to investigate and unreviewable discretion to refuse. Judicial scrutiny may extend to questions of whether the administrative decision was arbitrary, capricious or otherwise not in accordance with law.⁹⁷ In the course of its decision, the *Abbott* court cited legislative history of the APA for the standard precluding pre-enforcement review: "A statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it."⁹⁸ While the preceding analysis of the legislative history argues against pre-enforcement reviewability of the TPM, the *Abbott* standard of clear and convincing evidence may prove too heavy a burden of persuasion, and invite a reviewing court to examine the TPM when faced with allegations of arbitrary exercise of discretion.

⁹³440 F.2d at 1027, 1030-31. The CCPA was clearly influenced by its determination that assessment of countervailing duties "necessarily involves judgments in the political, legislative or policy spheres." *Id.* at 1030.

⁹⁴S. REP. NO. 1298, 93d Cong., 2d Sess. 178, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7186, 7314-15.

⁹⁵421 U.S. 560 (1975).

⁹⁶*Id.* at 567.

⁹⁷A.P.A. § 10(e)(B)(1), 5 U.S.C. § 706(2)(A) (1976). See also *Wong Wing Hang v. Immigration and Naturalization Serv.*, 360 F.2d 715, 719 (2d Cir. 1966); *DeVito v. Shultz*, 300 F. Supp. 381, 383 (D.D.C. 1969).

⁹⁸387 U.S. at 14 n.2, citing H. R. REP. NO. 1980, 79th Cong., 2d Sess. 41 (1946).

Even if pre-enforcement judicial review is not precluded, courts may refrain from examining the Treasury's pre-enforcement actions if they find that the controversy is not yet ripe for judicial evaluation.⁹⁹ In *Abbott*, once reviewability was established, the court required the challenger to show that he would suffer hardship if pre-enforcement review were denied and that judicial resolution of the issues was appropriate at that time.¹⁰⁰ Companion cases to *Abbott*¹⁰¹ concerning pre-enforcement challenges of FDA action further demonstrate that the doctrine of "ripeness" is a barrier to initiating judicial review separate from the problem of reviewability.

There are three elements that must be balanced in deciding whether a controversy is ripe for judicial review: fitness of issues for judicial resolution, hardship to the parties resulting from deferral of review until enforcement occurs, and finality of the agency action.¹⁰² The issue of fitness pertains not to the declaration of the rights of individual parties but to the administration of the judicial process and the proper separation of powers.¹⁰³ Consequently, the decision as to pre-enforcement review may turn on whether the issues brought before the court are strictly legal, thus implicating questions of the relationship between the coordinate branches of government, or are interwoven with factual disputes concerning the rights of individuals. In *Abbott*, the Supreme Court found the issue fit for judicial resolution because *inter alia* the parties agreed that the issue was "purely legal."¹⁰⁴ The TPM, if challenged on pre-enforcement review, presents both legal and factual issues: whether the trigger mechanism may properly be limited to the specified categories of raw steel mill products, whether calculation of the trigger prices themselves was properly made, and whether the Treasury exceeded its statutory authority in promulgating the TPM.¹⁰⁵

⁹⁹Vining, *Direct Judicial Review and The Doctrine of Ripeness in Administrative Law*, 69 MICH. L. REV. 1443, 1495 (1969). Professor Vining charitably described the doctrine as an "anomaly" and "curiously atavistic." *Id.*

¹⁰⁰387 U.S. at 148-49. As described by the Court, the basic rationale of the ripeness doctrine is to prevent courts from becoming entangled in abstract disagreements over administrative policies, and to protect agencies from judicial interference until "an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.*

¹⁰¹In *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158 (1967) [*Toilet Goods I*] and *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167 (1967) [*Toilet Goods II*], the Court applied the doctrine of ripeness in cases where judicial review of FDA action was clearly authorized. In *Toilet Goods I*, pre-enforcement review of an FDA regulation was held inappropriate because the challenged regulations did not affect the primary conduct of petitioners and only minimal adverse consequences would occur if review were delayed until after enforcement. 387 U.S. at 164-66. In *Toilet Goods II*, the same Court compelled pre-enforcement review because the petitioner would risk criminal charges, seizure of the goods, or injunctions by challenging the regulations after enforcement. 387 U.S. at 172. See Vining, *supra* note 99, at 1499-1500.

