ANTIDUMPING DUTIES FOR JAPANESE TVs

Or the social costs of everyone's locating himself in wonderland

Warren F. Schwartz

THE DEPARTMENT of the Treasury recently decided there had to be a simpler way of determining antidumping duties on television sets imported from Japan. Instead of trying to calculate the value of the set in the foreign market by independently investigating sales in that market, the Treasury will take the value established by the Japanese government for purposes of its own commodity tax. This procedure could lead to the imposition of more than $400 million in antidumping duties. Understandably, then, it has provoked bitter controversy, both as to the accuracy of the commodity tax valuation for fixing the relevant value under U.S. law and as to the fairness of applying the new method retroactively.

If there were good reasons for antidumping laws, the controversy would be an opportunity to address important issues involving the imprecision that must be tolerated in order to minimize the costs of administering the law and the limitations on change derived from the importance of being able to rely on stated policy. The need to determine foreign and domestic prices for an enormous number of products, to choose "comparable" products when the products offered in the two markets are not identical, to adjust the values to reflect differences between the "comparable" products, and to take into account differences in the distribution methods prevailing in the two countries—all of this constitutes a formidable challenge to the ingenuity of the persons entrusted with implementing the law. If, however, the antidumping laws are unjustified, as I believe they are, then the controversy is either a terrible social tragedy or (on alternate days) an uproarious social comedy in which those who stand to gain or lose from different interpretations and modes of enforcement commit enormous resources to a game from which society loses.

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The Antidumping Laws

The antidumping laws authorize a duty on imported goods equal to the difference between a specified price (usually the selling price in the country of origin) and the lower price at which the goods are sold in the United States. The question why such a duty should be imposed and consumers denied an opportunity to purchase goods at prices freely offered by foreign suppliers has not been addressed by the Congress for a long, long time. I believe, moreover, that it is a question with no good answer.

The law, originally enacted in 1921, appears to have been passed in response to perceived evils that would now be regarded by many scholars as nonexistent (or at least greatly exaggerated). Its principal rationale was that by offering their goods in the U.S. market at lower prices, foreign firms are engaging in "predatory" conduct—that is, conduct designed to destroy competitors and thus eventually to create monopoly profits. Recent scholarship has demonstrated, however, that the circumstances in which predatory pricing can be expected to be effectively pursued are extremely limited. Moreover, it is clear that the antidumping laws,

which require only (1) the existence of different prices and (2) "injury" to the domestic industry, extend well beyond cases of predatory pricing, if indeed there are such cases. It is also clear that the possibility of the Japanese television industry's bringing the U.S. television industry (which includes such firms as RCA and General Electric) to its knees by predatory pricing is extremely remote. Moreover, import penetration has been far too minor to pose a significant threat to the viability of the domestic TV industry. In any event, if I am wrong and the Japanese do harbor such an intention and succeed in bringing it off, their monopoly profits would no doubt be reduced by the costs of defense against public and private antitrust proceedings and by fines and damage awards. After all, predatory pricing also violates the antitrust laws. And it would, of course, be anticipated that the prospect of antitrust liability would deter the effort to secure a monopoly by engaging in predatory pricing, if such an adventure would otherwise have been launched.

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In sum, then, the predatory pricing rationale fails to justify both the antidumping laws in general and the proceeding against the Japanese manufacturers of television sets in particular. Other efficiency-oriented rationales—such as the argument that foreign competition characterized by different prices in the home and export market is particularly difficult for domestic firms to understand (so that they make an inordinate number of "mistakes" in responding appropriately)—are, in my opinion, equally baseless. Departures from efficiency have not been proved, and antidumping duties would be inappropriate corrective measures even if such departures were shown to exist, because no systematic relationship has been established between the magnitude of the price differentials and the frequency and seriousness of the "mistakes" made by domestic competitors.

