

# **Antidumping rules vs. competition rules**

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## **Abstract**

”Antidumping, as practiced today, is a witches’ brew of the worst of policy making: power politics, bad economics, and shameful public administration“ (FINGER 1993, 57). Nevertheless, the number of antidumping (AD) complaints has risen sharply to roughly three hundred new cases per year since the mid-1990ies. While historically only four countries – the USA, the EU, Canada and Australia – were ’heavy users‘ of AD legislation (with a share of 80 per cent of all AD cases initiated), the recent increase must almost exclusively be attributed to a class of ’new users‘: developing countries whose exports had been the principal targets of AD complaints in the past.

The increasing use of AD is a most worrisome trend in trade policy, since, contrary to common belief, AD rules do not necessarily prevent ’unfair‘ competition on international markets. By contrast, due to their enormous potential for protectionist abuse, the proliferation of AD complaints probably poses the most serious threat to free trade and international economic integration to date. Therefore a fundamental reform of current AD rules is proposed. Accordingly, in order to minimize the risk of protectionist abuse AD rules should be enhanced in such way as to incorporate the key principles and basic procedures of competition /antitrust policy.

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# Antidumping rules vs. competition rules

Andreas Knorr\*

## Introduction

The number of antidumping proceedings has continuously increased to around three hundred new cases per year worldwide.<sup>1</sup> Historically, the driving forces behind this development were the United States, Canada, Australia and the European Union which initiated more than eighty percent of all such complaints through the early 1990ies. In recent years, however, developing countries and emerging economies such as Brazil, South Korea, Mexico, and Tunisia have begun to use this trade policy instrument to shield their domestic markets from foreign competition;<sup>2</sup> in the past, these countries were themselves frequently affected by the AD complaints filed by industrialized nations. Nevertheless, a trend reversal towards less AD complaints is unlikely to happen any time soon. The reason is the full integration of the GATT 1947's former AD codex – which had only been signed by a small minority of the GATT's signatory states –, into the new GATT 1994, which is binding on every WTO-member state. However, a fundamental reform of AD rules appears to be badly needed in order to prevent a further erosion of the WTO system in the face of the well-known and well-documented penchant among politicians to abuse AD rules in a protectionist manner and considering the easiness in doing so.<sup>3</sup> This is because despite its obvious deficiencies<sup>4</sup> the WTO framework still remains an astonishingly successful attempt to enforce the principles of a market-based economy also in the domain of cross-border trade. Therefore, its primary purpose is to protect international trade against restraints and distortion of competition, whoever tries to implement them.<sup>5</sup> In this paper I will demonstrate that AD rules are counterproductive as regards this overall aim owing to the fact that AD rules degenerated in the course of time to some kind of legal claim on governmental protection from foreign competition. As a result, in their present form AD rules endanger the proper functioning of competitive market processes far more than dumping does itself. I therefore hold that the vast protectionist potential of AD rules could best be contained by reforming them in accordance with their little-known competition law roots. Once again AD rules ought to be closely realigned and harmonized with competition policy both in terms of their policy objective and procedural issues.

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<sup>1</sup> See *Wooton/Zanardi* (2002: 28).

<sup>2</sup> See *Petersmann* (1990: 194).

<sup>3</sup> See *Nicolaysen* (1991) and *Peters* (1996).

<sup>4</sup> See *Molsberger/Kotios* (1990) and *Hauser/Schanz* (1995).

<sup>5</sup> See *Gröner* (1994: 56)

While consensus was not at any time reached in the economic and legal debate about the merits and necessity of competition policy per se, or with respect to the empirical validity of alternative theories of competition, or the effectiveness and efficiency of specific antitrust instruments, this discussion is irrelevant for the following considerations. Instead, the underlying thesis of this paper is that the economic and legal procedures and criteria used to identify and sanction anticompetitive behavior should be the same for home and foreign producers.

