

# What Role for TDIs Between the EU and the UK After Brexit – A Trade or Competition Solution to a Future Problem?

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## 1. Introduction

The triggering of Article 50 TEU on March 29, 2017 marked the beginning of lengthy divorce proceedings between the European Union (EU) and the United Kingdom (UK). Close to a year later, at the time of writing, the precise arrangements by which the UK will withdraw from the EU and the details of the future partnership remain considerably unclear.<sup>1</sup> Sober observers are left to hope that the worst possible outcome, a 'no-deal Brexit', will not become reality.<sup>2</sup>

<sup>1</sup> Peers S and Barnard C (2017), Chapter 27.

<sup>2</sup> Leaked Government analysis suggests the UK will be worse off outside the EU under every scenario surveyed (no-deal, free trade agreement, and single market access through membership of the European Economic Area) and worst off under a 'no-deal' scenario according to which the UK economic growth would reduce by 8% over the next 15 years compare to current forecasts, see Nardelli A, This Leaked Government Brexit Analysis Says The UK Will Be Worse Off In Every Scenario. BuzzFeed, 29 January 2018, [www.buzzfeed.com/albertonardelli/the-governments-own-brexit-analysis-says-the-uk-will-be?utm\\_term=.pnRRn8jAw#.pfNQJq50b](http://www.buzzfeed.com/albertonardelli/the-governments-own-brexit-analysis-says-the-uk-will-be?utm_term=.pnRRn8jAw#.pfNQJq50b) (last accessed 5 March 2018).

According to a 'no-deal Brexit', the UK would leave the EU without any form of deal and resort to World Trade Organisation (WTO) trade rules.

Trading under WTO rules would dramatically alter the UK's position to trade disputes post-Brexit. The EU as a whole is the UK's largest trading partner: in 2016, UK exports to the EU were made up 43% of all UK exports and UK imports to the EU 54% of all imports.<sup>3</sup> Disputes are bound to arise. The UK will need to have a way of resolving disputes with the bloc and individual member states. Conversely, the UK, under an independent trade policy, will have to be ready to resolve disputes with third States. Journalist Ian Dunt provides us with a telling worst-case scenario for trade remedies post-Brexit:

On 31 March 2019, Britain [in the WTO] argues that it is still a party to an EU arrangement preventing the sale of cheap Chinese steel in Europe. Once those floodgates open, the UK knows domestic steel will be unable to compete. China reacts furiously, demanding that Britain demonstrate domestic injury and unfair trade. But the UK doesn't have an investigating authority capable of undertaking trade remedy investigations. It cannot fight back because it doesn't have the regulatory infrastructure. Workers in factories like Port Talbot start to fear for their livelihoods.<sup>4</sup>

This article explores options for trade remedies and trade disputes for the UK after Brexit. In particular, it concentrates on the role of trade defence instruments (TDIs) in the UK's trading future outside of the EU and mechanisms for implementing these instruments post-Brexit. This article first reviews potential issues linked to the UK's continued membership to the WTO once it leaves the EU. It, then, outlines the importance of TDIs in any modern trade policy to ensure a country's industries continued are protected from unfair competition and the current EU approach to trade defence. Third, this article highlights issues of capacity in the UK's ability to impose TDIs in the post-Brexit era and reviews recent calls for the UK to set up a new, independent, trade remedies body capable of enforcing such instruments. A fourth section looks at trade defence in the context of a customs unions taking as a case study the EU-Turkey customs union. A final section highlights that a competition solution would leave no room for a UK's post-Brexit trade defence.

## **2. The UK's post-Brexit WTO Membership and Commitments**

This section details the first hurdle facing the UK upon leaving the EU when it comes to international trade, namely the UK's membership to the WTO and its ability to determine its own commitments, independent of those of the EU. As will be seen, although the UK's continued membership to the WTO is not doubtful, there is considerable uncertainty around its issuance of its own schedules of commitments for trade and services and negotiating its own commitments.

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<sup>3</sup> Ward M, Statistics on UK-EU Trade, House of Commons Library, Briefing Paper 7851, 19 December 2017, <http://researchbriefings.files.parliament.uk/documents/CBP-7851/CBP-7851.pdf> (last accessed 5 March 2018), p. 4.

<sup>4</sup> Dunt I (2016).

## 2.1. The UK a founding member of the UK with no independent schedule

The UK, together with the EU, are founding members of the WTO, whose membership terms are closely connected. Article XI(1) of the Marrakesh Agreement establishing the WTO provides that:

The contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept this Agreement and the Multilateral Trade Agreements and for which Schedules of Concessions and Commitments are annexed to GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS shall become original Members of the WTO.<sup>5</sup>

The UK ratified the 1947 General Agreement on Tariffs and Trade (GATT) on January 1, 1948.<sup>6</sup> Only the EU (known at the WTO as the European Communities until 2009) has valid schedules to the GATT 1994, the successor to the GATT 1947 governing trade in goods, and the General Agreement on Trade in Services (GATS). The European Union, hence, has a single set of tariffs and quotas applicable to other WTO member states along with common commitments pertaining to trade in services. The European Court of Justice, in *Opinion 1/94*, held that the WTO Agreement constituted a mixed agreement, as such the European Community and its Member States shared competence to conclude this agreement.<sup>7</sup> But such mixed membership is not visible in practice. The EU does not merely represent its Member States when it comes to the WTO, Article 3 TFEU clearly states that the EU has exclusive competence when it comes to common commercial policy. The European Commission negotiates on behalf of the whole of the EU and also initiates and handles any WTO complaints. Member states, in turn, are bound to support the common EU position.

Lord Lawson, former chancellor and Brexit-supporter, confidently asserted: "[o]ur trade relations with the rest of the world remain unchanged."<sup>8</sup> The reality may, however, be more complicated.<sup>9</sup> A month before the referendum, in May 2016, Roberto Azevêdo, the Director-General of the WTO, warned:

Pretty much all of the UK's trade [with the world] would somehow have to be negotiated... It is a very important decision for the British people. It is a sovereign decision and they will decide what they want to decide. But it is very important, particularly with regard to trade, which is something very important for the British economy, that people have the facts and that they don't underestimate the challenges.<sup>10</sup>

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<sup>5</sup> Article XI, Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994.

<sup>6</sup> World Trade Organisation, The 128 countries that had signed GATT by 1994, [www.wto.org/english/thewto\\_e/gattmem\\_e.htm](http://www.wto.org/english/thewto_e/gattmem_e.htm) (last accessed 5 March 2018).

<sup>7</sup> CJEU, *Opinion 1/94* (WTO Agreement) [1994] ECR I-5267.

<sup>8</sup> Lord Lawson, BBC Radio 4 interview, quoted in Gehring M, Brexit and EU-UK trade relations with third states, EU Law Analysis, 6 March 2016, <http://eulawanalysis.blogspot.co.uk/2016/03/brexit-and-eu-uk-trade-relations-with.html> (last accessed 6 March 2018).

<sup>9</sup> For a useful retrospective on declarations in the context of Brexit and the WTO, see Green D, Brexit and the issue of WTO schedules. The Financial Times, 28 February 2017, <https://www.ft.com/content/42b59126-794c-3a0b-b19a-6d4b0a11c990> (last accessed 6 March 2018).

<sup>10</sup> Donnan S, WTO warns on tortuous Brexit trade talks. The Financial Times, 25 May 2016, <https://www.ft.com/content/745d0ea2-222d-11e6-9d4d-c11776a5124d> (last accessed 6 March 2018).

Azevêdo stressed that the UK would not be able to simply "cut and paste" the EU terms of membership; instead, it would have to renegotiate brand new schedules, without the "institutional mechanism" to negotiate such deals or to deal with disputes.<sup>11</sup> By October 2016, the Director General, in another interview, seemed ready to alleviate fears of a disruptive vacuum for UK businesses, stressing that:

The UK is a member of the WTO today, it will continue to be a member tomorrow. There will be no discontinuity in membership... They have to renegotiate (their terms of membership) but that doesn't mean they are not members... Trade will not stop, it will continue and members negotiate the legal basis under which that trade is going to happen. But it doesn't mean that we'll have a vacuum or a disruption.<sup>12</sup>

Other commentators similarly highlighted that:

Assuming the UK does not enter into a customs union with the EU after its withdrawal, it would no longer be part of the common [tariff] schedules. In this scenario, the UK must submit its own new schedules after the conclusion of an exit agreement with the EU if it is to remain a WTO member. These schedules need to be accepted by all other WTO members in consensus and certified following certain procedures, which might create difficulties.<sup>13</sup>

In other words, it is not yet entirely clear under which condition WTO trade will progress once the UK leaves the EU. The UK will continue to be a member of the WTO upon leaving the EU. According to Lorand Bartels, "what will change with Brexit are not the UK's underlying rights and obligations, but rather the EU's exercise of these rights and assumption of responsibility for the performance of these obligations."<sup>14</sup> The rights and obligations of the EU and its member States, according to the WTO Agreement, are identical. Piet Eeckhout, argued, that pursuant to Article XI, the "then EC Member States and the EC became full original WTO Members, each apparently bound by all obligations resulting from the WTO Agreement".<sup>15</sup> The EU's membership, further, was not expressly limited by any list or declaration of competences or an indication in the Agreement itself of the obligations binding onto the EU, or its Member States, as may be common in the context of international organisations or agreements.<sup>16</sup> When the UK and the EU agreed a division of agricultural quotas last year, many

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<sup>11</sup> Elliott L, WTO chief says post-Brexit trade talks must start from scratch. The Guardian, 7 June 2016, <https://www.theguardian.com/business/2016/jun/07/wto-chief-brexit-trade-talks-start-scratch-eu-referendum> (last accessed 6 March 2018).

