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Schwartz: An American Response to the Trigger Price Mechanism

An American Response to the Trigger Price Mechanism

*by Warren F. Schwartz**

IT IS IMPOSSIBLE to evaluate the trigger price mechanism (TPM) without first considering what objectives were sought to be accomplished by its adoption. To do this one must begin by defining the purposes of the anti-dumping laws which TPM is designed to implement. Unfortunately, these purposes are both obscure and ill-conceived. The deliberations which preceded the adoption of TPM and much of the subsequent discussion as to its effectiveness have suffered from this basic confusion about goals, which derives fundamentally from the absence of a coherent theory justifying the prohibitions embodied in the antidumping law.

The antidumping law does not prevent all "sales at less than fair value," only those causing the requisite "injury." Thus the law contemplates that in some circumstances sales in the American market at a price below the home market price or some alternative reference price are not unlawful. A coherent theory for distinguishing the lawful conduct from unlawful conduct could be based either on systematic differences in the behavior of the firms making the sales at less than fair value, or on some general conception of those adverse consequences to domestic firms which are to be accepted in the interests of national and international efficiency, as opposed to those which are to be avoided even at the price of foregoing the gains of trade which can be secured through efficient specialization. The antidumping laws, however, embody no defensible general conception either as to why the behavior of the foreign firms is "bad" or as to why the adverse consequences to American firms and workers should be held to outweigh the greater overall national gain obtainable from allowing free trade. In particular, if the focus is on the consequences to American firms and workers, no good reason has ever been advanced as to why such consequences should be viewed differently if foreign rivals happen to be practicing price discrimination. Despite the existence of a wide range of protective and compensatory measures for domestic interests adversely affected by international trade, there has been no reason advanced as to why such consequences require greater governmental intervention in cases where harm has been caused by international competition than in cases where harm has resulted from domestic competition.

From the point of view of the desirability of prohibiting price discrimination by firms competing in the American market because this conduct is harmful to the overall national interest of the United States, the anti-dumping laws are equally unjustified. I believe that there is no reason to prohibit international competition characterized by lower prices being charged in

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the export market than in the home or some third country market, absent a finding that the price discrimination is being carried on as a predatory device to impair competition and ultimately capture monopoly profits. In the absence of such a finding, the existence of the different prices is perfectly compatible with profit maximizing conduct of the foreign firm uninfluenced by an expectation that monopoly profits may be earned. The practice is, moreover, efficiency enhancing. It is also clear that predatory price discrimination in markets like the American steel market, for which there is a large number of suppliers located throughout the world, is a tactic which is extremely unlikely to succeed.

The antidumping laws, in any event, are not limited to instances of predatory pricing. While the full reach of the law is difficult to define, it certainly extends well beyond cases of predatory pricing.

Since the circumstances justifying the imposition of an antidumping duty are so ill-defined, domestic interests understandably invoke these laws whenever a colorable case of price discrimination can be made out and the industry is losing a significant portion of the market to its foreign competitors. The effectiveness of this remedy is, however, limited in a number of ways. Most obviously, the necessity of establishing that price discrimination has occurred, that it is the price discrimination which has caused the injury which the industry has suffered, and that such injury is sufficient to satisfy the statutory requirement are serious limitations when the real aim of the domestic industry is to secure protection from more efficient foreign rivals. In addition to the basic difficulty that these substantive requirements may not be satisfied, there is the further problem that it is costly to decide whether they have been met. Given the limited resources of the enforcement agency, not all cases are brought. Some allocation of decisional resources in relation to the importance of the proceeding is necessary, and delay in processing cases is unavoidable. For all these reasons, the tying of protection to the existence of price discrimination and its effects on the domestic industry limits the effectiveness of the antidumping laws as a protectionist device.

