eef UK Steel

UK IMPLEMENTATION OF POST-BREXIT WTO-COMPLIANT TRADE DEFENCE REMEDIES: A STEEL SECTOR VIEW

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INTRODUCTION

The General Agreement on Tariffs and Trade ("GATT") allows members to derogate from their market access commitments in order to defend their domestic industries from disruptive imports. The conditions that need to be met, and the processes that need to be followed, are set out in three WTO agreements: the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "AD agreement"); the Agreement on Subsidies and Countervailing Measures (the "SCM agreement"); and the Agreement on Safeguards (the "safeguards agreement").

Within the EU Customs Union, the Commission is responsible for investigating complaints and deciding on the implementation of trade defence remedies (although the Member States can block certain decisions). The rules are set out in three Regulations.

Part 1 of this paper argues that it is imperative that the UK introduce its own trade defence remedy law to come into effect immediately it leaves the EU. Part 2 sets out detailed proposals on what this law should contain. While written on behalf of the UK steel industry, the proposals are relevant to the whole UK manufacturing sector. UK Steel is perhaps in a unique position to take a balanced and informed view on this subject. Steel has been the
subject of countless trade disputes over several decades, and the UK industry has, in addition to being a complainant against unfair imports into the EU, opposed anti-dumping complaints brought in the EU against imports of its raw materials, and defended its interests as an exporter when trade defence measures have been brought against its sales in foreign countries.

EXECUTIVE SUMMARY

1. Trade defence measures act as a safety valve, allowing countries to defend themselves from disruptive trade flows. They have been part and parcel of the rules-based WTO system from its very inception in 1947. The shelter they provide has enabled nations to reduce tariffs and eliminate trade barriers, secure in the knowledge that they can act to defend their industries if the need arises. They have thus been an integral component of trade liberalisation.

2. The UK has embarked on a new industrial strategy, and is tasking manufacturing with expanding its exports. But outside the EU the UK will be more exposed to the harsh winds of international competition. The UK's manufacturing base will become further eroded unless it maintains the capacity to activate these safety valves when needed. WTO-compliant trade defence is an integral part of the government's industrial strategy.

3. The Prime Minister has stated that "the same rules and laws will apply on the day after Brexit as they did before". This requires the UK to enact a trade defence remedy law to come into effect the day we exit the EU.

4. Many aspects of the EU's trade defence regulations are inappropriate to a post-Brexit UK. We should seize this opportunity to go back to basics, and develop our own trade defence law that is fit for the 21st century, unashamedly copying best practice from around the world. The aim is to provide prompt and effective remedies when needed, while remaining fully compliant with WTO rules.

5. Different trade defence models are in use around the world. We propose that the UK adopts the "bifurcated" approach favoured by the US and Canada, by setting up two new, independent bodies to assess injury and dumping/subsidy separately. They would be tasked with objective examination of the facts: political interference would be kept to a minimum.

6. This paper also examines the contents of the three relevant WTO agreements and sets out detailed proposals on what the new UK legislation should contain. Headline recommendations are:

7. It is in the interests of all parties that decisions on whether to introduce trade defence remedies, and if so in what form, are taken expeditiously. We therefore propose that a strict timetable is included in the law, that would improve on the EU's current practice.

8. The Union interest clause, whereby in the EU trade defence measures are only introduced if they are deemed to be in the Union interest, will be entirely superfluous when the UK has repatriated its trade defence system. However, nor should it be replaced by a "user interest" rule in the UK. There is no support for it within the WTO rules, and it would lead to the government making invidious decisions about whether one sector was more important than another.

9. The lesser duty rule[1] is not mandated by the WTO agreements, and is implemented by very few other governments other than the EU. (Indeed, the EU is the only major user of trade defence measures to apply this rule on a systematic basis in every case.) The WTO requires only that the administering authority must establish that the dumped and/or subsidised imports are causing injury. It does not require them to quantify the level of injury. Such calculations frequently use arbitrary assumptions and can produce unsafe results. We therefore propose that the UK should not apply a lesser duty rule.

10. Although dwindling in number, there are still some non-market economies around the world, and special rules are needed to determine how dumping is calculated when these countries export to the UK. There is a growing number of "mixed" economies, where private investors and state-owned companies co-exist, but the economy as a whole remains subject to high levels of state control and influence. China is one such. Despite the growing number of private investors, state control of the economy remains high and market distortions abound[2], so in reality China is not yet a market economy. The UK in administering its future trade defence law should of course respect future WTO rulings on such issues. However, even if at some point in the future that results in China acquiring so-called market economy status, special rules will still be needed to deal with companies that are state-owned, or whose selling price and/or input costs are distorted by state practices.

11. For reasons of better regulation, the UK should retain the EU practice of levying anti-dumping and anti-subsidy duties prospectively, rather than moving to the US system of levying them retrospectively.

12. We propose a number of other changes that would make a UK law more liberal than current EU practice, for example the rules on cumulating injury.

13. At the time the UK exits the EU, there will be many EU trade defence measures in existence. The UK should from day one continue to apply these measures, but then progressively review them in order to ensure their WTO compliance. We propose a timetable for implementing this. Measures affecting products for which there is no UK manufacturer should be withdrawn as quickly as possible.

1 The EU regulation stipulates that the duties imposed should be equal to either the dumping/subsidy margin, or the injury margin, whichever is the lower.

2 It is noteworthy that according to the Commission's most recent formal assessment, China met only one of the EU's five tests designed to establish objectively whether countries operate as market economies.

PART 1: WHY A TRADE DEFENCE REMEDY LAW IS NEEDED

1.1 The WTO context

The right of countries to introduce trade defence measures has been an integral feature of the GATT since its very inception in 1947. It has been argued – a view which we share – that these rights have been an important factor in facilitating the rapid liberalisation of world trade that has occurred since World War II. Countries have been able to reduce (and in some instances, eliminate) their import tariffs and to eradicate non-tariff barriers safe in the knowledge that if needed they would be able temporarily to shield their domestic industries from the worst ravages of disruptive imports.

It is inaccurate to characterise the GATT (today the WTO) as a pure and simple free trade system. The GATT is and has always been a **rules-based** system that has facilitated trade liberalisation.

Today all the UK's principal trading partners have trade defence remedy laws, and 48 countries currently have one or more trade defence measure in force[3]. It should be stressed however that a very small proportion of global trade is affected by these measures[4], and that global trade in goods has continued to grow by around 5% per annum on average over the past decade[5]. Most countries use these measures responsibly to address very specific instances of disruptive trade – as intended.

