The Modernization of the EU Trade Defence

Some Comments

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Reform of the EU Trade Defence Instruments

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Introduction

1. This paper addresses a few selected areas of possible reform. It focuses on anti-dumping (AD) and anti-subsidy (AS) action.
   This does not imply that safeguard action and the action against trade barriers should not be reviewed. It means simply that a review of AD and AS is more urgent in the view of the European Commission, which left safeguard action and the action against trade barriers aside. The Commission, however, submitted a proposal designed to strengthen the EU decision-making process when dealing with trade barriers.[1]

2. The scope of this paper is limited. First, it is based on the working hypothesis that in modernizing its trade defence the EU wants to remain within the framework set by the WTO rules as they are today. In other words the modernization exercise is not a pre-emptive bid in the Doha Development Round of Multilateral Trade Negotiations, even though at present these negotiations have been put on the back-burner. This does not mean that the EU's experience of trade defence measures has not revealed the need to review the current WTO framework. However that is part of another exercise to be conducted mainly in Geneva rather than in Brussels.

   The working hypothesis of this paper is that the EU wants to modernize its trade defence by using the flexibilities, which WTO Members have in interpreting certain aspects of the various relevant WTO agreements and their implementation, in order to bring about changes which experience suggests.

   The second limit is that this paper does not address the impact of the "comitology" on the interpretation and application of the current trade defence rules. Such an analysis would at this stage be speculative. However, as will be shown, changes brought about by the Lisbon Treaty in the allocation of responsibilities for applying trade defence rules have a direct impact on one of the requirements to which AD and AS action is subject: the Community [European Union] interest. This topic will be addressed briefly.

3. The comments in this paper are grouped under the following headings: nature of trade defence, initiation and duration of investigations, time frame of remedies, lesser duty rule, transparency and predictability, effectiveness and enforcement, "European Union interest" and the global supply chains

[1] Proposal for a regulation concerning the exercise of the Union's rights for the application and enforcement of international trade rules (COM/2012 773 final, 2012/0359 (COD) of 18 December 2012.

On the nature of trade defence

Trade defence measures are taken following an investigation triggered practically always by a complaint of the EU industry. Moreover they are taken in order to remove the injury caused to that industry by dumped or subsidized imports.

This does, however, not mean that only private interests are at stake. Interestingly, while the EU rules governing AD and AS actions grant the EU industry a right to complain[2], they do not grant it a right to corresponding AD and AS measures once it is established that there is dumping or subsidization and injury caused by it. The adoption of remedial measures depends on an additional finding that the public interest "calls for an intervention".[3]

When considering the public interest the Commission and, as the case may be, the Council enjoy a very wide discretion. By subjecting the adoption of remedial measures to such a finding, the EU legislator has refrained from creating for the EU industry a right to remedial measures. This is to some extent comparable to the situation in the competition policy area: the Commission can reject a complaint alleging a breach of EU competition rules when it finds that there is no "European Union interest" in acting on that complaint.

EU trade defence involves certainly establishing a balance between conflicting private interests but as the "European Union interest" clause makes clear trade defence is about public interest.

It should be noted that the WTO does not require WTO Members to apply a public interest test when contemplating AD and AS measures. It is for the EU legislator to decide whether the legitimate interest of the EU industry in obtaining a remedy against the injury caused by dumping or subsidization should be a legally enforceable right of the EU industry.

Initiation and Duration of Investigations

1. Time and cost factors

The European Commission's longstanding policy is to initiate an investigation only following a complaint by the EU producers of the "like" product.
Following WTO rules, such complaint must contain information on a number of items.

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2 *FEDIOL*, 1983 ECR 2913, para 26.

3 Regulation 597/2009 on protection against subsidized imports from countries not members of the European Community (O.J. 2009 L 188/93), Art. 15(1); Regulation 1225/2009 on protection against dumped imports from countries not members of the European Community (O.J. 2009 L 343/51) Art. 9(4).

The European Commission subjects complaints to high standards. The advantage thereof is to limit considerably the likelihood that investigations, in which time and effort are invested by the European Commission and by interested parties, are terminated without measures being adopted. The drawback is that preparing such a complaint requires time and represents an important cost for the complainant.
As is well known no complainant in his right mind would lodge a complaint without first "testing the waters" by seeking the advice of the Complaints Office of the Commission Trade Defence Directorate on his draft complaint. This may involve several re-drafts of the complaint. It is not uncommon for this unofficial vetting of a complaint to take one year.

Once initiated an investigation will lead to definitive measures more often than not by taking up the maximum duration of 15 months set by the WTO rules. Taking account of the time usually needed to prepare a complaint, the EU industry has a much longer time to wait for a remedy than e.g. the Australian, Canadian and US industry.

