A New Transatlantic Trade War?

Six months after the Doha agreement on a new round of talks to liberalise world trade, tension is mounting between the EU and the US, the world's two major trading powers, giving rise to fears of a full-blown transatlantic trade war and a new wave of global protectionism. The contributors to this Forum look at the causes of, and possible remedies for, this development, taking economic, legal and political aspects into consideration.

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Issues Surrounding the US-EU Steel Conflict

Faced with the misery and destitution of the war just ended, the founding fathers of the new system for regulating world trade found in their Proposal for Expansion of World Trade and Employment (November 1945) that: "The fundamental choice is whether countries will struggle against each other for wealth and power, or work together for security and mutual advantage." Any new conflict arising between the major trading partners confronts them anew with this choice. This article on the international steel dispute which broke out in early March aims to sketch the development of the trade feud over time and then to critically assess the procedures chosen by the trading partners and the decisions they have taken, questioning these in the light of the world trading rules currently in operation.

Timeline

5 June 2001: US President George W. Bush announces a comprehensive initiative to respond to the challenges facing the US steel industry. As part of that initiative, President Bush directs the US Trade Representative Robert B. Zoellick to request the US International Trade Commission (ITC) to initiate an investigation under section 201 of the Trade Act of 1974 into the effect of steel imports on the US steel industry.

22 June 2001: Trade Representative Zoellick calls upon the ITC to clarify "whether certain steel products are being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof."

7 December 2001: The ITC announces recommendations and views on remedy in its global safeguard investigation involving imports of steel, promising to issue its final report by the end of the month.

20 December 2001: The ITC concludes from its investigation that certain steel products "are being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or threat of serious injury, to the domestic industries producing like or directly competitive articles." The Commission proposes the establishment of protective tariffs of up to 20% of an imported product's price, for a four-year period.

5 March 2002: President Bush, on the basis of the ITC report, proclaims safeguard measures in the form of a tariff rate quota and an increase in duties on imports of certain steel products. The Annex to the Steel Products Proclamation, over 40 pages long, lists the protective tariffs, ranging up to 30%, applying to specific steel product types. The president reserves the right "to reduce, to modify or to terminate" the safeguard measures if certain conditions are fulfilled.

6 March 2002: The EU Commission puts forward a four-point programme in response to the United States' decision: 1) The EU will call upon the World Trade Organisation (WTO) to condemn the United States. 2) It will consider safeguard measures of its own against diverted imports from third countries. 3) The EU challenges the USA to propose what measures it will take to compensate injured parties and, if it fails to make any concessions: 4) Punitive tariffs will be applied to certain US products. The WTO confirmed the receipt of the EU's complaint on 7 March.

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20 March 2002: The US safeguard measures come into force for a four-year period.

20 March 2002: Under the auspices of the WTO, consultations take place between the United States and the EU, Brazil, New Zealand, Japan and South Korea. The negotiations show no immediate signs of success. If the consultations fail to produce any satisfactory result within 60 days, the EU is entitled to call for a WTO panel to be appointed.

22 March 2002: The EU compiles a list of 300 US products that it currently imports. These are the products that would be subject to punitive tariffs if the United States persisted with its measures to protect the steel industry.

27 March 2002: The EU resolves to apply an additional tariff of 15-26% on any steel imports from third countries that exceed the average import level for the last three years by more than 10%.

3 April 2002: The EU's safeguard measures against imports from third countries come into force.

19 April 2002: The EU publishes a proposed Council Regulation which would impose 100% punitive tariffs on certain US goods from 18th June 2002 (the so-called "short" list providing customs revenues of €377 million), to be followed by tariffs of 8-30% following a condemnation of the United States by the WTO (the "long" list with prospective customs revenues of €626 million).

17 May 2002: Japan decides to impose 100% tariffs on steel imports from the USA worth $4.88 million as of 18 June.

Unsolved Procedural Issues

Without presuming to judge the propriety of the procedures adopted by the disputing parties, the following will nevertheless highlight a number of procedural issues it might be interesting to discuss.

The US Trade Representative's letter requesting the investigation and the ITC's interim and final reports all avoid any mention of consultations between the trading partners under the terms of Article 3 (1) of the WTO's Agreement on Safeguards. Though not necessarily at government level, prior consultations are in fact said to have occurred between the trading partners.