Furthermore when it leaves the protective embrace of the Customs Union, UK manufacturing could be uniquely exposed to the risk of exports covered by EU trade defence measures being diverted to its shores if there is not an effective trade defence remedy system in place. It should be noted in this context that the steel industry is more exposed than most: the EU has zero import tariffs on all steel products[6]. The UK will continue to have zero tariffs on steel post-Brexit[7].

Such a system would be fully compatible with key government policy objectives. There would be little point in developing an industrial strategy if the UK manufacturing base did not have the back-up protection offered by trade defence remedies, and was instead nakedly exposed to the risk of disruptive imports – unlike its global competitors. Similarly the government's aim that Brexit should result in increasing UK exports will fail if our manufacturing base is further eroded.

Finally, looking at the three types of trade defence remedy:

- **Anti-Subsidy (countervailing)**: There is general consensus amongst economists and legislators that subsidies are distortive, and that countries must be able to act against injury caused by subsidised competitors.

- **Anti-Dumping**: While some economists have challenged the economic rationale of the WTO definition of dumping, discriminatory pricing - particularly when if left unchecked it could result in the effective elimination of competitors - is frequently regarded as an unfair trading practice in countries' internal competition laws. Globalisation, which in many sectors has resulted in the emergence of a handful of dominant players, has increased the importance of defending smaller local producers from such practices[8].

3 Source: WTO Integrated Trade Intelligence Portal. As at 31 December 2016. In total there are 1,969 AD measures in place, 218 CVD measures and 63 safeguards. The USA is the most prolific user of trade defence remedies, accounting for 20% of the total.

4 For example, only 0.21% of EU imports are covered by trade defence measures. Source: European Parliamentary Research Service

5 Source: WTO World Trade Statistical Review 2016.

6 As a result of a "zero-for-zero" deal between the major developed countries agreed during the Uruguay Round. Zero steel tariffs compare with 6% to 10% for competing products, and up to 22% for steel consuming sectors.

7 As the EU and its Member States are jointly and severally signatories of the WTO agreements, the EU's tariff bindings will continue to apply to the UK after leaving the Customs Union. Thus while the UK will be able unilaterally to reduce tariffs from these levels should it wish, it will not be able to increase tariffs and remain WTO compliant.

8 Some countries, such as Australia, give explicit special consideration in their law to the introduction of AD measures when their domestic industries include small producers.

Anti-dumping measures are the only WTO-approved tool for tackling the effects of discriminatory pricing across international boundaries. They allow governments to act against imports where discriminatory pricing is causing or threatening to cause material injury to a domestic industry. The number of AD measures introduced demonstrates that this instrument has over the decades proved to be the most effective safety valve, and has thus helped keep global trade liberalisation on track.

- **Safeguards** measures on the other hand have been described as the "nuclear" option, partly because they must be applied against ALL imports, both 'good' and 'bad' (i.e. fairly as well as unfairly traded goods), but also because countries taking such measures can pay a high price through the "suspension of concessions" by affected trading partners – i.e. the imposition of higher tariffs on imports from the country taking the safeguard measure. As such it is unlikely that the UK would employ safeguards measures. Nevertheless it is vital that the UK has on the statute book the ability to take them. To stretch the analogy, that is how the nuclear deterrent works.

Furthermore, it should be noted that domestic producers do not lightly make trade complaints. There are large costs entailed, both in legal fees and management time[9]; and the eventual outcome is always uncertain. Complaints are never brought frivolously, but only when disruptive trade is causing grave problems for the companies.

Therefore in conclusion, it would be foolhardy for the UK not to have the full range of WTO-compatible trade defence remedies available to it at the point of departure from the EU, together with a system of effective implementation.

1.2 The Brexit context

Following the Prime Minister's Lancaster House speech on 17th January, and the subsequent publication of the White Paper[10], the UK's Brexit negotiation objectives are now much clearer. There is an explicit intention, amongst other things, for the UK to withdraw from the EU Customs Union, but to retain some elements of it, particularly in the field of trade facilitation – the administrative nuts and bolts of physically moving goods across the new international border between the UK and EU27. This raises the (probably remote) possibility that there could be some form of bilateral customs union agreed between the UK and EU27.

If there is no such agreement, then the UK is faced with a stark, binary choice: either to have its own trade defence remedy act in place by Brexit Day; or to become exposed and defenceless overnight. Our view – and one apparently shared by the Prime Minister (see below) - is of course that it is essential to embrace the first option.

If there were to be a UK/EU27 bilateral customs union agreement, it is highly probable that the UK would still need to enact its own trade defence remedy legislation. There are few precedents to draw on: the nearest would be the EU/Turkey Customs Union[11]. This agreement does not harmonise EU and Turkish trade defence remedy laws, and nor does it prohibit the parties from imposing trade defence measures against each other.

The Prime Minister in her speech also said "we will convert the *acquis* …..into British law……The same rules and laws will apply on the day after Brexit as they did before." Thus the PM has now committed the UK to retaining trade defence measures.

9 Based on the real-life experience of UK Steel member companies, the costs of bringing an anti-dumping complaint, in terms of legal fees and of management time and disruption, can exceed €1 million per company.

10 Cm 9417

11 The EU has two other minuscule customs union agreements: with San Marino and Andorra.

It is not however completely clear what this will mean in practice. While it is obvious that EU directives, which have already been transposed into British law, will continue to have effect until such time as Parliament repeals or amends such provisions, the case with EU regulations is different – new legislation will be required to give effect to their provisions when the European Communities Act is repealed.

The EU's trade defence instruments are embodied in three regulations. As we will demonstrate in part 2, many of their provisions are inappropriate in a UK-only context. Therefore the regulations cannot be simply "copied and pasted" into British law. A new, UK-specific trade defence remedy law is required. This in turn gives us the opportunity to discard some of the complexity that EU practice has accreted over the years, to go back to WTO basics, and devise a "state of the art" system of trade defence remedies that is efficient, effective and fit for the UK's new 21st century trading ambitions.

PART 2: WHAT A UK TRADE DEFENCE REMEDY LAW SHOULD LOOK LIKE

2.1 Institutional considerations

In the EU the decision-making process is monolithic: the Commission is responsible both for undertaking all the investigations and for proposing and deciding on the final measures (if any). There are minimal consultations with the Member States, and while the latter can overturn Commission proposals, the odds are heavily stacked in favour of the Commission[12]. With the key decisions in the hands of politicians – the trade Commissioner and, until last year, the Council - the EU system has also become heavily politicised, moving away from the purely "technical" approach to decision-making that the WTO agreements require.

The EU practice is thus unsuited to the British system of government.

The UK government has in recent years expressed frustration at the length of time the Commission takes to investigate unfair trade complaints. We therefore propose that the UK adopt a system that streamlines investigations by adopting best practice from around the world, while remaining true to British traditions of administrative practice.