<sup>12</sup> Conway E, Brexit will not cause UK trade 'disruption' - WTO boss. Skynews, 26 October 2016, <https://news.sky.com/story/brexit-will-not-cause-uk-trade-disruption-wto-boss-10632803> (last accessed 6 March 2018).

<sup>13</sup> Koutrakos (2016), p. 54.

<sup>14</sup> Bartels L, The UK's status in the WTO after Brexit. SSRN Paper, 22 September 2016, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2841747](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841747) (last accessed 6 March 2018), p. 2.

<sup>15</sup> Eeckhout P (2006), p. 451.

<sup>16</sup> Eeckhout P (2006), p. 451.

heralded this as a major breakthrough, however some of the UK's closest allies, such as the US and New Zealand strenuously objected.<sup>17</sup>

The conclusion that the UK WTO membership rights are identical to that of the EU and other WTO States is supported by the WTO jurisprudence in *EC and Certain Member States – Large Civil Aircraft* where the EU requested the removal of five member States as respondents, arguing that it was the "only proper respondent" in the dispute and that it took "full responsibility" for those States' actions.<sup>18</sup> The Panel held that "[e]ach of these five is, in its own rights, a member of the WTO, with all the rights and obligations pertaining to such membership, including the obligation to respond to claims made against it by another WTO Member."<sup>19</sup> The Panel went further, stressing that "[w]hatever responsibility the [EU] bears for the actions of its member States does not diminish their rights and obligations as WTO Members, but is rather an internal matter concerning the relationship between the [EU] and its member States."<sup>20</sup> The UK will continue to benefit from its pre-existing rights and obligations as a WTO member.

## 2.2. The issuance of independent schedules of commitment

The key issue is not the UK's continued membership to the WTO but the question of reissuing its own schedules of commitment for goods and services. The UK government has maintained that there will be no negotiations as it plans to re-issue the EU schedules with a name change and other minor editorial changes. The international trade secretary, Liam Fox, in a statement to the House of Commons and the House of Lords recalled that the UK is a founding member of the WTO, apparently dispelling doubts that the UK would no longer be a member.<sup>21</sup> He further stated:

The UK's WTO commitments currently form part of the European Union's schedules. When we leave the EU we will need UK-specific schedules. In order to minimise disruption to global trade as we leave the EU, over the coming period the Government will prepare the necessary draft schedules which replicate as far as possible our current obligations. The Government will undertake this process in dialogue with the WTO membership.<sup>22</sup>

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<sup>17</sup> Ungphakorn, P, The limits of 'possibility': Splitting the lamb-mutton quota for the UK and EU–27, Trade Beta Blog, 6 January 2017, <https://tradebetablog.wordpress.com/2017/01/06/limits-of-possibility/> (last accessed 13 March 2018).

<sup>18</sup> WTO Panel Report, *EC and Certain Member States – Large Civil Aircraft*, WT/DS316/R, 30 June 2010, paras. 7.169-7.177.

<sup>19</sup> WTO Panel Report, *EC and Certain Member States – Large Civil Aircraft*, WT/DS316/R, 30 June 2010, paras. 7.174.

<sup>20</sup> WTO Panel Report, *EC and Certain Member States – Large Civil Aircraft*, WT/DS316/R, 30 June 2010, paras. 7.175.

<sup>21</sup> Written Statement by Dr Liam Fox, Secretary of State for International Trade and President of the Board of Trade, UK's commitments at the World Trade Organisation, House of Commons, HCWS316, 5 December 2016, <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2016-12-05/HCWS316/> (last accessed 6 March 2018).

<sup>22</sup> Written Statement by Dr Liam Fox, Secretary of State for International Trade and President of the Board of Trade, UK's commitments at the World Trade Organisation, House of Commons, HCWS316, 5 December 2016, <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2016-12-05/HCWS316/> (last accessed 6 March 2018).

The UK Permanent Representative to the UN and WTO in Geneva, Julian Braithwaite, similarly, in January 2017, stated that "as a full member, the UK already has its own schedules. But at the moment these are shared with the other EU Member States."<sup>23</sup> The Permanent Representative notes that the UK will have to submit new schedules as part of the normal WTO process, subject to none of the WTO's other 163 members objecting to them. To minimise such disruption, "we plan to replicate our existing trade regime as far as possible in our new schedules."

The Bar Council has taken the position that new schedules could be given effect through three different procedures: certification under the decisions of 26 March 1980 (L/4962) for goods and 14 April 2000 (S/L/83) for services; renegotiation under Article XXVIII GATT for goods and Article XXI GATS for services; and supplementary negotiations through a bespoke procedure per Article XXVIII bis GATT and/or Article IV WTO Agreement.<sup>24</sup> Any WTO member state would be entitled to block certification of new schedules and negotiations under a bespoke procedure would have to be negotiated with the EU and other WTO states by consensus. It would, hence, leave the UK vulnerable to the veto of any of the WTO member, as highlighted by the UK Permanent Representative to the UN and WTO.

The advantage of renegotiation under Articles XXVIII GATT and XXI GATS is that it is not adversarial and, hence, does not provide for the possibility of a veto. Article XXVIII is specifically concerned with the question of "Modification of Schedules" where a WTO member wants to modify or withdraw a concession including in a schedule. Article XVIII provides that in such negotiations "the contracting parties concerned shall endeavour to maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for in this Agreement prior to such negotiations."<sup>25</sup> Only WTO members with "initial negotiating rights", which have a "principal supplying interest" or determined by the requesting party to have a "substantial interest" are entitled to negotiate with the requesting member. Such countries could adjust their own schedules in retaliation or claim compensation where the changes lead to damage to their own trade interests. It is interesting to point that Article XXIV(6) GATT notes that the renegotiation procedure under Article XXVIII can be triggered upon the creation of a customs union or free trade area. No such article is provided in the context of the dissolution of a customs union or, more relevantly in the case of Brexit, in the case of a member leaving a customs union.

Bartels argues that the proper procedure to give effect to the UK's new schedules should be through a "rectification".<sup>26</sup> The 1980 Decision on Procedures for Modification and

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<sup>23</sup> Braithwaite J, Ensuring a smooth transition in the WTO as we leave the EU. Foreign & Commonwealth Office Blog, 23 January 2017, <https://blogs.fco.gov.uk/julianbraithwaite/2017/01/23/ensuring-a-smooth-transition-in-the-wto-as-we-leave-the-eu/> (last accessed 6 March 2018).

<sup>24</sup> Bar Council Brexit Working Group, The UK's position in the WTO. Paper 21, June 2017, [https://www.barcouncil.org.uk/media/575749/brexit\\_paper\\_21\\_-\\_wto.pdf](https://www.barcouncil.org.uk/media/575749/brexit_paper_21_-_wto.pdf) (last accessed 6 March 2018), p. 3-5.

<sup>25</sup> WTO Agreement, Article XVIII(2).

<sup>26</sup> Bartels L, The UK's status in the WTO after Brexit. SSRN Paper, 22 September 2016, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2841747](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841747) (last accessed 6 March 2018), p. 13-18; Bartels L, Understanding the UK's position in the WTO after Brexit (Part II – The consequences). International Centre for Trade and Sustainable Development Opinion, 26 September 2016, <https://www.ictsd.org/opinion/understanding-the-uk-0> (last accessed 6 March 2018).

Rectification of Schedules of Tariff Concessions distinguish between "modifications" and other "changes".<sup>27</sup> Paragraph 1 of the Decision provides that "[c]hanges in the authentic texts of Schedules annexed to the General Agreement which reflect modifications" resulting from action, including under Article XVIII, shall be certified by certification. Conversely, Paragraph 2 describes other "changes" as "[c]hanges in the authentic texts of Schedules" done through "amendments or rearrangements which do not alter the scope of a concession are introduced in national customs tariffs in respect of bound items." The parallel GATS Decision also contains this distinction between ordinary modification under Article XXI GATS and modifications "which consist of new commitments, improvements to existing ones, or rectifications or changes of a purely technical character that do not alter the scope or the substance of the existing commitments."<sup>28</sup>

Bartels' argument is that "new schedules scheduled by newly autonomous WTO Members ... should, in the first instance, be treated as changes in a schedule not amounting to a modification within the meaning of paragraph 1 of the 1980 Decision."<sup>29</sup> This, he posits, is justified on the basis that newly independent States, under Article XXVI:5(c) GATT 1947, were granted GATT contracting party status, under the sponsorship of the former coloniser and WTO member.<sup>30</sup> The newly independent States fully inherited the rights and obligations previously applicable to that territory, including the schedules which were treated as other "changes", except when it included an increase in duties beyond the rate set. It should be highlighted however that state succession is not the best analogy for the obligations of the UK after Brexit. Brexit is distinctly not a case of state succession and thus most of the rules established for state succession are not applicable, as will be further discussed below.

The clear advantage of submitting new UK GATT and GATS schedules for certification as other changes, explains Bartels, is that WTO have limited grounds on which to object.<sup>31</sup> Indeed, per Paragraph 3 of the Decision, the draft with such changes shall be certified unless an objection is raised by a contracting party, within three months, on the ground that "in the case of changes described in paragraph 2, the proposed rectification is not within the terms of that paragraph." Bartels points that, even if other WTO member states do object, "the legal effect of certification of evidentiary."<sup>32</sup> If the UK's new schedules were rejected by another WTO State, it would be left to that State to commence dispute proceedings. This could lead to the real danger of a zombie WTO Member State because valid tariff schedules are a condition of membership in the WTO.

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<sup>27</sup> GATT Contracting Parties, Procedures for Modification and Rectification of Schedules of Tariff Concessions, Decision of 26 March 1980, L/4962.

<sup>28</sup> WTO Council for Trade in Services, Decision on Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments, adopted 14 April 2000, S/L/83, 18 April 2000.

