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Trade, Competition and Antidumping – Breaking the Impasse!?

Recent reviews of the WTO, while cautioning against broadening its scope, nevertheless agree that antidumping concerns would need to be addressed "somehow". Obviously, promoting international market access and "fair" competition is difficult in the presence of divergent rules for dealing with private market power and non-border restraints to trade. This is especially true once these differences are taken to justify preferences for highly discretionary trade policy measures in dealing with dumping concerns. Antidumping and the prerequisite competition issues will therefore have to be put onto the agenda of the new round of trade negotiations.

Five years following its inauguration, the WTO, arguably "the single most effective international organisation"[1] but certainly *the* driving force behind multilateral trade liberalisation, experienced a major set-back. Not the presence of outraged protestors, but a seemingly mundane dispute among delegates over placing competition policy and antidumping on the agenda of the "millennium round" of trade talks led to the termination of the Seattle summit in December 1999. The EU and Japan had argued for extending the scope of GATT/WTO law from its current focus on public border measures to those domestic policies and private actions threatening to foreclose markets and distort competition. As part of that plan, WTO members were asked to enforce competition rules in line with shared principles for cases with an international dimension, particularly dumping allegations, and to agree to agency cooperation and binding dispute settlement.[2] US representatives, however, saw no value in a trade-focused forum setting competition standards, or "second-guessing complex national prosecutorial decisions".[3] It was held that, without a global consensus on economic, legal and procedural principles, efforts to harmonise fairly diverse national regulations would create lowest-common-denominator rules, politicise national antitrust enforcement, and overburden the WTO system. And yet, some statutory initiative seems vital lest the swelling of discriminatory trade measures continue to undermine the integrity of international accords, impair the benefits and predictability of global production and commerce, and impose huge direct welfare costs. What is the rationale behind proposing a switch from trade policy to competition policy in dealing with matters arising from international commerce? Does it require the scope of the WTO to be expanded? Are concerns for national sovereignty or income redistribution limiting broader economic integration? Or are we facing the political limits of globalisation, set by national authorities unwilling to forgo discretion over the domestic allocation of trade protection? What are the implications for business?

This article offers a concise perspective on these issues. It sketches the global growth and costs of international antidumping actions. It then takes the US system of trade administration as an example to review antidumping processes and standards and to point to a general need for redirecting policies to pursue long-term efficiencies and consumer benefits. Next, it discusses how to motivate a switch from current practice. Finally, it evaluates the pros and cons for expanding the scope of the WTO in a system that deals with private and public market distortions.

Trade, Antidumping and the Costs of Protection

Since the signing of the GATT by 23 mostly industrialised nations in 1947, 136 countries have bound themselves to multilateral trade concessions.

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[1] See W. A. Niskanen: Building on the WTO's Success, in: Cato Journal, Vol. 19, No. 3, Winter 2000, pp. 459-461.

[2] See EU Competition Commissioner Mario Monti, commenting on a decision by EU justice ministers to add antitrust policy to the Commission's draft mandate for the "millennium round", in: European Report, 12 October 1999.

[3] See J. I. Klein: A Reality Check on Antitrust Rules in the WTO and a Practical Way Forward on International Antitrust, paper presented at the OECD Conference on Trade and Competition, 30 June 1999.

In the process, they significantly lowered and "locked-in" tariffs on manufactured goods, and addressed barriers to trade ranging from government subsidies and procurement, to regulations of services, sanitation or intellectual property rights. Since 1950, the volume of world trade grew 16-fold, at three times the rate of global output.[4] Awaiting the inclusion of China and Russia, 85% of the world population and 95% of world trade will soon be tied to a "single undertaking." In contrast to the GATT, the WTO commits signatories to *one* common set of rules and disciplines whose application may be challenged in the course of a binding dispute settlement process. However, it is this control and the elimination of significant barriers to trade that contributed to a sharp increase in various forms of contingent protection, which are not yet subject to multilateral trade agreements. The prime example, antidumping action, is to relieve domestic producers from "unfair" and "injurious" low-price imports.