The US and Canada are among the leading practitioners who use a bifurcated approach, with two dedicated, specialist bodies investigating dumping/subsidy and injury separately. This has several advantages:

- Findings are more objective and less prone to bias.
- Both investigations can run in parallel, speeding up the process. Both the US and Canada are able to introduce provisional duties (when justified by the facts) with shorter deadlines than the Commission has ever been able to commit to.
- It enables the development of knowledgeable, experienced teams, with skillsets suited to the two very different types of investigation.

We therefore propose:

1. An independent unit or agency should be created dedicated to the investigation of dumping and subsidy margins (called in this paper the "unfair trade unit"). The skillsets needed would be those of accountants and auditors (although they wouldn't need to be qualified accountants), with also some customs expertise, as their role would be to collect data from exporting producers and importers[13], verify those data[14], and undertake complex calculations using those data. The outputs would be objective and auditable. It is suggested that the sponsoring department could be the Department for International Trade.

2. An independent tribunal should be established (called in this paper the "injury tribunal") to rule on whether material injury had been caused[15]. This should comprise a panel of (say six) independent trade law experts and economists[16], appointed we suggest by the Secretary of State for Business, Energy and Industrial Strategy. The law should place an obligation on the Secretary of State to ensure that the tribunal's membership is balanced and that it is not dominated by people with either "protectionist" or free trade" views[17]. The tribunal would be supported by a staff of data analysts and economists whose role would be to collect and verify data, and analyse the data, but not to produce recommendations[18].

12 The procedures in respect of safeguards investigations are slightly different in that Member States do have a greater say in the eventual outcome.
13 And foreign governments in the case of Countervailing Duty investigations.
14 In cases where foreign producers had failed to cooperate, estimates would of course be used based on the WTO "facts available" standard.
15 Or "serious injury" in the case of safeguards.
16 The models would be the US International Trade Commission and the Canadian International Trade Tribunal.
17 Views on trade defence have become very polarised. These labels are used to mean "people who believe strongly that UK industry should always be protected from foreign goods" and "people who believe that trade, fair or otherwise, should be completely free of all impediments".
18 The type of analyses to be undertaken would be very similar to those performed by the Competition and Markets Authority, so consideration could be given to using CMA staff, subject to reassurances over the protection of confidentiality.

In order to ensure that decisions are as fact-based and objective as possible, it is proposed that if dumping and/or subsidy is proved, and if the injury tribunal determines that injury has been caused, then duties should be applied automatically (subject of course to appeal – see below).

A somewhat different procedure would be needed for decisions on whether or not to accept price undertakings. As explained in section 2.2.1, UK Steel is opposed in principle to the use of price undertakings. However, if the government decided to legislate to allow the possibility of accepting price undertakings, it needs to be recognised that, unlike determinations of injury or dumping/subsidy, decisions on undertakings are not matters of objective fact, but rather based on an assessment of the balance of interests between the exporters/importers and the domestic industry. Such decisions would need to be taken at ministerial level, after consultation with interested parties[19].

A separate arrangement would be required for safeguard actions, where there would be no dumping/subsidy calculations needed, but where decisions can be politically controversial. This is because all WTO member countries are affected by such measures, and because other sectors can ultimately suffer "collateral damage" from the suspension of concessions by other countries - see section 2.2.4 for more details. It is proposed that the injury tribunal should rule on whether serious injury (the WTO test for safeguards measures) exists. In cases where serious injury is found, then the final decision on whether to impose trade restrictions, and in what form, should be a political one.

In the US the final decision on safeguards is taken by the President, but it may not fit with British traditions of government for the Prime Minister to be the decision-taker. There are two government departments with critical interests in the outcome are the Department for International Trade and the Department for Business, Energy and Industrial Strategy, while the Treasury and Foreign and Commonwealth Office also have an interest. It may therefore be more appropriate for decisions on safeguards to be subject to Cabinet clearance after write-round to all interested departments, with the Department for International Trade taking the lead.

The WTO agreements stipulate that AD and CVD decisions can be appealable. The US has a specialist Court of International Trade for this purpose. We do not suggest this degree of specialism is necessary for the UK. The number of cases is likely to be far lower, so the costs of establishing a specialist court are unlikely to be justified. Instead it is suggested that an existing tribunal could perhaps be used, such as the Competition Appeals Tribunal – subject of course to subsequent appeal to higher courts. The trade defence remedy law will need to require UK courts to have regard to WTO Dispute Settlement Body ("DSB") decisions.

2.2 The contents of a trade defence remedy law

In this section we make detailed proposals on the contents of a UK trade defence remedy law. As previously noted, some elements of the EU regulations are not applicable to a post-Brexit UK. We therefore propose in essence that the law should stick closely to the WTO agreements – indeed where consistent with UK legislative language we would suggest that it might be possible to "copy and paste" sections of WTO text.

The agreements stipulate the broad principles that should be observed for trade defence measures, they do not spell out detailed calculation methodologies. We propose that the UK's law should adopt the same approach. The UK need not follow rigorously the practices adopted by the Commission, but could instead start to develop its own administrative custom and practice, maintaining at all times strict compliance with the WTO agreements.

19 As defined in the WTO AD agreement.

On the other hand, the UK should of course operate in full compliance with WTO DSB decisions. The corpus of these past rulings should be built into the UK's practices from the start, but need not be written into the law.

In our detailed proposals below, we will follow the order in which the issues are addressed in the WTO agreements.

2.2.1 Anti-dumping

Determination of dumping

We propose that the wording of Article 2 of the AD agreement should in broad terms be copied into the UK law, with the word "authorities" substituted with the name of our proposed independent unfair trade unit. This would give the unit sufficient flexibility to make reasoned and fair calculations of dumping based on the facts of individual cases.

Article 2.2 allows two alternative methodologies for determining dumping where sales on the domestic market of the exporting country "do not permit a proper comparison": either the sales price of exports to an "appropriate third country, provided that this price is representative"; or the cost of production. We propose that the UK should adopt cost of production as its default means of determining normal value, because of the great difficulty in determining if export prices are truly "representative".

The treatment of non-market economies ("NMEs") is not explicitly dealt with in the AD agreement, but as neither domestic prices in these countries nor their costs of production meet the "proper comparison" standard of Article 2.2, it has long been acceptable practice for the investigating authorities to use alternative methodologies, usually in the form of using a market economy as a surrogate, for determining normal value.

However, the emergence of a new form of hybrid economy, where private investors operate within an environment tightly controlled by the state, means that the old distinction between market and non-market economies is becoming more complex.

Within the EU this is beginning to be understood, and legislators are looking at new ways of ensuring that dumping margins properly reflect reality, and are not distorted by state intervention and market distortions[20]. This is work in progress, and we propose that the UK should for the time being keep this aspect of its future trade defence system under review pending clearer indications of the approach to be taken by the EU and other trading partners, including the US.