<sup>29</sup> Bartels L, The UK's status in the WTO after Brexit. SSRN Paper, 22 September 2016, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2841747](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841747) (last accessed 6 March 2018), p. 15-16.

<sup>30</sup> Bartels L, The UK's status in the WTO after Brexit. SSRN Paper, 22 September 2016, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2841747](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841747) (last accessed 6 March 2018), p. 16.

<sup>31</sup> Bartels L, The UK's status in the WTO after Brexit. SSRN Paper, 22 September 2016, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2841747](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841747) (last accessed 6 March 2018), p. 17.

<sup>32</sup> Bartels L, The UK's status in the WTO after Brexit. SSRN Paper, 22 September 2016, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2841747](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841747) (last accessed 6 March 2018), p. 18.

Unfortunately, looming WTO disputes are a very real possibility. Many WTO Member States are unhappy with the UK's handling of Brexit in the organisation and rejection of all negotiations. Any restriction of market access will come under scrutiny with possibly damaging disputes from multiple WTO Members.

### **2.3. State succession issues and identifying the UK's own commitments**

There are two crucial issues left to explore pertaining to the UK's rights and obligations as a WTO member post-Brexit, pertaining, first, to state succession and, second, to identifying the UK's own commitments. The EU GATS schedule opens by stating that "[t]he specific commitments in this schedule apply only to the territories in which the Treaties establishing the European Communities are applied under the conditions laid down in these Treaties."<sup>33</sup> This has important implications in light of the law of state succession. From a public international law standpoint, as has been argued elsewhere,<sup>34</sup> the UK may have little room to argue that such reference to territorial application should be deleted or to succeed in its own name to the WTO Government Procurement Agreement, dating back to 2014, and to which the EU alone is the relevant party.<sup>35</sup> Bartels argues that this is a straightforward case of state succession.<sup>36</sup> A 1971 UN Secretariat study on the succession of states in respect of bilateral treaties looking specifically at the question of trade agreements concluded that "in general the members of a union remain bound by the trade agreements of the union following its dissolution, at least if there is a clear continuity of the entity involved."<sup>37</sup> This is, however, not a case of dissolution. The UK and the EU both enjoy international legal personality and the EU will continue to do so post-Brexit.

The reason why negotiations may still be necessary relates to the second issue, namely, identifying and, likely, negotiating the UK's own commitments as a WTO member in the post-Brexit era. The UK cannot honour its current obligations under the WTO independently of its membership in the EU and its participation in the EU single market.<sup>38</sup> WTO membership and its liberalisation commitments entail that all goods once imported into the EU are treated as EU goods upon clearing customs and can move freely within the entire EU. Negotiations is crucial when it comes to the EU-wide tariff rate quotas in which UK participates. Such quotas provide lower duties on limited quantities of goods imported into a country.<sup>39</sup> An example is

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<sup>33</sup> European Communities and their Member States – Schedule of Specific Commitments, GATS/SC/31, 15 April 1994, p. 1.

<sup>34</sup> Gehring M, Brexit and EU-UK trade relations with third states, EU Law Analysis, 6 March 2016, <http://eulawanalysis.blogspot.co.uk/2016/03/brexit-and-eu-uk-trade-relations-with.html> (last accessed 7 March 2018).

<sup>35</sup> Agreement on Government Procurement with appendices, rectifications and modifications, concluded at Marrakesh on 15 April 1994 (1996) 1915 UNTS 103.

<sup>36</sup> Bartels L, The UK's status in the WTO after Brexit. SSRN Paper, 22 September 2016, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2841747](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841747) (last accessed 6 March 2018), p. 18-21.

<sup>37</sup> UN Secretariat, Succession of States in respect of bilateral treaties: third study prepared by the Secretariat on trade agreements, UN Doc A/CN.4/243/Add.1, 24 March 1971, para 182.

<sup>38</sup> Gehring M, Brexit and EU-UK trade relations with third states, EU Law Analysis, 6 March 2016, <http://eulawanalysis.blogspot.co.uk/2016/03/brexit-and-eu-uk-trade-relations-with.html> (last accessed 7 March 2018).

<sup>39</sup> House of Lords, European Union Committee, Brexit: the options for trade, 5<sup>th</sup> report of session 2016-17, <https://publications.parliament.uk/pa/ld201617/ldselect/ldecom/72/72.pdf> (last accessed 9 March 2018), para. 178.



the tariff rate quota for 280 tonnes of duty free lamb shared out among Argentina, Australia, Chile, New Zealand, Uruguay and nine other States.<sup>40</sup> The EU and the UK would have to agree on how to divide such a quota. Similarly, the EU and the UK would also have to decide quotas enabling the EU to export to third countries on preferential terms.<sup>41</sup> The UK and the EU would also have to agree on dividing the entitlement to domestic subsidies, in particular agricultural subsidies.<sup>42</sup>

The WTO does not provide any guidance on dividing shared quotas. Where negotiations do not bear fruit, the fall-back will be to rely on normal WTO rules and its dispute resolution mechanism. The UK's proposed tariff quota could, per Article XIII(2) GATT, aim at a "distribution of trade in such product approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions." It would be up for the EU in turn to access the UK quota for products it has a substantial interest to export to the UK.<sup>43</sup> The EU would be in a position to start dispute proceedings and claim compensation for the imposition of such tariffs, per the normal WTO rules.

Thankfully it appears that negotiations are ongoing and that identifying the UK's own commitment will not be done through the WTO dispute resolution mechanism. Recent reports have highlighted that the UK and the EU have struck a preliminary agreement on dividing up the tariff-rate quotas governing the import of farm products into the EU.<sup>44</sup> Renegotiating tariff commitments has proven difficult, even for large trading nations, such as Russia and China. WTO States may try to extract special liberalisation commitments from the UK. This could be done through non-violation complaints, pursuant to Article XXIII 1(b), which may be instigated even when there has been no breach of the Agreement, and where a WTO member could argue that the measures applied by the UK result in "nullification or impairment of a benefit". It is to be hoped that negotiations in the context of the GATS schedules, where further liberalisation pressure in the context of trade in services may be particularly likely, also bear fruits so as to avoid heavy reliance on the WTO dispute settlement mechanism.

### **3. On the importance of TDIs and their widespread use by the EU**

The issue of TDIs to post-Brexit trade is crucial and, this article argues, trade defence should be tackled head-on as part of the preparations made by the UK to leave the EU. TDIs are lawful measures under WTO rules, by which WTO members can protect their own industries from

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<sup>40</sup> House of Lords, European Union Committee, Brexit: the options for trade, 5<sup>th</sup> report of session 2016-17, <https://publications.parliament.uk/pa/ld201617/ldselect/ldcom/72/72.pdf> (last accessed 9 March 2018), para. 178.

<sup>41</sup> House of Lords, European Union Committee, Brexit: the options for trade, 5<sup>th</sup> report of session 2016-17, <https://publications.parliament.uk/pa/ld201617/ldselect/ldcom/72/72.pdf> (last accessed 9 March 2018), para. 179.

<sup>42</sup> House of Lords, European Union Committee, Brexit: the options for trade, 5<sup>th</sup> report of session 2016-17, <https://publications.parliament.uk/pa/ld201617/ldselect/ldcom/72/72.pdf> (last accessed 9 March 2018), para. 180.

<sup>43</sup> Bartels L, Understanding the UK's position in the WTO after Brexit (Part II – The consequences). International Centre for Trade and Sustainable Development Opinion, 26 September 2016, <https://www.ictsd.org/opinion/understanding-the-uk-0> (last accessed 6 March 2018).

<sup>44</sup> Beattie A and Brundsen J, UK and EU strike initial deal on WTO quotas in Brexit breakthrough. Financial Times, 3 October 2017, <https://www.ft.com/content/e30185c6-a83d-11e7-ab55-27219df83c97> (last accessed 7 March 2018).

unfair competition through anti-dumping duties and countervailing measures directed at subsidies. This section provides an overview of the scope of measures directed at dumping and subsidies and of their widespread use by the EU.

### 3.1. Anti-Dumping Measures

Dumping occurs in a situation where "an exporting country sells its products in an importing country at a lower price than that at which the products are sold in the exporting country's home market."<sup>45</sup> Such practice is prohibited as a form of unfair price discrimination, which is contrary to the level playing field in international trade, and thus may allow for retaliatory anti-dumping measures. Article VI GATT provides for the authorisation for anti-dumping duties, while the Agreement on Implementation of Article VI of GATT 1994, commonly referred to as the Anti-Dumping Agreement, elaborates on Article VI. A WTO Member must show the following factors in order to justify the imposition of anti-dumping duties: first, that dumping is occurring; second, that domestic industry producing a similar product in the importing country suffers material injury; and that there is a causal link between the two.<sup>46</sup> Rules of origin post-Brexit might also constitute an obstacle to applying anti-dumping rules as such rules allow customs authority to check for anti-dumping compliance.<sup>47</sup>

The first hurdle is establishing that dumping is in fact occurring. The Anti-Dumping Agreement establishes different methods to determine calculating the "normal value" and the "export price", the first being the product's appropriate price in the exporting country's market and the second that product's appropriate price in the importing country's market. Article II of the Anti-Dumping Agreement provides three different methods to calculate the normal value of a product. In most instances, this value will be determined by the price consumers pay for the product "in the ordinary course of trade" in that exporting country. Sales will be excluded from the calculation of normal value where: the sales were made below cost; over an extended period of time; in substantial quantities; and at prices not allowing for the recovery of costs within a reasonable time.<sup>48</sup> Sales may also be too insufficient to allow for a proper comparison of prices in the exporting and importing countries' markets. In such cases, two other methods of calculating the normal value of a product may be used. The first involves calculating the normal value of a product by reference to its price when that product, or a similar product, is exported to an "appropriate third country, provided that this price is representative."<sup>49</sup> The second involves determining a "constructed normal value", defined as the cost of production plus "reasonable amount for administrative, selling and general costs and for profits".<sup>50</sup>

Calculating the "export price", by comparison, is simpler and generally merely involves the price at which the importer buys the product from the exporting country.<sup>51</sup> This basic determination may be put aside in favour of a "constructed export price" where there are

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<sup>45</sup> Gehring M, Hepburn J and Segger J (2007), p. 87.