The call for consultations made by the EU and other WTO members immediately after the announcement of the United States' safeguard measures, and their initiation of WTO dispute settlement procedures, is in accordance with the organisation's Agreement on Safeguards and the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding). However, Article XIX (2) of the GATT states that a resolution such as that made by the EU, to apply quotas to third-country imports without prior consultation, beyond which supplementary tariffs will be imposed, can only be justified "in critical circumstances, where delay would cause damage which it would be difficult to repair". Whether or under what circumstances this might actually be the case is a difficult question to answer. Consultations with the parties affected are required to produce satisfactory evidence of likely "damage which it would be difficult to repair", so it is up to the EU to present a convincing case in this respect.

A problematic item in procedural terms is the EU's Council Regulation imposing punitive tariffs on US merchandise. Article 22 of the WTO Dispute Settlement Understanding stipulates that a party to a dispute may not seek the Dispute Settlement Body's permission to take counter-measures unless the Body has already made recommendations and decisions and these have failed to be fulfilled within a reasonable period of time. The author is not aware of any dispute managed by the WTO in which the panel or any other body resorted to by a complaining country has agreed to counter-measures being taken before proceedings have got under way. The United States has already charged the EU with acting in contravention of WTO rules, stating that a WTO decision must be taken before retaliatory measures can be contemplated and that one party cannot act "as judge and jury" at one and the same time. It is fair to assume that the disputing parties' actions and reactions seen in recent weeks are at least to some degree intended as no more than posturing. However, aware that it only takes a small spark or flame to start a devastating blaze, representatives of German industry in particular (The Association of German Chambers of Industry and Commerce – DIHK; The Federation of German Industry – BDI; The Federal Ministry of Economics) have been urging moderation, calling on the EU Commission to "put paid to [this dispute] flexibly and constructively, without damaging transatlantic cooperation as a whole" (DIHT press release).

Legal Issues of Substance

Overcoming the differences between the United States and its foreign steel suppliers in the current dispute will also entail resolving a number of substantive issues. The main such issues concern

proving that imports are a source of "serious injury" and/or a "threat of serious injury" to US manufacturers, which involves establishing a causal link and, secondly, the problem of selectivity (i.e. departures from the "most-favoured-nation" principle).

Article XIX of the GATT, the WTO Agreement on Safeguards and the US Trade Agreement all concur that safeguards may be deployed "if ... any product is being imported ... in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products ..." The WTO defines serious injury as a "significant overall impairment in the position of a domestic industry", while a "threat of serious injury" is understood to mean a threat "based on facts and not merely on allegation, conjecture or remote possibility". On the basis of usage in US legislation, a distinction needs to be drawn between the term "serious injury" as used by the WTO and "major injury". The term "serious" is used when the injury concerned is one among other forms of injury occurring and, though significant, it is not the most significant of them. In contrast, a "major injury" would be the most significant among them. Thus the term chosen by the WTO assumes that, though excessive imports are injurious or pose the threat of injury to domestic producers, there may well be other factors contributing to the damage or threat besides the excessive imports.

Proving damage is always difficult on the basis of economic statistics. Depending on how products are grouped (i.e. precisely which products a category includes or excludes) and whether a case is made in value or volume terms, vastly different conclusions can be drawn. The ITC, for example, points out that the total value of steel imports into the United States has grown by 25% in the last five years, from $10.2 to $12.8 billion, whereas the EU Commission calculates that the volume has remained virtually unchanged at 28 million tonnes. The discrepancies between interpretations are even greater for specific product groups. Looking at the same five-year period, the ITC identifies some product groups (such as carbon and alloy pipe and tube) showing growth of a little over 55% while imports of others (e.g. carbon and alloy flat products) grew just under 5%. In other words, depending on how categories are defined there is ample scope for "creative" grouping. All in all, the ITC defined 33 product groups, among which it found twelve groups for which imports were so excessive "that they are a substantial cause of serious injury or threat of serious injury".