¹⁰²*National Automatic Laundry and Cleaning Council v. Shultz*, 443 F.2d 689 (D.C. Cir. 1971).

¹⁰³*Id.* at 695.

¹⁰⁴387 U.S. at 149.

¹⁰⁵See Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction, *Davis Walker Corp. v. Blumenthal*, Civil Action No.78-0421, (D.D.C. 1978) [here-

Potential challengers face a lesser barrier in proving that hardship to the parties is caused by deferring judicial consideration of the TPM until the Treasury takes enforcement actions.¹⁰⁶ Both domestic steel fabricators and foreign producers of raw steel will suffer injury from the imposition of the TPM as a consequence of the "minimum price" effects of the system.¹⁰⁷ Once the trigger prices are published, foreign steel enterprises will raise their prices in conformity with the triggers and domestic fabricators who rely on foreign-produced raw steel will face an immediate rise in their raw material costs. Moreover, confronted with the possibility of strict enforcement of the Antidumping Act in raw steel products, foreign steelmakers may shift from raw steel production to fabrication, which is not covered by the TPM. Domestic fabricators consequently will face increased competition from foreign fabricators, some of whom may sell fabricated steel at a price below the cost of producing the raw steel involved. Domestic steelmakers may also be injured if the trigger prices are set too low, thus allowing foreign steel to be sold at prices American manufacturers cannot match. Hardship in all of these cases to a proper party seems evident.

Finality is properly the last of the three elements which must be balanced to determine ripeness. The APA provides for judicial review of "final agency action."¹⁰⁸ The term "agency action" includes within its statutory definition "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."¹⁰⁹ The TPM should be treated as a final agency action, because steelmakers are encouraged to rely on the trigger prices in the course of business planning,¹¹⁰ and the TPM is plainly an agency statement designed to implement both law and policy within the meaning of the APA. Considered solely as a means of spurring an antidumping investigation, the TPM may not appear to be a final agency action, as producers are affected only when the Treasury Department reaches a Tentative Determination of LTFV sales. This argument, however, ignores the significant economic effects on domestic steel fabricators and on both foreign and domestic steelmakers caused by the introduction of the TPM. Finality

inafter cited as Memorandum], and *Tarnished Shield: 'Trigger-Price' System to Help Steel Industry Triggers Much Dismay*, Wall St. J., Sept. 26, 1978, at 1, col. 6.

¹⁰⁶Granting review on the basis of hardship is supported by the APA provision permitting review of final agency actions for which there is no other adequate remedy, § 10(c), 5 U.S.C. § 704 (1976). *National Automatic Laundry and Cleaning Council v. Shultz*, 443 F.2d at 696. The test focuses on hardship to particular challengers and not on systemic effects. *Vining*, *supra* note 99, at 1503-04. Imposition of the TPM will both have general systemic effects and also place particular producers at an economic disadvantage prior to enforcement. Consequently, the defects in the calculation of costs which *Vining* discerns in *Abbott* and both *Toilet Goods* cases are not present here. See *Vining*, *supra* note 99, at 1501-04.

¹⁰⁷See notes 122-130 and accompanying text *infra*.

¹⁰⁸A.P.A. § 10(c), 5 U.S.C. § 704 (1976).

¹⁰⁹Section 2(g) of the A.P.A., 5 U.S.C. § 551(13) (1976) defines "agency action" to include the whole or part of an agency rule. "Rule" is further defined by § 2(c) of the APA, 5 U.S.C. § 551(4) as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy."

¹¹⁰See *Solomon Report*, *supra* note 5, at 5.

should be judged by the practical effects of agency action, not just by the direct effects on individual parties of enforcement activities.¹¹¹ In *National Automatic Laundry and Cleaning Council v. Shultz*, the court held that a letter sent by the Administrator of the Wage-Hour Division in the Department of Labor in reply to a question by a trade association about application of the Fair Labor Standards Act was final agency action entitling the trade association to judicial review. The court stated that the Supreme Court "has found final action in a wide array of pronouncements and communications having the contemplation and likely consequence of 'expected conformity.'"¹¹² "Expected conformity" in steel pricing is an explicit goal in the Treasury's creation of the trigger system, so the TPM should be considered a final agency action.