At the beginning of the 1990s, the WTO counted in total 405 antidumping orders, 193 of which were protecting US markets; by 1997, the United States accounted for 294 out of, in total, 832 orders. While the US had been the most active user of antidumping in the ten years to 1987, emerging markets such as India, Mexico, Argentina and Brazil have since become increasingly important users of antidumping proceedings.[5] Still in 1999, with the total number of antidumping investigations rising to 328 from an annual average of 232 for the preceding three years, traditional users (the USA, EU, Australia, Canada) accounted for 46%, with the EU taking first place.[6] Clearly, WTO-condoned antidumping action has spread to become *the* global trade remedy of choice. It is also a very costly one for most parties involved.

Restricting imports affects domestic competition, income distribution and incentives across a range of interrelated markets and sectors and fuels costly, "rent-seeking" activities just to maintain the "benefits of protection". Aggregating these various factors, the net economic costs of current US antidumping and countervailing duty actions are estimated to be $ 4 billion per annum.[7] Of the about 250 antidumping petitions filed by US steel producers since 1980, around one hundred are still enforced twenty years later. They currently "protect" less than 0.1% of the US labour force at an estimated 40% cost-penalty to steel consuming sectors employing more than 50 times as many workers.[8] Similar efforts in the 1980s to protect the US car industry cut consumers' real incomes between US$ 3.50 and US$ 5.50 for each dollar of added profit; each job saved cost consumers between US$ 93,000 and US$ 250,000 per year.[9] Comparable figures can be found for most economies delaying adjustments while claiming to benefit from free trade.[10]

Table 1
Top Users of Antidumping Measures (across Sectors)

1998		1999	
South Africa	41	EU	65
USA	34	India	60
India	30	US	45
EU	22	Australia	24
Brazil	16	Argentina	21
Australia	13	Canada	18
Mexico	10	South Africa	16
Canada	8	Brazil	14
Israel	7	Mexico	14

Source: Rowe & May, April 17, 2000.

But even more concerning than the evident resource waste, the rationale for imposing antidumping measures, commonly based on some foreign "unfair" private anti-competitive conduct or discriminatory governmental policy, only rarely lives up to domestic competition standards or broader economic principles. Willig concludes that less than 10% of international antidumping petitions in the United States, the EU and Canada in the 1980s could be justified on competition policy grounds.[11] Rather, dumping duties present domestic producers with a targeted firm or country specific trade weapon whose threatened use alone may cause international competitors to raise prices or restrain sales and effectively agree to collude at the consumers' expense.[12] They are the outcome of a domestic policy-making process that discounts

[4] OECD: Open Markets Matter: The Benefits of Trade and Investment Liberalization, Paris 1998.

[5] J. Miranda et al.: International Uses of Antidumping, 1987-1997, in: Journal of World Trade, Vol. 32, No. 2, 1998, pp. 5-71.

[6] See European Report, No. 2493, 18 April 2000, citing the antidumping review by the London law firm Rowe & May.

[7] M. P. Gallaway, B. A. Blonigen, J. E. Flynn: Welfare Costs of the US Antidumping and Countervailing Duty Laws, in: Journal of International Economics, Vol. 49, No. 2, 1999, pp. 211-244.

[8] R. Boscheck: Managing Structural Adjustment in the Global Steel Industry!? IMD Industry Note, 2000.

[9] OECD: The Costs of Restricting Imports: The Automobile Industry, Paris 1987, p. 38.

[10] See, for example, J. Coppel, M. Durand: Trends in Market Openness, OECD Working Papers, No. 221, 1999.

[11] R. Willig: Competition Policy & Antidumping, Brookings Trade Policy Forum, 1998. EU antidumping duties averaged 29% between 1991 and 1995; the US' average antidumping duty was 57% with a 454% duty imposed on Japan's NEC's super-computer exports in 1997.

broadly spread gains from freer trade to react to focused protectionist demands; their use is facilitated by a combination of murky assessment practices and deficient institutional restraints.

Antidumping Process and Standards

Again taking the US case, two authorities, the International Trade Administration (ITA) and the International Trade Commission (ITC), cooperate in determining whether import prices are unfairly low and injurious to domestic industry. Both agencies render a preliminary and a final verdict. If both rule affirmative at the first stage, the foreign producer deposits a tariff in an escrow account, which lifts prices up to a level deemed fair by the ITA. The money will be returned in case of a negative final verdict. If the final verdict stays affirmative, the producer either continues to pay the tariff or raises the price to the specified level. Which standards are used in practice to identify fair prices and injury?