## **Dumping – original meaning of the term and subsequent extensions**

### ***Traditional definitions of dumping***

*Viner* (1923), in his seminal treatise, defined dumping as “price-discrimination between national markets”. Since then dumping means that the sales price of the good in question is higher in its country of origin than abroad. The reverse issue is denoted as “reverse” dumping – a variant which is not covered by AD rules, however. Furthermore, closely following *Viner* the potential economic damage caused by dumping were widely considered to be a function of its duration – sporadic, short or medium term or as permanent –, and, most of all, of its underlying motives. While no consensus emerged on the first point,<sup>6</sup> with regard to the second criterion, only predatory dumping is now considered worth to impose sanctions. Predatory dumping is spoken of when a foreign supplier attempts to monopolize the market of the importing country by underselling the local competitors. This outcome is widely held to be economically undesirable if in the end a less efficient foreign producer with a ‘deeper purse’ has prevailed over a more efficient, yet less financially viable local rival. From an economic point of view, predatory dumping can be considered as a special form of the well-known predatory pricing problem. The sole, but merely technical, difference is that only a foreign market participant can exercise predatory dumping – and be sanctioned for doing so.

### ***Extensions of the dumping concept***

With the introduction of the additional variant of cost dumping – i.e. below cost pricing – the scope of application of AD rules had considerably increased by the end of the 1970s. Meanwhile, the majority of AD proceedings is centred on cost dumping. Nevertheless cost dumping is not explicitly mentioned, neither in Article VI of GATT nor in the complementary GATT AD agreement.<sup>7</sup> This is because this extension of the dumping concept was accomplished by some kind of gentlemen’s agreement between the USA, the EU, Canada and Australia shortly prior to the vote on the amended AD codex at the end of the GATT’s Tokyo Round. To be more precise, these countries agreed upon applying the AD rules also on those imported goods the sales price of which was lower than their fully allocated production costs.<sup>8</sup> Furthermore, this legal

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<sup>6</sup> See *Frenkel* (1991) and *Yarrow* (1987).

<sup>7</sup> See *World Trade Organization* (1994).

<sup>8</sup> See *Finger* (1992, 136).

conception has not been challenged by a GATT-panel so far. As a result, domestic suppliers – which on their home market are not subject to AD rules but only to national competition rules – are generally free to offer their products at a loss (as will be shown later, only those local companies which have been classified as dominant under antitrust laws might face some legal restrictions here), while importers are not.

Despite suffering a defeat before a GATT-panel which was set up, at Japan's request, to investigate its infamous 'screw-driver plant' regulation of 1987,<sup>9</sup> the EU succeeded in convincing other influential GATT-member states of the necessity to further broaden the scope of the dumping concept during the Uruguay-Round. The allegedly ever frequent attempts to erode AD rules by executing little value-adding direct investment in the country of import by establishing so-called 'screw-driver plants' served as a justification for the extension of the dumping definition in terms of assembling and input dumping.<sup>10</sup> Since then, the output of production facilities, which are owned by foreign companies or indirectly controlled by them, might not automatically be regarded as domestic production in the meaning of Article VI (as specified in Article 4 of the GATT AD agreement) – keyword: local-content.

## **AD rules versus competition rules**

### ***The common roots of competition rules and AD rules***

AD rules were originally been introduced in order to prevent foreign suppliers from restricting competition on domestic markets. In other words, initially AD rules were a necessary addendum to national competition laws, which could not be enforced extraterritorially. Frontrunner were the United States with the adoption of an addendum to the Sherman Antitrust Act of 1890 – the Wilson Tariff Act which was adopted in 1894 and which indeed was the world's first AD law.<sup>11</sup> The Sherman Antitrust Act was adopted to prevent competition restraints in trade between the U.S. states as well as in international trade from or towards the U.S. In the course of time the AD rules lost sight of their initial objectives and, furthermore, they also began to deviate substantially from the commonly accepted norms and standards of competition policy and law. Other than these, which were continuously refined to absorb new theoretical knowledge in the fields of competition theory and industrial organization economics, AD rules are still essentially based upon simple welfare economics.