The issue of reviewability is further complicated by a question of jurisdiction. Original jurisdiction of the United States District Courts involving customs matters, including antidumping duties, must be established under 28 U.S.C. § 1340. That section provides for jurisdiction of "any civil action arising under any Act of Congress providing for . . . revenue from imports or tonnage *except matters within the jurisdiction of the Customs Court*" (emphasis supplied). The Customs Court, under 28 U.S.C. § 1582(a), has "exclusive jurisdiction of civil actions instituted by any person whose protest pursuant to the Tariff Act of 1930, as amended, has been denied, in whole or part . . ." Such protests are governed by section 516 of the Antidumping Act, as amended,¹¹³ which applies exclusively to challenges of appraised value, classification or the proper rate of duty imposed pursuant to the Antidumping Act, and challenges of an LTFV determination.¹¹⁴

In *National Milk Producers Federation v. Shultz*,¹¹⁵ a federal district court, rather than the Customs Court, was found to have jurisdiction where the plaintiff was suing to force the Treasury Department to impose countervailing duties on imported dairy products pursuant to section 303 of the Tariff Act of 1930. The complaint alleged that the Department had refused for six years to enforce the statute against EC dairy producers. After construing *Hammond Lead* to deny the Customs Court jurisdiction to hear protests by American manufacturers under section 1582, the district court in *National Milk Producers Federation* held that section 1340 conferred jurisdiction on the district courts.¹¹⁶ The court rejected the defendant's argument that the court in *Hammond Lead* had merely held countervailing duty protests to be unauthorized by section 516 and had not barred Customs Court jurisdiction. The district court stated that the unavailability of review under section 516 necessarily eliminated Customs

¹¹¹The issue of finality is to be determined "in a pragmatic way." *National Automatic Laundry and Cleaning Council v. Schultz*, 443 F.2d 689, 698 (D.C. Cir. 1971).

¹¹²*Id.* at 698.

¹¹³19 U.S.C. § 1516 (1970 & Supp. V 1975).

¹¹⁴19 U.S.C. §§ 1516(a), (c), and (d) (Supp. V 1975).

¹¹⁵372 F. Supp. 745 (D.D.C. 1974).

¹¹⁶*Id.* at 747.

Court jurisdiction under section 1582, "since that statutory provision unequivocally predicates jurisdiction on the existence of protests under the 1930 Tariff Act."¹¹⁷

This conclusion is important in the context of pre-enforcement review of the TPM. One of the principal maxims of customs practice is that the Customs Court is without equity jurisdiction.¹¹⁸ Thus, any declaratory or injunctive relief against imposition of the trigger price system can only come from federal district courts. This principle of jurisdiction was confirmed in *Sneaker Circus, Inc. v. Carter*,¹¹⁹ where the unavailability of Customs Court jurisdiction to review challenges to trade agreements negotiated between the United States, the Republic of Korea, and the Republic of China, was held to confer jurisdiction on the District Court for the Eastern District of New York.¹²⁰ Because relief under section 516 is unavailable to parties challenging institution of the TPM, the Customs Court is divested of exclusive jurisdiction under section 1582 and such challenges may be considered by district courts with the power to grant adequate relief.

V. EFFECTS OF THE TPM AND ALTERNATIVE PROCEDURES

The trigger price system is designed to leave untouched the statutory rights of all parties under the Antidumping Act.¹²¹ Thus, a foreign steel producer selling in the United States below the applicable trigger price may challenge the Treasury's conclusion that sales are at "less than fair value." However, the protection afforded by this right may be illusory in practice. Trigger prices will be based on the best evidence available, which is the type of evidence required by the statutory enforcement provisions.¹²² Consequently, the data used for antidumping investigations triggered through the TPM may well be the same data used in establishing the trigger. Indeed, the Solomon Report claim that the TPM will expedite antidumping investigations is founded on the advantage to be derived from the application of continually collected information on foreign and domestic steel production to LTFV determinations.¹²³ The trigger price will consequently reappear during the LTFV investigation as the legal

¹¹⁷*Id.*

¹¹⁸Vance, *Proposed Legislation—Equity Power for the Customs Court*, in *THIRD ANNUAL JUDICIAL CONFERENCE OF THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS*, May 10, 1976, 72 F.R.D. 239, 381, at 382 (1976).