In assessing the fairness of import prices, the ITA compares these either with the importer's domestic price levels or the cost of production. The former requires a comparison of like products and markets, and upon finding price differentials, leads authorities to rule out common business practices that are profit-maximising and can be shown to expand output and sales and, by that, overall economic welfare. The latter amounts to legally prescribing "acceptable" margins and banning potentially pro-competitive market entry strategies like cross-subsidisation and penetration pricing. Similar concerns can be brought against the ITC's evaluation of injury, or threat of injury, as "material" in the sense of "not inconsequential, immaterial or unimportant." But it is the overall vagueness of the standard that explains the agency's nearly general acceptance of injury claims, irrespective of their alleged causes or impact on sales, capacity utilisation, profits or cash flow.[13] Moreover, a recent analysis of ITC decisions in antidumping, countervailing duty and safeguard cases shows that the ratio of US imports from all countries rather than from any *particular* country correlated with the finding of material injury and specific actions.[14] Trade remedy figures as protection.

This is not to say that the dumping remedy is conceptually flawed. But of the three types of economic rationales commonly advanced in favour of antidumping – international price discrimination, intermittent dumping, and predatory pricing – only the latter provides a cogent, but largely theoretical justification. By charging different prices in different markets, price discriminating may lead to an increase, rather than a reduction, in total output and value creation. Welfare concerns are thus limited to the potentially significant costs of sustaining segregated market segments. But these costs are borne by the exporter, not the importer. Next, long-term systematic, or intermittent, dumping may injure consumers only if domestic supply is unable to adjust, which relates to concerns for efficient factor markets rather than trade remedies. Finally, predatory pricing is defined as "systematically pricing below cost with a view of intimidating and/or eliminating rivals in an effort to bring about a market price higher than would otherwise prevail."[15] But for predatory pricing to be viable, the exporter's home market or some third country must provide a source of cross-subsidy. Given that insight into these markets is vital for establishing predatory conduct, the question is which agency seems best positioned to undertake the assessment and could be relied upon to pursue broader welfare objectives rather than particular demands for protection.

If policy is to support global trade as the means for an efficient specialisation of production, and institutional restraints can be created to support the attainment of that objective, there is a necessary case to substitute antitrust for antidumping and delegate the assessment of dumping charges to exporters' competition authorities. To some, this may amount to "putting the fox in charge of the hen house".[16] To others it means limiting the inconsistent application and potential abuse of trade remedies and avoiding double standards for dealing with domestic vs. international competitors. This proposal requires harmonised competition principles and assessment practices to be decentrally applied, subject to arbitration. In addition, it calls on national authorities

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[12] Panagariya and Gupta offer an interesting analysis of optimal strategies for terminating antidumping proceedings in exchange for price agreements. A. Panagariya, P. Gupta: Antidumping Duty versus Price Negotiations, in: The World Economy, Vol. 21, No. 8, 1998, pp. 1003-1019. For a related view see R. J. Pierce, Jr.: Antidumping Law as a Means of Facilitating Cartelization, in: Antitrust Law Journal, Vol. 67, No. 3, Winter 2000, pp. 725-743.

[13] From January 1980 to July 1997, such claims were rejected only 12% of the time after the preliminary investigation and 17% of the time after the final investigation. See T. Klitgaard, K. Schiele: Free versus Fair Trade: The Dumping Issue, in: J. Rome: Reader in International Political Economy, 2000, pp. 30-37.

[14] R. Baldwin, J. W. Steagall: An Analysis of US International Trade Commission Decisions in Antidumping, Countervailing Duty and Safeguard Cases, Center for Economic Policy Research Working Paper No. 990, July 1994.

[15] Compare with Sherman Act, 15 U.S.C. para. 2 (1988).

[16] See C. Morgan: Competition Policy and Antidumping, in: Journal of World Trade, Vol. 30, No. 5, 1996, pp. 61-88.

to switch from seeking trade relief to pursuing antitrust remedies and, by that, to limit their discretion in dealing with domestic protectionist needs. What are the requirements for change?

Requirements for Change

Even if benefits from free trade clearly outweigh the costs of adjustment, focused interest group pressures are typically biased towards those who lose from trade. Sustaining a liberal trade policy therefore requires tight institutional support, transparency over the costs of protection, adequate stakeholder representation and access to institutions. As is argued next, by substituting antitrust for antidumping action and allowing for binding arbitration many countries could immediately obtain some of the needed institutional backing, but with insufficient stakeholder representation, it is doubtful whether governments would actually do so.