Apart from the time this takes, the gathering by the complainant of market data costs between 60.000 and 100.000€.[4]

The total cost for interested parties is, according to a survey, on average 217.000€.[5] While still lower than in Canada and in the US, this cost is bound to be prohibitive to SMEs. One way to lower that cost would be to introduce a simplified complaint procedure for SMEs.

2. Retaliation threats

EU industry has complained about threats of retaliation by exporting countries against EU undertakings to persuade them not to file trade defence complaints.
WTO rules do not exclude "self-initiation" of investigations by WTO Members. The European Commission should be prepared to self-initiate investigations in such cases.[6]
Except where the complaining EU industry consists of a significant number of undertakings, self-initiation by the Commission is unlikely to prevent the exporting WTO Member from identifying the EU undertakings that are behind the investigation. Nonetheless self-initiation ought to be considered as an option: it signals to the exporting WTO Member that the EU is determined to use its trade defence instruments notwithstanding threats of retaliation directed at EU undertakings affected by dumped or subsidized imports from that WTO Member.

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4 BKP, *Evaluation of the European Union's trade defence instruments*, Vol. 1 at p. 355.

5 *Ibid* at p. 392.

6 Where retaliation materializes in the form of trade defence measures taken by exporting WTO Members against EU undertakings, the EU should challenge without delay such measures if they are inconsistent with WTO rules. The EU did so in the case of the anti-dumping action by China against imports of security scanning equipment.

Time Frame of Remedies

Pursuant to the current EU AD and AS rules a duty is applied only to goods imported after the entry into force of such duty. The principle thus is no retroactivity. The current rules also provide that a provisional duty is definitely collected if the Council decides so when adopting a definitive duty. This is no retroactivity as the provisional duty itself applies to goods imported after the entry into force of that provisional duty. Definitive collection of provisional duties is the normal practice.

The current EU AD and AS rules allow the Council to impose a definitive duty on goods imported before the entry into force of the provisional duty. This retroactivity is possible only when certain conditions are fulfilled, i.a. the imports must have been registered and there is for the product in question "a history of dumping over an extended period" or "the importer was aware, or should have been aware, of the dumping as regards the extent of the dumping and the injury alleged or found".[7] Moreover this retroactivity is limited: the definitive AD or AS duty may be applied to goods imported not more than 90 days prior to the entry into force of the provisional AD or AS duty.

So far no AD or AS duties have been applied retroactively. One can only guess why. Are the conditions too difficult to fulfil? If that is the case there is little to be done at present as these are the conditions appearing in the WTO rules. Is retroactivity of the definitive duty not worth it as it cannot go beyond 90 days prior to the entry into force of the provisional duty? Is there no evidence of history of dumping over an extended period of time? In the absence of any precedent and any explanation thereof by the Commission it is difficult to come to some recommendation. At the very least the Commission should be invited to explain why this provision on retroactivity has so far remained a dead letter.

"Lesser Duty" Rule

Under the "lesser duty" rule in the basic AD regulation and the basic AS regulation the AD duty and the AS duty are set at an amount less than the dumping margin or the total amount of the subsidy, where such "lesser duty" would be adequate to remove the injury caused to the EU industry by the dumped or subsidized imports.

The injury is a condition for imposing an AD or an AS duty. It thus seems logical to consider this condition as the purpose the imposition of an AD or an AS duty seeks to achieve and consequently to limit the duty to what is needed to remove such injury.

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[7] Basic AD regulation cited *supra* n 3 Article 10(4); the basic AS regulation cited *supra* n 3 contains a comparable provision.

The question arises, however, whether this rule is as justified in AS proceedings as it is in AD proceedings. Subsidization by a government is a quite different matter than dumping by an undertaking. Subject to this reservation, this rule calls for two comments:

1. It has been suggested that the "lesser duty" rule should not apply to anti-circumvention and anti-absorption duties. This makes sense: circumvention of AD and AS duties and their "absorption" by the exporters are actions taken by exporters to nullify measures taken by the EU. These actions should be counteracted by anti-circumvention and anti-absorption duties that have a deterrent effect beyond that of merely removing the injury caused by these actions.

2. It should be borne in mind that other WTO Members do not apply the "lesser duty rule" and apply higher AD and AS duties. In cases where the EU imposes duties on imports of the same product as one of these other WTO Members there exists a risk of deflections of trade: exporters of the product in question might shift their exports to the WTO Member with the lower AD or AS duty. The Commission should examine what could be done to take account of such risk and possibly increase the amount of the AD and AS duties to cover the dumping margin or the amount of the subsidy.