¹¹⁹566 F.2d 396 (2d Cir. 1977).

¹²⁰*Id.* at 399-401. See also *Timken Co. v. Simon*, 539 F.2d 221, 225-27 (D.C. Cir. 1976) (holding that the United States District Courts have jurisdiction over antidumping complaints where Customs Court jurisdiction is unavailable).

¹²¹See note 62 and accompanying text *supra*.

¹²²Compare Solomon Report, *supra* note 5, at 14 with 19 U.S.C. § 165 (1970).

¹²³See Solomon Report, *supra* note 5, at 16.

standard for "fair value,"¹²⁴ and will therefore set an effective minimum price for imports entering the United States steel market.¹²⁵

The imposition of effective minimum prices for steel imports compels foreign producers to act as a steel export cartel.¹²⁶ Because the triggers are set at *average* cost rather than marginal cost, foreign producers who otherwise would have charged lower prices will expropriate monopoly profits on sales.¹²⁷ Moreover, a system which sets *de facto* minimum prices will protect inefficient foreign producers from competition for the import market.¹²⁸ The TPM prices are calculated from the *average* costs of production for the most efficient foreign steelmakers, currently the Japanese. As a result, an efficient Japanese firm may not sell in the United States market below its average total cost of production without violating the trigger price system even where marginal cost pricing would dictate a lower price. Less efficient producers, such as the EC steelmakers who sell at a higher price than the Japanese concerns even while dumping, may continue to sell below their average total costs of production. Because the Treasury will not initiate an antidumping investigation unless such sales are below the relevant trigger,¹²⁹ less efficient producers may escape additional duties despite their continued dumping. In addition, the higher prices charged by efficient producers to escape antidumping penalties will permit less efficient producers to capture a larger share of the import market due to the decrease in price differentials. The TPM therefore reallocates economic advantage among foreign producers.

To counter the adverse impact of the TPM, the most efficient foreign steel producers may concentrate on exporting fabricated steel products and reduce their exports of raw steel.¹³⁰ Fabricated steel products are outside the purview of the trigger price system, and enforcement of the Antidumping Act against such products when their prices do not fully incorporate production costs must proceed under the existing statutory re-

¹²⁴See 43 Fed. Reg. 2031 (Jan. 13, 1978) (Dept. of the Treasury, Welded Stainless Steel Pipe and Tubing from Japan: Antidumping—Withholding of Appraisal Notice and Exclusion from Antidumping Investigation).

¹²⁵See FTC STAFF REPORT, *supra* note 2, at 559-63. While the FTC Staff Report considers only legally enforceable minimum prices, use of the same standard of "fair value" in LTFV determinations and the prospect of strict enforcement in steel cases combine to set a reference standard equivalent in economic effect to a *de jure* minimum price. See Memorandum, *supra* note 105, at 16-17. Cf. *Moss v. CAB*, 430 F.2d 891 (D.C. Cir. 1970) (order invalid for failure to meet rate-making procedures where stating rates based on newly promulgated formula would be acceptable but rates not conforming to the new formula would be suspended and investigated).

¹²⁶FTC STAFF REPORT, *supra* note 2, at 560.

¹²⁷"To the extent that the Treasury price exceeds what the exporter would have charged, the exporter appropriates the higher profits on its sales." *Id.*

¹²⁸Solomon Report, *supra* note 5, at 18.

¹²⁹*Id.* See also *Hearings*, *supra* note 5, at 229 (testimony of Robert H. Mundheim, General Counsel, Department of the Treasury), and the discussion of the Treasury's antidumping investigation of Western European steel in note 67 *supra*.

¹³⁰*Hearings*, *supra* note 5, at 187 (testimony of John H. Lyons, General President, International Association of Bridge, Structural and Ornamental Iron Workers); *The Opposition Grows to Reference Pricing*, BUS. WEEK, April 10, 1978, at 30.

gime and cannot share in the administrative advantages of the TPM. Domestic fabricators will therefore be twice disadvantaged by imposition of the TPM; those fabricators who rely on foreign produced raw steel will pay more for their supplies, and all domestic fabricators will face increased competition due to the shift in production towards fabrication by foreign steel makers responding to the TPM.