Trade and antitrust laws typically differ in objectives, patterns of influence that shape enforcement policies, procedures and institutions, and crucial injury and pricing standards. For instance, US trade policy provides a broadly discretionary and fairly blunt executive tool "to pursue the competitiveness of domestic competitors vis-à-vis foreigners (...) rather than competitive processes or consumer welfare".[17] By comparison, US antitrust policy is subject to congressional oversight, tight adjudicative rules and due process requirements. Antitrust cases are fully subject to the Administrative Procedure Act (APA) and reviewed by the US Court of Appeals based on principles of economic efficiency, consumer welfare and predictable enforcement.[18] It is largely for that reason that both Canada and Mexico argued for substituting antitrust for trade law in NAFTA. Similarly, the NAFTA Task Force of the American Bar Association preferred a replacement of antidumping by antitrust law, aiming to involve the tighter pricing standards of the Robinson-Patman Act and Section 2 of the Sherman Act in dealing with issues of predatory abuse. Alternatively, the Task Force opted for maintaining both antitrust and antidumping standards, but applying antitrust principles of injury and causation to make antidumping competition friendly. Yet, similar to its position taken at the Seattle summit later on, the United States has consistently resisted attempts at harmonisation and policy substitution and instead opted for a system of NAFTA working-groups on "subsidies and countervailing duties", "dumping and antidumping" and on "the link between competition and trade law". This is not surprising. Why would *any* government want to tie its hands in the domestic rent-seeking process – unless, of course, it could obtain some offsetting advantage not available otherwise, or it is forced to do so by some stakeholder representation or effective concern for the "public interest"? How are stakeholders represented?

National as well as multilateral antidumping standards do not give consumers adequate institutional access; there is little government interest in specifying the costs of protection. Articles 6 and 12 of the WTO Antidumping Agreement outline procedural rights of interested parties but limit consumers and users to present information on dumping, injury and causality rather than on the broader public interest. In fact, the WTO does not prescribe any cost-benefit analysis of antidumping relief. The United States Antidumping Code also does not contain any public interest provision. Canadian and EU authorities, however, are held to assess the broader impact of antidumping, at least in principle.[19] But in practice, less than a handful of public interest hearings have been convened since the Canadian provision was enacted in 1985, and consumer groups did not initiate or participate in any of these hearings.[20] Article 21 of the EC Antidumping regulation[21] goes further by denying relief if it is not considered to be in the broader Community interest.

[17] For reviews see H. M. Applebaum: The Interface of Trade/Competition Law and Policy: An Antitrust Perspective, in: Antitrust Law Journal, Vol. 56, No. 2, 1987, p. 409; H. M. Applebaum: The Interface of the Trade Laws and the Antitrust Laws, in: George Mason Law Review, Vol. 6, No. 3, 1998, pp. 479-492.

[18] Policies for enforcing US antitrust law are set by the Department of Justice and the Federal Trade Commission subject to congressional oversight, tight adjudicative rules and due process requirements. Cases are fully subject to the Administrative Procedure Act (APA) and reviewed by the US Court of Appeals. US antitrust laws primarily focus on the competitive process and outcome as assessed by measures of consumer welfare. Cases are brought for antitrust relief in terms of private single or treble damages, injunctions, divestitures, or criminal penalties. With regard to standards of injury and causation, antitrust laws require a showing that unreasonable restraints to trade or a substantial lessening of competition are the material causes of injury. With regard to price discrimination, the Robinson-Patman Act allows for a meeting-competition-defence.

[19] The Canadian International Trade Tribunal, upon finding injury, may consider the potential effect of antidumping duties on "the public interest" to address concerns that "concentration on producer interest alone is too narrow a focus and consumer interest must be considered". See M. J. Trebilcock, R. Howse: The Regulation of International Trade, London 1995: Routledge, Chapter 5, footnote 99.

[20] M. J. Trebilcock, R. House, op. cit., p. 111.

[21] Regulation No. 3283/94, O. J. 1994, L 349/1, revised O. J. 1995, C 319/10. Another mitigating factor is the so-called lesser-duty rule. Antidumping duties will not equal the dumping margin if the EC authorities considered that a lesser duty would suffice to remove the injury, Article 7(2) and 9(4).