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<sup>9</sup> See *Landsittel* (1990) and *Belderbos/Vandenbussche/Veugelers* (2001).

<sup>10</sup> See *Reuter* (1996: 51p.).

<sup>11</sup> See *Trebilcock/Howse* (1996: 101). This fact has been largely ignored by the literature on the topic which, more often than not, considers Canada's 1904 Customs Act the world's first AD regulation.



## **Competition rules**

### **Object of protection and objective**

The key function of competition policy is the prevention of individual or collective competition restraints in order to protect competition as an institution. Therefore, its exclusive objective is to ensure competitive market processes.

### **Procedural steps to identify and sanction predatory pricing**

The economic rationale of predatory pricing has always been a controversial issue in economics – particularly as a reaction to the extreme scepticism of the Chicago School of Antitrust Analysis regarding the viability of such a strategy.<sup>12</sup> A major intermediary result of this discussion is the prevailing opinion that predatory pricing or a credible threat of a predatory pricing strategy is beneficial if certain market structural conditions are fulfilled. Hence, antitrust authority investigate cases of alleged predatory behavior in a multi-stage process.<sup>13</sup>

#### *Who is entitled to sue?*

Neither US, nor German, nor the European competition laws set high requirements in this regard. Moreover, in some countries, the (corporate) victims of predatory pricing are allowed to sue the predator for damages as well.

#### *Step 1: Definition of the relevant market*

The overall objective of market definitions is to identify all existing and potential suppliers of a certain good or possible substitutes. The market definition also determines the quality of any antitrust action to a considerable extent. For competition policy purposes, demand characteristics are typically used to define product markets. As a result, all goods, which a sensible consumer classifies as functionally interchangeable to satisfy a given need, form the same product market, i.e. from his perspective, these goods are close substitutes. By contrast, the degree of technical and physical homogeneity of goods, which is the decisive segmentation criterion of *Marshall's* industrial concept,<sup>14</sup> has long been irrelevant in competition policy analyses (as opposed to trade statistics<sup>15</sup> and trade policy purposes including AD decisions). More often than not, product market definitions are amended by a geographical component. This reflects the insight that competition on any given product market might also be restricted due to the existence of natural barriers like transport costs or tariff and non-tariff barriers to trade. Finally, in order to be able to estimate the likelihood of new entries and future product and process innovations on the relevant market, it is crucial to try and identify which stage in its product life cycle has been reached.

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<sup>12</sup> See *Knorr* (1999); *Edwards* (2002) and *Ten Kate/Niels* (2002).

<sup>13</sup> See *Joskow/Klevorick* (1979) and *Bolton/Brodley/Riordan* (2000).

<sup>14</sup> See *Marshall* (1956: 84).

<sup>15</sup> Take, for example, the United Nations' Standard International Trade Classification (SITC) scheme.

### *Step 2: Test for market domination*

According to most antitrust laws in force, a company can be considered as dominant if either no competitor or no substantial competition exists in the relevant market. The market share of the company in question, its financial strength, its access to procurement and distribution markets, its linkages with other companies, legal and de facto market entry barriers, actual and potential competition by other companies, its ability to reorganise its range of goods and/or services, and the ability of consumers to evade to goods and/or services of other companies have to be considered in this regard. As a result, a comprehensive market analysis is required in order to audit for market dominance. If the competition authority concludes that no market dominant position exists, however, the procedure ends at this point, meaning that the company in question is not subject to any regulations whatsoever regarding its pricing behavior.