There is currently much dispute on whether the terms of China's WTO accession agreements required all other countries automatically to start treating it as a market economy for AD purposes with effect from the start of this year[21]. The meaning of this ambiguously worded clause is currently at the centre of a WTO dispute resolution proceeding brought by China against the US and EU. The outcome of this proceeding also needs to be kept under review[22].

In reality, China is still a non-market economy, albeit one in transition, with significant levels of state control and influence, even over companies that are privately owned and operated. Therefore in the event that the UK does give China market economy status in the context of anti-dumping, the law should require that non-market

20 Relevant market distortions would include, for example: the widespread presence of enterprises which the state owns or which operate under its control, policy supervision or guidance; state involvement in companies allowing interference with respect to prices and costs; public policies or measures discriminating in favour of domestic companies, or otherwise influencing free market forces; or access to finance granted by institutions implementing public policy objectives.

21 For the avoidance of doubt, UK Steel shares the view of its EU and US counterparts that China should only receive market economy status once it can be clearly demonstrated that the country is in fact a market economy. This is not currently the case.

22 This case may set a precedent for Viet Nam, whose accession agreements contain a similar clause, operative in 2018.

economy treatment be applied to individual exporting companies where there is evidence that prices and/or costs are distorted directly or indirectly by the state.

Article 2.4.2 gives authorities the option of either comparing weighted average normal value with weighted average export prices, or comparing normal value with export price on a transaction to transaction basis. The Commission generally uses a weighted average to weighted average approach, and we suggest that the UK adopt the same approach. The Commission sub-divides the product into several product types. This enables the comparisons to be finessed and produces more accurate dumping calculations, and we suggest that the UK should follow suit.

The agreement does allow for a weighted average to individual transaction comparison in cases where there have been wide fluctuations in export prices "among different purchasers, regions or time periods", and we propose that the UK should also legislate for this possibility, as it would in these circumstances produce more accurate results.

Determination of injury

Again, the AD agreement wording (Article 2) could in most cases be adopted by a UK law.

Footnote 9 is important. It stipulates that throughout the agreement the term "material injury", unless otherwise specified, also means "threat of material injury to a domestic industry or material retardation of the establishment of such an industry". The UK legislation must make this clear.

Article 3.3 refers to the cumulation of injury from several dumped sources. Note that this article is permissive: "authorities **may** cumulatively assess the effects….." EU practice has evolved differently: the Commission requires that all countries where there is *prima facie* evidence of dumping be included in an AD complaint. This practice has the effect of arbitrarily expanding the scope of measures, and would thus be inappropriate for the UK to adopt. It should be the prerogative of the complainants to decide on which countries to include in a complaint, and to demonstrate that the WTO standards for cumulation are met.

Article 3.7 imposes stricter criteria for the assessment of threat of material injury, and again the UK should include these provisions in its law. (Article 3.8 however is superfluous and need not be enacted, as it merely duplicates the intention of the preceding article.)

Definition of domestic industry

The law should reproduce the language of Article 4, defining the term "domestic industry" as "the domestic producers….of the like products…..". When producers are related to the exporters or importers, or are importers themselves, of the allegedly dumped product, "domestic industry" may be interpreted as referring to all other producers.

Article 4.1(ii) allows for injury to be assessed at a regional level, while Article 4.2 deals with how AD duties should be levied in regional cases. We do not see these provisions as being used in a UK context, and thus probably need not be enacted into UK law.

Similarly Article 4.3, while relevant to the EU, is not applicable in a UK-only context and should not be enacted.

Initiation and subsequent investigation

It is proposed that decisions on the adequacy of a complaint be taken by the unfair trade unit and injury tribunal respectively with regards to dumping and injury. The initial decision to initiate investigations should be taken by the unfair trade unit.

It would be desirable practice in terms of efficiency (and discouraging vexatious complaints) for there to be an advisory service provided by both bodies to potential complainants so that they can ensure that their complaint meets the required standards prior to its formal submission.

Article 5.2 refers to the *prima facie* evidence of dumping and injury that must be included in a complaint before an investigation can be initiated. The key wording is "such information as is reasonably available to the applicant". The information listed in sub-paragraph (iii), regarding exporters' prices and costs, can be extremely difficult for companies to obtain – particularly when the constraints that competition law applies to information exchanges are taken into account. The complainants should only be expected to provide such *prima facie* evidence as can reasonably be obtained from publicly available sources.

Article 5.4 refers to standing, i.e. the proportion of domestic producers needed to support a case. The law should repeat these twin thresholds that must be met before a case can be brought.

Article 5.6 allows governments to self-initiate an investigation without receiving a complaint. We do not see this as a priority for the steel sector, but this option could be retained as long as industry participation in any investigations remained voluntary.

Article 5.7 states that dumping and injury investigations should proceed simultaneously, while Article 5.8 requires that investigations be promptly terminated where *de minimis* dumping[23] or negligible injury[24] is found. Under the US approach, poorly substantiated cases are dismissed at the provisional injury stage – i.e. very early in the investigation. Our proposal to adopt the US bifurcated approach would replicate this.

Additionally, the UK government has frequently expressed its frustration over the length of time the Commission takes to reach conclusions. With both these aims in mind, we propose the following timetable for AD investigations, which complies with the AD agreement. The adoption of faster timescales will be facilitated partly by the fact that the obligations on the Commission to consult with the Member States will not be needed in the UK context, and also by the bifurcated procedures. The deadlines for key decision milestones including provisional rulings and for definitive decisions should be mandated on the investigating bodies under the UK law. As previously indicated, the twin investigations would be conducted concurrently where appropriate[25].

23 De minimis dumping is margin of less than 2%.

24 Negligible injury is defined as where imports from a country account for less than 3% of the total imports of the product in question. However, if there are imports from several such countries, then their imports will only be deemed negligible if in aggregate they account for less than 7% of total imports.

25 There are only a few timescales mandated by the agreement:

- The total length of the investigation should not exceed one year, or 18 months in exceptional circumstances.
- Provisional duties must not be applied sooner than 60 days from initiation.
- Provisional duties must not last longer than 4 months, or 6 months if a significant proportion of the exporters request it. These periods can be increased to 6 and 9 months respectively by countries applying the lesser duty rule.