In addition to reviewing the industry interests, users and consumer organisations are asked to submit written views at the beginning of an investigation.[23] However, consumers or user groups have no right of disclosure or to request an interim review of antidumping measures.[23] EC authorities are not required to verify any information other than from producers and traders and do not need to publish the results of any cost-benefit analysis.[24] In fact, it is unlikely that governments will undertake and publish comprehensive assessments of the costs and benefits of protection. Nor do they seem ready to accept any "second guessing" of policy decisions by, for example, extending the WTO Trade Policy Review Mechanism to provide detailed welfare assessments of trade remedies and evaluations of domestic policy processes.[25]

Hence, with the wide-spread use of antidumping action threatening to completely destabilise commercial relations and the efficient global organisation of production and exchange, its root causes need to be exposed. Questionable assessment standards and a highly discretionary and ambiguous political process create concerns for legitimacy and representation of affected interest. There is an urgent need for political action to create the transparency, institutional access, and legal standing that permits consumers to contest domestic or foreign trade policy decisions in courts, helps to substitute discretionary trade policy rationales by non-discriminatory competition principles, and allows for binding arbitration. But with these domestic institutions in place, would one have to expand the scope of the WTO to deal with competition-related trade issues?

Expanding the Scope of the WTO?

Whether the proposed policy switch requires international institutional support depends on the effectiveness of national enforcement and the extent to which substantive and procedural rules need to be harmonised to guarantee universal application. The current, broader debate on competition policy features a series of positions ranging from seeking a comprehensive and centrally administered competition policy – a "one world view"[26] – to rejecting any direct cooperation and insisting on liberalised trade and investments to effect regulatory harmonisation.[27] In between these nodes, an array of coordination opportunities extends from mere bilateral, procedural collaboration via focused sector or issue-based agreements, to multilateral accords on minimum or broader antitrust standards. Focusing on antidumping limits the number and complexity of antitrust rules to be applied, but disputes may still arise over cases of inadequate transposition of common principles into domestic law or different interpretations of facts. The question is whether the WTO should play a part in the review process and what should be reviewed.[28]

As a trade policy body, the WTO suffers from the stigma of promoting politically acceptable results rather than economic optima that competition authorities are often said to pursue.[29] In addition, WTO trade law does not directly address major competition related issues.[30] It is focused on dealing with government measures; the same is true for the WTO dispute settlement mechanism. Finally, although the WTO includes all the major trading nations that have comprehensive antitrust legislation, it is also com-

[22] Upon receipt of such comments, parties are given access to non-confidential files, and have the right to request an oral hearing whose content is to be taken into consideration in the final decision. Regulation No. 3283/94, Art. 6(7), 6(5).

[23] Regulation No. 3283/94, Article 20.

[24] Furthermore, Community interest does not figure during sunset reviews. Hence, although there is marked improvement in the procedural position of user and consumer interest relative to earlier EC rulings, their standing still does not equal that of producers. Article 21 (1) points to "the need to eliminate the trade distorting effects of injurious dumping and to restore effective competition," but antidumping relief will be rejected only when relief is clearly not in the Community's interest. For decisions on data access and presentation see BEUC v. Commission, case C-170/89 (1991) ECR I-5709, para. 18-23; see also Regulation No. 2423/88, Article 7(4)a 9, O. J. 1988, L. 209/88.

[25] Already in the 1980s, trading nations greeted but never effectively adopted similar suggestions. The Leutwieler-group, for example, came up with a "protection balance sheet" with which a government was to identify annually all trade restrictions and subsidies benefiting particular industries. See the GATT: Trade Policies for a Better Future, Annex II, Geneva 1985. The OECD drafted an "indicative checklist" for the assessment of individual trade-policy measures. See OECD: Competition and Trade Policies: Their Interactions, Paris 1984.

[26] For an exposition of this view see E. Fox, J. Ordover: The Harmonization of Competition and Trade Law, in: L. Waverman, W. S. Comanor, A. Goto (eds.): Competition Policy in the Global Economy, London 1996: Routledge.

[27] For a presentation of this position, see A. Lall: Competition Policy in Singapore: There is None, in: C. J. Green, D. E. Rosenthal (eds.): Competition Regulation in the Pacific Rim, New York 1996: Oceana Publications.