Transparency and Predictability

Guidelines

The Commission is examining the possibility of adopting guidelines. This is obviously to be welcomed from a transparency point of view. In addition guidelines improve predictability as the Commission will, as a rule, be bound by its own guidelines. Predictability depends on the wording of such guidelines i.e. on the extent there are many "if's" and "but's".

1. Such guidelines are considered for the following items:
   - analogue country
   - injury margin
   - expiry review
   - Union interest.

   The first 3 topics could be addressed by guidelines as they are of a more technical nature and could be based on an extensive case-by-case practice.

   The Union interest however is a quite different matter. As indicated earlier, this vague, undefined concept is a device not to adopt remedies, as provided by the basic AD and AS regulations, notwithstanding findings of dumping or subsidization and of resulting

injury. Clarifying this concept and defining the conditions in which it applies is not a topic for Commission guidelines.

First, such guidelines could not be based on an extensive case-by-case practice. While most regulations on AD and AS findings consider that remedies are in the Union interest, there is very little practice of proceedings being terminated without remedies on the ground that such AD or AS remedies would not be in the Union interest.

Second, and more importantly, the final say on Union interest and clarifying the concept and defining the conditions in which it applies cannot be left to the Commission, to which under the new "comitology" rules the making of final AD and AS findings, including on Union interest, and adoption of AD and AS duties will be delegated.[8] The TFEU is perfectly clear on that. Article 290 provides that

> "[t]he essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power".

Consequently the "essential elements" of the Union interest - its definition and the conditions of its application - will have to be defined by the legislative act delegating the power to apply AD and AS rules to the Commission, thus by the Council and the Parliament and not by Commission guidelines.

2. Predictability has been invoked in support of a "shipping clause", i.e. a rule that would require the Commission to give exporters and importers one or two months advance notice that provisional AD or AS duties will be imposed.
Such advance notice is certainly not a legal requirement resulting from the principle of legal certainty or the protection of legitimate expectations applied by the Court of Justice and by the General Court. Far from indicating that there will be stability the basic AD and AS regulations precisely provide that AD and AS duties may be imposed. Similarly exporters and importers are not given reasonable expectations that there will be no AD or AS duties.

Is such notice necessary? This is at first blush highly doubtful. 9 months before the adoption of provisional measures exporters and importers are warned by a Notice of Initiation that provisional duties may be imposed. Maybe they want to have a last clear chance to export/import before AD or AS duties are imposed once they have certainty that provisional duties will be adopted. Would this not lead to "bunching" and defeat partly the purpose of imposing an AD or AS duty?

[8] Under the AD and AS basic regulation as they still apply pending the adoption of specific « comitology » rules in this area, the final decision on Union interest is for the Council to take.

Effectiveness and Enforcement

Co-operation

As any other institution charged with trade defence investigation, the Commission depends on the willingness of the parties to cooperate.[9]

The two basic Regulations impose certain obligations on private parties in this regard. How are these obligations enforced?

One sanction-like measure is the use of available evidence in the event of non-cooperation in the course of an investigation. Such evidence, e.g. generally the evidence contained in the EU industry's complaint, is normally less advantageous to the foreign exporter/producer than the evidence that the exporter/producer could supply. Even though the rationale is different,[10] the effect on the foreign exporter/producer is that of a sanction.

Another sanction-like measure is termination of an investigation without protective measures where the EU industry fails to cooperate.[11] Here again, the rationale may be different, but such measure acts as a sanction.

Circumvention and absorption

A third type of sanction-like measure applies once an anti-dumping or a countervailing duty is in place; it concerns circumvention or "absorption" of such duty by the exporter. The measure consists of an expedited procedure providing faster relief to the EU industry. Such measure is in substance a measure that the EU could take anyway following a new investigation.[12]

Deterrent effect?

It is doubtful that these quasi-sanctions have a genuine deterrent effect. If research confirms that there is no such deterrent effect, the Commission should consider alternative measures.

To address refusal to cooperate, daily penalties comparable to those applying in the competition policy area would seem appropriate.[13] In the area of trade defence, such penalties would not be out of place. While taking on board legitimate interests of the EU

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9 *European Fertilizer Manufacturers' Association*, 1999 ECR II-3291 paras 71-72.

10 According to the EU General Court it is not part of the purpose of the use of « facts available » to penalize traders for their failure to participate in an anti-dumping investigation (*Medici Grimm v. Council* [2000] ECR II-2671, para 88).