As the previous discussion demonstrates, establishing the TPM as a procedural system for prosecution effectively reallocates economic opportunities among the interested parties even before enforcement.¹³¹ There are two other alternative procedures for controlling imports that the Administration could have used, each of which would allocate economic opportunity differently. The first alternative was the imposition of quantitative restrictions on the importation of foreign steel.¹³² Quantitative restrictions may arguably be imposed unilaterally by the United States consistent with its responsibilities under the General Agreement on Tariffs and Trade (GATT).¹³³ Although quantitative restrictions are generally outlawed by the GATT,¹³⁴ they may be applied for national security reasons¹³⁵ or after receipt of a waiver by the GATT.¹³⁶ Additionally, the GATT "escape clause" provisions may authorize such import restraints

¹³¹See Transcript of White House Briefing by Anthony M. Solomon, Under Secretary of the Treasury for Monetary Affairs, at 5 (Dec. 6, 1977). One domestic fabricator dependent on foreign-produced raw steel has alleged a 30% increase in its costs for imported steel since the system has gone into effect, but before enforcement actions have been brought by the Treasury. *BUS. WEEK*, April 10, 1978, at 30. See also *Steel Heads for a Comeback*, *BUS. WEEK*, April 10, 1978 at 30, 31, and Memorandum, *supra* note 105, at 16-17, 43-44, alleging that foreign steel producers immediately upon promulgation of the TPM have refused to sell below the relevant trigger, and that the plaintiff fabricator in that case will pay approximately \$700,000 more during the second quarter of 1978 as a consequence.

¹³²Quantitative restrictions may be imposed unilaterally under U.S. law pursuant to the "escape clause" provision of the 1974 Trade Act, §§ 201-203, 19 U.S.C. §§ 2251-2253 (Supp. V 1975). Under these procedures, presidential institution of quantitative restraints must be preceded by a finding of the International Trade Commission (ITC) that "an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the treat thereof, to the domestic industry producing an article like or directly competitive with the imported article." See §§ 201(b)(1), 202(c), and 203(a)(3), 19 U.S.C. §§ 2251(b)(1), 2252(c), and 2253(a)(3) (Supp. V 1975). A similar procedure is required for the negotiation of Orderly Marketing Agreements with foreign countries limiting imports. § 203(a)(4), 19 U.S.C. § 2253(a)(4) (Supp. V 1975). Whether negotiation by the U.S. of a Voluntary Restraint Agreement directly with a foreign producer may be undertaken outside the framework of the escape clause is an open question. See J. JACKSON, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 676-78 (1977). For an example of a Voluntary Restraint Agreement, see *Consumers Union of U.S., Inc. v. Kissinger*, 506 F.2d 136 (D.C. Cir. 1974). Presidential action under the escape clause is open to congressional veto in the form of a concurrent resolution if it differs in any respect from ITC recommendations. The effect of such congressional action is to establish the ITC recommendation as the chosen form of import relief. §§ 203(b) and (c), 19 U.S.C. §§ 2253(b) and (c) (Supp. V 1975).

¹³³General Agreement on Tariffs and Trade, *date done* October 30, 1947, 61 Stat. parts 5 & 6, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter cited as GATT]. For a current listing of all GATT protocols and agreements, see J. JACKSON, *WORLD TRADE AND THE LAW OF GATT*. 888-97 (1969).

¹³⁴GATT, *supra* note 133, at art. XI.

¹³⁵*Id.* at art. XXI.