TPM was designed to respond to the difficulties inherent in the antidumping laws. It sets the costs of Japan, the most efficient producing country, as a floor, with the expectation that sales below the costs of the Japanese industry will lead to an expedited antidumping proceeding. This seems to me to raise two equally unfortunate possibilities.

First, if the trigger price is really set to reflect costs as a businessman would conceive them in deciding whether to accept a price offered, and the costs as thus defined of the Japanese industry are correctly ascertained, the device should be wholly ineffective. By definition, no one is going to sell below the costs of the most efficient producer. If this is so, TPM will have little or no effect and the administrative costs of having it will be entirely wasted.

Second, the possibility is that by requiring an allocation of fixed costs which would not be followed by a profit maximizing firm or in the averaging of the costs of various Japanese firms, the costs will be computed so as to set a trigger price above the price at which some significant portion of the inter-

national steel industry is prepared to sell its products. If this is done, then protection is being afforded the domestic industry. This is, however, objectionable, first as a disguised form of protection which is incompatible, in spirit at least, with the United States GATT obligations, and second as less desirable from the American point of view than a tariff since the foreign firms charge a higher price in the American market and pay nothing to the American government. Finally, to the extent that the device deters sales below trigger price that are not also "at less than fair value," it goes beyond the statutory authority for the program.

What I fail to understand from Mr. Anawaty's presentation is the government's view of what TPM is supposed to do. He points to variations in the amount of steel imported before and after the introduction of TPM. However, how is one supposed to know whether these variations are desirable or undesirable? Presumably, the legitimate impact of TPM is limited to instances of price discrimination which would violate the antidumping laws. How does Mr. Anawaty have any idea whether the changes which have occurred reflect more or less of the conduct which is the legitimate concern of the antidumping laws or whether they are the product of the undifferentiated protectionist impact of setting a floor on the price of imported steel?¹ (Indeed, during the discussions at this conference it was suggested that the real explanation of any reduction in imports is the decision of the Japanese steel industry to reduce its exports to the United States.)

I should like to conclude my discussion of TPM by pointing out some of the serious administrative difficulties which arise even if one assumes its basic legitimacy. The first basic difficulty is that if the device is not to be a wholly unrestrained protectionist device, some effort to relate the practices of the foreign suppliers to the requirements of the antidumping laws will have to be made. Nothing in TPM makes this any easier. All of the complexities which faced Treasury in proceeding individually before TPM will reoccur if sales below TPM lead to a proceeding against particular foreign suppliers. The other basic difficulty of TPM is the endless struggle to classify products in order to avoid evasion of the TPM prices. Steel producers can, for example, integrate forward into products containing steel. If this is successful, not only will the domestic steel industry lose out, but so too will those American industries which are supplanted by foreign rivals who enjoy the advantage of having access to cheaper steel.

The reasons why international free trade is a good idea seem so obvious and compelling to me that it is difficult to articulate them without assuming the disagreeable tone of the moralist who is terribly certain of the soundness of his position. But what is ultimately at stake here is whether we will make the world wealthier by letting each country allocate its resources so as to realize the comparative advantages of putting them to their most efficient use, or poorer by protecting American steel workers and entrepreneurs from

¹ See Anawaty, *The United States Legal Response to Steel Dumping*, 2 CAN.-U.S. L.J. 60 (1979).

foreign rivals who are better at doing the job. The issue is often confused by pointing to losses of jobs or closing of plants in the domestic industry without inquiring whether the overall welfare of the nation is increased by the reallocation of the resources. But the conclusion is really inescapable that if the foreign supplier offers the goods at a lower price, the opportunity cost abroad must be less than the opportunity cost in the United States and there are therefore gains of trade to be shared by the trading partners. We may choose not to realize these gains because we posit some stated number of steel workers or steel firms or steel plants as an independently desirable aim of national policy. But if we do this we should be clear about it, acknowledge the cost to consumers and taxpayers, and not confuse the issue with the existence of sales “at less than fair value”—as if that for some reason were a bad thing.