<sup>46</sup> Gehring M, Hepburn J and Segger J (2007), p. 88.

<sup>47</sup> Holmes P and Jacob N, Certificates and rules of origin: the experience of UK firms. UK Trade Policy Observatory, Briefing paper 15, 15 January, <http://blogs.sussex.ac.uk/uktpo/files/2018/01/BP15-CRoO.pdf> (last accessed 13 March 2018), p. 2.

<sup>48</sup> Article 2.2.1 Anti-Dumping Agreement.

<sup>49</sup> Article 2.2 Anti-Dumping Agreement.

<sup>50</sup> Article 2.2. Anti-Dumping Agreement.

<sup>51</sup> Gehring M, Hepburn J and Segger J (2007), p. 89.

reasons to believe that price may not be fair, for instance because the export is an internal company transfer or there are compensatory arrangements between exporter and importer.

A fair comparison of the normal value and the export must be made between prices at the same level of trade, typically upon leaving factory, and the price of sales made at the same time. This further requires taking into account a host of technical differences in conditions in terms of sale, tax, quantities and physical characteristics. This allows to measure the margin of dumping, which, essentially, constitutes the "advantage in monetary terms that the dumped product has over domestic like product."<sup>52</sup> This is in turn crucial to determine the amount of anti-dumping duty that may lawfully be imposed to counter this advantage. Calculating the dumping margin, generally, involves either a comparison of the weighted average normal value to a weighted average of comparable export prices or a comparison of the normal value and export price on a "transaction-to-transaction" basis. Typically, the margin will be calculated for each individual exporter but, where a large number of exporters and producers are concerned, margins may instead be calculated across a valid sample of a reasonable number of exporters and producers and then applied across the board.

The process to determine that material injury to a domestic industry has occurred is described in Article 3. It involves first determining exactly which domestic industries are concerned. A "like product" is defined, in Article 2.6 as a "product which is identical, ie, alike in all respects" or alternatively a product which "has characteristics closely resembling those of the product under consideration." In exceptional cases, the injury requirement may be satisfied when the injury affects only a specific part of the domestic industry, and not the whole of it. Each separate "regional industry" may be considered as a microcosm of the country's total domestic industry, in which case duties must be only imposed on imported products designed for the specific area, and, if impossible, where they cannot be limited to specific producers supplying the area, duties may be imposed without limitation.<sup>53</sup>

The Anti-Dumping Agreement recognises three types of injuries: material injury to a domestic industry; threat of material injury to a domestic industry; or material retardation of the establishment of a domestic industry. As pointed out by Article 3.4 the examination of the impact of the dumped imports require:

[A]n evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments.

Article 3.4 expressly adds that this list is not exhaustive and that no single factor or combination of factors will necessarily be determinative. The country alleging dumping to establish material injury must "examine the volume of dumped imports, their effect on prices of like products in the domestic market and the impact of the dumping on domestic producers of like products, taking into account all relevant economic factors such as actual or potential decline in sales,

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<sup>52</sup> Gehring M, Hepburn J and Segger J (2007), p. 90.

<sup>53</sup> Gehring M, Hepburn J and Segger J (2007), p. 90.

profits, output or market share."<sup>54</sup> Relevant factors to establish a threat of material injury include "the rate of increase of dumped imports, the capacities of the exporters and the likelihood of the lower-priced products increasing demand for more imports."<sup>55</sup> No further guidance is provided in the Agreement on what constitutes material retardation.

The last step for a complainant is to prove that dumping from the exporting country is the cause of the injury being suffered. Article 3.5 states that such a determination "shall be based on an examination of all relevant evidence before the authorities." This includes "any known factors other than the dumped imports which at the same time are injuring the domestic industry", which could include: changes in demand or consumption patterns in the importing country market; trade-restrictive or competitive practices in the exporting or importing countries' industries; technology development; and the domestic industry's productivity.<sup>56</sup>

In terms of procedural requirements, an investigation on anti-dumping may be carried out by the government of any WTO member state "upon a written application by or on behalf of the domestic industry",<sup>57</sup> and when there is sufficient evidence warranting such an investigation. Further, the collective output of those domestic producers supporting the investigation must be greater than 25% of the total production of the like product of all domestic producers.<sup>58</sup> The Anti-Dumping Agreement specifies that the government authorities, after considering an application or during an investigation, shall stop the investigation if there is no sufficient evidence of dumping. Per Article 5.8, this includes situations where the margin of dumping is less than 2% of the export price or the volume of allegedly dumped imports from the exporting question is less than 3% of imports of the like product, unless several exporting countries representing less than 3% each together constitute more than 7% of the like product in the complaining country. Investigations are conducted in accordance with fixed procedures established by the Anti-Dumping Agreement.

### **3.2. Anti-Subsidies Measures**

The second type of measures against unfair practice target the practice of government to support domestic producers by granting them financial incentives in the form of subsidies.<sup>59</sup> Such subsidies allow domestic producers to sell their goods in local and international markets at cheaper prices, which may hurt foreign producers and lead to trade distortion. The WTO Agreement on Subsidies and Countervailing Measures regulates the provision of subsidies and the use of countervailing measures to offset their effect.

The Agreement on Subsidies and Countervailing Measures defines a subsidy as a "financial contribution by a government or any public body within the territory of a Member" where: a government practice involves a direct transfer of funds (e.g. grant, loan) or a potential transfer of funds (e.g. loan guarantee); when a government revenue normally due is not collected (e.g. tax credit); when a government purchases goods or provides particular goods or services, other than in the context of general infrastructure); when a government directs a private body to

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<sup>54</sup> Gehring M, Hepburn J and Segger J (2007), p. 91.

<sup>55</sup> Gehring M, Hepburn J and Segger J (2007), p. 91.

<sup>56</sup> Gehring M, Hepburn J and Segger J (2007), p. 91.

<sup>57</sup> Article 5.1 Anti-Dumping Agreement.

<sup>58</sup> Article 5.4 Anti-Dumping Agreement.

<sup>59</sup> Gehring M, Hepburn J and Segger J (2007), p. 77.

undertake any of the above activities.<sup>60</sup> The financial contribution must confer a benefit for it to amount to a subsidy.<sup>61</sup> A WTO panel has interpreted this to mean that the financial contribution must be "provided on terms that are more advantageous than those that would have been available to the recipient on the market."<sup>62</sup> A loan provided to an enterprise at an interest rate not better than that generally available to the marketplace constitutes a financial contribution to that enterprise but does not confer a benefit, and hence, is not a subsidy.<sup>63</sup>

The Agreement on Subsidies and Countervailing Measures only applies to subsidies which are "specific" in the meaning of Article 2. A subsidy is specific if it applies to particular enterprises or industries. It is not specific if there are objective criteria or conditions governing the eligibility for, and the amount granted. These criteria must be neutral, non-discriminatory, economic in nature and horizontal in application. Further, eligibility must be automatic, and the conditions strictly adhered to. A subsidy, which at first appeared non-specific, may still be specific when considering other factors, including: predominant use of a subsidy programme by certain enterprises, disproportionately large amounts awarded to certain enterprises, and the granting authority's exercise of discretion in granting the subsidy.<sup>64</sup> Subsidies may also be specific if they are limited to enterprises in a particular geographic region.<sup>65</sup>

The Agreement sets out a three-tier system for subsidies. Part II sets out "red light" subsidies which are prohibited outright. This includes subsidies tied to export performance, for instance by requiring a level of export earnings for the subsidy to be granted.<sup>66</sup> Subsidies contingent on the use of domestic, as opposed to imported, goods are also prohibited. Part II establishes a complaints procedure starting with consultations between the complaining member and the member alleged to be making use of prohibited subsidies. Failing this, the dispute is passed on to the WTO's dispute resolution body under an expedited timeframe. Following the dispute resolution procedure, if the prohibited subsidy is not immediately removed, the complaining WTO Member is granted the right to take countervailing measures to avoid the subsidy's effect.

The second "amber-light" category, under Part III of the Agreement, concerns actionable subsidies which may or may not be permitted depending on whether it has "adverse effects" on other WTO members. Per Article 5, adverse effect includes situations a subsidy causes: injury to another member's domestic industry; nullification or impairment of benefits accruing directly or indirectly to other Members under the GATT, in particular the benefits of bound concessions; or serious prejudice to the interests of another Member. Serious prejudice may be found where one of the following effects can be shown: the subsidy displaces or impedes the imports of a like of product of another Member into the market of the subsidising member; the subsidies displaces or impedes the exports of a like product from the complaining Country to third country; there is significant price undercutting, price suppression, price depression or lost sales of another member's like product in that market; the subsidy increases the world market share of the subsidising State in a particular primary product or commodity compared its

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<sup>60</sup> Article 1.1. Agreement on Subsidies and Countervailing Measures

<sup>61</sup> Gehring M, Hepburn J and Segger J (2007), p. 78.

<sup>62</sup> WTO, Panel Report, WT/DS70/R, *Canada – Measures Affecting the Export of Civilian Aircraft*, 14 April 1999, para 9.112.

<sup>63</sup> Gehring M, Hepburn J and Segger J (2007), p. 78.