Another issue which remains unresolved in the present dispute over steel is the justification for selectivity. Without any further explanation, item 11 of the US proclamation states that the safeguards will apply to imports from all countries with the exception of Canada, Mexico, Israel and Jordan. According to a letter by Robert B. Zoellick, the exception for the two fellow NAFTA members Canada and Mexico is attributable to President Bush, who used the phrase "products from all sources other than Mexico and/or Canada" in his letter of instruction. The ITC then added its own proposal "that none of the additional tariffs or tariff-rate quotas apply to imports from Israel, or to any imports entered duty-free from beneficiary countries under the Caribbean Basin Economic Recovery Act or the Andean Trade Preference Act". Referring to the US-Jordan Free Trade Area Implementation Act, the ITC recommended that none of the additional tariffs be applied to imports from Jordan. In contrast to the United States, which grants preferential treatment to its treaty partners, the EU has evidently chosen to take no heed of its existing trade agreements. Switzerland and Norway, which have had a free trade agreement with the European Coal and Steel Community (ECSC) since 1972 expressly forbidding tariffs on exports or imports, will be subject to the same EU punitive tariffs as all other countries.

There are insufficient precedents to clarify the extent to which the most-favoured-nation (MFN) principle must be adhered to when safeguards are applied, or whether exceptions may be made to honour specific free trade agreements. Proponents of upholding the MFN principle base their case on the first sentence in the interpretational terms of the article on safeguards contained in the Havana Charter which never came into force. These state: "It is understood that any suspension, withdrawal or modification ... must not discriminate against imports from any member ..." However, the proponents of selectivity go on just one sentence further in the same interpretational passage, stating "... that such action should avoid, to the fullest extent possible, injury to other supplying member countries". This, without doubt, will be one of the issues that need to be resolved in the WTO's dispute settlement proceedings.

The preference granted to developing countries in item 11 of the US proclamation will not, in principle, give grounds for differing views as the terms stipulated by the United States comply with Article 9 of the Agreement on Safeguards: "Safeguard measures shall not be applied ... as long as its share of imports

of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned." However, one issue that may arise in this context is how exactly the term "developing countries" should be defined.

Whether the steel conflict can be brought to a mutually satisfactory solution in the months ahead – and if so, how – will be very significant for the further development of the world trade system as we know it today. This dispute not only concerns an important traded good, but it also involves two trading partners who play the role of vanguard in the on-going development of a world trading order.

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Transatlantic Trade Under Fire

The United States is by far the most important trading partner of the European Union, taking nearly one fourth of its exports and supplying one fifth of its imports. The EU, for its part, is the second-largest trading partner of the USA, "sandwiched" between Canada and Mexico (the two other NAFTA members), each of which accounts for roughly one fifth of US exports and imports. Among the trade flows between the world's largest regions (East and South Asia, North America, Western Europe), the transatlantic one, comprising the trade between the NAFTA area and the European Economic Area (including the EU and EFTA states), is the second-biggest flow (with one twelfth of total world trade) after transpacific trade between North America and Asia (with one tenth of total world trade). If interregional trade is more strictly considered in terms of bilateral trade among countries or political entities, trade between the USA and the EU is the largest item by a wide margin. As shown in Figure 1, it is almost twice the value of US-Japanese trade (the second-largest bilateral interregional trade flow) and more than three times as large as the EU-Japanese flow (the third-largest one).

Expanding Transatlantic Production Networks

In the field of foreign direct investment (FDI), EU-US economic links are even closer than in the area of foreign trade. The US economy has gained ever-growing significance for both outgoing and ingoing EU FDI flows. In consequence, almost 50% of the FDI stocks controlled by EU companies in third countries are located in the USA while even 55% of third-country controlled FDI within the EU originates in the USA. Conversely, EU member states combine nearly two thirds of total inward FDI stocks in the USA (as against less than 60% a decade ago) and 45% (43%) of outward US FDI. In a global perspective, bilateral FDI between the EU and the USA clearly dominates FDI links between the world regions (Figure 2). Transatlantic direct investment and trade flows are also closely interwoven and complement (rather than substitute) each other. For example, US subsidiaries in the EU undertake about one fifth of total EU trade of manufactures with the USA (more or less evenly distributed between exports to and imports from the USA) while EU subsidiaries in the USA are responsible for almost one third of US manufacturing imports from the EU and one eighth of US manufacturing exports to the EU. Most of this trade is intra-company supplies of parts and components for further processing. These shipments have grown faster than at-arm's-length sales among unrelated companies and thus more quickly than total EU-US trade. Expanding production networks between the EU and the USA also involve a growing overall economic significance of each other's companies in the respective host economies. For instance, affiliates of European firms in the USA and American owned subsidiaries in the EU now account for approximately one tenth of total US and EU employment in manufacturing respectively.

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