What has somehow emerged is a vague and emotionally charged idea that there is some real world phenomenon called "dumping" that is inherently unfair to domestic producers. But no satisfactory explanation is given as to why the existence of different prices in the two markets (which can be explained on several grounds unrelated to the objective of securing a monopoly position) should necessarily be equated with "unfairness." I do not know the extent to which domestic interests actually believe that the practice is "unfair" and the extent to which the notion is employed cynically to secure protection from foreign competition, but there seems to be a remarkable amount of genuine conviction. I should also add, in justice to those who favor antidumping laws, that laws of this kind are widespread through the world.

Antidumping laws are not the only laws protecting American interests from foreign competition. There are tariffs and quantitative restrictions on imports. There is also the general grant of authority by which the President, upon recommendation of the International Trade Commission (ITC), may invoke a variety of means to restrict imports or assist domestic interests "injured" by foreign competition. This authority is available no matter what kind of pricing is employed by the foreign firms (which means that relief is available whether or not dumping has occurred), and it has in fact been used in favor of the U.S. television industry. In late 1977, following the ITC's finding that the U.S. industry had been injured by imports, the U.S. and Japanese governments negotiated an "orderly marketing agreement" limiting the number of Japanese television sets that can be imported into the United States and contemplating that the importation of sets from other countries will also be restricted.

The so-called import relief statute under which this action was taken was greatly liberalized when it was amended in 1975. Before 1975 it was necessary that the import-induced "injury" to U.S. manufacturers be linked to concessions granted by the United States in multilateral trade negotiations. With the removal of this requirement, there is now substantial overlap between the relief available under the general "import relief" statute and the relief available under the antidumping laws. Although there is no explicit requirement that this overlap be taken into account in administering the

antidumping laws, it is conceivable that it is influential in shaping the Treasury conception of how great the need is for vigorous enforcement.

The Administrative Impasse and the Proposed Japanese Commodity Tax Solution

In order for goods to be subject to antidumping duties, the Treasury must, as above noted, find a disparity between the foreign and domestic prices for a general class of goods from a particular country (in statutory terms, it must determine that the foreign goods are being sold for "less than fair value") and the International Trade Commission must conclude that the domestic industry has been injured. The amount of antidumping duties (the difference between the foreign and domestic prices) must then be determined for particular shipments entering the United States.

The International Trade Commission made its "injury" determination for Japanese TVs in early 1971. Thereafter bonds were posted on TV sets subject to the determination to cover the amount of antidumping duties ultimately found to be due. The amount of antidumping duties due on particular shipments was, however, not determined until the Treasury adopted the controversial use of the Japanese commodity tax evaluation. The adoption of this practice thus affects a large quantity of goods imported throughout the period beginning with early 1971. (Some goods entering before that time are also covered, for complicated reasons not worth discussing here.) The application of the commodity tax formula to goods entering for a portion of this period prior to June 30, 1973, resulted in the imposition of duties totaling $46 million. If the method were to be used for all goods with assessments pending, it is estimated that more than $400 million would be due.

Whether it is proper for Treasury to adopt this practice turns on two basic questions. First, does the complexity of the issues, combined with the deception and lack of cooperation of the Japanese manufacturers (and the importers of their goods) alleged by Treasury, justify abandoning the practice of independently determining the value of the goods in the foreign market? Second, if a simplified procedure is warranted, does the Japanese commodity tax valuation sufficiently approximate the valuation criteria of the antidumping laws to be acceptable under those laws?

So far as the first question is concerned, there are unresolved legal issues as to how much the customary methods of evaluation must cost and how much the Japanese manufacturers (and the importers) must have contributed to that cost by their "wrongful" conduct before alternative—presumably less costly but also less accurate—methods can properly be employed. There is also the question as to how much deception and lack of cooperation has actually occurred. Moreover, Treasury has taken the position that if some firms are guilty of deception and lack of cooperation, this justifies the use of the simpler valuation method in dealing with all firms—even those whose conduct has been wholly unobjectionable.