<sup>64</sup> Article 2.1(c) Agreement on Subsidies and Countervailing Measures

<sup>65</sup> Article 2.2 Agreement on Subsidies and Countervailing Measures

<sup>66</sup> Gehring M, Hepburn J and Segger J (2007), p. 79.

average share in the previous three years.<sup>67</sup> The complaints procedure is similar to that of prohibited subsidies. Consultation, first, should serve to "clarify the facts of the situation and to arrive at a mutually agreed solution."<sup>68</sup> Where no solution is found, a panel is convened to resolve the dispute, also allowing for a possible appeal to the appellate body. Countervailing measures are authorised where a subsidy is found to result in adverse effects to the complaining member. Such measure must be "commensurate with the degree and nature of the adverse effects determined to exist."<sup>69</sup>

Non-actionable subsidies feature in the "green light" category: members are permitted to make use of them as they do not adversely affect international trade.<sup>70</sup> Any form of government assistance not classified as a subsidy falls outside the scope of the Agreement, and is, hence, allowed. Any subsidy not classified as specific are also allowed. A WTO Member may approach the Permanent Group of Experts, a panel of five independent experts established under the Agreement, to obtain a confidential advisory opinion on any subsidy proposed by the member or that is currently maintained.

As has been sketched out above, the major remedies against prohibited and actionable remedies are either the removal of the remedy or the imposition of a countervailing duty offsetting the benefit of the exporting country's subsidy on those goods.<sup>71</sup> Article VI GATT provides the authorisation for WTO Members to impose countervailing duties, elaborated on in Part V of the Agreement on Subsidies and Countervailing Measures. A Member considering which is considering imposing such duties must first receive a request from domestic industry to commence a formal investigation into the subsidy. The investigation must establish that: there is a subsidy; a domestic industry is being materially injured, threatened with material injury or the establishment of a domestic industry is being impeded; and the situation was caused by the subsidy in question. Again, the first step of the investigation must be holding consultations with interested parties. The determination of injury, the factors to consider as part of a formal investigation, and procedures for conducting such an investigation are detailed in Article 15 of the Agreement on Subsidies and Countervailing Measures. Article 19 deals with the process of imposing a countervailing duty.

Agriculture subsidies are treated differently under the Agreement on Subsidies and Countervailing Measures. The WTO Agreement on Agriculture sets out two types of domestic support subsidies. Green box measures are described under the agreement as having "no, or at least most minimal, trade-distorting effects." Accordingly, the measure must: be provided through a publicly funded government programme not involving transfers from consumers; and must not have the effect of providing price support to producers.<sup>72</sup> Examples of such measures are included in Annex 2 to the Agreement on Agriculture: research, pest and disease control, training services, inspection services, some forms of marketing services and infrastructural services not including on-farm facilities. A much wider range of domestic support is hence permitted for agricultural goods than other goods.<sup>73</sup> Domestic agriculture

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<sup>67</sup> Article 6, Agreement on Subsidies and Countervailing Measures

<sup>68</sup> Article 4 Agreement on Subsidies and Countervailing Measures

<sup>69</sup> Article 7.9 Agreement on Subsidies and Countervailing Measures

<sup>70</sup> Gehring M, Hepburn J and Segger J (2007), p. 80.

<sup>71</sup> Gehring M, Hepburn J and Segger J (2007), p. 80.

<sup>72</sup> Gehring M, Hepburn J and Segger J (2007), p. 81.

<sup>73</sup> Gehring M, Hepburn J and Segger J (2007), p. 81.

support not falling into the green box are considered trade-distorting measures which form part of the amber box. Typically, these are measures supporting prices or directly linked to production quantities. Calculations in Article 1 and Annexes 3 and 4 of the Agreement on Subsidies and Countervailing Measures lay out the total value WTO Members have agreed to reduce progressively from their amber box measures. Blue-box measures are the third category encompassing domestic support that would typically feature in the amber box upon conditions of limiting production to reduce the goods' trade-distorting effect. Finally, Article 9 of the Agreement on Subsidies and Countervailing Measures covers export subsidies, which can include: cost reduction measures, internal transport subsidies, and subsidies on agricultural products to be included in other products made for export.<sup>74</sup> WTO Members have committed to reducing these export subsidies, by the amounts listing in their schedules of commitment.

### **3.3. The EU's approach to TDIs**

The EU's approach to TDIs, both when it comes to dumping and subsidies, closely mirrors the processes laid out by the WTO. Trade remedies is an EU competence: investigations, implementation and monitoring of TDIs are taken up by the European Commission on behalf of all EU Member States, including the UK.

Anti-dumping requests, within the EU, are carried out by the Commission, according to the Council Regulation 384/96 Of December 22, 1995, which closely mirrors the provisions of the WTO's Anti-Dumping Agreement. Any EU company may make a request, either directly or through its government, to the Commission to begin an investigation into dumping allegedly committed by a non-EU Member State. The EU conducts such investigations on behalf of the affected producers and concerned Member State(s).

Just like in the case of anti-dumping measures, the EU closely mirrors the terms of the WTO's Agreement on Subsidies and Countervailing Measures in its subsidies regime. An EU complainant may apply to the Commission, directly or through its government to instigate an investigation into alleged subsidies of non-EU States. The investigation must show that a specific subsidy has been granted which causes material injury to an EU industry. Upon such a showing, the Commission may impose countervailing duties. Communication 98/C 394/04 sets out the Commission's methods for calculating subsidies and the resulting countervailing duties and its methods of conducting investigations.

The EU has made prolific use of TDIs to preserve a competitive environment for EU industries. By the close of 2017, the EU had 99 provisional and definitive anti-dumping measures and 13 provisional and definitive countervailing measures in force, or overall 112 measures.<sup>75</sup> 46 investigations, including into re-openings and cases where provisional measures had been imposed.<sup>76</sup> The number of anti-subsidy and anti-dumping measures in force in the EU is at a historical low: from 156 in 2004, to 126 in 2011.<sup>77</sup> In comparison, the United States had a total

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<sup>74</sup> Gehring M, Hepburn J and Segger J (2007), p. 82.

<sup>75</sup> European Commission, Anti-dumping, anti-subsidy, safeguard statistics covering the 12 months of 2017, 6 February 2018, [http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc\\_156598.pdf](http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156598.pdf) (last accessed 9 March 2018), p. 2.

<sup>76</sup> European Commission, Anti-dumping, anti-subsidy, safeguard statistics covering the 12 months of 2017, 6 February 2018, [http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc\\_156598.pdf](http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156598.pdf) (last accessed 9 March 2018), p. 2.

<sup>77</sup> European Commission, Trade Defence Instruments, September 2012, [http://trade.ec.europa.eu/doclib/docs/2012/september/tradoc\\_149906.pdf](http://trade.ec.europa.eu/doclib/docs/2012/september/tradoc_149906.pdf) (last accessed 9 March 2018), p. 2.

of 303 measures in force in 2011.<sup>78</sup> Similarly, there has been a decrease in the percentage of EU imports affected by EU anti-dumping and anti-subsidy measures, with less than 0.5% of total EU imports affected.<sup>79</sup>

The EU has embarked on a large-scale project to modernise its trade defence. On October 3, 2017, negotiators of the European Parliament reached an agreement on a Commission's proposal to introduce a new anti-dumping methodology for calculating dumping margins.<sup>80</sup> On December 5, the European Parliament and the Council agreed on the Commission's proposal, initially presented in 2013, to modernise the EU's TDIs.<sup>81</sup> At the time of writing, the new rules were expected to enter into force by the end of May 2018.<sup>82</sup> The reforms are expected to ensure faster and more efficient investigations, with provisional measures being imposed within 7 to 8 months as opposed to the current 9 months; provide for the imposition of higher duties in anti-subsidy cases and anti-dumping cases of imports produced raw materials and energy provided at an artificially low price; improved calculation of injury by taking into account the costs of necessary investments (such as infrastructure or R&D) and future expenses related to social and environmental standards to reflect the 'non-injurious price' (the price the industry should have charged in normal circumstances); higher social and environmental standards; and among other things better access by EU small and medium-sized companies to trade defence investigations by putting in place bespoke streamlined procedures.<sup>83</sup>

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<sup>78</sup> European Commission, Trade Defence Instruments, September 2012, [http://trade.ec.europa.eu/doclib/docs/2012/september/tradoc\\_149906.pdf](http://trade.ec.europa.eu/doclib/docs/2012/september/tradoc_149906.pdf) (last accessed 9 March 2018), p. 2.

<sup>79</sup> European Commission, Trade Defence Instruments, September 2012, [http://trade.ec.europa.eu/doclib/docs/2012/september/tradoc\\_149906.pdf](http://trade.ec.europa.eu/doclib/docs/2012/september/tradoc_149906.pdf) (last accessed 9 March 2018), p. 2.

<sup>80</sup> European Commission, Commission welcomes agreement on new anti-dumping methodology, News archive, 3 October 2017, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1735&title=Commission-welcomes-agreement-on-new-anti-dumping-methodology> (last accessed 9 March 2018).

<sup>81</sup> European Commission, EU modernises its trade defence instruments, 23 January 2018, [http://europa.eu/rapid/press-release\\_MEMO-18-396\\_en.htm](http://europa.eu/rapid/press-release_MEMO-18-396_en.htm) (last accessed 9 March 2018).

<sup>82</sup> European Commission, EU modernises its trade defence instruments, 23 January 2018, [http://europa.eu/rapid/press-release\\_MEMO-18-396\\_en.htm](http://europa.eu/rapid/press-release_MEMO-18-396_en.htm) (last accessed 9 March 2018).

<sup>83</sup> European Commission, EU modernises its trade defence instruments, 23 January 2018, [http://europa.eu/rapid/press-release\\_MEMO-18-396\\_en.htm](http://europa.eu/rapid/press-release_MEMO-18-396_en.htm) (last accessed 9 March 2018).