Stage	Max. no. of days from previous stage	Max. no. of days from filing
Unfair trade unit rules on adequacy of dumping data.	10	10
Injury tribunal staff rule on adequacy of injury data.		
Investigation formally initiated, or application is refused.		
Tribunal makes provisional injury ruling, based on low evidential standard. Cases with negligible injury as defined by the agreement are terminated automatically. Tribunal can also decide that cases where there is already very clear evidence that there is no injury are also terminated.	35	45
Unfair trade unit gives preliminary dumping ruling based on unverified data received from exporting producers etc. Provisional duties imposed equal to dumping margin. Verifications start.	135	180
Unfair trade unit publishes definitive dumping margins. Case terminated for producers found to be dumping at or below de minimis levels.	110 (or 170 if requested by exporters)	290 - 350
Injury tribunal issues definitive injury and causation determination. Case terminated where no injury is found. Definitive duties imposed where injury is found.	15	305 - 365

It is proposed that, unlike in the US, where the US ITC considers the case at the beginning of the process, and then again only after the Commerce Department has completed its dumping determinations, the injury tribunal would continue to collect and verify data, subject it to economic analysis, receive submissions and where requested hold hearings throughout the time when the unfair trade unit was conducting its own separate dumping/subsidy investigations, in order to make these deadlines achievable. We believe that this timetable would match, or even exceed, world best practice standards.

Evidence

The law should replicate the language of Article 6 regarding the rights and obligations of interested parties to submit data and make representations, and the publication of information by the investigating authorities. In the case of the injury tribunal, it is proposed that interested parties' rights should be extended by the tribunal holding a formal hearing at which the interested parties can make their case in respect of injury and causation.

The provisions regarding the protection of confidentiality are crucial to obtaining co-operation from interested parties. Nevertheless, sufficient non-confidential information needs to be made available to all interested parties to allow them to defend their interests.

Article 6.8 allows the investigating authorities to use "facts available" to calculate dumping margins where interested parties (normally the exporters and/or foreign producers) fail to cooperate with or otherwise impede the investigation. Annex II sets out additional provisions. The UK's legislation should allow the unfair trade unit sufficient flexibility to use any facts available to it that are **reasonable** simulacra, while at the same time placing a duty on the unfair trade unit to ensure that parties are not rewarded for their non-compliance by incurring low dumping margins.

Article 6.11 defines "interested parties", and it is proposed that the UK law should embrace the same definition. Industrial users and consumer organisations, while not formally defined as interested parties, are given the right to "provide information which is relevant to the investigation regarding dumping, injury and causality", and the UK should include this right in its legislation. (Note: the concept of "user interest", which is not enshrined in the agreement, is dealt with under "Union interest" below.)

Provisional duties

The law should provide for provisional duties to be applied as soon as dumping has been provisionally determined in line with the timetable outlined above. As stipulated in the agreement, the duty should be equivalent to the provisional dumping margin(s).

Price undertakings

The language of Article 8 of the Agreement is permissive in respect of price undertakings. There is no obligation on governments to agree price undertakings, nor on exporters to offer or accept them.

In our view, price undertakings rarely provide a fair or adequate outcome to an AD investigation. They are opaque, and likely to be either too simple to provide an effective remedy, or too complex to allow HMRC to check that imports are in compliance. Our recommendation therefore is that the UK should **not** legislate to allow the acceptance of price undertakings.

Should the government nevertheless wish to retain the flexibility to offer and/or accept undertakings, we propose that the legislation should stipulate the following conditions:

- Decisions are taken by the Secretary of State for International Trade in consultation with the Secretary of State for Business, Energy and Industrial Strategy;
- Any undertaking should set prices at a level that eliminates dumping;
- Given the complexity of pricing structures for many industrial products, the complainant industry should be consulted about the practicability of the proposal; and
- No undertaking should be accepted unless HMRC has confirmed that monitoring compliance at the border is feasible.

Additionally the agreement should require regular statistical reports from the exporter which must be liable to on- site verification (in accordance with Article 8.6).

Imposition and collection of anti-dumping duties

Final duties should be imposed as soon as the injury tribunal has definitively determined the existence of material injury and causation, as outlined in the above timetable. If the tribunal finds that there has been no injury caused, then any provisional duties collected should be refunded within 30 days. If the definitive level of dumping found by the unfair trade unit is below the provisional dumping duty, then the difference in duties should similarly be refunded.

It will be noted that Article 9.1 does **not mandate** that the final duty be "lesser than the [dumping] margin if such lesser duty would be adequate to remove the injury": it merely states that this is desirable. No other major users of trade defence have implemented the lesser duty rule[26]. In our view it would be inappropriate for a post-Brexit UK, potentially more exposed to international competition than when in the EU, to offer a weaker trade defence regime to its domestic producers, one that made them less resilient to trade shocks than other major non-European competitors.

An additional consideration is that if the UK were to apply the lesser duty rule, the injury tribunal would be required to calculate an actual level of injury suffered, rather than "simply" determining that injury had been caused. Such calculations would be highly problematic. The approach adopted by the Commission is over-simplistic: they simply calculate the level of price that the domestic industry would need to charge in order to achieve a normal rate of return. This takes no account of the nature, depth or duration of the injury suffered. If say the domestic producers had been forced to cut back on investment over several years as a result of the dumped imports, this method would not raise market prices sufficiently to remove this injury. Similarly, the Commission's methodology penalises sectors who have traditionally operated on low margins over several years.

Thus the lesser duty rule would be a poisoned chalice and we urge the UK to exercise its WTO rights not to apply this methodology.

26 In the English-speaking world, the US and Canada do not have a lesser duty rule; while in Australia the law merely states that the Minister "….must have regard to [its] desirability", but then goes on to list several circumstances where the lesser duty rule should not in any case be applied.

We recommend that the UK maintains the EU practice of levying duties on a prospective basis – i.e. that a definitive duty equivalent to the dumping margin be imposed on all future entries from the final determination onwards. The alternative retrospective approach (such as that adopted by the US) whereby bonds or cash deposits are taken at the time of the goods entering the country, with the actual duty being levied 12 or more months later based on the actual dumping margin of each individual transaction, is burdensome and costly for the exporter, and resource-intensive for the government. Additionally HMRC are not currently equipped to administer a retrospective duty collection system.

Article 9.3.2 requires administrations operating a prospective duty system to refund duties when it is found, upon request, that actual dumping margins were lower than the duty levied. The UK must of course enact this provision, but the law should also stipulate that a refund request will trigger a full dumping investigation by the unfair trade unit in order to assess the correct level of duty.

In compliance with Article 9.5 the law should also provide for new exporter reviews, and should require the posting of bonds, equivalent to the anti-dumping duty, on imports made by the new exporters while the review is underway.

Retroactivity

Articles 10.2 and 10.4 place certain restrictions on the levying of provisional duties in threat of injury cases, and where material retardation of the establishment of an industry is alleged. The UK should enact these restrictions.