### *Step 3: Did the dominant player abuse its market power by practising predatory pricing?*

Competition authorities compare the sales price of the good in dispute with its production costs in order to analyse predatory pricing-suspicions. Tests include the so-called *Areeda-Turner*-test as well as the recoupment test. Their economic soundness should not be overestimated, however,<sup>16</sup> given their substantial theoretical, methodological and practical deficiencies.<sup>17</sup>

### *Step 4: Sanctions for predatory pricing*

German competition law forbids dominant companies any undue obstruction of competitors, including predatory pricing (cf. § 20 GWB), otherwise fines of up to 500,000 Euros plus an additional fine of up to three times the additional profit, which has been accrued due to the abuse, can be imposed. EU competition law allows for a fine of up to ten percent of the respective company's last year's turnover.

## **AD rules**

### **Dumping under GATT/WTO rules**

Article VI section 1 of the GATT treaty, which is mandatory for national AD rules of all member states, generally defines dumping as the introduction of products of one country into the commerce of another country at less than their normal value.

### **General objectives of the GATT/WTO's AD rules**

The GATT does not prohibit dumping. Anyhow it also allows the affected contracting party to take defensive measures under specific circumstances. In particular, said dumping has to demonstrably threaten or lead to "material injury to an established industry in the territory of a contracting party or materially retards the establishment of

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<sup>16</sup> See *OECD* (1989).

<sup>17</sup> Amongst other unresolved issues, it is impossible to exactly determine short-run marginal or average costs. Moreover, marginal and average cost can only be determined ex post if economies of scale persist. Finally, multi-product firms pose enormous difficulties in the proper allocation of joint costs.

a domestic industry” (Article VI section 1) – thereby the importing country bears the burden of proof. In conspicuous contrast to competition rules, the objective of AD rules is to protect individual domestic sector against (allegedly) unfair foreign competition.

### **Procedural steps to identify and sanction dumping**

Procedurally, as well as in terms of evaluation criteria and sanctions, AD rules differs substantially from antitrust rules.

#### *Who is entitled to sue?*

As a basic principle, the responsible authorities may only allow an application for an initiation of an AD procedure if the applicants represent at least fifty percent (measured by their share of the total output) of the allegedly harmed domestic sector – domestic subsidiaries of foreign suppliers as well as domestic companies which are closely linked with foreign suppliers do not count as domestic in this regard (Article 4 of the GATT’s AD agreement). Therefore, the application is often submitted by trade associations in practice. This application has to contain sufficient company and market data – in fact and in particular information which supports the dumping claim, about the relevant market as defined by the plaintiffs, and also evidence that the (allegedly) dumped imports do indeed harm the suing domestic suppliers.<sup>18</sup>

#### *Step 1: Test for dumping – calculation of the normal value*

The normal value is considered as undershot if the price of the good in the country of import “is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country” (Article VI of GATT). In case such a price cannot be determined, because the good in dispute is not produced for export or because no like good is offered in the country of origin or respectively not offered in the ordinary course of trade, GATT provides two alternative calculation methods to deduce the normal value. Hence, the sales price of the good in dispute must not be less than “the highest comparable price for the like product for export to any third country in the ordinary course of trade” or “the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit”. Allowances shall be made for country-specific differences “in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability” regardless of the method which has been chosen to calculate open-market value. If dumping cannot be proven, the proceedings end at this point.

#### *Step 2: Does dumping injure the affected domestic sector?*

#### Definition of the relevant market

In AD procedures, the relevant market is defined in a completely different and at the same time far wider manner than under competition rules. To begin with, only the domestic market of the importing country counts as the geographically relevant market – an approach that would not normally hold before the courts in a competition case. Furthermore, product markets are not defined by demand characteristics, but rather by

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<sup>18</sup> See *Monti* (1995).

means of the industrial concept. As a result, technical similarities of goods instead of their substitutability as stated by consumers are used to define the relevant product market.<sup>19</sup> The result is a far broader definition of the relevant product market definition in comparison to what would be the outcome of an otherwise identical antitrust investigation – with a proportionately larger protection effect in case sanctions may eventually be imposed against the foreign company. However, the major and most significant difference in comparison to malpractice surveillance is that in the course of AD procedures it is not analysed whether the foreign defendant enjoys a market dominant position.