## 4. Building up the UK's TDI capabilities in the post-Brexit era

The previous section has highlighted the complexity and technicality of the procedures laid out by the WTO to ensure that a WTO Member is in a position to protect itself from unfair competition through either anti-dumping or anti-subsidy measures. Today, such measures are taken by the EU, on behalf of the affected industries or member states, including the UK. In the post-Brexit era, it will be up to the UK to handle its own trade defence, which, as will be shown in this section, represents a considerable challenge.

### 4.1. Post-Brexit trade defence uncertainty

In contrast to the calls from the UK Prime Minister and Secretary for International Trade that the UK should capitalise on Brexit to be a "global champion of free trade",<sup>84</sup> experts testifying before the House of Lords' European Union Committee were quick to stress that it was vital for the UK to consider its trade defence measures as it leaves the EU.<sup>85</sup> Professor Piet Eeckhout of University College London noted being:

[U]ncertain what would happen, for example, with the current antidumping measures that the European Union applies to imports from other WTO members, which have been the consequence of an EU-wide investigation into dumping. Lots of those currently apply, particularly to China. Whether the United Kingdom could simply continue to apply those or would not apply them may also be an issue that comes up in defining the UK's WTO status.<sup>86</sup>

Richard Eglin, Senior Trade Policy Advisor of White & Case LLP, took the example of antidumping duties currently imposed by the EU on Chinese steel.<sup>87</sup> If such anti-dumping measures were simply taken over and imposed by the UK, China could "object vigorously" demanding that a new investigation be carried out to demonstrate domestic injury and unfair trade. Eglin added that "one major issue is going to be re-establishing in the UK an investigating authority that is capable of undertaking trade remedy investigations and protecting the UK's interests in any trade remedy measures that are taken against the UK."<sup>88</sup>

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<sup>84</sup> Elgot J, Theresa May sets out stall for UK's place in Trump's world. The Guardian, 14 November 2016, <https://www.theguardian.com/politics/2016/nov/14/uk-must-become-global-leader-in-free-trade-theresa-may-brexit-vote-donald-trump-election> (last accessed 9 March 2018).

<sup>85</sup> House of Lords, European Union Committee, Brexit: the options for trade, 5<sup>th</sup> report of session 2016-17, <https://publications.parliament.uk/pa/ld201617/ldselect/ldcom/72/72.pdf> (last accessed 9 March 2018), para. 195-196.

<sup>86</sup> The Select Committee on the European Union, External Affairs and Internal Market Sub-Committees Corrected oral evidence: Brexit: future trade between the UK and the EU, 8 September 2016, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-external-affairs-subcommittee/brexit-future-trade-between-the-uk-and-the-eu/oral/37864.html> (last accessed 9 March 2018), Question 1.

<sup>87</sup> The Select Committee on the European Union, External Affairs and Internal Market Sub-Committees Corrected oral evidence: Brexit: future trade between the UK and the EU, 8 September 2016, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-external-affairs-subcommittee/brexit-future-trade-between-the-uk-and-the-eu/oral/37864.html> (last accessed 9 March 2018), Question 2.

<sup>88</sup> The Select Committee on the European Union, External Affairs and Internal Market Sub-Committees Corrected oral evidence: Brexit: future trade between the UK and the EU, 8 September 2016, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-external-affairs->

This, he stressed, is a "capacity-building problem", "not a negotiating problem" as the UK will not have to agree with the rest of the WTO Member States. Nonetheless, an investigating authority has to be set up, in a highly specialised area of work, over a very short period of time. According to Eglin, getting that done in two years "although it is not contentious it is probably the most difficult thing facing the UK at the moment."<sup>89</sup>

Lord Aberdare asked whether the UK had the skills and capacity necessary to put in place an investigating authority.<sup>90</sup> Eglin emphasised in response that an investigating authority for trade remedies is "specialised work" requiring "targeted capacity-building":

The UK will need trade negotiators, trade analysts and statisticians and trade diplomats with a general background, but there will also need to be expertise in certain areas: one is dispute settlement, another is intellectual property, and another is certain parts of services. Those are specialised areas. You tend to find that people specialise in those particular areas through their career. We will need to get up to speed rather quickly on that. Dispute settlement lawyers do not grow on trees. We have plenty of good lawyers, I am sure, but whoever is doing it will need to go back and will need to know the last 20 years of dispute settlement cases in the WTO, and you do not learn that overnight; you do not pick it up that quickly. There is probably a big capacity gap, because we have not been doing this for so many years. I am sure it can be made up—we are not short of clever people—but there will need to be some rather targeted capacity- building, particularly in the investigating authority for trade remedies.<sup>91</sup>

Recommendation 35 of the House of Lords European Union Committee Report stressed:

Whatever framework the Government adopts, it will also need to establish a domestic authority for trade remedy investigations, to replace the work currently undertaken by the Commission on behalf of EU Member States. This will require capacity-building in a specialised area of law. This may take a considerable time, and should therefore be an early priority in preparing for Brexit.<sup>92</sup>

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subcommittee/brexit-future-trade-between-the-uk-and-the-eu/oral/37864.html (last accessed 9 March 2018), Question 2.

<sup>89</sup> The Select Committee on the European Union, External Affairs and Internal Market Sub-Committees Corrected oral evidence: Brexit: future trade between the UK and the EU, 8 September 2016, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-external-affairs-subcommittee/brexit-future-trade-between-the-uk-and-the-eu/oral/37864.html> (last accessed 9 March 2018), Question 2.

<sup>90</sup> The Select Committee on the European Union, External Affairs and Internal Market Sub-Committees Corrected oral evidence: Brexit: future trade between the UK and the EU, 8 September 2016, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-external-affairs-subcommittee/brexit-future-trade-between-the-uk-and-the-eu/oral/37864.html> (last accessed 9 March 2018), Question 5.

<sup>91</sup> The Select Committee on the European Union, External Affairs and Internal Market Sub-Committees Corrected oral evidence: Brexit: future trade between the UK and the EU, 8 September 2016, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-external-affairs-subcommittee/brexit-future-trade-between-the-uk-and-the-eu/oral/37864.html> (last accessed 9 March 2018), Question 6.

<sup>92</sup> House of Lords, European Union Committee, Brexit: the options for trade, 5<sup>th</sup> report of session 2016-17, <https://publications.parliament.uk/pa/ld201617/ldselect/ldcom/72/72.pdf> (last accessed 9 March 2018), p. 75.

The Government in its response merely noted, very succinctly, that "[w]ork is in hand to develop an independent trade remedies framework for the UK, and includes the need to develop an investigative function by recruiting and training staff."<sup>93</sup>

The key question facing the UK when it comes to post-Brexit trade defence is indeed, as right pointed out by Eglin, a question of capacity. It is expected that the UK will establish the institutional and legislative capacity to act in accordance with WTO rules but that institutional capacity needs to be built up. The Department of International Trade has focused exclusively on trade negotiations and not on building up TDI capabilities. HM Revenue and Customs, the non-ministerial department of the UK Government responsible for the collection of taxes and payment of state support works on trade statistics but has no concrete TDI capabilities. The Department for Business, Energy & Industrial Strategy assists in State Aid investigations but is not currently equipped to replace the EU Commission to complete complex investigations into allegations of dumping and subsidies. The Competition and Markets Authority (CMA) has responsibility over competition law in the UK and consumer protection but no capacity to deal with trade distortion investigations.

#### **4.2. Establishing an independent investigative authority**

Given the urgent need to build up the UK's capacity to tackle allegations of unfair competition and impose TDIs, reports in August 2017 through a job advert that the UK Government was setting up a new trade authority were welcome.<sup>94</sup> An advert on the Department for International Trade website stressed that "[w]e need to develop the UK's approach to tackling allegations of unfair competition and build the capability and capacity to investigate complaints and enforce the rules." The "UK Trade Remedies Organisation" would be an arm's length body of the Department for International Trade, would have around 130 staff and be operational by October 2018. The advert notes that setting up "a fully functional and fit-for-purpose organisation" would be a "huge challenge" for the UK given the "challenging deadline" and a "changing and uncertain environment".

The Government White Paper on "Preparing for our future UK trade policy", published in October 2017, provided more detail about the UK's post-Brexit approach to trade remedies and trade dispute.<sup>95</sup> The White Paper states that "the UK's framework will be implemented by a new mechanism to investigate cases and propose measures that offer proportionate protections for our producers." As part of this, the Government would identify existing EU members "essential to UK business" which would be carried forward. The White Paper notes that by the time the UK leaves the EU, it will be ready to "act independently to protect UK interests should

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<sup>93</sup> Department for Exiting the European Union, Department for International Trade, Response to Brexit: the options for trade, 28 February 2017, <https://www.parliament.uk/documents/lords-committees/eu-external-affairs-subcommittee/Future-trade-EU-UK-Government-Response-and-Annex%20A.pdf> (last accessed 9 March 2018), p. 14.

<sup>94</sup> Mance H, Job advert reveals surprise plans for new trade authority. Financial Times, 2 August 2017, <https://www.ft.com/content/78201a5e-77a2-11e7-a3e8-60495fe6ca71> (last accessed 9 March 2018).

<sup>95</sup> Department for International Trade, Policy paper: preparing for our future UK trade policy, 9 October 2017, <https://www.gov.uk/government/publications/preparing-for-our-future-uk-trade-policy/preparing-for-our-future-uk-trade-policy#trade-remedies> (last accessed 9 March 2018).

our trading partners fail to meet their international obligations and to defend any disputes brought against the UK."

The White Paper notes that as the UK leaves the EU "we will need to put in place an independent UK trade remedy framework to be implemented by a new mechanism to investigate cases and propose measures" in compliance with WTO rules. The following principles are listed as key to the UK's future trade remedies framework. First, impartiality, by setting up a "new arm's length body that will investigate trade remedies cases and make recommendations on the basis of clear economic criteria" operational by the time the UK leaves the EU; ensure investigations are transparent, objective and effective; and provide a route for interested parties to appeal.