Article 10.6 on the other hand allows the retroactive application of definitive duties up to 90 days prior to the start of provisional measures. This provision is designed to deter foreign producers from undermining the effectiveness of eventual anti-dumping measures by massively increasing their imports. It is important that the UK maintains this provision even if, as in the past, it is rarely used – its existence will serve as a deterrent against the worst excesses of injurious imports.

The UK could simply replicate the WTO wording – there is no need at this stage to define "massive". Applications for retroactive duties should be made to the injury tribunal, who would be responsible for assessing if the WTO criteria are met.

The UK will also need to legislate for a system for effecting the retroactive collection of duties. It is proposed that for the time being the UK simply retains the EU system of "registration", as this will be readily understood by Customs officers.

Duration and review of anti-dumping duties and price undertakings

The UK should enact the provisions of Article 11.2 enabling changed circumstances reviews at the request of an interested party (as defined in Article 6.11). To reduce the risk of burgeoning administrative costs, the law should specify that at least 12 months must have elapsed since the imposition of the definitive duties, or since the conclusion of a previous review, before a review can be requested.

The UK should similarly enact the provisions of Article 11.3 regarding sunset reviews. Consistent with current practice and the agreement, a sunset review should commence, if requested by the domestic industry, five years after the date of the imposition of definitive duties (or after the conclusion of the most recent changed circumstances review if that review covered both dumping and injury). Duties should remain in place during the course of the review, but if it is determined that expiry of the duty would not lead to the resumption of injurious dumping, then all duties paid during this period should be refunded. Similarly, if the exporters/importers requested a review of the dumping/subsidy margins, and the outcome of the review is that a lower duty is merited, the difference should be refunded.

Sunset reviews can be problematical for the authorities, as they are required to assess a hypothetical situation. For example, if the exporter has ceased its sales as a result of the anti-dumping measures, then there will be no hard data available to establish a dumping margin. The law should therefore mandate the unfair trade unit to use any evidence at its disposal to establish if there is a likelihood that dumping would resume in the absence of duties[27], without being over-prescriptive.

It is suggested that, to comply with the agreement, a timetable should be set out for sunset reviews, similar to that for initial investigations. The unfair trade unit could be given 180 days to establish the likelihood of resumed dumping. If they find no such likelihood, then the duties would be terminated at that point. The injury tribunal could then be given a further 180 days to rule on whether a resumption of dumped imports would cause material injury. The data collected by the tribunal and opportunities for submissions and hearings would be the same as for an original investigation.

Public notice and explanation of determinations

The provisions of Article 12 should be carried into a UK law.

Judicial review

As previously proposed, the Competition Appeals Tribunal could be used for the purposes of appealing findings by either the unfair trade unit or the injury tribunal.

Anti-dumping action on behalf of a third country

It is not inconceivable that in the future the UK could receive dumped imports that injure producers in the EU, and that the Commission could therefore make an application to the UK under Article 14. This could particularly apply in sectors where the UK has no manufacturing capability.

We would regard any decisions on whether to comply with such requests as essentially political in nature. It would nevertheless be sensible to include a provision in the act that enables the unfair trade unit and injury tribunal to conduct investigations at the request of the Secretary of State for International Trade in this specific context.

27 Or in the absence of price undertakings should any exist.

Developing country members

If, as we propose, the legislation mandates decisions on price undertakings to be taken jointly by the Secretaries of State for International Trade and for Business, Energy and Industrial Strategy, then there is no need to explicitly legislate for Article 15. The Secretaries of State will have the UK's obligations towards developing countries in mind when reaching their decisions.

Union interest

The EU Regulation contains the contentious additional requirement that AD measures against dumped imports causing injury must also be in the "Union interest". This requirement has no backing from the AD agreement, but is unique to the EU.

It is clear that the UK has no need of a Union interest clause as such - it would be completely irrelevant after Brexit – but should it have a "national interest" clause? We are strongly of the opinion that this would be wrong.

Originally, the primary driver of the Union interest clause was to give legal cover to the Council. The Commission, responsible for the investigation, if it finds dumping, injury and causality recommends measures. However, until last year it was the Council that took the final decision on measures[28]. If the Council were to ignore the hard evidence gathered by the Commission by blocking meritorious cases, it would have been left open to potential legal challenges from aggrieved complainants. Its right to take the final decision would have been meaningless in reality. Including the additional Union interest criterion, which is ill-defined and nebulous, means that the Council can safely veto meritorious cases by, in effect, asserting that the imposition of measures would not be in the Union interest. Looked at from this angle, a post-Brexit "public interest" clause is clearly unnecessary.

Over the years however, Member States have voted against otherwise meritorious cases for a variety of reasons. Member States may, in the face of pressure from the exporters' government, perhaps threatening to block inward investment or procurement deals, decide that it is not in their national interest to offend that government. Equally however Member States may oppose AD measures on purely ideological grounds. In our view, such considerations should have no place whatsoever in the proper administration of AD law, and would be antipathetic to the UK system of government.

Member States have also however frequently voted against otherwise meritorious cases because duties would not be in their **national** interest. If this is because there is no national manufacturer of the product, then the Member State is in effect protecting the interests of its national users or consumers.

Firstly, we do not believe that it would be appropriate for the interests of **consumers** to be taken into account, with the government placed in the invidious position of choosing between the interests of consumers on the one hand, and workers and shareholders on the other.

However, as **users** of materials that have been affected by EU AD duties, UK steel producers have frequently opposed measures under the Union interest clause when the products in question are not available from UK sources. This was a legitimate use of the Union interest test in our view. Nevertheless we think it very unlikely that there would ever be any need for a user interest provision in the UK-only context. Put simply, there can be no AD investigations on products where there is no UK manufacturer – as no one would have the standing to bring a case.

28 Under the new Basic Regulation (2016/1036) the ability of the Member States to block Commission recommendations is more constrained.

Industrial users will of course have the right to provide evidence to refute claims of dumping, injury and/or causation, but it is not for the government to decide whether one sector is more or less deserving of support than another sector which consumes its products.

Finally, as already stated, if the government is serious in its aims of supporting and encouraging domestic manufacturing through its industrial strategy, and boosting UK exports of manufactured goods, then it should accept that defending local manufacturers from unfairly traded imports is an integral component of those strategies.

Consistent with the WTO agreement, in the new post-Brexit environment measures should be automatically imposed whenever dumping, injury and causality are found. The introduction of extraneous additional considerations would be counter-productive[29].

2.2.2 Countervailing duties

Generally the proposals outlined above for AD investigations can be applied *mutatis mutandis* to CVD investigations. The following section focuses only on the principal exceptions.

Definition of Subsidy

The law should adopt the wording of Articles 1 and 2 of the SCM agreement. (This is broadly consistent with EU state aid practice, so the concepts should already be familiar to UK officials, although successive European court rulings have broadened the scope of the specificity rule.)