¹³⁶*Id.* at art. XXV(5).

where unforeseen developments and the effect of obligations incurred under the GATT together cause or threaten serious injury to domestic producers.¹³⁷

Quantitative restraints also may be imposed through voluntary agreements restricting imports. These agreements, often motivated by the threat of unilateral actions, are known as Orderly Marketing Agreements or Voluntary Restraint Agreements.¹³⁸ Such mutual accommodations are, however, prohibited by the GATT limitations on export controls. Even if the imposition of quantitative restrictions does not violate the GATT, foreign countries are authorized to take retaliatory trade action where adversely affected.¹³⁹

Quantitative restrictions effectively create, as do minimum prices, a steel export cartel and thus generate monopoly profits. As a party to the international agreements creating voluntary trade restraints, the United States has some flexibility in determining who will capture these profits, but foreign concerns rather than the Treasury are in practice the usual beneficiaries. Moreover, the possible benefits from government allocation of these monopoly profits seem to be outweighed by the costs of potential retaliatory trade action by other countries. In addition, quantitative restraints completely break the link between domestic and world steel prices, and allow inefficient foreign domestic producers to retain their share of the market.¹⁴⁰ Finally, domestic fabricators face the same two-pronged attack on their market when quantitative restraints are imposed as they presently confront under the TPM regime.¹⁴¹

The second alternative means of controlling steel imports would have been the introduction of increased tariff rates on foreign steel products.¹⁴² Because most tariffs in the United States are imposed *ad valorem*, an increased rate does not affect the competitive position of foreign producers in the steel import market. In consequence, the levy of a tariff increase would not serve to protect less efficient Western European steel concerns in price competition with the more efficient Japanese steelmakers for the American import market. A steel export cartel is not created, and the revenues generated by the tariff increase can be captured by the United States Treasury.¹⁴³ Fabricators, however, once again remain outside the

¹³⁷*Id.* at art. XIX.

¹³⁸See note 132 *supra*.

¹³⁹Retaliation for action taken under the aegis of the GATT escape clause, art. XIX, may take the form of suspension of substantially equivalent trade concessions and obligations or, in special cases, suspension of such concessions or obligations as may be necessary to prevent or remedy injury. *Id.* at art. XIX(3). Retaliation for actions which contravene the GATT, or impair or nullify obligations incurred under the GATT, must be authorized by the Contracting Parties to the GATT.

¹⁴⁰See generally Bell, *Analysis of Protective Measures*, in I COMMISSION ON INTERNATIONAL TRADE AND INVESTMENT POLICY, UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD 421, 431-34 (1971) and Metzger, *Injury and Market Disruption From Imports*, in *id.* 167, 168-73 (1971).

¹⁴¹See text following note 130 *supra*.

¹⁴²Tariff increases in these circumstances must meet the requirements of United States law discussed in note 132 *supra*.

¹⁴³See Stern, *Tariffs and Other Measures of Trade Control: A Survey of Recent Develop-*

protective barrier erected by the increased tariff.

Increases in existing tariff rates, to avoid U.S. violation of the GATT, must come within the same escape clause, waiver, or national security provisions as quantitative restrictions.¹⁴⁴ Retaliatory trade action by foreign countries is thus a possibility to be considered by decisionmakers. Consequently, a tariff increase, while less destructive to competitive equilibrium than the TPM, shares with quantitative import restraints the problem of international trade retaliation. Because the trigger system is, at least in form, merely an administrative device for managing investigation resources, amounting to stricter enforcement of existing law, it does not touch off retaliatory action by foreign states under the GATT. In addition, the TPM is less likely to be seen by foreign states as a protectionist measure than either quantitative restrictions or increased tariffs. These considerations provide a strong incentive to use the TPM as the principal component of the Administration response to the current steel crisis.

Since the TPM involves self-initiated limitation of administrative discretion, the Administration's policy choice may be perceived as circumventing "the checks and balances of both the U.S. Congress and the international negotiations for trade liberalization."¹⁴⁵ Judicial inquiry into the TPM may not be based on the GATT,¹⁴⁶ because the TPM is not within the legal jurisdiction of the Agreement. Further, the TPM may be insulated from judicial review entirely, as discussed earlier. Of course, as an important element of the U.S. regulatory scheme for steel imports, the TPM clearly comes within the purview of multilateral trade negotiations proceeding under the auspices of the GATT. Consequently, the system is sure to receive international scrutiny during these ongoing negotiations.

The issue of congressional accountability raises a more substantial question. Both quantitative restrictions and increased tariffs would in all probability be exposed to congressional scrutiny under section 203 of the 1974 Trade Act, which empowers Congress to veto presidential actions to provide import relief.¹⁴⁷ Section 203, part of the escape clause provisions of the Trade Act, is applicable only where tariffs, quotas, and other import restraints are at issue.¹⁴⁸ The TPM, because it does not implicate legal rights and is a procedural response to the steel problem, is not sub-

ments, 11 J. ECON. LIT. 589 (1973).