Second, proportionality to ensure the UK's TDI framework is "used judiciously and proportionately". Decisions will be based on "clear evidence, targeted at addressing the injury caused, and take into account the interests of domestic producers and regional impacts, as well as those of other interested parties, such as user industries and consumers." This will require applying an economic interest test as part of the trade remedies investigation prior to imposing any measures; applying a UK-specific threshold for initiating cases; determining a methodology for calculating injury.

Third, efficiency, to ensure cases are "investigated swiftly and effectively, avoiding unnecessary burdens on complainants as well as the subjects of the complaint". This is to be achieved through applying provisional measures according to WTO rules; developing a "digital service" to support the investigations process and introducing measures to tackle attempts to circumvent TDIs.

Fourthly, transparency to make sure relevant information is accessible and there is accountability for decision-making, without creating an unreasonable burden on businesses taking part in the process.

The White Paper recognises that the key need of UK companies is "certainty, continuity and as much notice as possible for any significant changes that might directly impact them." Further, it notes that if no action is taken to transition existing EU trade remedy measures, these will no longer apply to products arriving into the UK, which could have serious effects on certain UK industries. The White Paper states that as a result "we will seek to effectively continue the existing trade remedies measures which matter to UK business, and which meet WTO requirements around the level of domestic production". This, it is expected, will emerge from a call for evidence from the public.

As was pointed out elsewhere by George Peretz QC,<sup>96</sup> the White Paper leaves considerable room for uncertainty: who ultimately will investigate and take decisions? The White Paper stresses the need for an independent evaluation and yet says that that independent body will merely "make recommendations". The White Paper does not discuss the powers of the authority

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<sup>96</sup> Peretz G, Trade defence instruments: issues for the UK post-Brexit. UK Trade Forum, 10 October 2017, <https://uktradeforum.net/2017/10/10/trade-defence-instruments-issues-for-the-united-kingdom-post-brexit/> (last accessed 9 March 2018).

to investigate, for instance, their ability to constraint information. The role of the courts, implied in the reference to the right of appeal by interested parties, is also left unclear. Who will constitute an interested party and what remedies are referred to? Interestingly, Peretz also notes that the future relationship between the UK and the EU in the field of TDIs is not sketched out in the White Paper. There may be significant advantage to extensive cooperation between the UK and the EU in the field where the interests of the EU are closely aligned.

The UK Government has since, in November 2017, set out proposed provisions for the UK trade remedies regime in the Trade Bill<sup>97</sup> and the Taxation (Cross-border Trade) Bill.<sup>98</sup> Schedule of the Taxation (Cross-border Trade) Bill sets out the framework of operation of the Trade Remedies Authority for "dumping of goods or foreign subsidies causing injury to UK industry." Peretz notes that "[t]he regime set out in Schedule 4 resembles maps of Africa produced by early 19th century European explorers: while the outlines are clear, large areas are, in effect, marked as 'unknown lands' or 'here be dragons'."<sup>99</sup> While the determination of an injury and the maximum amount of duty is to be handled by the Trade Remedies Authorities, the final determination as to whether the imposition of a TDI is in the public interest is left to the Secretary of State. Paragraph 30 notes regulations "may make provision for or in connection with... the review or appeal of decisions made by the TRA or the Secretary of State under provision made by or under this Schedule." This does not elaborate on the already barely sketched out procedures for Appeal of the White Paper as to which decisions should be subject to appeal and how the balance between the judiciary and the executive is to be drawn. Altogether, in Peretz's words:

If, as now seems likely, the United Kingdom does leave the EU trade remedy system, there will be considerable and immediate calls on the TRA to take action in all sorts of sectors. A robust legal framework therefore needs to be in place well before it starts work. The framework in the two Bills is a start, but there is much work still to do.<sup>100</sup>

It should be recalled, that despite trading currently under the same rules, similar calls upon EU authorities to impose trade defence measures might also be made from the rest of the EU once the UK starts to restructure its economy, perhaps with the help of loosening rules on state aid or competition.

## **5. Post-Brexit trade defence options in a customs union: the EU-Turkey case study**

The previous sections have discussed options for trade defence in the situation where the UK, upon leaving the EU, leaves the customs union and is left to rely solely on WTO rules. The option of the UK remaining in the customs union was put back on the table on February 26,

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<sup>97</sup> Trade Bill, <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0122/18122.pdf> (last accessed 9 March 2018)

<sup>98</sup> Taxation (Cross-border Trade) Bill, <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0128/18128.pdf> (last accessed 9 March 2018).

<sup>99</sup> Peretz G, Briefing paper: the government's proposed legislation for trade remedies. UK Trade Forum, 22 January 2018, <https://uktradeforum.net/2018/01/22/418/#wto> (last accessed 9 March 2018).

<sup>100</sup> Peretz G, Briefing paper: the government's proposed legislation for trade remedies. UK Trade Forum, 22 January 2018, <https://uktradeforum.net/2018/01/22/418/#wto> (last accessed 9 March 2018).

2018. Jeremy Corbyn, leader of the Labour Party, shifted the party's position to remain in a customs union with the EU upon the UK leaving the bloc.<sup>101</sup> The speech was not free of ambiguity, particularly concerning Mr. Corbyn's insistence that the UK should join "*a* customs union" (emphasis added) as distinct from "the customs union" with the EU. Nonetheless, for this article's purposes, it opens up new options for the UK's post-Brexit trade defence that warrant separate analysis. Turkey is the natural point of comparison as a country which, although not a Member State of the EU, is in a customs union with the bloc.

### **5.1. Trade defence modalities in the EU-Turkey customs union**

Decision No 1/85 of the EC-Turkey Association Council, adopted on 22 December 1995, lays out the details of the Association between the Turkey and the EU (then the European Economic Community).<sup>102</sup> The agreement excludes agriculture and services and removes all tariffs between the parties, while providing for external trade rules. As provided in Article 12 of the Decision: "Turkey shall, in relation to countries which are not members of the Community, apply provisions and implementing measures which are substantially similar to those of the Community's commercial policy."

When it comes to trade remedies, "very strikingly, anti-dumping is still possible between the EU and Turkey" as was pointed out by Dr Peter Holmes, Reader in economics at the University of Sussex, in his evidence to the House of Lords' European Union Committee.<sup>103</sup> Duties on goods traded between Turkey and the bloc can still be imposed. This has also been stressed by André Sapir:

As a result, the EU-Turkey customs union is in fact a hybrid between a genuine Customs Union and a [Free Trade Agreement (FTA)]. This is demonstrated by the fact that Turkey has adopted the EU's common external tariff for most, but not all, industrial products and only for some agricultural products; it applies additional customs duties for some textile products from countries outside the EU and the EU's FTA partners; it applies trade defence instruments, such as anti-dumping and countervailing duties, in a totally different manner (for different products and countries) than the EU; and it has not concluded FTAs with some EU FTA partners (including Mexico, South Africa and Ukraine).<sup>104</sup>

Decision No 1/85 generally provides that state aid and competition law apply between the EU and Turkey but countervailing measures may be permitted in specific circumstances. Section III of the Decision deals with TDIs. Per Article 44 of the Decision, Article 47 of the Additional Protocol, signed on 23 November 1970, to the Agreement establishing the Association between

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<sup>101</sup> Pickard J, Parker G and Hughes L, Pro-EU toy faction to join Labour on Brexit in threat to May. Financial Times, 26 February 2018, <https://www.ft.com/content/44558030-1ae8-11e8-aaca-4574d7dabfb6> (last accessed 12 March 2018).

<sup>102</sup> Decision no 1/95 of the EC-Turkey association council on implementing the final phase of the Customs Union (96/142/EC), 22 December 1995.

<sup>103</sup> House of Lords, European Union Committee, Brexit: the options for trade, 5<sup>th</sup> report of session 2016-17, <https://publications.parliament.uk/pa/ld201617/ldselect/lducom/72/72.pdf> (last accessed 9 March 2018), para. 92.

<sup>104</sup> Sapir A, Should the UK pull out of the EU customs union?. Bruegel, 1 August 2016, [bruegel.org/2016/08/should-the-uk-pull-out-of-the-eu-customs-union/](http://bruegel.org/2016/08/should-the-uk-pull-out-of-the-eu-customs-union/) (last accessed 12 March 2018).

the European Economic Community and Turkey provides the modalities of implementation of TDIs between Turkey and the EU.<sup>105</sup>

The EU and Turkey may apply to the Council of Association to complain of the other party's dumping practices. The Council of Association upon a finding that there has been dumping may issue recommendations to the person or persons to put an end to those practiced.<sup>106</sup> The injured party may take protective measure, after first having notified the Council of Association, where: the Council of Association has not taken any decision within three months from the making of the application or despite the issue of recommendations the dumping practice continue.<sup>107</sup> Interim protective measures may be introduced if immediate action is necessary to ensure the interests of the injured party but must not be in force for longer than 3 months from the date of application.<sup>108</sup> The Council of Association may recommend that TDI measures be suspended pending the issue of a recommendation and may recommend the abolition or amendment of measures taken when despite the issue of recommendations the dumping practice continued.<sup>109</sup>

Article 44 of the Decision provides that any anti-dumping or countervailing measures shall be reviewed by the EU-Turkey Association Council upon the request of either party. The Association Council may suspend the applications of those TDIs " provided that Turkey has implemented competition, State aid control and other relevant parts of the *acquis communautaire*" to ensure Turkey is providing against unfair competition in a comparable way to that the EU.