11 The rationale is that in such a case the EU institutions would have great difficulty in making findings on injury (*Gimelec e.a. v. Commission* [1991] ECR I-5589, para 30).

12 Except for cases where following an anti-dumping or an anti-subsidy investigation the producer/exporter assembles the product concerned within the EU.

13 The BKP stufy comes to the same conclusion *supra* n. 4, Vol. 1 at pp 160-161.

industry, trade defence is, as indicated earlier, in the end a public interest matter for the EU. Public international law sets limitations to the effective application of such penalties to foreign exporters/producers. Notwithstanding such limitations, in the competition policy area the threat of such penalties seems to persuade undertakings to cooperate with the Commission.

To address absorption and circumvention of anti-dumping or countervailing duties, the "lesser duty" rule should not apply to the duty against absorption or circumvention.

Global Supply Chains

The phenomenon of global supply chains is known. It has recently been well documented by a joint OECD/WTO study.[14] It is one of the consequences of what economists call the international division of labour. It is also called the "fragmentation of production" or "segmentation of production". Companies spread their production by purchasing components and by locating parts of their production processes where it is most advantageous to do so. One of the results is that an end-product imported from country "x" may consist of components that are assembled in country "x" but are themselves imported from country "y".[15] The question has arisen on whether and how the EU's current AD and AS rules cope with that phenomenon. The question may be relevant from two different angles: defining the "EU industry" and applying the proper remedy.

EU industry

In defining EU industry for the purpose of taking AD or AS action the Commission appears to rely on the EU customs rules on origin. Is EU producer the undertaking that has carried out in the EU "the last substantial manufacturing or processing, deemed sufficient to give the commodity its essential character". This may be an important added value but is not necessarily so. As a result an industry that adds an important value in the EU but does not carry out in the EU the "last substantial transformation" will not be qualified as "EU industry" within the meaning of the AD and AS rules and be denied the protection against dumped or subsidized imports of a final product. By contrast an industry that carries out in the EU the "last substantial transformation" without adding much value in the EU will be qualified as "EU industry" with the attending consequences. Clearly the EU practice needs to be adjusted to this phenomenon.

[14] *Trade in value-added: concepts, methodologies and challenges* (2013).

[15] *Ibid*, the example of Apple Iphones and Ipads at pp. 2 and 7.

The proper remedy against dumped/subsidized imports

The current EU AD and AS rules refer to the EU customs rules on origin for the purpose of defining the origin of the products to which AD and AS measures apply. If no specific solutions are adopted this means that AD and AS measures apply to products whose origin is defined by reference to the "last substantial transformation" but not to the value added which may be minimal. The AD or AS duty collected on importation is calculated on the basis of the customs value of the final product. This has certain drawbacks.

The first drawback is that part of that value is represented by components that have been supplied to the exporting country by undertakings located elsewhere.[16] The result is that the AD and AS duty applies in fact on these components.

The second drawback has to do with the similar phenomenon occurring within the EU. The EU industry may be carrying out the "last substantial transformation" but adding little value to components it purchases on the world-market. Again, the AD or AS duty collected on importation of the "like" (final) product is calculated on the customs value of the imported like final product. The result is that the AD or AS duty over-protects the EU industry which adds little value in the EU. Clearly the EU AD and AS rules referring to the customs definition of origin and the calculation of the AD and AS duties need to be reviewed.

Conclusions

This paper has a narrow scope. As indicated it is limited to action against dumping and subsidization of imports into the EU. Moreover, the topics addressed have been selected assuming that in modernizing its trade defence instruments the EU does not intend to depart from the relevant WTO rules. In addition, except for the "EU interest" test, this paper leaves aside possible changes resulting from the new "comitology".

- The way the EU deals with initiation and duration of investigations should not be reviewed - except maybe when SMEs are complainants - as it contributes to the quality of the investigation.
  The question arises whether the long wait of the EU industry for AD and AS duties should not somehow be compensated by a more flexible attitude of the Commission with regard to retroactive application of such duties.

- The application of the "lesser duty" rule should be reviewed in AS cases and for anti-circumvention and anti-absorption duties.

[16] See *ibid* at p. 7 the example of the Iphone showing that most of the components of the Iphone imported from China are sourced from economies outside China, i.a. from Germany.

- More transparency and predictability through publication of guidelines by the Commission is to be welcomed. However, it is for Council and Parliament to define "European Union interest". Furthermore whether a "shipping clause" is necessary is highly doubtful.

- The necessary co-operation of the parties needs to be strengthened by introducing the possibility for the Commission to impose daily penalties.

- The impact of global supply chains on defining "EU industry" and on calculating AD and AS duties needs to be taken into account.