¹⁴⁴See notes 134-139 *supra*.

¹⁴⁵FTC STAFF REPORT, *supra* note 2, at 560.

¹⁴⁶A GATT working party which examined the issue concluded that reference prices are not covered by art. XVI of the GATT as an indirect subsidy to domestic industry. GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 188, 191 (9th Supp. 1961). See J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 385-86 (1969).

¹⁴⁷Under § 203 of the 1974 Trade Act, 19 U.S.C. § 2253 (Supp. V 1975), if the President recommends import relief which differs from the ITC recommendations under § 201(d)(1), 19 U.S.C. § 2251(d)(1) (Supp. V 1975), he must state the reasons for such differences in a document transmitted to Congress. §§ 203(b)(1) and (b)(2), 19 U.S.C. §§ 2253(b)(1) and (b)(2) (Supp. V 1975). The recommendations of the ITC, rather than those of the President, will take effect if both Houses of Congress within a ninety day period adopt a concurrent resolution disapproving the presidential determination. § 203(c)(1), 19 U.S.C. § 2253(c)(1) (Supp. V 1975).

¹⁴⁸1974 Trade Act, § 203(a), 19 U.S.C. § 2253(a) (Supp. V 1975).

ject to section 203 inquiry. Therefore, it is necessary to examine the elements which enter into the Treasury Department's balance between discretion and rule, in the absence of direct congressional accountability and the possible absence of judicial review.

VI. DISCRETIONARY JUSTICE AND ACCOUNTABILITY

Administrative discretion exists when an agency is free to make a choice among possible courses of action, including the choice to do nothing at all.¹⁴⁹ The trigger price system identifies those cases in which the Treasury Department will do nothing to investigate alleged violations of the law. Having concluded that the Treasury is not legally accountable to Congress nor perhaps to the courts for its failure to investigate, the essential fairness of enforcement of the Antidumping Act can be ensured only by other means of checking arbitrary and unjust exercise of the Treasury's discretion.¹⁵⁰

Where there are no rules governing agency discretion, agency decisions are often the result of conflicting political and economic forces.¹⁵¹ The promulgation of the TPM, while exempted from APA procedures on rulemaking, is in effect the promulgation of rules structuring investigatory discretion. These rules, guided by the policy of restricting antidumping investigations to cases where the sale price of a raw steel product is below the cost of production by the most efficient steelmakers,¹⁵² are displayed and are to be revised publicly. Consequently, the most important instruments identified by Professor Kenneth Culp Davis, a well-known proponent of circumscribing official discretion, as essential in controlling discretionary authority¹⁵³ are employed in the construction of the trigger price system. However, in the absence of a showing that such devices are effective, the mere existence of these instruments of control does not guarantee adequate regulation of Treasury discretion.

¹⁴⁹Davis, *supra* note 70, at 4.

¹⁵⁰Discretion, and particularly selective enforcement, is integral to the effective functioning of administrative agencies. However, because the bulk of administrative activity is either judicially unreviewable or judicially unreviewed, *see* K. DAVIS, ADMINISTRATIVE LAW TEXT 88 (3d ed. 1972), this power may be exercised in an arbitrary and unjust manner. Courts have devised tools for the judicial structuring and control of this discretion, *see* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES 607 (1976), but much government activity is still uncontrolled by the courts. Consequently, legislative oversight, interest group input, and political accountability must be considered as means of controlling discretion. This article will not attempt to identify the effect of relying on institutions other than the judiciary for control of administrative discretion. It is clear, however, that such institutions will structure discretionary authority in line with their own interests. *See* T. LOWI, THE END OF LIBERALISM (1969).

¹⁵¹Wright, *Review: Beyond Discretionary Justice*, 81 YALE L. J. 575, 577 (1972).

¹⁵²*See* Solomon Report, *supra* note 5, at 18.

¹⁵³Davis has identified several instruments for the purpose of controlling the exercise of discretionary authority: open plans, open policy statements, open rules, open findings, open precedent, and fair informal procedures. DAVIS, *supra* note 70, at 99-120.