#### Does dumping harm the domestic sector?

The more of the following attributes persist on the market in dispute, the rather has to be assumed material injury of the import-competing domestic sector as defined in Article 3 of the GATT's AD agreement: (please note that only a few attributes are specified here for illustrative purposes):

- The import quantities increase in absolute numbers (value or volume) or relatively compared to domestic demand or to domestic production,
- prices decrease or a due price increase cannot be put into effect by the domestic companies,
- production capacity, capacity utilisation, distribution, market share, profits, cash-flow, employment, wages and/or growth of the domestic sector decrease and/or its inventories increase and/or the domestic sector's investment and financing potentials deteriorate.

The provision of evidence on the causality between dumping and impairment is compulsory in order to prevent that any observed injury to the suing domestic sector was effectively caused by other factors – e.g. by increasing regular imports, changes in consumers' preference, a failed national structural policy or mismanagement. Admittedly the GATT-codex does not contain any robust guidelines on how to conduct this crucial causality test. In particular, decision criteria to prove the cause-and-effect-connection by sufficient certainty are missing. Hence, the national authority which is responsible for AD procedures enjoys considerable scope of discretion in its concluding decision, which even cannot be significantly curtailed by a decision-controlling GATT-panel.

#### *Step 3: Sanctions for injurious dumping*

The WTO allows members-states which are affected by injurious dumping to take two possible countermeasures: AD duties or price undertakings. The AD duty imposed shall not exceed the margin of dumping, i.e. the difference between the normal value of the good and the price charged by its foreign supplier in the importing country; however, “it is desirable that the imposition [is] permissive in the territory of all Members, and that the duty [is] less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry” (Article 9 of the GATT's AD agreement). Yet, AD duties can be renounced in favour of so-called price undertakings. This means that the convicted foreign company commits to “satisfactory voluntary undertakings [...] to

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<sup>19</sup> See *Lux* (1991); *Messerlin* (1995) and *Bronckers/McNelis* (1999).

revise its prices or to cease exports to the area in question at dumped prices so that the authorities are satisfied that the injurious effect of the dumping is eliminated” (Article 8 of the GATT’s AD agreement). Concerning the amount of the resulting price increase, price undertakings also shall not exceed the margin of dumping; furthermore, they should be limited to the amount, which is necessary to compensate the domestic sector for the injury suffered.

### ***Synopsis: Why AD rules are fundamentally flawed from an antitrust perspective***

#### *Flawed theoretical basis*

AD rules classify spatial price differentiation of any kind per se as a sanctionable, unfair abuse of market power. From a competition policy perspective this assumption can only be justified if perfect competition serves as the theoretical benchmark for analysis. However, competition policy has long abandoned this model due to its utmost unrealistic assumptions. In short, an antitrust policy based on it would more frequently suppress than safeguard competition. The same conclusion must be drawn with respect to current AD rules. Consequently, by far not every pricing behaviour of a foreign supplier, which technically meets the dumping definition, is per se questionable if analysed from a competition policy perspective. This is because modern economic theories – as manifested in the dynamic, evolutionary theories of market processes and competition as well as in the product-life cycle and technological gap theories of international trade<sup>20</sup> – have identified complex motives and causes for dumping practices, most of which have by now become accepted as pro-competitive.<sup>21</sup> These include:

- Profit maximisation through spatial price differentiation due to different price elasticities of demand in the country of import and the country of origin. Closely linked to this is the so-called ‘meeting-the-competition’-behaviour. The foreign supplier has to adjust prices to the lower level prevailing in the country of import, compared to the country of origin – due to more intense competition or lower demand –, in order to become and remain competitive;
- penetration pricing;
- loss minimisation (e.g. the company tries dispose of surplus inventory of a product it will no longer produce through very low prices);
- substantial economies of scale, learning curve effects or network externalities; in order to maximize profits over the entire product life cycle, the company ought to, when introducing the new good, charge prices below unit costs to fully exploit the mentioned effects and to capture the necessary market share. Profits will then be realised once these effects have fully come to bear.
- predatory dumping/pricing.