The second question—how closely the commodity tax formulation specified by Japanese law approximates what is required under U.S. law—is equally complex. While, as Treasury contends, the two laws do seem similar in principle, it also appears that certain adjustments appropriate under U.S. law (such as reduction in price to reflect services provided in kind) may not be made under the Japanese law. The Japanese law, moreover, uses various methods of approximation with alternative procedures for actual valuation available to the firm. The influence of the Japanese tax system upon a firm's choice of various assessment methods is difficult to judge a priori. All of this is further complicated by the fact that the Treasury (to some as yet undefined extent) plans to adjust the Japanese tax evaluation in particular cases. How closely the ultimate Treasury determination, using the Japanese commodity tax valuation and making individual adjustments, is likely to approximate the result that would have been reached under the usual valuation methods is a question I cannot answer. One does wonder, however, what savings in administrative cost have really been produced, if courts now have to answer it in order to pass on the propriety of the Treasury practice. Indeed, more generally, it is difficult to believe that substantial savings really have been achieved in view of the costs of adopting the commodity tax valuation, adjusting it to the requirements of U.S. law, deciding which firms are subject to the procedure, and litigating the propriety of its adoption, both in principle and

in the varying circumstances of particular cases. (I am informed that more than 800 proceedings challenging Treasury valuations are now pending.)

The Political Dimension

It may be that everything I have discussed so far is only one part of a complex operatic scene. At stage left, the lawyers and administrative officials are conducting the debate about appropriate procedure discussed above. But there may be other important actors in the drama (I imagine them at stage right) whose voices, while no doubt influential in determining the outcome, and sounding loud and clear to the audience of decision-makers, come through indistinctly to an outsider like me. I refer, of course, to the public and private players in the larger political game of regulating international trade. It is clear that domestic interests invoke all the available remedies—congressionally imposed quotas and tariffs, countervailing duties supposedly designed to nullify subsidization of foreign goods, the import relief mentioned above, proceedings against "unfair" methods of competition in international trade, actions under the antitrust law, and no doubt many others of which I am unaware. Government officials have considerable discretion in the ways these various laws are applied. In particular, the Treasury, in its enforcement of both the antidumping laws and the law authorizing countervailing duties, has considerable discretion which can be used to make marginal adjustment to grant the degree of protection to domestic interests dictated by the underlying political forces.

How much the adoption of the commodity tax valuation represented such an adjustment toward the equilibrium dictated by the controlling political forces (rather than an effort to "improve" the administration of the law) is an interesting subject of speculation. One is impressed by the fact that the "procedural" change (first suggested by a U.S. manufacturer of television sets) appears to result in larger antidumping duties than were originally anticipated. It is also possible that the failure to complete the determination of the antidumping duties—coupled as it was with preliminary indications of much lower duties than are now likely to be imposed—reflected an earlier, more "permissive" view of the importation of Japanese TV sets than is now held by the Treasury.

There are, moreover, intimations that the willingness of the Japanese to enter into an orderly marketing agreement limiting exports to the United States was premised on some understanding of what Treasury intended with respect to the pending antidumping valuations. Although the Japanese have not explicitly charged "betrayal," there is no question that their government protested strongly when the commodity tax formula was adopted. And there are signs that the Treasury is vacillating: so far the commodity tax formula has only been applied to a small percentage of the cases for which it was supposedly designed. Thus, the ultimate outcome may well be determined by the complex interplay of political influence rather than by a legal decision as to the propriety of Treasury's actions.

Conclusion

It is a pervasive theme in the thinking of people skeptical about the social value of much government intervention in economic affairs that a large portion of the harm derives not from the outcome produced by the intervention but from the resources wasted in implementing it and in trying to influence its result. It would require large social benefits to justify the expenditures (actual and contemplated, public and private) in the controversy over how antidumping duties on Japanese television sets should be determined. To me it is plain that sufficient benefits do not exist to justify these costs, or indeed any costs, because I believe that the law serves no worthwhile ends. It would seem reasonable, however, to ask those holding a contrary view to demonstrate not only that there is in principle something to be said for the law, but also that its objectives can be secured at a cost that makes their attainment worthwhile. Of course, I realize that the questions whether to have an antidumping law and, if so, with what mode of enforcement will be answered in political forums in which the nice calculation of overall social cost and benefit may be influenced by the interests of those making the decisions and those seeking to influence them. Still, some good may come from heightened awareness of the social cost of this method of conferring private benefits. ■