A *de minimis* subsidy should be defined as less than 1% *ad valorem*.

Consultations

CVD investigations are potentially more political because they inevitably involve an examination of another country's government's policies and practices, and require the provision of financial data by that government. This is why CVD investigations, unlike AD investigations, cannot proceed until there have been government-to-government consultations, with the aim of agreeing a resolution to the dispute. This provision has a number of implications for a UK law:

- The timetable outlined earlier would be different for CVD investigations. It is proposed that the pre-initiation stage be extended from 10 days to 30 days. The period between stages 3 and 4 however (definitive subsidy determination) should in all cases be set at 110 days, as there is no provision in the SCM agreement for the duration of provisional duties to be extended by two months if the exporters so request.

- The law should enable the Secretary of State for International Trade to instruct the unfair trade unit and injury tribunal to terminate their investigations in cases where bilateral discussions have reached an understanding that is acceptable both to the Secretary of State and the complainants.

29 Apart from the EU, very few countries have adopted a "public interest" test. In the English-speaking world, Canada is the only country we have been able to identify, where "public interest" is broadly synonymous with "user interest".

Calculation of the amount of subsidy in terms of the benefit conferred to the recipient

The provisions of Article 14 can be "copied and pasted" into UK law, with one exception. The ASCM was agreed at a time when non-market economy countries generally were not WTO members, and when in any case the concept of subsidisation within an NME was considered an oxymoron. Today's reality, with countries in which private ownership and state control co-exist, is very different. The law should therefore mandate that in the case of non-market economies and mixed economies, references to "the market" should be interpreted as meaning "typically available in full market economies".

Article 14 however gives little guidance on how subsidy benefits should be calculated. For example, there is no distinction made between operating subsidies (the impact of which falls wholly within a single accounting period) and investment subsidies (whose impact will last over a substantially longer period). We suggest that the law should require the unfair trade unit to have regard to UK Generally Accepted Accounting Practice ("GAAP") in determining how to value the benefit that a subsidy has conferred.

2.2.3 Double counting

Neither the AD agreement nor the ASCM deals with the issue of whether or not to cumulate duties when both AD and CVD investigations have been conducted into the same product.

However, Article VI.5 of the GATT states that "no product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization."

It will be noted that this refers explicitly to **export** subsidisation; while paragraph 3 of the same article makes a distinction between subsidies that benefit manufacture, production or export[30]. We therefore propose that the UK law should state that in cases where both dumping and subsidisation have been found, duties should comprise the total of both dumping margins and subsidy margins, minus the benefits of any export subsidies as defined by the ASCM[31].

2.2.4 Safeguards

Conditions

The law should repeat the conditions, laid out in Article 2 of the WTO safeguards agreement, under which a safeguard measure can be taken. Note however that the Article 2.2 requirement that measures be applied irrespective of a product's sources is over-ridden by the Article 9 provision regarding developing countries.

Investigation

The provisions discussed above under anti-dumping investigations regarding public notice, the rights of interested parties to provide evidence and submit their views and the treatment of confidential information should apply equally to safeguard investigations.

30 "The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise."

31 "Subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance" (ASCM Article 3.1(a)).

It is proposed that applications for a safeguards investigation should be made directly to the injury tribunal, who would have 21 days in which to decide on the adequacy of the evidence submitted, and on whether to initiate an investigation. The law should state that complainants in making their application should provide concrete evidence of serious injury, or of threat of serious injury.

Determination of serious injury or threat thereof

The injury tribunal should be responsible for investigating the existence of serious injury or threat of serious injury, which should be defined as in Article 4. The tribunal should report its findings to the Secretaries of State for International Trade and for Business, Energy and Industrial Strategy. Given that the conditions under which safeguards measures can be taken often require urgent action, it is proposed that the serious injury investigation should be completed within 90 days of initiation.

Application of safeguard measures

Where serious injury is found, decisions on whether to impose measures, and in what form, should be taken jointly by the Secretaries of State for International Trade and for Business, Energy and Industrial Strategy. The law should make it clear that their role is to decide whether measures are in the national interest, after consulting with the interested parties. It is suggested that the Secretaries of State be allowed a maximum of 90 days to reach a decision.

Article 5 makes no recommendation as to the preferred type of measure. The law should give the Secretaries of State the freedom to decide which type of measure, in the national interest, gives the domestic industry the breathing space it needs without unduly harming the interests of its customers.

Tariffs can be a blunt instrument, hitting all exporters equally, even though only a handful may have been responsible for causing the serious injury. Furthermore a tariff that was sufficient "to prevent or remedy serious injury" would in a safeguards context normally be one that was high enough to eliminate a substantial quantity of imports, thus having a trade freezing effect.

The law should therefore explicitly permit the use of import quotas when the Secretaries of State deem them appropriate, or of tariff rate quotas. Consistent with Article 5.1, the total level of quota should be the average of the three years prior to the import surge that gave rise to the complaint[32].

Article 2(a) states that if quotas are to be sub-divided amongst exporting countries, it should where possible be by agreement with them. The law should authorise the Secretary of State for International Trade always to enter into such negotiations when quotas are proposed. However, in reality is unlikely that negotiations would succeed. The law should therefore mandate that the Secretaries of State subdivide the quota among exporters *pro rata* to their imports during the period used to establish the overall quota. This will ensure that exporters who were responsible for the import surge will be reined back, while those who had been selling responsibly maintain their traditional access to the market.

32 The period during which imports had surged would not be "representative", to use the language of the safeguards agreement.

Provisional safeguard measures

The complainant should have the right to make a submission alleging critical circumstances, as defined in Article 6, to the injury tribunal. The tribunal should be required to rule on critical circumstances within 30 days, and report its findings to the Secretaries of State.

The Secretaries of State should be given a further 30 days in which to decide whether to impose provisional tariffs. The provisions of Article 6 regarding the duration of provisional measures, and the potential refunding of tariffs should apply

Duration and review of safeguard measures

It is proposed that the provisions of Article 7 regarding the duration of measures, the regular review of those measures, their progressive liberalisation and the need for the domestic industry to demonstrate "adjustment" when measures last for longer than four years should all be enacted, with one exception. Having regard to Article 8.3, it is proposed that safeguard measures be introduced initially for only three years (instead of the four allowed in Article 7.1), and that the Secretaries of State review their continued necessity in the light of the national interest prior to extending them for a fourth year.

Level of concessions and other obligations

The law should enable the Secretary of State for International Trade to enter into consultations with the relevant trading partners with a view to agreeing compensatory concessions. However we view it as unlikely that such agreement would be reached, and the law should not encourage it.