Merely the last aforementioned behaviour might, under certain circumstances, be considered problematic from a competition policy point of view and, therefore, might be rightly classified as ‘unfair’ and sanctioned. C.p. this ought to be the case, if the

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<sup>20</sup> See Posner (1961); Vernon (1966); Lemper (1974) and Oberender (1988).

<sup>21</sup> See Reuter (1996: 72pp.).

foreign supplier is dominant on the relevant market and can, therefore, act abuse its power. In contrast, all other dumping motives are unobjectionable, because they are competition compliant price setting strategies. The fact that competition in the country of import can be revitalised by market entries of price aggressive foreign suppliers should also not be ignored, in particular when the good in dispute already is in a later stage of the product life cycle, i.e. at a time when the domestic suppliers know each other inside out – with the effect that competition has more often than not given way to explicit or implicit collusion or at least conscious parallelism.<sup>22</sup>

What is more, current AD laws are not just out of touch with state-of-the-art competition theories and industrial organization economics. They also ignore some fundamental insights of trade theory, e.g. the validity of the theorem of comparative advantages. By this, the economic advantageousness of specialisation and international division of labour is ultimately disputed. The pure microeconomic objective of AD rules rather discloses and legitimates simplistic autarky thinking and a domestic economic policy, which is foremost aimed at conserving uncompetitive domestic industries – at enormous costs to consumers and taxpayers, and the economy as a whole.

#### *Serious procedural deficiencies*

AD rules offer numerous possibilities for a systematic discrimination of foreign suppliers, e.g. by different calculation methods for the determination of the normal value and the export price which have to be compared. This has already been documented by numerous authors. The effects of dumping on the country of import are merely partially analysed, i.e. unilaterally and merely in terms of the specific economic interests of the domestic competitors. Furthermore, the positive effects of dumping for consumers (exempt in case of predatory dumping) – first and foremost lower prices – and for the competitiveness of domestic companies, which use dumped foreign goods as inputs, are not considered at all.<sup>23</sup>

The substantial potential for discrimination, which results from significantly differing procedural rules of AD law versus competition rules has also been largely ignored up to now.<sup>24</sup> To begin with, in dealing with AD complaints domestic authorities normally follow the factual market definition of the applicant without conducting analyses of their own. This means that the definition of the relevant market is de facto left to the suing domestic sector or to the acting suing trade association, respectively. Furthermore, as mentioned above, the country of import normally is considered as the only geographically relevant market due to non-existence of generally accepted legal guidelines on how to define it. Finally, and most importantly, in AD trials there is no need to prove that the foreign competitor accused of dumping enjoys a dominant position in the relevant market (while in competition case sanctions can only be imposed for the abuse of such a position!). This leads to an interesting question: How many AD cases would lead to the imposition of sanctions, if antitrust rules had been

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<sup>22</sup> See *Oberender/Väth* (1986).

<sup>23</sup> See *Lux* (1991 and 1992).

<sup>24</sup> See *Nicolaysen* (1991: 229pp.); *Messerlin* (1995: 41pp.).

applied instead? According to an important study by *Messerlin*, who performed this test on all AD investigations conducted by the European Commission during the 1980ies, the market share of the foreign companies was less than five percent in 56 percent of the cases, and less than 25 percent in more than 90 percent of the cases.<sup>25</sup> A similar study by *Niels and Ten Kate*<sup>26</sup>, which analysed AD cases of OECD-member states between 1979 and 1989 and which is not publicly accessible, confirms this result. Therefore, if the procedural rules of competition policy would also be applied in AD cases most complaints would have failed!