The consultation and decision-making procedures laid out in Section II Chapter V of the Decision do not apply to TDIs put in place by either party.<sup>110</sup> The EU and Turkey instead "shall endeavour, through exchange of information and consultation, to seek possibilities for coordinating their action when the circumstances and international obligations of both Parties allow." Per Article 46, where the EU or Turkey has put in force TDIs against the other party or with third countries, "that Party may make imports of the products concerned from the territory of the other Party subject to the application of those measures."

## **5.2. Lessons for UK's trade defence options in a customs union**

A 2014 evaluation from the World Bank of the EU-Turkey customs union draws a very mixed portrait of trade defence measures between the EU and Turkey. The study notes that a "a key source of concern [is] the use of Trade Defense Instruments (TDIs) by both parties."<sup>111</sup> The

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<sup>105</sup> Additional Protocol and Financial Protocol signed on 23 November 1970, annexed to the Agreement establishing the Association between the European Economic Community and Turkey and on measures to be taken for their entry into force.

<sup>106</sup> Article 47(1) Additional Protocol.

<sup>107</sup> Article 47(2) Additional Protocol.

<sup>108</sup> Article 47(2) Additional Protocol.

<sup>109</sup> Article 47(3) Additional Protocol.

<sup>110</sup> Article 45, Decision no 1/95 of the EC-Turkey association council on implementing the final phase of the Customs Union (96/142/EC), 22 December 1995.

<sup>111</sup> World Bank, Evaluation of the EU-Turkey customs union, Report no. 85830-TR, 28 March 2014, [www.worldbank.org/content/dam/Worldbank/document/eca/turkey/tr-eu-customs-union-eng.pdf](http://www.worldbank.org/content/dam/Worldbank/document/eca/turkey/tr-eu-customs-union-eng.pdf) (last accessed 12 March 2018), p. ii.

World Bank study reveals two important lessons of the EU-Turkey customs union for the UK's own trade defence post-Brexit options: first, TDIs ability to undermine bilateral trade and, second, problems linked to a lack of coordination.

First, the World Bank study shows that TDIs may drastically impede trade between the parties of a common union. Thus, it notes that, while the use of TDIs by the EU and Turkey has mostly not been intended to undermine bilateral trade, it can "still create a policy environment of substantial uncertainty for their exporters."<sup>112</sup> 3% of Turkey's dumping investigations between 1995 and 2015 targeted exports from the EU. Conversely, 9% of the total number of products investigated by the EU over the same period were aimed at Turkey. Further, the study emphasised that recent use of TDIs between the two parties could significantly threaten bilateral trade.<sup>113</sup> Turkey's actual or proposed TDIs could affect up to 1 billion in annual imports from the EU, while the EU's proposed TDIs could affect nearly US\$500 million in annual imports from Turkey. The study also highlighted that Turkey's application of TDIs had create divergent economic incentives across different EU Member States, with antidumping measures being applied selectively across different EU countries.<sup>114</sup> Given, that the EU is the UK's largest trading partner, it is imperative that trade continue to be able to flow between the two entities, so as to little the potential heavy economic impact. The EU-Turkey case study illustrates that, where the UK officially embraces the customs union option, it is crucial that sufficient time be given during the negotiations between the UK and the EU to the question of trade defence.

Secondly, the World Bank study shows that the use of TDIs by the EU and Turkey has not been coordinated.<sup>115</sup> There is very little overlap in the product coverage of the parties' use of TDIs or against common trading partners. 15 percent of the 329 different products that Turkey investigated and the 336 products that the EU investigated were subject to investigations by both parties between 1995 and 2011. In less than 2% of each party's total investigation was the particular good investigated by both the Turkey and the EU in the same year. According to the study, "[t]his suggests that the differential use of TDIs across Turkey and the EU may be related to each economy facing different shocks for which there is evidence that movements in the business cycle and real exchange rates may be important determinants of new TDI import restrictions."<sup>116</sup> Post-Brexit, as was already said above, there would be significant advantage to cooperation between the EU and the UK when it comes to trade defence. The UK and the

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<sup>112</sup> World Bank, Evaluation of the EU-Turkey customs union, Report no. 85830-TR, 28 March 2014, [www.worldbank.org/content/dam/Worldbank/document/eca/turkey/tr-eu-customs-union-eng.pdf](http://www.worldbank.org/content/dam/Worldbank/document/eca/turkey/tr-eu-customs-union-eng.pdf) (last accessed 12 March 2018), para. 75.

<sup>113</sup> World Bank, Evaluation of the EU-Turkey customs union, Report no. 85830-TR, 28 March 2014, [www.worldbank.org/content/dam/Worldbank/document/eca/turkey/tr-eu-customs-union-eng.pdf](http://www.worldbank.org/content/dam/Worldbank/document/eca/turkey/tr-eu-customs-union-eng.pdf) (last accessed 12 March 2018), para. 76.

<sup>114</sup> World Bank, Evaluation of the EU-Turkey customs union, Report no. 85830-TR, 28 March 2014, [www.worldbank.org/content/dam/Worldbank/document/eca/turkey/tr-eu-customs-union-eng.pdf](http://www.worldbank.org/content/dam/Worldbank/document/eca/turkey/tr-eu-customs-union-eng.pdf) (last accessed 12 March 2018), para. 78.

<sup>115</sup> World Bank, Evaluation of the EU-Turkey customs union, Report no. 85830-TR, 28 March 2014, [www.worldbank.org/content/dam/Worldbank/document/eca/turkey/tr-eu-customs-union-eng.pdf](http://www.worldbank.org/content/dam/Worldbank/document/eca/turkey/tr-eu-customs-union-eng.pdf) (last accessed 12 March 2018), para. 74.

<sup>116</sup> World Bank, Evaluation of the EU-Turkey customs union, Report no. 85830-TR, 28 March 2014, [www.worldbank.org/content/dam/Worldbank/document/eca/turkey/tr-eu-customs-union-eng.pdf](http://www.worldbank.org/content/dam/Worldbank/document/eca/turkey/tr-eu-customs-union-eng.pdf) (last accessed 12 March 2018), para. 74.



EU will likely continue to have closely aligned interests on particular trade practices in the post-Brexit era. This could avoid a duplication of efforts and wasted resources. This question should hence also be tackled appropriately in negotiations between the UK and the EU as the UK prepares itself to leave the bloc.

## 6. Post-Brexit competition law option

There is a small possibility that the hard stance of the UK government to this date is only a negotiation position. If the UK were to accept all competition and state aid rules, this would, de facto, leave no room for the application of any TDI.

This would notably be the case if the UK changed its approach to eventually embrace continued permanent membership in the European Single Market. This would be the case if the UK struck an arrangement by which it would be a party to the European Economic Area (EEA) Agreement. This would require the UK to join the European Free Trade Association (EFTA) as membership to the EEA is open to Member States of the EU and EFTA.

In an EEA-type agreement between the UK and the EU, competition rules could continue to apply in many areas, although there could be important exclusions in the areas of agriculture and fisheries. The EU Commission has sole responsibility for mergers and acquisitions which could significantly reduce competition in the Single Market, as provided in Council Regulation No. 139/2004. The EFTA Surveillance Authority and the European Commission share other competition responsibilities, per Part IV of the Agreement on the European Economic Area which deals with competition.<sup>117</sup> While EU Member State are subject to the European Commission's review of state aid, the EFTA Surveillance Authority, per Article 62 of the Agreement, would be responsible for State Aid enforcement, in the context of the UK if it were to become an EFTA State.<sup>118</sup> Such decisions are subject to the determination of the EFTA Court.

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<sup>117</sup> Decision of the Council and the Commission of 13 December 1993 on the conclusion of the Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation\* (94/1/ECSC, EC); OJ L1/1, 3.1.1994.

<sup>118</sup> Article 62

## 7. Conclusion

This article has reviewed various trade defence options between the EU and the UK after Brexit. This analysis has shown that the imposition of trade defence measures is certainly on the horizon in EU-UK relations without a deal. In the event that the UK leaves the EU without any form of deal, the UK will be left to trade with the bloc on the basis of WTO rules. WTO rules will also be the basis of trade between the UK and any third State, in the absence of any comprehensive free trade agreement.

While the UK will continue to be a member of the WTO upon its departure from the EU, the question of how the UK will be able to reissue the currently existing EU schedules of commitment under its own name is much more complex. New schedules can be given effect through a variety of procedures, renegotiation or rectification in particular could partly shield the UK from the risk of a veto from any other WTO Member State. Negotiations in any case will be necessary to identify the UK's own commitments, independent of those of the EU. Reports of preliminary breakthrough in ongoing negotiations about dividing up the UK and the EU's tariff-rate quotas are hence particularly welcome.

This article has argued that the question of TDI is crucial and should not be overlooked as the UK makes its preparations to leave the EU. Anti-dumping measures and countervailing measures against subsidised goods are vital tools to ensure that the UK's own industries are protected from unfair competition in the post-Brexit era. While the UK as an EU Member State has so far relied on the sole competence and expertise of the European Commission when it comes to TDIs, the UK will be left to handle its own trade defence.

The only way to avoid the imposition of trade defence measures would be either full participation of the UK in the single market or at least an acceptance of all state aid and competition rules, probably including ultimately the jurisdiction of the Court of Justice. This latter element might not be acceptable to the UK government, which then makes TDIs in UK-EU relations unavoidable post-Brexit.

While many in the UK argue for creative thinking on the topic, it is clear that the UK government prepares for a robust legal and institutional framework to impose TDI measures unilaterally post-Brexit. Only an agreement between the UK and the EU could prevent such imposition. An agreed solution would also make the enjoyment of WTO Membership for the UK much easier, as it would eradicate the considerable uncertainty about the terms of UK WTO Membership. There is an urgent need for the UK to build up its TDI capacity to prepare for the post-Brexit era. At present, while recent proposals for the UK government about setting up a Trade Remedies Authority are encouraging, they leave considerable room for uncertainty.

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