Article 8.3 makes it clear that our trading partners cannot suspend concessions (retaliate) against the UK until the measures have been in place for three years, provided that the measures were in response to an absolute increase in imports. We suspect that only in the most exceptional of circumstances would the import tribunal find there had been serious injury or threat of serious injury caused by imports that had not increased.

Developing country members

A clause will be needed mandating the Secretaries of State to exempt developing countries (provided they are WTO members) from safeguard measures when the criteria stipulated in Article 9.1 are met.

Notification and consultation

It is questionable whether the Article 12 requirements need to be written into the UK legislation. In any case, it is suggested that the Department for International Trade should be responsible for ensuring that the UK complies with these obligations.

Defending the UK from safeguards actions brought in other countries

It should be the responsibility of the Department for International Trade robustly to defend the interests of UK producers when safeguards actions are brought in other countries.

It is again questionable whether legislation is required to enable the consultative and negotiating activities that will be an essential part of this rôle. Two functions deriving from this agreement might however require enabling legislation:

- An agreement reached under Article 5.2(a) regarding the UK's share of an import quota might involve the government in administering compliance with that quota – for example through an export licensing arrangement.

- The right to suspend concessions enshrined in Article 8.2 means that the government must have the power to increase tariffs on an *ad hoc*, unilateral basis[33].

2.3 Transitional measures

At the point the UK exits the EU there will be a significant number of active EU trade defence measures in place. Some of these will be of critical importance to UK manufacturers, others will not. The UK will not however have either the time or capability to review each individual measure prior to leaving the EU.

Consistent with the Prime Minister's commitment to convert the *acquis* into British law, the UK must therefore automatically adopt all EU AD, CVD and safeguards tariffs[34] in place on the day of exit.

Most of the AD measures will not be strictly compliant with WTO standards[35], as export sales prices to the UK are unlikely to be identical to the EU average, and therefore UK-specific dumping margins will be different (not necessarily lower). In CVD cases however, subsidy margins will be identical. Finally, for all three types of trade defence measure, while UK-specific injury **margins** will also differ from the EA averages, this of itself would not render measures non-compliant, as the WTO agreements do not require the investigating authorities to calculate the **level** of injury, but merely to establish that injury has been caused[36].

The risk of trading partners triggering WTO dispute settlement proceedings as a result of, possibly insignificant, inaccuracies in UK-specific dumping margins is low. This risk will be further reduced if the UK commits to a review timetable as proposed below. Furthermore, if any trading partner did trigger a WTO dispute its real impact on the UK would be minimal. DSU procedures are notoriously slow. The UK could appeal any adverse Panel ruling, thus delaying procedures further. The UK will have reviewed many of the measures before the Appellate

Body ("AB") is able to issue a ruling. But even if the Appellate Body does eventually issue an adverse ruling the UK could comply simply by agreeing to bring forward its review of the measure in question. The WTO process allows for a reasonable period of time to be agreed between parties for an AB ruling to be implemented.

Thus the chances of the UK suffering any suspension of concessions by affected trading partners as a result of carrying over all EU trade defence measures are close to zero.

33 We would assume that repatriation from the Customs Union of the power generally to impose and vary import tariffs will be a key component of the "great repeal act".
34 It is unlikely that there will be any safeguards quotas in place. If there were, these should be carried over into the UK pro rata to the UK's shares of EU imports during the representative three years used to calculate the quotas initially.
35 One clear exception will be high fatigue performance steel concrete reinforcement bars from China, as the only market on which these imports were sold was the UK. Dumping margins and injury will be identical for both the EU28 and UK.
36 Note that the same issue theoretically arises for EU27. Many EU28 trade defence measures will for the same reason not be strictly WTO- compliant in an EU27 context. However, during previous enlargements, the scope of EU trade defence measures has been expanded to cover the newly enlarged market without provoking WTO dispute with affected trading partners.

Timetable for reviewing trade defence measures

One approach would be only to review measures if one or more interested party requested a changed circumstances review. The risk with this approach is that a glut of such requests could be received, leaving the newly-established injury tribunal and unfair trade unit struggling to cope.

Alternatively, should the UK wish to demonstrate good faith with respect to WTO compliance, it is proposed that all trade defence measures carried over from the EU into the UK should be reviewed in the following order

1. The first priority should be to review measures where there is believed to be no domestic industry. The injury tribunal should issue a public notice and contact relevant representative organisations. As soon as it established beyond reasonable doubt that there is no UK manufacturer of the product, the measure should be immediately terminated.

2. Measures that are due in any case to expire under the sunset rule within the next 12 months should be ignored. They will then be reviewed at the appropriate time under the sunset inquiry criteria should the domestic industry so request. This assessment should be carried forward on a rolling basis, so that no measure that is due to sunset within 12 months need be subjected to review in accordance with points 3 to 6. Measures should of course remain in place pending the outcome of this review.

3. The injury tribunal should then start reviewing individual measures, starting with the most recent. This order is suggested as being administratively the most efficient. The review standard should be: did the injury (or threat of injury) that the Commission established for the EU28 industry as a whole also apply at that time to the UK manufacturers on a standalone basis? Ideally it is hoped that the Commission will cooperate by providing UK company data submitted to it. Failing that, the domestic industry should be asked to resubmit its data. Reviews should take no longer than 180 days.

4. If the tribunal finds that there was no UK injury during the EU's period of investigation, then the measure should be terminated.

5. If the tribunal finds that there was UK injury during that period:

   5.1 CVD duties automatically continue to be collected

   5.2 AD measures are referred to the unfair trade unit.

6. The unfair trade tribunal will then conduct an AD investigation to establish a UK-specific dumping margin. Data should be collected from exporters and verified. Again it is to be hoped that the Commission will facilitate this process by sharing their knowledge and case-specific experience. Data should be collected for the preceding 12 months in order to be WTO-compliant. If an exporter refuses to cooperate, then the applicable EU dumping margin should be used as a "fact available". In the unlikely event that no UK-specific dumping is found, the measure should be promptly terminated. Otherwise new duties should be collected equivalent to the dumping margin. The time limit would be 245 days (as for new investigations).

2.4 Trade disputes between the UK and EU27

The possibility of trade disputes arising between the UK and EU27 will depend in large part on the terms of the UK's new agreement (if any) with the EU. The Prime Minister's declared objective is for a "bold and ambitious free trade agreement". Free trade agreements can restrict the use of trade defence remedies between the parties. Some introduce pre-consultation requirements. Others have no restrictions at all.

Until the government's negotiations are completed it is impossible to predict what, if any, restrictions will apply to the use of trade defence remedies. It is highly unlikely that the details of the UK's new relationship with the EU will have been settled within the two year Article 50 period. The UK's trade defence remedy law must therefore allow trade defence measures to be imposed against EU Member States (individually or collectively) unless or until agreement is reached that would prohibit all parties from imposing them.

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