[28] See M. E. Janow: Contribution to the Antitrust and Trade Policy Roundtable, in: B. Hawk (ed.): International Antitrust Law & Policy, 1998 Annual Proceedings, Fordham Corporate Law Institute 1999; P. J. Lloyd: Multilateral Rules for International Competition Law, in: The World Economy, Vol. 21, No. 8, 1998, pp. 1129-1149; see also the special issue of Cato Journal: The Future of the WTO, Vol. 19, No. 3, Winter 2000.

[29] For an argument along this line see A. D. Melamed: Antitrust Enforcement in a Global Economy, in: B. Hawk (ed.): International Antitrust Law & Policy, 1998 Annual Proceedings, Fordham Corporate Law Institute 1999.

[30] For example in the areas of horizontal restraints, abuse of dominance, vertical restraints or mergers.

prised of a large number of economies that do not have any competition law at all and are unlikely to commit the resources to set up a viable enforcement infrastructure. Hence in view of its legal base, procedural facilities and broad commitment to multilateralism, the WTO may not seem to provide the best choice for housing the required coordination initiative.

However, the WTO offers an existing multilateral platform and dispute settlement mechanism, with some recent experience in tackling competition issues under the General Agreement on Trade in Services (GATS), agreements on Trade-Related Intellectual Property Rights (TRIPS) and Trade-Related Investment Measures (TRIMS). Also, the latest dispute panel findings on antidumping seem to strengthen the role that the WTO may play. Formally, Article 17.6 of the Antidumping Agreement[31] calls on panels to defer to an administering authority's interpretation of the Antidumping Agreement if facts were properly established and the evaluation was unbiased and objective – even if the panel would have reached a different conclusion. However, two recent WTO decisions,[32] directly challenging the US administration's application of its antidumping and countervailing duty laws, have been interpreted to show that panels *may but do not have to defer* to the decisions taken by national authorities. This lends credibility to panel reviews. At the same time, allowing panels to reconsider cases in detail raises concern about legal certainty, the efficiency of law, and the fact that "two authorities applying a rule of reason as well as similar norms and methodologies might still legitimately reach different conclusions".[33] Of the two principle ways of addressing this – defining a proper standard for review or pre-empting the assessment of individual cases altogether – only the former helps avoid the potential abuse of the system. Hence, given that the recent decisions effectively adjusted the procedural conditions of the WTO dispute settlement system, what remains to be done is to devise antidumping guidelines in line with a shared set of antitrust principles, de-centrally applied by national antitrust authorities and subject to binding review. This, in essence, restates the position of European and Japanese negotiators at the abortive Seattle Summit. It is the same as the one agreed upon during the EU-Japan Summit of 19th July 2000, when both parties pledged to cooperate in promoting a comprehensive round of world trade talks in the course of the year. It remains to be seen whether negotiators can break the impasse.

Summary and Implications

Since the inception of the GATT in 1947, every round of negotiation expanded the agenda and enhanced the benefits from trade. Recent reviews of the WTO, cautioning against broadening its scope, nevertheless agree that antidumping concerns would need to be addressed "somehow".[34] Obviously, promoting international market access and "fair" competition is difficult in the presence of divergent rules for dealing with private market power and non-border restraints to trade. This is especially true once these differences are taken to justify preferences for highly discretionary trade policy measures in dealing with dumping concerns. It is therefore inevitable to put antidumping and the prerequisite competition issues onto the agenda of the new round of trade negotiations. This would tie the hands of domestic policy-makers and undercut the influence of protectionist interest groups. Substituting clear, uniform and predictable rules for national discretion involves the use of self-restraint to constitute a global market and rely on competition to enforce efficiency in the allocation of resources and their productive use. To motivate the required change, stakeholders not only need to call on political authorities to demand institutional access and legal standing, but have to avoid opportunism themselves. To benefit from open markets and predictable business relations requires a readiness to deal with the resulting challenges to one's own production and employment. There is still no free lunch.

[31] Antidumping Agreement Article 17.6 states: In examining the matter referred to in paragraph 5 (the complaint and the domestic record of the importing Member): (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned. (ii) The panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panels find that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

[32] See WTO Panel Report, United States – Antidumping on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea, WT/DS99/R, para. 6.48-6.51, 29 January 1999; WTO Panel Report, United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, WT/DS 138/R, para. 6.17, 23 December 1999.

[33] See Issue Paper, OECD Conference on Trade & Competition (COM/DAFFE/CLP/(TD (99) 66; 25 June 1999.

[34] W. A. Niskanen, op. cit.