At the present time, there has been little enforcement of the Antidumping Act in steel cases by means of the TPM.¹⁵⁴ Therefore, evidence of control over the exercise of discretion by the Treasury must be garnered by examining the events leading up to institution of the trigger system. Executive action to assist the steel industry was prompted in 1977 by strong congressional pressures, by the combined efforts of labor and the industry to focus national attention on the problems of steel, and by the filing of nineteen antidumping cases by the steel industry.¹⁵⁵ The principal criticisms of the existing scheme for enforcing the Antidumping Act were delay, product specificity and abuse of discretion,¹⁵⁶ and the TPM was constructed to remedy these problems. In designing the TPM around the cost of production standard, the Task Force accepted specific industry claims that domestic steel concerns were fully competitive in the absence of below-cost sales by foreign steel producers. Following publication of the Solomon Report, Administration witnesses appeared at congressional hearings to discuss and explain the proposed solutions.¹⁵⁷ These events, taken together, evidence both political and interest group input into the process of establishing the TPM.

VIII. CONCLUSION

The TPM was advanced by the Solomon Report as a response to the current steel crisis. Because the system involves self-initiated restraint of administrative discretion, the availability of pre-enforcement judicial review is problematic. While the legislative history of the 1974 Trade Act and the language of section 516 argue against reviewability of the TPM, the standard for prohibiting review established in *Abbott* is so strict that a court may review the trigger system if it is alleged to constitute an abuse of discretion.

In its construction of the TPM, the Treasury Department was apparently subject to political and interest group checks against the institution

¹⁵⁴See Memorandum, *supra* note 105, for material filed as part of a civil action brought by a steel fabrication company, Davis Walker Corp., against the Secretary of the Treasury. On the basis of the complaint in that case, the U.S. district court issued a temporary order barring the Treasury from enforcing trigger prices on wire rod. BUS. WEEK, April 10, 1978 at 30. The complaint brought by Davis Walker Corp. alleged that establishment of the TPM exceeded the Treasury's statutory authority under the Antidumping Act. It further claimed that the TPM failed to comply with the rulemaking procedures of the APA and was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, within the meaning of 5 U.S.C. § 706," in publishing trigger prices for steel wire rod where (i) no other semi-finished steel products are included in the system, (ii) no trigger prices are imposed on any finished steel products, and (iii) the inclusion of steel wire rod in the TPM will not accomplish the purpose of the Antidumping Act where domestic steel production capacity is inadequate to supply the domestic market for steel wire. See Complaint for Declaratory and Injunctive Relief, Davis Walker Corp. v. Blumenthal, Civil Action No. 78-042 (D.D.C. 1978).

¹⁵⁵N.Y. Times, Oct. 17, 1977 at 51, col. 4.

¹⁵⁶See note 41 and accompanying text *supra*.

¹⁵⁷See *Hearings*, *supra* note 5.

of potentially arbitrary discretion in steel antidumping actions. If judicial review is unavailable, however, steps should be taken to ensure direct congressional accountability. Moreover, because the level at which the trigger price is set determines the effectiveness of the system, there should be public participation in construction of the methodology used in establishing the actual prices. By instituting the TPM, which is essentially nothing more than open policy and procedure for initiating investigations, the Treasury has begun the process of establishing accountability in the administration of the antidumping laws.¹⁵⁸ Whether the Treasury will continue in this direction remains to be seen.

—Mark Alan Kantor

¹⁵⁸*Cf.* Wright, *supra* note 151, at 578-79.

ERRATA

The following corrections should be made in Volume 11, Issue 1 :

Page 90. The last line of text should read:

“eliminating the abuses which have been disclosed in recent months.”

Page 116. The first paragraph of text should read:

“Courts adopting the modern majority position have differed over whether the Tucker Act supplements, displaces, or provides an alternative to the theories of recoupment and set-off.⁴⁸ A few older decisions held that the \$10,000 limit of the Tucker Act applies to counterclaims for recoupment or set-off. Such an interpretation denies the district courts jurisdiction over a valid counterclaim in excess of \$10,000 when the defendant could otherwise recoup or set-off a claim regardless of the amount.”