*Perverse incentives: AD rules as a cause of competition restraints*

Without doubt, AD rules are seriously undermining the GATT-/WTO-system. These rules allow member states to easily withdraw from two of its main principles – non-discrimination and bound concessions. This is particularly true, if contrasted with the criteria which countries have meet to be granted an exemption from their treaty obligations according to the specific protection clause in Article XIX GATT. This clause, which allows member states to introduce temporary protection measures in order to avert “serious injury” of domestic suppliers, “as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement” has been effectively replaced by the use AD rules under Article VI of the GATT.<sup>27</sup> This process of substitution can be explained by the extraordinary easiness – especially if compared to the much stricter procedural standards in Article XIX – by which interested parties at home and abroad (!) can use AD rules GATT-conform in order to restrict competition to their favour:

- The major advantage of AD rules is that they allow giving in on specific and cost-efficient domestic protectionism and rent-seeking-interests without any obligation to compensate the affected trading partners – which is de rigueur under the specific protection clause. Furthermore, AD rules allow selective, i.e. country- or sector-specific, protection measures, in contrast to much broader-based protection measures according to Article XIX, which apart from few exceptions, does not allow countries to infringe upon the non-discrimination principle. Next, the countries hit by AD measures are prohibited to take retaliation measures, another clear contrast to the specific protection clause. Finally, the lower intervention threshold has already been mentioned – condition to prove is a “material injury” (Article VI) rather than a “serious” one (Article XIX).<sup>28</sup>
- Current AD rules offer domestic suppliers the possibility of applying a risk-free strategy of “raising rivals’ costs”, which is successful when AD duties will be imposed. What is more, in the face of the good prospects of success for suitors, a credible threat of an AD complaint could bring the potentially affected foreign suppliers to voluntarily raise their prices to the level prevailing in the country of import, to strike a cartel agreement with domestic suppliers or even to fully withdraw from that country. Finally, the joint application, which is legally required by AD rules, forces the exchange of confidential intra-corporate data. It is obvious

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<sup>25</sup> See *Messerlin* (1990: 126).

<sup>26</sup> See *Niels/Ten Kate* (1997: 37pp.).

<sup>27</sup> See *Smeets* (1987).

<sup>28</sup> See *Trebilcock/Howse* (1996: 167).

that the probability of collusion among the participating domestic producers increases significantly as a result – not to mention the fact that, under competition rules, a similar exchange of business secrets would in all likelihood be considered and sanctioned as an illegal conspiracy.<sup>29</sup>

- Current AD rules even allow foreign suppliers to restrict competition in their favour. Meanwhile, most AD complaints are concluded with price undertakings instead of the imposition of AD duties.<sup>30</sup> This incentivises foreign suppliers to intentionally infringe upon AD rules in order to be found guilty of this offence – a judgement which, in turn would force (!) them to legally collude with their domestic competitors.<sup>31</sup> Therefore, AD rules can also be considered as a trigger of dumping with the aim of forming lawful cross-border cartels.
- Against this background, it is quite rational for the governments of countries in Eastern and Southeast Asia, Middle and Latin America as well as Eastern Europe – traditionally the main targets of AD complaints – not to seek to overcome the status quo. As aforementioned, meanwhile many of those states passed own AD laws or they increasingly used the GATT-AD rules anyway. As such, these countries are now also in a position to satisfy rent-seeking and protectionism interests of domestic suppliers.

## Conclusions

“AD, as practiced today, is a witches’ brew of the worst of policy making: power politics, bad economics, and shameful public administration” (FINGER 1993, 57). As this paper has shown, a fundamental reform of current AD law is badly needed. The first-best solution would be to replace AD rules by national or supranational/international competition rules<sup>32</sup> – an approach which has worked extremely well on the EU’s single market. At least, as a second-best solution, they should be reformed so as to be based on the objectives and procedural rules of competition policy and competition law.

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<sup>29</sup> See *Stegemann* (1990).

<sup>30</sup> See *Reuter* (1996, 166).

<sup>31</sup> See *Anderson* (1992).

<sup>32</sup> The pros and cons of international competition rules are discussed by *Scherer* (1994) and *Gröner/Knorr* (1996).



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